



Tyson Foods and “Uninjured Class Members” in Antitrust Class Actions

Joshua Snyder explains that the Supreme Court will review, in *Tyson Foods, Inc. v. Bouaphakeo*, whether a class action may be certified or maintained under Rule 23(b)(3) when it contains members who may not have been injured. The author contends that allowing class certification in those situations does not produce any meaningful concerns, while not doing so could severely impede class certification and thwart Congressional policy. In particular, the Supreme Court’s ruling may have important implications for class certification in private antitrust actions.

Competitor Parity Clauses: Increased Scrutiny of MFNs in the United States and Europe

Enforcement officials are taking a harder look at most favored nations clauses and other parity provisions. Recent investigations in Europe focused on contracts between online travel agencies and hotels, and in the U.S. American Express and Apple have seen their contracts challenged. Notably, in neither region were market power or consumer harm much in focus. **Fiona Schaeffer, Kimberley Piro, Alexander Rinne, and Andreas Boos** outline a range of factors attorneys should assess when determining whether contractual provisions may increase the risk of antitrust scrutiny.

Key Developments in Misleading Advertising in Canada

As **Anita Banicevic** explains, Canada’s Commissioner of Competition continues to actively enforce and expand the deceptive marketing provisions of the Competition Act. Among the key developments are the Act’s broadened definition of “electronic message,” recent enforcement actions based on the newly minted prohibition on misleading subject line representations, consent agreements incorporating sizable penalties for allegedly misleading “regular price” representations, and the Commissioner’s enhanced authority to work with foreign agencies.

Best Practices for Antitrust Procedure: The Section of Antitrust Law Offers Its Model

Tad Lipsky and **Randolph Tritell** provide an introduction to the development of the ABA Section of Antitrust Law’s Report on Best Practices for Antitrust Procedure. The authors describe the history and context of the report, relate ongoing efforts, and compare the report’s findings with those of the International Competition Network. The full Report is appended.

Tyson Foods and “Uninjured Class Members” in Antitrust Class Actions

Joshua D. Snyder

The Supreme Court will consider four class action cases during its October 2015 term. In one, *Tyson Foods, Inc. v. Bouaphakeo*,¹ a multi-million dollar judgment following a jury trial in a wage-and-hour case hangs in the balance. Although *Tyson Foods* is not an antitrust case, the second question it presents for Supreme Court review arises as a recurring issue in antitrust class actions: whether a class action may be certified or maintained under Rule 23(b)(3) when it contains members who may not have been injured.²

In almost any price-fixing class action, in which even a relatively small class will have membership numbering into the hundreds or thousands, proof of injury will be offered through some form of statistical sampling, and a subset of absent class member customers, for one reason or another, may lack quantifiable damages. Indeed, during the *Tyson Foods* oral argument held on November 10, 2015, Justice Stephen Breyer asked detailed hypothetical questions based on antitrust fact patterns highlighting the potential ramifications of a ruling from the Court on this issue for antitrust cases.³

Must a class, even one including hundreds of thousands of members (or more) who were injured by a defendant’s anticompetitive conduct, only be certified where harm is shown for each and every class member? Tyson, and even more so its amici, invoke Article III standing doctrines and Rule 23 in arguing in favor of a requirement to demonstrate individualized proof of damage to every class member at the certification stage. But they are wrong: constitutional standing is established if the class representative has the requisite injury; meanwhile the notion of an “uninjured class member” is something of an oxymoron since Rule 23 allows a flexible approach to defining classes (or subclasses), calculating damages, and allocating recoveries so that “uninjured” parties are ultimately excluded from the class definition, not included in the calculated damages, or not allocated any part of an aggregate recovery. In contrast, a strict rule of universal proof of injury at the certification stage would unduly chill robust private enforcement of the antitrust laws.

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¹ *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (U.S. filed Mar. 19, 2015), *cert. granted*, 135 S. Ct. 2806 (2015).

² Petition for a Writ of Certiorari in *i*, *Tyson Foods*, No. 14-1146 (U.S. Mar. 19, 2015), <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/04/1146.pdf>. The same petition asks whether a collective action may be properly certified or maintained in those circumstances under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 et seq. The first question presented is “[w]hether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.” *Id.*

³ Transcript of Oral Argument at 13–16, *Tyson Foods*, No. 14-1146 (U.S. Nov. 10, 2015) [hereinafter Oral Argument], http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-1146_8n59.pdf.

Tyson Foods: Background

In 2007, Peg Bouaphakeo and several co-workers brought suit against Tyson Foods, alleging widespread violations of the Fair Labor Standards Act (FLSA) and the Iowa Wage Payment Collection Law at its Storm Lake meat processing facility. Tyson paid workers on the basis of “gang-time,” essentially for the time when the production line starts moving until it stops. The employees claimed that Tyson owed them overtime compensation for activities outside of the “gang-time” regime, namely for time spent donning and doffing—putting on job-related equipment and clothing before production begins and after lunch, and taking it off again before lunch and after production—and for certain walking time. Tyson did not record the time outside of “gang time,” so calculating the alleged shortfall became the central issue, with the plaintiffs contending that compensable donning, doffing, and walking time actually averaged 18 to 21 minutes per employee per shift.⁴

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The district court certified a class of employees in the “kill” and “processing” departments at that facility. The class presented their case to the jury on the basis of common evidence, including representative class member testimony about the nature of the work, standard protective and sanitary gear required, and typical donning and doffing and walking times. Tyson’s management testified about similar issues, and confirmed the existence of a broadly applicable donning and doffing policy.⁵ The plaintiffs also proffered expert testimony from an industrial engineering expert, who performed a time study based on videotape and stopwatch measurements.

To prove damages, the plaintiffs relied on average times calculated from a sample of 744 observations of employee donning, doffing, and walking, with the plaintiffs’ industrial engineering expert testifying that the sample was “large,” “representative,” and “accepted procedure in industrial engineering.”⁶ The plaintiffs also presented testimony of a separate damages expert who analyzed pay data on an employee-by-employee basis, and was provided with individual back pay calculations for each class member.⁷

The jury returned a \$2.9 million verdict awarding damages to the class, with the final judgment exceeding \$5.7 million after the addition of liquidated damages. A divided panel of the Eighth Circuit affirmed the judgment, with the dissent voicing concerns about the inclusion in the class of workers who had not suffered injuries in the class, who could potentially receive a portion of the jury’s seven-figure verdict. The Eighth Circuit declined to hear the case en banc, which drew another dissent. Tyson, supported by multiple amici curiae, petitioned for review by the Supreme Court, and on June 8, 2015, the Supreme Court granted Tyson’s petition.

Tyson Foods: Issues of Injury

Before the Supreme Court, Tyson has argued, in part, that the data the plaintiffs presented showed there were 212 employees within the class definition who were not, in fact, damaged by its practices, and that this required that the class be decertified, even though thousands of other class members were found by the jury to have been injured. Tyson suggested two primary sets of doc-

⁴ See *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 797–800 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 2806 (2015); *id.* at 803–04 (Beam, J., dissenting).

⁵ See generally *id.* at 799–800.

⁶ *Id.*

⁷ Brief for Respondents at 17, *Tyson Foods*, No. 14-1146 (U.S. Sept. 22, 2015), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-1146_resp.authcheckdam.pdf. Tyson did not challenge or object to the plaintiffs’ time-study evidence as unreliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

trinal concerns—both of which are also oft cited by defendants in antitrust class actions—in allowing a class action to proceed where any member of the class as defined was not injured: Article III limitations, and the Federal Rule of Civil Procedure 23(b)(3)'s procedural requirements.

Article III

In its opening merits brief, Tyson asserted that “Article III limits the authority of federal courts to providing redress for actual injuries that are fairly traceable to a defendant,” that “federal courts lack authority to compensate persons who cannot prove injury,” and that “the fact that a single, named class plaintiff has Article III standing—and that a court can therefore adjudicate a case or controversy between that plaintiff and the defendant—does not establish that the court has authority to award damages to class members who cannot prove injury.”⁸ As a result, Tyson contended class certification would be constitutionally impermissible unless the plaintiffs either prove that all class members were injured or ensure that uninjured class members do not contribute to the defendants’ liability or share in any recovery.⁹ How do these questions play out in the antitrust arena?

At the outset, there is a question, which was prominent during the oral argument,¹⁰ concerning whether *Tyson* should be decided under FLSA-specific precedent, rather than involving any broader issues. The Supreme Court had long ago ruled in *Anderson v. Mt. Clemens Pottery Co.*¹¹ that when an employer has not kept proper and accurate time records, employees may carry their burden of proof as the quantum of their damages under the FLSA by proving that they have “in fact performed work for which [they were] improperly compensated” and by “produc[ing] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.”¹² Although there is no record-keeping presumption under the Sherman or Clayton Acts, the “just and reasonable inference” standard for proof of the quantum of an injured plaintiff’s damages is well known to antitrust practitioners, with *Bigelow* decided by the Supreme Court during the same term as *Mt. Clemens*.¹³

Putting *Mt. Clemens* aside, Tyson’s position offers important inherent concessions. First, and simply put, it acknowledges that there is no constitutional standing issue if the plaintiffs offer proof that all class members were injured. Second, and especially important in the antitrust context, to the extent the plaintiffs’ damage model accurately measures a marketwide harm, any uninjured

⁸ Brief of Petitioner at 44–46, 49, *Tyson Foods*, No. 14-1146 (U.S. Aug. 7, 2015), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-1146_pet.authcheckdam.pdf.

⁹ *Id.* at 44–45.

¹⁰ Oral Argument, *supra* note 3, at 9–10.

¹¹ 328 U.S. 680 (1946).

¹² *Id.* at 687.

¹³ See *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) (“In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of the defendants’ wrongful acts and their tendency to injure the plaintiffs’ business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants’ wrongful acts had caused damage to the plaintiffs.”) (emphasis added); *accord* *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (“[I]t would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.”) (emphasis added).

class members will not contribute to the defendant's liability. Third, to the extent, through modeling or otherwise, uninjured class members can be identified before the distribution of any class-wide recovery, uninjured class members will not share in the award or dilute the interests of the injured class members.

Of course, a defendant will have a legitimate interest in limiting its own damages. But that really presents no issue under Article III. Furthermore, where there is marketwide harm, a defendant's involving itself in the allocation of an award or the culling of "uninjured" class members presents the situation of the "fox guarding the hen house." It is the role of class counsel and the representative plaintiffs to allocate the judgment, subject to court approval and potential objections from class members.¹⁴ It would be a truly unusual case in which the class would need any assistance from the defendant to allocate the judgment appropriately, particularly in the absence of any indication that the aggregate damages award has been inflated by the claims of class members lacking proof of injury.

Whether the Article III issue is properly raised by Tyson is doubtful in light of the case's procedural history. Tyson expressly "oppos[ed] Plaintiffs' requested bifurcation of damages from the liability phase of the trial" as, *inter alia*, "a waste of resources."¹⁵ Like some antitrust defendants who may conclude they are better off mounting a universal defense rather than a customer-specific one, Tyson also affirmatively requested that the jury provide a lump sum damages award.¹⁶ Had Tyson accepted the requested bifurcation, or requested a special verdict form with individual damages calculations, then damages could have been allocated to each individual class member. The 212 class members for whom no damages were sought based on the plaintiffs' own damage estimations would not share in the recovery. And by re-running the damage expert's algorithm based on the reduced damage figure awarded by the jury, the remaining uninjured class members could be identified in minutes. Notably, during oral argument, several of the Justices, including Justice Kennedy, asked questions that perhaps imply that certiorari may have been improvidently granted given the procedural history.¹⁷

Tyson has backed off of taking the position that Article III mandates proof of injury for each and every class member, including named plaintiffs and absent class members alike, and now acknowledges that a class may be certified so long as any uninjured members may be culled prior to judgment. That is, after arguing in its petition for Supreme Court review that the circuit courts were split on the question of whether plaintiffs must show that "all" class members were injured,¹⁸ in its merits brief, Tyson's position changed sharply, with Tyson conceding that Article III "does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured."¹⁹

Nevertheless, several of Tyson's amici continue to urge the Court to rule that Article III precludes maintenance of a class action unless *every* class member has been injured.²⁰ This posi-

¹⁴ *E.g.*, *In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468-JWL, 2011 WL 1808038, at *2 (D. Kan. May 12, 2011) (approving a plan of distribution of a jury's damages award to a class).

¹⁵ See Brief for Respondents, *supra* note 7, at 46.

¹⁶ *Id.* at 14.

¹⁷ Oral Argument, *supra* note 3, at 12, 18–19, 22.

¹⁸ Petition for a Writ of Certiorari, *supra* note 2, at 26–28.

¹⁹ Brief of Petitioner, *supra* note 8, at 49. During oral argument, Justice Anthony Kennedy asked about this change in position, citing page 49 of Tyson's merits brief. Oral Argument, *supra* note 3, at 12.

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tion appears extreme and is at odds with the more recent appellate decisions. Although appellate rulings have not been uniform, a number have held that only the named plaintiff or plaintiffs need have standing.²¹ This year, the First and Third Circuits considered the question at length, and concluded that only the named plaintiff need have standing to satisfy Article III. In a scholarly opinion retracing the history of representative actions, the Third Circuit held that “so long as a class representative has standing, a class action presents a valid ‘case or controversy’ under Article III” irrespective of whether certain class members may not have been injured on the merits.²² Similarly, in *In re Nexium Antitrust Litigation*, the First Circuit held that while “injury is a prerequisite to standing,” it is only the named plaintiffs who need to satisfy this standing requirement.²³

The facts in *Tyson Foods* do not present sympathetic circumstances for the extreme view of standing advanced by Tyson (at the petitioning stage) and its supporters. This is not a case in which one member of a class with a plausible claim to damages seeks to represent a broad class whose members largely do not. Nor is there any attempt to increase leverage over a defendant by including uninjured class members in the class. Far from it. The *Tyson Foods* class included thousands of individual workers who alleged and proved that they were injured. Even the 200 or so class members (less than 10%) who were “uninjured” were so only in the sense that they were not undercompensated by Tyson for fortuitous reasons—they simply did not work enough hours to qualify for overtime, even when their uncompensated time was added.

One of Justice Breyer’s questions during oral argument illustrates how the issue can arise in price-fixing cases. Justice Breyer asked Tyson’s counsel to assume there was an antitrust price-fixing conspiracy between sneaker manufacturers as to the materials to include in their shoes, and further that the conspiracy was proven at trial for a lesser period than the conspiracy period orig-

²⁰ See Brief *Amicus Curiae* of Atlantic Legal Foundation and The International Association of Defense Counsel in Support of Petitioner at 26–29, *Tyson Foods*, No. 14-1146 (U.S. Aug. 14, 2015), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-1146_amicus_pet_AtlanticLegalFoundation.authcheckdam.pdf; Brief for Ass’n of American R.R.s as *Amicus Curiae* in Support of Petitioner at 5–8, *Tyson Foods*, No. 14-1146 (U.S. Aug. 14, 2015), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-1146_amicus_pet_AssnofAmericanRailroads.authcheckdam.pdf; Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioner at 24–25, *Tyson Foods*, No. 14-1146 (U.S. Aug. 14, 2015), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-1146_amicus_pet_WashingtonLegalFoundation.authcheckdam.pdf.

²¹ *Compare* *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (“[O]ur case law keys on the representative party, not all of the class members”), *abrogated on other grounds by* *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *DG ex rel. Stricklin v. DeV Vaughn*, 594 F.3d 1188, 1197 (10th Cir. 2010) (“[O]nly named plaintiffs in a class action seeking prospective injunctive relief must demonstrate standing”), and *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009) (“[A]s long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied”), and *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306–07 (3d Cir. 1998) (holding that the only the named members of the class must demonstrate an injury in order to establish standing under Article III), with *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (“[N]o class may be certified that contains members lacking Article III standing”), and *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012) (same, citing *Denney*, but holding that plaintiffs’ allegations of classwide injury were sufficient to confer standing), and *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779–80 (8th Cir. 2013) (denying class certification where some members likely did not suffer an injury and thus did not have standing).

²² *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015); see also *id.* (“We now squarely hold that unnamed, putative class members need not establish Article III standing.”). The recent cases are in accord with the views of the authors of the treatise WILLIAM RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 2:3 (5th ed. 2011) that these “[p]assive members need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court.” (quoting *Denney*, 443 F.3d at 264 (quoting HERBERT B. NEWBERG & ALBA CONTE, 1 *NEWBERG ON CLASS ACTIONS* § 2.7 (4th ed. 2002)).

²³ 777 F.3d 9, 31–32 (1st Cir. 2015).

inally alleged.²⁴ In such a case, there would be a set of the class of all sneaker purchasers who bought their sneakers outside of the conspiracy period proven at trial. Defense-oriented arguments would doom this situation to class decertification, notwithstanding the proof of conspiracy and injury to many. The ultimate culling of the uninjured presents no constitutional barrier to the compensation of the injured in this situation. Indeed, no cogent reason has been advanced by Tyson or any of its supporters as to why the class claims of thousands of underpaid Tyson workers—or, in the hypothetical, victims of a collusive agreement between horizontal competitors—are flawed simply because some small subset of class members will ultimately be excluded from the final award.

The defense bar suggests that the presence of uninjured class members undercuts the cohesiveness of the class but there is no issue in *Tyson Foods* regarding cohesiveness of the class—all members of the class were denied pay by the same policy and in the same manner. The fact that in an FLSA case, thousands were denied overtime pay, or in Justice Breyer's hypothetical antitrust case, thousands were deprived of the benefits of competition as to the materials in the sneakers, guarantees that legal questions will be resolved in a “context conducive to a realistic appreciation of the consequences of judicial action,”²⁵ an essential element of the constitutional standing requirement.

As a final point regarding Article III, it appears that there would be a fallacy, or at a minimum, a serious anomaly, if the Supreme Court adopted the interpretation of Article III advanced by Tyson's amici: in certain (not unlikely) circumstances, a defense verdict in certified class actions involving even a small number of uninjured class members would not result in a class-wide judgment on the merits but rather decertification and dismissal for lack of jurisdiction—thus effectively depriving the defendant of the benefits of a hard-fought win.²⁶

Article III standing arguments are too blunt an instrument to address the “problem” that Tyson and its amici—as well as the authors of a recent article in *The Antitrust Source*²⁷—have claimed to exist. In any class action—whether a wage and hour case like *Tyson Foods* or an antitrust case—a plaintiff may not succeed on all claims or prevail against all defendants, or will find itself in the situation where the common policy is established but some variant has insulated a minority of class members from its effects. In such circumstances, it may be possible and advisable to re-define the class after trial to exclude that subset of uninjured class members. The result Tyson and its amici implicitly advocate—decertification across the board with potentially no right to re-define the class

²⁴ Justice Breyer's fact pattern parallels the conduct at issue in a case arising under Section 1 of the Sherman Act, in which an analogous violation was treated as impacting price. See *Nat'l Macaroni Ass'n v. FTC*, 345 F.2d 421, 424 (7th Cr. 1965) (finding an unlawful agreement concerning quantity of a type of wheat of lower quality to be used in competitors' pasta products).

²⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

²⁶ The Seventh Circuit's Judge Richard Posner has made this very point:

If the case goes to trial, this plaintiff may fail to prove injury. But when a plaintiff loses a case because he cannot prove injury the suit is not dismissed for lack of jurisdiction. Jurisdiction established at the pleading stage by a claim of injury that is not successfully challenged at that stage is not lost when at trial the plaintiff fails to substantiate the allegation of injury; instead the suit is dismissed on the merits.

Kohen, 571 F.3d at 677. See also 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1785.4 (3d ed. 2005) (“If the class has lost on the merits, [decertification] may be inappropriate when the opponent has devoted the time and resources necessary to defend a class suit and now finds that only the named plaintiffs are bound and the same issues may have to be retried. Similarly, if the class prevailed, then decertification wrongly may deprive them of the fruits of their victory.”).

²⁷ Theane Evangelis & Cynthia E. Richman, *The Need to Establish Absent Class Member Standing in Antitrust Class Actions*, ANTITRUST SOURCE, Oct. 2015, http://www.americanbar.org/groups/antitrust_law/publications/the_antitrust_source/article_preview_01.html.

to fully account for compensable activities—could well result in casting aside altogether a verdict in which liability and damages are proven for most class members, but not all. Such an outcome is problematic for both plaintiffs and defendants, to say nothing of the institutional interests of courts in not having to repeat the exercise. Class members whose claims are ultimately defeated on the merits do not add to defendants' liability and under a proper plan of allocation would not share in a recovery. At the same time, defendants will benefit from a judgment as to the class members whose claims are defeated. These considerations further call into question whether the arguments of Tyson and its supporters raise significant constitutional concerns, or whether, instead, the courts can avoid any asserted concerns by first looking to Rule 23 and its flexible application.

Rule 23

Arguably, the heart of the controversy about uninjured class members goes to the requirements of Rule 23 of the Federal Rules of Civil Procedure. As the Third Circuit observed earlier this year (and as echoed by some of the Justices in their questions), “[m]any courts are in fact dealing with Article III standing questions within the confines of Rule 23, which raises serious doubts as to whether they really mean to impose Article III standing as separate and distinct analyses in these cases.”²⁸

In the view of many, the leading authority on the uninjured class member issue remains the Seventh Circuit's opinion in *Kohen v. PIMCO*, handed down six years ago, in which the court held a class may be suitable for certification under Rule 23 as long as it does not include a “great many persons” who suffered no injury.²⁹ In reaching that conclusion, Judge Posner, writing for the panel, expressed concern that requiring courts to determine at the certification stage which class members had suffered damages “would vitiate the economies of class action procedure; in effect the trial would precede the certification.”³⁰ As a general, and perhaps fundamental, proposition, a

class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification. . . .³¹

Judge Posner focused on the class definition, reasoning that “a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant,” such that “if the class definition clearly were overbroad, this would be a compelling reason to require that it be narrowed.”³² The Seventh Circuit applied the *Kohen* approach in the context of an antitrust class action in *Messner v. Northshore University. HealthSystem*.³³ There, the class sought treble damages arising from an allegedly anticompetitive hospital merger. The court rejected the defendant's argument that a number of members of the putative class were not harmed by any post-merger price increases.³⁴ In *Messner*, the defendant contended that the

²⁸ *Neale*, 794 F.3d at 368 (emphasis omitted).

²⁹ *Kohen*, 571 F.3d at 677.

³⁰ *Id.* at 676.

³¹ *Id.* at 677.

³² *Id.* at 677–78.

³³ 669 F.3d 802, 822–26 (7th Cir. 2012).

³⁴ *Id.* at 822–23.

class, as defined, included an insurer that submitted a declaration stating that it “did not pay artificially inflated prices,” as well as an unspecified number of individuals whose contracts purportedly protected them from price increases.³⁵ The Seventh Circuit expanded its view of *Kohen*’s rationale, by observing the tension between a potentially overbroad class and a fail-safe class—i.e., a class that includes only members who have won, for example, a proposed class of direct purchasers “who were the victims of price-fixing.”³⁶ In this regard, the Seventh Circuit was mindful of the practical issues confronting class counsel: “Defining a class so as to avoid, on one hand, being over-inclusive and, on the other hand, the fail-safe problem is more of an art than a science. Either problem can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis.”³⁷

The Seventh Circuit’s reasoning in *Kohen* and *Messner* remains sound in the wake of the Supreme Court’s decisions in *Wal-Mart*³⁸ and *Comcast*³⁹ emphasizing the importance of rigorous analysis at the certification stage. At the class certification stage, it is often unknowable (given limited discovery and merits fact finding) whether and to what extent each specific class member actually suffered injury on the merits. But, as the Seventh Circuit has explained, that is not the relevant issue for certification purposes.⁴⁰ Rather than rejecting class certification outright because of the possibility of uninjured class members, district courts instead address issues of class overbreadth at the certification stage by tailoring the class definition to avoid sweeping in absent class members with weak or obviously non-existent claims.⁴¹ Likewise, as the case proceeds on the merits—perhaps revealing subsets of uninjured members in the course of discovery—the court has discretion to modify the class definition accordingly.⁴²

At the merits stage, the court has at least two straightforward options for dealing with a subset of class members found (by the jury or otherwise) to be uninjured on the merits. One option is to enter final judgment based on the litigation class definition and simply handle the “uninjured” class member issue as a matter of claims administration. Alternatively, the court may amend the class definition to reflect the results of the trial and thereby exclude any class members with zero damages, which was suggested by the Eighth Circuit’s dissenting judge in *Tyson Foods*.⁴³

The case law advanced by the defense bar does not support their extreme position. In the antitrust realm, the *Rail Freight*⁴⁴ decision is often cited by defendants for the proposition that the inclusion of any uninjured class members is fatal to certification based on the following sentence

³⁵ *Id.* at 825.

³⁶ Some courts have held fail-safe class definitions to be impermissible. *See, e.g., id.* (collecting cases); *but see In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012) (allowing a fail-safe class, holding that “our precedent rejects the fail-safe class prohibition”).

³⁷ *Messner*, 669 F.3d at 825.

³⁸ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

³⁹ 133 S. Ct. 1426.

⁴⁰ *Kohen*, 571 F.3d at 677.

⁴¹ *See Messner*, 669 F.3d at 825–26.

⁴² *See* FED. R. CIV. P. 23(c)(1)(C) (2015). In addition, defendants facing claims by supposedly “uninjured” subsets of a certified class also can move for summary judgment as to those particular class members, thereby securing a preclusive victory on the merits that eliminates uninjured parties from the case going forward.

⁴³ *See Bouaphakeo v. Tyson Foods, Inc.*, 593 Fed. App’x 578, 584 (8th Cir. 2014) (Beam, J., dissenting) (asserting that the district court possibly should have “recertified [the class] in accordance with only those putative members with provable damages, if such damages were reasonably discernible from the evidence available”).

⁴⁴ *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013).

in that opinion: “The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.”⁴⁵ The *Rail Freight* decision, however, turned on a much different issue. According to the D.C. Circuit, the Supreme Court’s decision in *Comcast* “sharpen[ed] the defendants’ critique of the damages model as prone to false positives”⁴⁶ by revealing damages for a subset of class members that the defendants contended could not have suffered damages. The court concluded that a model that “detect[ed] injury where none could exist” would not be a reliable model, and without a reliable model, plaintiffs could not prove their case on a class-wide basis.⁴⁷ Putting aside the question of whether the defendants’ “false positives” critique is factually correct, the issue in *Rail Freight* was not whether the plaintiffs were able to prove that all class members were injured; the issue was whether the plaintiffs could set forth a model that could be trusted to show injury or damages as to any class members. As the D.C. Circuit succinctly stated: “No damages model, no predominance, no class certification.”⁴⁸ The *Rail Freight* holding that the plaintiffs’ class claims cannot survive without a reliable damages model is a far cry from a determination that class claims must fail if plaintiffs’ reliable model shows that, despite injury to thousands, there were nevertheless a few uninjured class members.

In the *Nexium* opinion decided earlier this year,⁴⁹ the panel majority was very much attuned to how the case would be tried, and whether insurmountable management challenges would be present, such that common issues would not predominate: “we see no basis for overturning the district court’s ultimate conclusion that the number of uninjured members here is not so large as to render the class impractical or improper, or to cause non-common issues to predominate.”⁵⁰ In this regard, the First Circuit’s approach echoes that of the Third Circuit in its influential *Hydrogen Peroxide* opinion, which emphasized that deciding whether predominance is met “calls for the district court’s rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove [individual injury or antitrust impact] *at trial*.”⁵¹

While class actions, including antitrust class actions, rarely go to trial, when they do, the jury instructions often call for the jury to award damages on an aggregate basis.⁵² Notably, in *Tyson Foods*, the jury was instructed, without objection by Tyson, to return an aggregate verdict on damages.⁵³ The jury was specifically instructed not to award damages to individual class members whose injuries were not proven.⁵⁴ During oral argument, an Assistant to the Solicitor General, on behalf of the United States as an amicus supporting the class, emphasized these instructions, which required the jury to consider whether the representative evidence demonstrated that the

⁴⁵ *Id.* at 252.

⁴⁶ *Id.* at 253.

⁴⁷ *Id.* at 252–53.

⁴⁸ *Id.* at 253.

⁴⁹ 777 F.3d 9.

⁵⁰ *Id.* at 31.

⁵¹ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008), *as amended* (Jan. 16, 2009) (emphasis added).

⁵² See Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 990–91 (2010).

⁵³ See Brief for Respondents, *supra* note 7, at 46.

⁵⁴ See *id.* at 19 (“The court instructed that ‘[y]ou may not award damages to non-testifying members of the class unless you are convinced by the preponderance of the evidence that they have been underpaid . . . Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages.’”) (citations to joint appendix omitted).

class is entitled to recover.⁵⁵ In fact, Tyson proposed, and the district court adopted, a verdict form in which the jury would answer a series of yes/no questions as to Tyson's liability and then provide a single aggregate damages award. Seeking an instruction as to aggregate damages may well reflect a sound defense trial strategy. A defendant may prefer to advance the vigorous defense of denying or refuting involvement in any unlawful activity. In a price-fixing case, for instance, a defendant may seek to refute all evidence of conspiratorial conduct. Such a strategy could be undermined by an alternative defense seeking to show that even if there were a conspiracy, some class members were unaffected, especially if there is compelling evidence that many, even if not all, were in fact harmed.

In any event, under no circumstances does it make sense to resolve this issue by throwing out the verdict and denying recovery to any class member, effectively exonerating the defendant notwithstanding its loss at trial.

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Implications for Antitrust

Policy considerations are never far beneath the surface of the arguments advanced on both sides of the uninjured class member debate. Given the absence of any clearly defined, real-world harm to defendants arising from including uninjured class members in a class, the defense view may well be driven by a desire to see fewer classes certified. Defendants frequently argue that class certification creates incentives for defendants to settle flimsy cases, as an amicus supporting Tyson emphasized:

[T]he certification of a class creates an overwhelming hydraulic pressure on the defendant to settle, even if the claims are fairly weak in substance. . . . A class cannot be certified on the premise that the court will figure out *later* whether the case can be tried as a class action, consistent with the defendant's rights.⁵⁶

For plaintiffs, on the other hand, overly restrictive procedural requirements for class certification threaten to foreclose litigation altogether. This would upset the long-recognized view, which has been underscored by the Supreme Court, that predominance is "readily" satisfied in antitrust class actions.⁵⁷ Turning again to the reasoning of Judge Posner, albeit from a non-antitrust class action opinion: "The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30."⁵⁸

Although in the antitrust context, the damages to each class member may not be so small, the gist of Judge Posner's quote remains apt, at least for many putative class members for whom individual litigation is out of the question. The Second Circuit's opinion in *In re American Express*

⁵⁵ Oral Argument, *supra* note 3, at 49–50.

⁵⁶ Brief for Ass'n of American R.R.s as *Amicus Curiae* in Support of Petitioner, *supra* note 20, at 15 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011)).

⁵⁷ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws.").

⁵⁸ *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Judge Posner's reasoning echoes an observation from the Supreme Court in a seminal class action opinion:

A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974).

Acceptance of Tyson
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would further weaken
private antitrust
enforcement. The
Supreme Court has
long recognized that
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private parties treble-
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private relief but was to
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the antitrust laws."

Merchants' Litigation,⁵⁹ provides instructive figures. There, the court cited an expert report indicating that "expert fees and expenses usually are substantial, even in a non-class action involving an individual plaintiff. . . . [E]ven a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed \$1 million."⁶⁰ The Second Circuit contrasted those high costs with the likely range of individual recoveries, highlighting that in the case at bar the largest volume named plaintiff merchant might expect to recover four-year damages of roughly \$13,000 to \$39,000 *after* trebling.⁶¹ Clearly, in most cases, individual litigation would be cost prohibitive.

The notion of "hydraulic" settlement pressure—i.e., that certain class actions may be weak on the merits but nevertheless provide defendants with intense pressure to settle due solely to the size of the potential adverse judgment—though widely discussed, is of dubious origin.⁶² Scholarship has pointed to a stark lack of empirical or doctrinal support for the notion of hydraulic pressure.⁶³ Even putting aside the issue of whether hydraulic settlement pressure is a legitimate concern, any such concern should only apply in the non-meritorious or "fairly weak" case. Yet Tyson, and particularly its amici, present the Supreme Court with an issue that could be resolved in a way that would endanger the prosecution of meritorious class actions in which proof of injury for a subset of class members fails. In addition, and cutting against the likelihood that an improperly certified class will cause undue pressure to settle, there are other well-established mechanisms for culling out the weak cases, including motions to dismiss and for summary judgment. And even at the class certification stage, appellate courts do exercise their discretion to allow for interlocutory review of class certification—*Comcast*, *Hydrogen Peroxide*, and *Messner*, are just some of the more prominent recent examples in antitrust cases, with each demonstrating that significant, and precedent-shaping, appellate review occurs at the Rule 23(f) stage.

Acceptance of Tyson and its amici's position would further weaken private antitrust enforcement. The Supreme Court has long recognized that the "purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief but was to serve as well the high purpose of enforcing the antitrust laws."⁶⁴ Additionally, there is a growing literature on the

⁵⁹ 634 F.3d 187, 198-99 (2d Cir. 2011), *adhered to on reh'g*, 667 F.3d 204 (2d Cir. 2012), *rev'd on other grounds sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁶⁰ 634 F.3d at 198 (citation omitted).

⁶¹ *Id.* at 198-99.

⁶² As further testament to Judge Posner's influence, the concept stems from the Seventh Circuit's opinion in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (noting that class certification may result in "intense pressure" to settle); *but see id.* at 1299 ("That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts.").

⁶³ See Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269, 1316 (2013) ("We know of no study providing evidence that any significant number of cases lacked merit and yet recovered substantial settlements."); *see generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U.L. REV. 729, 732 (2013); Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681 (2005).

⁶⁴ *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969); *see also* *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."); *overruled on other grounds by* *Copperweld Corp. v. Independence Tribe Corp.*, 467 U.S. 752 (1984); *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 318 (1965) ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.").

value of class actions especially from the standpoint of deterrence.⁶⁵ Within the past decade, however, there has already been a tightening of procedural rules that bear on a private party's ability to prosecute antitrust claims, notably *Twombly*'s alteration of the standards for specificity at the pleading stage,⁶⁶ *Italian Colors*'s endorsement of arbitration⁶⁷ and class action waivers, even in cases where this could imperil the ability to vindicate an antitrust claim, and rulings such as *Hydrogen Peroxide*,⁶⁸ *Wal-Mart*, and *Comcast* that have emphasized the importance of rigorous analysis at the certification stage. With these developments of the not-too-distant past, it is particularly important to weigh whether further process-related rules with the potential to prevent or impede class certification are warranted or would instead thwart Congressional policy.

Finally, wherever one comes out on the issue of whether there are too few or too many antitrust class actions, the uninjured class member question raises different considerations than cases like *Twombly* or *Hydrogen Peroxide*. Taking *Twombly*: if one posits that defendants are exposed to heavy discovery costs in the face of non-meritorious claims, tightening pleading standards may be helpful in addressing that (perceived) problem. Taking *Hydrogen Peroxide* and *Wal-Mart*: if appellate courts perceive that trial courts have conducted lax review of the evidence supporting class certification, then emphasizing the need for rigor at the class certification stage is closely connected to the perceived problem.

When considered in this context, the uninjured class member debate is different. What is the problem that needs addressing and what would prove to be an effective solution? For the reasons discussed herein, neither is apparent. So long as there are injured class members, the existence of uninjured class members presents no Article III problems, and Rule 23, which allows for re-defining the class, or adjusting allocations among class members, as warranted, prevents any adverse impact on defendants or injured class members. In this context, one might hope that the Supreme Court would avoid formulating broadly applicable rules—and it well might, as some of the Justices' more pointed questions during oral argument concerned FSLA-specific precedent—that could have significant effects for private antitrust class actions. Alternatively, perhaps the Court should accept the Solicitor General's view⁶⁹ that certiorari was improvidently granted on this question. Whatever the outcome in the Supreme Court, antitrust lawyers will surely be watching. ●

⁶⁵ Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 81 (2013); Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. REV. 315 (2011); Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008).

⁶⁶ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

⁶⁷ *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁶⁸ *Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305.

⁶⁹ Brief for the United States as *Amicus Curiae* Supporting Respondents at 31-32, *Tyson Foods*, No. 14-1146 (U.S. Sept. 29, 2015), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-1146_amicus_resp_United_States.authcheckdam.pdf.

Competitor Parity Clauses: Increased Scrutiny of MFNs in the United States and Europe

Fiona Schaeffer, Kimberley Piro, Alexander Rinne, and Andreas Boos

Recent cases in the United States and Europe suggest that the traditional safe harbors for most favored nation clauses (MFNs) may no longer immunize them from antitrust challenges, at least in certain industries. MFNs and parity provisions typically require sellers to give buyers the lowest price (or best terms) offered to any rival purchaser. In this article, we analyze recent challenges to the use of MFNs by online platforms on both sides of the Atlantic—notably, (1) the cases pursued by national competition authorities and the European Commission against online travel agencies (OTAs) and Amazon, and (2) the U.S. Department of Justice's successful challenge to American Express's use of non-price vertical restrictions (in the form of "non-discrimination" provisions) in the Eastern District of New York. In these jurisdictions, regulators have challenged parity clauses even where their beneficiaries were not dominant in the traditional sense and where harm to end consumers was not a primary concern:

- In the *American Express* case, Amex was found to have market power notwithstanding that its market share was below 30 percent (at 26.4 percent), and second to the market leader. Furthermore, the court was clear that Amex's non-discrimination provisions (NDPs) would have been unlawful even absent evidence of harm to end consumers. As Judge Nicholas Garaufis stated, "Proof of anticompetitive harm to merchants, the primary consumers of American Express's network services, is sufficient to discharge Plaintiffs' burden in this case."¹
- Similarly, in its decision against Hotel Reservation Service (HRS), the German Federal Cartel Office (FCO) found HRS's use of pricing parity provisions unlawful despite HRS's relatively modest market share (just over 30 percent), which had been shrinking and was well below market leader Booking.com (at 40–50 percent). The FCO's primary concern was potential harm to small and medium-sized hotels, rather than the impact of HRS's pricing parity provision on the prices paid by ultimate consumers.²

These cases suggest that MFNs and parity provisions are vulnerable to challenge even where they would pass muster under traditional screens, such as modest market shares and lack of harm to end consumers. As a result, antitrust counselors need to use a more sophisticated assessment to fully capture the regulatory risks associated with these provisions and should consider other "aggravating factors" that could trigger antitrust scrutiny.

The European Landscape

Many European regulators are actively investigating parity clauses based on concerns that they infringe Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and

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¹ United States v. Am. Express Co., 88 F. Supp. 3d 143, 208 (E.D.N.Y. 2015).

² See generally Bundeskartellamt [German Federal Cartel Office], Dec. 20, 2013, B 9-66/10, http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf?_blob=publicationFile&v=3.

national competition laws.³ Regulators are particularly concerned with the use of such clauses in e-commerce, which is the subject of a broad and ongoing sector inquiry by the European Commission.⁴ While the transparency of the Internet is often helpful to consumers and can facilitate entry and innovation, it can also facilitate coordination among competitors. Because the European Union seeks to “set objectives that match the growth potential of online commerce and services,”⁵ its regulators are keen to limit restrictions on potentially innovative entrants, who must compete with established market participants.

Online Travel Agencies and Hotel Rooms

Since 2012, many European authorities—including the UK, Germany, Austria, Belgium, Denmark, Switzerland, France, Sweden, Italy, Ireland, the Czech Republic, and Hungary—have launched investigations concerning parity provisions in contracts between OTAs and hotels. OTAs, such as Expedia, enable customers to search for and reserve hotel rooms, flights, and other travel-related services through their online platforms. A common model for their agreements with hotels gives the hotel responsibility for setting and listing room prices on OTA platforms, and the OTAs collect commissions upon booking. The parity provisions at issue require that hotel room prices offered through the OTA are the same (or better) than prices offered through the hotel’s other sales channels, including competing OTAs and the hotel’s own website. Typically, this parity requirement also covers other conditions, such as cancellation terms or inclusion of breakfast in the room price. Expedia, Booking.com, and HRS, three of the largest OTAs for hotels in Europe, have all come under scrutiny for requiring such provisions.

European regulators have been concerned that these parity provisions have an adverse impact on competition among OTAs.⁶ Because each of the major OTAs requires parity, in practice, the provisions guarantee that the price of a particular hotel room is the same across all online platforms. Knowing that room rates will remain in line with their competitors, regulators believe that OTAs have little (if any) incentive to compete against one another on commission rates charged to hotels. That is, OTAs could raise commission rates to hotels without losing business to one another because the room rate would remain unchanged (at the expense of the hotel’s margins). Alternatively, if the hotel did increase room rates, this increase would apply to their competitors as well. According to national competition authorities, this arrangement eliminates price competition between OTAs and “risks leading to higher commission rates, which in turn risks leading to higher hotel room prices.”⁷

European regulators also have expressed concern that pricing parity reinforces the position of incumbents at the expense of new entrants because pricing parity impedes their ability to increase share by discounting commissions or room rates. As a result, these provisions arguably preserve

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³ See Consolidated Version of the Treaty on the Functioning of the European Union arts. 101, 102, Sept. 5, 2008, 2008 O.J. (C 115) 47 (effective Dec. 1, 2009).

⁴ See European Commission Press Release IP/15/4921, Antitrust: Commission Launches E-Commerce Sector Inquiry (May 6, 2015), http://europa.eu/rapid/press-release_IP-15-4921_en.htm.

⁵ Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, A Coherent Framework for Building Trust in the Digital Single Market for E-commerce and Online Services 2, COM (2011) 942 final (Nov. 1, 2012).

⁶ See, e.g., Konkurrensverket [Swedish Competition Authority], 2015 case no. 596/2013, http://www.konkurrensverket.se/globalassets/english/news/13_596_bookingdotcom_eng.pdf.

⁷ *Id.* ¶ 21.

the concentrated structure of the OTA market, and impede entry from innovative new players. OTA pricing parity thus is at odds with the European Union's desire to facilitate growth and innovation in e-commerce.

“Broad” vs. “Narrow” Parity Clauses

Many of the European regulators have distinguished between broad and narrow parity clauses in OTA agreements. Broad parity clauses apply to all Internet listings, including those from competing OTAs. Narrow clauses refer to those between OTAs and hotels' direct online channels. Most European regulators have concluded that narrow parity clauses are not per se anticompetitive. Because OTAs earn commissions only when consumers book rooms through their platforms, regulators recognize that allowing hotels to set lower prices through their own online channels creates a free-rider problem. OTAs receive nothing for their search and comparison services if consumers ultimately book rooms through the hotels' direct channels. Germany's competition regulator and France's legislature, however, have taken issue with all MFN clauses, even those requiring parity with respect to hotels' direct online channels, such as booking via the hotel's website.

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To settle investigations with Swedish, French, and Italian regulators, Booking.com agreed to remove broad parity clauses from its hotel agreements on April 21, 2015.⁸ Months later, on July 1, Booking.com made this change throughout Europe. Effective August 1, 2015, Expedia followed Booking.com's lead, and similarly amended its parity provisions across Europe.⁹ Hotels contracting with Expedia and Booking.com may now offer lower room prices via competing OTA sites.

With the exception of France and Germany, these amendments appear to have satisfied European regulators.¹⁰ In December 2013, Germany ordered HRS to remove all MFN clauses (even with respect to hotels' direct online channels) from their hotel contracts. Despite the contrary conclusions of other European Union members regarding hotel pricing parity, the German FCO has not modified its position. More recently, in spite of its settlement with Booking.com earlier this year, France passed a law prohibiting price parity clauses in hotel contracts, effective August 6, 2015. Like Germany, the ban applies to both broad and narrow parity. Last September, a group of OTAs, including Expedia, filed complaints with the European Commission, challenging the validity of the French law.¹¹ As a result, market participants operating on a multinational basis must either adopt a country-by-country approach for their contracts or follow the strictest approach in all jurisdictions. In the absence of intervention by the European Commission, this scenario is unlikely to change in the near future.

Two important themes emerge from the European investigations. First, regulators may scrutinize parity provisions even where benefiting parties lack market power. For example, although the

⁸ See Sam Schechner, *Booking.com Settles Antitrust Complaints*, WALL ST. J., Apr. 21, 2015, <http://www.wsj.com/articles/booking-com-settles-antitrust-complaints-1429623279>.

⁹ See Press Release, Expedia, Expedia Amends Rate, Conditions and Availability Parity Clauses (July 1, 2015), <http://expediaincorporated.mediaroom.com/2015-07-01-Expedia-Amends-Rate-Conditions-and-Availability-Parity-Clauses>.

¹⁰ Following the removal of broad parity clauses from Expedia and Booking.com's hotel agreements, many national authorities closed their investigations. However, investigations in Austria, Belgium, the Czech Republic, Hungary, and Turkey are still pending.

¹¹ See Press Release, European Tech. & Travel Servs. Ass'n, European Travel Distributors File Complaints with the European Commission to Review Incompatibility of Loi "Macron" with EU Law (Sept. 14, 2015), http://www.etsa.eu/uploads/Modules/Mediaroom/2015_09_12_loi-macron.pdf. Italy may soon follow in France's footsteps. On October 7, 2015, Italy amended a competition bill to ban broad parity clauses. The Italian Senate has not yet considered this bill, which would call into question the Italian government's previous settlement with Booking.com. See Matthew Newman, *Booking.com Settlement May Be Further Undermined by Italian Bill*, MLEX, Oct. 21, 2015.

[T]he backseat role of consumer harm in these decisions is curious, especially given the consumer-focused nature of the hospitality industry.

Swedish Competition Authority states that Booking.com is “the largest online travel agency . . . in Sweden,”¹² whose market share “exceeds 30 percent by an appreciable margin,”¹³ its decision does not analyze whether Booking.com possesses market power over hotels (or consumers). It does not address why hotels could not push back on higher OTA commission rates. Although the German FCO’s HRS decision touched on this concept, finding that small and medium-sized hotels relied on OTAs, HRS was not even the market leader at the time of the decision. In fact, HRS’s market share had been shrinking significantly and, in 2012, HRS maintained a market share only slightly above 30 percent (nearly qualifying for the European Union’s block exemption concerning vertical agreements), well below the market leader Booking.com’s share in the 40–50 percent range.¹⁴ However, due to the high level of concentration in the OTA market and the need for hotels to market themselves on several OTA portals, the German FCO concluded that HRS had “leverage” over small and medium-sized hotels.¹⁵

Second, the regulators do not require proof of harm to ultimate consumers. The Swedish decision simply reasoned that OTAs had incentives to increase commission rates and hypothesized that such increases would lead to higher consumer prices: “This risks leading to higher commission rates, which in turn risks leading to higher hotel room prices.”¹⁶ Similarly, the FCO referred not to consumer harm, but harm to small and medium-sized hotel partners, which are dependent on HRS to increase their online visibility.¹⁷ Recognizing harm to wholesale-level customers is not new by any means. But the backseat role of consumer harm in these decisions is curious, especially given the consumer-focused nature of the hospitality industry.

To date, the U.S. agencies have not announced any investigation of vertical agreements between OTAs and hotels. Last year, Judge Jane J. Boyle of the Northern District of Texas dismissed a consolidated class action against OTAs and hotel brands. Citing to the European investigations, the class alleged that OTAs and hotel brands were engaged in an “industry-wide conspiracy” to eliminate price competition in the online hotel bookings market.¹⁸ The court found that the vertical agreements “made perfect economic sense” because hotels have “the right to control online pricing for their rooms” and OTAs needed assurances that their competitors would be similarly prohibited from discounting room prices.¹⁹ Thus, the defendants’ actions were consistent with each party’s independent rational business interests.

Amazon’s Use of Parity Clauses

The EU Member States’ suspicion of parity clauses in e-commerce agreements is not limited to OTAs, as they have kept close watch over Amazon in recent years. In June 2015, the European Commission opened a formal investigation into MFN clauses in Amazon’s e-book publisher con-

¹² Konkurrensverket [Swedish Competition Authority], 2015 case no. 596/2013, ¶ 12.

¹³ *Id.* ¶ 18. The 30% figure is significant because competition authorities in the EU apply a block exemption concerning vertical agreements for a firm with a sub-30% market share in the relevant market.

¹⁴ See Bundeskartellamt [German Federal Cartel Office] Dec. 20, 2013, B 9-66/10, ¶ 192 tbl.2, ¶ 193 tbl.3.

¹⁵ See *id.* ¶¶ 236–237.

¹⁶ Konkurrensverket [Swedish Competition Authority], 2015 case no. 596/2013, ¶ 21.

¹⁷ See Bundeskartellamt [German Federal Cartel Office] Dec. 20, 2013, B 9-66/10, ¶ 237.

¹⁸ See *In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526, 529 (N.D. Tex. 2014).

¹⁹ *Id.* at 537–38.

tracts.²⁰ Under these agreements, Amazon, the largest e-book distributor in Europe, has the right to the best terms (price and non-price) offered to other online retailers. According to the Commission, such conduct may constitute an abuse of a dominant market position, as the clauses “may limit competition between different e-book distributors and may reduce choice for consumers.”²¹

In October 2012, the UK’s Office of Fair Trading (now known as the Competition & Markets Authority) opened an investigation into pricing parity provisions between Amazon and its Marketplace sellers. Germany opened a similar investigation in February 2013, followed by an in-depth market analysis with questionnaires to 3000 retailers. “Marketplace” is Amazon’s online platform where third-party sellers can offer new (and used) goods alongside Amazon’s regular offerings. Under the parity clauses at issue, Marketplace sellers were prohibited from selling products at lower prices via other platforms, including their own. Competition regulators were concerned that these clauses might curb entry of potential entrants and affect sellers’ pricing levels, resulting in higher consumer prices. On August 29, 2013, after an in-depth investigation by the FCO, Amazon eliminated these price parity provisions throughout Europe.

Without any formal decisions, it is difficult to assess the role of market power and consumer harm in the Amazon investigations. However, as in the OTA cases, there is little doubt that Amazon’s ubiquitous internet presence was (and is) valued greatly by smaller third-party sellers who rely on the Marketplace for online selling opportunities.

Heightened Scrutiny of Parity Provisions in the United States

Historically, U.S. courts have regarded MFNs as competitively benign or even procompetitive. For example, in *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, the Seventh Circuit found that MFNs are “standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers.”²² In *Ocean State v. Blue Cross & Blue Shield of Rhode Island*, the First Circuit similarly held that “a policy of insisting on a supplier’s lowest price—assuming that the price is not ‘predatory’ or below the supplier’s incremental cost—tends to further competition on the merits and, as a matter of law, is not exclusionary.”²³ MFN clauses also may create efficiencies between parties, such as minimizing the bargaining costs associated with ongoing price negotiations. In recent years, however, recognizing that parity requirements may hinder the entry and expansion of competitors, the U.S. antitrust agencies have investigated and sometimes challenged such clauses where they are perceived to facilitate exclusionary or collusive conduct.

Exclusionary Conduct

MFNs used by dominant firms (i.e., firms possessing monopoly or market power) to exclude or disadvantage competitors are more likely to be targets of antitrust scrutiny. In 2010, the U.S. Department of Justice filed suit against Blue Cross Blue Shield of Michigan (BCBSM), alleging that the MFNs in its contracts with hospitals reduced competition in the sale of health insurance.²⁴ At the

²⁰ See European Commission Press Release IP/15/5166, Antitrust: Commission Opens Formal Investigation into Amazon’s E-Book Distribution Agreements (June 11, 2015), http://europa.eu/rapid/press-release_IP-15-5166_en.htm.

²¹ *Id.*

²² *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995).

²³ *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110 (1st Cir. 1989).

²⁴ See Complaint, *United States v. Blue Cross Blue Shield of Mich.*, Civil Action No. 2:10-cv-14155-DPH-MKM (E.D. Mich. Oct. 18, 2010).

time, BCBSM's commercial health insurance policies covered more than 60 percent of Michigan's commercially insured population. The DOJ claimed that BCBSM possessed market power in the sale of commercial health insurance in each of the alleged relevant geographic markets due to BCBSM's high market shares, increased prices to consumers, restricted output, barriers to entry, and exclusion of competitors.²⁵

The DOJ's concerns were heightened by the fact that BCBSM's contracts contained "MFN-plus" clauses, requiring hospitals to offer *higher* prices to BCBSM's competitors. According to the DOJ, "These hospitals [were] among the most important providers of hospital services in their respective areas."²⁶ For example, BCBSM insisted on an MFN-plus clause in its contract with Marquette General, the only tertiary care hospital in Michigan's Upper Peninsula.²⁷ Such a hospital is a "must-have" for commercial health insurers, which "must provide its subscribers with reasonable access to tertiary hospital care to be able to market a health insurance product."²⁸ In turn, BCBSM is a "must-have" for such a hospital, as "Blue Cross patients are a significant portion of these hospitals' business, and Blue Cross patients typically are more profitable than Medicare and Medicaid patients."²⁹ The DOJ argued that these MFNs caused hospitals to substantially raise prices for their services to BCBSM's competitors, limiting entry and expansion in commercial health insurance markets. In 2013, because Michigan passed a law prohibiting health insurers from including MFNs in contracts with health care providers, the DOJ and BCBSM voluntarily dismissed the case.³⁰

Competing firms also have used MFNs to facilitate or maintain agreements on price or other competitive terms.

Collusive Conduct

Competing firms also have used MFNs to facilitate or maintain agreements on price or other competitive terms. In *United States v. Apple*, Apple entered into e-book agency sales agreements with five of the "Big Six" publishers.³¹ The agreements contained MFNs requiring "each publisher to guarantee that it would lower the retail price of each e-book in Apple's iBookstore to match the lowest price offered by any other retailer."³² The court found that the publishers understood that the MFNs obliged them to impose agency agreements with other e-book retailers, created a price floor, and enabled them to increase retail prices. Finding that the e-book prices to consumers had increased as a result, Judge Denise Cote ruled against Apple.

The Second Circuit agreed that Apple violated Section 1 of the Sherman Act, explaining that, although MFNs are "surely proper in many contexts,"³³ here the "MFN's capacity for forcing collective action by the publishers was precisely what enabled [Steve] Jobs to predict with confidence that 'the price will be the same' on the iBookstore and the Kindle"³⁴

²⁵ See *id.* ¶¶ 33–35.

²⁶ *Id.* ¶ 39.

²⁷ See *id.* ¶¶ 49–51.

²⁸ *Id.* ¶¶ 51–52.

²⁹ *Id.* ¶ 45.

³⁰ See Stip. Mot. to Dismiss, *United States v. Blue Cross Blue Shield of Mich.*, Civil Action No. 2:10-cv-14155-DPH-MKM (E.D. Mich. Mar. 25, 2013), ECF No. 246.

³¹ *United States v. Apple, Inc.*, 791 F.3d 290, 308 (2d Cir. 2015).

³² Complaint ¶ 65, *United States v. Apple, Inc.*, Case 1:12-cv-02826 (S.D.N.Y. Apr. 11, 2012).

³³ *Apple*, 791 F.3d at 320.

³⁴ *Id.* at 317 (citation omitted).

American Express's Non-Discrimination Restrictions

The DOJ's challenge to Amex's non-discrimination provisions (NDPs) demonstrates that even non-price vertical restraints imposed by non-dominant firms can cause anticompetitive harm actionable under the Sherman Act. This past year, Judge Garaufis of the Eastern District of New York found that American Express's use of NDPs in its merchant agreements adversely affected competition in a network services market in which Amex and other card networks compete to provide acceptance services to merchants.³⁵ Specifically, he ruled that Amex's NDPs prevented merchants from steering customers to other network's cards, "block[ing] Amex-accepting merchants from encouraging their customers to use any credit or charge card other than an American Express card, even where that card is less expensive for the merchant to accept."³⁶

The DOJ's challenge to Amex's non-discrimination provisions (NDPs) demonstrates that even non-price vertical restraints imposed by non-dominant firms can cause anticompetitive harm actionable under the Sherman Act.

Unlike the MFN clauses in OTA agreements, Amex's NDPs did not explicitly address pricing. But because the NDPs prevented merchants from promoting cards with more favorable discount rates, they similarly "disrupt[] the price-setting mechanism ordinarily present in competitive markets" by "reduc[ing] American Express's incentive . . . to offer merchants lower discount rates."³⁷ As a result, the court found that the NDPs thwarted horizontal competition in the network services market, much like the effect of MFNs in the market for OTA services. In each case, the provisions effectively insulated their beneficiaries from price competition.

The court found also that Discover Card's failed attempt to expand market share by offering lower merchant discount rates highlighted how Amex's NDPs impeded competition.³⁸ This is precisely the scenario European regulators sought to avoid in the OTA market. Because the entrenched OTAs relied on MFNs to guarantee they would receive the best hotel room prices and terms, new entrants hoping to gain traction with consumers and hotels were unlikely to extract more favorable deals with hotels by lowering commission rates.

Because the government plaintiffs presented direct evidence of adverse effects to competition in the relevant market, a finding of market power was not necessary.³⁹ Judge Garaufis nonetheless concluded that American Express had sufficient market power for its NDPs to have anticompetitive effects, despite having a market share below 30 percent; American Express held a 26.4 percent share, which was well below the market leader. Recognizing that American Express's sub-30 percent "market share alone likely would not suffice to prove market power by a preponderance of the evidence,"⁴⁰ the court emphasized the concentrated nature of the relevant market, high entry barriers, and strong American Express "cardholder insistence."⁴¹

More than any other factor, cardholder insistence explains why merchants were beholden to American Express: "[T]he prospect of losing insistent charge volume by terminating acceptance[] constrains merchants' ability to resist anticompetitive behavior by American Express."⁴²

³⁵ See *American Express*, 88 F. Supp. 3d at 151–52.

³⁶ *Id.* at 165.

³⁷ *Id.* at 207.

³⁸ See *id.* at 213–16; see also *id.* at 213 ("[T]he failure of Discover's low-cost provider strategy in the 1990s provides direct evidence of how anti-steering rules like Defendants' NDPs impede modes of completion . . .").

³⁹ See *id.* at 169 (stating that "proof of actual adverse effects on competition is compelling evidence that the defendant firm does, in fact, possess sufficient power to profitably restrain competition in the relevant market").

⁴⁰ *Id.* at 191.

⁴¹ See *id.* at 188.

⁴² *Id.* at 194.

A segment of Amex's cardholder base "insist[s] on paying with their Amex cards and [] would shop elsewhere or spend less if unable to use their cards of choice."⁴³ It was thus economically rational for merchants to accept American Express's repeated price increases because the incremental cost was far lower than losing the business of numerous Amex cardholders altogether. Indeed, American Express performed insistence-based calculations to develop its pricing strategy and relied on this data in negotiations with merchants. For example, American Express instructed airline merchants that highly insistent cardholders were "responsible for hundreds of millions in charge volume that would be put 'at risk' by not accepting the price increase."⁴⁴

The court's diminished emphasis on Amex's modest market share (versus the court's thorough examination of cardholder insistence) is consistent with a full rule of reason analysis, which requires the fact finder to "weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."⁴⁵ This is in line with the European OTA investigations—the FCO was not dissuaded by HRS's modest market share or position.⁴⁶ The FCO referred to harm to small and medium-sized hotels that relied on OTAs for market exposure: "Small and medium-sized hotels are particularly dependent on marketing their rooms via hotel portals since they are less well known to hotel customers than the large hotels and they cannot reach a good ranking on the search engines when competing with the hotel portals and the large hotels."⁴⁷ HRS possessed leverage over such hotels, which chose to accept increases in commission rates rather than withdrawing their listings from HRS's website. The fact that HRS was "not the largest and not the only enterprise on the relevant market"⁴⁸ was not dispositive because hotels need to list on several portals in order to successfully market themselves.⁴⁹ Similarly, it is to a merchant's advantage to accept payment via multiple card networks. That these competing products are of a complementary nature serves to enhance the market power each competitor exercises at the wholesale level.

Another common theme underlying the *American Express* case and the European OTA investigations is that harm to ultimate consumers was not a primary concern: "Proof of anticompetitive harm to merchants, the primary consumers of American Express's network services, is sufficient to discharge Plaintiffs' burden in this case."⁵⁰ While the Swedish Competition Authority considered consumer pricing, its conclusion that the OTAs' parity clauses "risked" leading to higher hotel room rates was purely theoretical. Similarly, the FCO did not evaluate whether hotel room prices had in fact increased. It limited its analysis to increased commission rates, just as Judge Garaufis relied principally on increases in merchant discount rates.

Lastly, *American Express* illustrates how parity provisions can reinforce existing information asymmetries in a two-sided market. Amex's NDPs prohibited merchants from communicating merchant discount rates to cardholders. Because "Amex's rules ensure that the set of customers

⁴³ *Id.* at 191.

⁴⁴ *Id.* at 193.

⁴⁵ *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

⁴⁶ It is unclear how American Express would fare in Europe, where there is a block exemption for parties to vertical agreements holding a market share not exceeding 30 percent. As there is no such safe harbor here, U.S. rule of reason analysis appears more flexible than Europe's framework.

⁴⁷ Bundeskartellamt [German Federal Cartel Office] Dec. 20, 2013, B 9-66/10, ¶ 237.

⁴⁸ *Id.* ¶ 238.

⁴⁹ *See id.*

⁵⁰ *American Express*, 88 F. Supp. 3d at 208.

responsible for driving demand for network services (cardholders) cannot be influenced in their payment choice by the set of customers on the other side of the platform . . . (merchants),” consumers cannot internalize the full cost of their purchasing decisions.⁵¹ The result is a disruption of the price-setting mechanism in the market for card network services. The presence of MFNs in OTA agreements, another example of a two-sided platform, similarly drive a wedge between consumer demand for online booking and the hotels who are responsible for paying commission rates to the OTAs.

Conclusion

After *American Express* and the European Union’s OTA cases, there is a heightened risk that MFNs or other parity provisions may be challenged. When evaluating parity provisions, practitioners should look beyond traditional considerations of market power and overtly collusive behavior. Other considerations include the nature of the industry, especially the presence of two-sided networks. Companies with access to an established network of consumers have the ability both to leverage pricing power at the wholesale level and limit the flow of information between customers on opposite sides of the market. Such power enables commercial health insurers to impose price increases on hospitals, credit and charge card companies to increase merchant discount rates, and online travel agencies to increase hotel commission rates. Full rule of reason analysis gives U.S. courts the flexibility to find market power, even if market shares are modest.

To assess the regulatory risks associated with MFN clauses or other parity provisions in the United States and Europe, antitrust counselors should consider a range of factors in addition to traditional screens of market power. Based on recent cases, the following “aggravating factors” may increase the risk of antitrust scrutiny:

- **Market structure:** How concentrated is the market? In its case against HRS, the FCO repeatedly emphasized that HRS, Expedia, and Booking.com composed roughly 90 percent of the OTA market in Germany. Moreover, in both the OTA and card network services markets, it is in the best interest of hotels and merchants to partner with *multiple* OTAs and card networks, respectively.
- **Nature of the product or service:** Recognizing the increasing importance of the Internet and e-commerce to innovation and economic growth, regulators have targeted the use of MFNs by online platforms, especially where they have significant network effects. The use of MFNs by online platforms in this transparent environment can discourage innovation and new entry that otherwise would occur.
- **Reach of the provision:** How strict is the parity provision? Be wary of MFN-plus, retroactive clauses, or other elements of an MFN that give the beneficiary a significant advantage over (not just parity with) competitors.
- **Asymmetric information:** Do the provisions prevent customers on one side of a two-sided market from internalizing the full cost of their decisions? The asymmetry of information reinforced by the NDPs as well as cardholders’ loyalty in *American Express* left merchants with an “all-or-nothing” decision to accept modest price increases or risk losing significant business because they could no longer accept Amex cards.
- **Consumer pricing:** At what level does the parity apply—end consumer or wholesale business? Although harm to consumers has not been a focus of recent MFN cases, as we observed in the OTA cases and *United States v. Apple*, MFNs that set or determine consumer pricing levels are more likely to be challenged. ●

When evaluating parity provisions, practitioners should look beyond traditional considerations of market power and overtly collusive behavior.

⁵¹ *Id.* at 209.

Key Developments in Misleading Advertising in Canada

Anita Banicevic

Canada's Commissioner of Competition continues to actively enforce and expand the deceptive marketing provisions of the Competition Act (the Act). For example, in the past two years, the Commissioner has:

- overseen amendments to the Act to allow the Commissioner to more easily pursue misleading representations occurring in electronic messages;
- initiated proceedings before the Competition Tribunal alleging that Avis/Budget has engaged in misleading advertising by failing to provide adequate disclosure of additional mandatory fees for its rentals and seeking \$30 million CAD in penalties¹;
- initiated proceedings before the Ontario Superior Court against a major furniture retailer alleging that the retailer had engaged in misleading advertising with respect to its claims that customers could "pay nothing up front"²;
- conducted a surprise search of a Canadian company under the criminal misleading advertising provisions;
- reached a settlement with Bell Canada relating to online reviews posted by its employees for one of Bell's mobile applications³;
- reached a settlement with Michaels concerning regular pricing representations made about its custom and select ready-made picture frames⁴; and
- initiated several other confidential misleading advertising investigations.

The enforcement activity in this area shows no signs of abating and officials from the Competition Bureau have repeatedly stated that enforcement of the Act's misleading advertising provisions remains a priority.⁵ Provided below is a discussion of some of the key developments and enforcement actions and the corresponding areas to watch out for in the near future.

New Advertising Provisions Applicable to Electronic Messages

When Canada's anti-spam legislation (widely referred to as CASL) was introduced in July 2014,

¹ Press Release, Competition Bureau, Competition Bureau Takes Action Against Alleged False or Misleading Car Rental Advertising (Mar. 11, 2015), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03885.html>.

² Press Release, Competition Bureau, Competition Bureau Takes Action Against Leon's and The Brick for Deceptive 'Buy Now, Pay Later' Promotions (July 9, 2013), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03582.html>.

³ Press Release, Competition Bureau, Bell Canada Reaches Agreement with Competition Bureau over Online Reviews (Oct. 14, 2015), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03992.html>.

⁴ Press Release, Competition Bureau, Michaels to Pay \$3.5 M Penalty to Settle Frames and Custom Framing Services Price Advertising Case (May 6, 2015), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03923.html>.

⁵ Matthew Boswell, Senior Dep. Comm'r of Competition, Competition Bureau, Remarks to Public Interest Advocacy Centre (Nov. 28, 2014), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03856.html>.

The enforcement**activity in this area****shows no signs of****abating and officials****from the Competition****Bureau have repeatedly****stated that enforcement****of the Act's misleading****advertising provisions****remains a priority.**

the implementing legislation⁶ also contained several important amendments to the Act's deceptive marketing practices provisions.

One of those amendments was the introduction of Section 74.011 of the Act, which addresses false or misleading representations in any "electronic message." While the existing misleading advertising provisions⁷ already prohibit any representation to the public that is false or misleading in a material respect, these new provisions expand the ability of the Commissioner to pursue representations in a variety of electronic mediums, including representations that may not be considered to be material or may be made to individuals (rather than the public) or embedded in data that may not be visible to the public. The Government's stated rationale for introducing new provisions dealing exclusively with electronic messages is to include "technology-neutral language that catches emerging technologies" and to "assist the Bureau in enforcing provisions in the *Competition Act* as technological threats evolve."⁸

Guidance documents issued by the Bureau in connection with CASL emphasize the broad application of the new provisions, stating that "all means of telecommunications are captured under the new law, including Short Message Services (SMS or text messaging), social media, websites, uniform resource locators (URL) and other locators, applications, blogs, and Voice over Internet Protocol (VoIP)."⁹ While representations to "the public" made using such technologies would already likely be caught under the existing misleading advertising provisions, as discussed in greater detail below, the new provisions do not require that such representations be made to the public and, for certain types of representations, there is no requirement that the representation be false or misleading in a material respect.

Just as with the general prohibition on misleading representations, any transgression of Section 74.011 pursued by the Commissioner could result in the imposition of administrative monetary penalties of up to \$10 million dollars.¹⁰ Further, beginning in July 2017, a private right of action will be available under Section 74.011.¹¹ Private plaintiffs who allege that they are "affected" by conduct that is contrary to Section 74.011 can apply to a court for an order requiring compensation for damages or expenses as well as \$200 in penalties for each occurrence of the conduct with the total penalty amount not to exceed \$1 million for each day on which the conduct occurred.¹²

⁶ An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010, c 23 (Can.).

⁷ Competition Act, R.S.C. 1985, c C-34, section 74.01(1)(a).

⁸ *Frequently Asked Questions About Canada's Anti-Spam Legislation*, COMPETITION BUREAU (Nov. 5, 2015) [hereinafter *Frequently Asked Questions*], <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03765.html>. An "electronic message" is broadly defined as "a message sent by any means of telecommunication, including a text, sound, voice or image message." Competition Act, R.S.C. 1985, c C-34, section 2(1).

⁹ *Frequently Asked Questions*, *supra* note 8.

¹⁰ These penalties, however, are limited to proceedings initiated by the Commissioner. As discussed below, different penalties will apply in private actions.

¹¹ An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010, c. 23 (Can.), section 47(1).

¹² *Id.* section 51(1).

Section 74.011 contains three subsections, each of which addresses a different aspect of electronic messages. Subsection 74.011(2) prohibits sending or causing to be sent any representation in an electronic message that is false or misleading in a material respect. However, subsection 74.011(2) differs from the existing general prohibition against false or misleading representations in two key respects. First, there is no requirement that the representation be “made to the public.” Second, it is “immaterial whether the electronic address to which the electronic message is sent exists or whether the electronic message reaches the intended destination.” As a result, this new provision does away with any possible argument as to whether a particular representation was, in fact, “made to the public.”¹³ From a practical perspective, this means that the Commissioner may now take enforcement actions against representations in electronic messages that may not be visible to the public. For example, the Commissioner could attempt to use Section 74.011(2) to pursue embedded data that causes a particular web page to appear in the search results for “cures for cancer” even though this data may not be visible to the public. Such embedded data would likely be outside the scope of the existing general prohibition on misleading representations.

Additionally, subsection 74.011(1) prohibits sending or causing to be sent any misleading or false representation that appears in the “subject matter information” or “sender information”¹⁴ of electronic messages. Subsection 74.011(3) prohibits false or misleading representations that are found in the “locator”¹⁵ of an electronic message. Unlike other general prohibitions on misleading representations these subsections do not require that the representation at issue be false or misleading in a “material respect.”¹⁶ The omission of the materiality requirement appears to have been motivated by a desire to take action against “phishing emails” (i.e., where an email appears to be coming from a legitimate sender in an attempt to gather confidential information from the recipient).¹⁷ In such cases, the recipient may be more likely to open (and even respond) to an email that appears to originate from a legitimate source. However, these new provisions may also allow the Commissioner to pursue, for example, any “catchy” subject line in an email or blog posting (e.g., “exclusive sale for you” or “50 per cent off everything”) without needing to prove materiality.

Enforcement Action Under New Section 74.011(1)

The Commissioner already has relied upon the new prohibition against misleading subject line representations as part of the proceedings initiated against Avis/Budget in March of this year. As noted above, the Commissioner alleged that Avis/Budget had advertised rental rates that are not

¹³ See, e.g., *R. v. Stucky*, 2009 O.N.C.A. 151 (Can).

¹⁴ “Subject matter information” is defined to mean “the part of an electronic message that purports to summarize the contents of the message or to give an indication of them.” Competition Act, R.S.C. 1985, c C-34, § 2(1). “Sender information” is defined as “the part of an electronic message—including the data relating to source, routing, addressing or signalling—that identifies or purports to identify the sender or the origin of the message.” *Id.*

¹⁵ “Locator” is defined as “a name or information used to identify a source of data on a computer system and includes a URL.” *Id.* Official guidance released from the federal government regarding the implementation of CASL states that locator will be interpreted to include “meta-data” as well. See *Frequently Asked Questions*, *supra* note 8.

¹⁶ As the Bureau has acknowledged in its own guidance materials, the materiality of a given representation is determined by whether it influences a consumer’s purchasing decision.

¹⁷ Guidance accompanying the implementation of CASL provides the following context for the amendments to the Act: “Spammers will often: disguise their identity or subject lines so as to imply a personal acquaintance with the recipient; offer to sell a product or service despite a false or misleading subject line that suggests a different purpose; or, seek to compel a person to open an email by virtue of a false or misleading subject line.” See *The Competition Bureau and CASL*, COMPETITION BUREAU (Apr. 25, 2014), <http://fightspam.gc.ca/eic/site/030.nsf/eng/00290.html>. This discussion suggests that the type of conduct that was intended to be caught by these provisions is very limited.

[C]ompanies are well advised to carefully review any marketing messages delivered by electronic messages and, in particular, any representations found in the subject lines of emails or electronic postings.

available to consumers because of undisclosed mandatory fees. The Commissioner has asked the Competition Tribunal to impose \$30 million in administrative monetary penalties and order restitution to consumers. While the Commissioner's case alleges that the misleading representations occurred in a variety of forms (including traditional newspaper and direct mail pieces), the Commissioner also has taken issue with email communications sent by Avis/Budget with the following subject line: "Valued customer; relaxation that's more rewarding. Up to 25% off." The Commissioner alleges that the "up to 25% off" representation is misleading because Avis "does not apply the discount to its Non-Optional Fees or the total cost of the weekend rental."¹⁸

The Respondents have responded that the "up to 25% off" representation relates only to the base rental rates.¹⁹ However, they also have argued that the new provision is unconstitutional in light of the absence of a materiality threshold "as it places unauthorized and unjustified limits on their freedom of expression as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*."²⁰

Currently, the Avis/Budget hearing is scheduled for April 2016. The decision of the Tribunal in these proceedings may provide some guidance as to the application or constitutionality of these new provisions. In the interim, however, companies are well advised to carefully review any marketing messages delivered by electronic messages and, in particular, any representations found in the subject lines of emails or electronic postings. The need for particular attention to electronic messages of any kind will become even more acute beginning in July 2017, when a private right of action becomes available for representations prohibited by Section 74.011.

Reinvigorated Enforcement of Ordinary Sales Pricing Provisions—Beware the Sale

A significant portion of the Bureau's recent enforcement activity has focused on representations relating to pricing (e.g., disclosure of all applicable charges up front). However, over the past few years, the Bureau had been relatively quiet in its enforcement related to "ordinary sales pricing" or "regular price" representations.²¹ More recently, however, officials from the Competition Bureau have publicly remarked that the Bureau has received an increased number of complaints in this area. In light of this increased interest, it is perhaps not surprising that the Commissioner has recently initiated a number of investigations as well as contested proceedings involving the ordinary sales price provisions.

¹⁸ Amended Notice of Application ¶ 52, *Comm'r of Competition v. Aviscar Inc.* (Can. Comp. Trib.), http://www.ct-tc.gc.ca/CMFiles/CT-2015-001_Notice%20of%20Application_5_38_4-29-2015_3528.pdf.

¹⁹ Response of the Respondents to the Amended Notice of Application ¶ 69, *Comm'r of Competition v. Aviscar Inc.* (Can. Comp. Trib.), http://www.ct-tc.gc.ca/CMFiles/CT-2015-001_Response%20of%20the%20Respondents%20to%20the%20Amended%20Notice%20of%20Application_39_38_7-15-2015_9722.pdf.

²⁰ *Id.* ¶ 99. Although § 74.011 is a new provision, it should be noted that similar challenges to the constitutionality of other advertising provisions found in the Act have failed. More specifically, in a recent challenge to the constitutionality of the "adequate and proper test" requirement for performance claims found in § 74.01(1)(b), the Ontario Superior Court held that although § 74.01(1)(b) is not limited to material performance claims, performance claims are likely to be material to consumers such that only material claims would be covered by the provision. The Court also noted that false and misleading claims are already limited by the general prohibition against false or misleading claims found in § 74.01(1)(a) of the Act, and, accordingly, § 74.01(1)(b) "does not further interfere with the freedom to express a false claim because such a freedom never existed." *Canada (Competition Bureau) v. Chatr Wireless Inc.*, 2013 O.N.S.C. 5315, paras. 507 & 518 (Can.).

²¹ As a reminder, the Act contains specific requirements for ordinary sales pricing or "OSP" representations. In particular, the OSP provisions require that either: (i) a "substantial volume" of the product must have been sold at the "regular price" or higher within a reasonable period of time before or after making the representation (often referred to as the "volume test"; or (ii) the product was offered the "regular price" or higher in good faith for a substantial period of time recently before or immediately after making the representation (often referred to as the "time test"). *Competition Act*, R.S.C. 1985, c C-34, sections 74.01(2) & 74.01(3).

Earlier this year, the Commissioner opened an investigation into two major Canadian retailers regarding their ordinary sales representations for mattresses.²² While these investigations remain ongoing, in May of this year the Commissioner announced a consent agreement with Michaels of Canada ULC, regarding representations it made between January 2011 and December 2014 relating to the “regular” price of its custom and select ready-made frames. As part of the resolution, Michaels agreed (1) to pay an administrative monetary penalty of \$3.5 million; (2) to ensure its business complies with the OSP provisions for the next ten years; and (3) to enhance its overall competition compliance program.²³

The consent agreement also provides some context for the settlement. According to the recitals of the consent agreement,²⁴ the Commissioner investigated the marketing practices of Michaels related to custom and select ready-made frames and concluded that:

- Michaels had offered such frames on sale for half or “in some occasions more than half of the time” during the relevant time period;
- the “cumulative effect of the various promotions (i.e. ordinary price representations, BOGO, and coupons) employed by the Respondent was that the market was not validating the claimed Regular Prices . . . as supported by the low volume of sales sold at Regular Prices”;
- Michaels “did not have a formal process in place to assess whether the Regular Prices on Frames were comparable to prices offered by other competitors in Canada and the Regular Prices for Frames were primarily based upon pricing information in the United States.”
- As a result of the factors noted above, Michaels had not “offered the Frames for sale in good faith for a substantial period of time recently before making the representations.”

This resolution is noteworthy for two reasons. For one, the Commissioner’s conclusions serve as an important reminder that the regular price at which the products are offered must be set in good faith. In this case, it appears that the Commissioner concluded that the “regular price” set by Michaels did not reflect a reasonable market price and accordingly, was not set in good faith.²⁵ The fact that Michaels had no systematic basis for checking its pricing against its Canadian competitors seems to have influenced the Commissioner’s conclusion on this issue.

The settlement is also noteworthy for the significant size of the penalty and the relatively broad scope of the agreed-upon prohibition order. While the penalty is below the maximum administrative monetary penalty of \$10 million, given that custom and ready-made frames represent only one area of the overall Michaels business, the penalty of \$3.5 million is significant. In addition, although the alleged transgression in this case was limited to advertising for the Michaels framing business, it is notable that Michaels agreed to comply with the ordinary price provisions of the Act for any

²² *Competition Bureau Investigates HBC, Sears for Deceptive Mattress Marketing*; CBC News (Feb. 23, 2015), <http://www.cbc.ca/news/business/competition-bureau-investigates-hbc-sears-for-deceptive-mattress-marketing-1.2967460>.

²³ Given that the misleading advertising provisions are found in the *Competition Act*, it is not uncommon for the Competition Bureau to require that the party enter into a compliance program that ensures compliance with the *Competition Act* in general.

²⁴ Consent Agreement at 1–4, *Comm’r of Competition v. Michaels of Canada, ULC* (Can. Comp. Trib.) (May 6, 2015) [hereinafter *Michaels Consent Agreement*], http://www.ct-tc.gc.ca/CMFiles/CT-2015-006_Consent%20Agreement_2_38_5-6-2015_9532.pdf.

²⁵ According to the Bureau’s 2009 Ordinary Sales Pricing Enforcement Guidelines, the factors that the Bureau will consider as part of an evaluation as to whether the pricing was set in good faith will include whether: (a) the product was openly available in appropriate volumes; (b) the reference price was based on sound pricing principles and/or was reasonable in light of competition in the relevant market during the time period in question; (c) the reference price was a price that the supplier fully expected the market to validate whether or not the market did validate this price; and/or (d) the reference price was a price at which genuine sales had occurred, or it was a price comparable to that offered by competitors. *Ordinary Price Claims*, COMPETITION BUREAU (Oct. 16 2009), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03125.html>.

product supplied in Canada within 120 days of the date of the agreement.²⁶ Accordingly, any future transgression involving ordinary sales pricing representations that occurs during the term of the consent agreement (of ten years) would be a breach of a consent agreement and thus, a criminal offense.²⁷

The penalty's size and fact that the prohibition order relates to the entirety of Michael's business (and not simply framing) underscores the seriousness with which the Bureau views transgressions in the misleading advertising area. However, while it has become relatively routine for the Bureau to demand significant penalties and prohibition orders, it is important to recognize that even where the Commissioner has successfully established a contravention of the Act's misleading advertising provisions, certain courts have nonetheless declined to impose a prohibition order. Similarly, whether courts will agree to impose significant monetary penalties in advertising cases where the conduct is not intentional remains to be seen.

In any event, given the apparent resurgence in enforcement of the ordinary sales pricing provisions, companies operating in Canada are well-advised to review and if necessary, update their existing policies and practices concerning ordinary or "regular" price representations. In particular, companies should consider whether the "regular price" has been set in "good faith" and not simply to inflate any savings claims.

With the increasingly international nature of digital and social media, it is not surprising that the Commissioner continues to seek out greater cross-border cooperation in advertising-related matters.

Increased International Cooperation

With the increasingly international nature of digital and social media, it is not surprising that the Commissioner continues to seek out greater cross-border cooperation in advertising-related matters. In fact, as a result of the amendments to the Act contained in CASL, the Commissioner now has enhanced abilities to conduct civil misleading advertising investigations on behalf of foreign states, governments or any international organization of governments and to share related information with such entities.

Section 74.012 enables the Commissioner to provide assistance related to "an investigation or proceeding with respect to the laws of a foreign state, an international organization of states, or an international organization established by the governments of states" that addresses conduct that is substantially similar to conduct that is reviewable under the civil misleading advertising provision of the Act. It also enables the Commissioner to use any powers that are available to the Commissioner for civil misleading advertising investigation.²⁸ Further, the Commissioner may disclose any information that he collects to the government of the foreign state or to the international organization provided that he receives a written declaration from the recipient that use of the information will be restricted to purposes relevant to the investigation and the information will be treated in a confidential manner. Practically speaking, this means the Commissioner could seek compulsory production orders against companies operating in Canada that may have information relevant to advertising investigations in other jurisdictions or investigations involving international organizations such as the International Consumer Protection Enforcement Network (or ICPEN).

In addition to these new powers, the Commissioner has recently succeeded in obtaining assistance from the U.S. Federal Trade Commission in relation to a contested misleading advertising

²⁶ Michaels Consent Agreement, *supra* note 24, ¶ 2. This aspect of the settlement is referred to as a "prohibition order" as it prohibits certain future conduct.

²⁷ Competition Act, R.S.C. 1985, c C-34, section 66.

²⁸ *Id.* section 74.012.

proceeding taking place in Canada. The Bureau requested that the FTC obtain certain information from a third party operating in the United States (Aegis Mobile LLC) that the Bureau believed had information relevant to the contested proceedings. The FTC applied for such an order and the court granted the application, authorizing the issuance of the subpoena on the same day. While Aegis challenged the basis for the subpoena, the challenge was largely dismissed on July 30, 2014.²⁹

The Commissioner has highlighted the importance of this decision in recent speeches, stating:

This decision marks the first time that an American court has granted authorization to the Federal Trade Commission to conduct discovery of an American resident to assist the Competition Bureau. The decision is important because deceptive marketing cases often involve persons outside of the country where enforcement proceedings take place.³⁰

Looking ahead, the combination of the CASL amendments and the recent Maryland District Court decision regarding Aegis will undoubtedly lead to greater cooperation and information sharing between the various agencies. As a result, companies under investigation for misleading advertising or that are even on the periphery of an investigation (e.g., providing services to the target of an investigation) may find themselves involved in an international investigation and requested to produce relevant documents to foreign authorities.

Conclusion

Canada's Commissioner of Competition has new tools and powers available to assist in the enforcement of the deceptive marketing provisions of the Act. As the contested cases wind their way through the Canadian courts, the boundaries of these new powers and provisions should become clearer. In the interim, companies advertising in Canada would be well advised to conduct a comprehensive review of their own advertising practices and institute effective compliance programs for their advertising practices in Canada. ●

²⁹ *In re* Application of the Federal Trade Commission for an Order Pursuant to 28 U.S.C. 1782 to Obtain Information from Aegis Mobile LLC on Behalf of the Competition Bureau, Canada, for Use by Foreign Judicial Proceedings, Case No. MJG-13-MC-524 (D. Md. July 30, 2014).

³⁰ John Pecman, Comm'r of Competition, Remarks to International Privacy Enforcement Meeting (June 4, 2015), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03957.html>.

Best Practices for Antitrust Procedure: The Section of Antitrust Law Offers Its Model

Abbott B. (“Tad”) Lipsky, Jr. and Randolph Tritell

Antitrust law seeks to benefit consumers by prohibiting anticompetitive agreements, acts of monopolization/abuse of dominance, and anticompetitive mergers and other structural transactions. Undertaking the quest, however, does not guarantee reaching the goal. Antitrust rules and remedies may be inadequate (allowing harmful market conduct) or excessive (chilling desirable conduct). Members of the antitrust community (practitioners, enforcement officials, scholars, economists, policymakers, and business leaders) continuously debate how enforcement should be adjusted to find the “Goldilocks Zone,” where legal tools are “just right” when judged by their effectiveness in serving antitrust law’s ultimate objectives.

Recent years have witnessed an increasing recognition that antitrust procedure—like substantive rules and remedies—constitutes another dimension of the quest for appropriate balance. Enforcement aspires to be accurate, efficient, and impartial—both in reality and perception. Procedure can have a profound influence on the ability of antitrust enforcement to fulfill those aspirations. Recognizing this reality, a number of public international organizations have launched projects to improve antitrust procedure, with encouragement and support from the antitrust community. For example, shortly after its formation, the International Competition Network launched a major project that ultimately led to consensus adoption of “Recommended Practices for Merger Notification and Review Procedures.”¹ More recently, the ICN adopted “Guidance on Investigative Process” (ICN Guidance) at its 2015 annual conference.² The ICN Guidance contains good practice standards applicable to agencies that operate within all types of legal and enforcement systems regarding transparency to the public, transparency to and engagement with parties to investigations, and protection of confidential information.

Enforcers have also launched procedural initiatives, recognizing that procedures that are accurate, efficient, and impartial bring multiple benefits to their agencies. These initiatives include ensuring that the agency hears the parties’ view of the facts, the evidence, and how the law applies, resulting in better informed agency decisions and conferring legitimacy on the agency’s enforcement activities as perceived by affected parties and by the domestic and international antitrust communities. Similar initiatives have been pursued in the OECD³ and in negotiations of

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¹ International Competition Network, Recommended Practices for Merger Notification and Review Procedures, <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

² International Competition Network, ICN Guidance on Procedural Fairness, <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.

³ ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, TRANSPARENCY AND PROCEDURAL FAIRNESS (2012), <http://www.oecd.org/competition/mergers/proceduralfairnessandtransparency-2012.htm>. See also Asia Pacific Economic Cooperation (APEC), http://www.apec.org/Meeting-Papers/Leaders-Declarations/1999/1999_aelm/attachment_apec.aspx; APEC Principles to Enhance Competition and Regulatory Reform (Sept. 13, 1999), http://www.apec.org/Meeting-Papers/Leaders-Declarations/1999/1999_aelm/attachment_apec.aspx.

bilateral (U.S.-Chile,⁴ U.S.-Korea⁵) and multilateral (Trans-Pacific Partnership⁶) trade agreements. There has also been a private sector initiative in this area by the International Chamber of Commerce's Competition Commission.⁷

The increasing intensity of discussion and initiatives regarding procedure was duly noted by the ABA Section of Antitrust Law and its International Task Force (ITF). In its role as the main vehicle for Antitrust Section and ABA input on antitrust issues at enforcement agencies worldwide, the ITF coordinates the submission of Section comments involving antitrust procedure to numerous foreign agencies (often jointly with the ABA Section of International Law). Although other bodies had addressed antitrust procedures, the ITF concluded, based on the long U.S. experience in implementing antitrust law and the Section's strong expertise and reputation, that the Section could make a valuable contribution to the international dialogue on these issues. Ultimately the ITF proposed a thematic approach to this topic, as distinct from only responding to individual consultations by agencies (by far the most common mode of ITF activity).

Following discussion of this change in approach, in 2013 then-incoming Section Chair Christopher Hockett launched a variety of Section initiatives focused on procedure, including (among others) a request to the ITF for a report that would survey scholarship concerning antitrust procedure and suggest whether, and if so how, the Section could contribute to the international dialogue on procedural aspects of antitrust enforcement. The ITF initiative continued under Chris Hockett's successors, Howard Feller and Roxann Henry.

In January 2015, the Section's Council accepted the ITF's Report and approved its three principal recommendations—that the Section: (1) attempt to formulate best practices for antitrust procedure; (2) identify mechanisms to enhance the effectiveness of Section outreach and contributions to policy dialogue on antitrust procedure (such as that occurring in the international antitrust organizations); and (3) identify specific research topics (legal, empirical, economic, or otherwise) that might deserve Section encouragement or support in pursuit of better information to enhance the quality of policy dialogue about antitrust procedure. The Council approved the ITF's consensus proposal for Best Practices for Antitrust Procedure in June 2015. The approved text of the Report on Best Practices for Antitrust Procedure (Report) is reproduced below.

A few brief framing remarks are in order. First, the Report is targeted at a fundamental type of proceeding common to all systems of antitrust or competition law enforcement—specifically, proceedings conducted by a government agency seeking to determine whether an infringement of competition rules has occurred and, if so, to formulate and apply a remedy. This excludes a variety of other enforcement agency activities, such as conducting industry studies, participating in proceedings between private parties (e.g., as an *amicus curiae*), participating in proceedings under other regulatory systems, public advocacy for competition and antitrust policy, and formulating or reacting to proposals for legislative change in antitrust law, to name just a few. These other activities can be vital to the success of an enforcement program, but government proceedings to assess and remedy possible infringements form the canonical tool of antitrust

[T]he Report is targeted at a fundamental type of proceeding common to all systems of antitrust or competition law enforcement—specifically, proceedings conducted by a government agency seeking to determine whether an infringement of competition rules has occurred and, if so, to formulate and apply a remedy.

⁴ United States-Chile Free Trade Agreement, art. 16, June 6, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file616_4010.pdf.

⁵ Free Trade Agreement Between the United States of America and the Republic of Korea, ch. 16 (June 30, 2007), https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file193_12715.pdf.

⁶ Trans-Pacific Partnership, Oct. 5, 2015, ch. 16, <https://ustr.gov/sites/default/files/TPP-Final-Text-Competition.pdf>.

⁷ International Chamber of Commerce Commission on Competition, Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings (Aug. 30, 2010), <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2010/Recommended-framework-for-international-best-practices-in-competition-law-enforcement-proceedings/>.

enforcement, and they are a—if not *the* leading source—of questions about the quality of procedure in antitrust enforcement.

Second, the Report proposes best practices for each distinct phase of government infringement proceedings from inception of an investigation through first level review of the first-instance determination regarding an infringement. The process is analyzed in five distinct phases: Investigation, Asserting Contentions of Infringement, Assessing Contentions of Infringement, First-Instance Decision, and Review. (The Report concludes with a short list of key practices relevant to all phases of the process.) Thus, at least within the specific sphere of government infringement proceedings, the Report attempts to be comprehensive.

Third, in suggesting best practices, no presumptions are made regarding the superiority or inferiority of any particular system—common law versus civil law, adversarial versus inquisitorial, or administrative versus prosecutorial/judicial. Best practices are selected only on the basis of their capacity to help assure accurate, efficient, and impartial antitrust enforcement. The ITF's initial Report to the Section Council had included, at the Chair's request, a stock-taking of existing scholarship on antitrust procedure. The ITF's experience in compiling that very extensive list demonstrated (1) that procedure has been a frequent topic of study and commentary in numerous antitrust enforcement systems around the world, and (2) the scope and variety of antitrust procedures in use across the more than 100 jurisdictions that actively enforce antitrust laws are so profound as to almost defy characterization. Accordingly, identifying best practices that are relevant only in the context of a specific system of procedure would severely limit the utility of the Report. Thus, the selection was heavily influenced by a desire to focus on practices that could be understood and applied to a broad variety of specific systems and jurisdictions. In addition, the recommendations are based on the premise that basic principles of accurate, efficient, and impartial procedure should apply across all types of enforcement systems.

Those interested in comparing the Report with the ICN Guidance will see numerous similarities, but one major contrast: while the Report identifies best practices for each of the five previously noted distinct phases of government proceedings (Investigation, Asserting Contentions of Infringement, Assessing Contentions of Infringement, First-Instance Decision, and Review), the ICN Guidance is limited to the investigation phase. Within the ambit of the investigation phase there are numerous similarities between the good practices identified in the Report and the ICN Guidance. Some notable common principles include that (1) agencies should seek evidence broadly rather than limiting their inquiry to complainants and/or targets, (2) applicable substantive rules and procedures should be adequately disclosed so that parties are able to know in advance the legal framework that applies to their conduct, and (3) parties should be permitted to present all aspects of a defense, including expert economic analysis among others.

The ITF is currently working on implementing the other two ITF recommendations the Council approved in 2014—enhanced outreach and identification of worthy research topics relevant to antitrust procedure. We hope that through discussion of the Report and the other supporting efforts, the Section will reaffirm its best traditions and also contribute to progress in assuring that antitrust proceedings are accurate, efficient, and impartial, both in reality and as perceived by the antitrust community and the broader public.⁸ ●

*(T)he Report proposes
best practices for
each distinct phase
of government
infringement
proceedings from
inception of an
investigation through
first level review of
the first-instance
determination
regarding an
infringement.*

⁸ The authors of this article express their great appreciation for the hard work and many contributions of all who brought the Report to fruition. The Report was a collaborative effort undertaken primarily by a subgroup of the International Task Force, including (in alphabetical order) William Blumenthal, Rachel Brandenburger, Terry Calvani, Neil Campbell, Jennifer Driscoll, Damien Geradin, Elizabeth Kraus, and James Rill. The various drafts were reviewed, edited, and commented upon by the other members of the International Task Force, by Deborah Garza (the Section's International Officer at the relevant times) and, finally, by other Council members. The project benefited greatly from the continuous support of Section Chairs Christopher Hockett, Howard Feller, and Roxann Henry.

BEST PRACTICES FOR ANTITRUST PROCEDURE

REPORT OF THE ABA SECTION OF ANTITRUST LAW INTERNATIONAL TASK FORCE

May 22, 2015

INTRODUCTION

Among numerous policy studies and reform efforts underway throughout the global antitrust and competition-law community (enforcement officials, private antitrust-law practitioners, antitrust economists and academics, among others), significant recent interest has focused on improving antitrust procedures. Merger review procedures were among the first areas targeted for study and for proposals regarding best or recommended practices, but more recently interest in reform of procedures has broadened to include all the main areas of antitrust enforcement.

As new antitrust laws and agencies continue to expand globally, an increasing variety of legal methods and institutions has been applied to competition matters. This offers both opportunities and challenges: on one hand this increased diversity allows comparison of different procedures, which may help identify those rules, institutions and other mechanisms that are most conducive to impartial, efficient and accurate enforcement. On the other hand, the increasing variety of the systems encountered in antitrust enforcement creates new challenges in developing principles and approaches likely to be widely accepted and implemented.

Adopting procedures that promote the impartiality, efficiency and accuracy of antitrust decisions can help achieve basic competition goals. Procedures that allow agencies to obtain and test relevant evidence, as well as the legal and economic approaches and analyses that inform their decisions regarding infringement and remedy, can enhance significantly the overall quality of enforcement decisions. This facilitates vigorous competition within established legal constraints and ultimately enhances productivity and consumer welfare. Moreover, procedures that are—and are rightly perceived to be—accurate, efficient and impartial will enhance respect for competition law and its enforcement institutions and processes among counterpart agencies, within the business community, among consumers and by the general public.

As the latest development in a process that began several years ago, the ABA Section of Antitrust Law's International Task Force has developed this proposal for best practices for antitrust procedure. This proposal is intended to stimulate and contribute to ongoing global dialogue on this fundamental subject, adding the perspective of the world's oldest and largest association of antitrust professionals to current efforts to improve antitrust procedures. This proposal has been formulated based only on the anticipated ability of these practices to contribute to the impartiality, efficiency and accuracy of antitrust decisions. No specific system of enforcement—adversarial or inquisitorial, common-law or civil-law, judicial or administrative—has been assumed superior in its relevant capabilities.

The best practices listed below are considered relevant to the conduct of any antitrust proceeding, defined as a process for determining whether one or more specific individuals or business organizations have infringed applicable competition-law standards, and to prescribe and enforce a remedy for such infringement. Antitrust enforcement involves many activities that do not fall into this category: competition advocacy, general market or industry studies (other than those that can lead to the imposition of remedies for identified anticompetitive practices), or amicus par-

ticipation in judicial proceedings between private parties, just to name some of the most obvious. Such activities were not considered as part of the subject matter of this report, although they can each be vital to the broader success of a competition-law enforcement system.

The Report also does not address any but the most fundamental principles that govern the conduct of public officials and private parties engaged in the antitrust enforcement process. Thus, for example, aside from the most elementary protections against corrupt influence of the decision making process, rules of conduct for public officials or private parties are not included although they are obviously essential to sound antitrust enforcement. This report presupposes that such individuals and entities are subject to their own professional, legal, and other disciplines that assure orderly engagement with antitrust enforcement processes. Such practices may facilitate dialogue and compliance with applicable procedural rules, and are also likely to enhance efficient and accurate enforcement.

The proposed best practices have been divided into six specific categories, five of which correspond to conceptually distinct stages of an antitrust proceeding as it is defined in this proposal: (1) Investigation, (2) Asserting Contentions of Infringement, (3) Assessing Contentions of Infringement, (4) First-Instance Decision and (5) Review. We conclude with a brief list of best practices applicable at all stages of an antitrust proceeding.

ANTITRUST PROCEDURES—BEST PRACTICES

I. INVESTIGATION

- A. In conducting investigations and seeking evidence, officials should make every reasonable effort to define clearly the specific potential legal, factual and economic contentions being considered.
- B. Officials should adopt management practices designed to help ensure that the expected costs and other burdens of investigation—including those imposed upon targets and others who provide information or otherwise cooperate with the investigation—are proportionate to the expected value of the evidence sought. The expected significance of the potential competitive harm also should be considered in making this assessment.
- C. At key points in a pending investigation (or periodically) officials should specifically reassess the potential contentions and tailor the investigation accordingly.
- D. Officials should strive for balance, pursuing and considering both exculpatory and inculpatory evidence and analysis.
 1. Officials should not limit pursuit or consideration of exculpatory evidence to that provided by targets' counsel. Officials should pursue and consider potentially exculpatory evidence from third parties, especially when such evidence may not otherwise be available to targets or their counsel.
- E. At key points in a pending investigation (or periodically) officials should disclose (subject to limitations reasonably reflecting and tailored to any legitimate concerns such as the preservation of evidence of covert criminal behavior or maintaining confidentiality of business secrets) all potential contentions of infringement and (in reasonable detail)

the underlying evidence, analysis and argumentation relevant to the defense, to targets and their counsel, and provide reasonable opportunities for and carefully consider all responses to such disclosures (including submissions as to facts, economic analysis, legal analysis, policy, and other forms of argumentation). Targets and counsel for targets should have reasonable opportunities to present such responses in face-to-face meetings with officials conducting the investigation and with officials managing the investigation. Subject to the foregoing, officials should maintain the confidentiality of evidence and all other aspects of the investigation (including its existence).

- F. Officials should apply credible objective checks and balances to the process of investigation to ensure adherence to the foregoing practices.
 - 1. It is important for officials to establish management practices that limit susceptibility of their processes to confirmation bias and other institutional characteristics that may allow or even encourage officials to broaden or persist with investigations beyond the point that disinterested analysis would consider well supported. Periodic review of investigations by retained experts with the ability and incentives to provide objective independent views may be one such practice; others might include the development of specialized offices or other units (a staff including experts in competition economics, law, and/or the particular sector involved) internal to the investigating institution or to another institution, subject to safeguards for their objectivity, independence and candor.
- G. Prior to the time when any contention of infringement is asserted, each target should be provided with all evidence (regardless of whether subject to any assertion or finding of confidentiality) then known to officials and upon which they intend to rely in support of such contention. Each target should be provided with the opportunity to present a full response, including as to all matters of fact, economic and other expert analysis, legal, policy and other argumentation. Protections for material reasonably regarded as confidential should be afforded by such mechanisms as restricting access to counsel or outside counsel only, use of data rooms (physical or virtual), or disclosure pursuant to protective order. A target should be permitted to present its response through documentary submissions and through face-to-face presentation to the official(s) responsible for making any contention of infringement.
- H. The disclosure of an investigation, or the possibility of a future investigation, should ensure that targets and/or potential targets are not prejudiced or otherwise unnecessarily disadvantaged. Such disclosure should be accompanied by a clear statement that there has been no contention of infringement, and that any future such contention would be subject to assessment on the merits.

II. ASSERTING CONTENTIONS OF INFRINGEMENT

- A. The official decision to make a contention of infringement should be based on a well-considered assessment, including balanced and conscientious evaluation of both exculpatory and inculpatory evidence, that the completion of proceedings (including obtaining a final determination of infringement and defining, implementing and administering a remedy) is highly likely to serve the fundamental purposes of competition

law. A contention of infringement should include a clear explanation of the evidence and the legal and economic theories and analyses that support it.

- B. A contention of infringement, and the pursuit of remedies, should not be fashioned for any inappropriate purposes, including, for example: (1) primarily to prevail in infringement proceedings independent of any substantial competitive benefit; or (2) primarily to obtain any advantage over or concession from a target that is not directly justified by the competition law purposes of proceedings.
 - 1. Key competition-law concepts such as “restraint of trade,” “restriction of competition,” “abuse of dominance,” “exclusionary conduct,” “substantial adverse impact on competition,” “substantial lessening of competition” and the like are inherently broad and flexible. Accordingly, assessing contentions of infringement of these laws often involves complex factual, economic and policy assessments of numerous interacting factors. Some circumstances exist in which it is possible for officials to secure a determination of infringement even where it might be questionable whether this would serve fundamental purposes of competition law. Moreover, some accused targets that may ultimately be entitled to exoneration may have powerful private reasons to avoid contesting official assertions of infringement—to avoid the substantial expense, disruption, extended periods of legal, financial and commercial uncertainty, public opprobrium, and/or contentious relationships with a public institution associated with fully contested proceedings—leading such targets to settle quickly and/or by making concessions that exceed the relief that ultimately might be justified. This may create temptation for officials to press investigations—consciously or unconsciously—beyond the point that best serves fundamental purposes of competition law.
- C. No official contention of infringement should be made before providing respondents a genuine opportunity to settle the matter by consent without additional contested proceedings.
- D. The process of publicizing a contention of infringement should ensure that such publication does not prejudice or otherwise unnecessarily disadvantage respondents. Specifically, publication of any contention of infringement should be accompanied by a clear statement that such contention is subject to assessment on the merits and does not constitute a determination or finding of infringement.

III. **ASSESSING CONTENTIONS OF INFRINGEMENT**

- A. Following a contention of infringement, officials should follow specific procedures for the assessment of such contention in accord with the following practices. No finding of infringement should be made absent compliance with such procedures.
- B. Any assessment (hereinafter “first-instance decision”) of a contention of infringement should be made by an independent official or officials, personally identified to the parties.
 - 1. “Independent” in this context means (1) having no prior role in the investigation or in formulating the contention of infringement (except as a neutral decision maker regarding interim or preliminary matters required for management of prior

proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to conduct the proceeding and to make the assessment in a disinterested, efficient and accurate manner.

- C. The decision-making officials should compile a record whose contents are clearly ascertainable by respondents and any reviewing authorities (subject to proportional limitations to protect specific and reasonable confidentiality concerns). Officials should provide specific and enforceable means to exclude from the record all extraneous matter. Off-the-record communications with decision-making officials by the parties or their counsel or other agents or representatives should be prohibited throughout proceedings.
- D. Counsel for respondents should be permitted to introduce all relevant evidence, argument and expert analysis on all material issues (subject to reasonable administration of proceedings—*e.g.*, limits on merely cumulative evidence, reasonable requirements as to timeliness and/or sequence of submission).
- E. All evidence, arguments and expert analysis placed in the record should be subject to challenge on the basis of authenticity, relevance, materiality and/or other potentially significant aspects. All documentary and testimonial evidence, argument and analysis should be subject to challenge by means tailored to provide tests of credibility, completeness and weight.
 - 1. Allowing counsel for parties to challenge inculpatory or opposing testimony by live cross-examination should be permitted to the extent feasible. In legal systems that do not present this opportunity, as in some administrative, inquisitorial and/or civil-law systems, other equivalent means for testing the quality and credibility of such testimony should be made available, such as questioning of witnesses by the independent decision maker *sua sponte* or upon request of the parties.
- F. Presentation of or challenges to evidence, arguments and expert analysis should be made in the presence of the first-instance decision-making official(s).
 - 1. For reasons of efficiency, certain procedural stages may call for written submissions by counsel, such as briefing of a request for summary disposition, a request for narrowing of the issues, or upon final submission of the matter for decision. Where submissions are made in writing, counsel for respondents should have the opportunity for oral presentation of argument before the decision maker(s).

IV. FIRST-INSTANCE DECISION

- A. Any assessment of infringement should be based only on matters of record as to which targets and their counsel have had full opportunity to respond. The assessment should be in writing, explaining reasons for the assessment of evidence on each issue and the economic, factual and legal analysis relied upon.

- B. A finding of infringement should include a clear explanation of the evidence and the legal and economic theories and analyses that support it. The specification of remedy should be written and should explain why each element of the remedy is required by, and tailored to, the characteristics of the infringement.

V. REVIEW

- A. First-instance decisions should be subject to review by an independent tribunal.
 - 1. “Independent” in this context means (1) having no prior role in the investigation, accusation, or first-instance proceeding (except as a neutral decision maker regarding interim or preliminary matters required for management of first-instance proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to review the first-instance decision in a disinterested, efficient and accurate manner.
 - 2. “Tribunal” in this context means one or more named officials specifically designated to conduct the review and render decision and personally identified to counsel for the parties.
- B. Counsel for the parties should be permitted to address the tribunal directly in face-to-face proceedings and through written submissions.
 - 1. The opportunity for face-to-face proceedings should be subject to the discretion of the independent tribunal to forego such proceedings where they are highly unlikely to affect the outcome of or basis for the decision on review, in which case the tribunal should consider the parties’ written submissions.
- C. Review should be permitted on any issue unless sound policy suggests deference to the first-instance tribunal (*e.g.*, basic fact-finding, routine evidentiary and procedural rulings, assessments of witness credibility and the like).
 - 1. Many basic facts are usually not appropriate for review on the merits, such as whether particular individuals participated in particular communications (cartel cases) or whether particular distributors traded in specific goods (exclusionary conduct cases). By contrast, competition proceedings frequently involve the drawing of inferences (*e.g.*, the existence of conspiracy; whether a practice should be regarded as exclusionary) that implicate important economic and/or competition policy aspects (such as the probability and consequences of mistaken inferences) or otherwise intertwine fact, economic analysis, law and/or policy. Review should be permitted on such issues.
- D. The basis for decision should be confined to matters addressed in the record in the first-instance proceeding (subject to reasonable exceptions for post-decision changes in law or fact and incontestable public-record facts).
- E. The decision on review should be in writing and explain in detail the assessment of and conclusions upon all issues underlying the decision.

VI. BEST PRACTICES APPLICABLE TO ALL PHASES OF ANTITRUST PROCEEDINGS

- A. Officials involved in all steps of an antitrust proceeding should possess sufficient expertise in competition law, economics and/or other relevant disciplines to enable them to conduct their duties in a disinterested, efficient and accurate fashion.
- B. All rules and practices governing proceedings—procedure, evidence, review, *etc.*—should be clearly disclosed and made publicly accessible in advance of proceedings. Any exceptions should be proportional and based on specifically identified objective and legitimate reasons.
- C. Officials should provide for an effective system to prevent unnecessary delay at any stage in proceedings.