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Working Party No. 3 on Co-operation and Enforcement

RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- United States --

15 June 2015

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More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>

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-- United States --

1. The United States relies on a combination of federal, state,¹ and private enforcers to combat anticompetitive conduct.² The three enforcement groups play different, yet complementary, roles. Federal and state competition law enforcers have similar missions – to protect the public from the harms flowing from anticompetitive conduct. Federal enforcement seeks to protect the interests of all consumers across the nation or within interstate commerce, while state enforcers focus their efforts on the consumers in their respective states. Private enforcers typically act on their own behalf or on behalf of an affected group of which they are a member, usually seeking damages for any antitrust harms resulting from anticompetitive conduct. The roles played by federal, state and private enforcers have evolved over the decades, with each enforcer generally complementing the others and focusing on what each is best positioned to do.

2. This submission begins with an overview of private enforcement in the U.S. It then discusses the interaction between public and private enforcement in criminal cartel cases, followed by discussion of such interaction relating to merger and then civil non-merger cases. It describes the role of the courts in developing U.S. antitrust law, and concludes with a discussion of potential conflicts between public and private enforcement, and how they are resolved.

1. Private Enforcement

3. Subject to certain standing requirements, private plaintiffs may bring civil actions for violations of the federal antitrust laws.³ To ensure that private parties have an adequate economic incentive to undertake costly antitrust litigation, federal competition law in the United States authorizes the award of treble damages, plus attorneys' fees, to prevailing plaintiffs.⁴ According to the U.S. Supreme Court, “by offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general.’”⁵ The Supreme Court also has called the “treble-damages provision wielded by the private litigant . . . a chief tool in the antitrust enforcement scheme,” because the treble damage threat creates “a crucial deterrent to potential violators.”⁶ The Court has observed that this remedy was “also designed to compensate victims of antitrust violations for their injuries.”⁷ Contingent-fee arrangements—in which the plaintiff’s attorney receives a percentage of whatever money is paid to the plaintiff to resolve the case, but receives no fees absent a monetary award to the plaintiff—are common in private antitrust cases, as they are in other types of private cases.

¹ We use the term “state” to refer to all 55 sub-federal units of government; all have competition laws. In addition to the 50 states, these include the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. territories of Guam, the Northern Mariana Islands, and the Virgin Islands. Many states explicitly apply federal antitrust law.

² See generally Bill Baer, Ass’t Att’y Gen., Antitrust Div., U.S. Dept. of Justice, *Public and Private Antitrust Enforcement in the United States*, Remarks as Prepared for Delivery to European Competition Forum 2014 (February 11, 2014), available at <http://www.justice.gov/atr/public/speeches/303686.pdf>.

³ 15 U.S.C. § 15.

⁴ *Id.* Injunctive relief is also available to private parties. 15 U.S.C. § 26 (2012).

⁵ *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

⁶ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).

⁷ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

4. Before trial, the parties in private antitrust cases may discover information from each other and from third parties that may be relevant to the claims or defenses in the case. This ensures that all parties understand the nature and scope of the claims. The rules applicable to this discovery process in antitrust cases are the same rules of discovery applied in other civil cases. The parties gather information through mandatory disclosures under the Federal Rules of Civil Procedure, including written interrogatories, information production requests, requests for admissions, depositions, and expert disclosures. This process of discovery lays the foundation for the facts the parties will present to the court.

5. The Federal Rules of Civil Procedure specify the conditions under which a member of a class may sue or be sued as a representative of the class.⁸ Private damages cases against cartels usually are brought as class actions, though individual class members have the right to opt out and pursue separate cases; in antitrust cases, class action “opt-outs” are increasingly common. Our courts are frequently presented with issues of whether it is appropriate for a single plaintiff or small group of plaintiffs to maintain an action on behalf of a class in a particular case. The law continues to evolve in this regard. Class actions are common when the antitrust harm affects a number of persons, but not in an amount sufficient to justify the cost of individual claims.⁹

6. According to the Administrative Office of the U.S. Courts, private plaintiffs filed 844 antitrust cases in federal district courts in 2014;¹⁰ the number of private cases filed each year has varied over the past decade from under 500 to over 1,300.

2. Cartel Enforcement and Private Damages Actions

7. The leading anti-cartel enforcer in the U.S. has always been the Department of Justice Antitrust Division (Antitrust Division), which has the enforcement resources and powerful criminal investigative tools that state and private enforcers lack.¹¹ Cartels are punished as felonies. Corporations may be punished by a fine of up to the greatest of \$100 million,¹² twice the gain derived by the cartel, or twice the loss caused by the cartel. Individuals also face fines of up to the greatest of \$1 million, twice the gain derived by the cartel, or twice the loss caused by the cartel, but, more importantly, may in addition be punished by imprisonment not exceeding 10 years.¹³ Federal antitrust law applies to local cartel activity when

⁸ Federal Rule of Civil Procedure 23(a) requires that (1) the class be “so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. Rule 23(a)(1)-(4) (2014).

⁹ Antitrust class actions are also common in non-cartel cases, although the Supreme Court has upheld the enforceability of class-action waivers embedded in mandatory arbitration clauses. *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

¹⁰ See <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2014/june/C02Jun14.pdf>.

¹¹ These tools include the grand jury and its power to compel both the production of documents and testimony, lawyers specialized in cartel enforcement, and the support of trained investigators in the Federal Bureau of Investigation (FBI) and other federal investigative agencies.

¹² 18 U.S.C. § 3571(c)(1)-(2), (d); 15 U.S.C. § 1.

¹³ 18 U.S.C. § 3571(b)(1)-(2), (d); 15 U.S.C. § 1.

anticompetitive conduct has a nexus to commerce among the states or with foreign nations, which it typically does;¹⁴ the Antitrust Division refers some cases involving local activity to state prosecutors.¹⁵

8. The state enforcers typically focus on securing monetary redress for their residents.¹⁶ In the U.S. system, states have the same rights as private parties to sue for damages when they are the victims of cartels.¹⁷ In addition, a provision of federal competition law authorizes states to bring what are called *parens patriae* actions to recover damages on behalf of their residents.¹⁸ Finally, the antitrust laws of most states allow the imposition of civil penalties—essentially fines—rather than criminal prosecution.¹⁹

9. In the United States, private treble damages actions against cartels promote both deterrence and compensation. Cartel defendants are jointly and severally liable for damages caused by the entire conspiracy. In major cartel cases, the damages recovered on behalf of U.S. consumers sometimes exceed the fines imposed in Antitrust Division prosecutions. Most of this recovery goes to victims.²⁰ Ordinarily, only direct purchasers can recover under federal law,²¹ but most state laws allow indirect purchaser recovery as well.²² And claims under the laws of many states can be combined in a single lawsuit in federal court.

3. Relationship of Antitrust Division Proceedings to Private Cartel Cases

10. The Antitrust Division does not assist private plaintiffs' lawyers pursuing damages actions,²³ although Antitrust Division cartel prosecutions are frequently followed by private civil damages actions. The cartel convictions that the Antitrust Division secures, including those secured through guilty pleas, constitute "prima facie evidence" in follow-on private damages actions against those companies and

¹⁴ See, e.g., *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991) (A conspiracy to exclude a single ophthalmological surgeon from "the Los Angeles market" supplied the requisite nexus to interstate commerce.).

¹⁵ See Protocol for Increased State Prosecution of Criminal Antitrust Offenses (1996), available at <http://www.justice.gov/atr/public/guidelines/0618.pdf>.

¹⁶ See Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004 (2001).

¹⁷ See Hawaii, *supra* note 5; 15 U.S.C. § 15.

¹⁸ See 15 U.S.C. § 15c.

¹⁹ See ABA SECTION OF ANTITRUST LAW, *STATE ANTITRUST ENFORCEMENT HANDBOOK* 19 & n.96 (2d ed. 2008).

²⁰ See Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 22-25 (2013) (finding, in a study of sixty private antitrust cases, that attorneys' fees constituted about 25% of plaintiffs' total recovery and that administrative costs constituted another 4-6%), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217051.

²¹ *Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 204 (1990); *Illinois Brick*, *supra* note 7, at 746.

²² This inconsistency between state and federal law was held not to be a basis to invalidate the state law in *California v. ARC America Corp.*, 490 U.S. 93 (1989).

²³ Access to grand jury material is tightly controlled, and "particularized need" must be demonstrated before grand jury material can be obtained in civil discovery; even then, the interest in grand jury secrecy is balanced against the need for discovery. Fed. R. Crim. Proc. 6(e). See, e.g., *In re Air Cargo Shipping Antitrust Litig.*, 931 F. Supp. 2d 458, 463 (E.D.N.Y. 2013).

individuals convicted.²⁴ As a practical matter, therefore, plaintiffs usually need to prove only the fact of harm and the amount of damage in order to recover (and, in class actions, meet the standards for class recovery). The rules of civil discovery allow private plaintiffs to obtain from cartel participants data and documents evidencing the cartel.

11. Private cartel damages actions also benefit from the cooperation of leniency applicants seeking to take advantage of the damages limitation provided in the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA).²⁵ Pursuant to ACPERA, a successful applicant under the Antitrust Division's Corporate Leniency Policy has its exposure to civil damages limited to its pro rata share of the total damages before trebling, provided that the company cooperates with the plaintiffs in the civil actions.

12. Because private parties have the opportunity to pursue treble damages under federal antitrust law, plea agreements in criminal cartel prosecutions rarely impose a restitution obligation on prosecuted entities. Under the Antitrust Division's Leniency Policy, a leniency applicant is obligated to make restitution to any person or entity injured as a result of the applicant's participation in the cartel offense; that obligation may be satisfied through resolution of private litigation to which it is a party. At the same time, ACPERA protects a successful leniency applicant from the burden of treble damages and joint and several liability in private litigation if the applicant provides the cooperation to the plaintiffs that is required under ACPERA. The court presiding over the civil action determines whether the applicant has provided satisfactory cooperation to the plaintiffs.

4. Merger Enforcement

13. Merger enforcement in the U.S. also typically is led at the federal level, with the Federal Trade Commission (FTC or Commission) and the Antitrust Division ("the Agencies") sharing federal antitrust enforcement responsibilities. Advance notification to the Agencies for large transactions is mandatory, and the pre-merger notification statute allows the federal agencies to obtain additional documents and data from the parties. Both U.S. federal enforcement agencies also have powers to obtain documents and data from third parties in merger investigations, and to investigate transactions not subject to the notification requirement as well as transactions that already have been consummated.²⁶

14. The states also are active in merger enforcement.²⁷ To facilitate coordinated merger review and enforcement, the states have established the Multistate Antitrust Task Force of the National Association of Attorneys General.²⁸ The federal enforcement agencies have a protocol under which they cooperate with

²⁴ 15 U.S.C. § 16(a) (A conviction in a "criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . .").

²⁵ Pub. L. No. 108-237, §§ 201-214, 118 Stat. 666-67 (2004) (codified at 15 U.S.C. § 1 note).

²⁶ See U.S. submission to Feb. 2014 WP3 roundtable on *Investigations of Consummated and Non-Notifiable Mergers*, DAF/COMP/WP3/WD(2014)23.

²⁷ The U.S. Supreme Court upheld the ability of states to challenge mergers under federal law and obtain full relief, including divestiture in *California v. American Stores Co.*, 495 U.S. 271 (1990). On the other hand, contested merger challenges by states, and not joined by a federal agency, only rarely have been successful in obtaining relief. *E.g.*, *Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. 860 (W.D.N.Y. 1994) (preliminary injunction granted in consolidated actions brought by a competitor and a state).

²⁸ See Michael F. Brockmeyer, *Report on the NAAG Multi-State Task Force*, 58 ANTITRUST LAW JOURNAL 215 (1989). The states also sought voluntary disclosure by merging parties of their notifications

the states in merger investigations.²⁹ Each year, cooperation with states occurs in a significant number of Antitrust Division and FTC merger investigations, and the Agencies typically work with multiple states that might be affected by the proposed merger. As part of this cooperation, the Agencies share materials provided by the parties if the parties waive their confidentiality rights.

15. When the Agencies challenge a merger, one or more states often join the case as co-plaintiffs. For example, seven states were co-plaintiffs in the Antitrust Division’s challenge to the merger of US Airways and American Airlines.³⁰ In the FTC’s ongoing challenge to the merger of Sysco and US Foods, the Commission is joined by ten states and the District of Columbia as co-plaintiffs.³¹ In addition, the FTC and the state of Idaho were co-plaintiffs in challenging a merger between Idaho’s largest health system and an independent, multi-specialty physician practice group.³² On occasion, when the Agencies decide not to challenge a merger, one or more states may nevertheless continue to seek remedies.³³

16. Private merger litigation is possible, but unusual. Because private plaintiffs lack the investigative tools available to the federal agencies, these cases are more difficult for them to maintain. To meet the antitrust standing requirements, private plaintiffs must allege that their injury is of the type that the antitrust laws were intended to prevent.³⁴ For example, competitors that would be harmed by a more efficient merged firm cannot maintain a claim.³⁵ While some private merger challenges have been launched in recent years on behalf of allegedly harmed consumers, they are often dismissed.³⁶

17. In most merger cases, the Agencies seek to enjoin the mergers before they happen or undo them after they have occurred.³⁷ However, in appropriate cases, the Agencies may also seek disgorgement of ill-gotten gains as a part of the remedy for a consummated merger. In a 2015 settlement to a challenge by the

to the federal enforcement agencies through the Voluntary Pre-Merger Disclosure Compact of 1987, which was revised in 1994.

²⁹ Protocol for Coordination in Merger Investigations between the Federal Enforcement Agencies and States Attorneys General (Mar. 1998), available at <http://www.justice.gov/atr/public/guidelines/1773.pdf>.

³⁰ Complaint, United States and Plaintiff States v. US Airways Group, Inc., (D.D.C. filed Aug. 13, 2013) (No. 1:13-cv-01236), available at <http://www.justice.gov/atr/cases/f299900/299968.pdf>.

³¹ As of this date the preliminary injunction action remains pending before the court. See FTC Challenges Proposed Merger of Sysco and US Foods (Feb. 19, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/02/ftc-challenges-proposed-merger-sysco-us-foods>.

³² Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015), available at <https://www.ftc.gov/system/files/documents/cases/150210stlukeopinion.pdf>.

³³ An example is a 2007 merger of providers of school bus services. The Antitrust Division closed its investigation after the parties divested one of their operations, but eleven states brought suit under federal competition law. See STATE ANTITRUST ENFORCEMENT HANDBOOK, *supra* note 19, at 97.

³⁴ See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

³⁵ See Cargill Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 114-17 (1986).

³⁶ See Ginsburg v. InBev NV/SA, 649 F. Supp. 2d 943 (E.D. Mo. 2010), *affirmed*, 623 F.3d 1229 (8th Cir. 2010); Taleff v. Southwest Airlines Co., 828 F. Supp. 2d 1118 (N.D. Cal. 2011), *affirmed*, 554 Fed. App’x 598 (9th Cir. 2014), cert. denied, 135 S. Ct. 231 (2014); Edstrom v. Anheuser-Busch InBev SA/NV, 2013 WL 5124149 (N.D. Cal. 2013) (dismissing complaint).

³⁷ For an example of a case to permanently enjoin a proposed merger, see the case filings for *United States v. H&R Block, Inc.* at <http://www.justice.gov/atr/cases/handrblock.html>. For an example of a case to undo a consummated merger, see the case filings for *In re Polypore International, Inc.* at <https://www.ftc.gov/enforcement/cases-proceedings/081-0131/polypore-international-inc-matter>.

Antitrust Division and the New York Attorney General to a consummated joint venture involving the New York City hop-on, hop-off bus tour market, the defendants agreed to relinquish key bus stop authorizations to restore competition. In addition, the settlement required the defendants to disgorge \$7.5 million in profits they had obtained from the operation of their illegal joint venture. This amount was in addition to \$19 million that the defendants had already agreed to pay to a class of consumers to settle related private litigation brought after the filing of the government’s complaint. The Antitrust Division determined that the defendants had earned profits in excess of \$19 million from their unlawful monopoly and that disgorgement was particularly appropriate on the facts of this case – a consummated merger involving an anticompetitive price increase and deliberate attempts to evade antitrust enforcement. The payment of \$7.5 million in disgorgement serves the purpose of depriving the defendants of ill-gotten profits they retained even after the class settlement and deterring future antitrust law violations.³⁸

5. Civil Non-Merger Enforcement³⁹

18. Civil non-merger enforcement is a priority for both FTC and the Antitrust Division. Over the years, some of the Agencies’ biggest litigation victories have been civil non-merger cases litigated with state partners, from *Microsoft*⁴⁰ in the 1990s to *Mylan* in 2001⁴¹ to *e-books*⁴² in 2013 to *American Express*⁴³ this year. The Agencies may seek equitable monetary remedies in civil non-merger matters.⁴⁴ As in merger enforcement, the states have played an important role in civil non-merger enforcement. The Agencies frequently cooperate with one or more state partners on civil non-merger investigations, or litigate civil non-merger enforcement actions with one or more state enforcers. In the *e-books* case, for example, the Antitrust Division and a group of states filed simultaneous complaints alleging a violation of Section 1 of the Sherman Act. The factual allegations in the two challenges were the same, but the Antitrust Division action focused on securing injunctive relief while the states also were seeking damages for their citizens who were forced to pay more for e-books. After the publishers consented to a remedy, the Antitrust Division’s case against Apple was consolidated with that of the states for trial.

³⁸ See antitrust case filings at <http://www.justice.gov/atr/cases/twinamerica.html>.

³⁹ By “civil non-merger enforcement” we refer to all non-merger enforcement that is not prosecuted criminally as a hard core cartel.

⁴⁰ See http://www.justice.gov/atr/cases/ms_index.htm.

⁴¹ See <https://www.ftc.gov/enforcement/cases-proceedings/9810146/mylan-laboratories-inc-cambrex-corporation-profarmaco-sri-gyma>.

⁴² See <http://www.justice.gov/atr/cases/applebooks.html>.

⁴³ See <http://www.justice.gov/atr/cases/americanexpress.html>.

⁴⁴ The FTC recently reached a settlement resolving the Commission’s antitrust suit charging Cephalon, Inc. with illegally blocking generic competition to its blockbuster sleep-disorder drug Provigil. The settlement ensures that Teva Pharmaceutical Industries, Ltd., which acquired Cephalon in 2012, will make a total of \$1.2 billion available to compensate purchasers, including drug wholesalers, pharmacies, and insurers, who overpaid because of Cephalon’s illegal conduct. See <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill>. In another recent settlement, the FTC obtained \$26.8 million as disgorgement for ill-gotten gains. Final Order and Stipulated Permanent Injunction, Federal Trade Commission v. Cardinal Health Inc., No. 1:15-cv-03031 (S.D.N.Y. Apr. 23, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150415cardinalorder.pdf>. The Antitrust Division has also obtained disgorgement in a non-merger case involving a Sherman Act violation. *U.S. v. Keyspan Corporation*, 763 F.Supp.2d 633 (S.D.N.Y. 2011).

19. While these cases are important examples of civil non-merger enforcement actions brought by federal and state enforcement agencies, most civil non-merger antitrust cases are brought by private enforcers. A high volume of private civil non-merger litigation in the United States means a constant flow of new competition law decisions. Indeed, outside the cartel and merger areas, competition law in the United States is developed largely in private litigation. U.S. courts are often presented with new questions, new slants on old questions, and new factual settings, all of which can provoke rethinking of the rationales of older decisions and restating core principles with added clarity. Those judicial precedents often apply to government enforcement actions, so the common law is developed through decisions in multiple circuits. The Antitrust Division and FTC monitor the cases closely and participate as *amicus curiae* where important principles are implicated.⁴⁵

6. The Role of Courts in Developing U.S. Antitrust Law

20. One feature of the U.S. federal court system is the role of the 12 regional circuit courts of appeals. In each circuit, decisions from other circuits might be persuasive but are not binding precedent, so each circuit has the opportunity to take a fresh look at every interesting question in competition law. Review by the Supreme Court in competition cases, as in most cases, is taken by that Court only on a discretionary basis, and most petitions for review are not granted. Generally speaking, the Supreme Court does not take up a question unless and until a split in the circuit courts develops. The Supreme Court will then have the benefit not only of the opposing views of the litigants, but also the conflicting analyses of the courts of appeal, along with economic literature and legal commentary.

21. The Supreme Court has decided important cases in recent years on such issues as using the rule of reason in minimum resale price maintenance cases,⁴⁶ the scope of any duty to deal with competitors in a regulated sector context,⁴⁷ when and under what standard pharmaceutical patent settlements are subject to antitrust scrutiny,⁴⁸ the viability of price squeeze theories of exclusionary conduct,⁴⁹ when the action of state governments displaces federal antitrust law,⁵⁰ and the significance of patent rights in assessing market power.⁵¹ Although some of these decisions have been seen as limiting the scope of private damages actions,⁵² many antitrust cases continue to be brought by private plaintiffs in the U.S.

⁴⁵ See, e.g., Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party, *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015) (No. 14-8003), available at https://www.ftc.gov/system/files/documents/amicus_briefs/motorola-mobility-llc-v-au-optronics-corp./140905motorolaamicusbrief.pdf; Brief of Federal Trade Commission as Amicus Curiae in Support of Plaintiffs-Appellants, *In re Lamictal Direct Purchaser Antitrust Litig.*, No. 14-1243 (3d Cir. Apr. 28, 2014), available at https://www.ftc.gov/system/files/documents/amicus_briefs/re-lamictal-direct-purchaser-antitrust-litigation/140428lamictalbrief.pdf.

⁴⁶ *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁴⁷ *Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

⁴⁸ *FTC v. Actavis*, 133 S. Ct. 2223 (2013).

⁴⁹ *Pacific Bell Tel. v. linkLine Commc'n*, 129 S. Ct. 1109 (2009).

⁵⁰ *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015); *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003 (2013).

⁵¹ *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

⁵² Some have opined that U.S. courts have restricted antitrust actions through procedural devices and substantive law limitations at least in part because of concerns about treble damages. See, e.g., Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement*, 56-63 (describing judicial “backlash” to perceived excesses of private litigation); J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, *Striking a*

22. In nearly all antitrust cases that reach the Supreme Court—whether brought by federal, state, or private enforcers—the federal government shares its views through and is represented by the Solicitor General of the United States, the chief appellate officer in the DOJ. When DOJ and FTC cases are before the Supreme Court⁵³ the Office of the Solicitor General works closely with the Antitrust Division and FTC. That office also consults with the Agencies and other interested components of the federal government when it participates as *amicus curiae* in private antitrust and related cases. The Supreme Court often seeks the views of the Solicitor General on whether to take particular cases.

7. Benefit of Agency Proceedings for Private Plaintiffs in Non-Cartel Cases

23. Like a conviction in an Antitrust Division criminal proceeding, a final judgment or decree in a civil proceeding brought by or on behalf of the United States finding a violation of the antitrust laws is *prima facie* evidence in a subsequent private case.⁵⁴ This means that such a final judgment or decree is sufficient in a subsequent private case to establish as an initial matter the facts found in the government proceedings to the extent that the judgment or decree would preclude the parties in the government proceeding from contesting them against one another. In addition, certain antitrust-related findings made by the FTC in administrative litigation can be used as evidence in a subsequent private case against the same defendant.⁵⁵ This does not apply to cases resolved by consent decree before trial, however, and settled government civil enforcement cases typically include language asserting that they may not be used as evidence against any other party in other proceedings.⁵⁶

24. When the Agencies litigate cases, the process is highly transparent. In Antitrust Division and FTC enforcement actions, the judicial or administrative proceedings are generally open to the public. The burden of proof lies with the agency, and the public generally has a qualified right of access to the evidence admitted and filed with the court in the proceedings. Some evidence may be filed under seal, redacted, or subject to a protective order and not made available to the public, however, to protect, among other things, trade secrets, competitively sensitive confidential business information, or personal privacy.⁵⁷ Procedural and final decisions by the court or FTC are generally accompanied by reasoned written opinions on the public record, which are also available for use by private plaintiffs.

Balance? Some Reflections on Private Enforcement in Europe and in the United States, Remarks Before the International Chamber of Commerce Annual Meeting 17 (Sept. 24, 2008), available at <http://www.ftc.gov/speeches/rosch/080924strikingbalance.pdf>.

⁵³ See, e.g., *supra* nn. 48, 50.

⁵⁴ 15 U.S.C. § 16(a).

⁵⁵ *Id.*; see also *See Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1030-33 (9th Cir. 2001) (recognizing that 15 U.S.C. § 16(a) grants *prima facie* weight, but not collateral estoppel effect, to FTC findings in subsequent matters to which collateral estoppel would apply had the government itself brought the case).

⁵⁶ Final judgments in Antitrust Division civil consent decrees typically contain language stating that the parties “have consented to entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law.” FTC consent agreements usually contain language stating that “This Consent Agreement is for settlement purposes only and does not constitute an admission by Proposed Respondents that the law has been violated as alleged in the draft of Complaint here attached, or that the facts as alleged in the draft of Complaint, other than jurisdictional facts, are true.”

⁵⁷ See Fed. R. Civ. P. 26(c).

8. Potential Conflicts between Public and Private Enforcement

25. Federal courts actively supervise the timing of discovery in private damages actions. Cartel damages actions commonly are filed while the Antitrust Division's criminal investigation of the conduct is ongoing. The Antitrust Division evaluates on a case-by-case basis whether certain types of private discovery are likely to interfere with its criminal investigation and, if so, whether to seek a stay of civil discovery in the private action, or limitations on its scope. Antitrust Division attorneys are frequently in contact with the attorneys in private cartel cases, and receive status updates on the progress of the private litigation and information regarding the effect of any stays as the private cases progress.

26. As noted above, access to grand jury material is tightly controlled, and Federal Rule of Criminal Procedure 6(e) prohibits disclosure by government attorneys of any matters occurring before grand juries. When a party in private litigation seeks to obtain from another party information that the latter has provided to the government (such as a discovery request to a leniency applicant or subpoena recipient asking for all information provided to the government during the course of a criminal investigation), the government can seek to intervene to obtain a stay of discovery. Frequently, in a private damages case the court will stay testimonial discovery and certain interrogatories of key witnesses while the government's criminal investigation progresses.

27. On the civil enforcement side, the FTC and the Antitrust Division have on occasion dealt with attempts by private parties to obtain non-public civil investigation materials from the Agencies by subpoena or by making a request under the Freedom of Information Act (FOIA).⁵⁸ In general, documents, information, and testimony obtained from merging parties under the Hart-Scott-Rodino Act (HSR Act), or produced by any party in response to civil investigative demands and administrative subpoenas, are shielded by law from disclosure to outside parties.⁵⁹ HSR materials are expressly exempt from disclosure under FOIA,⁶⁰ and otherwise protected from public disclosure except in the course of administrative and judicial proceedings in which the FTC or DOJ are participating. Likewise, materials submitted in response to administrative subpoenas are exempt from disclosure under FOIA,⁶¹ and may not be disclosed to outside parties without the consent of the producing party, except where the disclosure is (1) to Congress, (2) between DOJ and the FTC, (3) to third parties during the course of investigatory depositions, or (4) for official use in connection with federal administrative, judicial, or regulatory proceedings.⁶² As a result, private parties have been generally unsuccessful in obtaining these investigative materials from the Agencies.

28. With respect to other investigative material, such as information provided voluntarily by investigative sources, the Agencies strictly protect the confidentiality of appropriately designated sensitive business information, and take all appropriate steps to prevent competitively sensitive information from being shared among competitors.⁶³ Therefore, the Agencies' policy is not to disclose such information unless it is required by law or necessary to further a legitimate law enforcement purpose. In response to any FOIA request by a private party for disclosure of appropriately designated confidential business information, the Agencies generally will assert all applicable legal exemptions from disclosure and act in

⁵⁸ 5 U.S.C. § 552.

⁵⁹ See, e.g., *Lieberman v. FTC*, 771 F.2d 32 (2d Cir. 1985) (prohibiting disclosure of HSR materials to state attorneys general); *Mattox v. FTC*, 752 F.2d 116 (5th Cir. 1985) (same).

⁶⁰ 15 U.S.C. § 18a(h).

⁶¹ 15 U.S.C. §§ 57b-2(f)(1), 1314(g).

⁶² 15 U.S.C. §§ 57b-2, 1313(c)-(d).

⁶³ See, e.g., 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10.

accordance with agency regulations.⁶⁴ For requests under any provision of law other than those under FOIA, the Agencies generally will assert all applicable privileges and exemptions from disclosure permitted by law and use best efforts to provide the company such notice as is practicable prior to disclosure of appropriately designated confidential business information.⁶⁵

9. Conclusion

29. Public and private enforcement play different, yet complementary, roles in the United States. The courts develop the common law of antitrust, and private plaintiffs benefit from the disposition of public enforcement actions. When private proceedings threaten to interfere with the investigations of the federal agencies, the courts are available to protect the integrity of public enforcement.

⁶⁴ See 5 U.S.C. § 552(b)(4); 16 C.F.R. § 4.10; 28 C.F.R. § 16.7.

⁶⁵ See Antitrust Division Model Voluntary Production Letter, available at Division Manual, http://www.justice.gov/atr/public/divisionmanual/supporting_documents/206430.htm.