3. The Private Cause of Action

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Topics

- Role of private antitrust enforcement
- General requirements for private litigation
  1. *Private cause of action* to bring the case
  2. *Subject matter jurisdiction* for a court to adjudicate the case
  3. *Personal jurisdiction* to bind the parties to the judgment
  4. *Venue* as the place to adjudicate the case
- Initiating a private action: The complaint
- Statutory standing limitations ("antitrust standing")
- Collateral estoppel effect of prior government actions
- Statute of limitations/fraudulent concealment and other tolling doctrines
- Proof of damages/right to jury trial
- Coconspirator liability relationships/sharing agreements
- Attorneys' fees and statutory fee-shifting in adjudicated cases
- Consolidation/change of venue/multidistrict litigation

Role of Private Antitrust Enforcement

- A private cause of action provision was an essential part of the original 1890 Sherman Act
  1. Enables injured persons to obtain redress and vindication for their private harms
     - Damages (actually, treble damages)
     - Permanent injunctive relief from actual or threatened harm
     - Preliminary injunctive relief to maintain the status quo ad litem
     - Other equitable relief (e.g., declaratory judgments, possibly disgorgement)
  2. Advances the public interest by deterring unlawful anticompetitive conduct
     - Congress intended for private parties to act as "private attorneys general"[1]
- Private plaintiffs have full rights
  - Decisions of government enforcement agencies or courts in government cases do *not* limit rights of private plaintiffs
    - A private plaintiff may pursue its action even if the DOJ or FTC brought a case against the same conduct and lost on the merits

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

Requirements for a Private Action

1. Private cause of action
   - The power of the plaintiff to bring the action to court for adjudication
2. Subject matter jurisdiction
   - The judicial power to adjudicate the case
3. Personal jurisdiction
   - The power of the court to bind the parties with a final judgment
4. Venue
   - The forum where a case may be brought and adjudicated

Causes of Action Generally

- Enables the plaintiff to bring an action to the court for adjudication
  - Typically expressly prescribed by statute
  - If not expressly stated, may be implied
  - But in the absence of an express or implied cause of action, the plaintiff cannot seek redress in the federal courts

	Criminal	Damages	Injunctive relief	Comments
DOJ	Sherman Act § 1 Sherman Act § 2	Clayton Act § 4A	Sherman Act § 4 Clayton Act § 15	Has obtained disgorgement in consent decree
FTC			FTC Act § 5 FTC Act § 13(b)	Has obtained restitutionary relief*
Private plaintiffs		Clayton Act § 4(a)	Clayton Act § 16	
States				
Individually		Clayton Act § 4(a)	Clayton Act § 16	
Parens patriae		Clayton Act § 4C	Clayton Act § 16	

* In *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67 (2021), the Supreme Court held that the FTC lacks the authority to seek equitable monetary relief such as restitution or disgorgement

Private Cause of Action

- Clayton Act § 4(a)—Treble damages

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover ***threefold the damages by him sustained***, and the cost of suit, including a reasonable attorney's fee.[1]

  - Treble damages is a defining characteristic of U.S. antitrust law
    - Contained in original Sherman Act
  - General rules for treble damages
    - Automatically awarded—Not discretionary with the court
    - Right to jury finding as to liability and actual damages
    - Trebling of actual damages not revealed to the jury
    - Punitive damage awards not permitted, since damages already enhanced
    - Only actual damages deductible as a business expense on income taxes

[1] 15 U.S.C. § 15(a) (emphasis added).

Private Cause of Action

- Statutory requirements of a treble damages cause of action
  1. A "person"
     - Section 1 of the Clayton Act defines "persons" to include "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country"[1]
     - *Examples*: Natural persons, corporations, partnerships, states,[2] government instrumentalities,[3] foreign nations[4]
  2. "who is injured" (injury in fact)
     - Purely binary: Did the plaintiff sustain a cognizable antitrust injury?
  3. in his "business or property"
     - A consumer whose wealth has been diminished by paying an anticompetitive overcharge is injured in her "property"[5]
     - BUT precludes a state for suing for damages resulting from an injury to its general economy caused by an antitrust violation[6]

[1] 15 U.S.C. § 12(a).
[2] Hawaii v. Standard Oil Co., 405 U.S. 251, 261 (1972); Georgia v. Pennsylvania R. Co., 324 U.S. 439, 447 (1945).
[3] Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906).
[4] Pfizer, Inc. v. Government of India, 434 U.S. 308, 318-20 (1978).
[5] Reiter v. Sonotone Corp., 442 U.S. 330 (1979).
[6] *Hawaii*, 405 U.S. at 263-65.

Private Cause of Action

- Statutory requirements of a treble damages cause of action
  4. "by reason of"
     - Proximate causality
  5. a violation of an "antitrust law"
     - Defined in Clayton Act § 1
     - Includes the Sherman and Clayton Acts but does *not* include the FTC Act[2]
  6. Quantifiable compensatory damages (amount of damages)

[1] There is no implied private right of action to enforce the FTC Act. FTC v. Klesner, 280 U.S. 19, 25 (1929).

Private Cause of Action

- Clayton Act § 16—Permanent injunctive relief

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings.[1]

  - Requirements
    - Actual or threatened violation of an "antitrust law"
    - No "business or property" limitation
      - Allows states to seek injunctive relief for injuries to their general economy[2]
    - Usual rules of equity apply[3]
      1. Irreparable injury
      2. Remedies at law (e.g., monetary damages) are inadequate to compensate injury
      3. Balance of hardship between plaintiff and defendant weighs in favor of plaintiff
      4. Public interest would not be disserved by a permanent injunction

[1] 15 U.S.C. § 26

[2] Georgia v. Pennsylvania R. Co., 324 U.S. 439, 450-51 (1945); *see* Hawaii v. Standard Oil Co., 405 U.S. 251, 261, 260 (1972).

[3] *See* eBay v. Mercexchange L.L.C., 547 U.S. 388, 391 (2006) (stating elements of traditional equitable test).

Private Cause of Action

- Clayton Act § 16—Permanent injunctive relief (con't)
  - Types of injunctive relief
    - *Preventive*: Prevent future irreparable harm from continuing or threatened violation
    - *Remedial*: Restore competitive conditions to prevent future harm from continuing effects of past violation

Private Cause of Action

- Clayton Act § 16—Preliminary injunctive relief
  - Observations
    - Usually designed to preserve the status quo ante litem ("before the suit") pending a determination on the merits[1]
    - Provisional in nature
      - Unlike a permanent injunction, does not conclusively determine any rights
      - Does not conclusively resolve factual disputes

[1] Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) (The purpose of a preliminary injunction is ... to preserve the relative positions of the parties.").

Private Cause of Action

- Clayton Act § 16—Preliminary injunctive relief
  - Supreme Court *Winter* requirements:

> A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.[1]

    - Irreparable harm
      - Plaintiffs must demonstrate that irreparable injury is *likely* in the absence of an injunction; a "possibility" is too lenient[2]
    - The "sliding scale"
      - The Second, Seventh, and Ninth Circuits have adopted a "sliding scale"
        - Under this approach, "serious questions going to the merits" *and* a balance of hardships that tips sharply towards the plaintiff serves as an alternative element to a likelihood of success of the merits, *provided* that the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.[3]

[1] Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008).
[2] *Id*. at 22.
[3] Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011); Green Haven Prison Preparative Meeting of Religious Soc'y of Friends v. New York State Dep't of Corr. & Cmty. Supervision, 16 F.4th 67, 78 (2d Cir. 2021); Mays v. Dart, 974 F.3d 810, 822 (7th Cir. 2020); *see* Alabama Ass'n of Realtors v. United States Dep't of Health & Hum. Servs., No. 21-5093, 2021 WL 2221646, at *1 (D.C. Cir. June 2, 2021) (reserving question whether "sliding scale" survived *Winter*).

Private Cause of Action

- Clayton Act § 16—Preliminary injunctive relief (con't)
  - Two types of preliminary injunctions
    - *Prohibitory*: Maintain the status quo pending resolution of the case
    - *Mandatory*: Alter the status quo pending resolution of the case
      - Relatively rare
      - Because mandatory injunctions disrupt the status quo, a party seeking a mandatory injunction must meet a heightened legal standard
        - In the Second Circuit, for example, the party must show "a clear or substantial likelihood of success on the merits"[1]
  - Notice and opportunity to be heard
    - Before a court may enter a preliminary injunction, it must provide notice to the defendant and give the defendant an opportunity to be heard[2]

[1] North Am. Soccer League, LLC v. United States Soccer Fed'n, Inc., 883 F.3d 32 (2d Cir. 2018) (affirming denial of a mandatory injunction to require USSF to designate NASL as a Division II league).
[2] Fed. R. Civ. P. 65(c)(1).

Private Cause of Action

- Clayton Act § 16—Preliminary injunctive relief (con't)
  - Injunction bond
    - Section 16 authorizes a court to enter a preliminary injunction if, among other things, the plaintiff executes a "proper bond against damages for an injunction improvidently granted"[1]
    - More generally, Rule 65(c) of the Federal Rules of Civil Procedure provides:

> The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.[2]

      - Despite the apparently mandatory language, there is a minority of circuits have held the whether an injunction bond will be required is in the discretion of the court
    - The purpose of the bond is to protect the defendant against damages if the plaintiffs ultimately does not prevail on the merits
      - In this sense, "improvidently granted" does not mean improperly granted
    - The DOJ and FTC do not have to post injunction bonds under the statutes that give them the right of action (Clayton Act § 15 and FTC Act § 13(b), respectively)

[1] 15 U.S.C. § 26.
[2] Fed. R. Civ. P. 65(c).

Private Cause of Action

- Clayton Act § 16—Preliminary injunctive relief (con't)
  - Appeal
    - Grant or denial immediately appealable under 28 U.S.C. § 1292(a)
    - Standard of review
      - Legal rulings: De novo
      - Ultimate decision to grant or deny injunction: Abuse of discretion

[1] 15 U.S.C. § 26.
[2] Fed. R. Civ. P. 65(c).

Subject Matter Jurisdiction

- Subject matter jurisdiction: The power to adjudicate the case
  - Think about in three nested parts:
    1. The constitutional authority for the federal government to regulate through statute
    2. The constitutional authority for the federal courts to adjudicate generally cases arising under the federal statute
    3. The constitutional authority of a court to adjudicate the particular case before it
  - Subject matter jurisdiction cannot be conferred on a court by agreement of the litigating parties[1]
    - Compare to personal jurisdiction, which can be conferred on the court by consent

[1] Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986).

Subject Matter Jurisdiction

1. The constitutional authority for the federal government to regulate through statute
   - Federal government is a limited government of enumerated powers
   - There must be a source of federal power in the Constitution for the federal government to enact regulatory legislation
   - Commerce Clause:

> The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.[1]

     - Gives Congress the power to pass laws regulating interstate and foreign commerce
     - The Sherman Act and the other antitrust laws was passed under this authority
     - The Commerce Clause acts as both the source—and as a limitation on the scope—of federal power to regulate anticompetitive conduct

[1] U.S. Const. art. I, § 8, cl. 3.

Subject Matter Jurisdiction

2. The constitutional authority for the federal courts to adjudicate generally cases arising under the federal statute
   - Two relevant constitutional provisions
     - Article III of the U.S. Constitution:

       > The *judicial power* of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.[1]

     - Article I also states that Congress shall have the power "To constitute Tribunals inferior to the supreme Court."
     - These clauses permit Congress to create lower federal courts and distribute original and appellate jurisdiction among them.[3]
   - Implications
     - Inferior courts—district courts and courts of appeal—only have jurisdiction when Congress specifically gives them jurisdiction
     - Congress can create a federal offense—and then take away the jurisdiction of the lower courts to enforce the law

[1] U.S. Const. art. III, § 1.
[2] U.S. Const. art. I, § 8, cl. 9.
[3] *See* Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922) As a technical matter, the Necessary and Proper Clause provides a third leg of the federal power to distribute jurisdiction among the lower courts. *See* U.S. Const. art. I, § 8, cl. 18.

Subject Matter Jurisdiction

2. The constitutional authority for the federal courts to adjudicate generally cases arising under the federal statute (con't)
   - Four statutes give federal district courts original jurisdiction to adjudicate claims arising under the federal antitrust laws
     a. 28 U.S.C. § 1331: General federal question jurisdiction
        - Gives federal courts subject matter jurisdiction over all civil actions "arising under" the laws of the United States
     b. 28 U.S.C. § 1337: Special federal antitrust jurisdiction
        - Gives district courts "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies"
        - Provides jurisdiction to federal district courts to adjudicate Sherman, Clayton, and FTC Act cases
        - Interpreted to provide *exclusive jurisdiction*, so that state courts cannot adjudicate claims under the federal antitrust laws
        - But not preemptive: States may enact and state courts may enforce state antitrust statutes with language either identical to the federal statutes or of their own design

Subject Matter Jurisdiction

2. The constitutional authority for the federal courts to adjudicate generally cases arising under the federal statute (con't)
   - Four statutes give federal district courts original jurisdiction to adjudicate claims arising under the federal antitrust laws (con't)
     c. Clayton Act § 4, 15 U.S.C. § 15:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ***in any district court of the United States*** in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

     4. Clayton Act § 16, 15 U.S.C. § 26:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, ***in any court of the United States having jurisdiction over the parties***, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .

Subject Matter Jurisdiction

2. The constitutional authority for the federal courts to adjudicate generally cases arising under the federal statute (con't)
   - *Supplemental jurisdiction* over state law claims: 28 U.S.C. § 1367
     - Not applicable to federal antitrust laws, but gives federal jurisdiction over state law claims that "form part of the same case or controversy" within the original jurisdiction of the court:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.[1]

     - Supplemental jurisdiction under Section 1367 gives federal district courts subject matter jurisdiction over related state indirect purchaser claims when the court has original jurisdiction (here, federal question jurisdiction) over direct purchaser claims
       - NB: The state law claims must be part of the *same* civil action in which the court has original jurisdiction over other claims

[1] 28 U.S.C. § 1367(a).

Subject Matter Jurisdiction

2. The constitutional authority for the federal courts to adjudicate generally cases arising under the federal statute (con't)
   - *Supplemental jurisdiction* over state law claims: 28 U.S.C. § 1367 (con't)
     - The district court may decline to exercise supplemental jurisdiction where:
       a. the claim raises a novel or complex issue of state law,
       b. the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
       c. the district court has dismissed all claims over which it has original jurisdiction, *or*
       d. in exceptional circumstances, there are other compelling reasons for declining jurisdiction[1]

[1] 28 U.S.C. § 1367(c).

Subject Matter Jurisdiction

2. The constitutional authority for the federal courts to adjudicate generally cases arising under the federal statute (con't)
   - *Supplemental jurisdiction* over state law claims: 28 U.S.C. § 1367 (con't)
     - Observations
       - Supplemental jurisdiction can exist only when the court has original jurisdiction over other claims in the same complaint
         - The court does not have supplemental jurisdiction over state claims in a separate complaint arising out of the same facts (say, a state law-only complaint that has been consolidated for pretrial purposes with other federal complaints challenging the same conspiracy). The court could proceed with the state law complaint only if it had diversity jurisdiction.[1]
       - Once a federal district court has supplemental jurisdiction over a state law claim related to a federal claim, the court's subject matter jurisdiction over the state law claim does not *automatically* terminate if the federal claim is dismissed
       - As a matter of practice, however, if the district court dismisses all of the federal antitrust claims before it, it is very likely to decline to exercise supplemental jurisdiction over the state antitrust claims

[1] Cf. *In re* Lipitor Antitrust Litig,, 722 F. App'x 132, 135-36 (3d Cir. 2018) (assessing diversity jurisdiction over state law complaint that had been removed from state court and transferred by the MDL Panel to the district court handling the related federal law complaints).

Subject Matter Jurisdiction

3. The constitutional authority of a court to adjudicate the particular case before it
   - Article III, Section 2 of the U.S. Constitution provides in part:

> The judicial Power shall extend to all ***Cases***, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . [and to various] ***Controversies*** . . . .

U.S. Const. art III, § 2, cl. 1.

   - *Constitutional standing:* Judicial power only extends to "cases" and "controversies" before the court
   - Three requirements:
     a. *Injury-in-fact:* The plaintiff must suffer an "injury in fact," that is, an invasion of a legally protected interest that is concrete and particularized and is actual or imminent as opposed to conjectural or hypothetical
     b. *Causation:* There must be a causal connection between the injury and the challenged conduct, that is, the injury must be fairly traceable to the defendant's action
     c. *Redressability:* It must be "likely" rather than "speculative" that a decision by the court in favor of the plaintiff will redress the plaintiff's injury.

Subject Matter Jurisdiction

- Challenges to subject matter jurisdiction
  - A court that lack subject matter jurisdiction has no authority to adjudicate the case
    - Consequently, a challenge to subject matter jurisdiction can be raised for the first time at any point in the litigation, including—
      - after a jury verdict,[1] *or*
      - on appeal [2]
    - Even the party originally invoking federal jurisdiction may raise a challenge
  - Types of challenges
    - A *facial attack* contests the sufficiency of the pleadings: the defendant contends that, even if all allegations in the complaint were true, they would be insufficient to establish the court's jurisdiction
      - When addressing a facial attack, the court must consider all the well-pleaded allegations of the complaint as true and draw all reasonable inferences in favor of the plaintiff
    - A *factual attack* challenges the court's jurisdiction on the basis of extrinsic evidence

[1] *See In re* Lorazepam & Clorazepate Antitrust Litig., 631 F.3d 537, 539-40 (D.C. Cir. 2011).
[2] *See* Mansfield, Coldwater & L.M. Ry. v. Swan, 111 U.S. 379, 382-83 (1884); *accord* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-96 (1998); Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 570-71 (2004).

Subject Matter Jurisdiction

- Challenges to subject matter jurisdiction
  - Federal Rules of Civil Procedure
    - Rule 12(b)(1)
      - Provides one means for challenging by motion the subject matter jurisdiction of the court:

> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; . . . . [1]

      - Although Rule 12(b) requires motions to "be made before pleading if a responsive pleading is allowed,"[2] the Rules provide an exception for motions to dismiss for lack of subject matter jurisdiction, which can be made at any time in the course of the litigation[3]
    - The court also may raise the question of subject matter jurisdiction sua sponte

[1] Fed. R. Civ. P. 12(b)(1).
[2] Fed. R. Civ. P. 12(b).
[3] *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Personal Jurisdiction

- The power to render a judgment with respect to a particular person
  - Sometimes called “in personam jurisdiction”
  - Contrast with subject matter jurisdiction, which is the power of the court to render a judgment concerning the subject matter of the suit
  - Can be waived
    - A party may always voluntarily submit to the personal jurisdiction of the court
      - Compare to subject matter jurisdiction, which cannot be waived
    - A general appearance in court by a party gives the court personal jurisdiction over that party
      - That is, the appearance waives the right to raise any personal jurisdiction defects
      - A party may make a special appearance in order to contest personal jurisdiction
    - The existence of personal jurisdiction over a party may be challenged by motion under Rule 12(b)(2) of the Federal Rules of Civil Procedure

Personal Jurisdiction

- Two types of personal jurisdiction
  1. General jurisdiction
     - Sometimes called “all purpose” jurisdiction
     - Defendant has sufficient contacts to constitute the kind of *continuous and systematic general business contacts* that approximate physical presence
       - A defendant whose contacts are substantial, continuous, and systematic is subject to a court’s general jurisdiction even if the suit concerns matters not arising out of its contacts with the forum[1]
       - Generally, contacts must be so extensive as to make it fundamentally fair to require the defendant to answer in the court any claim arising out of any transaction or occurrence taking place anywhere in the world
     - General jurisdiction may be limited

> In what we have called the “paradigm” case, an individual is subject to general jurisdiction in her place of domicile. *Ibid*. [Daimler AG v. Bauman, 571 U.S. 117, 137 (2014)] (internal quotation marks omitted). And the “equivalent” forums for a corporation are its place of incorporation and principal place of business. Ibid. (internal quotation marks omitted); *see id*., at 139, 134 S.Ct. 746, n. 19 (leaving open “the possibility that in an exceptional case” a corporation might also be “at home” elsewhere).[2]

[1] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15 (1984).
[2] Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021).

Personal Jurisdiction

- Two types of personal jurisdiction
  2. Specific jurisdiction:
     - Specific jurisdiction under federal statutes
       - When subject matter jurisdiction is premised on a federal question, a court may exercise specific jurisdiction over a defendant if a rule or statute authorizes it to do so and the exercise of jurisdiction comports with the constitutional requirement of due process.[1]
     - "Long-arm" specific jurisdiction
       - Where there is no applicable federal statute governing personal jurisdiction, federal courts look to the law of the state in which the district court sits.[2]
       - State "long-arm" specific jurisdiction generally requires that—
         1. Defendant has *performed some act or transaction* within the forum or *purposefully availed* himself of the privileges of conducting activities within the forum,
         2. Plaintiff's claim arises out of or results from the defendant's forum-related activities, *and*
         3. Exercise of jurisdiction over the defendant is reasonable

[1] *E.g.*, Myers v. Bennett Law Offices, 238 F.3d 1068, 1072 (9th Cir. 2001).
[2] *See* Fed. R. Civ. P. 4(k)(1)(A).

Personal Jurisdiction

- Constitutional requirements
  - In federal courts, personal jurisdiction must satisfy two constitutional due process requirements:
    1. "Minimum contacts"
    2. Notice (service of process)

Personal Jurisdiction

- "Minimum contacts" due process requirements
  - Defendant must have—

> "certain *minimum contacts* with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[1]

  - "Minimum contacts"
    1. Protects defendants from having to litigate in a distant forum, *and*
    2. Allows the defendant to reasonably anticipate where they may be haled into court.[2]

> "[T]here must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[3]

[1] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (emphasis added).
[2] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).
[3] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

Personal Jurisdiction

- Notice due process requirement—Service of process
  - Due process also requires the defendant receive notice of:
    1. the claims against it, *and*
    2. the pendency of the action in the court.

    NB: This is a distinct requirement from the "minimum contacts" requirement
  - This notice requirement is satisfied through "service of process"
    - Essentially requires the plaintiff to deliver certain documents to the defendant
    - The content of the documents and the manner of delivery is prescribed by either a statute or rule
  - Two primary sources of authority for service of process in antitrust cases:
    - FRCP 4
    - Clayton Act § 12

Personal Jurisdiction

- Service of process and personal jurisdiction
  - Rule 4(k)(1)
    - "Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant—
      1. "(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . or
      2. "(C) when authorized by a federal statute."[1]
    - Subsection (A)
      - Means, in essence, that federal personal jurisdiction is proper whenever the person would be amenable to suit under the laws of the state in which the federal court sits (typically under a state long-arm statute),

[1] Fed. R. Civ. P. 4(k)(1).

Personal Jurisdiction

- Service of process and personal jurisdiction
  - "Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
    1. "(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
    2. "(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or
    3. "(C) when authorized by a federal statute."
  - Subsection (A)
    - In essence, means that federal personal jurisdiction is proper whenever the person would be amenable to suit under the laws of the state in which the federal court sits (typically under a state long-arm statute),

[1] Fed. R. Civ. P. 4(k)(1).

Personal Jurisdiction

- Service of process—Content
  - FCRP 4 prescribes the content for service of process
    - "Process" means a summons
    - The summons must:[1]
      1. Include the name the court and the parties
      2. Be directed to the defendant
      3. State the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff
      4. State the time within which the defendant must appear and defend
      5. Notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint
      6. Be signed by the clerk
      7. Bear the court's seal
    - In general, a summons must be served with a copy of the complaint[2]

[1] Fed. R. Civ. P. 4(a).
[2] *Id*. 4(c)(1).

Personal Jurisdiction

- Service of process—Service (delivery)
  - FRCP 4—Means of service of process
    - Rule 4(e): On an individual in a judicial district in the United States—
      - Personal service on the individual
      - Leaving a copy at the individual's dwelling or usual place of abode
      - Service on the individual's agent authorized by appointment to receive service of process
      - Following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made
    - Rule 4(h): On a corporation, partnership or association—
      - Delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process
        - If the agent is one authorized by statute and the statute so requires, must also mail a copy of each to the defendant
      - Following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made
    - For service outside of the United States, see FRCP 4(f)

Personal Jurisdiction

- Service of process
  - Clayton Act § 12

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and **all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found**.[1]

    - Highlighted provision provides for nationwide service of process
      - The first part of Section 12 goes to venue
    - Some question in the courts when nationwide service of process is available[2]
      - In any court with proper venue, regardless of the source of authority for that venue (local contacts theory), *or*
      - Only in a court where Section 12 establishes venue (unitary theory)
    - Constitutional implications
      - Where a statute provides for nationwide service of process, the relevant area for assessing the constitutionally required "minimum contacts" is the United States as a whole

[1] 15 U.S.C. § 22.
[2] For a good discussion, see KM Enters., Inc. v. Global Traffic Techs., Inc., 725 F.3d 718 (7th Cir. 2013).

Personal Jurisdiction

- Coconspiracy theory
  - Agency liability
    - Recall that every member of the conspiracy is liable for the acts of every other member because the law considers each member of the conspiracy to be the agent of the other members
  - Extension to personal jurisdiction
    - If one co-conspirator commits acts in the forum which would justify the forum court in exercising personal jurisdiction over that co-conspirator, those acts are attributed to the other co-conspirators and personal jurisdiction exists over them as well[1]

[1] *In re* Potash Antitrust Litig., 667 F. Supp. 2d 907, 937 n. 26 (N.D. Ill. 2009).

Venue

- General rules
  - Venue is the location where a case may be brought and adjudicated
  - Difference from personal jurisdiction
    - Personal jurisdiction goes to the court's *power* to adjudicate
      - Has a constitutional dimension
    - Venue goes to the *convenience* of the parties as to the location of the forum
      - Creature of statute
      - Intended to limit the potential districts where one may be called upon to defend oneself to those that are fair and reasonably convenient
      - Venue requirements can be waived[1]
- Three sources of venue in antitrust cases
  - General venue statute
  - Clayton Act §§ 4, 16
  - Clayton Act § 12

[1] *See* Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979).

Venue

- General venue statute
  - 28 U.S.C.§ 1391(b) provides venue in federal question cases in a judicial district—
    1. where any defendant resides, if all defendants reside in the same State;
    2. in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; *or*
    3. in which any defendant may be found, if there is no district in which the action may otherwise be brought.
  - Under the third alternative, venue may be established if the "long-arm statute" of the state that contains the federal district provides for personal jurisdiction over the defendant[1]
  - Section 1391(c) provides that a corporate defendant is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced
  - Section 1391(d) provides that an alien may be sued in any district

[1] A "long-arm statute" is a state statute that provides for a state court's personal jurisdiction over out-of-state defendants. Every state has one, although they may differ somewhat in their reach.

Venue

- Clayton Act §§ 4, 16
  - Clayton Act § 4 provides that qualifying antitrust victims may sue for treble damages—
    1. in any district court of the United States
    2. in the district in which the defendant resides or is found or has an agent,
    3. without respect to the amount in controversy
  - Clayton Act § 16 provides that qualifying antitrust victims may use for injunctive relief—
    - in any court of the United States having personal jurisdiction over the parties

Venue

- Clayton Act § 12
  - Provides additional venue opportunities in antitrust suits against a corporation

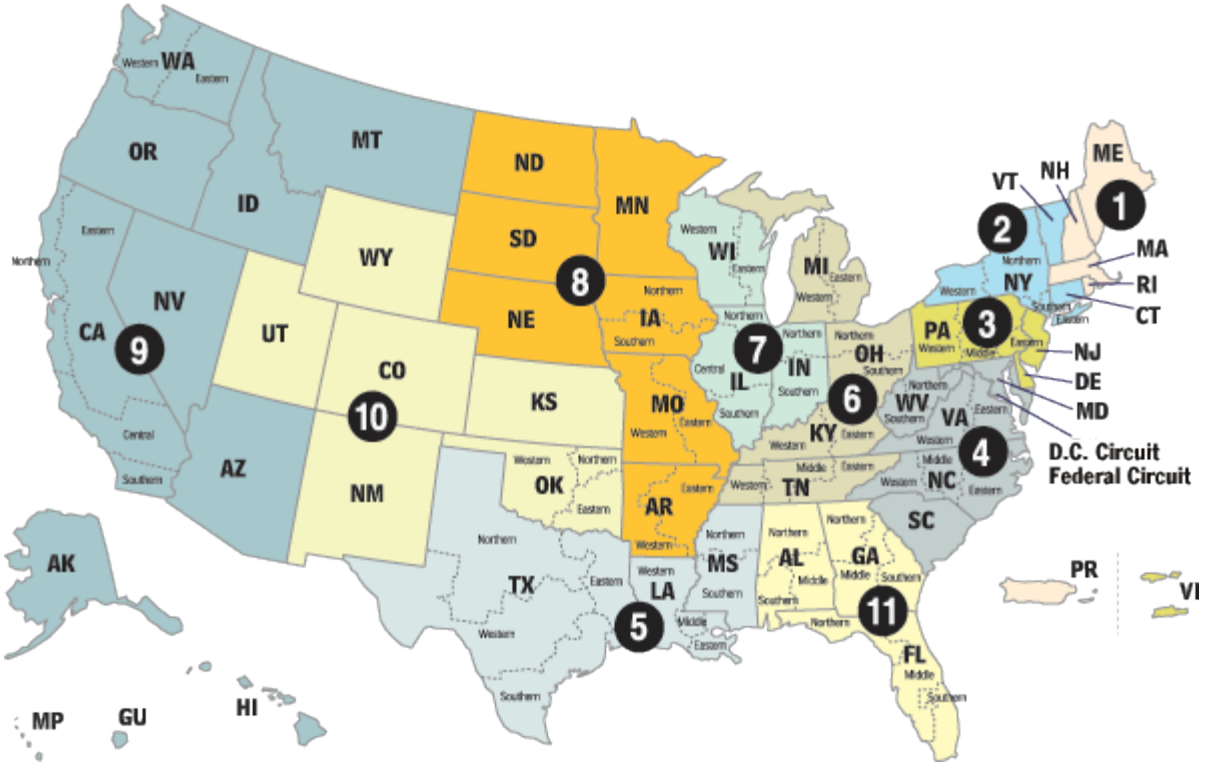
> [1] Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and
>
> [2] all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.[1]

    - First part provides for venue
      - Applies only to corporations
      - A corporation “inhabits” the district in which it is incorporated
      - A corporation "transacts business" where it carries on business, in the ordinary sense of the term, "of any substantial character“[2]
    - Second part provides for nationwide service of process (actually worldwide[3])
      - Applies to all entities

[1] 15 U.S.C. § 22.
[2] Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 373 (1927).
[3] Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1413 (9th Cir. 1989)

Venue

- Federal court circuits and districts



Statutory Standing Limitations

- Statutory standing
  - Considers whether the plaintiff has a cause of action under a particular statute[1]
- History
  - Originally known as "prudential standing"
    - A requirement of judicial self-restraint, not constitutional authority
      - Known as "zone of interest" test in administrative law
    - May be waived
      - Intended—
        1. to limit the private cause of action to a plaintiff that is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers, so as to
        2. respect the separation of powers by limiting judicial resolutions to those cases brought by plaintiffs that Congress sought to protect
    - Over time, the concept looked more to notions of statutory interpretation rather than judicial self restraint
      - Justice Scalia was the major movant in this evolution[2]
      - *Query*: Can statutory standing be waived?

[1] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 & n.2 (1998).

[2] *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) (calling "prudential standing" a "misnomer" and holding that "[w]hether a plaintiff comes within "the 'zone of interests' " is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim.").

Statutory Standing Limitations

- Contrast: Article III "case or controversy" standing requirement
  - Requires[1]—
    1. the plaintiff must suffer an "injury in fact," that is, an invasion of a legally protected interest that is concrete and particularized and is actual or imminent as opposed to conjectural or hypothetical;
       a. Concreteness and particularity are two separate requirements1
       b. An injury is "concrete" when it "actually exist[s]"
       c. An injury is "particularized" when it "affect[s] the plaintiff in a personal and individual way" that goes beyond widely shared "generalized grievances about the conduct of government"
    2. a causal connection between the injury and the challenged conduct, that is, the injury must be fairly traceable to the defendant's action; *and*
    3. it must be "likely" rather than "speculative" that a decision by the court in favor of the plaintiff will redress the plaintiff's injury. Ensures that self-interested parties vigorously advocating opposing positions present issues in a concrete factual setting

[1]. *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); *accord* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).; see
[2] Spencer v. Kemna, 523 U.S., 1, 7 (1998).

Statutory Standing Limitations

- Contrast: Article III "case or controversy" standing requirement
  - Constitutionally required at every stage of the litigation, including appeal[2]
    - Not waivable
    - When a live case or controversy ceases to exist, the case is said to become *moot*
    - When a plaintiff lacks Article III standing, its claims should be dismissed[3]

[1] *See, e.g.*, Garavanian v. Jet Blue Airways Corp., No. CV 23-10678-WGY, 2023 WL 8627631 (D. Mass. Dec. 13, 2023) (granting summary judgment for lack of Article III standing against plaintiffs challenging the JetBlue/Spirit deal for increased Spirit prices who did not regularly fly Spirit).

Statutory Standing Limitations

- Statutory standing in antitrust cases
  - Applies in both damages and injunctive relief actions
  - Three antitrust applications have emerged—
    1. "Antitrust injury"
    2. Indirect purchasers
    3. "Proper parties" (sometimes called an "efficient enforcer")

> To satisfy antitrust standing at the pleading stage a plaintiff must plausibly allege two things: (1) that it suffered a 'special kind of antitrust injury, and (2) that it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an "efficient enforcer" of the antitrust laws.[1]

[1] IQ Dental Supply, Inc. v. Henry Schein, Inc., 924 F.3d 57, 62 (2d Cir. 2019).

Statutory Standing Limitations

- "Antitrust injury"
  - "[I]njury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"[1]
    - Plaintiffs seeking treble damages must sustain antitrust injury[2]
    - Plaintiffs seeking injunctive relief must sustain or be threatened with antitrust injury[3]
  - Antitrust injury has two components—
    - The plaintiff's alleged injury must "correspond[ ] to the rationale for finding a violation of the antitrust laws in the first place"[4]
    - The defendant's alleged anticompetitive conduct must be the proximate cause of the plaintiff's alleged injury
      - This can cut off injuries that are too remote or removed from the alleged violation

Antitrust standing is generally limited to customers and competitors

[1] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).
[2] *Id*.
[3] Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986).
[4] Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 (1990). For a nice application, see IQ Dental Supply, Inc. v. Henry Schein, Inc., 924 F.3d 57, 62-65 (2d Cir. 2019)

Statutory Standing Limitations

- "Antitrust injury"
  - Examples—Not antitrust injury
    - Nonconspiratorial competitors that benefit from a price-fixing conspiracy to raise prices[1]
    - Third-party construction firm losing contracts because of underbidding by a bidding cartel[2]
    - Employee losing job for refusal to participate in employer's illegal anticompetitive conduct[3]
    - Employee losing job as a result of cost-cutting in the wake of an allegedly anticompetitive merger[4]
    - Harm from maximum resale price maintenance, whether by—
      - lost profits by not being able to charge high prices; *or*
      - lost sales because low prices prevented provision of demand-increasing point-of-sale (pos) services[5]

[1] Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 583 (1986).
[2] James Cape & Sons Co. v. PCC Constr. Co., 453 F.3d 396 (7th Cir. 2006).
[3] Vinci v. Waste Mgmt., Inc., 80 F.3d 1372 (9th Cir. 1996).
[4] Adams v. Pan Am. World Airways, Inc., 828 F.2d 24, 31 (D.C. Cir. 1987).
[5] Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990).

Statutory Standing Limitations

- Indirect purchasers—The *Illinois Brick* doctrine[1]
  - Indirect purchasers generally lack statutory standing to seek treble damages
    - "[T]he antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it."[2]
    - *Major exception*: Indirect purchasers who purchase from a conspirator may sue anyone in the alleged conspiracy
      - So if a distributor is a member of a manufacturer conspiracy, a purchaser from the distributor can sue the manufacturers even though the purchaser was only an "indirect purchaser" from the manufacturers
      - This is a result of *joint and several liability* of coconspirators (discussed later)
  - Indirect purchasers have statutory standing to seek injunctive relief

[1] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
[2] *Id*. at 735.

Statutory Standing Limitations

- Indirect purchasers—The *Illinois Brick* doctrine
  - State repealers
    - A number of states have enacted so-called "*Illinois Brick* repealers" to permit indirect purchasers to sue for damages under state law
      - These states typically also provide that the court take steps to ensure that the defendant is not subject to duplicative recoveries (thus also rejecting the *Hanover Shoe* doctrine that prohibits a passing-on defense in Clayton Act § 4 actions)[1]
    - These cases can be tried in federal court whenever the court has subject jurisdiction over the state claim[2]
      - Typically, state indirect purchaser actions are found in federal court when the court is also adjudicating the direct purchaser actions against the defendants under federal law, so that the federal court has supplemental jurisdiction over the state claims
      - However, federal courts are often reluctant to certify indirect purchaser class actions because of the individualized nature of proof of impact and damages, since these need to be traced through an innocent intermediary (one of the major concerns of *Illinois Brick*)

[1] *See, e.g.*, In re TFT-LCD (Flat Panel) Antitrust Litig., 637 F. App'x 981, 985 (9th Cir. 2016) (unpublished) (finding no when the district court permitted HannStar to assert a pass-through defense to Best Buy's indirect purchaser claim under Minnesota law).

[2] *See, e.g.*, *In re* Potash Antitrust Litig., 667 F. Supp. 2d 907 (N.D. Ill. 2009) (consolidated federal direct purchaser and state indirect purchaser class actions).

Statutory Standing Limitations

- "Proper parties"
  - Developed in *Associated General Contractors v. Calif. State Council of Carpenters*[1]
  - Attempts to pull together statutory standing limitations in antitrust actions
  - Identified five factors to consider in recognizing statutory standing:
    1. Causal relationship between antitrust violation and the harm to the plaintiff
    2. Nature of the injury, including whether the plaintiff is a consumer or competitor
    3. The directness of the injury and whether damages are too speculative
    4. The potential for duplicative recovery and whether apportionment would be too complex
    5. The existence of more direct victims
  - Examples—Not "proper parties"
    - Shareholders who suffered reduced dividends as a result of antitrust injury on the company (also employees, creditors, suppliers)
    - Employee terminated for refusing to participate in an antitrust violation

[1] 459 U.S. 519 (1983).

Effect of Prior Government Actions

- General rules
  - On plaintiffs: No offensive collateral estoppel—No effect resulting from:
    - The failure of the government to bring an action
    - The success of a defendant on the merits
  - On defendants
    - Clayton Act § 5(a)
    - *Parklane* offensive collateral estoppel[1]

[1] Parklane Co. v. Shore, 439 U.S. 322 (1979).

Effect of Prior Government Actions

- Clayton Act § 5(a)

> A final judgment or decree heretofore or hereafter rendered in any civil or 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.[1]

  - Section 5(a) prerequisites—
    1. Final judgment
    2. In a civil or criminal proceeding
    3. Brought by the United States under the antitrust laws
    4. Finding that the defendant has violated the antitrust laws
  - Section 5(a) effect
    - Final judgment is "prima facie evidence" against the defendant in a follow-on antitrust action
    - As to "all matters" to which the judgment "would be an estoppel" as between the defendant and the United States

[1] 15 U.S.C. § 16(a).

Effect of Prior Government Actions

- Clayton Act § 5(a)
  - An historical note
    - Section 5(a) was enacted as part of original Sherman Act in 1914
      - Section 5(a) was enacted "to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions" and to permit them "as large an advantage as the estoppel doctrine would afford had the Government brought suit."[1]
    - At the time, courts applied the common law requirement of *mutuality of estoppel*—A could estop B only if B could estop A—which in turn required that A and B be parties to the same prior litigation or in privity with parties in the prior litigation[2]
      - Section 5(a) statutorily eliminated mutuality of estoppel in follow-on private antitrust actions
      - In enacting Section 5(a), Congress was concerned that conclusive estoppel without mutuality would be unconstitutional[3]
      - The drafters' solution was to make the effect to be only *prima facie* and so be rebuttable
      - The result was that Section 5(a) had little of its intended effect to simplify and reduce the costs of follow-on private litigation, since defendants could introduce the same evidence they had used (unsuccessfully) in the original government litigation and effectively force a relitigation of the issues in the follow-on action

[1] Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951).
[2] *See* Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found., 402 U.S. 313, 320 (1971).
[3] *See* 51 Cong. Rec. 13,851 (1914) (statement of Sen. Walsh).

Effect of Prior Government Actions

- *Parklane* offensive collateral estoppel
  - Forecloses relitigation of issues or facts previously decided against a defendant in a prior litigation
    - Compare—
      - Section 5(a) provides only prima facie evidence—subject to rebuttal
      - Offensive collateral estoppel is conclusive—permits no rebuttal
  - Some potential problems with offensive collateral estoppel:
    - Did the defendant have both the opportunity *and* incentive to fully litigate the issue?
      - *Example*: If little was at stake in the prior litigation, the defendant may not have had the incentive to fully litigate the issue
    - Was the issue in fact fully litigated in the prior action and, at least in principle, reviewable on appeal?
    - Was the issue decided in contrary ways with respect to the defendant in different prior litigations (presenting a cherry-picking problem)?
      - *Currie example*: Railroad collision injures 50 passengers, each of which brings a separate action. The railroad wins in the first 25 cases; it loses in the 26th case. Can the 27th plaintiff invoke offensive collateral estoppel against the railroad based on the one loss?

Effect of Prior Government Actions

- *Parklane* offensive collateral estoppel
  - Usual requirements[1]
    1. The issue or fact must be identical to one previously litigated
    2. The issue or fact must have been actually resolved in the prior proceeding
    3. The issue or fact must have been necessary to the prior judgment
       - Critical question: What does it mean to be "necessary"?
         - "Critical and essential"? (*Microsoft* majority)
         - "Distinctly raised, determined and a material element of the judgment"? (*Microsoft* dissent)
    4. The judgment in the prior proceeding was final and valid
       - Does not apply to issues or facts on a claim reversed on appeal
    5. The party to be foreclosed by the prior resolution of the issue or fact must have had a full and fair opportunity to litigate the issue or fact in the prior proceeding
  - Application of offensive collateral is within the discretion of the court
    - Where "the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."[2]

[1] *See In re* Microsoft Corp. Antitrust Litig., 355 F.3d 322, 326 (4th Cir. 2004).
[2] Parklane Hosiery Co. v. Shore, 439 U.S. 322, 652 (1979).

Effect of Prior Government Actions

- Another historical note
  - *Blonder-Tongue*[1]
    - In 1971, the Supreme Court eliminated the requirement of mutuality of estoppel, at least in cases of defensive collateral estoppel[2]
    - Defensive collateral estoppel aids defendants, since it allows them to estop a plaintiff from asserting a legal or factual proposition that was decided against the plaintiff in an earlier litigation
      - *Example*: Plaintiff sues only A alleging that A and B were in a price-fixing conspiracy. The jury, in a special verdict, decides that there was no conspiracy between A and B. B may assert offensive collateral estoppel when plaintiff sues B alleging the same price-fixing conspiracy between A and B.

[1] Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found., 402 U.S. 313, 320 (1971).
[2] *Id*. at 320.

Effect of Prior Government Actions

- Another historical note (con't)
  - *Parklane*[1]
    - In 1979, the Supreme Court also eliminated the requirement of mutuality of estoppel in cases of offensive collateral estoppel, at least in cases where—
      1. the defendant had a full and fair opportunity to defend itself, as well as
      2. the incentive to do so[2]
    - Offensive collateral estoppel aids plaintiffs, since it allows them to estop a defendant from asserting a legal or factual proposition that was decided against the defendant in an earlier litigation
      - *Example 1*: Plaintiff 1 sues A and B for price-fixing conspiracy and alleging $100 million in actual damages. The jury, in a special verdict, decides that there was conspiracy between A and B. Plaintiff 2 may assert offensive collateral estoppel when Plaintiff sues A and B alleging the same price-fixing conspiracy and seeking $10 million in damages.
      - *Example 2*: Same as Example 1, except Plaintiff 1 only sought $1 million in damages, while Plaintiff 2 seeks $100 million in damages. Here, offensive collateral likely would be judicially disallowed in the subsequent litigation, since A's incentive to litigate the first case is significantly less than its incentive to litigate the second case.

[1] Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979).
[2] *Id*. at 331.

Effect of Prior Government Actions

- Another historical note (con't)
  - Antitrust Procedural Improvements Act of 1980[1]
    - After *Parklane*, there was a suggestion that Section 5(a) precluded the application of conclusive offensive collateral estoppel and limited the estoppel effect to prima facie evidence
    - The Antitrust Procedural Improvements Act of 1980 amended Section 5(a) to provide that nothing in Section 5(a) "impose[d] any limitation on the application of collateral estoppel."[2]
    - Interestingly, Congress also took the opportunity to clarify that "collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 5 of the Federal Trade Commission Act which could give rise to a claim for relief under the antitrust laws"[3]
      - This amendment has been interpreted to mean that conclusive *Parklane* offensive collateral estoppel effect cannot be given to an FTC decision in a subsequent litigation, although it can still serve as prima facie evidence[4]

[1] Pub. L. No. 96-349, 94 Stat. 1154 (1980).
[2] *Id*. § 5(a)(3).
[3] *Id*.
[4] *See, e.g.*, Pool Water Products v. Olin Corp., 258 F.3d 1024, 1030 (9th Cir. 2001); Hynix Semiconductor Inc. v. Rambus Inc., No. CV-00-20905 RMW, 2007 WL 2814654, at *2 (N.D. Cal. Sept. 25, 2007); Hynix Semiconductor Inc. v. Rambus, Inc., No. CV-00-20905 RMW, 2006 WL 2458761, at *2 (N.D. Cal. Aug. 22, 2006).

Effect of Prior Government Actions

- Application: Discover/Visa/MasterCard[1]
  - Background
    - After a 34-day bench trial, the DOJ obtained a judgment that Visa's and MasterCard's by-laws prohibiting their respective member banks from distributing AmEx and Discover cards violated Sherman Act § 1[2]
  - In its follow-on private action, Discover invoked a dual-motion strategy
    - First, Discover moved for partial summary judgment on *Parklane* offensive collateral estoppel grounds to establish 81 factual propositions Discover maintained were determined against Visa and MasterCard in the earlier DOJ case
    - Subsequently, Discover moved to give certain finding of fact in the prior court Section 5(a) effect

[1] Discover Fin. Servs. v. Visa U.S.A. Inc., 598 F. Supp. 2d 394 (S.D.N.Y. 2008).
[2] *See* United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003).

Effect of Prior Government Actions

- Application: Discover/Visa/MasterCard (con't)
  - Resolution of summary judgment motion for collateral estoppel treatment
    - District court declined to give the 81 factual propositions collateral estoppel effect
      - Presenting them to the jury "in a vacuum and without context would be unfair to the Defendants"
    - But did give collateral estoppel effect to the following higher-level determinations:
      - General purpose credit and charge cards is a relevant market
      - General purpose credit and charge card network services is a relevant market
      - The United States is the appropriate geographic scope of the relevant markets
      - Visa and MasterCard each had market power within the relevant markets
      - Visa's Bylaw 2.10(e) and MasterCard's Competitive Programs Policy (CPP) were each unlawful restraints of trade
      - Bylaw 2.10(e) and the CPP harmed competition and consumers in the relevant markets by:
        - limiting output of Discover cards in the U.S.
        - restricting Discover's competitive strength by restraining merchant acceptance levels and their ability to distribute new features through exclusion from the network services market
        - foreclosing Discover from competing to issue off-line debit cards
        - depriving consumers of the ability to obtain credit cards that combine the unique features of their preferred bank with any of the four major network brands
    - These were the high-level findings that predicated the prior judgment and were affirmed by the Second Circuit on appeal

Effect of Prior Government Actions

- Application: Discover/Visa/MasterCard (con't)
  - Section 5(a) motion
    - Immediately before trial, Discover moved to give prima facie effect under Section 5(a) to 38 of the 81 factual findings of the district court in the prior judgment that were not subsumed under the collateral estoppel findings
      - Section 5(a) was written at a time when "an estoppel" needed five elements—
        1. *Mutuality*: The parties had to be parties in the prior litigation, so that either could have been bound by the prior judgment
        2. *Identity of issue*: The issue must be the same as that decided in the prior litigation
        3. *Necessity*: Must have been necessary to decide the issue in the prior litigation to reach the prior court's decision
        4. *Full and fair opportunity to litigate*
        5. *Litigated final decision*
      - *Parklane* eliminated mutuality, although it imposed two additional conditions on nonmutual collateral estoppel:
        1. Plaintiff could not easily have joined the prior litigation (almost always true in government antitrust cases), and
        2. Fairness in foreclosing the defendant's opportunity to litigate
      - Discover argued—
        - The district court in its prior decision found that the traditional elements for collateral estoppel (except for mutuality) were satisfied, but rejected (conclusive) collateral estoppel effects on the grounds of a lack of fairness to the defendant
        - Fairness to the defendant is not a factor in Section 5(a) (rebuttal) collateral estoppel, since the defendant has the opportunity to litigate the issues

Effect of Prior Government Actions

- Application: Discover/Visa/MasterCard (con't)
  - Section 5(a) motion
    - Visa and MasterCard filed an opposition
      - Pre-*Parklane* estoppel included fairness as an element
        - *Parklane's* innovation was only to extend offensive collateral estoppel to nonmutual parties
      - Since the district found in the prior motion that it would be unfair to apply collateral estoppel, the (non- mutuality) traditional elements were not satisfied and hence Section 5(a) cannot be invoked
    - Case settled before the district court decided the Section 5(a) motion
      - Visa: $1.9 billion to settle
      - MasterCard: $900 million to settle

Statute of Limitations

- Clayton Act § 4B

> Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued.[1]

  - *Section 15* is the right of action for treble damages granted to private persons injured in their business or property
  - *Section 15a* is the right of action for treble damages granted to the United States when it is injured in its business or property
  - *Section 15c* is a right of action for treble damages granted to state attorneys general to sue on behalf of natural persons residing in their respective states for injuries to their property.

- Purpose
  - Give defendants timely notice of adverse claims
  - Prevent plaintiffs from sleeping on their rights

[1] 15 U.S.C. § 15B.

Statute of Limitations

- Treated as an affirmative defense
  - Must be pleaded in the answer with particularity (see FRCP 8(c)(1) & 9(b))
  - Burden of proof is on the party asserting the defense
  - May be waived
    - Waiver may be contractual
- Limitations period
  - Creates a 4-year limitations period
  - Applies only to damages actions
  - Applies separately to each *cause of action*, not to the complaint as a whole
    - So some causes of action alleged in a complaint may be time-barred, while other causes of action are not[1]
  - Does not technically apply in injunctive relief actions, but often used as a guide in applying the *doctrine of laches*
  - Compare to 5-year limitations period for criminal prosecutions
  - Subject to tolling under certain conditions

[1] *See, e.g.*, Novell, Inc. v. Microsoft Corp., Civ. JFM-05-1087, 2005 WL 1398643 (D. Md. June 10, 2005), *aff'd*, 505 F.3d 302 (4th Cir. 2007)

Statute of Limitations

- Accrual of cause of action
  - Zenith Radio Corp. v. Hazeltine Research, Inc.:

> "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business."[1]

  - This statement has caused an enormous amount of confusion and bad law, since it refers to both—
    - the time when the defendant committed an act (the "act date"), *and*
    - the time at which the plaintiff actually sustained injury (the "injury date")
  - Best reading[2]
    1. Cause of action accrues on injury date
       - Injury date occurs when the plaintiff first sustains actual injury
    2. Within four years of injury date, statute runs for all—
       - Actual injuries sustained to that date, *and*
       - All future injuries that may be reasonably quantified (i.e., not speculative)
    3. Thereafter, a cause of action accrues for speculative damages at the time they become reasonably quantifiable

"Accrual rule"

"Speculative damages rule"

[1] 401 U.S. 321, 338 (1971).

[2] For an excellent opinion applying these principles, see Mayor of Baltimore v. Actelion Pharms. Ltd., 995 F.3d 123 (4th Cir. 2021).

Statute of Limitations

- Continuing antitrust violations
  - In a "continuing antitrust violation," the statute of limitations begins to run "each time a plaintiff is injured by an act of the defendants"[1]
    - The doctrine was developed in the context of continuing antitrust conspirators, but it applies to other types of violations as well[2]
  - Corollary
    - The statute of limitations in a direct purchaser action begins to run each time an antitrust defendant makes a sale to the purchaser at a supracompetitive price enable by the antitrust violation[3]
  - Possible tension with the speculative damages rule:
    - *Query*: Suppose that a defendant's anticompetitive act produces a reasonably quantifiable future overcharge. For a plaintiff that regularly purchases the defendant's products, does the statute of limitations start to run with the commission of the act or with the actual sale of the product to the purchaser?

[1] Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971); *see* Klehr v. A.O. Smith Corporation, 521 U.S. 179 (1997) (RICO).

[2] *See* Mayor of Baltimore v. Actelion Pharms. Ltd., 995 F.3d 123, 131-33 (4th Cir. 2021) (monopolization).

[3] *See, e.g.*, *Actelion*, 955 F.3d at 131; *In re* Pre-Filled Propane Tank Antitrust Litig., 860 F.3d 1059, 1065 (8th Cir. 2017); *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 902 (6th Cir. 2009); *In re* Cotton Yarn Antitrust Litig., 505 F.3d 274, 290-91 (4th Cir. 2007); Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 828 (11th Cir. 1999*), amended in part*, 211 F.3d 1224 (11th Cir. 2000)

Statute of Limitations: Tolling

- Fraudulent concealment
  - Idea
    - Tolls statute of limitations until the plaintiff either learned, or should have become aware in the exercise of due diligence, of the existence of its cause of action
    - A form of equitable estoppel that is read into every federal statute of limitations
  - Requirements
    1. One or more affirmative acts of concealment by the defendant of its wrongful conduct,
       - Although some circuits hold that price-fixing conspiracies are inherently self-concealing and do not require an additional affirmative act of concealment
    2. Plaintiff failed to discover the facts underlying its cause of action during the limitations period, *and*
    3. Plaintiff exercised reasonable diligence until it discovered those facts
  - Application
    - Four-year limitations period begins to run at the time of discovery
  - Pleading
    - Sounds in fraud—must be pleaded with particularity under FRCP 9(b)

Statute of Limitations: Tolling

- During pendency of government actions
  - Clayton Act § 5(i) tolls the running of the statute of limitations during the pendency of a government antitrust action plus one additional year
  - Requirements
    1. Predicate action must be brought by United States under the antitrust laws, *and*
    2. Private action must be "based in whole or in part on any matter complained of" in the predicate government action
       - Section 5(i) is not to be given a "niggardly construction" and must be "read in light of Congress' belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."[1]
       - But significant differences in the relevant markets alleged in the government suit and those alleged in the subsequent private action will prevent tolling under Section 5(i)
  - Supreme Court has held for policy reasons that United States includes FTC administrative actions for this purpose
    - May apply to FTC Act § 5 actions as well as Clayton Act actions

[1] Leh v. Gen. Petroleum Corp., 382 U.S. 54, 59 (1965).

Statute of Limitations: Tolling

- During pendency of class actions
  - Under *American Pipe,*[1] the filing of a class action tolls the statute of limitations for all putative class members until:
    - Class certification is denied, *or*
    - Putative class members opts out of class
  - Observations
    - Based on an interpretation of FRCP 23 and not equitable tolling
    - Intended to minimize multiple lawsuits and further judicial economy
    - No requirement that the putative class member relied on the class action instead of asserting its own individual claim or even that the class member knew about the pendency of the class action
  - Query:
    - Does *American Pipe* tolling apply to individual actions that are filed after the class action compliant was filed but before the court decides the motion for class certification?
    - Cases split: The argument against is that tolling here would encourage multiple lawsuits, which is contrary to the policy of *American Pipe* tolling[2]

[1] American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974).
[2] *See In re* Refrigerant Compressors Antitrust Litig., 92 F .Supp. 3d 652 (D.D. Mich. 2015) (analyzing cases).

Statute of Limitations: Tolling

- "Equitable tolling"
  - Allows courts to extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances
  - Usually tolls limitations period only for the short time necessary to permit the plaintiff to file

Right to Jury Trial

- Seventh Amendment

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII

- "Suits at common law"
  - Interpreted to preserve the right of trial by jury in civil cases as it existed under the English common law in 1791, when the amendment was adopted.
  - Essentially applied in cases where *legal rights* are being adjudicated
    - So applies in damages actions (including antitrust treble damages actions)
    - But not in equitable relief cases (including antitrust injunctive relief cases)
  - Protects both plaintiffs and defendants

Right to Jury Trial

- FRCP 38
  - Party requesting jury trial must serve a written demand
    - May be included in a pleading (typically in the complaint)
    - Must be served within 14 days of the last pleading directed to the issue
  - Split issues
    - When an equitable remedy is sought in conjunction with a legal remedy the legal claim is tried first and the jury's findings bind the judge, in order to vindicate the right to a jury trial on legal claims[1]

[1] *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962).

Damages: A Fundamental Distinction

- Fact of injury/amount of damages
  - Proof of damages is often plagued by—
    - Multiple causes of injury, some of which are often legal
      - Lawful exercise of market power
      - Changed economic conditions
      - New competition
      - Shifts in consumer demand
      - Business mismanagement
    - Uncertainty in connecting particular damages to particular causes
    - Methodological problems in quantifying damages even with only one cause
  - Resolution
    - Separate damages injury into two components
      - "Fact of injury"
      - "Amount of damages"
    - Employ different standards of proof for these two showings, so that the cost of error falls differently on private plaintiffs and defendants depending on which category the error occurs

Damages: Injury in Fact

- "Fact of Injury"
  - Requires plaintiff to have sustained a cognizable injury as the proximate result of an antitrust violation
    - Subsumes constitutional requirement for Article III standing ("case or controversy")
    - The injury must be "antitrust injury" sustained by a plaintiff with antitrust standing
    - Binary—either it is present or not
  - Burden of proof
    - On plaintiff
    - Requires showing by a preponderance of the evidence test, if not something stronger (such as "reasonable certainty")
  - Cognizable injury means—
    1. antitrust injury
    2. sustained by a plaintiff with statutory standing
  - Injury from multiple causes
    - Sufficient if antitrust violation contributed materially to the plaintiff's injury
    - Not necessary to show the antitrust violation was the sole cause of the injury
    - Other causes handled in calculating the amount of damages

Damages: Amount of Damages

- "Amount of damages"
  - Burden of proof
    - Much lower standard of proof in quantifying the amount of damages than in establishing fact of injury
      - The idea is that once the plaintiff has established "fact of injury," and so has compensable injuries, the plaintiff should be allowed to make its case to the trier of fact as to the amount of its damages
    - Still must meet some *reasonableness standard* based on evidence at trial
    - Courts will not award speculative damages
  - Methods of proof[1]
    - "Before-and-after"
    - Yardstick comparisons

[1] *See generally* Justin McCrary & Daniel L Rubinfeld, *Measuring Benchmark Damages in Antitrust Litigation*, 2 J. Econometric Methods 63 (2014); Daniel L. Rubinfeld, *Antitrust Damages*, *in* Research Handbook on the Economics of Antitrust Law 378 (Einer Elhauge ed., 2012); Herbert J. Hovenkamp, *A Primer on Antitrust Damages* (Mar. 1, 2011); Theon van Dijk & Frank Verboven, *Quantification of Damages*, *in* 3 Issues in Competition L. & Pol'y 2331 (2008); Patrick L. Anderson, Theodore R. Bolema & Ilhan K. Geckil, *Damages in Antitrust Cases* (Anderson Economic Group 2007).

Damages: Amount of Damages

- "Before-and-after" proof
  - Generally
    - The most common method (especially in price-fixing conspiracies)
    - Purpose
      - The purpose of this method of proof is to show the difference between the prices actually charged during the conspiracy period with the prices that would have been charged during the conspiracy period in the absence of the conspiracy (the *"but-for" prices*)
      - Since firms may exercise some market power lawfully, the right comparison is between—
        - The actual prices and the "but-for" prices
        - NOT the actual prices and the competitive price

Damages: Amount of Damages

- "Before-and-after" proof
  - Methodology
    - Compares prices before the alleged conspiracy with prices during the alleged conspiracy
      - If the conspiracy has broken down before trial (say because of criminal price-fixing investigations and prosecutions), the comparison can also be with prices after the conspiracy (sometimes called the *"before-during-after" approach*)
      - To apply this method properly, it is important to identify the particular time periods in which the conspiracy is operating and not operating
    - Typically, this technique relies on regression analysis to determine "but-for" prices during the conspiracy period
      - A number of factors, including input prices, that can vary over time can effect prices
      - Regression analysis can be used to quantitatively "remove" these influences in order to isolate the effect of the alleged conspiracy

Damages: Amount of Damages

- Some special cases
  - Antitrust violations without damages
    - Can occur with some technical per se violations
    - Example
      - Consider a small town with 100 gasoline stations, with four on each corner. Two stations at one corner collude and raise their prices by 20%. Since the stations are otherwise law abiding, they post their prices. No one buys gasoline from them. The stations are guilty of per se illegal horizontal price fixing but no one was injured and hence there are no damages.
  - Antitrust violations with nominal damages
    - In some cases, the jury will find the plaintiff was injured by an antitrust violation but only immaterially. Juries have awarded $1 in actual damages.
    - Example
      - In 1986, Donald Trump, the owner of the New Jersey Generals, and other USFL owners sued the National Football League for monopolization of major league professional football that drove the USFL out of business. The plaintiffs sought $1.7 billion in treble damages. Although the jury found the NFL had violated the antitrust laws, it also found that the failure of the USFL injuries had been predominantly caused by its decision to switch to a fall schedule. The jury awarded $1 in damages, which was trebled to $3.[1]

[1] *See* U.S. Football League v. Nat'l Football League, 842 F.2d 1335 (2d Cir. 1988).

"Umbrella Damages"

- The idea
  - A dominant cartel, comprising most but not all of the competitors in the market, raises the market price. The nonconspirator competitors each decide unilaterally to charge prices just under the cartel price.
  - The overcharge paid by customers purchasing from the nonconspirators are called "umbrella damages"
- *Question*: Does a customer that sustained umbrella damages have a claim under Clayton Act § 4 against the conspirators?
  - Was the umbrella customer "injured in his business or property by reason of anything forbidden in the antitrust laws" as required by Section 4?
  - Did the umbrella customer sustain antitrust injury under *Brunswick*?
  - Is the umbrella customer an "efficient antitrust enforcer" under *Associated General Contractors*?
- The circuits that have addressed the issue are split—
  - Have antitrust standing: Fifth and Seventh
  - Lack antitrust standing: Third

Proof of Damages

- Two types of damages
  - Exploitative
    - Typically damages resulting from anticompetitive overcharges
  - Exclusionary
    - Typically damages resulting from anticompetitive foreclosure

Proof of Damages

- Exploitative damages
  - Damages due to the overcharge resulting from illegal antitrust conduct
  - Typical customer injury
  - Not necessarily the difference between the supracompetitive price charged and the competitive price
    - Some portion of the supracompetitive price may be due to lawfully obtained market power
    - In the absence of the unlawful conduct, the equilibrium price may be higher than the competitive price (say due to oligopoly)
  - Do not take into account
    - Decreased purchases due to higher prices (the "dead weight loss")
    - Higher prices paid to non-violators riding under the price umbrella of the violators (the "competitive fringe")
    - Any offset due to "passing on" a portion the overcharge to downstream purchasers (i.e., no "passing on" defense)[1]
      - True even in the defendant-wholesaler passes on more than 100% of the conspiratorial overcharge (typical in "percentage markup pricing")

[1] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968)

Proof of Damages

- Exclusionary damages
  - Damages to a firm due to its permanent exclusion from some or all of the affected market
  - Typical injury in foreclosure cases
  - Usual measures
    - If exclusion is temporary, then lost profits
    - If exclusion is permanent, then reduction in going concern value

Proof of Damages

- Damages offsets
  - Question
    - In some cases, antitrust conduct will have two effects: one pushing price up for one product, and the other pushing price down for another product
    - Does the plaintiff's savings from the decrease in price offset the plaintiff's damages from the increase in price?
- Example: *Delta/AirTran Baggage Fee Antitrust Litigation*[1]
  - Delta and AirTran began, allegedly conspiratorially, to charge fees for checked baggage
  - The airlines argued that when they "unbundled" the baggage fee, they also reduced air fares
  - Court:
    - Reduced air fares, to the extent they existed, could not offset damages
    - Antitrust injury occurred at the moment a plaintiff paid a conspiratorially-set supracompetitive price
    - Damages are the full amount of the overcharge

[1] No. 1:09-md-2089-TCB (N.D. Ga. July 12, 2016).

Proof of Damages

- Damages—Examples in non-class action cases
  - AMD/Intel
    - AMD had challenged Intel for exclusionary practices in microprocessors
    - $1.25 billion to settle all antitrust and patent disputes worldwide (Nov. 12, 2009)
  - American Express/Visa/MasterCard
    - DOJ obtained a judgment that Visa's and MasterCard's by-laws prohibiting their respective member banks from distributing AmEx and Discover cards violated Sherman Act § 1[1]
    - AmEx brought follow-on suit for damages
    - Visa: $2.25 billion to settle (Nov. 7, 2007)
    - MasterCard: $1.8 billion to settle (June 25, 2008)
  - Discover/Visa/MasterCard
    - Discover's follow-on suit to DOJ case
    - Visa: $1.9 billion to settle (October 14, 2008)
    - MasterCard: $900 million to settle (October 14, 2008)

[1] United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003).

Proof of Damages

- Damages—Examples in non-class action cases
  - Conwood Company, L.P. v. United States Tobacco Co.[1]
    - Conwood had challenged UST for monopolization in moist snuff
    - Jury found actual damages of $350 million, which the court trebled to $1.05 billion (Mar. 2000)
    - Judgment was stayed pending appeal
    - When all appeals were exhausted and the judgment affirmed, UST paid Conwood $1.262 billion (Jan. 2003)[2]

[1] *See* Conwood Company, L.P. v. United States Tobacco Co., 290 F.3d 768 (6th Cir. 2002).
[2] UST Inc., Form 10-K for the period ending Dec. 31, 2002, at 65 (filed Feb. 24, 2003).

Interest on Damages

- Postjudgment interest
  - Available on damages awarded in federal civil cases from the date of entry of final judgment:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.[1]

  - Rate
    - "[T] the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment[2]

[1] 28 U.S.C. § 1961(a).
[2] To find the interest rate, use Board of Governors of the Federal Reserve System, H.15 Selected Interest Rates (Treasury constant maturities: 1-year).

Overturning a Jury Damage Award

- Two central challenges:
  - Are the damages awarded traceable to the antitrust violations found by the jury?
    - Damages can be awarded only for injuries *proximately caused* by an antitrust violation
    - If the jury sustains some claims but reject others, the damages can be awarded only for injuries resulting from the sustained claims[1]
  - For traceable damages, is the damage amount excessive or inadequate?
    - Very high standard for overturning a jury award:

> "[T]he finding of the jury [on damages] must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts."[2]

[1] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459-60 (1993); Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 29-30 (1962).

[2] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 566 (1931).

Overturning a Jury Damage Award

- Mechanisms:
  - Motion for a new trial on damages
    - Excessive or inadequate damages is a ground for a new trial under FRCP 59(a)
    - May be granted in the discretion of the court where the court concludes that the damages award was contrary to the manifest weight of the evidence
    - But as noted above, courts are extremely deferential to jury verdicts on damages
    - Denial of the motion is reviewable on appeal for abuse of discretion

Overturning a Jury Damage Award

- Mechanisms:
  - Motion for remittitur
    - Remittur is a means for the court to "remit" the portion of the damages award the court finds excessive and enter a judgment for the reduced amount
      - A motion for remittitur is permitted under Rule 59(e) as a type of motion to alter or amend a judgment
    - Courts often will condition the denial of a motion for a new trial on the plaintiff's acceptance of a remittitur
      - When a court determines that a verdict is excessive because it is more than a reasonable jury could have awarded based on the evidence presented at trial, the court must give the parties the option of a new trial in order to avoid impinging on their Seventh Amendment rights
      - But when it is apparent as a matter of law that certain identifiable sums were included in the verdict that should not have been there, it is appropriate for a district court to enter a remittitur and correct the verdict without further jury proceedings[1]
    - Deference to jury verdicts make remittiturs for excessive damages awards in antitrust cases rare

[1] For an example, see *In re* Lorazepam & Clorazepate Antitrust Litig., 261 F. Supp. 3d 14, 17-18 (D.D.C. 2017).

Co-Violator Liability Relationships

- Joint and several liability
  - Antitrust violations frequently been viewed as statutory torts
    - The Supreme Court at least twice has suggested, but never explicitly held, that private antitrust suits are analogous to tort actions[1]
  - Consistent with this view, courts have adopted joint and several liability for antitrust violators
    - "Collective fault, collective responsibility"
    - Accordingly, antitrust violators are liable for injuries caused by their coconspirators in the course of the conspiracy

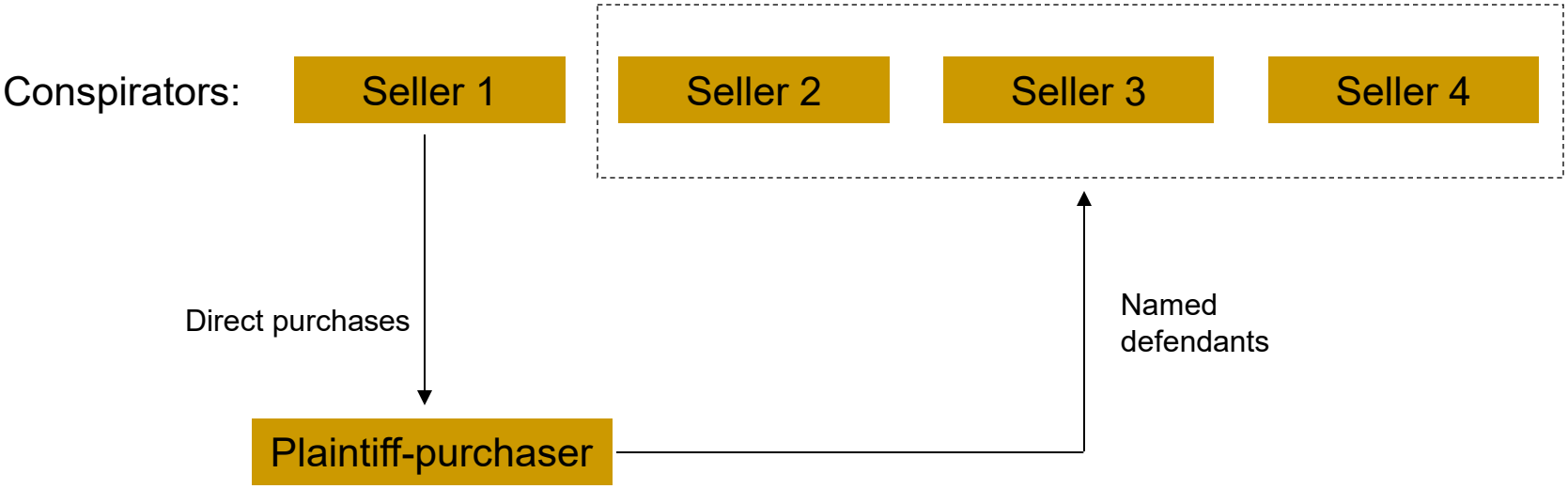
[1] Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 634 (1981) (rejecting right to contribution from Section 1 coconspirators by analogy to the common law rule of no contribution for joint tortfeasors); Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 312, 342-48 (1971).

Co-Violator Liability Relationships

- Joint and several liability
  - Consequences
    - Plaintiffs may select which members of the alleged conspiracy they name as defendants
      - May only select a subset
      - Need not name the alleged coconspirator that directly injured them (e.g., the seller from whom the plaintiff purchased a price-fixed product)
    - If found liable, the named defendants are responsible for 100% of the damages caused by the conspiracy (even if not all coconspirators are named as defendants)
    - In executing the judgment, the winning plaintiff may collect the entire judgment from—
      - any one of the defendants, or
      - any or all of the defendants in various amounts until the judgment is paid in full
    - If any of the defendants do not have enough money or assets to pay the amount the plaintiff assesses it, the other defendants must make up the difference

Co-Violator Liability Relationships

- Joint and several liability—Example



Assume that Seller 1 overcharged the plaintiff by $10 million as part of a conspiracy

Plaintiff sues only Sellers 2, 3, and 4—none of whom sold products to the plaintiff—and wins

Plaintiff's $10 million actual damages trebled to $30 million

Plaintiff may, in its discretion, elect to collect: $20 million from Seller 2

$10 million from Seller 3

$ 0 from Seller 4

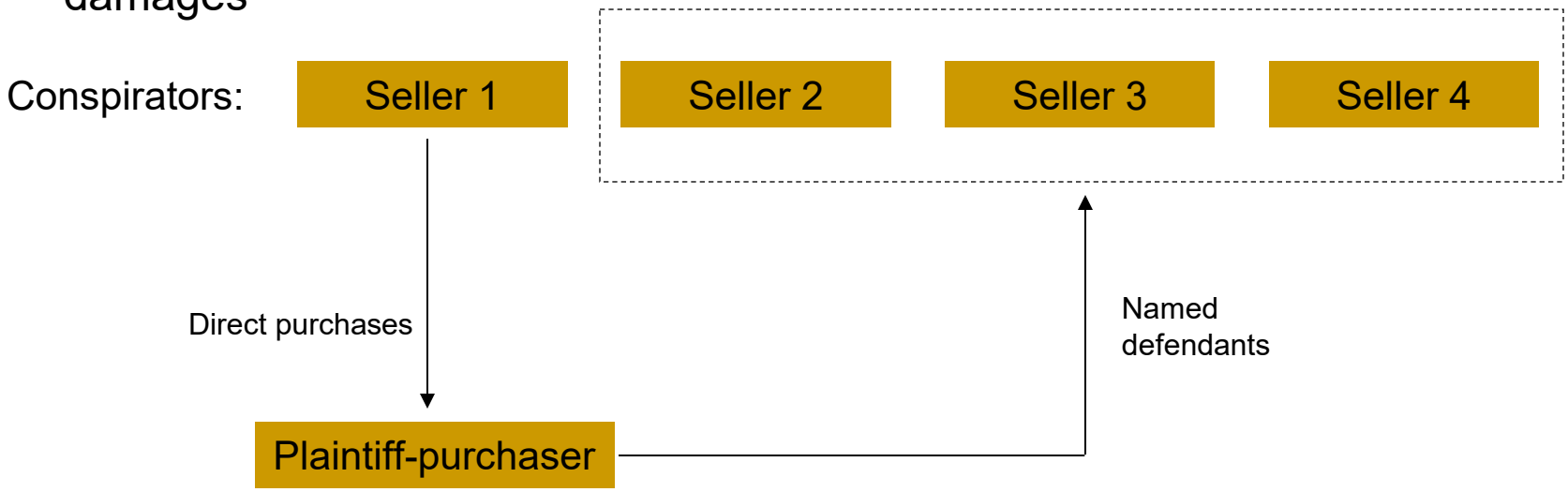
Co-Violator Liability Relationships

- No right to contribution
  - The common law regarding joint tortfeasors
    - The common law provided no right to contribution among joint tortfeasors for intentional torts
      - *Theory*: When several tortfeasors have caused damage, the law should not lend its aid to have one tortfeasor compel others to share in the sanctions imposed by way of damages intended to compensate the victim.
    - Over time, most states adopted rules providing for a right to contribution
  - Application in antitrust
    - In 1981, Supreme Court resolved a split in the circuits and held that there is no right to contribution for liability under the antitrust laws[1]
      - No federal statute explicitly provides for a right of contribution
      - No implied right of action for contribution, since there is no indication in the legislative history that Congress intended for such a right
      - No legal basis for creating a right of action for contribution as a matter of "federal common law"
      - Court did not take a view on policy arguments—changes on policy grounds is for Congress to decide

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

Co-Violator Liability Relationships

- The *Flintkote* rule in partial settlements
  - Settlement amounts are offset against *post*-trebled damages, not actual damages[1]



Assume that Seller 1 overcharged the plaintiff by $10 million as part of a conspiracy

Named defendants jointly and severally liable for $30 million (after trebling)

Prior to final judgment, Seller 2 settles for $2 million

The residual liability of Sellers 3 and 4 is $28 million = $30 million post-trebling - $2 million settlement

[1] Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957).

Co-Violator Liability Relationships

- The *Flintkote* rule in partial settlements
  - Unless a partial settlement is three times the pro rata liability of the settling defendant, the residual liability of the remaining defendants increases with each settlement
  - Can create an exceptionally strong individual incentive to settle depending on defendant's priors on probability of success in—
    - Dismissing the case against it on a Rule 12(b) motion
    - Defeating class certification
    - Obtaining summary judgment
  - This can result in an auction among defendants to settle in multi-defendant actions
    - Plaintiffs sometimes explicitly run an auction for the right to settle early
  - Experienced plaintiff's counsel are very adept at settling with defendants in a particular sequence in order to maximize the total recovery

Judgment Sharing Agreements

- Essentially provide for a right to contribution through contract
- Key features
  - Signatory defendant may settle at any time
  - Agreement by signatory defendants to share responsibility for paying a judgment, unless
  - Plaintiffs agree to remove settling defendant's pro rata liability from the "damages pool" as a condition of settlement (usually based on relative market shares)
- Typical sharing provisions
  - Signatory defendants who pay less than their pro rata share must reimburse signatory defendants who pay more than their pro rata share
  - "Market shares" often negotiated and specified in the agreement
  - May or not exclude signatory defendants who are not found liable
  - May provide that a settling defendant is excluded if the plaintiffs extends an proportionally equal settlement offer to all remaining defendants

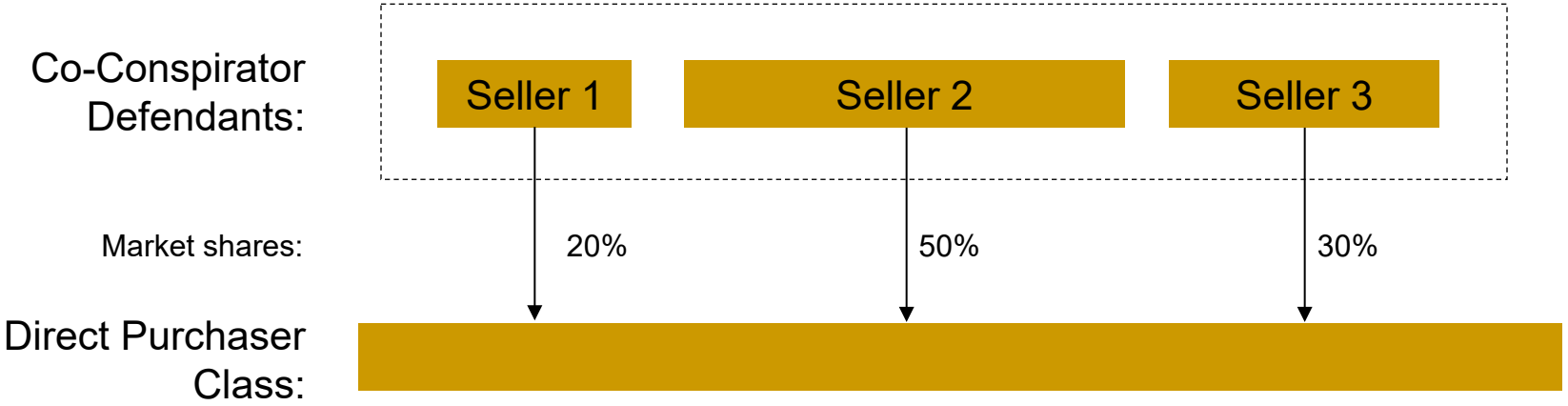
Judgment Sharing Agreements

- Notice provisions
  - Sharing agreements may provide for notice to other signatories when a defendant has contact with a plaintiff about settlement
- May be voided by the court if the agreement unreasonably discourages settlement
  - "Void for public policy"
  - Plaintiffs have standing to challenge sharing agreement
  - Examples of overreaching provisions
    - No defendant may settle unless all defendants settle
  - Cases largely sympathetic to sharing agreements—avoids "coercive" settlements

Judgment Sharing Agreements

- Discovery of judgment sharing agreements
  - Courts typically reluctant to order disclosure of entire agreement to plaintiffs
  - May require disclosure of market share removal provisions
  - Plaintiffs often learn about much of the agreement from settlement negotiations with signatory defendants
  - In a challenge by a plaintiff, court typically will review agreement in camera

Judgment Sharing Agreements

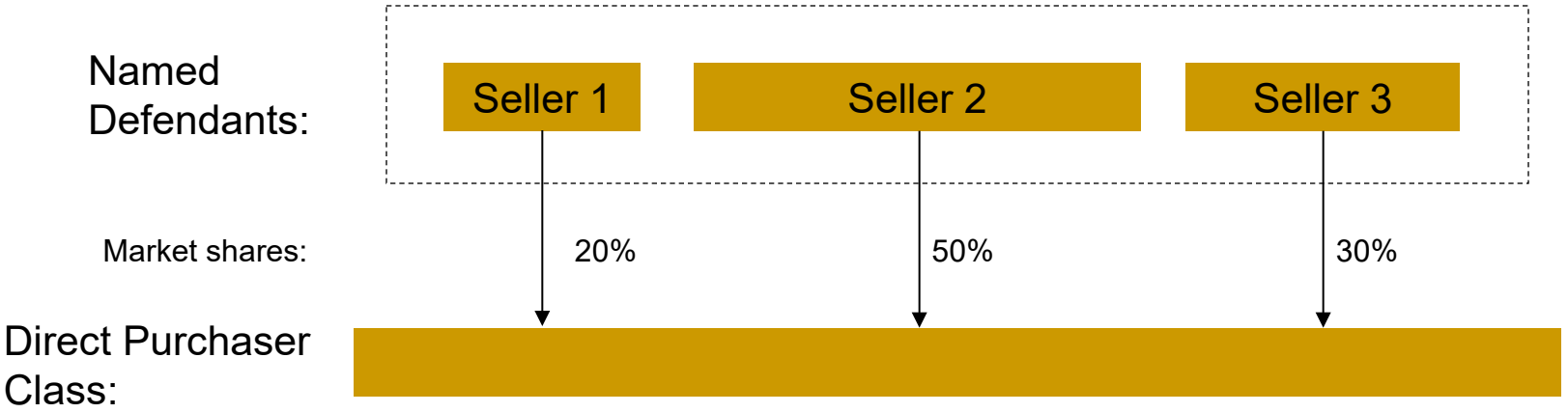


Jury finds all defendants liable
Damages found by jury: $150 million
Trebled damages: $450 million

Pro rata liability:	$ 90 million (20%)	$225 million (50%)	$135 million (30%)
Class execution:	$ 0	$400 million	$ 50 million

Seller 1 pays $ 90 million to Seller 2
Seller 3 pays $ 85 million to Seller 2

Judgment Sharing Agreements



Jury finds only Seller 2 and 3 liable; Seller 1 not liable. Plaintiff executes judgment only on Seller 3.
Damages found by jury: $120 million
Trebled damages: $360 million

If sharing agreement excludes non-liable defendants

Pro rata liability:	$0	$225 million (62.5%)	$135 million (37.5%)
Class execution:	$0	$ 0 million	$360 million
Seller 2 pays	$225 million to Seller 3		

If sharing agreement does not exclude non-liable defendants

Pro rata liability:	$ 72 million (20%)	$180 million (50%)	$108 million (30%)
Class execution:	$ 0	$ 0 million	$360 million
Seller 1 pays	$ 72 million to Seller 3		
Seller 2 pays	$180 million to Seller 3		

Statutory Attorneys' Fees

- "American Rule"
  - Parties pay their own legal expenses, regardless of who prevails in the litigation[1]
    - Compare the *English Rule*, where the prevailing party recovers its legal expenses from the losing party
    - Costs (not including attorneys' fees) can usually be recovered by the prevailing party in federal court under FRCP 54(d)
  - Major exceptions
    - Statutory fee-shifting
    - Recovery from a "common fund"
    - Sanction to punish an adverse party for improper conduct in the course of the litigation
  - Policy considerations
    - Minimize adverse selection of cases
    - Encourage efficient investment and minimize the moral hazard problem
    - Market pricing

[1] Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 249-50 (1975).

Statutory Attorneys' Fees

- Antitrust statutory fee-shifting
  - Statutes
    - Clayton Act § 4 provides that prevailing plaintiffs "shall recover threefold the damages by him sustained, and *the cost of suit, including a reasonable attorney's fee*"
    - Clayton Act § 16 provides that "[i]n any action under this section in which the plaintiff substantially prevails, the court shall award *the cost of suit, including a reasonable attorney's fee*, to such plaintiff"
  - Calculation of attorneys' fees
    - Starting point—The *lodestar*
      - Number of hours expended in the litigation multiplied by a reasonable hourly rate
        - May be adjusted upwards or downwards in rare circumstances to account for factors not subsumed within its calculation
      - Presumption
        - Lodestar represents a reasonable attorneys' fee,
        - but it may be adjusted upwards or downwards in rare circumstances to account for other factors

Statutory Attorneys' Fees

- Antitrust statutory fee-shifting
  - Calculation
    - Number of hours
      - Party seeking fees bears the burden of proof on the number of hours actually expended
      - Court must exclude from the calculation hours that it determines were not "reasonably expended" on litigation because they were
        - Excessive
        - Redundant
        - Otherwise unnecessary[1]
      - Opposing party has the burden of rebuttal to challenge the accuracy or reasonableness of the hours charged
    - Reasonable hourly rate
      - To be based on the experience, skill, and reputation of the attorneys requesting fees
      - While the rates charged by attorneys for the prevailing party may be relevant, market rates in the community (typically for non-contingent work) should ultimately guide the court
      - Burden on the fee applicant to prove that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation

[1] Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

Statutory Attorneys' Fees

- Antitrust statutory fee-shifting
  - Calculation
    - Multiplier
      - An adjustment to the lodestar amount to reflect the contingent nature of the attorney's compensation
      - Enhancement for contingency is never permitted under a federal fee-shifting statute[1]
    - Time value of money
      - Court may adjust the award to take into account the delay in payment
      - Some adjustment schemes
        - Augment award with interest for delay
        - Utilize current billing rates

[1] Burlington v. Dague, 505 U.S. 557 (1992).

Statutory Attorneys' Fees

- Antitrust statutory fee-shifting: "The cost of suit"
  - Sections 4 and 16 also provide that "prevailing plaintiffs shall recover . . . the *cost of suit*"
  - 28 U.S.C. § 1920
    - Generally delimits taxable costs to be—
      - Fees of the clerk and marshal
      - Fees for printed or electronically recorded transcripts necessarily obtained for use in the case
      - Fees and disbursements for printing and witnesses
      - Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case
      - Docket fees under 28 U.S.C. § 1923
      - Compensation of court-appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 U.S.C. § 1828

Statutory Attorneys' Fees

- Antitrust statutory fee-shifting: Expert fees
  - West Virginia University Hospitals, Inc. v. Casey[1]
    - *Held*, fee-shifting statutes do not provide for the payment of expert fees as part of attorneys' fees or costs unless there is "explicit statutory authority"[2]
      - NB: *Casey* recognized that attorneys' fees include out-of-pocket expenses that are either customary elements of an attorney's fee, such as costs for telephone, telecopier, air and local couriers, postage, photocopying, WESTLAW research, secretarial overtime, and counsels' travel expenses that are routinely billed to fee-paying clients as part of the provision of legal services[3]
    - Courts have held that neither Section 4 nor 16 provide for the payment of expert fees[4]
    - 28 U.S.C. § 1821
      - Provides that "[a] witness shall be paid an attendance fee of $40 per day for each day's attendance"—Applies to expert as well as lay witnesses

[1] 499 U.S. 83 (1991). Justice Scalia wrote the majority opinion in a 6-3 decision.
[2] *Id*. at 87 (relying on Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987)).
[3] See Brown v. Pro Football, Inc., 839 F. Supp. 905, 916 (D.D.C. 1993), *on reconsideration*, 846 F. Supp. 108 (D.D.C. 1994), *rev'd on other grounds*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996).
[4] *See, e.g.*, Louisiana Power & Light Co. v. Fischbach & Moore, Inc., No. CIV. A. 86-0594, 1993 WL 419871, at *3 (E.D. La. Oct. 8, 1993), *aff'd as modified sub nom.* Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319 (5th Cir. 1995); Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 789 F. Supp. 1288, 1299 (D.N.J. 1992); Oltz v. St. Peter's Cmty. Hosp., No. CV 81-271-H-JFB, 1992 WL 184239, at *5 (D. Mont. May 11, 1992)

Consolidation of Related Actions

- FRCP 42(a) provides that if actions before the court involve a common question of law or fact, the court may:
  1. join for hearing or trial any or all matters at issue in the actions;
  2. consolidate the actions; or
  3. issue any other orders to avoid unnecessary cost or delay
- Observations
  - Rule 42(a) is a codification of the trial court's inherent authority to control the conduct of the cases before it
  - Consolidation may be for trial of the entire case or only for separable common issues
  - The predicate for consolidation is a common question of law or fact that can be addressed through common evidence
    - An identity of the parties, or even of the defendants, in the various actions is not required

Consolidation of Related Actions

- Factors to consider: Courts generally weigh—
  - the saving of time and effort in the reduction of duplicative discovery or multiple trials
  - against any inconvenience, delay, confusion, or prejudice that consolidation would cause
- Procedural device
  - Rule 42(a) a procedural device for judicial economy, and so its exercise should not change the rights of parties in separate suits
  - In particular, a Rule 42(a) consolidation order does not—
    - merge the suits into a single cause,
    - change the rights of the parties, *or*
    - make those who are parties in one suit parties in another
- Appeal
  - Orders granting or denying motions to consolidate are interlocutory in nature and hence appeals are rare
  - When there is an appeal, the standard of review is abuse of discretion

Transfer of Venue

- 28 U.S.C. § 1404(a):

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

- Purposes
  - To prevent the waste of time, energy and money
  - To protect litigants, witnesses and the public against unnecessary inconvenience and expense
- Court may transfer an action even if the transferor court lacks personal jurisdiction over the defendant
  - But the transferee court must establish personal jurisdiction over the parties

Transfer of Venue

- Requirements:
  1. Both the original venue and the requested venue must be proper
     - If venue is not proper in the original venue, the proper motion is one under Rule 12(b)(3) to dismiss for lack of venue, not a motion to transfer
  2. Transfer must serve the interest of justice
     - Decided in the discretion of the court
- Moving party bears the burden of proof

Transfer of Venue

- Factors generally to be considered[1]
  - Private interest considerations include—
    - The plaintiffs' choice of forum, unless the balance of convenience is strongly in favor of the defendants (courts give special weight to this factor)
    - The defendants' choice of forum
    - Whether the claim arose elsewhere
    - The convenience of the parties
    - The convenience of the witnesses, but only to the extent that the witnesses may actually be unavailable for trial in one of the for a
    - The ease of access to sources of proof
  - Public interest considerations include—
    - The transferee court's familiarity with the governing laws
    - The relative congestion of the calendars of the potential transferee and transferor courts
    - The local interest in deciding local controversies at home
  - No one factor is dispositive

[1] *See, e.g.*, FTC v. Cephalon, Inc., 551 F. Supp. 2d 21, 25 (D.D.C. 2008).

Transfer of Venue

- Special considerations
  - Plaintiff's choice of forum
    - Courts give special weight to the plaintiff's private interest in choosing the forum and so have imposed a heavy burden on those who seek transfer under Section 1404(a)
    - Some courts have found that the government's choice of venue in an antitrust case is "entitled to heightened respect"
      - Although there are cases granting a motion to transfer that the government plaintiff has opposed
  - Risk of inconsistent adjudications
    - The existence of an ongoing case dealing with similar issues in another jurisdiction weighs very heavily in favor of a transfer under Section 1404(a)
- Appeal
  - Orders granting or denying motions to transfer venue are interlocutory in nature and hence appeals are rare
  - When there is an appeal, the standard of review is abuse of discretion

Multidistrict Litigation

- 28 U.S.C. § 1407 applies to actions filed different districts ("multidistrict litigation")
- Created Judicial Panel on Multidistrict Litigation ("MDL Panel")
  - Determines whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and
  - Selects the judge or judges and court assigned to conduct such proceedings.
- Purpose
  - Avoid duplication of discovery
  - Prevent inconsistent pretrial rulings
  - Conserve the resources of the parties, their counsel and the judiciary.
- Test:
  - Convenience of parties and witnesses
  - Promotion of the "just and efficient conduct of such actions"

Multidistrict Litigation

- MDL Panel
  - Consists of seven sitting federal judges, who are appointed to serve on the Panel by the Chief Justice of the United States
  - No two panel members may be from the same federal judicial circuit
- MDL Panel transfers are to a particular court and a particular judge
  - Judges are not randomly assigned through the "wheel"
  - Transferee court can exercise personal jurisdiction to the same extent as the transferor court
    - Consequently, transferee court must apply the law of the transferor court in determining personal jurisdiction over the parties
- Consolidation only for pretrial proceedings
  - Actions will be remanded to the original (transferor) court at or before the conclusion of pretrial proceedings for the remainder of the litigation
  - NB: Section 1407 not applicable to any action in which the United States is a complainant arising under the antitrust laws. (Section 1407(g)).

Multidistrict Litigation

- Remand
  - No firm test as to timing—MDL Panel looks to transferee court
  - Improper for the transferee court to transfer an action to itself under Section 1404(a)[1]
  - But parties can consent to hold trial in the transferee court and avoid remand
    - Recall that personal jurisdiction and challenges to improper venue are waivable—the parties can always submit to the personal jurisdiction and venue of the transferee court
- Consolidated complaints
  - Common for parties in an MDL to file a single "consolidated complaint"
  - Parties need to be clear whether a consolidated complaint is:
    - Simply a device to facilitate ease of the MDL's administration while in pretrial, *or*
    - A new "case or controversy" in the transferee district that supersedes the separate transferred actions, moots the MDL transfer, and allows the matter to proceed to trial in the transferee court

[1] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

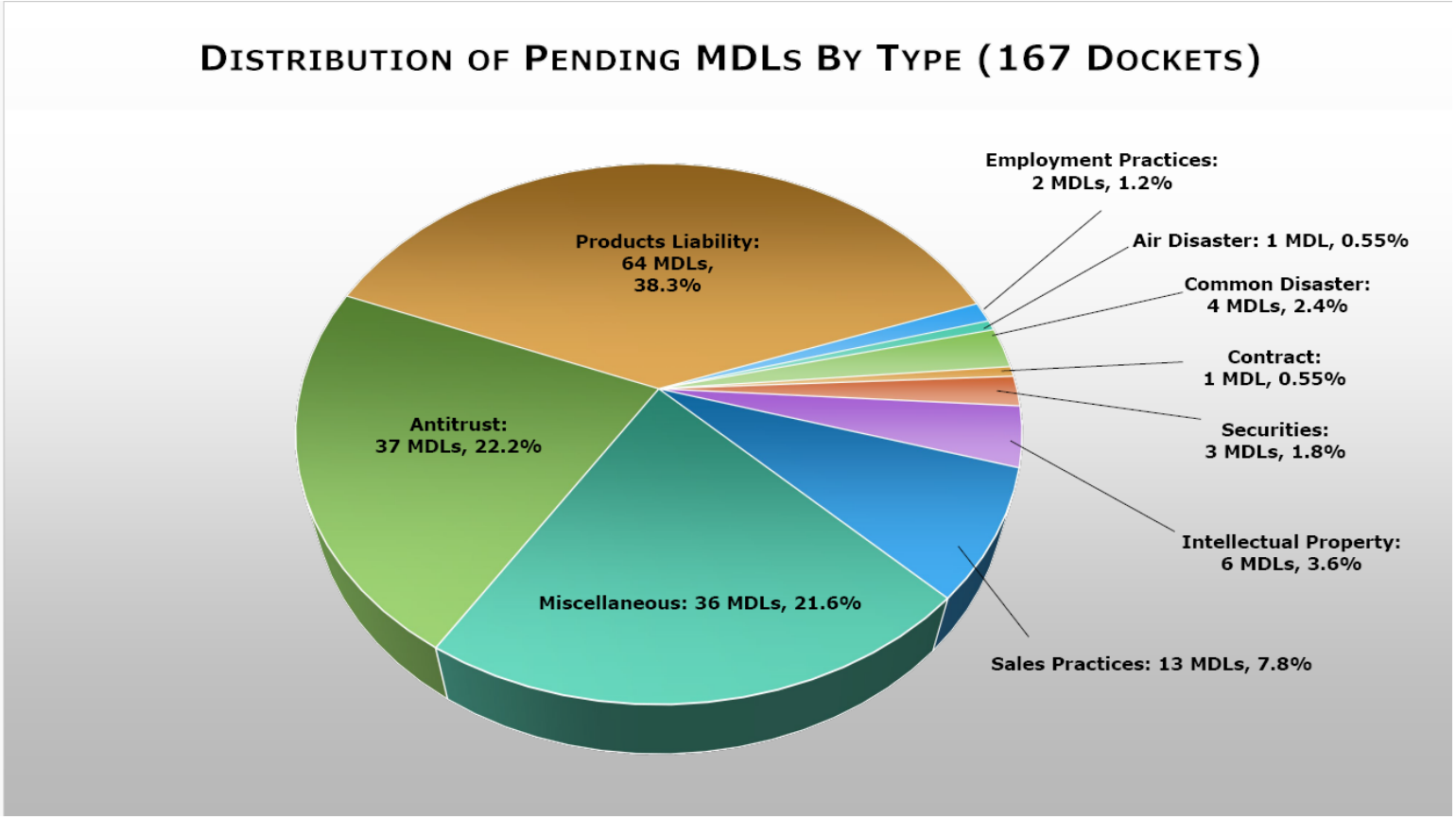
Multidistrict Litigation

- Jurisdiction and powers of transferee court
  - *Rule*: The transferee court has the jurisdiction and powers that the transferor district would have had in the absence of transfer[1]
  - Personal jurisdiction

[1] *In re* FMC Corp. Pat. Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976).

Multidistrict Litigation

- As of December 31, 2023:



Source: Calendar Year Statistics of the United States Judicial Panel on Multidistrict Litigation 11 (2023).

Multidistrict Litigation

- Some examples
  - *In re* Chocolate Confectionary Antitrust Litigation[1]
    - Involving 91 separate private actions
    - Consolidated in 2008 in the Middle District of Pennsylvania

[1] 801 F.3d 383 (3d Cir. 2015) (affirming grant of summary judgment to defendants) .

Multidistrict Litigation

United States Judicial Panel on Multidistrict Litigation **Report Date: 2/3/2025**

MDL Statistics Report - Docket Type Summary

MDL Filters:

Status: **Transferred**

Limited to **Active Litigations**

Docket Type Summary

Grouped by:

MDL Number

DOCKET	Transferee Judge	District	MASTER DOCKET	DATE FILED	Date Transferred	DATE CLOSED
Air Disaster						
3072 IN RE: Air Crash Into the Java Sea on January 9, 2021	Hilton, Claude M.	VAE	1:23-md-3072	01/26/2023	04/07/2023	
Number of **Air Disaster** Litigations Listed: **1**						
Antitrust						
1663 IN RE: Insurance Brokerage Antitrust Litigation	Cecchi, Claire C.	NJ	2:04-cv-5184	11/19/2004	02/17/2005	
1720 IN RE: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation	Brodie, Margo K.	NYE	1:05-md-1720	07/28/2005	10/19/2005	
1869 IN RE: Rail Freight Fuel Surcharge Antitrust Litigation	Howell, Beryl A.	DC	1:07-mc-489	06/06/2007	11/06/2007	
1917 IN RE: Cathode Ray Tube (CRT) Antitrust Litigation	Tigar, Jon S.	CAN	3:07-cv-5944	11/29/2007	02/15/2008	
2262 IN RE: Libor-Based Financial Instruments Antitrust Litigation	Buchwald, Naomi Reice	NYS	1:11-md-2262	05/13/2011	08/12/2011	
2311 IN RE: Automotive Parts Antitrust Litigation	Cox, Sean F.	MIE	2:12-md-2311	10/11/2011	02/07/2012	
2406 IN RE: Blue Cross Blue Shield Antitrust Litigation	Proctor, R. David	ALN	2:13-cv-20000	09/06/2012	12/12/2012	
2460 IN RE: Niaspan Antitrust Litigation	Savage, Timothy J.	PAE	2:13-md-2460	04/26/2013	09/17/2013	
2542 IN RE: Keurig Green Mountain Single-Serve Coffee Antitrust Litigation	Broderick, Vernon S.	NYS	1:14-md-2542	03/20/2014	06/03/2014	
2656 IN RE: Domestic Airline Travel Antitrust Litigation	Kollar-Kotelly, Colleen	DC	1:15-mc-1404	07/06/2015	10/13/2015	
2670 IN RE: Packaged Seafood Products Antitrust Litigation	Sabraw, Dana M.	CAS	3:15-md-2670	08/28/2015	12/09/2015	
2704 IN RE: Interest Rate Swaps Antitrust Litigation	Oetken, J. Paul	NYS	1:16-md-2704	02/26/2016	06/02/2016	
2724 IN RE: Generic Pharmaceuticals Pricing Antitrust Litigation	Rufe, Cynthia M.	PAE	2:16-md-2724	05/19/2016	08/05/2016	
2817 IN RE: Dealer Management Systems Antitrust Litigation	Pallmeyer, Rebecca R.	ILN	1:18-cv-864	11/07/2017	02/01/2018	
2862 IN RE: Diisocyanates Antitrust Litigation	Hardy, W. Scott	PAW	2:18-mc-1001	07/10/2018	10/03/2018	
2867 IN RE: Local TV Advertising Antitrust Litigation	Kendall, Virginia M.	ILN	1:18-cv-6785	07/31/2018	10/03/2018	
2895 IN RE: Sensipar (Cinacalcet Hydrochloride Tablets) Antitrust Litigation	Connolly, Colm F.	DE	1:19-md-2895	04/10/2019	07/31/2019	
2918 IN RE: Hard Disk Drive Suspension Assemblies Antitrust Litigation	Chesney, Maxine M.	CAN	3:19-md-2918	08/09/2019	10/08/2019	
2925 IN RE: Rail Freight Fuel Surcharge Antitrust Litigation (No. II)	Howell, Beryl A.	DC	1:20-mc-8	11/12/2019	02/06/2020	
2931 IN RE: Delta Dental Antitrust Litigation	Bucklo, Elaine E.	ILN	1:19-cv-6734	12/13/2019	03/27/2020	
2966 IN RE: Xyrem (Sodium Oxybate) Antitrust Litigation	Seeborg, Richard	CAN	3:20-md-2966	08/12/2020	12/16/2020	
2981 IN RE: Google Play Store Antitrust Litigation	Donato, James	CAN	3:21-md-2981	11/05/2020	02/05/2021	
2998 IN RE: Pork Antitrust Litigation	Tunheim, John R.	MN	0:21-md-2998	03/10/2021	06/09/2021	
3010 IN RE: Google Digital Advertising Antitrust Litigation	Castel, P. Kevin	NYS	1:21-md-3010	04/30/2021	08/10/2021	
3030 IN RE: Deere & Company Repair Services Antitrust Litigation	Johnston, Iain D.	ILN	3:22-cv-50188	02/25/2022	06/01/2022	

Multidistrict Litigation

2/3/25, 8:02 AM CM/ECF for JPML (LIVE)

3031 IN RE: Cattle and Beef Antitrust Litigation	Tunheim, John R.	MN	0:22-md-3031	03/10/2022	06/03/2022
3062 IN RE: Crop Protection Products Loyalty Program Antitrust Litigation	Schroeder, Thomas D.	NCM	1:23-md-3062	11/22/2022	02/06/2023
3071 IN RE: RealPage, Inc., Rental Software Antitrust Litigation (No. II)	Crenshaw, Waverly D.	TNM	3:23-md-3071	01/04/2023	04/10/2023
3097 IN RE: Concrete and Cement Additives Antitrust Litigation	Liman, Lewis J.	NYS	1:24-md-3097	12/19/2023	04/12/2024
3107 IN RE: Passenger Vehicle Replacement Tires Antitrust Litigation	Lioi, Sara	OHN	5:24-md-3107	02/27/2024	06/07/2024
3110 IN RE: Granulated Sugar Antitrust Litigation	Blackwell, Jerry W.	MN	0:24-md-3110	03/19/2024	06/07/2024
3113 IN RE: Apple Inc. Smartphone Antitrust Litigation	Neals, Julien Xavier	NJ	2:24-md-3113	03/30/2024	06/07/2024
3119 IN RE: Shale Oil Antitrust Litigation	Garcia, Matthew L.	NM	1:24-md-3119	05/08/2024	08/01/2024
3121 IN RE: MultiPlan Health Insurance Provider Litigation	Kennelly, Matthew F.	ILN	1:24-cv-6795	05/20/2024	08/01/2024

Number of **Antitrust** Litigations Listed: 34