담합의 소비자피해와 피해구제 제도 연구

(THE HARM CAUSED BY CARTELS AND COMPARATIVE STUDY ON THE CONSUMER DAMAGE REMEDY SYSTEM)

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공정거래위원회

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  - 어바인시 등 75 개 기관 구성원이 서포터즈로 참여
  - 한미 양국간에 걸쳐 발생하는 법률문제 연구 및 연구원 교류
  - US-Korea Law Journal, Laws of Korea 등의 간행물 발간

I. Introduction

In the Republic of Korea (hereinafter “Korea”), the Korean Fair Trade Commission (hereinafter “KFTC”) imposes administrative surcharges on antitrust law violators after investigation. Criminal prosecutors also prosecute violators of certain type of anti-competitive activities and ask courts to impose criminal punishment. In addition, victims of antitrust violations can also file damages recovery litigations in the civil courts.

The KFTC plays a central role to enforce antitrust law imposing huge administrative surcharges on antitrust law violators in Korea. Despite ever-increasing levels of corporate surcharges, antitrust violations have been constantly recurring and cartel activities have not been deterred. Therefore, many people argue that administrative enforcement is insufficient to suppress antitrust law violations and protect the consumers damaged by the antitrust violations.

The private right of action including treble damages and class actions has played an important effective role in detecting and punishing antitrust violators, in deterring future violations in the United States (hereinafter “U.S.”). In order to enhance the effectiveness of antitrust regulation in Korea, consumer damages need to be recovered effectively. I will analyze if the introduction of class actions and multiple damages are necessary in order not only to enhance the recovery of consumer damages by antitrust violations but also to suppress antitrust law violations in Korea.

The debate over the merits of the private antitrust remedy in the U.S. could provide valuable lessons to Korea. Accepting the advantages from the American system while at the same time avoiding its drawbacks is the key benefit to analyze the American's legal system. Through the comparative legal research on the U.S. and Korea's legal system, I will try to explore the direction of the desirable system and antitrust law enforcement in Korea. Observations about the U.S. experience about private antitrust remedy and litigation procedures such as treble damages and class actions may be useful in designing antitrust remedy scheme in Korea.

II. Overview of the Antitrust Remedy System in the U.S.

A. Public Enforcement

Since the 19th Century, the U.S. has relied on a complimentary combination of federal, state and private enforcers to protect the public from anticompetitive conduct. And the roles that have played by federal, state and private enforcers have evolved over the decades.[1]

Congress passed the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[2] In 1914, Congress passed the Federal Trade Commission Act, which created the FTC,

[1] Bill Baer, Ass't Att'y Gen., Antitrust Div., U.S. Dept. of Justice, Public and Private Antitrust Enforcement in the United States, Remarks as Prepared for Delivery to European Competition Forum 2014 (February 11, 2014), available at http://www.justice.gov/atr/public/speeches/303686.pdf.
[2] Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4-5 (1958).

and the Clayton Act. The Department of Justice (hereinafter "DOJ") and the Federal Trade Commission (hereinafter "FTC") as federal agencies share enforcement responsibility of enforcing the antitrust laws on the federal level.

The DOJ enforces the Sherman Act in both the civil and criminal context, while the FTC has exclusive authority to enforce Section 5 of the FTC Act. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and antitrust violators may be prosecuted by the DOJ. Criminal prosecution is typically limited to intentional and explicit violations, such as fixing prices or rigging bids. The DOJ and the FTC have concurrent statutory authority to enforce Sections 2, 3, 7, and 8 of the Clayton Act. The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Thus, although the FTC does not technically enforce the Sherman Act, it can challenge conduct constituting a Sherman Act violation.[3]

These duplicate antitrust enforcement powers require coordination between the two agencies to ensure efficient use of limited resources and fairness to subjects of antitrust investigations.[4]

State antitrust enforcement occurs at both the federal and state levels. Federal competition law applies to local cartel activity when the bad conduct has a nexus to

[3] FTC Guide to Antitrust Laws, available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws

[4] U.S. Department of Justice, Antitrust Division Manual, Fifth Edition, Last Updated August 2017.

interstate commerce, which it typically does.[5] Although the DOJ stands ready to refer cases involving local activity to state prosecutors,[6] local cartels in the U.S. nevertheless often are investigated and prosecuted by the DOJ.

The states more typically focus on securing monetary redress.[7] The competition laws of most states allow the imposition of civil penalties—essentially fines—rather than criminal prosecution.[8] In the U.S. system, states have the same rights as private parties to sue for damages when they are the victims of cartels.[9] At the federal level, state attorneys general have authority to file suits for damages or equitable relief both on behalf of the state or as *parens patriae* on behalf of individual consumers under Sections 4 and 16 of the Clayton Act.

B. Private Enforcement

Private parties can also bring suits to enforce the antitrust laws. Private parties can also seek court orders preventing anticompetitive conduct (injunctive relief) or bring suits under state antitrust laws. Private parties may seek damages and equitable relief for violation of the antitrust laws under Sections 4 and 16 of the Clayton Act, respectively. Section 4 of the Clayton Act permits private parties to recover treble

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

[6] U.S. Dept. of Justice, Antitrust Div., Protocol for Increased State Prosecution of Criminal Antitrust Offenses (1996).

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

[8] ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST ENFORCEMENT HANDBOOK 19 (2d ed. 2008).

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

damages for injury to "business or property by reason of anything forbidden in the antitrust laws."

To ensure that private parties have economic incentives to carry out costly antitrust litigation, federal antitrust law in the U.S. authorizes treble damages, plus attorneys' fees to prevailing plaintiffs. The private antitrust enforcement system in the U.S. is mainly based on actions for treble damages, opt-out class actions, jury trials, contingency fee agreements and an extensive discovery system.[10] The U.S. Supreme Court also has explained, "by offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'"[11]

There are several evidentiary limitations on Section 4 claims that distinguish antitrust claims from common law business torts. First, the plaintiff must allege and prove an "antitrust injury". Second, the plaintiff must establish injury to its business or property. Finally, the plaintiff must have standing.

The Third Circuit court has articulated several factors courts should consider to analyze standing: (1) The causal connection between the antitrust violation and the alleged injury and whether the harm was intended; (2) The nature of the alleged injury, including whether the plaintiff is a consumer or a competitor in the relevant

[10] OECD, RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT, Note by the Secretariat, 15 June 2015.
[11] Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

market; (3) The directness or indirectness of the alleged injury and whether the damages are highly speculative; (4) The potential for duplicative recovery and whether the apportionment of damages would be too complex; and (5) Whether the plaintiff is a direct or an indirect victim.[12]

A plaintiff must prove the alleged antitrust injury with a reasonable degree of certainty, whether through direct evidence, inference, or circumstantial evidence.[13] The burden of proof for damages, by contrast, is less rigorous, because a plaintiff is rarely able to establish precise damages. While damages amounts can be determined using a "just and reasonable estimate ... based on relevant data," they may not be based on "speculation or guesswork."[14]

The actual calculation of damages differs depending on the type of antitrust violation involved. In price-fixing cases, damages are usually the difference between the price paid and the price that would have been paid absent an antitrust violation.[15] When tying arrangements are at issue, damages are typically the difference between the price paid for the tied product and the price of the tied product on the open market.[16]

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[12] In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1165 (3d Cir. 1993) (citing Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 545 (1983)).
[13] J.Truett Payne Co. v Chrysler Motors Corp., 451 U.S. 557. 565-68 (1981).
[14] Zenith Radio corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).
[15] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968).
[16] MCA Television Ltd. v. Public Interest Corp., 171 F.3d 1265 (11th Cir. 1999); Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 890 (10th Cir. 1997).

C. Litigating Antitrust Claims

1. Pleading

The Supreme Court's decision in Bell Atlantic Corp. v. Twombly[17] effected a sea change in antitrust procedure. The plaintiffs had brought a class action lawsuit against several telecommunications companies under Section 1 of the Sherman Act, but the Court held that they had not alleged "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."

In so holding, the Court raised the bar from the old “any set of facts” pleading standard in Conley v. Gibson, [18] adopting a stricter, "plausibility" standard and this new standard made it more difficult for plaintiffs to defeat a motion to dismiss. The applicability of this heightened standard was later extended to all federal civil actions outside of antitrust cases in Ashcroft v. Iqbal.[19]

2. Jurisdiction

The Sherman Act only applies to restraints that have significant impact on interstate commerce. Therefore, federal courts have exclusive jurisdiction over antitrust cases

[17] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
[18] Conley v. Gibson, 355 U.S. 41 (1957).
[19] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

brought under the Sherman act. State laws regulate local restraints on competition and state courts can decide claims brought under those laws.

As in all litigation, the court must have personal jurisdiction over the defendant or defendants in an antitrust lawsuit. Personal jurisdiction must be consistent with the constitutional due process considerations established in "minimum contacts"[20] test of International Shoe.[21]

Service of process on individual defendants (including partnerships and other non-corporate entities) is governed by Rule 4 of the Federal Rules of Civil Procedure.[22] Under Section 12 of the Clayton Act, a corporate defendant may be served with process in the judicial district where it is "an inhabitant" or where it "may be found or transacts business."[23]

3. Class Actions

Antitrust suits may be brought as class actions. Rule 23(a) of the Federal Rules of Civil Procedure provides that a class representative must meet the following requirements to obtain class certification: (1) Numerosity—the class must be so numerous that joinder of all members is impracticable, (2) Commonality—there must

[20] Minimum contact is a term used in the law of civil procedure to determine when it is appropriate for a court in one state to assert personal jurisdiction over a defendant from another state.
[21] International Shoe Co. v. Washington, 326 U.S. 310 (1945).
[22] FED. R. CIV. P.4.
[23] § 12 Clayton Act, 15 U.S.C. § 22.

be questions of law or fact common to the class, (3) Typicality—the claims or defenses of the class representative must be typical of those of the class, and (4) Adequacy—the class representative must be able to fairly and adequately protect the interests of the class.

In addition, the class representative must satisfy one of four alternative criteria set forth in Rule 23(b) that measure the appropriateness of maintaining a class action. Counsels are well advised to move for class certification during the early stages of litigation because Rule 23(c)(1) requires that the class certification decision be made "[a]s soon as practicable" after commencement of the action.

4. Discovery

Prior to trial, the parties in private antitrust cases may discover information from each other and from third parties related to the allegations or defenses in the case. This ensures that all parties understand the nature and scope of the claims.

The rules that apply to this discovery process in antitrust cases are the same rules of discovery applied in other civil cases. Therefore, the Federal Rules of Civil Procedure and the Federal Rules of Evidence govern discovery in civil antitrust cases. The parties gather information through mandatory disclosures, including written

interrogatories, information production requests, requests for admissions, depositions, and expert disclosures.[24]

Generally, of particular interest to the practitioner are protective orders and qualifications of expert witnesses in antitrust cases. A party may obtain a protective order to prevent production of confidential information such as trade secrets and other sensitive material not generally available to the public pursuant to rule 26(c): "Upon a motion by a party or by the person from whom discovery is sought, and for good cause shown, the court. . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ...."[25]

Due to the economic underpinnings of antitrust law and theory, expert testimony, particularly from economists, plays a central role in antitrust litigation. Expert economists can help define the relevant market, determine market share, calculate damages, and offer testimony on a number of other important issues. Expert testimony must be both reliable and relevant,[26] and the trial court should function as a gatekeeper so that expert testimony can meet these standards.

[24] OECD, RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT, Note by the Secretariat, 15 June 2015.
[25] FED. R. Civ. P. 26(c).
[26] Federal Rules of Evidence 702

III. Comparative Analysis on Antitrust Sanctions

A. The United States

1. Public Enforcement

a) Overview of the Current System

The DOJ may enforce Sherman Act violations either criminally or civilly. There are some situations that require considerable deliberation when deciding to proceed with criminal or civil investigation. In general, current policy is to proceed with criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations.[27]

In order to impose sanctions, the DOJ must either prove its case in a Federal court or negotiate a plea agreement with the defendant. The final fine imposed on the undertaking is determined by the court. Most of convictions for antitrust violations are the result of plea agreements between the DOJ and the defendant. A defendant may seek to reach an agreement at any stage of the investigation, under the condition that he admits guilt and cooperates with the DOJ.

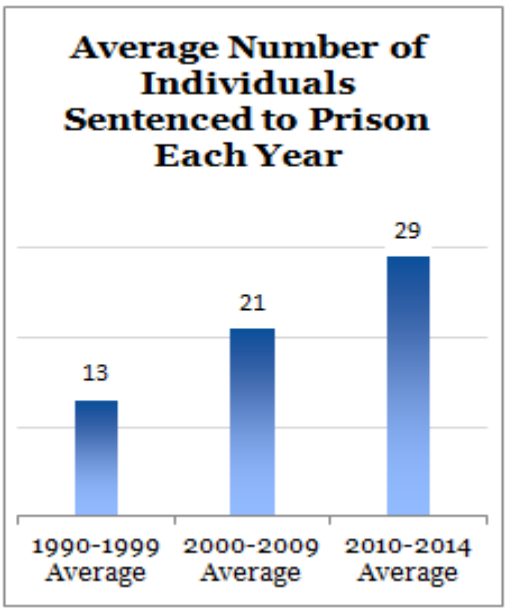
[27] U.S. Department of Justice, Antitrust Division Manual, Fifth Edition (Last Updated August 2017) Ch. 3 C.1.

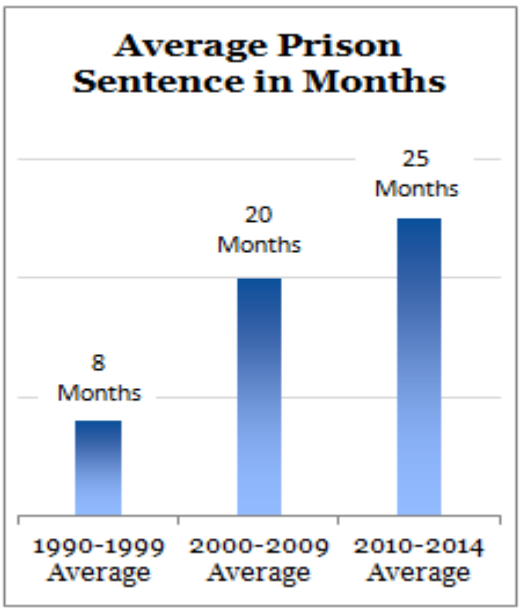
The statute governing fines for antitrust violations was first amended in 1987 to provide the option to double the greater of the defendant's gain or the victims' losses.[28] At this time, antitrust fines set without using this alternative option were limited to $100,000 for individuals and $1 million for corporations.[29]

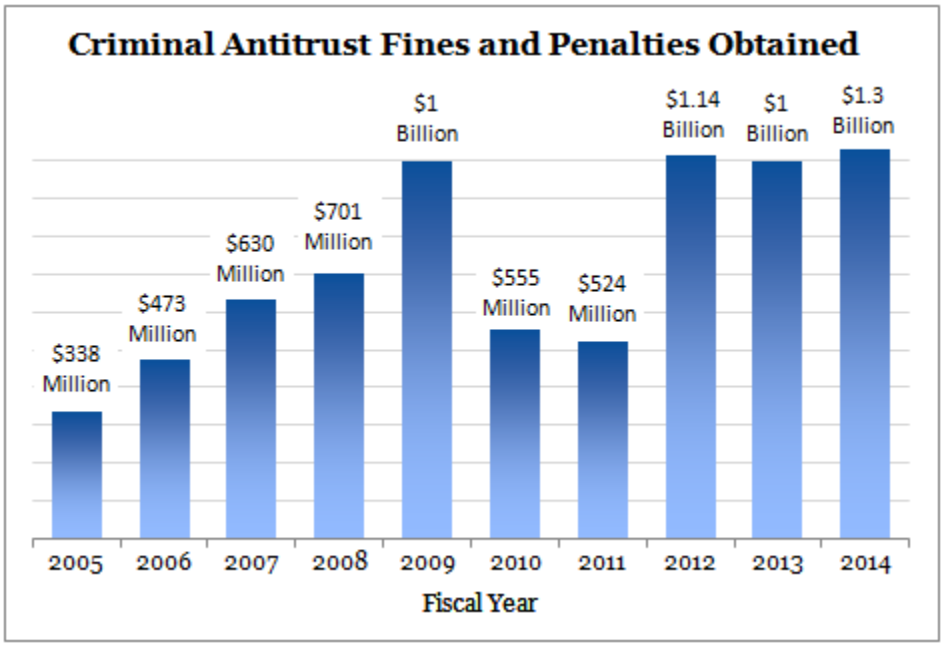
It was amended again in 1990 to increase the maximum personal fine to $350,000 and the maximum corporate fine to $10 million,[30] and again in 2004 to increase the maximum personal fine to $1million, the maximum corporate fine to $100 million and the maximum jail sentence from three years (which it had been since 1974) to ten years.[31]

The DOJ releases data about the number of individuals sentenced to prison and antitrust criminal fines annually. This data shows a considerable increase in antitrust criminal convictions and financial penalties imposed in recent years.

[28] 18 U.S.C. § 3571.
[29] 15 U.S.C. § 1 (1989) (amended 1990).
[30] Antitrust Amendments Act of 1990, Pub. L .No. 101-588, 104 Stat. 2879 (codified at 15 U.S.C. § 1 (2000)).
[31] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004) (codified as amended at 15 U.S.C. §§ 1-3).







Source: Division Update Spring 2015 (DOJ website)

Sherman Act Violations – highest corporate fines

Defendant	FY	Product	Fine ($ Millions)	Geographic Scope	Country
Citicorp	2017	Foreign currency exchange	$925	International	U.S.
Barclays, PLC	2017	Foreign currency exchange	$650	International	United Kingdom Of Great Britain And Northern Ireland
JPMorgan Chase & Co.	2017	Foreign currency exchange	$550	International	U.S.
AU Optronics Corporation of Taiwan	2012	Liquid Crystal Display (LCD) Panels	$500	International	Taiwan
F. Hoffmann-La Roche, Ltd.	1999	Vitamins	$500	International	Switzerland
Yazaki Corporation	2012	Automobile Parts	$470	International	Japan
Bridgestone Corporation	2014	Anti-vibration rubber products for automobiles	$425	International	Japan
LG Display Co., Ltd LG Display America	2009	Liquid Crystal Display (LCD) Panels	$400	International	Korea
Royal Bank of Scotland	2017	Foreign currency exchange	$395	International	Scotland (United Kingdom)
Société Air France and Koninklijke Luchtvaart Maatschappij, N.V.	2008	Air Transportation (Cargo)	$350	International	France (Société-Air France) The Netherlands (KLM)
Korean Air Lines Co., Ltd.	2007	Air Transportation (Cargo & Passenger)	$300	International	Korea
British Airways PLC	2007	Air Transportation (Cargo & Passenger)	$300	International	UK
Samsung Electronics Company, Ltd. Samsung Semiconductor, Inc.	2006	DRAM	$300	International	Korea
BASF AG	1999	Vitamins	$225	International	Germany
CHI MEI Optoelectronics Corporation	2010	Liquid Crystal Display (LCD) Panels	$220	International	Taiwan
Furukawa Electric Co. Ltd.	2012	Automotive Wire Harnesses & Related Products	$200	International	Japan

Source: Sherman Act Violations Yielding a Corporate Fine of $10 Million or More (DOJ website)

b) History of the Sentencing Guidelines

In 1977 the DOJ published Guidelines for Sentencing consisting of base sentences along with aggravating and mitigating factors.[32] In 1984 Congress passed the Sentencing Reform Act, which created a Sentencing Commission with the mandate to develop sentencing guidelines.[33] One of the main objectives of Congress was to reduce unwarranted sentencing disparities between similarly situated defendants by framing the sentencing judge's discretion.

The Sentencing Commission implemented the Sentencing Guidelines and promulgated specific Antitrust Sentencing Guidelines in 1987[34] with the aim to provide a definite, transparent, uniform and respectful of the principle of proportionality process of sentencing offenders.[35]

These were most recently revised by the Antitrust Penalty Enhancement and Reform Act of 2004, which increased the maximum penalty for corporations ten-fold (from 10 million to $100 million fines) and penalties for individuals more than three-fold (from 3 years to 10 years imprisonment, and from $350,000 to $1 million in fines).

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[32] Guidelines for Sentencing: Recommendations in Felony Cases under the Sherman Act (24 February 1977).
[33] Sentencing Reform Act of 1984, pub. L. No. 98-473, tit. II, Ch. 2, 98 Stat. 1987.
[34] Thide, Frederick, Judicial Policy Nullification of the Antitrust Sentencing Guideline, 54 B.C. L. Rev. 861 (April 31, 2012).
[35] US Sentencing Commission, Sentencing Guidelines and Policy Statements (April 13, 1987), reprinted in 52 fed. Reg. 18,046 (May 13, 1987).

2. Private Enforcement

Subject to certain standing requirements, private plaintiffs may bring civil actions for violations of the federal antitrust laws. Private damages against cartels usually are brought as class actions, though individual class members have the right to opt out and proceed with separate litigations.[36]

According to the Administrative Office of the U.S. Courts, private plaintiffs filed 1,022 antitrust cases in federal district courts in 2016. The number of private cases filed each year has varied over the past decade from under 500 to over 1,300.[37]

B. European Union

1. Public Enforcement

Public enforcement is the core of antitrust enforcement in the EU to ensure effective deterrence by detecting and sanctioning infringements of the competition rules in Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU).[38]

The European Commission increased fines to improve deterrence in 1998.[39] Under the 1998 Fining Guidelines, the first step was to categorize the gravity of an

[36] Bill Baer, Ass't Att'y Gen., Antitrust Div., U.S. Dept. of Justice, Public and Private Antitrust Enforcement in the United States, Remarks as Prepared for Delivery to European Competition Forum 2014 (February 11, 2014).
[37] http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary
[38] OECD, RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT, Note by the Secretariat, 15 June 2015.

infringement (minor/serious/very serious)[40] and this fine level was to be adjusted for the duration of the infringement (short/medium/long)[41] and then for aggravating or attenuating circumstances.[42] These Guidelines applied the cap of 10% of the undertaking's annual worldwide turnover in the preceding accounting year, and took account of certain objective factors such as a specific economic context and any economic or financial benefit derived by the offenders.[43]

Under the 2006 EC Guidelines, in most cases hard-core cartel offenses warrant baseline fines up to 30 percent of relevant sales. The 2006 Fining Guidelines significantly differ from the 1998 Fining Guideline, in the way in which the basic amount is calculated (the value of sales is the starting point) and the duration is taken into account (by multiplying the basic amount by the number of years of duration, rather than merely adjusting the basic amount).[44] The introduction of the 1998 and 2006 Fining Guidelines have led to a considerable increase in the fines imposed by the Commission.[45]

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[39] Ioannis Lianos & Frederic Jenny, An Optimal and Just Financial Penalties System for Infringements of Competition Law: A Comparative Analysis (May 1, 2014). CLES Research Paper No. 3/2014.

[40] "minor" (vertical agreements, limited market impact, limited geographic scope), "serious" (horizontal agreements, but also some abuses of dominant positions, wider market impact, wider geographic scope), "very serious" (horizontal hardcore agreements, clear-cut abuses of a dominant position).

[41] "short" (usually shorter than 1 year), "medium" (usually between 1 and 5 years), "long" (longer than 5 years)

[42] 1998 Fining Guidelines, section 2 and 3.

[43] 1998 Fining Guidelines, section 5 (a) and (b).

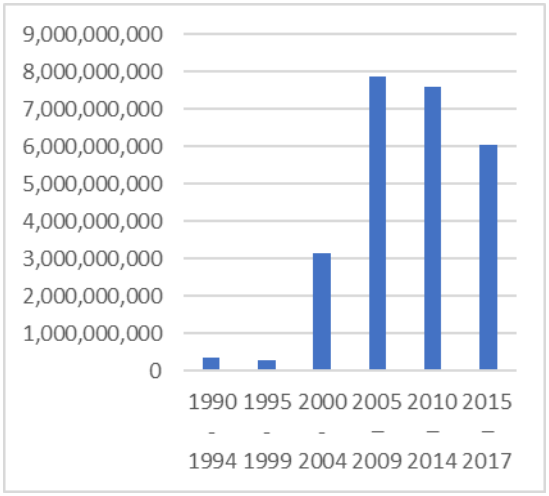
[44] Guidelines on the Method of Setting Fines, Official Journal C 210, Sept. 1, 2006; UK Office of Fair Trading, An assessment of discretionary penalties regimes (October 2009).

[45] http://ec.europa.eu/competition/cartels/statistics/statistics.pdf (last updated 22 November 2017)

Cartel Fines imposed (adjusted for Court judgments) - period 1990 – 2017

Last change: ++22 November 2017++

Period	Amount in €*
1990 - 1994	344 282 550,00
1995 - 1999	270 963 500,00
2000 - 2004	3 157 348 710,00
2005 – 2009	7 863 307 786,50
2010 – 2014	7 598 863 580,00
++2015 – 2017++	6 022 203 000,00
Total	25 256 969 126,50



Ten highest cartel fines per case (since 1969)

Last change: ++10 November 2017++

Year	Case name	Amount in €*
2016/2017	Trucks	3 807 022 000
2012	TV and computer monitor tubes	1 409 588 000
2013/2016	Euro interest rates derivatives (EIRD)**	1 310 039 000
2008	Carglass	1 185 500 000
2014	Automotive bearings	953 306 000
2007	Elevators and escalators	832 422 250
2001	Vitamins	790 515 000
2010/2017	Airfreight (incl. re-adoption)	785 345 000
2013/2015	Yen interest rate derivatives (YIRD)	669 719 000
2007/2012	Gas insulated switchgear (incl. re-adoption)	675 445 000

Ten highest cartel fines per undertaking (since 1969)

Last change: ++27 September 2017++

Year	Undertaking	Case name	Amount in €*
2016	Daimler	Trucks	1 008 766 000
2017	Scania	Trucks	880 523 000
2016	DAF	Trucks	752 679 000
2008	Saint Gobain	Carglass	715 000 000
2012	Philips	TV and computer monitor tubes	705 296 000 of which 391 940 000 jointly and severally with LG Electronics
2012	LG Electronics	TV and computer monitor tubes	687 537 000 of which 391 940 000 jointly and severally with Philips
2016	Volvo/Renault Trucks	Trucks	670 448 000
2016	Iveco	Trucks	494 606 000
2013	Deutsche Bank	Euro interest rate derivatives (EIRD)	465 861 000
2001	F. Hoffmann-La Roche	Vitamins	462 000 000

* Amounts adjusted for changes following judgments of the Courts (General Court and European Court of Justice) and / or amendment decisions

Fines Guidelines 2006 – fines as percentage* of global turnover

Last update ++12 December 2016++

Fines Guidelines 2006 – fines imposed on undertakings as percentage of global turnover (incl. immunity applicants)											
percentage	0-0.99%	1-1.99%	2-2.99%	3-3.99%	4-4.99%	5-5.99%	6-6.99%	7-7.99%	8-8.99%	9-9.99%	total
undertakings fined	222	38	19	13	16	9	9	11	5	24	366
	60.66%	10.38%	5.19%	3.55%	4.37%	2.46%	2.46%	3.01%	1.37%	6.56%	

Fines Guidelines 2006 – fines imposed on undertakings as percentage of global turnover (excl. immunity applicants)											
percentage	0-0.99%	1-1.99%	2-2.99%	3-3.99%	4-4.99%	5-5.99%	6-6.99%	7-7.99%	8-8.99%	9-9.99%	total
undertakings fined	168	38	19	13	16	9	9	11	5	24	312
	53.85%	12.18%	6.09%	4.17%	5.13%	2.88%	2.88%	3.53%	1.60%	7.69%	

* The percentages of fines imposed on undertakings are considered per cartel infringement. Certain cases may comprise several infringements for which multiple counting of undertakings is considered.

2. Private Enforcement

The Articles 101 and 102 TFEU create rights and obligations which the national courts must protect against the individuals concerned.[46] In this respect, the Court of Justice of the EU made it clear that those who suffered harm as violations of EU competition rules have the right to claim full compensation before national courts.[47]

Private antitrust enforcement in the EU has been less prominent so far. However, recent legislative changes could make private enforcement more and more important [48] The European Parliament and the Council adopted Directive 2014/104/EU (the Directive),[49] which aims to promote private enforcement by eliminating the legal barriers of Member States, which made it difficult to bring actions for damages before the national courts.

C. United Kingdom

1. Public Enforcement

[46] Case C- 127/73 BRT and SABAM ECLI:EU:C:1974:6; Case C-453/99 Courage and Crehan ECLI:EU:C:2001:465; Joined Cases C-295/04 to C-298/04 Manfredi and Others ECLI:EU:C:2006:461;
[47] Case C-453/99 Courage and Crehan ECLI:EU:C:2001:465; Joined Cases C-295/04 to C-298/04 Manfredi and Others ECLI:EU:C:2006:461;
[48] OECD, RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT, Note by the Secretariat, 15 June 2015.
[49] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1.

Section 36(1) and (2) of the Competition act 1998 authorized the Office of fair Trading (OFT) to impose a fine on an undertaking in respect of an infringement of the Chapter I, Chapter II prohibition of the Competition Act 1998, as well as EU competition law.[50] The Competition Act 1998 also required the OFT to publish guidance on how to determine the appropriate fines.[51] On 1 April 2014, the Competition and Markets Authority (CMA) became the UK's national competition enforcement agency taking over the competition functions previously performed by the OFT and Competition Commission.

When making a decision that an undertaking infringed the Chapter I or Chapter II, the CMA may impose a fine up to a maximum of 10% of the worldwide turnover[52] of the undertaking concerned in the previous business year, provided it is satisfied that the infringement committed either intentionally or negligently.[53]

The CMA also adopted the guidance published by the OFT as to the appropriate fines.[54] Factors to be considered in determining the level of a fine included seriousness and duration of the infringement.

[50] On 23 June 2016, a referendum was held in the UK in which the electorate voted in favor of leaving the EU. The vote has no immediate legal effect and for now the UK remains subject to EU law, including EU-implemented sanctions regimes and export controls.
[51] Section 38(1) Competition Act 1998
[52] Section 36(8) of the Competition Act 1998. Also Order 2000, SI 2000/309, which specifies how the turnover of the undertaking is to be determined for the purposes of section 36(8) of the Competition Act 1998, as amended by the Competition Act 1998 (Determination for Turnover of Penalties)(Amendment) Order 2004, SI 2004/1259.
[53] Section 36(3) of the Competition Act 1998.
[54] Guidance as to the appropriate amount of a penalty (September 2012, OFT423), adopted by the CMA

Adjustments to the level of the fine may also be made for aggravating and mitigation factors such as cooperating or interfering with the CMA's investigation, leading or reactive role in the infringement, involvement of directors or senior management, repeat infringements and the intentional or negligent nature of the infringement.[55]

In determining the amount of a fine, the CMA will also consider factors such as the purpose of deterring future infringements, ensuring that the penalty is not disproportionate or excessive overall, whether a penalty has been imposed by the EC or in another Member State and whether the undertaking has a leniency agreement or has reached settlement with the CMA.

When dealing with an infringement of the Chapter I, Chapter II that also has effects in another Member State, the CMA may, with the consent of the Member State concerned, consider the effects of the infringement in that Member State. In imposing a penalty under the EC Act or Chapter I, Chapter II, the CMA must consider fines imposed by the EC or national competition authorities.[56]

[55] The OFT Guidance of 2012 indicates that a financial penalty imposed by the OFT (now CMA) under section 36 of the Competition Act 1998 will be calculated following a six-step approach:
Step 1: calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking
Step 2: adjustment for duration
Step 3: adjustment for aggravating or mitigating factors
Step 4: adjustment for specific deterrence and proportionality
Step 5: adjustment if the maximum penalty of 10 per cent of the worldwide turnover of the undertaking
Step 6: adjustment for leniency and/or settlement discounts.

[56] Slaughter and May, An overview of the UK competition rules (June 2016).

2. Private Enforcement

The UK enacted legislative reforms designed to facilitate private damages claims in October 2015. These changes, introduced by the Consumer Rights Act 2015 (CRA15), are intended to strengthen the private antitrust enforcement.

The UK private antitrust enforcement is expected to increase significantly after the reforms. A main aspect of the reforms is the new opt-out collective actions regime under CRA15 designed to ensure that small businesses and consumers are easily compensated for damages cause by antitrust violations.[57]

D. Germany

1. Public Enforcement

The administrative fining system[58] in Germany has undergone several changes since its inception and the modernization of the antitrust rules on the EU level was implemented with the Seventh Amendment to the German Act against Restraints of Competition (GWB), which took effect on 1 July 2005.

The legislators sought to make German competition law in conformity with the EC law.[59] Since this amendment, the absolute amount (now €1 million) is de facto only

[57] OECD, RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT, Note by the Secretariat, 15 June 2015.
[58] In addition to the administrative fines enforcement, Germany prosecutes bid rigging both under the general fraud provision (§ 263 Strafgesetzbuch (Criminal Code, StGB)
[59] Government Bill, 12 August 2004, BUNDESTAGS-DRUCKSACHE

of relevance to individuals who are fined, whereas for undertakings and associations it is 10% of their annual turnover that is the relevant threshold.

The German Bundeskartellamt (Federal Cartel Office, BKartA) focused on the implementation of the reform. In late August 2006, the Bundeskartellamt announced a reorganization. In the cartel enforcement area, the Bundeskartellamt released new leniency guidelines clarifying and revising the existing leniency rules.

The Bundeskartellamt also published the first set of fining guidelines in 2006,[60] setting out the enforcement policy to impose fines under the new statutory provision. § 81(4) GWB stipulates, as does Article 23 Regulation 1/2003 in EU law, that the seriousness and duration of the infringement must be taken into account.

Since then, the constitutionality of this provision had been hotly debated over 10% threshold. In 2013, the Federal Court of Justice in Grauzement accepted the constitutionality of this fining regime with the modification that the 10% threshold is a maximum fine rather than a mere cap.[61] To take account of the principles espoused in the Grauzement decision, the Bundeskartellamt revised its 2006 Guidelines in 2013.[62]

[60] Bekanntmachung Nr. 38/2006 über die Festsetzung von Geldbußen nach § 81 Abs. 4 Satz 2 des Gesetzes gegen Wettbe- werbsbeschränkungen [GWB] gegen Unternehmen und Unternehmensvereinigungen – Bußgeldleitlinien, 15 September 2006.
[61] BGH, 26 February 2013 – KRB 20/12, WuW/E DE-R 3861
[62] Bundeskartellamt, Guidelines for the setting of fines in cartel administrative offence proceedings, June 25, 2013.

2. Private Enforcement

With the Seventh Amendment to the GWB effective on July 1, 2005, the German legislature amended the GWB to facilitate private antitrust enforcement. Until then, private enforcement focused mainly on anti-competitive behavior by dominant undertakings, whereas there had been few private damages claims against hard-core cartels.[63]

The private antitrust litigation in Germany is governed by national provisions since the EC laws do not set out the rules for private antitrust litigation nor for the relevant procedural rules for such litigation under articles 81 and 82 of the EC Treaty.[64] Consequently, the Amendment caused major changes in the rules on private antitrust enforcement before the German courts.

E. Korea

1. Public Enforcement

Korean antitrust law (the Monopoly Regulation and Fair Trade Act, "MRFTA") was enacted on December 23, 1980 and became effective on April 1, 1981 and the FTC was established in conformity with the law. The FTC is vested with the authority to

[63] Klaus-Jürgen Michaeli, Private enforcement of competition rules Germany, 21 November 2005.
[64] Alexander Rinne & Tatjana Mühlbach, Germany: Private Antitrust Litigation, Last Updated 24 September 2009, www.mondaq.com/.../Antitrust+Competition/Private+Antitrust+Litigation

issue corrective actions and to impose administrative surcharges. Surcharges under the MRFTA are stipulated in conjunction with corrective action as a means of administrative enforcement for almost all violations of the law.

The FTC may issue a corrective order which may include (i) an order to suspend or to cancel unlawful activities, transactions or agreements, (ii) an order to publicize the violation in the media, and (iii) any other actions necessary to correct the violation.

The FTC may impose administrative surcharges on certain types of anti-competitive activities such as abuse of dominant market position[65], conspiracy[66] and unfair trade practices[67]. Surcharge may be imposed up to 10% of the turnover of the relevant product during the relevant period. In the absence of sales turnover where there is no revenue, an amount of surcharge not exceeding 1 billion won may be imposed.

The MRFTA Article 55-3. (1) enumerates the contents and degree of the violation, the period and frequency of the violation, and the amount of the profits derived from the violation as the grounds for the compulsory consideration to be taken into consideration in imposing the surcharge.

[65] The FTC may impose on the market dominant undertaking that has abused its dominant position an amount of surcharge not exceeding 3 percentage of sales turnover (or the operating revenue in the case of the undertaking). In the case of circumstances wherein sales turnover does not exist or it is difficult to estimate the sales turnover, an amount of surcharge not exceeding 1 billion won may be imposed.

[66] The FTC may impose on the undertaking that has violate Article 19 (1) (Prohibition of Unjust Concerted Practices) an amount of surcharge not exceeding 10 percentage of sales turnover. In the absence of sales turnover, an amount of surcharge not exceeding 2 billion won may be imposed.

[67] The FTC may impose on the undertaking that has violate Article 23 (1) (except No. 7) an amount of surcharge not exceeding 2 percentage of sales turnover. In the absence of sales turnover, an amount of surcharge not exceeding 500 million won may be imposed.

Violations of competition law may be subject to criminal sanctions when the FTC files the criminal report. The FTC shall file a criminal report before the Prosecutor General if any conduct in violation of the Act apparently constitutes serious offence in Articles 66 and 67 (certain type of anti-competitive activities including abuse of dominant market position and conspiracy) that causes a significant harm to competition.

2. Private Enforcement

Korea competition law is enforced mainly by public enforcement and the measures taken are administrative sanctions. Although private damages may be brought before the court, treble damages are not permissible.

Under Korea civil law, which governs liability for damages, victims bear the burden of proof to prove the defendant's intent, negligence and specific damages amount. To facilitate damage actions, Korea competition law prescribes that the burden of proof is on the infringer to prove that he/she or it violated the provision without any deliberation or any negligence.[68] The law also stipulates that in situations where it is extremely difficult to determine the amount of damages, the court may recognize reasonable amount of damages based on the gist of entire arguments and the results of investigation.[69]

[68] Article 56 of the MRFTA
[69] Article 57 of the MRFTA

IV. Reflections on American Private Treble Damages Remedy

Mandatory treble damages are a key ingredient of the private antitrust enforcement under the U.S. antitrust laws.[70] Recognizing that government resources were limited, Congress sought to create a private enforcement mechanism that would prevent law violations, deprive them of the interests of their illegal activities, and provide ample compensation to the victims of antitrust violations.[71]

A. Features

Under section 4 of the Clayton Act, "any person injured in his business or property by reason of anything forbidden in the antitrust laws" may sue for recovery in federal court. Section 4 further provides that: (1) the litigants are entitled to a trial by jury; (2) any damage award from the jury is automatically trebled by the court; and (3) a prevailing antitrust plaintiff (but not a prevailing defendant) is entitled to reasonable attorneys' fees as well as treble damages. In addition, the parties are entitled to broad pretrial discovery under the Federal Rules of Civil Procedure.[72]

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[70] Cavanagh, Edward D., The Private Antitrust Remedy: Lessons from the American Experience (2010). 41 Loy. L.J. 629 (2010).

[71] Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) ("Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.").

[72] § 4 Clayton Act, 15 U.S.C. § 15(a).

B. The Rationale of the Private Treble Damages Remedy

1. Compensation

Treble damages remedy ensures that victims of antitrust violations would receive sufficient compensation.[73] Public enforcement measures generally do not provide any monetary recovery for individual losses. The Court also noted that this remedy was also designed to compensate victims of antitrust violations for their injuries.[74]

Moreover, no matter how diligent enforcers can be, they are unable to reveal all antitrust violations because there are many difficulties and costs to detect and prosecute illegal acts due to their typically covert nature. It is therefore essential to create incentives to investigate and prosecute violations.[75] If antitrust recoveries were limited to actual damages, private parties would have little incentive to sue because antitrust litigation is both complex and costly, making it an even riskier enterprise than other forms of litigation.

In addition, actual damages would not provide ample compensation in all cases. Therefore, mandatory trebling seeks to provide rough justice to antitrust victims.[76]

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[73] Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (noting that treble damages "would provide ample compensation to victims of antitrust violations").
[74] Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977).
[75] Frank H. Easterbrook, Detrebling Antitrust Damages, 28 J. L. & ECON. 445, 451 (1985).
[76] Robert H. Lande, Are Antitrust "Treble" Damages Really Single Damages? 54 Ohio St. L.J. 115 (1993).

2. Deterrence

Mandatory trebling serves to deter antitrust violations. The Supreme Court has observed the "treble-damages provision wielded by the private litigant . . . a chief tool in the antitrust enforcement scheme," because the treble damage threat creates "a crucial deterrent to potential violators."[77] In enacting the antitrust laws, Congress recognized that the government lacked sufficient resources to detect and prosecute all antitrust violations and that mandatory trebling would play a role in strengthening the prosecution of the antirust violators and enhancing the goals of antitrust enforcement.

Another important point is that the treble damages remedy provides an incentive for private actions to proceed even when the DOJ, the FTC, or state enforcers decide not to enforce for whatever reason. This leads to increase the probability that antitrust violations are detected and prosecuted successfully, and as a result, illegal conduct is deterred. In this context, the goals of strengthening compensation and deterrence are complementary.

Antitrust violators may be more afraid of civil liability even than criminal sanctions, making them lose the benefits of the DOJ's Leniency Program. That realization led

[77] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985).

Congress to limit the civil liability of Leniency Program participants to actual damages.[78]

Moreover, from the standpoint of deterrence, multiplying actual damages is indispensable because many antitrust violations are covert; hence, they are difficult to detect and prosecute. Theoretically, when a defendant weighs the potential gains of illegal behaviors against the accompanying risk of detection and prosecution, the higher the likelihood of detection, the less likely it is to benefit from illegal conduct.

3. Disgorgement

The treble damages remedy reduces the likelihood that antitrust violators will reap the benefits from their violations.[79] In theory, mandatory trebling is not necessary to produce disgorgement of ill-gotten gains because actual damages of plaintiffs would be presumed to be defendants' actual illegal gains. However, the reality is that plaintiffs are less likely to invest the time and money in lengthy, complicated, and costly civil antitrust litigation if their recovery is limited to actual damages.[80] Without mandatory trebling, antitrust violators may not be sued and may be more likely to profit from their illegal behaviors.

[78] Standards Dev. Org. Advancement Act of 2004, Pub. L. No. 108-237, §§ 102-201, 118 Stat. 661,661-70 (2004).
[79] Blue Shield of Va. v. McCready, 457 U.S. 465, 472-73 (1982).
[80] Frank H. Easterbrook, Detrebling Antitrust Damages, 28 J. L. & ECON. 445, 451 (1985).

4. Punishment

The treble damages remedy has a punitive element,[81] and the treble damages remedy is not exclusive to antitrust. Punitive damages were imposed at common law cases of intentional or malicious wrongdoing,[82] and multiple damages remedy has been enacted for certain instances, most notably for RICO[83] and insider trading violations.[84]

The treble damages may be harsh in those cases where the conduct is (1) open or not covert, (2) not clearly illegal but rather close to the line, and (3) potentially beneficial to the consumer.[85] The query about what multiple should be applied to actual damages has created the subject of significant debate in the U.S.

C. Issues related to the Private Enforcement Remedy in the U.S.

1. Fear of False Positives

"False positive" refers to "finding violations of antitrust law when the conduct did not harm competition". Any private enforcement scheme must seek to minimize false positives in which individuals are wrongly prosecuted. Bell Atlantic Corp. v.

[81] Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 189 (2d Cir. 1955) (trebling "presupposes a punitive purpose").
[82] Dan B. Dobbs, Law of Torts § 381, at 1062-66 (2001).
[83] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (2006).
[84] 15 U.S.C. § 78u (d)(3)(A) (2006).
[85] Edward D., Detrebling Antitrust Damages in Monopolization Cases, 76 Antitrust L. J. 97 (2009).

Twombly[86]and Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko[87] are evaluated as representing the court's idea of the costs of false positives to the competitive process and to the civil justice system.

In April 8, 2004, J. Bruce McDonald, Deputy Assistant Attorney General of the DOJ Antitrust Division remarked Trinko as follows[88]: "False positives. Finally, it is worth noting the Court's deference to the unilateral business decisions of monopolists, especially on what, to whom, and at what price to sell. "Mistaken inferences" is part of the Court's traditional concerns, fully discussed in the predatory pricing context of Matsushita and Brooke Group. The Trinko Court warns that "false condemnations" can result from such inferences, which can "chill the very conduct the antitrust laws are designed to protect." Such "false positives," the Court suggested, "counsel[] against an undue expansion of Section 2 liability," especially in an area that are "beyond the practical ability of a judicial tribunal to control." Simply put, courts and antitrust agencies are fallible, and using the antitrust laws as a kind of uber-regulation to force a monopolist in a regulated industry to share its resources with competitors "requires antitrust courts to act as central planners . . . a role for which they are ill-suited." Trinko focuses Section 2 where it can do the most good. This is part of what Judge Posner calls the "struggle for administrability." The Antitrust

[86] Bell Atd. Corp. v. Twombly, 550 U.S. 554, 559 (2007)
[87] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 882-83 (2004)
[88] J. Bruce McDonald, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dept. of Justice, ANTITRUST DIVISION UPDATE: TRINKO AND MICROSOFT, April 8, 2004.

Division welcomes the Court's stated desire to balance what can sometimes be "the slight benefits of antitrust intervention" with "a realistic assessment of [the] costs" of such intervention. Just as much as regulation, overzealous antitrust enforcement can be anticompetitive."

Some scholars argue that conservatives highlight the "social costs" of allowing false positives but minimize the social costs of permitting "false negatives" — finding no violations when the behavior did injure competition,[89] and Trinko and Twombly are silent on the issue of false negatives which wrongdoers mistakenly escape punishment.[90] Simply put, the cost of false negatives is at least as great as the cost of false positives. An effective system of private remedies must account for both false positives and false negatives.

2. Private Action Versus Regulation

Trinko and Twombly express skepticism about the ability of judges to achieve correct outcomes in antitrust cases and a distinct preference to for regulation over antitrust intervention. Trinko reasoned that in certain cases "regulation significantly diminishes the likelihood of major antitrust harm." The Court further noted that

[89] Jonathan B. Baker, Taking the Error Out of 'Error Cost' Analysis: What's Wrong with Antitrust's Right (July 19, 2015). 80 Antitrust Law Journal, American University, WCL Research Paper No. 2016-13.

[90] Cavanagh, Edward D., The Private Antitrust Remedy: Lessons from the American Experience (2010). 41 Loy. L.J. 629 (2010).

antitrust intervention in highly regulated industries is likely to lead to duplicative enforcement and liability.

There is no data supporting the view that courts are inept on antitrust issues. On the contrary, the courts have played an important role in antitrust enforcement over the years. Assistant Attorney General Antitrust Division of the DOJ BILL BAER Remarked as prepared for delivery to EC forum 2014 as follows[91]: "our Supreme Court has shown a great deal of interest in competition law during the past decade or so, and has handed down important decisions on such issues as using the rule of reason in minimum resale price maintenance cases,[92] a general lack of duty to deal with competitors,[93] when pharmaceutical patent settlements are subject to antitrust scrutiny,[94] the viability of price squeeze theories of exclusionary conduct,[95] when the action of state governments displaces federal competition law,[96] and the significance of patent rights in assessing market power.[97] Although some of these decisions have been seen as reining in the scope of private damages actions, we continue to see a very active plaintiffs' bar in antitrust cases."

[91] Bill Baer, Ass't Att'y Gen., Antitrust Div., U.S. Dept. of Justice, Public and Private Antitrust Enforcement in the United States, Remarks as Prepared for Delivery to European Competition Forum 2014 (February 11, 2014).
[92] Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007).
[93] Verizon Commc'n., Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).
[94] FTC v. Actavis, 133 S. Ct. 2223 (2013)
[95] Pacific Bell Tel. v. linkLine Commc'n., 129 S. Ct. 1109 (2009).
[96] FTC v. Phoebe Putney Health Sys., 133 S. Ct. 1003 (2013).
[97] Illinois Tool Works, Inc.v. Independent Ink, Inc., 547 U.S. 28 (2006).

In June 2015, the OECD held a discussion on the current state of private enforcement in OECD members and other selected jurisdictions and discussed the practical relationship between public and private antitrust enforcement. The U.S. remarked as follows[98]: "Public and private enforcement play different, yet complementary, roles in the U.S. The courts develop the common law of antitrust, and private plaintiffs benefit from the disposition of public enforcement actions. When private proceedings threaten to interfere with the investigations of the federal agencies, the courts are available to protect the integrity of public enforcement."

3. Combating Baseless Litigation

Given the burden of antitrust litigation, including costs for litigants, a credible mechanism for removing unfounded claims in litigation is essential. Rule 11 of the Federal Rules of Civil Procedure is designed to defend frivolous litigations.[99] Rule 11 of the Federal Rules of Civil Procedure provides that a district court may sanction attorneys or parties who submit pleadings for an improper purpose or that contain frivolous arguments or arguments that have no evidentiary support.

[98] OECD, RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT, Note by the Secretariat, 15 June 2015.
[99] FED. R. Civ. P. 11.

On the other hand, the Supreme Court prefers to dismiss cases on the merits where the complaint do not allege facts that make out a "plausible" antitrust violation.[100] In Bell Atlantic Corp. v. Twombly (2007), the supreme court ruled that parallel conduct without evidence of agreement is insufficient to state a plausible claim under § 1 of the Sherman Act.

Previously, under the standard the Court set forth in Conley v. Gibson (1957) and had lasted for 50 years, a complaint needed only state a "conceivable" set of facts to support its legal claims. In Twombly, the court adopted a stricter, "plausibility" standard, requiring "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement". The general applicability of this enhanced standard of pleading other than antitrust litigation was established in Ashcroft v. Iqbal (2009).

There are criticisms that Twombly and Iqbal at best create an unreasonable burden just to have a case heard on the merits, and at worst establish a complete barrier to access to the court for plaintiffs.[101] It is even more in claims where the defendant's conduct is covert by nature, so that discovery is the only opportunity to gather evidence.

[100] Bell At. Corp. v. Twombly, 550 U.S. 554, 559 (2007).
[101] Leslie A. Gordon, For Federal Plaintiffs, Twombly and Iqbal Still Present a Catch-22, ABA Journal, January 2011.

V. Reflections on American Class Action Litigation

A. The Purpose of Class Action Lawsuits

A class action is a type of litigation in which one of the parties is a group of people who are represented collectively by a member of that group. The U.S. Supreme Court noted that "the justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims."[102] The court also noted that the "principal purpose" of class actions is "the efficiency and economy of litigation."[103]

The preamble to the Class Action Fairness Act of 2005 stated that "class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm."

In other words, class action lawsuits have been created and develop to achieve economies of time, effort, and expense, and promote, uniformity of decision as to

[102] U.S. Parole Comm'n v. Geraghty, 445 U.S. 338, 402–03 (1980).
[103] Gen. Tel. Co. v. Falcon, 457 U.S. 147, 159 (1982).

persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. For example, assuming that the defendant has engaged in same wrongdoings repeatedly, a class action can provide an effective remedy for the plaintiffs without incurring the costs of hundreds or thousands of separate lawsuits and risking inconsistent decisions by the courts.

Furthermore, a class action is often the sole means of enabling individual plaintiffs to litigate small claims by banding people together whose claims might be too insignificant to litigate alone. As stated by former U.S. Supreme Court Justice William O. Douglas, “The class action is one of the few legal remedies the small claimant has against those who command the status quo.”

This tool can also serve the goals of compensation and deterrence by making it possible to litigate a large number of small claims in antitrust law violation cases, as is frequently the case in price fixing suits. No sensible person would invest the time and money in lengthy, complicated, and costly civil antitrust litigation by bringing a solo price fixing action. However, aggregated with hundreds of similar claims, the cumulative amount may be large enough to make it possible to engage the services of high-priced and skilled lawyers. Antitrust law violators would have the incentive to continue their anticompetitive conduct but for a class action.

B. The Requirements of Rule 23

To ensure fairness and efficiency of class actions, the requirement of Rule 23 of the Federal Rules of Civil Procedure (FRCP) must be met up. Class actions in federal courts are governed by Rule 23 and the provision applies to any class actions applying antitrust law in federal courts. The various states have their own class action rules, most of which are modeled after Rule 23 with some variations,[104] but most often these follow the provisions of Rule 23.

Soon after the commencement of a class action, the "class" must be certified. To obtain class certification, class representatives must meet all four requirements of 23(a). The prerequisites for a class action are as follows:

(1) Numerosity: There are so many people to be represented that joinder of all members of the class is impractical or extremely difficult; (2) Commonality: There are common questions of law or fact to the class, the questions do not have to be identical and some divergence is allowed; (3) Typicality: The claims or defenses of the representative must be typical of the claims or defenses as the other class member. (4) Representativeness: The representative will adequately and fairly protect the

[104] Thomas D. Rowe, Jr., State and Foreign Class-Action Rules and Statutes: Differences from—and Lessons for—Federal Rule 23, 35 W. ST. U. L. REV. 101, 102 (2008).

interests of the class, vigorously prosecuting the interests of the class through adequate counsel.[105]

Even after meeting Rule 23(a), the class action must fall into one of three categories listed in Rule 23(b): 1) A class action is permissible if separate actions would result in: (A) incompatible standards of conduct for defendant through inconsistent adjudications; or (B) substantially impair the interests of other members of the class; (2) A class action is permissible if relief to one plaintiff necessarily affects the whole class. Essentially, declaratory of injunctive relief would benefit the class as a whole.; (3) Questions of law or fact common to the class predominate over questions affecting only individual members and a class action is the superior means to adjudicate the controversy.[106]

The majority of antitrust class actions seek certification under Rule 23(b)(3). Under Rule 23(b)(3), the plaintiffs must demonstrate that questions of law or fact common to the class predominate over questions affecting only individual members and a class action is the superior means to adjudicate the controversy.[107] In deciding these questions, the court considers the class members' interests in individually controlling the prosecution or defense of separate actions, the extent and nature of any litigation concerning the controversy already begun by or against class members, the

[105] FED. R. CIV. P. 23(a).
[106] FED. R. CIV. P. 23(b)(1)-(3).
[107] FED. R. CIV. P. 23(b)(3).

desirability or undesirability of concentrating the litigation of the claims in the particular forum, and the likely difficulties in managing a class action.[108]

Whether or not favorable to the class, the judgment in a class action must for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.[109]

Because of the binding effect of a class judgment on members under Rule 23(c)(3), Rule 23(b)(3) class action members must be given notice and the opportunity to request exclusion ("opt out"). For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.[110]

If parties choose to opt out, they pursue their own claims as they see fit and are not bound by what subsequently happens in the class action. The most typical opt-outs in antitrust class actions are large corporate purchasers seeking to negotiate or litigate with the defendants in their own way.[111]

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[108] FED. R. CIV. P. 23(b)(3).
[109] FED. R. CIV. P. 23(c)(3).
[110] FED. R. CIV. P. 23(c)(2)(B).
[111] Jason S. Dubner & James A. Morsch, Turning Your Legal Dep't into a Profit Center: Opting Out of Class Action Litigation, The Antitrust Couns. Oct. 2007.

C. Criticisms of Class Actions in the U.S.

Class actions serve a vital function in aggregation large numbers of small claims, which otherwise would be nearly impossible to litigate individually, thereby supplement public enforcement in the U.S. However, the class action lawsuits have been also being abused. Therefore, there are several criticisms of class actions.[112]

The Class Action Fairness Act of 2005 stated that "Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where counsels are awarded large fees, while leaving class members with coupons or other awards of little or no value, unjustified awards are made to certain plaintiffs at the expense of other class members, and confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights."

It also stated that "Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are keeping cases of national importance out of Federal court, sometimes acting in ways that demonstrate bias against out-of-State defendants, and making

[112] Richard Epstein, "Class Actions: The Need for a Hard Second Look" (March 1, 2002).; Michael Greve, "Harm-Less Lawsuits? What's Wrong with Consumer Class Actions" (2005). Available at http://www.aei.org/wp-content/uploads/2011/11/20050404_book814text.pdf

judgments that impose their view of the law on other States and bind the rights of the residents of those States."

1. Coupon Settlements

As the Class Action Fairness Act of 2005 stated, class members often receive little or no benefit from class actions. Coupon settlements usually allow the plaintiffs to receive a small benefit by settling class action lawsuits with the issuance of coupons, small checks or certificates for the purchase of products or services from the defendants. Coupon settlements may only benefit the plaintiffs' lawyers who receive cash fees in amounts and the defendants who are relying on a coupon design and redemption process which ensures that coupons will be rarely redeemed.[113]

The Class Action Fairness Act of 2005 addresses these concerns to "assure fair and prompt recoveries for class members with legitimate claims."[114] In coupon settlement before judicial approval, the court may receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed"[115] and hold a hearing to determine whether, and make a written finding that, the settlement is fair, reasonable, and adequate for class

[113] Dickerson & Mechmann, Consumer Class Actions And Coupon Settlements: Are Consumers Being Shortchanged?, Advancing the Consumer Interest, Vol. 12, No. 2, Fall/Winter 2000, p. 6, Web Site http://classactionlitigation.com/library/
[114] Class Action Fairness Act of 2005. SEC. 2. (b) (1).
[115] 28 U.S.C.A. 1712(d).

members.[116] Further, if a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.[117]

2. Blackmail

There are many specialized firms in the U.S. that bring class action lawsuits, even if the lawsuits were poorly based in facts, in anticipation that defendants will settle and pay considerable negotiation fees rather than protracted litigation costs and risks. Generally, the enormous amount sued puts excessive pressure on defendants, so that defendants are forced to settle if they do not want to face bankruptcy and insolvency and effectively blackmailed.

For decades, there have been concerns about class actions forcing defendants into "blackmail settlements" in the U.S. As early as 1972, Judge Henry Friendly, the revered Second Circuit jurist, pointed out that class actions are likely to "blackmail" defendants into settling frivolous claims.[118]

[116] 28 U.S.C.A. 1712(e).
[117] 28 U.S.C.A. 1712(a).
[118] Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973).; Charles Silver, "We're Scared to Death": Class Certification and Blackmail, 78 N.Y.U. L.REV. 1357,1430 (2003).

Richard Posner, the renowned Chief Judge of the Seventh Circuit decertified the class to protect the defendants from blackmail[119] and noted as follows: “Suppose that 5,000 of the potential class members are not yet barred by the statute of limitations. And suppose the named plaintiffs in Wadleigh win the class portion of this case to the extent of establishing the defendants' liability under either of the two negligence theories. It is true that this would only be prima facie liability, that the defendants would have various defenses. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.”[120]

3. The Pass-on Problem

In 1977, the U.S. Supreme Court rendered an important decision in the Illinois Brick case which set out the "Illinois Brick doctrine", stating that only direct purchasers of goods or services were entitled to recover antitrust damages from conspirators to a price-fixing scheme.[121] It held that “Allowing offensive but not defensive use of pass-

[119] Waller, Spencer Weber and Popal, Olivia, The Fall and Rise of the Antitrust Class Action, World Competition: Law and Economics Review, 2016. (The defining moment in most U.S. class actions is the motion and hearing to certify the class…Once certified, the case becomes the entire class or classes certified versus the defendant or defendants. Only after certification can the named plaintiffs win or settle on behalf of the entire class of persons similarly situated. Only after certification can a prevailing or settling defendant achieve global peace and be secure from future suits from class members who did not affirmatively opt out.)

[120] In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299-1300 (7th Cir. 1995).

[121] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

on would create a serious risk of multiple liability for defendants, since even though an indirect purchaser had already recovered for all or part of an overcharge passed on to him, the direct purchaser would still automatically recover the full amount of the overcharge that the indirect purchaser had shown to be passed on, and, similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount. Overlapping recoveries would certainly result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever."

Most of the damage caused by price fixing is likely to return to the end consumer rather than the middlemen who are immediate purchasers from the conspirators. This issue was partially addressed by the states that have adopted their own antitrust laws without the Illinois Brick barrier. The asymmetry between state and federal law facilitated forum shopping and, on the other hand, increased the cost of damages recovery litigation.[122]

A 2007 Antitrust Modernization Commission Report recommended as follows: "Congress overrule Illinois Brick and Hanover Shoe to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the

[122] Scherer, Frederic M., Class Actions in the U.S. Experience: An Economist's Perception (June 2007). KSG Working Paper No. RWP07-028.

overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered."[123]

D. Improving the Litigation Process

On March 9, 2017, the Fairness in Class Action Litigation Act of 2017, H.R. 985, passed the House. According to the bill, class counsel must disclose: (1) whether any proposed class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; (2) the circumstances under which such representatives or plaintiffs agreed to be included in the complaint; and (3) any other class action in which such representatives and plaintiffs have a similar role. The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief. No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members.[124]

[123] The Antitrust Modernization Commission was created pursuant to the Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856. The Commission submitted its Report and Recommendations to Congress and the President on April 2, 2007. The Report and other documents relating to its work are found at its website—http://govinfo.library.unt.edu/amc/index.html.

[124] Available at https://www.congress.gov/bill/115th-congress/house-bill/985

The Fairness in Class Action Litigation Act of 2017 also contains that a court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.

VI. Analysis on Cartel Cases of the United States Private Antitrust Enforcement

I will introduce summaries (factual and procedural background and related actions) of four cartel cases of successful private antitrust enforcement in the U.S. These four cases are notable because hundreds of thousand purchasers (plaintiffs) received significant compensation[125] and their attorneys were awarded about 15% to 30% in attorneys' fees and expenses[126]. A few cases of these cases have important meaning

[125] In Air Cargo Shipping Services Antitrust Litigation case, the direct purchaser plaintiffs received a total in damages of $278 million. In De Beers (Sullivan v. DB Investments, Inc.) case, the plaintiffs settled for a total of $295 million; the Indirect Purchasers received $272.5 million and the Direct Purchasers received $22.5 million. In OSB Antitrust Litigation case, the plaintiffs recovered $120,730,000 in settlement. In Tobacco (DeLoach v. Philip Morris Cos.) case, the plaintiffs received a total in damages of $310 million in cash.

[126] In Air Cargo Shipping Services Antitrust Litigation case, the plaintiffs' attorneys were awarded 15% of the settlement fund for their fees. In De Beers (Sullivan v. DB Investments, Inc.) case, the attorneys were awarded 25% in fees and under 1% in expenses and the court awarded $220,000 in incentive awards to the class representatives. In OSB Antitrust Litigation, class counsel received $37,091,797 plus interest (one-third of the recovery) in fees. In Tobacco (DeLoach v. Philip Morris Cos.), the plaintiffs' attorneys were awarded $84 million in attorneys' fees and expenses (overall 27%). In Tobacco case, the settlement also established an $8 million trust, of which $3 million was for education and research activities, and $5 million for Class Counsel to pursue a "legislative buyout" of the Federal Tobacco Program; and as a result of Class Counsel's effort, Congress passed the Fair and Equitable Tobacco Reform Act of 2004.

that domestic consumers have also recovered significant damage from antitrust violations of foreign companies.[127]

These cases also exemplify the need for private antitrust enforcement along with public enforcement because government action imposes significant fines, it does not compensate hundreds of thousands of purchasers.[128] There is no such meaningful alternative means as private antitrust enforcement for victims of anticompetitive behavior to recover for the harm they suffered as a result of antitrust violations.

In addition, there is an argument based on these cases that private antitrust enforcement does more than DOJ criminal enforcement to deter anticompetitive behavior and the high success rate of government litigation suggests that in the absence of private litigation, many bad actors would get away with violating the antitrust laws. private.[129]

Although each nation has unique needs, history, institutions, judicial system and circumstances, we need to look into seriously successful private enforcement cases in U.S. to protect the consumers damaged by the antitrust violations.

[127] In De Beers (Sullivan v. DB Investments, Inc.) case, the defendants are a completely foreign corporation returning money to American businesses and consumers. In OSB Antitrust Litigation case, four of the defendants were Canadian firms.

[128] Joshua P. Davis & Robert H. Lande, Summaries of Twenty Cases of Successful Private Antitrust Enforcement, Univ. of San Francisco Law Research Paper No. 2013-01.

[129] Joshua P. Davis & Robert H. Lande, Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws, Brigham Young University Law Review, 2011; Univ. of San Francisco Law Research Paper No. 2010-17.

A. Tobacco (DeLoach v. Philip Morris Cos.)[130]

1. Procedural Background

Plaintiffs commenced these antitrust actions on February 16, 2000 in the US District Court for the District of Columbia, Doc. No, 1:00CV00294. Plaintiffs filed a class action, on behalf of over 170,000 leaf tobacco farmers, against four major tobacco manufacturers, including Philip Morris, Lorillard, Brown & Williamson ("B&W"), and RJ Reynolds ("RJR") ("Manufacturers"), and several leaf merchants ("Buyers").

Plaintiffs brought this lawsuit as a putative class action on behalf of themselves and all other persons and entities who have held a quota to grow, or have sold, flue-cured or burley tobacco in the United States "at any time from February 1996 to the present", asserting the violation of sections 1 and 2 of the Sherman Act.

This litigation was filed approximately two years after the DOJ announced its investigation of tobacco manufacturers for conspiracy to fix the price of tobacco. Defendants moved for the case to be transferred to the Middle District of North Carolina and the case was assigned to Judge William L. Osteen, Sr. on December 7, 2000.

[130] No. 1:00CV01235, 2004 WL 5508762 (M.D.N.C. Mar. 31, 2005).

The tobacco farmers purported to represent a class of hundreds of thousands of tobacco farmers that the district court certified as a class on April 3,2002, describing the class as: (1) all persons (including corporations and other entities) holding a quota [under the Federal Tobacco Program] to grow flue-cured or burley tobacco in the United States at any time from February 1996 to the present and (2) all domestic producers of flue-cured or burley tobacco who sold such tobacco in the United States at any time from February 1996 to the present.

2. Plaintiffs' allegations[131]

According to Plaintiffs, all individuals or entities who wish to produce tobacco must hold a "quota," which specifies the amount and type of tobacco that can be grown each year. Plaintiffs alleged that this quota was a "property right," and that quota holders may, subject to certain restrictions, sell or lease their right to grow certain types of tobacco.

The U.S. Department of Agriculture ("USDA") set the quota for both burley and flue-cured tobacco each year based on a rigid three-part formula, with little or no room for discretion, and then allocated a pro rata quota among the individual quota holders.

[131] See 132 F. Supp. 2d 22(2000), Third Amended Complaint, 2000 WL 34015502 (M.D.N.C. Dec. 7, 2000).

Plaintiffs asserted that quota holders "generally" sold their tobacco at auctions sponsored by the USDA, which, according to Defendants, occur primarily in Georgia, Florida, Kentucky, North Carolina, South Carolina, Tennessee, and Virginia (i.e., the Southeast U.S.).

According to Plaintiffs, cigarette manufacturers must bid above a "minimum price" at these auctions, and if no such bid occurs, the unsold tobacco was purchased by an "agricultural co-operative at the minimum price" and is then placed into a reserve.

The primary anti-competitive act of which Defendants was accused was "bid rigging." Plaintiffs claimed that Defendants — who were all ostensible competitors — "communicated with each other before tobacco auctions to discuss, coordinate, exchange information, including price information, and rig the auction" by agreeing on specific bid prices for Plaintiffs' tobacco, which none of Defendants would exceed. This resulted in a "tie-bid" (i.e., all bids being the same amount). Plaintiffs also alleged that Defendants punished, boycotted and retaliated against those who refused to abide by the terms of the bid-rigging scheme.

Plaintiffs alleged that the conduct described above (the bid rigging and general anti-competitive conduct) allowed Defendants to limit their purchases at auctions, which caused more tobacco to be placed into the "discounted reserve program." Plaintiffs further alleged that Defendants' anti-competitive acts had allowed them to "lower

their purchase intentions submitted to USDA each year since 1997," which in turn lowered Plaintiffs' yearly tobacco quota. According to Plaintiffs, the goal of Defendants was to destroy or eliminate the USDA tobacco program, an outcome that would permit Defendants to exercise greater monopsony power.

Plaintiffs claimed that the Defendant Manufacturers and Buyers conspired to fix the price of tobacco and to reduce tobacco growing quotas in violation of sections 1 and 2 of the Sherman Act. Plaintiffs asserted that the Defendants violated Sherman § 1.10 by colluding to fix prices at tobacco auctions and to reduce tobacco growing quotas.

Plaintiffs also contended that Philip Morris violated Sherman § 2 by abusing its monopsony power. Philip Morris had 49% of the domestic cigarette market, and purchased approximately 65% of domestically produced tobacco. The plaintiffs contended that Philip Morris possessed the financial resources and industry clout to dictate auction prices and allocations to the other Manufacturers, and to force the Buyers to cooperate with the agreement and the defendant abused its monopsony power by engaging in the anti-competitive conduct.

Plaintiffs also claimed that the manufacturers violated Sherman § 2 by abusing their oligopsony power. The four manufacturers had approximately 96% market share,

and purchased at least 95% of the domestically produced tobacco.[132] Plaintiffs asserted that the conspiracy resulted in the artificial reduction of tobacco prices at auction, and reduced tobacco quotas.

3. Settlements[133]

On May 15, 2003, the tobacco farmers Class and all of the defendants, except RJR, entered into the First Settlement Agreement, and the district court approved that agreement on October 1, 2003. The First Settlement Agreement provided two principal benefits to the tobacco farmers Class: (1) two cash payments consisting of a first installment of $135 million and a later conditional installment of $65million, and (2) a commitment by the settling manufacturers to purchase U.S.-grown leaf tobacco in specified amounts over specified years.

Each of these commitments was subject to a reduction adjustment should the Class enter into a settlement with RJR during a specified period. The second payment of $65 million was subject to a proportionate reduction if the plaintiff Class "reached" settlement with RJR "on or before the day before the first day of trial."

[132] RJR had approximately 24% market share and purchased approximately 10-15%. B&W had approximately 14% market share and purchased 10-15%. Lorillard had approximately 9% market share purchased 10-15%.

[133] Philip Morris, 391 F.3d 551 (4th Cir. 2004).

And the manufacturers' agreement to purchase U.S.-grown tobacco was subject to a "most favored nations clause" under which the settling manufacturers' obligations under the First Settlement Agreement would be" no less favorable" to them "than those terms agreed to" in any agreement with RJR. The adjustment, however, applied only if a settlement with RJR was "entered before the beginning of trial."

Following the district court's approval of the First Settlement Agreement on October 1, 2003, the litigation continued against RJR, and trial was ultimately scheduled to commence on April 22, 2004, at 9:00 a.m. During a settlement conference between counsel for the Class, counsel for RJR, and the district judge on Friday, April 16, 2004, counsel for RJR explained that it had not settled the case earlier because "we assumed we were going to try the case because the settlement for us late would have been prohibitive.

On the morning of April 22 when the jury venire was in the jury room and the judge in his chambers, the Class and RJR signed the Second Settlement Agreement at the courthouse and submitted it to the court. On the same day, the district court preliminarily approved the RJR Settlement, subject to the class action notice and final approval procedure.

The RJR Settlement contained the same two components as were included in the First Settlement Agreement. RJR agreed to pay the class $33 million in cash and

agreed to purchase from Class members 35 million pounds of tobacco annually for at least 10 years — for a total of 350 million pounds. The court observed with approval that the35 million pounds per year RJR agreed to purchase, coupled with the 405 million pounds per year agreed to by the other manufacturers, provided a total commitment to purchase 440 million pounds of tobacco each year. The District Court approved the RJR Settlement on March 31, 2005. This concluded the litigation.

Class Counsel requested $175 million to cover fees and expenses after the First Settlement and $15 million after the RJR Settlement. The Court awarded attorney's fees on December 19, 2003 after the First Settlement and on August 8, 2005 after the RJR Settlement. The Court noted that an award of $84 million in attorneys' fees and expenses (overall 27%) was fair and reasonable.[134]

B. De Beers (Sullivan v. DB Investments, Inc.)[135]

1. Factual Background

The allegations arose from De Beers's undisputed position as the dominant participant in the wholesale market for gem-quality diamonds throughout much of the twentieth century. It is alleged that, beginning in 1890 and continuing through the filing of the Complaints, De Beers coordinated the worldwide sales of diamonds

[134] 2003 U.S. Dist. LEXIS 23240

[135] No. 08-2784 et al. (3rd Cir. Dec. 21, 2011) (en banc).

by, inter alia, executing output-purchase agreements with competitors, synchronizing and setting production limits, restricting the resale of diamonds within certain geographic regions, and directing marketing and advertising.

Through its coordinated network of diamond producers, De Beers was able to value diamonds according to certain physical characteristics and to then control the quantity and prices of diamonds in the marketplace by strictly regimenting sales to preferred wholesalers, known as "sightholders." [136] Sightholders resold these diamonds to jewelry manufacturers and retailers – either as rough diamonds or as cut, polished, and finished stones – and constituted De Beers's primary channel for distribution of its diamonds.[137]

2. Preliminary Proceedings

Between 2001 and 2002, plaintiffs brought suit complaining that De Beers's aforementioned business practices contravened state and federal antitrust,

[136] Sightholders are selected by De Beers's subsidiary Diamond Trading Company ("DTC") based upon specific criteria, "including their financial standing and reliability, their market position, their distribution ability, their marketing ability, and their compliance with Diamond Trading Company Diamond Best Practice Principles". (App'x 1438.) In 2006, DTC had ninety-three sightholders, nine of which had head offices in the United States and seventy-six of which had sales offices in the country. Sightholders sell both rough and polished diamonds, as well as diamond jewelry. By way of example, the retailer Tiffany & Co. is a majority-owner of the South African sightholder Rand Precision Cut Diamonds, which sells polished diamonds and manufactures jewelry for sale in Tiffany stores.

[137] The process by which De Beers sold its rough diamonds entailed a —diamond pipeline, which began with the sale of rough diamonds and ended with the purchase of retail diamond jewelry by consumers. The participants in the diamond pipeline included rough stone wholesalers, cutters and polishers of rough diamonds, finished stone wholesalers, diamond jewelry manufacturers and wholesalers, and retailers.

consumer protection, and unjust enrichment laws, and constituted unfair business practices and false advertising under common law and relevant state statutes.

Specifically, the plaintiffs alleged that De Beers exploited its market dominance to artificially inflate the prices of rough diamonds; this, in turn, caused reseller and consumer purchasers of diamonds and diamond infused products to pay an unwarranted premium for such products.

The initial two price-fixing lawsuits were filed in the U.S. District Courts for the District of New Jersey and the Southern District of New York in 2001, and five subsequent lawsuits were initiated in federal and state courts in other parts of the country. Three of the lawsuits were filed in state court in Arizona, California, and Illinois, respectively; the last was then removed to the District Court for the Southern District of Illinois. The five suits in federal court were subsequently all transferred to and consolidated in the District Court for the District of New Jersey.

The plaintiffs in the seven cases are best characterized as falling within one of two types of purchaser classes. The first category includes direct purchasers of gem diamonds, who purchased directly from De Beers or one of its competitors ("Direct Purchaser Class" or "Direct Purchasers"). These plaintiffs advanced claims of price fixing and monopolization pursuant to §§ 1 and 2 of the Sherman Act, and sought monetary and injunctive relief under §§ 4 and 16 of the Clayton Act.

The second category of plaintiffs consists of indirect purchasers of rough or cut and-polished diamonds; this category of consumers, jewelry retailers and other middlemen acquired diamonds from sightholders or other direct purchasers, rather than directly from De Beers or its competitors ("Indirect Purchaser Class" or "Indirect Purchasers"). While both categories of purchasers alleged the same antitrust injury and sought injunctive relief pursuant to § 16 of the Clayton Act, the Indirect Purchasers sought damages pursuant only to state antitrust, consumer protection, and unjust enrichment statutes and common law.

As it had for well over a half-century, De Beers initially rejected the plaintiffs' assertion that courts in the United States possessed personal jurisdiction over it and its associated entities, arguing that it never transacted business directly in the U.S. De Beers refused to appear in the lawsuits, resulting in defaults or default judgments being entered against it in each of the filed cases with the exception of Cornwell.

3. Settlement

While continuing to insist that these default judgments were unenforceable, counsel for De Beers approached plaintiffs' counsel in May 2005 to discuss settlement of the Indirect Purchasers' claims. These discussions yielded an agreement to settle Sullivan, Hopkins, Null, and Cornwell (the "Indirect Purchaser Settlement"), with De

Beers agreeing to establish a settlement fund of $250 million to be distributed to class members, and further agreeing not to contest certification of a settlement class of indirect purchasers.

The settlement also provided for a stipulated injunction, enjoining De Beers from engaging in certain conduct violative of United States antitrust laws. Pursuant to the settlement, De Beers would consent to the District Court's jurisdiction for the limited purpose of fulfilling the terms of the settlement and enforcement of the injunction.

The District Court entered an order on November 30, 2005, preliminarily approving the Indirect Purchaser Settlement and conditionally certifying a settlement class of Indirect Purchasers pursuant to Federal Rule of Civil Procedure 23(b)(2) – for purposes of entering the stipulated injunction – and 23(b)(3) – in order to distribute the settlement fund to class members.

De Beers then entered into settlement discussions with plaintiffs' counsel for the Direct Purchasers in Anco and British Diamond, ultimately reaching an agreement in March 2006. The latter agreement paralleled the Indirect Purchaser Settlement in that De Beers agreed to not contest certification of a Direct Purchaser settlement class, to abide by substantively identical injunctive relief as imposed under the Indirect Purchaser Settlement, and to establish a $22.5 million fund to satisfy the direct purchasers' claims.

As part of this settlement, De Beers also agreed to increase the Indirect Purchaser Settlement fund by $22.5 million to accommodate those putative class members characterized as Indirect Purchasers in the lawsuits filed by the Direct Purchasers who had not participated in the Indirect Purchaser Settlement.

On March 31, 2006, the District Court modified its November 30, 2005 Order to conditionally certify both the Direct and Indirect Purchaser settlement classes under Rules 23(b)(2) and 23(b)(3), and to preliminarily approve a combined settlement fund for both classes totaling $295 million, of which $22.5 million was allotted to Direct Purchasers and $272.5 million was allocated to the Indirect Purchaser claims.

The combined settlement also provided for entry of a stipulated injunction, which required De Beers to, inter alia, comply with and abide by federal and state antitrust laws, to limit its purchases of diamonds from third-party producers, to abstain from setting or fixing the prices of diamonds sold by third-party producers, to desist from restricting the geographic regions within which sightholders could resell De Beers diamonds, and barred De Beers from purchasing diamonds in the United States for the principal purpose of restraining supply. Notably, De Beers agreed to subject itself to personal jurisdiction in the United States for purposes of enforcing the combined settlement agreement.

4. Special Master & Appeal

After granting preliminary approval to the combined settlement agreement, the District Court referred the case to a Special Master pursuant to Rules 23, 53, and 54 of the Federal Rules of Civil Procedure to consider and recommend a plan for dissemination of the Notice of Settlement, a distribution plan for members of the Indirect and Direct Purchaser settlement classes, division of the fund between the Indirect Purchaser reseller and consumer subclasses, the amount of incentive awards for named plaintiffs, and the fee requests filed by plaintiffs' counsel.

After two years of proceedings, the Special Master found the settlement fair, reasonable, and adequate based upon the parties' agreement to seek the certification of the nationwide Indirect and Direct Purchaser classes. The Indirect Purchaser Class was further subdivided into two subclasses for purposes of effectuating the Settlement Agreement:

(1) The "Indirect Purchaser Reseller Subclass," consisting of all members of the Indirect Purchaser Class who purchased any diamond product for resale; and

(2) The "Indirect Purchaser Consumer Subclass," consisting of all members of the Indirect Purchaser Class who purchased any diamond product for use and not for resale. After reviewing the record, the competing econometric reports furnished by several experts, and other reliable data, the Special Master recommended that, apart

from the $22.5 million allocated to the Direct Purchaser Class, the Indirect Purchaser Settlement Fund of $272.5 million should be allocated 50.3%, approximately $137.1 million, to the Resellers Subclass, and 49.7%, approximately $135.4 million, to the Consumers Subclass. Unlike Direct Purchasers, who purchased diamonds only, Indirect Purchasers generally purchased jewelry and other products containing diamonds; given this, the Special Master attempted to ascertain the cost of the diamonds in the final purchased product separate and apart from the cost of other components. The Special Master further recommended that claims that would result in *de minimis* recoveries from the settlement fund – equating to less than ten dollars – not be paid in light of high administrative costs.

With respect to plaintiffs' counsel's request for attorneys' fees and reimbursement of litigation expenses, the Special Master recommended a percentage of recovery approach with a lodestar cross-check, and concluded that the request for 25% of the settlement fund in fees, and for under 1% of the fund in expenses, was fair, reasonable, and adequate. The Special Master further decided that the $220,000 in incentive awards sought on behalf of class representatives was appropriate in light of the benefits conferred upon the class and the risks incurred in engaging in litigation.

In response to the preliminary certification of the Settlement Agreement and the Special Master's recommendations, the District Court received twenty separate

objections on behalf of thirty-seven objectors. In its May 22, 2008 Opinion, the District Court considered and rejected each of the objections. Responding to the Rule 23(b)(3) objections, the Court concluded that differences in state antitrust and consumer protection statutes did not override class commonalities. Accordingly, the District Court entered a final order on May 22, 2008, certifying the Direct and Indirect Purchaser Classes under Rules 23(b)(2) and 23(b)(3).

The Direct Purchaser Class consists of all sightholders who purchased rough gem diamonds directly from De Beers between September 20, 1997 and March 31, 2006. The Indirect Purchaser Class includes all Indirect Purchasers who acquired gem diamonds between January 1, 1994 and March 31, 2006, regardless of whether De Beers or one of its competitors supplied the diamonds.

The Court's order further included the previously agreed-upon injunction, which is to remain in effect for five years from the date of its issuance. The objectors then filed the appeals. The Third Circuit affirmed the District Court's order of the settlement, allocation plan, and award of attorney's fees.

5. Related Actions

a) Department of Justice[138]

[138] De Beers Pleads Guilty in Price Fixing Case, World Business on MSNBC, July 13, 2004.

De Beers was charged by the DOJ in 1994. After 10 years of these charges preventing any De Beers executives from even travelling to the U.S. De Beers pleaded guilty in a 10-year-old price-fixing case in July 2004 and was fined $10 million fine as part of an agreement that would clear the way for the diamond giant to resume selling diamonds directly in the lucrative U.S. market. The company admitted conspiring to fix prices in the $500 million industrial diamond market.

U.S. District Judge George Smith accepted the plea in the case, in which the DOJ charged De Beers with keeping prices in the worldwide industrial diamond market artificially high. The case was filed in Columbus because GE's industrial diamond business was headquartered in suburban Worthington. Smith did not order any restitution, saying a separate settlement of a civil case resolved that issue.

b) European Commission[139]

In February 2006, De Beers entered into legally binding commitments with the European Commission to cease purchasing rough diamonds from their main competitor as of the end of 2008. At the end of 2001, the companies De Beers and Alrosa, number one and number two respectively on the market for the production and supply of rough diamonds, concluded a business agreement under which Alrosa undertook to supply to De Beers, over a five-year period, rough diamonds to the

[139] Summary of the judgement in case C-441/07 P, European Commission Legal Service

value of USD 800 million a year. This agreement was notified to the Commission at the beginning of 2002.

The Commission initiated proceedings against the two companies based on Article 81(1) of the TEC (now Article 101 of the TFEU). Furthermore, separate proceedings were initiated against De Beers alone for abuse of a dominant position, on the basis of Article 82 of the TEC (Article 102 of the TFEU). In December 2004, De Beers and Alrosa proposed to the Commission, availing themselves of the possibility available to them under Article 9 of Regulation (EC) No 1/2003 on the rules on competition provided for under Articles 81 and 82 of the TFEU, joint commitments providing for the progressive reduction in the sales of rough diamonds by Alrosa to De Beers and capping them at USD 250 million from 2010. However, these commitments were not accepted by the Commission.

In January 2006, De Beers, under the proceedings concerning it alone regarding abuse of a dominant position, presented further commitments providing for the final cessation of any purchase of rough diamonds from Alrosa as of 2009. These commitments were accepted by the Commission, which made them obligatory by decision of 22 February 2006, adopted on the basis of the above-mentioned Article 9 of Regulation (EC) No 1/2003.

This decision, at the request of Alrosa, was annulled by the General Court by judgment of 11 July 2007. The General Court considered that the Commission had failed to respect the right of Alrosa to a hearing regarding the individual commitments proposed by De Beers on the one hand, and that it had not respected the principle of proportionality, on the other. On appeal by the Commission, the Court annulled this judgment. Ruling on the main issue of the case, the Court confirmed the Commission decision.

C. Air Cargo Shipping Services Antitrust Litigation[140]

1. Factual and Procedural Background

This litigation began in early 2006 when over ninety complaints were filed individually and on behalf of various classes of persons and entities who purchased, either directly or indirectly, airfreight shipping services from a number of airfreight carriers named as defendants.

The First Consolidated Amended Complaint, filed in February 2007, named more than two dozen defendant air carriers. Plaintiffs alleged that the defendants conspired to unlawfully fix Case prices of airfreight shipping services worldwide, including on cargo shipments to, from, and within the United States, by, among other things, concertedly levying agreed-upon, artificially inflated surcharges in violation of

[140]Air Cargo Shipping Services Antitrust Litigation, MDL No. 1775, 06-MD-1775 (JG) (VVP) (E.D.N.Y.)

Section 1 of the Sherman Act, 15 U.S.C. § 1. Additional defendants were named in complaints filed on February 12, 2010, and July 26, 2010.

After extensive motion practice directed at the First Consolidated Amended Complaint, on August 21, 2009, the Court adopted the Report and Recommendation of Magistrate Judge Viktor V. Pohorelsky with respect to the dismissal of indirect purchaser claims, the dismissal of claims under European law, and the denial of defendants' motion to dismiss under the Foreign Trade Antitrust Improvements Act of 1982. Contrary to Magistrate Judge Pohorelsky, the Court also ruled that the direct purchaser plaintiffs' Sherman Act claims satisfied the pleading requirements of Bell Atlantic Corp. v. Twombly, 550 U.S. 544(2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009).[141] The additional defendants' motions to dismiss were denied by the Court on November 1, 2010, adopting in its entirety Magistrate Judge Pohorelsky's Report and Recommendation of September 22, 2010. On November 18, 2009, by Minute Entry, the Court established a schedule for discovery, including the production of documents that defendants had previously produced to the DOJ in connection with its investigation of airfreight shipping services.

By the end of fact discovery on December 31, 2013, the parties had completed extensive discovery, including the production of more than 18million pages of

[141] https://kaplanfox.com/practiceareas/competitionlaw/cases/183-aircargo.html

documents and more than 90 depositions. On October 28, 2011, plaintiffs filed a motion, memorandum of law, and expert and other declarations in support of class certification.

On May 25, 2012, defendants filed their oppositions, as well as expert and other declarations. On October 5, 2012, plaintiffs filed reply papers. On April 22 and 23, 2013, defendants filed sur-reply papers. On April 22, 2013, plaintiffs filed motions to exclude the opinions of defendants' experts. Defendants opposed those motions on July 22, 2013, and plaintiffs filed reply papers on September 11, 2013. The parties retained multiple experts relating to class certification, all of whom were deposed on one or more occasions. During the period October 29-31, 2013, a three-day evidentiary hearing, including 20 hours of expert testimony was held before Magistrate Judge Pohorelsky, and, on November 25, 2013, closing arguments were held with respect to the class certification motion and plaintiffs' Daubert motions.

On October 15, 2014, Magistrate Judge Pohorelsky issued a 114-page Report and Recommendation recommending that plaintiffs' motion for class certification be granted.[142] See ECF. No. 2055 (the "Class Cert. R&R"). Magistrate Judge Pohorelsky found that plaintiffs had satisfied Rules 23(a)(1), 23(a)(2), 23(a)(3), 23(a)(4), and 23(b)(3). Magistrate Judge Pohorelsky also recommended that plaintiffs' motion to

[142] http://www.kaplanfox.com/news/915-aircargoclasscertified.html

strike certain opinions of defendants' experts David P. Kaplan and Dr. Michelle Burt is be granted in part. On July 10, 2015, the Class Cert. R&R was adopted in its entirety by the Court over defendants' objections.

John Gleeson, U.S. District Judge ruled that "Pohorelsky's thorough and well reasoned Report and Recommendations is adopted in its entirety. Accordingly, I hereby certify the following class for adjudicating the claims in this action: All persons or entities (but excluding Defendants, their parents, predecessors, successors, subsidiaries, affiliates, as well as government entities) who purchased airfreight shipping services for shipments to or from the United States directly from any of the Defendants or from any of their parents, predecessors, successors, subsidiaries, or affiliates, at any time during the period from January 1, 2000 up to and including September 30, 2006."

Defendants sought to appeal under Rule 23(f), but, on November 3, 2015, the Second Circuit denied the motion. Plaintiffs and the remaining defendants filed summary judgment motions on April 24, 2015. Plaintiffs' motions concerned the affirmative defenses of state action, act of state, foreign sovereign compulsion, international comity, filed rate, and Noerr-Pennington. Defendants filed similar summary judgment motions on these affirmative defenses.

Defendants Air India, Air China, Air New Zealand and Polar Air Cargo, LLC each filed a motion based on its alleged non-involvement in the alleged world-wide conspiracy.[143] Atlas Air Worldwide Holdings, Inc. filed a motion for judgment on the issues of alter ego and agency. Polar Air Cargo Worldwide filed a motion for judgment on the issue of de facto merger and mere continuation of business. All remaining defendants filed a motion for partial summary judgment on plaintiffs' security surcharge claims.

Air China, Air India, and Air New Zealand filed a motion for summary judgment for a purported failure to prove antitrust damages caused by the alleged conspiracy and for damages allegedly barred by the statute of limitations. On August 31, 2015, the Court denied defendants' motions for summary judgment and granted all of plaintiffs' motions for judgment on defendants' affirmative defenses, and set a date for trial.[144]

2. Settlements

The Settling Defendants denied all liability in this case and asserted various defenses to the Plaintiffs' claims. The Court did not decide in favor of the Plaintiffs or the Settling Defendants. Instead, both sides agreed to the proposed settlements. That way, they can avoid the cost and risk of a trial, and the class members will get

[143] https://kaplanfox.com/practiceareas/competitionlaw/cases/183-aircargo.html
[144] https://www.kaplanfox.com/news/927-aircargosummaryjudgment.html

compensation. The Class Representatives and Class Counsel thought the proposed settlements are best for all class members.[145]

Over the course of the litigation, the class has reached settlements totaling more than $1.2 billion with the following defendant airlines.[146]

(1) Deutsche Lufthansa AG, Lufthansa Cargo AG, and Swiss International Air Lines Ltd. (collectively "Lufthansa"): $85 million, plus the cost of providing notice to the class and cooperation (final approval granted Case September 25, 2009) (unlike subsequent settlements, which include payments only to direct purchasers, the Lufthansa settlement included payments both to direct and indirect purchasers);

(2) Société Air France ("Air France"), Koninklijke Luchtvaart Maatschappij N.V. ("KLM"), and Martinair Holland N.V. ("Martinair") (collectively "Air France/KLM"): $87 million, plus notice costs up to $500,000 and cooperation (final approval granted March 14, 2011);

(3) Japan Airlines International Co., Ltd. ("Japan Airlines"): $12 million, plus cooperation (final approval granted March 14, 2011);

(4) AMR Corporation and American Airlines, Inc. (collectively, "American Airlines"): $5 million, plus the cost of providing notice to the class and cooperation (final approval granted March 14, 2011);

[145] Settlement notice

[146] https://www.hausfeld.com/case-studies/air-cargo-shipping-services

(5) Scandinavian Airlines System and SAS Cargo Group A/S (collectively, "SAS"): $13.93 million, plus notice costs up to $500,000 and cooperation (final approval granted effective March 17, 2011);

(6) All Nippon Airways Co., Ltd. ("All Nippon Airways"): $10.4 million, plus cooperation (final approval granted July 15, 2011);

(7) Cargolux Airlines International S.A. ("Cargolux"): $35.1 million, plus notice costs of up to $150,000 and cooperation (final approval granted July 15, 2011);

(8) Thai Airways International Public Company Limited ("Thai Airways"): $3.5 million plus cooperation (final approval granted July 15, 2011);

(9) Qantas Airways Limited ("Qantas"): $26.5 million, plus notice costs of up to $250,000 and cooperation (final approval granted August 4, 2011);

(10) LAN Airlines, S.A., LAN Cargo S.A., and Aerolínhas Brasileiras, S.A. ("LAN/ABSA"): $66 million, plus notice costs up to $150,000 and cooperation (final approval granted August 2, 2012);

(11) British Airways PLC ("British Airways"): $89.512 million, plus notice costs up to $500,000 and cooperation (final approval granted August 2, 2012);

(12) Malaysia Airlines ("Malaysia Airlines"): $3.2 million, plus $150,000 toward the cost of notice and settlement administration, and cooperation (final approval granted August 2, 2012);

(13) South African Airways: $3.29 million plus $150,000 toward the cost of notice and settlement administration, and cooperation (final approval granted August 2, 2012);

(14) Saudi Arabian Airlines, Ltd. ("Saudi"): $14 million and cooperation (final approval granted August 2, 2012);

(15) Emirates: $7.833 million and cooperation (final approval granted August 2, 2012)

(16) El Al Israel Airlines Ltd. ("El Al"): $15.8 million and cooperation (final approval granted August 2, 2012);

(17) Air Canada and AC Cargo LP (collectively, "Air Canada"): $7.5 million and cooperation (final approval granted August 2, 2012);

(18) Salvatore Sanfilippo ("Sanfilippo"), a managerial employee of Defendant Air New Zealand: cooperation (final approval granted August 2, 2012);

(19) Korean Air Lines Co., Ltd. ("Korean Air"): $115 million and cooperation;

(20) Singapore Airlines Limited and Singapore Airlines Cargo PTE, Ltd. ("Singapore Airlines"): $92.5 million and cooperation;

(21) Cathay Pacific Airways Limited ("Cathay Pacific"): $65 million and cooperation;

(22) China Airlines, Ltd.: $90 million and cooperation;

(23) Asiana Airlines, Inc. ("Asiana"): $55 million plus $200 toward the cost of notice and administration, and cooperation;

(24) Nippon Cargo Airlines, Co., Ltd. ("NCA"): $36.35 million plus $200,000 toward the cost of notice and administration, and cooperation;

(25) EVA Airways Corporation ("EVA"): $99 million plus $200,000 toward the cost of notice and administration, and cooperation.

(26) Air China agreed to pay a settlement amount of $50,000,000, and made this payment to the class. This payment represents 4.846% of Air China's relevant sales during the class period, a significant percentage and higher than any settlement before it (except for plaintiffs' settlement with Polar). Air China also agreed to provide cooperation to the Class to aid in the prosecution of antitrust claims against the non-settling defendants by authenticating Documents and establishing them as business records (final approval granted October 5, 2016).

(27) Air India agreed to pay a settlement amount of $12,500,000 in two installments; both payments were made. This payment represents more than 10% of Air India's relevant sales during the class period. As the last defendant to settle, Air India paid a higher percentage of its sales during the class period than the other defendants (final approval granted October 5, 2016).

(28) Air New Zealand agreed to pay a settlement amount of $35,000,000 and made this payment to the Class. Air New Zealand's payment represents 7.1% of its relevant sales during the class period (final approval granted October 5, 2016).

(29) Polar agreed to pay a settlement amount of $100,000,000 in three installment payments. Polar declared bankruptcy in the midst of the conspiracy, emerging on July 27, 2004, and plaintiffs were enjoined from seeking damages from Polar that were incurred prior to that date (final approval granted October 5, 2016).

3. Related Actions

a) Department of Justice

On February 14, 2006, competition authorities in Europe carried out "dawn raids" and the U.S. DOJ executed search warrants in the major airline offices at the same time. The Antitrust Division of the U.S. DOJ conducted intensive criminal investigations into the alleged conspiracies on international passenger fuel surcharges and air cargo transportation rates.[147]

British Airways[148] and Korean Air Lines[149] each agreed to plead guilty to violations of Section 1 of the Sherman Act and to pay criminal fines totaling $300 million for its role in a conspiracy to fix international air cargo rates in August 2007. On January 14, 2008, Qantas Airways[150] Limited also agreed to plead guilty and pay a $61 million criminal fin.

[147] William M. Hannay, The air cargo antitrust conspiracy, A report on the criminal and civil cases in the U.S.
[148] Plea Agreements, United States v. British Airways, PLC, Criminal No. 07-183JBD
[149] Plea Agreements, United States v. Korean Air Lines Co. Ltd., Criminal No. 07-184JBD
[150] Plea Agreements, United States v. Qantas Airways Limited, Criminal No. 07-00322-JBD

In 2008 and early 2009, additional guilty pleas were obtained and criminal fines imposed on six airlines and two individuals, including: $119 million fine against Luxembourg-based Cargolux Airlines International S.A.[151]: $110 million fine against Japan Airlines International Co. Ltd. (JAL)[152]: $109 million fine against LAN Cargo, a Chilean company, and Aerolinhas Brasileiras S.A. (ABSA), a Brazilian company that is substantially owned by LAN Cargo: $50 million fine against Korea-based Asiana Airlines, Inc.: $45 million fine against Japan-based Nippon Cargo Airlines Co., Ltd.: $15.7 million fine against El Al, the Israeli airline.[153]

Between mid-2009 and the end of 2011, the air transportation investigation led to charges against additional companies, including the following: $48 million fine against Singapore Airlines Cargo Pte Ltd. : $73 million fine against All Nippon Airways Co. Ltd. : $40 million fine against China Airlines Ltd. : $17.4 million fine against Polar Air Cargo LLC : $38 million fine against Northwest Airlines LLC[154]

A total of 22 airlines and 21 executives have been charged in the Justice Department's investigation into price fixing in the air transportation industry. More than $1.8 billion in criminal fines have been imposed and four executives have been

[151] Plea Agreements(May 12, 2009), United States v. Cargolux Airlines International S.A., Criminal No. 1:09-cr-00097-JBD
[152] Plea Agreements(May 7, 2008), United States v. Japan Airlines International Co. Ltd., Criminal No. 08-00106(JBD)
[153] Criminal Program Update 2010, Department of Justice
[154] Criminal Program Update 2011, Department of Justice

sentenced to serve prison time. Two executives of Cargolux Airlines (the former president and CEO, and the senior vice president of sales and marketing) pleaded guilty and agreed to serve 13 months in prison for participating in a conspiracy to fix cargo rates for international air shipment.[155]

b) European Commission

On November 9, 2010, the EC fined 11 air cargo carriers a total of €799.4 million for operating a worldwide cartel. Among the cartelists are Air Canada, Air France-KLM, British Airways, Cathay Pacific, Cargolux, Japan Airlines, LAN Chile, Martinair, SAS, Singapore Airlines and Qantas. Furthermore, the Korean and U.S. authority investigations resulted in $98.1 million and $1.6 billion in fines respectively against various cargo airlines.[156]

According to EC press release, the carriers coordinated their action on surcharges for fuel and security without discounts over a six year from December 1999 to 14 February 2006. The cartel arrangements consisted of numerous contacts between airlines, at both bilateral and multilateral level. Lufthansa (and its subsidiary Swiss)

[155] Justice News, Department of Justice, "Cargolux Airlines International Executives Plead Guilty for Fixing Surcharge Rates on Air Cargo Shipments", December 8, 2011

[156] European Commission, Press releases database, "Antitrust: Commission fines 11 air cargo carriers €799 million in price fixing cartel", 9 November 2010, available at europa.eu/rapid/press-release_IP-10-1487_en.htm.

received full immunity from fines under the Commission's leniency program, as it was the first to provide information about the cartel.

The fines of the following carriers were also reduced for their cooperation with the Commission under its Leniency Program. The individual fines are as follows:

	Fine (€)*	Includes reduction (%) under the Leniency Notice
Air Canada	21 037 500	15%
Air France	182 920 000	20%
KLM	127 160 000	20%
Martinair	29 500 000	50%
British Airways	104 040 000	10%
Cargolux	79 900 000	15%
Cathay Pacific Airways	57 120 000	20%
Japan Airlines	35 700 000	25%
LAN Chile	8 220 000	20%
Qantas	8 880 000	20%
SAS	70 167 500	15%
Singapore Airlines	74 800 000	
Lufthansa	0	100%
Swiss International Air Lines	0	100%

(*) Legal entities within the undertaking may be held jointly and severally liable for the whole or part of the fine imposed.

D. OSB Antitrust Litigation[157]

1. Factual and Procedural Background

Direct purchasers of Oriented Strand Board ("OSB") filed a consolidated class action suit alleging a horizontal price-fixing conspiracy among the nine major OSB manufacturers in 2006.[158] OSB is a structural wood-based paneling product widely used in residential and other construction.

Defendants – Ainsworth Lumber Co., Ltd., Georgia-Pacific Corporation, J.M. Huber Corporation, Louisiana-Pacific Corporation, Norbord Industries, Inc., Potlatch Corporation, Tolko Industries, Inc., and Weyerhauser Company – manufacture OSB and together control 95% of the OSB market in North America.

Plaintiffs indirectly purchased OSB structural panels manufactured by one or more of the defendants, either for their own construction use or as part of a newly bought, newly built, or newly renovated structure. There are many chains of OSB distribution: some defendants distribute OSB directly to large contractors and home building companies; others sell OSB to home improvement warehouses, lumber yards, dealers, and other retailers, who may then resell the OSB to contractors or to end users.

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[157] 2007 WL 2253419 (E.D.Pa.), 2007-2 Trade Cases P 75,845.

[158] In re OSB Antitrust Litigation, Second Consolidated Amended Class Action Complaint, 2006 U.S. Dist. Ct. Pleadings 167515.

Thus, individual end-users may have purchased their OSB from home improvement centers such as Home Depot or Lowe's, from dealers, or from retailers. The OSB in homes may have been distributed through home improvement centers, lumber yards, or retailers before reaching building contractors and, finally, the homes themselves.

Several lawsuits were originally filed in March 2006 and the cases were consolidated before Judge Diamond in the Eastern District of Pennsylvania. The lawsuits asserted that the defendants unlawfully conspired to fix, raise, maintain or stabilize the prices for OSB in violation of the federal antitrust laws, namely, Section 1 of the Sherman Act, 15 U.S.C. § 1 and the consumer protection and antitrust laws of several states.

The Plaintiffs claimed that, as a result of the alleged conduct of the defendants, the prices paid for OSB were higher than they otherwise would have been. The lawsuit sought damages (including punitive and/or multiple damages where available) under the applicable laws of certain states which permit indirect purchasers to recover such damages, injunctive relief, attorneys' fees and costs from defendants. The defendants denied that any of their conduct was unlawful.

2. Plaintiffs' Allegations

Plaintiffs alleged that on or about June 1, 2002, Defendants together tacitly agreed to raise OSB prices and so revitalize the stagnating OSB market. Plaintiffs also

contended that the conspiracy was wildly successful, "transforming defendants' previously moribund OSB business into a highly profitable one in a matter of months." Plaintiffs charged that the conspiracy continued to the present day.

Plaintiffs claimed that defendants took the following concerted actions to reduce the supply of OSB (and so drive up the price): (1) kept OSB from the market through mill shutdowns; (2) delayed or canceled the construction of new OSB mills; (3) bought OSB from competitors instead of manufacturing it themselves (which they could have done at a lower cost); and (4) maintained low operating rates at mills. Plaintiffs allege that defendants fixed and maintained the price of OSB through the use of a twice-weekly published price list in Random Lengths, an industry periodical.

Plaintiffs asserted that because Random Lengths included lists of OSB prices by region, the defendants could monitor their competitors and ensure that no member of the conspiracy "cheated" by offering significantly different prices. Plaintiffs also alleged that the defendants confirmed their agreements during meetings at industry trade shows and events. Plaintiffs contended that they paid illegally inflated OSB prices as end users because direct purchasers and intermediate indirect purchasers passed their increased costs down the varied chains of distribution. Plaintiffs sought injunctive relief for the proposed nationwide class, and damages and disgorgement of the defendants' illegally inflated profits for the multistate class.

3. Class Certification

Judge Diamond in the Eastern District of Pennsylvania certified this lawsuit as a class action and appointed the plaintiffs to represent the Class and plaintiffs' counsel as Class Counsel. Judge Diamond ruled that one direct purchaser class and two separate indirect purchaser classes of individuals and businesses that purchased actual OSB for end use, a multistate class with eight state subclasses for damages and a nationwide class for injunctive relief. Judge Diamond concluded that Plaintiffs had satisfied all the prerequisites of Fed.R.Civ.P.23(a) and fulfilled one of the requirements of Rule 23(b) for each proposed class.

He ruled as follows: "It is Plaintiffs' burden to show that the classes should be certified. In determining whether to certify, I must accept as true all substantive allegations in the Amended Complaint. Although I may not consider whether Plaintiffs will prevail on the merits, I may look beyond the four corners of the Amended Complaint if Plaintiffs' allegations are unsupported, or even rebutted, by a well-developed record."

4. Settlement

The court did not resolve the merits of Plaintiffs' claims or determine whether the plaintiffs' or defendants' contentions are true. Although the court did not rule on the

merits of Plaintiffs' claims, plaintiffs agreed separately with LP, Norbord, Weyerhaeuser, Tolko and Potlatch to settle the lawsuit.

Each settlement negotiation was overseen by the court. Plaintiffs' Counsel conducted an extensive investigation of the facts and the law relevant to the lawsuit. LP, Norbord, Weyerhaeuser, Tolko and Potlatch each vigorously denied that it had acted unlawfully in any respect. They asserted affirmative defenses to all of the claims and stated that they entered into these settlements only to avoid the costs and inconvenience of litigation.

Plaintiffs and their counsel, after protracted litigation, concluded that the settlements with LP, Norbord, Weyerhaeuser, Tolko and Potlatch were in the best interests of the class represented by the plaintiffs. The settlements did not represent an admission of liability or that the court had reached a final decision with respect to the merits of the lawsuit.[159]

Between March 2007 and July 2008, each of the nine defendants entered into settlement agreements, with a total recovery for the class plaintiffs of $120,730,000. The recovery breaks down by defendant as follows: Louisiana-Pacific - $44,500,000, Weyerhaeuser - $18,000,000, Georgia-Pacific - $9,880,00, Potlatch - $2,700,000,

[159] OSB settlement notice

Ainsworth - $8,600,000, Norbord - $30,000,000, Huber - $2,000,000, Tolko - $4,325,000, and Grant - $725,000.[160]

On January 29, 2008, plaintiffs reached settlement agreements with Ainsworth, Georgia-Pacific, and Huber in the amounts of $1.3 million, $1.2 million, and $850,000 respectively. These settlements were approved by the court on July 17, 2008.

On August 1, 2008, plaintiffs reached settlement agreements with LP, Norbord, Weyerhaeuser, Tolko and Potlatch in the amounts of $2.3 million, $2.2 million, $1.44 million, $350,000 and $300,000, respectively. These settlements were granted preliminary approval by the court on September 4, 2008. On Dec. 9, 2008. The judge issued five orders granting final approval of the settlement among the following OSB manufacturers: Grant Forest Products Sales Inc. and Grant Forest Products Inc. (collectively, Grant Forest), Potlatch Corp., Weyerhauser Co., Norbord Industries Inc. and Louisiana-Pacific Corp. In all of the orders, the judge said approval of the settlement is appropriate because of the complexity, expense and likely duration of the litigation. The judge added that continued litigation would have meant incurring significant additional expenses and delay before recovery, if any.[161]

[160] Joshua P. Davis & Robert H. Lande, Summaries of Twenty Cases of Successful Private Antitrust Enforcement, Univ. of San Francisco Law Research Paper No. 2013-01.

[161] IN RE: OSB ANTITRUST LITIGATION; COURT APPROVES FIVE SEPARATE SETTLEMENTS WORTH $95,925,000, gotaclassaction.com, posted on January 9,2009.

VII. Consumer Damage Relief System in Korea

A. Public Enforcement

The KFTC is a ministerial-level central administrative organization under the authority of the Prime Minister and also functions as a quasi-judiciary body. The Commission formulates and administers competition policies, and deliberates, decides, and handles antitrust cases. The KFTC performs its roles and duties independently without any intervention from an outside organization. [162]

The Monopoly Regulation and Fair Trade Act ("MRFTA") was enacted on December 23, 1980 and became effective on April 1, 1981 and the FTC was established in conformity with the law. The KFTC is vested with the authority to issue corrective actions and to impose administrative surcharges. Surcharges under the MRFTA are stipulated in conjunction with corrective action as a means of administrative enforcement for almost all violations of the law.

When possible violation of the law is reported or alleged, the competent bureau or regional office launches an examination into the concerned issue. The concerned parties are given opportunities to fully voice their opinions, and confidentiality of any business information acquired during procedure is strictly protected.[163]

[162] Fair Trade Commission, “Who we are”, www.ftc.go.kr/eng/contents.do?key=493
[163] Fair Trade Commission, “How we handle cases”, www.ftc.go.kr/eng/contents.do?key=495

B. Private Enforcement

Consumers injured by antitrust violations can file damage claims based on the Civil Code article 750 or the Fair Trade Act section 1 of article 56. But it is extremely difficult for plaintiffs, including price-fixing, to prove damages in litigation. To address these issues, the Fair Trade Article 57 stipulates, "The court, when it acknowledges that a conduct in violation of this Act caused damages but it is extremely difficult for the plaintiff to prove the facts that are necessary to prove an amount of such damages due to the nature of the facts, may determine the proper amount of such damages based on all arguments and available evidence."[164]

From 1981 to 2011, the number of lawsuits for damages (10) out of the number of exposed price fixing (586) contrast has a ratio of 1.7%, the rate of the number of lawsuits for damages (3) out of the number of bid-fixing (85) is 3.53 percent. Although there are 255 cases (43.6%) of the above 586 price fixing cases, which are small damages of the large number of victims, there is no single damages claim that a minor victim filed by him/herself (without help of a civic group). About 10 cases of damages only had been filed by consumer associations or non-governmental organizations. These results show clear evidence that the current civil code or the

[164] 이선희 "우리나라의 독점규제법과 사적 집행의 발전," 성균관법학 제23권 제1호 (2011).

Fair Trade Act fails to function correctly on compensation for small damages of the large number of victims caused by price fixing.

According to the Framework Act on Consumers, collective consumer dispute resolution was effective since 2007 and consumer group collective lawsuits were effective since January 1, 2008. However, to date 5 to 7 collective dispute resolution cases are filed each year and consumer group collective lawsuits have been raised in only one case for 4 years. In the situation there are various consumer damages continue to occur, it is the problem that the use performance of collective consumer dispute resolution and consumer group collective lawsuits is so low that it does not show its function.

When the Framework Act on Consumers was fully revised in 2008, the discussion focused on the prevention measures of too many senseless lawsuits. As a result, the regulations such as the lawyer's mandate for plaintiff, court's permit, prohibit other groups from filing collective lawsuits against the dismissed judgment were introduced.[165] However, in reality after the enforcement of the Act, the abuse of litigation was merely an unfounded fear, the real problem, on the contrary, is that, under existing legal scheme, civil litigation does not fulfill its functions.[166]

[165] 국회 법사위원회 "소비자보호법 전부개정법률안(대안) 검토보고" p. 5. (2006).

[166] 박희주,강창경, 소비자단체소송제도의 운용평가 및 개선에 관한 연구(한국소비자원, 2011).

VIII. Discussion on the Introduction of class action lawsuits and punitive damages in Korea

A. Class Actions

1. Need for Introduction

The most efficient and breakthrough way that can reduce the cost of lawsuit of victims caused by antitrust violations and increase litigation incentive is the introduction of a class action. The usefulness of class actions has been identified sufficiently in the U.S., especially in cartel lawsuits for damages. If a class action is introduced, individual victims can share litigation costs and attorneys' fees, and the litigation expectation costs can be significantly lower.

Therefore, a number of victims of small amount of damages will be able to have the incentive of litigation. As far as a class action is not recognized in case individuals' damages are small amount, even if there is the introduction of 2 times or 3 times damages, this will be still difficult to take the total cost of litigation and expect private enforcement activation.

There is a view that in fact a class action is more important than punitive damages in order to enable the private enforcement in the U.S. and the private enforcement through a lawsuit for damages can be powerless without a class action lawsuit.[167]

[167] The American Antitrust Institute, The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President of the United States (2008).

In addition, if a class action is introduced, the expectation cost of law violators (administrative fine + possibility for criminal penalties + damages resulting from class actions) also becomes larger and it can be acted as a deterrent of violation of the law. 2008-EC-White Paper also took a positive view for a deterrent effect of a class action lawsuit on violations of competition law.

2. Opposite View

a) Criticism in the United States

In the 1970-80s, ever since federal courts took a friendly attitude to their federal class action lawsuits, class action lawsuits became widely spread in almost all areas such as mass tort, asbestos damage, product liability, shareholders derivatives suit, corporate misbehavior, violations of fiduciary duty, employment discrimination, consumer protection regardless of state courts and federal courts.[168]

In the process, unexpected problems appeared such as (i) a lawyer's opportunistic behavior, (ii) coupon settlements, (iii) blackmail settlements, (iv) forum shopping, (v) too many frivolous securities class-action lawsuits, (vi) so-called professional plaintiff. Since side effects of a class-action lawsuit as mentioned above became social problems, Supreme Court of the U.S. from the 2000s strictly limits the class action lawsuit permit.

[168] Calabresi, G. & Schwartz, K.S. The costs of class actions: Allocation and collective redress in the U.S. experience. Eur J Law Econ (2011).

In Twombly case (2007)[169] Supreme Court of the U.S. reversed[170], dismissed plaintiff's complaint alleging that Bell Atlantic (defendant) violated Section 1 of the Sherman Act. In this case the majority's opinion in violation of the Sherman Act is that an antitrust claim cannot survive a motion to dismiss when it only alleges that the monopolists engaged in certain parallel conduct unfavorable to competition, if there is no factual context suggesting conspiracy to do so and it must include some contextual facts that make the claim plausible. [171]

The reasoning of the majority's opinion is that something beyond the mere possibility must be alleged so that plaintiffs making unfounded claims can not be allowed to take up the time of other people during the discovery phase. Antitrust discovery is very expensive; the threat of this cost will pressure defendants to settle even in weak cases.

On the other hand, Justices Stevens in dissenting opinion criticized that the majority opinion ignored the fact that the simplified notice pleading standard of the FRCP relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims and that the Sherman Act authorizes the recovery of treble damages and attorney's fees for successful plaintiffs indicates that Congress intended to encourage private enforcement of the law.

[169] Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007).
[170] Twombly v. Bell Atlantic Corp., 425 F.3d 99 (2d Cir. 2005).
[171] Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007), p. 1974 ("We do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.")

In Wal-Mart case (2011)[172] Supreme Court of the U.S. held as follows: "Certification of a class action is appropriate only when the common contention of the class members is capable of classwide resolution. Commonality does not mean merely the assertion of common allegations of fact, or even allegations of violation of the same law. Instead, commonality requires a plaintiff to demonstrate that the class members have suffered the same injury. What matters for class certification is the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation."

Justice Scalia (majority's opinion) gives little weight to the anecdotal and statistical evidence. At the same time, he puts a great deal of emphasis to Wal-Mart's written anti-discrimination policy. If the statistics and anecdotal evidence are ignored, the only class actions allowed would be against employers foolish enough not to make a formulaic written statement that they disapprove of discrimination.

b) Criticism in Korea

While there is little doubt that class actions may not only encourage antitrust victims to bring cases before the courts but also discourage firms to violate the law, there also exist critics against class actions that emphasis on a possibility of their abuse.[173] These critics argue that corporate activities are likely to be shrinking because of senseless lawsuits filed by a lot of lawyers to seek a huge success fees.

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[172] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

[173] 머니투데이 인터넷판 (2012. 7. 30), "재계, 불공정거래 집단소송제 도입 심각한 우려," <http:// www.hankyung.com/news/app/newsview.php?aid=2012073046961>

In addition, there is a criticism that the introduction of opt-out class-action lawsuit in the U.S. that extends subjective scope of res judicata to a third party does not fit to our country's law system because the code of civil procedure of our country was passed down from the laws of European continent.

The criticism based on the side effects of a class action in our country was also already raised in relation to the securities class action law.[174] On this hence, in 2004, securities class action law reflected a variety of safeguards that would prevent senseless lawsuits and protect the class member (for example, section 2 of article 5, subdivision 5, 7 of section 1 of article 5, section 2, 3 of article 9, subdivision 1 of section 1 of article 12, article 22, article 35, article 38, section 1, 3 of article 44, article 45, article 61, 62, 63).[175]

3. Review

Criticism in the U.S. was raised in the context of the so-called tort reform that tort law needs reform since in the 1990s too many frivolous lawsuits due to class action in combination with punitive damages cause untold social costs.[176] About the tort reform movement, there is criticism that it was raised by the insurance industry for

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[174] 김홍규 "證券關聯集團訴訟制의 導入과 濫訴의 防止," 상장협연구 제49호 (2004) ; 조진원.윤민원, "증권관련집단소송법의 입법론적 고찰: 남소방지를 중심으로," 법학연구 제16집 (2004) ; 이상돈, "집단소송에 대한 비판적 연구-증권집단소송을 중심으로," 한국민사소송법학회지 제8권 제1호 (2004).

[175] 윤창술 "증권집단소송의 남소방지제도," 한양법학 제17집 (2005) : 한석훈 "증권집단소송의 남소방지대책," 기업법연구 제16집 (2004).

[176] Calabresi, G. & Schwartz, K.S. The costs of class actions: Allocation and collective redress in the U.S. experience. Eur J Law Econ (2011).

the first time that massive tort lawsuits had been filed against at the time of the 1980's, and tobacco industry secretly led it from the 1990s.

According to the evidence civic organizations obtained, cigarette, chemical, pharmaceutical, insurance, healthcare and automobile industry that had been sued for massive tort law claims ordered secretly research projects to support tort reform, gave donations to organizations representing their position and lobbied for tort reform through legislative activities. In particular, there were suspicions that the class action fairness Act of 2005 President Bush signed was the result of tobacco industry's lobby.[177]

In the U.S. in relation to securities class action, this criticism is persuasive in that sense that there are too many frivolous lawsuits based on fraud on market theory and securities class actions have no sufficient deterrence effects and recovery for damages at all, however this criticism is unrelated to the Sherman act.

Since the malicious abuse of frivolous lawsuits can be adequately controlled by the court through flexible certification process operating and the penalty provisions, the argument that class action itself cannot be introduced because of the risk of abuse of class action is not convincing. As a result, there seems to be no reason that class action in relation to the Fair Trade Act cannot be introduced if the policy aspects of the effective deterrence of law violations and victims' damages relief is highly considered.

[177] Carl Deal & Joanne Doroshow, Center for Justice and Democracy and & Public Citizen, The CALA Files: The Secret Campaign by Big Tobacco and Other Major Industries to Take Away Your Rights, July 2000.

B. Punitive Damages

1. Need for introduction

As you can see from the name, punitive damages are recognized as a system to punish violators of the law. Punitive damages also play a role to deter violations of the law effectively by eliminating all the benefits resulting from violations of law and make it possible for small majority of victims to raise lawsuits aggressively by increasing the recoverable sum of damages.

Main function of compensation for damages is compensation for victims. Therefore, punitive damages are also known as compensatory damages. On the other hand, it leads to reduce or extinguish violations since violators cannot gain benefits from violations of the law. And incidental effects to be able to deter violations of the law are eventually obtained.

The EU's modernization of antitrust rules which is the EU Council Regulation stipulates in the Recital 7 "National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States.[178]

[178] EU Competition Law, Cartel legislation and other reference texts on 1 January 2013, available at http://ec.europa.eu/competition/cartels/legislation/index.html.

Antitrust Modernization Commission in the U.S. released Report and Recommendations in April 2007. And it mentioned that treble damages serve five related and important goals: (1) Deterring anticompetitive conduct; (2) Punishing violators of the antitrust laws; (3) Forcing disgorgement of the benefits of anticompetitive conduct from those violators; (4) Providing full compensation to victims of anticompetitive conduct; and (5) Providing an incentive to victims to act as "private attorneys general."[179]

2. Opposite View

There is a view that since most of the continental law system countries separate out civil and criminal liability, it is desirable that any penalty or disciplinary action should be done by criminal or administrative punishment and as a result, punitive damages are not allowed. Therefore, it is difficult to introduce punitive damages without law system modification.[180]

If the punitive damage is introduced, many specific problems will arise. In particular, if a judge takes charge of all task such as deciding whether the litigation meets the requirement of damages and specific sum of damages in the absence of jury system in civil litigation, there will be a large difference in the amount of compensation among judges and concern about the fairness of the trial will be raised.

[179] Antitrust Modernization Commission, Report and Recommendations p.245. (2007) Available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm
[180] Morris "Punitive Damages in Tort Cases," 44 Harv. L. Rev. 1176 (1912).

The Supreme Court of Korea, in the case of damages caused by illegal acts under the civil law, it is holding "equitable sharing of damage" with ideology. Equitable sharing of damages is basically aiming for 'actual indemnity' that focuses on compensatory functions. The punitive damages are unfair and unreasonable because it grants victims the over-relief (windfalls) or unfair benefits.

Victims spend a lot of litigation-related costs in addition to the actual damages and even if it has the function to preserve the loss in the form of punitive damages. If so, this is essentially a matter to be solved by including the litigation costs in the concept of the actual damages, not the punitive damages. In addition, attorneys who expected a large amount of attorneys' fees are highly likely to lure victims to file lawsuits, as a result there is a risk that the lawsuits will explode.

In the U.S., with respect to this issue a solution based on Societal Damages function is presented.[181] Justification for punitive damages is that it is an accepted system to achieve the appropriate deterrence in the state that the likelihood of violations of the law being exposed is not 100%.

If so, since the owner of the punitive damages shall be a broad victim group, not plaintiff, there has been a system introduced for public purposes by giving part of the punitive damages to the government. Since the 1980s Split-Recovery Legislation or

[181] Sharkey, Catherine M. “Punitive Damages as Societal Damages,” 113 Yale Law Journal 347 (2003).; Andrew F. Daughety & Jennifer F. Reinganum, “Found Money Split-Award Statues and Settlement of Punitive Damages Cases,” 5 American Law and Economics 134 (2003).

Split-Award Statues began to be introduced, typically, in 1997, Alaska (split ratio 50%), in 1998 Indiana (split rate 75%), Iowa (split ratio 75%), in 2001 Oregon (split rate 60%), in 2002 Utah (split ratio 50%). These social remedies can be achieved by making some improvements to the use of penalties for welfare. It argued that there is no need to introduce a punitive damages system because the above purpose can be achieved without the introduction of the punitive damages.

3. Review

The opposite logic is the argument that is rigorously interpreting and applying the dogma principle of law. This opinion overlooked that legal issues need to be resolved by elastic approaches.

Elastic operation of the system is urgently required in light of the ultimate goal of achieving optimal enforcement by harmoniously combining public enforcement including criminal responsibility and private enforcement each other. Particularly, under the circumstances that public enforcement based on penalties is not enough the goal of optimal execution can be achieved by making good use of the punitive damages.

IX. Conclusion

Under the Korean antitrust jurisdiction, the administrative fine by KFTC has played a major role on deterring the violations of antitrust laws. However, the average amount of fine was imposed at a very low level as 1.4% of the affected commerce.[182] It is estimated not to have a sufficient deterrence effect. Except for this fine, there are two more other sanctions such as criminal fines and damages, which have no sufficient deterrence effects at all.

To reform the structure of Korean antitrust enforcement against the antitrust violations, the introduction of class action and/or punitive damages systems need to be considered. After reviewing the strength and opposite view of the introduction of the two systems, I can say that there is no royal way to get rid of all prospected drawbacks and there is no perfect and ideal system, but 'second best solution' may be offered if there are various complementary measures.

[182] 김차동 "집단소송제 및 징벌적 손해배상제도 도입시 증가될 것으로 예상되는 공정거래법 위반행위 억지효과에 관한 실증적 분석," 경쟁법연구 제29권 (2014).

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