GCR INSIGHT

THE SETTLEMENTS GUIDE

Editor
Mark H Hamer

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Publisher's Note

For many clients, a quick and easy settlement is infinitely preferable to a protracted and rambunctious legal battle, but settlements gain little time in the spotlight within the world of competition enforcement. Equally, while there may be common themes across some jurisdictions, there are also enough significant local variations in settlement processes and procedures to trip up a global antitrust matter.

For these reasons, *Global Competition Review* is delighted to bring this, the newest addition to its stable of resources designed to help practitioners through the complex world of competition law, to our community. *The Settlements Guide* draws on the wisdom and expertise of distinguished practitioners globally, and brings together unparalleled proficiency in the field. GCR thanks our editor, Mark H Hamer, and his distinguished panel in helping us provide such essential guidance for all competition professionals.

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PART III
SETTLING PRIVATE DAMAGES ACTIONS

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US: Settling Class Actions

Robin D Adelstein and Eliot Fielding Turner[1]

Introduction

Most antitrust class actions in the United States end not with a verdict but with a settlement. Antitrust claims are often complex, and outcomes are uncertain and costly to litigate. Moreover, US antitrust law's liability regime places pressure on defendants to settle even those claims that are considered weak. To begin with, a plaintiff's economic damages are trebled.[2] Prevailing plaintiffs are also entitled to attorneys' fees, which, in large complex cases, can run into the tens of millions of dollars by themselves.[3] And the expense of defending an antitrust lawsuit itself can be costly owing to wide-ranging discovery, use of expert witnesses and sophisticated counsel.

In addition, defendants are jointly and severally liable for damages and plaintiffs' attorneys' fees.[4] In other words, a plaintiff can attempt to recover the entire amount of the damages attributed to a conspiracy from a single defendant. And there is no right of contribution from co-conspirators.[5] This often creates a type of 'prisoner's dilemma' – whenever a defendant settles for less than three times the damages attributable to the alleged misconduct, the remaining defendants face an increased risk that they will bear more than their proportionate shares of the damages. Thus, in the absence of a judgment-sharing agreement – which allows defendants to create a contractual right of contribution between themselves – defendants can face exposure in antitrust class action litigation far beyond the amount of damages that may be attributed

1 Robin D Adelstein and Eliot Fielding Turner are partners at Norton Rose Fulbright US LLP.

2 15 U.S.C. § 15.

3 id.

4 *Wilson P. Abraham Constr. Co. v. Texas Industries, Inc.*, 604 F.2d 897, 904 n.15 (5th Cir. 1979) ('Antitrust coconspirators are jointly and severally liable for all damages caused by the conspiracy to which they were a party.')

5 *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

to their alleged conduct. Taken together, these factors often pressure defendants in antitrust class actions to consider the possibility of early settlement, regardless of their perspective on the merits of the litigation.

As robust as US antitrust law's liability regime is, a verdict is by no means assured for plaintiffs. Thus, plaintiffs also face pressure to resolve claims, from the uncertainty of a potential judgment in their favour or its size, the expense of funding litigation (which is typically conducted on a contingency-fee basis where plaintiffs' counsel are not paid until the conclusion of the litigation), and the length of time between filing a lawsuit to its potential resolution – which can take years to go to trial to say nothing of appeals.

As with any other case, in evaluating whether to settle a defendant needs to consider the relative strengths and weaknesses of the plaintiffs' and defendants' positions –whether a class can be certified and the risk of liability, and the potential size of a judgment and the cost of litigating the case.

Defendants commonly consider settlement near the time class certification is decided, as that is a natural inflection point in most class actions. Before a class is certified there is typically uncertainty for both sides. If a class is certified it greatly increases the potential exposure a defendant faces. If it is not certified, the individual named plaintiff's potential recovery is typically dwarfed by the cost of litigating the claims through trial and appeal.

There are, however, some instances where denial of class certification is not a boon to defendants – and thus a defendant should consider the types of claims it faces in deciding whether to settle. For example, although the DC Circuit vacated the trial court's initial order certifying a class in *In re Rail Freight Fuel Surcharge Antitrust Litigation*,[6] and then affirmed the district court's later denial of class certification,[7] the proposed class comprised large, sophisticated businesses that could craft substantial, individual claims. Following denial of class certification, many individual plaintiffs brought claims, exposing defendants to much the same risk they faced in the class action.

The period after a class certification briefing has been completed but before a class certification decision has been rendered is often a window for settlement, as plaintiffs' counsel may be eager to notify the court of a settlement while the decision is pending. In addition, simply securing an initial 'icebreaker settlement' may be of interest to the plaintiffs since it can heighten the pressure on the remaining defendants to settle.[8] It may also be of interest to the plaintiffs because such a settlement helps fund the case against the remaining defendants.[9] Being the first to settle may also be beneficial for a defendant as icebreaker settlements are generally smaller than settlements entered into later in the litigation.[10]

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

7 *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019).

8 *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) (approving settlement and noting that 'this settlement has significant value as an "ice-breaker" settlement – it is the first settlement in the litigation – and should increase the likelihood of future settlements. An early settlement with one of many defendants can "break the ice" and bring other defendants to the point of serious negotiations.')

9 id. ('[T]he settlement provides class plaintiffs with an immediate financial recovery that ensures funding to pursue the litigation against the non-settling defendants.').

10 See Memo. in Support of Plaintiffs' Motion for Preliminary Approval, *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, Case No. 1:13-cv-7789, ECF No. 480 at 18 and n.8 (S.D.N.Y. 22 October 2015) (noting that early settling defendants' settlement payments were approximately US$12 million and

If a class is certified, it generally increases plaintiffs' settlement leverage and typically results in at least some settlements, given the potential liability that defendants face if a judgment is entered against them. But even after a class is certified, there can still be some uncertainty for plaintiffs, if defendants opt (as most do) to pursue an interlocutory appeal of class certification. Interlocutory appellate review of an order granting or denying class certification is discretionary and parties need to pursue this relief 14 days after the district court issues its order.[11] During the period when the court of appeals is considering whether to grant the petition, or after it does, the uncertainty of a court of appeals decision could spur the parties to reach a settlement.

Court approval of class action settlements

When parties settle cases on behalf of a class, the Federal Rules of Civil Procedure require both that the class members be given notice of the proposed settlement and that the court approve the settlement.[12] The Class Action Fairness Act of 2005 also requires that the defendants who are participating in the settlement give notice to the US attorney general and state attorneys general so that they may determine whether to object to the settlement.[13]

Because a class action settlement will bind class members beyond the named plaintiffs, the Federal Rules of Civil Procedure require both that the settlement be judicially approved and that absent class members be given an opportunity to object to the settlement – and potentially the ability to 'opt out' of the settlement. Because notifying absent class members of the settlement is a potentially costly exercise (particularly in cases where the proposed class comprises individual consumers), the rules require that before notice is sent the court must determine that it is likely to approve the settlement and that it would be able to certify a settlement class.[14]

The factors a court evaluates to determine whether it would likely approve the settlement are the same as the court will use to make its final determination.[15] Those include whether:

- class representatives and class counsel have adequately represented the class;
- the proposed settlement was negotiated at arm's length;
- relief provided by the settlement is adequate; and
- the proposed settlement treats class members equitably relative to one another.[16]

This phase is generally referred to as 'preliminary approval' and plaintiffs' counsel usually files a motion seeking preliminary approval of the settlement. Among other things, the motion will include a copy of the proposed settlement. Once the proposed settlement is filed, the settling defendant's obligation to notify the US attorney general and state attorneys general (for those states where class members reside) is triggered. Although the notice that is provided to the US attorney general and state attorneys general does not generally require defendants to assemble

US$18 million dollars for each percentage of their market share, whereas later settling defendants paid between approximately US$35 million and US$54 million for each percentage of their market share).

11 Fed. R. Civ. P. 23(f) ('A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered . . .').

12 Fed. R. Civ. P. 23(e).

13 28 U.S.C. § 1715(b).

14 Fed. R. Civ. P. 23(e)(1).

15 id.

16 id., at 23(e)(1)(B)(i).

a great deal of information, the notice and accompanying materials must be sent out no later than 10 days after the proposed settlement is first filed with the court.[17] A settling defendant will want to coordinate with the plaintiffs' counsel to ensure adequate time between filing the motion for preliminary approval and the deadline for the defendant to notify the US attorney general and state attorneys general.

Normally, motions for preliminary approval are not terribly controversial – after all, both parties ostensibly have agreed to settle the dispute and should want the court to approve their agreement. But occasionally a court will find that it cannot grant a motion for preliminary approval. For example, in the *In re High-Tech Employee Antitrust Litigation*, a number of defendants reached a settlement for US$325.4 million with all but one of the class representatives. The remaining class representative objected to the settlement.[18] He filed a motion opposing preliminary approval of the settlement. The court agreed that the settlement fell 'below the range of reasonableness', which would have made final approval unlikely.[19] Ultimately, after the court rejected the parties' first attempt to settlement, the parties reached a second settlement for US$415 million, which the court approved.[20]

The motion for preliminary approval sometimes also includes a description of a plan to give absent class members notice of the settlement. At other times, the plaintiffs file a motion asking the court to approve a notice plan later – as sometimes the plaintiffs and the defendant need to exchange information that the defendant possesses about potential class members, which will allow the plaintiffs to design an effective plan to give notice of the proposed settlement to the class. For example, sometimes the defendant has physical or email addresses for potential class members that may be used as one means to give notice. On occasion, the defendant may not have this information (or it may be incomplete) and notice will have to rely on publications and advertising to reach potential class members. The notice plan will also set deadlines for class members to file their claims to the settlement fund as well as when to object or opt out of the settlement.

After the class has been given notice and the opportunity to object or opt out, the court must hold a fairness hearing to decide whether to approve the settlement.[21] During the fairness hearing, the court will examine in greater detail the same types of factors it considered when preliminarily approving the settlement. Of note, in deciding whether the relief afforded by the settlement is adequate, the court must consider:

- the costs, risks and delay of trial and appeal;
- the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims;
- the terms of any proposed award of attorneys' fees, including timing of payment; and
- any agreements made in connection with the settlement agreement.

17 28 U.S.C. § 1715(b).

18 2014 WL 3917126, at *3 (N.D. Cal. 8 August 2014).

19 id., at *4.

20 *In re High-Tech Employee Antitrust Litig.*, 2015 WL 5159441 (N.D. Cal. 2 September 2015).

21 Fed. R. Civ. P. 23(e)(2) ('If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate.').

The court also must consider whether it can certify a settlement class. Where the settlement follows the court's decision on class certification on the merits, certifying a settlement class follows from the court's certification order and even in instances where the settlement precedes a class certification decision, it is usually little impediment to court approval.

Special issues for indirect purchasers and opt-out plaintiffs

Indirect purchaser claims

Federal antitrust law prohibits most price-fixing claims brought by 'indirect purchasers' and has done since the Supreme Court's 1977 decision in *Illinois Brick Company v. Illinois*.[22] Put another way, buyers of price-fixed products do not usually have standing to sue antitrust conspirators if they bought the product from someone other than a conspirator. Despite predictions by some that the Supreme Court might overrule or pull back *Illinois Brick*'s limitation on antitrust claims by indirect purchasers, in 2019 the Court reaffirmed *Illinois Brick*'s bar on indirect purchaser claims in *Apple v. Pepper*, where the Court was emphatic that:

> *indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers – that is, those who are 'the immediate buyers from the alleged antitrust violators' – may sue.*[23]

Although state antitrust laws normally follow judicial interpretations of federal antitrust law, states diverge on whether indirect purchaser claims are permitted. After *Illinois Brick*, some states passed 'repealer' laws that explicitly allow indirect purchaser claims.[24] Others states rejected *Illinois Brick* in judicial opinions.[25] Still others chose to follow *Illinois Brick*.[26] And finally in some other states the law remains murky more than 40 years after *Illinois Brick* was decided.

Because most state antitrust laws allow indirect purchasers to pursue antitrust claims, class actions asserting such claims are relatively common. Until 2005, when the Class Action Fairness Act (CAFA) was passed, indirect purchaser claims were typically brought in state courts. The liberalised diversity and removal provisions in CAFA allowed defendants to remove

22 431 U.S. 720.

23 139 S. Ct. 1514, 1521 (2019).

24 See, e.g., Cal. Bus. & Prof. Code § 16750 (Cartwright Act claims may be brought by 'any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant'); 740 Ill. Comp. Stat. § 10/7 ('No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages.').

25 See, e.g., *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 519–20 (Tenn. 2005) (collecting cases) ('We join other jurisdictions in declining to interpret *Illinois Brick Co.* as precluding indirect purchasers from bringing suit under state antitrust law.')

26 See, e.g., *Abbott Labs. v. Segura*, 907 S.W.2d 503, 506–07 (Tex. 1995) (concluding that *Illinois Brick* would bar antitrust claims by indirect purchasers under the Texas Free Enterprise and Antitrust Act and foreclosing the 'recovery of damages for seeking a prohibited antitrust recovery under the masquerade of our consumer protection statute').

such cases to federal court, where they were typically consolidated in multi-district litigation along with federal antitrust law claims brought by direct purchasers.[27] Increasingly, indirect purchaser plaintiffs have brought such claims directly in federal court.

One of the rationales for *Illinois Brick*'s indirect purchaser rule was that allowing claims by both indirect purchasers and direct purchasers would potentially permit double recovery.[28] As the Supreme Court put it, 'potential plaintiffs at each level in the distribution chain are in a position to assert conflicting claims to a common fund – the amount of the alleged overcharge – by contending that the entire overcharge was absorbed at that particular level in the chain'.[29] That concern is likewise implicated by allowing such claims under state antitrust statutes, but despite doing so, the Supreme Court has concluded that *Illinois Brick* does not pre-empt state laws allowing such claims.[30] Of course, defendants faced with both indirect and direct purchaser claims often perceive (and sometimes are able to use to their advantage) conflicts between direct and indirect purchasers.[31] It is also often in a defendant's best interest to ensure such claims are tried together to prevent double recovery and permit a settlement that resolves all claims. In any case, the pressures created by facing claims from both direct and indirect purchasers are equally present in attempting to settle such claims.

The variety of state approaches to *Illinois Brick* raises another issue – how the settlement funds should be allocated when the claims arise under different state laws that may afford varying levels of relief. One court initially rejected a class action settlement that did not distinguish between class members making claims under state laws that did not allow indirect purchaser claims and those that did.[32] After the parties modified the allocation plan to reduce the amount allocated to claimants who lived in states that would not permit indirect purchaser claims, the court approved the settlement.[33] A number of other courts have specifically rejected this approach and instead advocated that settlement funds should be distributed on a pro rata basis.[34]

27 28 U.S.C. § 1332(d); 28 U.S.C. § 1453.

28 *Illinois Brick*, 431 U.S. at 737.

29 id.

30 *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) ('[T]he Court of Appeals erred in holding that the state indirect purchaser statutes are pre-empted.').

31 Steve Williams, 'Federal And State Class Antitrust Actions Should Not Be Tried In A Single Trial', 23 *J. of Antitrust and Unfair Competition Law Section of the State Bar of California* 66, 67 (Fall 2014) (acknowledging defendants 'may also view a joint trial as a wedge which may force an allocation of damages between the direct and indirect purchasers').

32 *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 75–76 (D. Mass 2005).

33 id., at 76 ('[H]ad this case proceeded to trial and judgment, claimants from . . . states [that don't allow indirect purchaser claims] would have recovered nothing at all. The decision to cut them a slice of the pie at all is borne out of SmithKline's unwillingness to bargain for less than a global settlement nationwide as well as the inherent vicissitudes of litigation.').

34 *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 327–28 (3d Cir. 2011) (rejecting objection that claimed greater percentage of settlement funds should have been awarded to class members in states that allow indirect purchaser claims); *In re Cathode Ray Tube Antitrust Litig.*, 2016 WL 721680, at *33 (N.D. Cal. 28 January 2016) (recommending denying objection that claimants from states allowing indirect purchaser claims should receive a larger portion of settlement funds).

Opt-out plaintiffs

Some members of a class may decide that rather than object to a settlement, they simply may wish to opt out and pursue their claims individually. Opt-out plaintiffs who are individual consumers tend to have small claims that do not make economic sense to litigate individually. But in other cases, opt-out plaintiffs – typically large businesses – may have significant claims themselves and wish to pursue them to increase the amount that will be allocated to them in any potential settlement of the claims. That may be particularly so where the opt-out plaintiff has an ongoing relationship with the defendant and may be able to reach a favourable commercial resolution. Businesses that believe they are the victims of antitrust violations are increasingly retaining independent counsel to monitor class litigation and decide whether they should pursue claims individually. In summary, whether a defendant should expect opt-out claims depends both on the nature of the plaintiffs comprising the class and the terms of the settlement.

Of course, if there are too many opt-out plaintiffs (or even a substantial number), it likely defeats the defendant's primary goal of resolving the litigation through settlement. Thus, in reaching a class settlement a defendant can consider several mechanisms – other than simply paying more, which may not be effective – to ensure the settlement achieves its goal of ending the litigation. One such mechanism is an agreement that if the number of opt-out claims represents a certain percentage of all claims, the defendant's settlement payment will be reduced by some amount to account for those plaintiffs that are not participating. Another similar term is a clause that 'busts' the settlement agreement if a certain percentage of plaintiffs decide to opt out.

Appendix 1

About the Authors

Robin D Adelstein
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Robin Adelstein is a partner at Norton Rose Fulbright, and global and US head of the firm's antitrust and competition group.

Robin's pragmatic approach to the practice of law is informed by her experience, having served as in-house antitrust and litigation counsel at Swiss healthcare company Novartis and UK alcohol beverage leader Diageo before becoming North American General Counsel of Sandoz, the generics and biosimilars division of Novartis.

In various sectors, including the pharmaceuticals and consumer products industries, Robin has advised her clients on a wide variety of issues and directed material litigation and government investigations to positive results. As a former general counsel of a multibillion-dollar company, she knows first-hand the importance of providing prompt, accurate and practical advice on legal and compliance issues, particularly in the context of balancing complex business objectives.

Robin litigates complex, commercial disputes, class actions and multi-jurisdictional cases before US federal and state courts, and represents clients in government enforcement actions by the Federal Trade Commission and the Department of Justice, as well as the Health and Human Services Office of the Inspector General. She has defended clients in qui tam matters in many locales and in investigations and litigation by numerous state attorneys general. Robin also advises companies with respect to the antitrust issues arising in mergers and acquisitions, joint ventures, trade association activities, distribution practices, pricing programmes and other aspects of competitor and customer communications and associations.

Eliot Fielding Turner
Norton Rose Fulbright US LLP

Eliot Turner is a partner in the firm's antitrust disputes group, representing clients in defending and prosecuting claims under Sections 1 and 2 of the Sherman Act, as well as claims under Section 7 of the Clayton Act and state antitrust laws. Eliot regularly counsels clients on antitrust

issues, including the requirements of the Hart-Scott-Rodino Antitrust Improvements Act, and represents them in government investigations. He also has broad experience representing clients in other complex litigation matters.

Eliot clerked for Judge Phyllis Kravitch of the US Court of Appeals for the 11th Circuit in Atlanta and Chief Judge Royce C Lamberth of the US District Court for the District of Columbia.

Eliot is the editor-in-chief of *Litigation*, the journal of the American Bar Association's Section of Litigation. He is also a council member of the State Bar of Texas' Antitrust Section and is the former chair of the Houston Bar Association's Antitrust Section.

Eliot is a member of the Texas and District of Columbia bars. He is admitted to practice before the US District Court for the Southern District of Texas, the US District Court for the Western District of Texas, the US District Court for the District of Columbia and the US Court of Appeals for the Fourth Circuit, and has appeared in federal courts throughout the country.

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Whether, where, why, when and how to settle global antitrust matters is fundamental to the successful counselling of a client facing competition enforcement issues, and yet surprisingly little practical guidance exists to help lawyers understand the process and how to best protect the company's interests in navigating it. *The Settlements Guide* brings together expert practitioners from 17 leading institutions around the world to fill that gap and debate the key issues in negotiating a successful settlement in antitrust matters.

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