# The International Handbook on Private Enforcement of Competition Law

*Edited by*

Albert A. Foer

*The American Antitrust Institute, Washington, DC, USA*

Jonathan W. Cuneo

*Cuneo, Gilbert & LaDuca, LLP, USA*

*Associate Editors*

Randy Stutz

*Research Fellow, American Antitrust Institute*

Bojana Vrcek

*Ph.D., M.E.S., Research Fellow, American Antitrust Institute*

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# 11 Plaintiffs' remedies

*W. Joseph Bruckner*[1] *and Matthew R. Salzwedel*[2]

**Introduction**

Unlike most of the world, the United States has long maintained that private victims of anticompetitive conduct are entitled and should be encouraged to seek private redress for violations of the antitrust laws, distinct from the civil and criminal fines and penalties imposed and collected by governments. The deterrence value of private antitrust enforcement is discussed throughout this *Handbook*, but the incentivizing force behind that deterrence – plaintiffs' remedies – is discussed here.

This chapter begins by discussing the linchpin of the US system of private antitrust remedies, the treble damages award, as well as attendant considerations including joint-and-several liability, measurement and distribution of damages, and the availability of pre- and post-judgment interest, attorneys' fees, and costs. The chapter concludes by discussing various equitable remedies and related issues.

**Single versus treble damages**

One of the primary economic deterrents of the American antitrust laws is the ability of successful plaintiffs to recover statutorily mandated awards of treble (three times) actual damages, in addition to whatever other legal or equitable relief they may receive under the law.

The Sherman Antitrust Act of 1890 itself does not authorize a private right of action or an award of treble damages to persons injured by a violation of its terms; instead, §4 of the Clayton Antitrust Act of 1914[3] establishes a private right of action, including an award of treble damages: 'Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.'[4]

In interpreting the Clayton Act's treble-damages provision, the Supreme Court of the United States has acknowledged two primary reasons for awarding civil plaintiffs treble damages for violations of the antitrust laws: (1) to punish past violations of the

[1] W. Joseph Bruckner is a partner at Lockridge Grindal Nauen P.L.L.P., in Minneapolis, Minnesota.

[2] Matthew R. Salzwedel is an associate at Lockridge Grindal Nauen P.L.L.P., in Minneapolis, Minnesota. The authors would like to thank Devona Wells for her research assistance in preparing this chapter.

[3] The Clayton Antitrust Act of 1914, in its entirety, is codified at 15 U.S.C. §§12–27 (2009). Section 4 of the Clayton Act is codified at 15 U.S.C. §15 (2009).

[4] Clayton Act, 15 U.S.C. §15(a) (2009); *see also* Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 US 164, 176, 126 S. Ct. 860 (2006) (treble damages may be recovered for violations of the Robinson Patman Act); Kristian v. Comcast Corp., 446 F.3d 25, 47 (1st Cir. 2006).

law; and (2) to deter future antitrust violations.[5] Because of the quasi-punitive nature of treble damages, a number of federal courts have concluded that parties cannot – even knowingly and voluntarily – contractually waive their ability to pursue awards of treble damages.[6] In addition, the jury is not told that its award of damages will be trebled; the court automatically multiplies the jury's damages award by three.[7]

Because of the availability of treble damages under the Clayton Act, punitive damages are not otherwise available under the Sherman or Clayton Act.[8] In addition, plaintiffs generally are only entitled to treble damages for either (1) overcharges paid[9] or lost profits attributable to defendants' antitrust violation; or (2) the deprivation to the value of a business as the result of the defendant's anticompetitive conduct, but not both.[10]

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[5] Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 US 143, 151, 107 S. Ct. 2759 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 US 614, 635, 105 S. Ct. 3346 (1985) ('The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.') (citing Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 US 134, 138–39, 88 S. Ct. 1981 (1968)), *overruled on other grounds*, Copperweld Corp. v. Independence Tube Corp., 467 US 752, 104 S. Ct. 2731 (1984)). *But cf*. Atl. Richfield Co. v. USA Petroleum Co., 495 US 328, 331 n.1, 110 S. Ct. 1884 (1990) (stating that the treble-damages provision of the Clayton Act is a 'remedial provision').

[6] Kristian v. Comcast Corp., 466 F.3d 25, 47–48 (1st Cir. 2006) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 US 614, 637 n.19, 105 S. Ct. 3346 (1985)) (noting that other circuit courts also have disapproved of waiver of statutory remedies for antitrust violations (citing Gaines v. Carrollton Tobacco Bd. of Trade, Inc., 386 F.2d 757, 759 (6th Cir. 1967))).

[7] Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240, 1242 (5th Cir. 1974).

[8] Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1332 (10th Cir. 1996) (citing McDonald v. Johnson & Johnson, 722 F.2d 1370, 1381 (8th Cir. 1983)). *See also* Hawaii v. Standard Oil Co., in which the US Supreme Court held that although a state may sue to recover three times the actual damages it has suffered from an alleged antitrust violation, the same as any citizen, it cannot also recover antitrust damages for harm to 'its general economy' because such recovery 'would open the door to duplicative recoveries.' The Court observed that if 'general economy' damages under the antitrust laws were allowed, 'we should insist upon a clear expression of a congressional purpose to make it so, and no such expression is to be found in §4 of the Clayton Act.' Haw. v. Standard Oil Co., 405 US 251, 263–64, 92 S. Ct. 885 (1972).

[9] S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 US 531, 38 S. Ct. 186 (1918); In re Linerboard Antitrust Litig., 305 F.3d 145, 159–60 (3d Cir. 2002); Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 631–32 (7th Cir. 2002); Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1043 (9th Cir. 1988).

[10] L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1374 (9th Cir. 1986). The US Supreme Court has held that only direct purchasers may recover monetary damages under the Clayton Act for violations of the Sherman Act. Illinois Brick Co. v. Illinois, 431 US 720, 735, 97 S. Ct. 2061 (1977) ('[T]he antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.'). Similarly, the Court has held that a defendant may not defend such a claim by demonstrating that the plaintiff had passed on any overcharges to indirect purchasers and consumers. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 US 481, 494, 88 S. Ct. 2224 (1968). Indirect purchasers still may sue for injunctive relief under the Clayton Act. In addition, several states allow monetary recovery by indirect purchasers for violations of the states' own antitrust and unfair trade practices statutes. For further discussion of direct and indirect purchaser standing, see Chapter 6 of this *Handbook*.

**Joint and several liability**

In cases in which multiple defendants have been shown to have engaged in a conspiracy with anticompetitive effects, it is well established that each defendant is liable, not only for the injury caused by its own conduct, but also jointly and severally for the injuries caused by the illegal acts of its coconspirators.[11] An antitrust action is a tort action, and, as such, co-conspiring joint tortfeasors are jointly and severally liable for the entire amount of damages caused by their acts.[12] Like the availability of treble damages for successful antitrust plaintiffs, defendants' joint and several liability for antitrust violations is another strong deterrent to anticompetitive conduct.[13]

**Damages measured**

Determining with precision the exact amount of damages resulting from violations of the antitrust laws is nearly impossible in most large antitrust cases. As a result, federal courts permit antitrust plaintiffs substantial leeway in calculating and showing their damages.[14]

'An antitrust plaintiff seeking treble damages under section 4 of the Clayton Act must prove an antitrust violation, fact of damage or injury, and measurable damages.'[15] A plaintiff's damages calculation, therefore, consists of two related damage components – the fact of injury or damage, and the measure of damage.[16]

First, a plaintiff must show 'the fact of damage,' that is, injury to the antitrust plaintiff, which courts sometimes deem to be the predicate 'injury in fact.'[17] 'The fact of damage requirement is one of causation; the plaintiff must show that the defendant's unlawful conduct was a material cause of injury to its business.'[18] 'The fact of injury may be established by inference or circumstantial evidence.'[19]

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[11] In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 284 (4th Cir. 2007) (quoting Wilson P. Abraham Constr. Corp. v. Tex. Indus., Inc., 604 F.2d 897, 904 n.15 (5th Cir. 1979)); In re Uranium Antitrust Litig., 617 F.2d 1248, 1257 (7th Cir. 1980); *see also* Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 632–33 (7th Cir. 2002).

[12] *E.g.*, Wainwright v. Kraftco Corp., 58 F.R.D. 9, 11–12 (N.D. Ga. 1973). Soon after the Sherman Act was enacted, courts 'treated antitrust violations as akin to torts' and applied joint-and-several liability as a remedy for plaintiffs. Burlington Indus. v. Milliken & Co., 690 F.2d 380, 391 (4th Cir. 1982). Recently, the Antitrust Modernization Commission also supported the continuation of joint-and-several liability in antitrust cases with some modifications. *See* Antitrust Modernization Comm'n, Report & Recommendation at 44 (Apr. 2007).

[13] Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 631–33 (7th Cir. 2002).

[14] Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198, 207 (5th Cir. 2000).

[15] Danny Kresky Enter. Corp. v. Magid, 716 F.2d 206, 209 (3d Cir. 1983).

[16] In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 19 n.18 (1st Cir. 2008); Nichols v. Mobile Bd. of Realtors, Inc., 675 F.2d 671, 675–76 (5th Cir. 1982).

[17] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 US 100, 114, n.9, 89 S. Ct. 1562 (1969); Am. Seed Co. v. Monsanto Co., 271 Fed. Appx. 138, 140 (3d Cir. 2008) (citing Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977)); In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 19 n.18 (1st Cir. 2008); Robinson v. Tex. Auto. Dealers Ass'n, 387 F.3d 416, 422 (5th Cir. 2004); In re Cardizem CD Antitrust Litig., 200 F.R.D. 326, 339 (E.D. Mich. 2001).

[18] El Aguila Food Prods., Inc. v. Gruma Corp., 131 Fed. Appx. 450, 452 (5th Cir. 2005).

[19] In re Cardizem CD Antitrust Litig., 200 F.R.D. 326, 339 (E.D. Mich. 2001); *see also* Cont'l Ore Co. v. Union & Carbon Corp., 370 US 690, 700, 82 S. Ct. 1404 (1962).

Second, the plaintiff must establish the 'measure of damage,'[20] which is the amount of damages directly flowing from the predicate fact of damage.[21] Once a plaintiff shows 'fact of damage,' his burden of persuasion in proving the amount of damages is relaxed,[22] and he must only satisfy a relaxed just-and-reasonable-inference standard in measuring damages.[23] To this end, a plaintiff is entitled to offer evidence of damages, and, after hearing such evidence, a 'jury is entitled to award damages in an antitrust case based on expert testimony.'[24]

*Just-and-reasonable standard*[25]

Courts substantially relax the proof required for showing the measure of plaintiff's damages 'to facilitate the policy of the antitrust laws.'[26] According to the United States

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[20] Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005) (citing Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1490 (8th Cir. 1992)).

[21] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 US 100, 114 n.9, 89 S.Ct. 1562 (1969) (stating that an antitrust plaintiff's 'burden of proving the fact of damage under §4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage').

[22] El Aguila Food Prods., Inc. v. Gruma Corp., 131 Fed. Appx. 450, 452 (5th Cir. 2005); Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198, 206-07 (5th Cir. 2000); Pierce v. Ramsey Winch Co., 753 F.2d 416, 435 (5th Cir. 1985); In re Plywood Antitrust Litig., 655 F.2d 627, 635 (5th Cir. 1981).

[23] In re Plywood Antitrust Litig., 655 F.2d 627, 635 (5th Cir. 1981) (quoting Malcolm v. Marathon Oil Co., 642 F.2d 845, 858 (5th Cir. 1981) (citing Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 23–24 (5th Cir. 1974)); Lehrman v. Gulf Oil Corp., 464 F.2d 26, 46 (5th Cir. 1972); *see also* Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198, 207 (5th Cir. 2000) (highlighting that once the fact of antitrust damage is shown, a more relaxed burden of proof arises for showing the amount of damages than would justify an award in other civil cases) (citing Pierce v. Ramsey Winch Co., 753 F.2d 416, 434 (5th Cir. 1985)); Allied Accessories & Auto Parts Co. v. Gen. Motors Corp., 901 F.2d 1322, 1326 (6th Cir. 1990) ('While the damages may not be determined by merely speculation or guess, it will be enough if the evidence shows the extent of damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.') (quoting Allied Accessories & Auto Parts Co. v. Gen. Motors Corp., 825 F.2d 971, 974 (6th Cir. 1987)) (quoting Story Parchment Co. v. Paterson Parchment Paper Co., 282 US 555, 563, 51 S. Ct. 248 (1931))).

[24] In re Scrap Metal Antitrust Litig., 527 F.3d 517, 533 (6th Cir. 2008) (citing Texaco Inc. v. Hasbrouck, 496 US 543, 572, 110 S. Ct. 2535 (1990)). Expert testimony and analysis is not required as a matter of law to be part of a plaintiff's proof of damages, but it is almost universally offered as a matter of practice.

[25] In addition to the relaxed standard for measuring antitrust damages, a plaintiff need only show that the antitrust violation was a material cause of the plaintiff's injury and resulting damages and need not show that the antitrust violation was the sole cause of the plaintiff's injury and resulting damages. *See, e.g.*, L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1366 (9th Cir. 1986) (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 US 100, 114 n.9, 89 S. Ct. 1562 (1969)); William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1051 (9th Cir. 1981)). Finally, a plaintiff's profitability does not preclude a damages award. *See* Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1222 (9th Cir. 1997) (holding that plaintiffs demonstrated that, although plaintiffs remained profitable, defendants' anticompetitive replacement-parts policy handicapped plaintiffs' growth) (citation omitted)); Pierce v. Ramsey Winch Co., 753 F.2d 416, 436–37 (5th Cir. 1985) (noting that a plaintiff can establish antitrust injury by showing that it would have earned an even higher profit but for the antitrust injury).

[26] Malcolm v. Marathon Oil Co., 642 F.2d 845, 858 (5th Cir. 1981) (citing Ford Motor Co.

Supreme Court, '[a]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.'[27]

In *J. Truett Payne Co. v. Chrysler Motors Corp.*, for example, the United States Supreme Court, in explaining its 'traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury,' articulated the reasons for its willingness to accept a degree of uncertainty in proving a plaintiff's measure of damages. The Court recognized the difficultly in determining actual damages in antitrust cases as opposed to other civil causes of action, such as personal injury cases: [28]

> The vagaries of the marketplace usually deny us sure knowledge of what the plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle articulated in cases such as *Bigelow* [*v. RKO Radio Pictures*], that it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.[29]

In *Bigelow*, the Court concluded that not allowing a jury to make 'a just and reasonable estimate' of damages based on direct, as well as inferential, proof could preclude recovery for an antitrust plaintiff, and thereby incentivize future antitrust wrongdoing by defendants.[30]

Courts will affirm an award of damages based 'on a plaintiff's estimate of sales it could have made absent the antitrust violation,'[31] despite the inherent imperfections in such an estimate. Indeed, '[t]he antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor

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v. Webster's Auto Sales, Inc., 361 F.2d 874, 887 (1st Cir. 1966)); Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 903 (5th Cir. 1973); J. Truett Payne Co. v. Chrysler Motors Corp., 451 US 557, 566, 101 S. Ct. 1923 (1981); In re Scrap Metal Antitrust Litig., 527 F.3d 517, 533 (6th Cir. 2008).

[27] Bigelow v. RKO Radio Pictures, Inc., 327 US 251, 264, 66 S. Ct. 574 (1946).

[28] J. Truett Payne Co. v. Chrysler Motors Corp., 451 US 557, 565, 101 S. Ct. 1923 (1981); *see also* Texaco Inc. v. Hasbrouck, 496 US 543, 572–73, 110 S. Ct. 2525 (1990).

[29] J. Truett Payne Co. v. Chrysler Motors Corp., 451 US 557, 566–67, 101 S. Ct. 1923 (1981) (quoting Hetzel v. Balt. & Ohio R. Co., 169 US 26, 39, 18 S. Ct. 255 (1898) (quoting US Trust Co. v. O'Brien, 143 N.Y. 284, 289, 38 N.E. 266, 267 (1894)); Story Parchment Co. v. Paterson Parchment Paper Co., 282 US 555, 563, 51 S. Ct. 248 (1931).

In *Bigelow*, the Supreme Court permitted an award of damages based on the difference in movie-theater receipts before the defendant unlawfully distributed films and fixed admission prices and the receipts after the plaintiff could no longer show certain new films. *See* Bigelow v. RKO Radio Pictures, Inc., 327 US 251, 261–63, 66 S. Ct. 574 (1946); *see also* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 US 100, 123, 89 S. Ct. 1562 (1969) (stating that '[t]rial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.').

[30] Bigelow v. RKO Radio Pictures, 327 US 251, 264, 66 S. Ct. 574 (1946); *see also* Pac. Coast Agric. Exp. Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1207 (9th Cir. 1975).

[31] Conwood Co. v. US Tobacco Co., 290 F.3d 768, 794 (6th Cir. 2002) (citation omitted).

imperfections.'[32] Additionally, '[a] plaintiff need not calculate a specific damage figure so long as he proposes an acceptable method for calculating damages.'[33] The amount of damages, however, must not be a product of 'speculation or guess work.'[34]

In determining whether the amount of plaintiff's claimed damages are just and reasonable, federal courts generally apply one or more of four measure-of-damages tests: (1) the yardstick lost-profits method; (2) the violation-free-market method; (3) regression analysis; and (4) the before-and-after method.

*Yardstick lost-profits method* The yardstick lost-profits method attempts to calculate damages by analyzing the profits of business operations in an industry closely comparable to the plaintiff's industry, or prices charged for products comparable to the conspiratorially affected products, but in markets or industries not affected by the conspiracy.[35] In employing the yardstick lost-profits method of calculating damages, however, the plaintiff 'bears the burden to demonstrate the reasonable similarity of the business whose earning experience he would borrow.'[36]

*Violation-free-market method* The violation-free-market method attempts to measure antitrust damages by estimating the amount of sales the plaintiff could have made (or what prices would have been for a particular product) absent the defendant's antitrust violation[37] by (1) constructing an 'offense-free' world; and (2) using and evaluating that 'offense-free' world to determine what would have happened in the particular market 'but for' the defendants' anticompetitive conduct.[38]

*Regression analysis* Another generally accepted method of measuring antitrust damages is a statistical analysis known as multiple- or variable-regression analysis.[39]

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[32] In re Scrap Metal Antitrust Litig., 527 F.3d 517, 533 (6th Cir. 2008); Conwood Co. v. US Tobacco Co., 290 F.3d 768, 795 (6th Cir. 2002) (quoting South-East Coal Co. v. Consol. Coal Co., 434 F.2d 767, 794 (6th Cir. 1970)).

[33] Rodney v. N.W. Airlines, Inc., 146 Fed. Appx. 783, 791 (6th Cir. 2005).

[34] In re Linerboard Antitrust Litig., 497 F. Supp. 2d 666, 675 (E.D. Pa. 2007) (quoting In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1176 (3d Cir. 1993)); *see also* Blanton v. Mobil Oil Corp., 721 F.2d 1207, 1216 (9th Cir. 1983); MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1161 (7th Cir. 1983)).

[35] Conwood Co. v. US Tobacco Co., 290 F.3d 768, 793 n.8 (6th Cir. 2002); Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198, 207 n.17 (5th Cir. 2000); Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974).

[36] Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198, 208 (5th Cir. 2000); *see also* Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974).

[37] Conwood Co. v. US Tobacco Co., 290 F.3d 768, 794 (6th Cir. 2002) (citing J. Truett Payne Co. v. Chrysler Motors Corp., 451 US 557, 565, 101 S. Ct. 1923 (1981)).

[38] LePage's Inc. v. 3M, 324 F.3d 141, 165 (3d Cir. 2003) (citing Callahan v. A.E.V., Inc., 182 F.3d 237, 254–58 (3d Cir. 1999); Rossi v. Standard Roofing, Inc., 156 F.3d 452, 484–87 (3d Cir. 1998)); Conwood Co. v. US Tobacco Co., 290 F.3d 768, 793 n.8 (6th Cir. 2002); Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198, 207 n.17 (5th Cir. 2000).

[39] Conwood Co., v. US Tobacco Co., 290 F.3d 768, 793 (6th Cir. 2002); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1238 (3d Cir. 1993); In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 485–86 (W.D. Pa. 1999) (discussing multiple-regression analysis), *cited in* In re Linerboard Antitrust Litig., 305 F.3d 145, 153 (3d Cir. 2002).

> Multiple regression analysis is a statistical tool for understanding the relationship between two or more variables . . . . [It] is sometimes well suited to the analysis of data about competing theories in which there are several possible explanations for the relationship among a number of explanatory variables . . . . [It] may also be useful (1) in determining whether a particular effect is present; (2) in measuring the magnitude of a particular effect; and (3) in forecasting what a particular effect would be, but for an intervening event.[40]

In general, regression analysis attempts to estimate a plaintiff's damages by determining the effect that two or more independent variables have on a single dependent variable.[41] For example, regression analysis can be used to estimate the effect of an antitrust violation on prices charged during the violation period by attempting to hold constant all other material 'non-violation' variables that also affected prices during the same period. In 1993, the United States Court of Appeals for the Third Circuit observed that multiple regression analysis is considered a reliable method to measure antitrust damages.[42]

*Before-and-after method* The before-and-after method of measuring antitrust damages (sometimes also called the 'before-during-after' method) attempts to measure damages by comparing the plaintiff's profits or defendant's prices charged during some period shown to be free of the antitrust violation (perhaps before the violation commenced, after its cessation, or during a break-down in the midst of an otherwise ongoing violation) to prices charged or profits earned during the violation period.[43] But the before-and-after theory is not easily applied to a plaintiff who is driven out of business by anticompetitive conduct, because it often cannot easily compile a subsequent earnings record to estimate its lost profits. In such circumstances, a yardstick lost-profits method sometimes is used.[44]

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[40] In re Linerboard Antitrust Litig., 203 F.R.D. 197, 219 (E.D. Pa. 2001), *quoted in* In re Linerboard Antitrust Litig., 497 F. Supp. 2d 666, 670 n.8 (E.D. Pa. 2007).

[41] Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade County, 122 F.3d 895, 917 (11th Cir. 1997); *see also* Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp., 100 Fed. Appx. 296, 299 (5th Cir. 2004); Conwood Co. v. US Tobacco Co., 290 F.3d 768, 793 n.8 (6th Cir. 2002); Gutierrez v. Johnson & Johnson, 2006 WL 3246605, *5 (D.N.J. Nov. 6, 2006); In re Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348, 1359 (N.D. Ga. 2000); In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 486 (W.D. Pa. 1999) (citing Daniel L. Rubinfeld, *Reference Guide On Multiple Regression*, Reference Manual on Scientific Evidence at 419 (1994)); In re Aluminum Phosphide Antitrust Litig., 893 F. Supp. 1497, 1504 (D. Kan. 1995).

[42] Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1238 (3d Cir. 1993); *see also* Conwood Co. v. US Tobacco Co., 290 F.3d 768, 793 (6th Cir. 2002); City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 566 (11th Cir. 1998) (citing Askew v. City of Rome, 127 F.3d 1355, 1365 n.2 (11th Cir. 1997)).

[43] In re Scrap Metal Antitrust Litig., 527 F.3d 517, 529 (6th Cir. 2008); Conwood Co. v. US Tobacco Co., 290 F.3d 768, 793 n.8 (6th Cir. 2002); Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198, 207 n.17 (5th Cir. 2000) (quoting Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974)).

[44] Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198, 207 n.17 (5th Cir. 2000) (quoting Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974)). In *Eleven Line, Inc.*, the court observed that, while the before-and-after method and the yardstick lost-profits method are common ways to quantify antitrust damages, different damages measures may be appropriate,

**Distribution of damages**

In antitrust cases involving multiple plaintiffs, the distribution of damages (whether through settlement or jury verdict) depends on the number of plaintiffs and the degree to which each plaintiff was damaged by defendants' conduct in relation to the other plaintiffs. In antitrust class or mass actions, for example, total damages may be distributed to the various class members or individual plaintiffs based on matrices comparing a given class member's or plaintiff's total purchases or sales to those of all other class members or plaintiffs.

In general, however, courts do not permit the 'fluid recovery' method of distributing damages. 'Fluid recovery refers to the distribution of unclaimed or unclaimable funds to persons not found to be injured but who have interests similar to those of the class.'[45] Fluid recovery, for example, is not allowed in the United States Court of Appeals for the Second Circuit.[46] The United States Court of Appeals for the Ninth Circuit, however, appears to allow fluid recovery only 'where conventional methods of proof are unavailable and, even then, only in an extraordinary circumstance.'[47]

The concept of 'fluid recovery' as a method for *distributing* damages, which generally is not allowed, should not be confused with the concept of a court or jury finding class-wide impact from an antitrust violation and *awarding* 'aggregate' or class-wide damages as a result. The United States Court of Appeals for the Sixth Circuit has held that '[d]amages in an antitrust class action may be determined on a classwide, or aggregate, basis, without resorting to fluid recovery where the [evidence] . . . provide[s] a means to distribute damages to injured class members in the amount of their respective damages.'[48]

Thus, for example, in a class action recovering damages for a price-fixing conspiracy, class members claiming against a recovery fund must demonstrate (usually to class plaintiffs' court-appointed class counsel or a court-appointed claims administrator) that

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depending on the facts of the particular case 'so long as the estimates and assumptions used [in the chosen method of showing antitrust damages] rest on adequate data.' 213 F.3d at 207.

[45] In re Scrap Metal Antitrust Litig., 527 F.3d 517, 534 (6th Cir. 2008) (quoting In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 525 (S.D.N.Y. 1996) (citing Schwab v. Philip Morris USA, Inc., 2005 WL 3032556, *1 (E.D.N.Y. Nov. 14, 2005))). Fluid recovery is conceptually distinct from a *cy pres* distribution. A *cy pres* distribution may be used to distribute damages that for one reason or another have not been claimed by members of a class. *See* Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1307 (9th Cir. 1990) (holding 'that the district court properly considered cy pres distribution for the limited purpose of distributing the unclaimed funds').

[46] Gutierrez v. Wells Fargo & Co., 2009 WL 1247040, *3 (N.D. Cal. May 5, 2009) (quoting Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973) ('allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes' and 'is clearly prohibited by the Enabling Act')).

[47] Gutierrez v. Wells Fargo & Co., 2009 WL 1247040, *3 (N.D. Cal. May 5, 2009) (citing In re Hotel Tel. Charges, 500 F.2d 86, 89–90 (9th Cir. 1974)). In *Gutierrez*, the district court pointed out that such an extraordinary circumstance would be 'where a defendant has not preserved its records so as to allow a more precise calculation of damages.' *Id.*

[48] In re Scrap Metal Antitrust Litig., 527 F.3d 517, 534 (6th Cir. 2008) (quoting In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 526 (S.D.N.Y. 1996)).

they purchased a product or products whose price is shown to have been affected by the antitrust violation, and that they purchased the product during the violation period.

**Prejudgment interest allowed only on a finding of defendants' bad faith and material delay**

In addition to authorizing awards of treble damages, the Clayton Antitrust Act, as amended in 1982, allows awards to successful plaintiffs of prejudgment interest, but only on a finding of bad faith on the part of defendants that caused a material delay in the adjudication of the dispute.

If the court finds such limited circumstances exist, the court may award prejudgment interest 'on actual damages for the period beginning on the date of service [of the complaint] . . . and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances.'[49] Because the bar is set high for a plaintiff to show that it is entitled to an award of prejudgment interest, it appears that no court to date has awarded prejudgment interest to a successful antitrust plaintiff.[50]

**Postjudgment interest**

In addition to prejudgment interest, an antitrust plaintiff also may obtain an award of postjudgment interest. Congress intended postjudgment interest to compensate a successful antitrust plaintiff for being deprived of compensation between the entry of judgment and the subsequent payment of the judgment by the defendant.[51] Postjudgment interest on a judgment generally begins to run from the date judgment is entered, rather than the date of the jury's verdict.[52]

**Indemnification or contribution**

The Clayton Antitrust Act does not provide for contribution, *i.e.*, the right of a joint tortfeasor to recover from other joint tortfeasors, nor does the common law provide a right of contribution among joint tortfeasors. The United States Supreme Court has held that it will not find such a right by implication in cases arising under the Sherman and Clayton Antitrust Acts because there is no indication that Congress considered contribution among joint violators under the US antitrust laws.[53]

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[49] Clayton Act, 15 U.S.C. §15(a)(1–3) (2009). *See* Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 435–36 (2d Cir. 2007); Fishman v. Estate of Wirtz, 807 F.2d 520, 561 (7th Cir. 1986); In re Linerboard Antitrust Litig., 504 F. Supp. 2d 38, 64–66 (E.D. Pa. 2007) (court found plaintiffs' damages claim for 'opportunity costs' akin to prejudgment interest and therefore not allowed absent finding of bad faith and material delay).

[50] *See* Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth., 133 F.R.D. 481, 487 n.4 (E.D. La. 1990) (noting that neither the court nor the parties cited any case where court awarded prejudgment interest under 15 U.S.C. §15(a)).

[51] H.J. Inc. v. Flygt Corp., 925 F.2d 257, 261 (8th Cir. 1991) (citation omitted).

[52] Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 US 827, 835, 110 S. Ct. 1570 (1990). The postjudgment interest rate is set by statute. It is calculated from the date of judgment, and the rate is 'equal to the weekly average 1-year constant maturity Treasury yield' as set by the Federal Reserve System. 28 U.S.C. §1961.

[53] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 US 630, 635–36, 101 S. Ct. 2061 (1981). *See generally* Chemung Canal Trust Co. v. Sovran Bank/Md., 939 F.2d 12, 17 (2d Cir. 1991). In

**Fees**[54]

Many antitrust cases are brought on a contingency-fee basis. Under a contingency-fee arrangement, attorneys representing a successful plaintiff or plaintiff class (through pre-trial settlement or jury verdict) generally will advance on their clients' behalf the time and costs for prosecuting the litigation and, if successful, will receive a percentage of the common-damages fund awarded to the plaintiff or plaintiff class (for example, in price-fixing direct-purchaser antitrust class actions).

Some larger single-plaintiff cases, however, may be brought under an hourly-fee or other attorney-fee arrangement. For example, a large plaintiff that files its own lawsuit in conjunction with a class action, in which the plaintiff would have qualified for class membership but chose to opt out, may decide to pay its attorneys to prosecute its tag-along action on an hourly basis.

The general 'American Rule' for awards of attorneys' fees provides that, absent statutory or other similar authority, a civil plaintiff generally may not ask the court to order the opposing party to pay the plaintiff's attorneys' fees, even if the plaintiff ultimately prevails in the litigation.[55]

The Clayton Antitrust Act, however, provides a statutory exception to the American Rule and specifically mandates that a losing defendant must pay the attorneys' fees of a successful plaintiff: 'Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, *including a reasonable attorney's fee*.'[56] Under the Clayton Act, therefore, an award of attorneys' fees to a successful antitrust plaintiff is mandatory[57] and, like awards of treble damages, may not be waived by agreement of the parties (for example, through agreements to arbitrate their antitrust claims).[58]

What is more, an antitrust plaintiff need not be entirely or even substantially successful in the litigation to obtain an award of attorneys' fees. In 1990, for example, the United

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2007, the congressionally chartered Antitrust Modernization Commission recommended that Congress enact legislation allowing non-settling defendants to seek contribution from other non-settling defendants to the extent a plaintiff has collected a disproportionate share of its judgment from one or more of the non-settling defendants. Two of the twelve Commissioners declined to join the Commission's recommendation; one Commissioner believed that current policy better furthers the goal of deterrence by destabilizing cartels and discouraging their formation. Antitrust Modernization Commission, *Report & Recommendations* at 252–55 (Apr. 2007). To date, no such legislation has been enacted, and the rule barring a right of contribution among co-defendants in antitrust cases remains in effect.

[54] For further discussion of attorneys' fees in the context of financing private enforcement, see Chapter 12 of this *Handbook*.

[55] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 US 240, 247, 95 S. Ct. 1612 (1975); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 US 714, 718, 87 S. Ct. 1404 (1967); Arcambel v. Wiseman, 3 US (3 Dall.) 306 (1796); Goldberger v. Integrated Res., Inc., 209 F.3d 43, 47 (2d Cir. 2000); Kelco Disposal, Inc. v. Browning-Ferris Indus., 845 F.2d 404, 410 (2d Cir. 1988).

[56] Clayton Act, 15 U.S.C. §15 (2009) (emphasis added).

[57] Hasbrouck v. Texaco, Inc., 879 F.2d 632, 635 (9th Cir. 1989) (citing Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1312 (9th Cir. 1982)).

[58] Kristian v. Comcast Corp., 466 F.3d 25, 53, 64 (1st Cir. 2006).

States Court of Appeals for the Fifth Circuit concluded that a successful plaintiff need only show (1) defendant's violation of the antitrust laws; and (2) the predicate 'fact of damage' to recover attorneys' fees from the losing defendant.[59] Therefore, 'the actual recovery of compensatory damages [is] irrelevant to the recoverability of attorneys' fees.'[60] The Supreme Court of the United States has similarly held that the Clayton Antitrust Act authorizes fees 'for legal services performed at the appellate stages of a successfully prosecuted private antitrust action.'[61]

The United States Court of Appeals for the Ninth Circuit has pointed out the significant benefit afforded to the general public by awarding attorneys' fees to a successful plaintiff: The purpose of requiring an award of attorneys' fees under the Clayton Act 'is to insulate treble damage recovery from expenditures for legal fees, consistent with section [4 of the Clayton Act's] purpose to encourage private persons to undertake enforcement of antitrust laws.'[62] Shifting the payment of attorneys' fees from a successful plaintiff to a losing defendant also serves to deter future antitrust violations.[63]

Awarding attorneys' fees to a successful plaintiff, however, should not result in a windfall to successful plaintiffs' counsel.[64] To guard against the potential for excessive attorneys' fee awards, for example, federal courts will judge the amount of 'reasonable'[65] fees requested by plaintiffs' counsel not based on the actual amount paid by a plaintiff to his attorneys but instead on the market rate for similarly situated attorneys in the particular legal market, however defined.[66]

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[59] Sciambra v. Graham News, 892 F.2d 411, 415 (5th Cir. 1990) (citing Ala. v. Blue Bird Body Co., 573 F.2d 309, 317 (5th Cir. 1978)); Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20–22 (5th Cir. 1974).

[60] Sciambra v. Graham News, 892 F.2d 411, 415–16 (5th Cir. 1990).

[61] Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1527 (10th Cir. 1984) (quoting Perkins v. Standard Oil Co., 399 US 222, 223, 90 S. Ct. 1989 (1970)) (citing Alexander v. Nat'l Farmers Org., 696 F.2d 1210, 1211–12 (8th Cir. 1982)); Moore v. James H. Matthews & Co., 682 F.2d 830, 839 & n.11 (9th Cir. 1982); Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 55–56 (5th Cir. 1976); 2 S. Speiser, Attorneys' Fees § 14:6 (1973)).

[62] Hasbrouck v. Texaco, Inc., 879 F.2d 632, 639 (9th Cir. 1989) (quoting Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1312 (9th Cir. 1982)).

[63] Sciambra v. Graham News, 892 F.2d 411, 416 (5th Cir. 1990) (quoting Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 90 (1st Cir. 1970)) (citing Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407, 1423–24 (11th Cir. 1987)); Illinois v. Sangamo Constr. Co., 657 F.2d 855, 859–60 (7th Cir. 1981) (quoting Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 90 (1st Cir. 1970)).

[64] La. Power & Light Co. v. Kellstrom, 50 F.3d 319, 328 (5th Cir. 1995) (citing Hensley v. Eckerhart 461 US 424, 430 n.4, 103 S. Ct. 1933 (1983)); *see also* City of Riverside v. Rivera, 477 US 561, 580, 106 S. Ct. 2686 (1986) (quoting S. Rep. No. 94-1011 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913)).

[65] The hourly fee of only the senior-most partners of a law firm does not constitute a reasonable hourly billing rate. *See* In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 306 n.14 (3d Cir. 2005) (citing Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000)); In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 732 n.11 (3d Cir. 2001).

[66] La. Power & Light Co. v. Kellstrom, 50 F.3d 319, 328 (5th Cir. 1995) (citing Blum v. Stenson, 465 US 886, 895–96, 104 S. Ct. 1541 (1984)); Blanchard v. Bergeron, 489 US 87, 93, 109 S. Ct. 939 (1989) (stating that '[s]hould a[n] [attorney's] fee agreement provide less than a reasonable fee . . ., the defendant should nevertheless be required to pay the higher [market-based] amount').

In *Hasbrouck v. Texaco*, the United States Court of Appeals for the Ninth Circuit noted that reasonable attorneys' fees could exceed the agreed-on contingency-fee arrangement between the plaintiff and his attorneys.[67]

Courts have employed several methods to calculate a reasonable attorneys' fee to be awarded to a successful plaintiff. The most common methods of determining a reasonable attorneys' fee are: (1) the percentage-of-the-fund method; (2) the lodestar method; (3) the lodestar cross-check method; and (4) the *Johnson-Kerr* method. These methods are discussed more fully in Chapter 11 of this *Handbook*, which addresses the funding of private antitrust litigation.

**Costs**

In addition to authorizing an award of attorneys' fees, the Clayton Antitrust Act also authorizes recovery of a successful antitrust plaintiff's costs: '[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, *and the cost of suit*, including a reasonable attorneys' fee.'[68] The recovery of costs also is discussed more fully in Chapter 11.

**Equitable remedies**

*Injunctive relief*

*Permanent injunctive relief* Section 16 of the Clayton Antitrust Act specifically authorizes an award of injunctive relief: 'Any person, firm, corporation, or association shall be entitled to *sue for and have injunctive relief*, in any court of the United States having jurisdiction over the parties, against *threatened loss or damage* by a violation of the antitrust laws . . . .'[69]

Injunctive relief, therefore, is available to an antitrust plaintiff as an equitable remedy, even if the plaintiff has not yet suffered any actual antitrust damages.[70] In circumstances such as these, where a plaintiff has not yet suffered any damages, a plaintiff 'need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue to recur.'[71]

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[67] Hasbrouck v. Texaco, Inc, 879 F.2d 632, 639 (9th Cir. 1989).

[68] Clayton Act, 15 U.S.C. §15 (2009) (emphasis added).

[69] Clayton Act, 15 U.S.C. §26 (2009) (emphasis added); *see also* Cargill, Inc. v. Monfort of Colo., Inc., 479 US 104, 110–11, 107 S. Ct. 484 (1986); In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 12 (1st Cir. 2008); Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n, 666 F.2d 1130, 1147 (8th Cir. 1981).

[70] Cargill, Inc. v. Monfort of Colo., Inc., 479 US 104, 111, 107 S. Ct. 484 (1986); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 US 100, 130, 89 S. Ct. 1562 (1969); In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 12 (1st Cir. 2008) (citations omitted).

[71] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 US 100, 130, 89 S. Ct. 1562 (1969) (citing Swift & Co. v. United States, 196 US 375, 396, 25 S. Ct. 276 (1905)); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 US 37, 54, 47 S. Ct. 522 (1927); United States v. Or. State Med. Soc'y, 343 US 326, 333, 72 S. Ct. 690 (1952); United States v. W. T. Grant Co., 345 US 629, 633, 73 S. Ct. 894 (1953)); *see also* Cargill, Inc. v. Monfort of Colo., Inc., 479 US 104, 111, 107 S.

Injunctive relief is intended to provide a private plaintiff with important non-monetary relief; but, like awards of treble damages, it also is vital to enforcing the antitrust laws and deterring future antitrust violations. As such, injunctive relief generally is applied flexibly, with 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'[72]

It is plaintiff's burden to show the presence of the threat of injury sufficient for an award of injunctive relief.[73] A plaintiff attempting to establish a claim for injunctive relief must demonstrate 'a "cognizable danger" of injury, not just a "mere possibility."'[74]

The broader range of anticompetitive conduct subject to injunctive relief was recognized by the United States Court of Appeals for the First Circuit in *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.* There, the court concluded that Congress empowered a broader range of antitrust plaintiffs to seek injunctive relief than it did plaintiffs seeking money damages by providing for less exacting standards for showing an entitlement to injunctive relief.[75] According to the First Circuit, a plaintiff seeking injunctive relief must only show 'a threat of injury rather than an accrued injury.'[76]

The distinction between the proof required for an award of injunctive relief as opposed to an award of money damages also took center stage in *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield*, where the United States Court of Appeals for the First Circuit held that, although a jury could find no damages on an antitrust claim, that jury finding still 'arguably requires the lower court to [independently] consider awarding injunctive relief.'[77]

*Preliminary injunctive relief* As opposed to permanent injunctive relief, which a court typically awards at the end of the litigation, courts also may grant requests for preliminary injunctions. A preliminary injunction is considered an extraordinary equitable remedy and, therefore, the antitrust plaintiff's 'right to relief must be clear and unequivocal.'[78]

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Ct. 484 (1986); In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 13 (1st Cir. 2008) (quoting Mid-West Paper Prods. Co. v. Cont'l Group, Inc., 596 F.2d 573, 591 (3d Cir. 1979)); Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n, 666 F.2d 1130, 1147 (8th Cir. 1981).

[72] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 US 100, 131, 89 S. Ct. 1562 (1969) (citing Hecht Co. v. Bowles, 321 US 321, 329–30, 64 S. Ct. 587 (1944)).

[73] In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 14 (1st Cir. 2008) (citations omitted).

[74] Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864, 870 (9th Cir. 1991) (quoting TRW, Inc. v. FTC, 647 F.2d 942, 954 (9th Cir. 1981)); *see also* Lake Hill Motors, Inc. v. Jim Bennett Yacht Sales, Inc., 246 F.3d 752, 755 (5th Cir. 2001) ('Likewise, a plaintiff seeking injunctive relief under §16 of the Clayton Act can only obtain that relief when they show a significant threat of some injury to their business or property from a violation of the antitrust laws.' (citing McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1341 (5th Cir. 1988); Cargill, Inc. v. Monfort of Colo., Inc., 479 US 104, 113, 107 S. Ct. 484 (1986) (same))).

[75] Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 407–08 (1st Cir. 1985); *see also* In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 13 (1st Cir. 2008).

[76] Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 408 (1st Cir. 1985).

[77] Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield, 883 F.2d 1101, 1106 (1st Cir. 1989).

[78] SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991) (citing GTE Corp. v. Williams, 731 F.2d 676, 678 (10th Cir. 1984)); Penn v. San Juan Hosp., Inc., 528 F.2d 1181, 1185

Courts in antitrust cases have differed on the elements of, and the level of proof required for, a preliminary injunction. In 1986, the United States Supreme Court concluded that to obtain preliminary injunctive relief a plaintiff must allege a threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.[79] Twenty-one years later, however, the United States Court of Appeals for the Second Circuit appeared to apply a relaxed standard for preliminary injunctive relief, concluding that an antitrust plaintiff must simply show irreparable harm as a result of the defendants' conduct,[80] in addition to a likelihood of success on the merits of the litigation.[81]

The United States Court of Appeals for the Seventh Circuit, in contrast, has varied in its treatment of requests for preliminary-injunctive relief. In 1999, in *Allied Signal v. B.F. Goodrich Co.*, the Seventh Circuit held that a plaintiff seeking preliminary-injunctive relief first must show that he was likely to prevail on the merits of the litigation and had suffered irreparable harm for which there was no adequate remedy.[82] If the plaintiff

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(10th Cir. 1975); Matzke v. Block, 542 F. Supp. 1107, 1112–13 (D. Kan. 1982); *see also* Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir. 2007) (citing Moore v. Consol. Edison Co., 409 F.3d 506, 510 (2d Cir. 2005)).

[79] Cargill Inc. v. Monfort of Colo., Inc., 479 US 104, 109, 107 S. Ct. 484 (1986) (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 US 477, 489, 97 S. Ct. 690 (1977)).

[80] Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir. 2007) (explaining that, to satisfy the irreparable-harm requirement, an antitrust plaintiff must demonstrate that, absent a preliminary injunction, it will suffer '"an injury that is neither remote nor speculative, but actual and imminent," and one that cannot be remedied "if a court waits until the end of trial to resolve the harm"' (quoting Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 114 (2d Cir. 2005) (quoting Rodriguez v. DeBuono, 175 F.3d 227, 234 (2d Cir. 1999)))).

[81] Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir. 2007) (quoting Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219, 225 (2d Cir. 2006)).

[82] AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 573 (7th Cir. 1999) (citing Doran v. Salem Inn, Inc., 422 US 922, 931, 95 S. Ct. 2561 (1975)); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1453 (7th Cir. 1995). Previously, Judge Richard Posner introduced a mathematical formula to guide the analysis of whether or not to grant a preliminary injunction: P x Hp > (1 – P) x Hd. Under this formula, a preliminary injunction should be granted only if the harm to the P (plaintiff) if the injunction is denied multiplied by the probability that the denial would be an error (so that P would win at trial) exceeds the harm to the defendants if the injunction is granted, multiplied by the probability that granting the injunction would be an error. Judge Posner opined that this formula was not offered as a new legal standard but was intended to assist with the analysis of a preliminary injunction by presenting succinctly the factors that the court must consider in making its decision and by articulating the relationship among the factors. *See* Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 593 (7th Cir. 1986); *see also* Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 590 (7th Cir. 1984) (citing Libertarian Party v. Packard, 741 F.2d 981, 984–85 (7th Cir. 1984) (holding that a preliminary injunction requires analysis of the harm to the plaintiff and the harm to the defendant from denial or grant of the injunction, respectively, the likelihood of the plaintiff prevailing on the merits when the case is tried, and the effect on the public of granting or denying the preliminary injunction)); Roland Mach. Co. v. Dresser Indus. Inc., 749 F.2d 380, 386–87 (7th Cir. 1984) (holding that an antitrust plaintiff must show that (1) he has no adequate remedy at law; (2) he will suffer irreparable harm if the preliminary injunction is not granted; and (3) he has some likelihood of succeeding on the merits; then, the court will determine the likelihood of success on the merits in determining whether to grant a preliminary injunction).

In contrast, the United States Court of Appeals for the Sixth Circuit has held that a preliminary-injunction analysis weighs whether (1) the plaintiff is likely to prevail on the merits; (2) whether

makes that preliminary showing, the court then applies a sliding-scale analysis that balances the harms to the parties with the public's interest.[83]

In 1988, however, the United States Court of Appeals for the Ninth Circuit held that a party seeking a preliminary injunction must show either (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor.[84] According to the Ninth Circuit, either test requires a plaintiff to show a significant threat of irreparable harm to the plaintiff.[85]

*Declaratory relief*

Although a plaintiff might not always recover money damages for allegedly anticompetitive conduct, he may be entitled to declaratory relief to determine his rights in relation to another party.[86]

In 1980, for example, the United States Court of Appeals for the Ninth Circuit acknowledged that 'the strong policy favoring enforcement of the antitrust laws may stay its application where the plaintiff seeks only to disentangle itself from an agreement which has a substantial anti-competitive effect on commerce.'[87] In *Beacon Theatres, Inc. v. Westover*, the United States Supreme Court recognized that plaintiffs may bring an action for declaratory judgment under the antitrust laws; however, the defendant was still entitled to a jury trial on the issue of antitrust liability.[88]

**Limitation periods**

The Clayton Antitrust Act provides for a four-year statute of limitations for claims under the several civilly enforceable antitrust laws: '[A]ny action to enforce any cause of action under [15 U.S.C.] shall be forever barred unless commenced within four years after the cause of action accrued.'[89] Courts generally consider the four-year limitations period in the Clayton Act to be procedural, not substantive, which means that it can be varied by agreement of the parties.[90]

But because Congress in the Clayton Act provided for a four-year statute of limitations in civil antitrust actions, that limitations period is definitive, and provides the

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the plaintiff would suffer irreparable injury if the court does not grant the injunction; (3) whether a preliminary injunction would cause substantial harm to others; and (4) whether a preliminary injunction would be in the public interest. *See* Samuel v. Herrick Mem'l Hosp., 201 F.3d 830, 833 (6th Cir. 2000) (citing Glover v. Johnson, 855 F.2d 277, 282 (6th Cir. 1988)).

[83] Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 593–94 (7th Cir. 1986).

[84] US v. BNS Inc., 858 F.2d 456, 464 (9th Cir. 1988) (citing Apple Computer, Inc. v. Formula Int'l Inc., 725 F.2d 521, 523 (9th Cir. 1984)).

[85] US v. BNS Inc., 858 F.2d 456, 464 (9th Cir. 1988) (citing Oakland Tribune, Inc. v. Chronicle Pub. Co., 762 F.2d 1374, 1376 (9th Cir. 1985)).

[86] THI-Hawaii, Inc. v. First Commerce Fin. Corp., 627 F.2d 991, 996 (9th Cir. 1980).

[87] THI-Hawaii, Inc. v. First Commerce Fin. Corp., 627 F.2d 991, 996 (9th Cir. 1980) (citing PHILLIP E. AREEDA & DONALD E. TURNER, ANTITRUST LAW ¶348a (1978)); *cf.* Florists' Nationwide Tel. Delivery Network v. Florists' Tel. Delivery Ass'n, 371 F.2d 263 (7th Cir. 1967).

[88] 359 US 500, 504, 79 S. Ct. 948 (1959).

[89] Clayton Act, 15 U.S.C. §15(b) (2009); Zenith Radio Corp. v. Hazeltine Research, Inc., 401 US 321, 338, 91 S. Ct. 795 (1971).

[90] In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 287–89 (4th Cir. 2007).

exclusive limitations period for civil antitrust claims, subject to very limited exceptions.[91] The United States Court of Appeals for the Fourth Circuit, for example, has held that an arbitration agreement between the parties may reduce the four-year limitations period to as short as one year, noting that the Clayton Act does not prevent parties from agreeing to a contractually shortened limitations period.[92]

*Accrual*

The predicate question that naturally arises in determining the effect of the Clayton Act's four-year statute of limitations is: when does a civil antitrust cause of action accrue, triggering the commencement of the statute's four-year statute of limitations?

The Supreme Court of the United States has held that an antitrust claim accrues 'when a defendant commits an act that injures a plaintiff's business'[93] and where the injured plaintiff is aware, or should be aware, of the existence and source of her injury.[94] Generally, this means an antitrust plaintiff must file its claim within four years following the defendant's injurious act, where the plaintiff was or should have been aware of the existence and source of the injury.[95] Important exceptions to this general rule are discussed more fully below.

*Laches*

The equitable doctrine of laches is similar to, but legally and factually distinct from, a statute of limitations. Laches may apply to bar an antitrust claim where it would be inequitable to permit a claim to be enforced because of a change in the condition or relations of the property or parties. It is possible, but not likely, that laches could bar an antitrust claim even though the statute of limitations for the claim has not yet expired.[96] For example, in *Kloth v. Microsoft Corporation*, the United States Court of Appeals for the Fourth Circuit concluded that the district court did not abuse its discretion in dismissing plaintiffs' claims for injunctive relief based on the doctrine of

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[91] Holmberg v. Armbrecht, 327 US 392, 395, 66 S. Ct. 582 (1946) (citing Herget v. Cent. Nat. Bank & Trust Co., 324 US 4, 65 S. Ct. 505 (1945)).

[92] In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 287-88 (4th Cir. 2007). For a discussion of defendants raising limitation periods as a procedural defense, see Chapter 9 of this *Handbook*.

[93] Rotella v. Wood, 528 US 549, 554, 120 S. Ct. 1075 (2000); Zenith Radio Corp. v. Hazeltine Research, Inc., 401 US 321, 338, 91 S. Ct. 795 (1971); Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 827 (11th Cir. 1999) (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 401 US 321, 338, 91 S. Ct. 795 (1971)), *amended in part*, 211 F.3d 1224 (2000); In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 287–90 (4th Cir. 2007); Sanderson v. Spectrum Labs, Inc., 227 F. Supp. 2d 1001, 1011 (N.D. Ind. 2000).

[94] Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994) (noting that a different rule for determining the time of accrual for a cause of action would require an insufficient degree of diligence on the part of the potential claimant).

[95] Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 827 (11th Cir. 1999) (citing Clayton Act 15 U.S.C. §15(b)).

[96] Holmberg v. Armbrecht, 327 US 392, 396, 66 S. Ct. 582 (1946) (citing Galliher v. Cadwell, 145 US 368, 373, 12 S. Ct. 873 (1892)); *see also* S. Pac. Co. v. Bogert, 250 US 483, 488–89, 39 S. Ct. 533 (1919).

laches, noting that plaintiffs did not pursue their equitable claims for injunctive relief with diligence.[97]

*Tolling*

*Pendency of government action* The Clayton Antitrust Act authorizes the tolling of a private civil antitrust action while the government (usually the United States Department of Justice or United States Attorneys) pursues a criminal or civil cause of action against the targeted defendants.[98] The Clayton Act provides:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations . . . *shall be suspended during the pendency thereof and for one year thereafter* . . . .[99]

This tolling provision applies to 'all proceedings in the government action until its termination in a final decree disposing of all issues.'[100]

In 1970, the United States Court of Appeals for the Second Circuit determined that the pendency of a government action continues until such time that a judgment or decree becomes final so that the government and defendants are satisfied (to the extent possible) with the result of the litigation and have decided to not appeal.[101] Consequently, according to the Second Circuit, 'only after the time to appeal has expired can private litigants rely on the irrevocability of determinations made in the [pendent] government action.'[102] Finally, a plaintiff's right to toll the statute of limitations during the pendency of a government action does not depend on the government's success (or lack thereof) in proving its allegations.[103]

There are several reasons why the statute of limitations for a private antitrust claim is tolled during the pendency of a government criminal or civil-enforcement action. Tolling during the pendency of a government action seeks to balance competing policy objectives of the antitrust laws, namely (1) retaining private antitrust litigation as a tool for

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[97] 444 F.3d 312, 325–26 (4th Cir. 2006).

[98] Clayton Act, 15 U.S.C. §16(i) (2009); *see also* In re Scrap Metal Antitrust Litig., 527 F.3d 517, 536–37 (6th Cir. 2008).

[99] Clayton Act, 15 U.S.C. §16(i) (2009) (emphasis added). Congress intended the pendency-of-government-action provision in the Clayton Act to replace 'diverse state laws with a uniform federal rule requiring that private antitrust actions be brought within four years of accrual or within one year after a government enforcement action ceased to pend.' Russ Togs, Inc. v. Grinnell Corp., 426 F.2d 850, 853 (2d Cir. 1970) (citing S. Rep. No. 619 (1955), *reprinted in* 1955 US Code Cong. & Admin. News, pp. 2332–33)).

[100] Russ Togs, Inc. v. Grinnell Corp., 426 F.2d 850, 854 (2d Cir. 1970).

[101] Russ Togs, Inc. v. Grinnell Corp., 426 F.2d 850, 857 (2d Cir. 1970).

[102] Russ Togs, Inc. v. Grinnell Corp., 426 F.2d 850, 857 (2d Cir. 1970) (citing Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 857-58 (8th Cir. 1952)).

[103] Leh v. Gen. Petroleum Corp., 382 US 54, 65–66, 86 S. Ct. 203 (1965) (citing Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co., 381 US 311, 316, 85 S.Ct. 1473 (1965)).

effective enforcement of the antitrust laws;[104] and (2) providing certainty in applying the statute's tolling provision to avoid overly prolonged antitrust litigation.[105]

Tolling during the pendency of a government action, however, is not without limits. In 2007, for example, the United States Court of Appeals for the Fifth Circuit stated that the leeway accorded to antitrust plaintiffs as a result of tolling during the pendency of a government action should not be interpreted to allow plaintiffs to "'sit on their rights" and to assert, years after the traditional statute of limitations has run, "claims so much broader than those asserted by the government that they open entirely new vistas of litigation."'[106]

*Equitable tolling and the fraudulent-concealment doctrine* In general, equitable tolling[107] prevents the statute of limitations for an antitrust claim from barring the claim even if the plaintiff fails to bring the claim within four years after the date the claim accrued.[108]

The equitable-tolling doctrine extends the Clayton Antitrust Act's four-year statute of limitations starting from the date the operable facts supporting plaintiff's claims either *actually* become apparent to the plaintiff, or the date where the operable facts *should have* become apparent to a reasonably prudent person in the plaintiff's position.[109]

Equitable tolling may toll the four-year statute of limitations in several circumstances. Equitable tolling may extend the applicable statute of limitations where the defendants actively misled plaintiffs by fraudulently concealing their unlawful conduct. Equitable tolling also may save an otherwise time-barred claim where the plaintiff in an extraordinary circumstance has been prevented from asserting his rights. Finally, equitable tolling

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[104] Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 320 (4th Cir. 2007), *cert. denied* 128 S. Ct. 1659 (2008) (quoting Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co., 381 US 311, 318, 320 (1965)).

[105] Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 320 (4th Cir. 2007), *cert. denied* 128 S. Ct. 1659 (2008) (citing Greyhound Corp. v. Mt. Hood Stages, Inc. 437 US 322, 335, 98 S. Ct. 2370 (1978)).

[106] Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 322 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 1659 (2008) (quoting In re Microsoft Corp. Antitrust Litig., 2005 WL 1398643, *5 (D. Md. June 10, 2005)).

[107] In 1998, the United States Court of Appeals for the Tenth Circuit stated that "'tolling" means "to suspend or stop temporarily," whereas the phrase, "a cause of action accrues" refers to "when a suit may be maintained thereon." Also, the federal equitable tolling doctrine "is at times misnamed because it often provides a rule for determining when the limitation period accrues."' Sterlin v. Biomune Sys., 154 F.3d 1191, 1195 n.8 (10th Cir. 1998) (quoting Ebrahimi v. E.F. Hutton & Co., 852 F.2d 516, 520 n.6 (10th Cir. 1988)).

[108] Forbes v. Eagleson, 228 F.3d 471, 486 (3d Cir. 2000) (citing Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994)).

[109] Zenith Radio Corp. v. Hazeltine Research, Inc., 401 US 321, 338, 91 S. Ct. 795 (1971); In re Scrap Metal Antitrust Litig., 527 F.3d 517, 536 (6th Cir. 2008); Forbes v. Eagleson, 228 F.3d 471, 486 (3d Cir. 2000) (noting that equitable tolling differs from the discovery rule in that equitable tolling centers on a plaintiff's cognizance of the facts supporting the plaintiff's cause of action rather than the plaintiff's cognizance of actual injury. Equitable tolling, therefore, presumes accrual while the discovery rule is meant to determine the accrual date of a claim to determine when the statute of limitations begins to run) (quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1390 (3d Cir. 1994)).

may save an otherwise time-barred claim where the plaintiff timely asserted its rights but mistakenly did so in the wrong judicial forum.[110]

One of the circumstances where equitable tolling may apply to save an otherwise time-barred antitrust claim, or to extend the statute of limitations beyond four years from the date the claim accrued, is where the defendant fraudulently concealed its unlawful anticompetitive conduct from the plaintiff.[111] The fraudulent-concealment doctrine seeks 'to prevent a defendant from "concealing a fraud, or . . . committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it."'[112] In general, 'acts of fraudulent concealment by the [antitrust] defendant toll the limitations period for as long as theconcealment continues.'[113] But 'a plaintiff seeking to invoke the doctrine of fraudulent concealment in order to toll the statute of limitations in an antitrust case must prove "affirmative acts" of concealment; "concealment by mere silence is not enough."'[114]

To show the existence of fraudulent concealment sufficient to equitably toll the running of the four-year statute of limitations, an antitrust plaintiff must show that (1) the defendant concealed from him the existence of his cause of action;[115] (2) he remained

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[110] Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994) (citing Sch. Dist. of City of Allentown v. Marshall, 657 F.2d 16, 19–20 (3d Cir. 1981)); *see also* Miller v. Beneficial Mgmt. Corp., 977 F.2d 834, 845 (3d Cir. 1992); Smith v. Am. President Lines, Ltd., 571 F.2d 102, 109 (2d Cir. 1978)).

[111] The equitable fraudulent-concealment doctrine is read into every federal statute of limitations. *See* Holmberg v. Armbrecht, 327 US 392, 396, 66 S. Ct. 582 (1946).

[112] State of N.Y. v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083 (2d Cir. 1988) (quoting Bailey v. Glover, 88 US (21 Wall.) 342, 349 (1874)); *see also* In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 287–91 (4th Cir. 2007) (citing Holmberg v. Ambrecht, 327 US 392, 397, 66 S. Ct. 582 (1946)); Supermarket of Marlinton, Inc. v. Meadow Gold Diaries, Inc., 71 F.3d 119, 122 (4th Cir. 1995)).

[113] In re Scrap Metal Antitrust Litig., 527 F.3d 517, 536 (6th Cir. 2008) (citing Norton-Children's Hosps., Inc. v. James E. Smith & Sons, Inc., 658 F.2d 440, 443 (6th Cir. 1981)).

[114] In re Scrap Metal Antitrust Litig., 527 F.3d 517, 538 (6th Cir. 2008) (quoting Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1467 (6th Cir. 1988)).

[115] In 1995, the United States Court of Appeals for the Fourth Circuit observed that different federal circuit courts of appeals apply different standards to determine if antitrust plaintiffs have satisfied the first element of the fraudulent-concealment doctrine. *See* Supermarket of Marlinton v. Meadow Gold Dairies, 71 F.3d 119, 122 (4th Cir. 1995). These differing standards are: (1) the self-concealing standard; (2) the separate-and-apart standard; and (3) the affirmative-acts standard. *Id.* The self-concealing standard is satisfied simply by showing that a self-concealing antitrust violation has occurred. *Id.* (citing N.Y. v. Hendrickson Bros., Inc., 840 F.2d 1065, 1084 (2d Cir. 1988)). The separate-and-apart standard, however, requires the plaintiff to provide evidence separate and apart from the acts of concealment involved in the defendants' antitrust violation, namely, that defendants affirmatively acted to conceal the plaintiff's claim. *Id.* (citation omitted). Finally, the affirmative-acts standard requires the plaintiff to show that the defendant affirmatively acted to conceal its antitrust violation but the plaintiff's proof may include acts of concealment involved in the antitrust violation itself. *Id.* (citing Texas v. Allan Constr. Co., 851 F.2d 1526, 1532 (5th Cir. 1988)). *See generally* Conmar Corp. v. Mitsui & Co. (U.S.A.), 858 F.2d 499, 505 (9th Cir. 1988) (holding that more than passive concealment is required to toll the statute of limitations unless the defendant had a fiduciary duty to disclose information to the plaintiff (citing Volk v. D.A.

ignorant of his potential claim within the four years before he filed his claim; and (3) his continuing ignorance was not attributable to any lack of diligence on his part.[116]

The latter element – the plaintiff's due diligence – is particularly important. In 1997, the United States Supreme Court held, citing a litany of cases, that a plaintiff who is not reasonably diligent cannot rely on the fraudulent-concealment doctrine to equitably toll the statute of limitations.[117]

*Continuing-violation injury* In addition to tolling during the pendency of a government action, and equitable tolling (including the fraudulent-concealment doctrine), the statute of limitations for a civil antitrust claim may be tolled if the defendant has engaged in a continuing antitrust violation.

In 1997, in *Klehr v. A.O. Smith*, the United States Supreme Court observed that:

> Antitrust law provides that, in the case of a 'continuing violation,' say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'[118]

The United States Supreme Court also has distinguished a continuing antitrust violation from a distinctly new violation, stating that 'the commission of a separate new overt act

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Davidson & Co., 816 F.2d 1406, 1416 (9th Cir. 1987)); Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 249–50 (9th Cir. 1978).

[116] Hamilton County Bd. of Comm'rs v. Nat'l Football League, 491 F.3d 310, 315 (6th Cir. 2007) (quoting Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975) (citing Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1465 (6th Cir. 1988)); Supermarket of Marlinton v. Meadow Gold Dairies, 71 F.3d 119, 122 (4th Cir. 1995) (citing Weinberger v. Retail Credit Co., 498 F.2d 552, 555 (4th Cir. 1974)); State of N.Y. v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083 (2d Cir. 1988) (citation omitted); Baskin v. Hawley, 807 F.2d 1120, 1131 (2d Cir. 1986) (claim for pension benefits); Cerbone v. Int'l Ladies' Garment Workers' Union, 768 F.2d 45, 48 (2d Cir. 1985) (employment-discrimination claim); *see also* Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1465 (6th Cir. 1988); In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1169 (5th Cir. 1979).

[117] Klehr v. A.O. Smith Corp., 521 US 179, 194–95, 117 S. Ct. 1984 (1997) (noting that many antitrust cases require due diligence by the plaintiff or that the plaintiff could reasonably have known of the offense, and none state to the contrary) (quoting 2 Phillip E. Areeda & Herbert Hovencamp, Antitrust Law ¶338 at 152 (1995)) (citing Irving Scher, Antitrust Adviser §10.27, p. 10–62 (4th ed. 1995)); Conmar Corp. v. Mitsui & Co., 858 F.2d 499, 502 (9th Cir. 1988); Texas v. Allan Constr. Co., 851 F.2d 1526, 1533 (5th Cir. 1988); Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1465 (6th Cir. 1988); N.Y. v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083 (2d Cir. 1988); Berkson v. Del Monte Corp., 743 F.2d 53, 56 (1st Cir. 1984); Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570, 574 (4th Cir. 1976).

[118] Klehr v. A.O. Smith Corp., 521 US 179, 189, 117 S. Ct. 1984 (1997) (quoting 2 Phillip E. Areeda & Herbert Hovencamp, Antitrust Law ¶338b at 145 (1995) (footnote omitted)) (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 US 321, 338, 91 S. Ct. 795 (1971)); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 US 481, 502 n.15, 88 S. Ct. 2224 (1968); DXS, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 467 (6th Cir. 1996); *see also* In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 287–91 (4th Cir. 2007); Midwestern Mach. v. N.W. Airlines, 392 F.3d 265, 269 (8th Cir. 2004).

generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.'[119]

In 2006, the United States Court of Appeals for the Tenth Circuit set forth the requirements in that circuit for extending the statute of limitations as the result of a continuing antitrust violation: '1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must inflict new and accumulating injury on the plaintiff.'[120] Similarly, in 1999, the United States Court of Appeals for the Eleventh Circuit pointed out that:

> an act constitutes a 'continuing violation,' if it injures the plaintiff over a period of time. Even though the illegal act occurs at a specific point in time, if it inflicts 'continuing and accumulating harm' on a plaintiff, an antitrust violation occurs each time the plaintiff is injured by the act.[121]

For the purpose of determining the point when the statute of limitations recommences, the focus should generally be on the timing of the defendant's overt acts, rather than the effects of the overt acts.[122] In 2004, the United States Court of Appeals for the Eighth Circuit, for example, concluded that the continuing-violation theory can apply only where the violator 'actively reinitiates the anti-competitive policy and enjoys benefits from that action.'[123] The Eighth Circuit further noted that the distinction between a new and a continuing violation 'allows the statute of limitations to have effect and discourages private parties from sleeping on their rights.'[124]

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[119] Klehr v. A.O. Smith Corp., 521 US 179, 189, 117 S. Ct. 1984 (1997) (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 US 321, 338, 91 S. Ct. 795 (1971), Pa. Dental Ass'n v. Med. Serv. Ass'n, 815 F.2d 270, 278 (3d Cir. 1987), Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299, 1300 (9th Cir. 1986), Nat'l Souvenir Cent., Inc. v. Historic Figures, Inc., 728 F.2d 503, 509 (D.C. Cir. 1984)); Imperial Point Colonnades Condo., Inc. v. Mangurian, 549 F.2d 1029, 1034–35 (5th Cir. 1977); Crummer Co. v. Du Pont, 223 F.2d 238, 247–48 (5th Cir. 1955)). *Cf.* 2 Phillip E. Areeda & Herbert Hovencamp, Antitrust Law ¶338b at 149 (1995).

[120] Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1088 (10th Cir. 2006) (quoting Kaw Valley Elec. Co-op. Co. v. Kan. Elec. Power Co-op., Inc., 872 F.2d 931, 933 (10th Cir. 1989)).

[121] Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 828 (11th Cir. 1999) (quoting Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 US 481, 502 n.15, 88 S. Ct. 2224 (1968)).

[122] Varner v. Peterson Farms, 371 F.3d 1011, 1019 (8th Cir. 2004) (quoting DXS, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 467 (6th Cir. 1996) (citing Peck v. Gen. Motors Corp., 894 F.2d 844, 849 (6th Cir. 1990)).

[123] Midwestern Mach. v. N.W. Airlines, 392 F.3d 265, 271 (8th Cir. 2004).

[124] Midwestern Mach. v. N.W. Airlines, 392 F.3d 265, 271 (8th Cir. 2004).