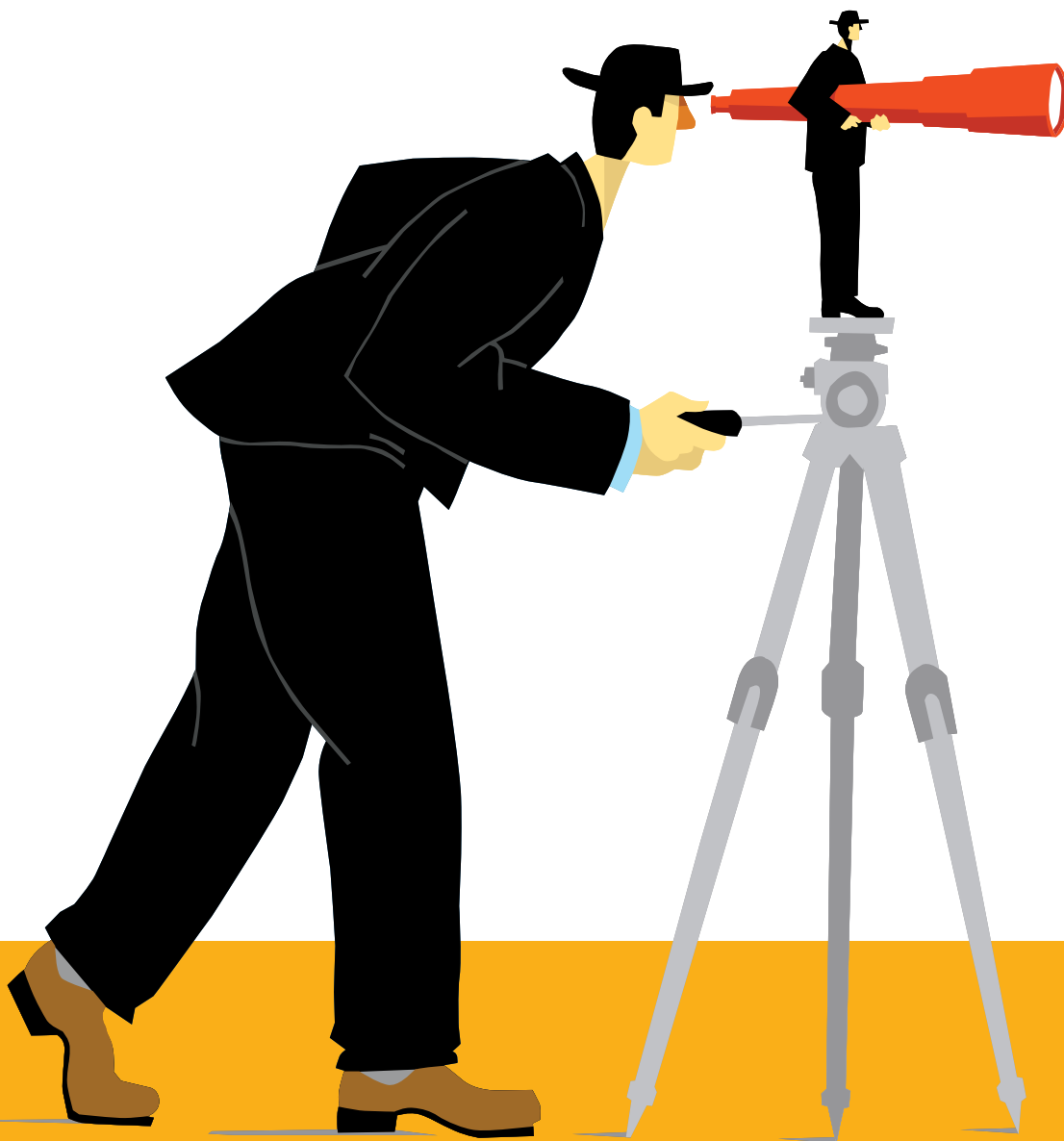


NAVIGANT

Antitrust Litigation Report

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DISPUTES & INVESTIGATIONS • ECONOMICS • FINANCIAL ADVISORY • MANAGEMENT CONSULTING

As industry consolidation heats up, competition issues are drawing the attention of plaintiff law firms and government regulators including the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Headline grabbing deals from the first and second quarter of 2011, such as the merger of Comcast and General Electric, and Google's \$700 million acquisition of ITA Software, came under fire by antitrust watchdogs. After a fall in the number of mergers following the recession in 2008, observers are noticing an increase in government activity as the number of mergers has begun to increase again. Blockbuster monopolization cases appear to be on the horizon, which could significantly impact the competitive landscape. Private antitrust litigation also gained attention during the first half of 2011. After talks on a new collective bargaining agreement failed, star quarterback Tom Brady filed a class action suit against the National Football League (NFL), alleging the league was running an illegal price-fixing scheme through the league salary cap among other purported antitrust violations.

Whether the suits are filed by the government, individuals, or corporations, defendant companies aren't taking any chances when it comes to antitrust litigation. As this report will highlight, defendants are turning to National Law Journal (NLJ) 250 law firms to represent them at increasing rates in antitrust litigation¹.

Navigant is pleased to release the first installment of its Antitrust Litigation Report. This report is designed to keep the legal community apprised of new antitrust litigation activity, spotlight notable cases, and identify trends and other major changes taking place in the antitrust litigation arena. Understanding the trends taking place in antitrust litigation is important for corporations and outside counsel to anticipate regulatory and emerging

competition issues. The primary goal of this publication is to answer the following principal questions:

1. How much antitrust litigation is being filed in federal court?
2. What is the status of the cases?
3. Who is filing antitrust lawsuits?
4. Who is being sued?
5. Who is defending companies in antitrust litigation?
6. What are the specific allegations being put forth?

METHODOLOGY USED FOR IDENTIFYING ANTITRUST LITIGATION

Navigant identified all cases filed in federal court relating to antitrust litigation. The case data presents a comprehensive picture of the nature and volume of antitrust litigation filed in the first and second quarters of 2011. This report utilized PACER and LexisNexis Courtlink to identify federal filings using Nature of Suit (NOS) codes that were likely to capture the target cases.

LITIGATION SPOTLIGHT

Hawaii experienced an unusual influx in antitrust filings during Q1. The law firm of Ivey Fosbinder Fosbinder LLLC filed seven antitrust lawsuits on behalf of plaintiffs who allege that major banks and mortgage companies fraudulently concealed mortgage loan terms, luring plaintiffs into loans they could not afford and resulting in foreclosure. The claims include antitrust, predatory lending, truth in lending, and rescission. Regarding the antitrust aspects, the complaints specifically allege that defendants engaged in anti-competitive conduct to monopolize the mortgage lending and servicing market, and intended to control prices to destroy healthy competition.

Then, cases were reviewed and evaluated for inclusion in the report. To the extent that multiple actions arose out of the same allegations against the same company, only the first matter filed was included in this report. For the purposes of this report, cases filed in state court, arbitrations, and administrative proceedings were not included.

1. HOW MUCH ANTITRUST LITIGATION IS BEING FILED IN FEDERAL COURT?

This report identified 36 antitrust cases filed in Q2 compared to 34 filed in Q1, representing a 6% increase between reporting periods. Combining both quarters, California had the largest number of cases filed with seven in Q2 and four in Q1, representing 16% of all antitrust litigation. Hawaii followed with seven total cases (10%) while New York and District of Columbia tied for third with six cases each (9%).

2. WHAT IS THE STATUS OF THESE CASES?

Navigant also tracked and identified the status of each antitrust case from its initial filing to its status at the end of each quarter. As a result, this report determined that 8% of the cases filed in Q2 had closed within that quarter, compared to 15% of the cases in Q1 had closed within that quarter. Closed cases were either remanded, voluntarily dismissed or resulted in a final judgment.

ANTITRUST DASHBOARD

- » California had the highest percentage of cases filed (19%) in Q2, followed by the District of Columbia and New York. Hawaii had the highest percentage of cases filed (18%) at the end of Q1, followed by California and New York.
- » The percentage of active cases increased in Q2 to 92% while the percentage of active cases was 85% in Q1. An active case is defined as a case that is still open during the quarter in which it was initially filed.
- » The number of filings by government entities doubled from Q1 to Q2. The percentage of antitrust cases that were filed by the government was 17% in Q2, compared to 9% in Q1.
- » In Q2, 11% of cases were removed from state court to federal court, while only 5% of cases in Q1 were removed.
- » A majority of the cases in Q2 (33%) were filed against companies in the Services industry. In comparison, the Services industry accounted for over half of the entities being sued in Q1 (53%). In each quarter, the Finance, Insurance, and Real Estate industry and the Manufacturing industry followed in second and third respectively.
- » Law firms representing defendants in antitrust cases were part of the NLJ 250 48% of the time in Q2 and 41% in Q1. In cases filed by the government, defendants were using NLJ 250 law firms 86% of the time in Q2 and 100% in Q1.

A review of the data shows the vast majority of antitrust litigation originated in federal court (Q2: 89% vs. Q1: 94%) while a much smaller percentage of federal court cases (Q2: 11% vs. Q1: 6%) began in state court.

3. WHO IS FILING ANTITRUST LAWSUITS?

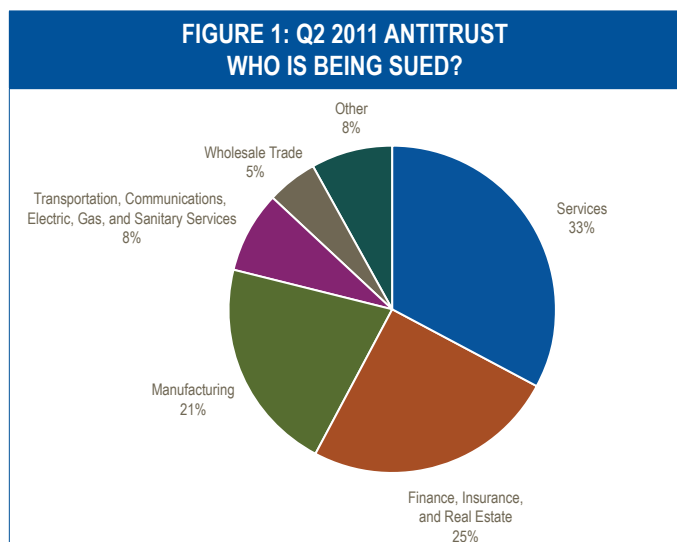
This report identified which cases were filed by the federal government and which law firms were most actively filing antitrust lawsuits. Government counsel represented 19% of the total plaintiff-side law firms (Q2: 20% vs. Q1: 18%). The FTC, DOJ, and State Attorney General Offices were the government entities filing antitrust lawsuits during the examination period. A variety of law firms represented plaintiffs in non-governmental litigation. However, there wasn't a specific law firm that represented plaintiffs in more than two cases in either quarter, other than Ivey Fosbinder Fosbinder LLLC which had a flurry of filings in Q1.

4. WHO IS BEING SUED?

A critical aspect of this antitrust report is categorizing the defendants by industry and headquarters location (U.S. domestic v. international). Based on Navigant's review of the data, 94% of the companies being sued across both quarters were domestic entities with headquarters in the United States.

This report also categorized the defendant entities into their Standard Industrial Classification (SIC) codes by major industry divisions to better understand the breakdown of industries with the highest concentration of litigation². In Q2, the industry divisions identified below were sued most frequently (See Figure 1).

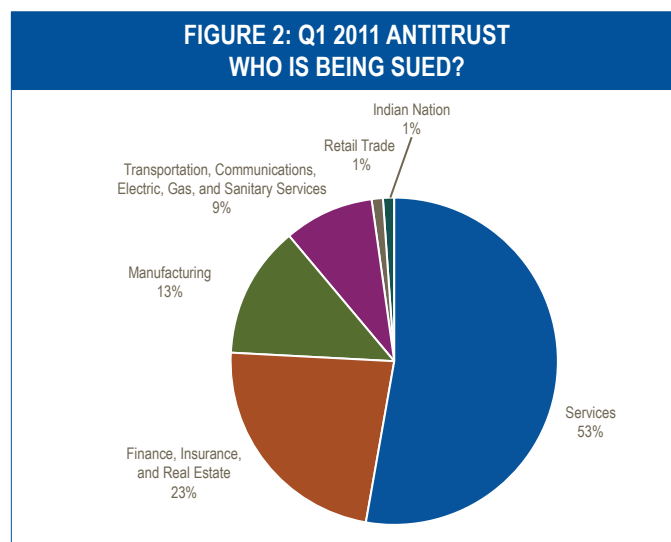
- » Services (33%)
- » Finance, Insurance, and Real Estate (25%)
- » Manufacturing (21%)
- » Transportation, Communications, Electric, Gas, And Sanitary Services (8%)
- » Wholesale Trade (5%)
- » Other (8%)



Q1 had a similar break-out; however there were notably more Services industry defendants and fewer Manufacturing industry defendants (See Figure 2). Services was the most common industry division (53%) followed by Finance, Insurance, and Real Estate (23%), Manufacturing (13%), Transportation, Communications, Electric, Gas, And Sanitary Services (9%), Retail Trade (1%), and General Government (1%).

This report further parsed the data using SIC code major industry groups to get a better sense of the specific type of companies being sued. In Q2, the most common types of company being sued were:

- » Health Services (11%)
- » Insurance Carriers (10%)
- » Depository Institutions (8%)
- » Food and Kindred Products (6%)
- » Engineering, Accounting, Research, Management, and Related Services (6%)
- » Business Services (6%)
- » Transportation Services (5%)
- » Industrial and Commercial Machinery and Computer Equipment (5%)



Q1 displayed a shift in defendant data. The most common type of companies sued in Q1 were:

- » Amusement and Recreation Services (33%)
- » Depository Institutions (11%)
- » Non-depository Credit Institutions (10%)
- » Health Services (7%)
- » Business Services (7%)
- » Communications (5%)
- » Transportation by Air (3%)
- » Membership Organizations (3%)

LITIGATION SPOTLIGHT

The Department of Justice filed a law suit to stop the acquisition of the maker of TaxACT, 2SS Holdings Inc., by digital tax software giant H&R Block for \$287.5 million because of worries that the combination would limit competition for online tax preparation software. H&R Block, TaxACT and Intuit Inc. account for about 90 percent of sales of all digital tax software that allows users to prepare their own returns either online or by installing the program onto their computer. Intuit's product TurboTax holds the largest share of the market. However, the proposed transaction would combine the second and third largest companies in the industry. The DOJ stated in their complaint that H&R Block knows TaxACT is a significant competitor and it is being acquired in order to thwart competition.

5. WHO IS DEFENDING COMPANIES IN ANTITRUST LITIGATION?

This report also identified and tracked defense counsel as part of this report. An array of law firms represented defendants in antitrust litigation. In Q2, 22% of defendant law firms had two or more antitrust cases in this report, compared to 17% with two or more cases in Q1. A majority of defense firms represented in this report only have one antitrust case in either quarter of 2011.

Across the span of both quarters, defense counsel was part of the NLJ 250 45% of the time. In Q2, a NLJ 250 firm was listed as defense counsel 48% of the time, compared to 41% of the time in Q1. The percentage of NLJ 250 firms increased dramatically when examining cases filed by a government entity. In cases filed by the government, at least one NLJ 250 firm represented a defendant 86% of the time in Q2. In Q1, 100% of all defendants sued by the government employed at least one NLJ 250 firm.

6. WHAT ARE THE SPECIFIC ALLEGATIONS BEING PUT FORTH?

One of the most important questions being asked is, "What are the specific violations being alleged and claims related to antitrust matters being filed?" This report identified the alleged violations from each case, and then organized them to provide an accurate overview of the type of claims facing the defendants.

Research captured all of the violations alleged in each complaint. In both quarters, violations of the Sherman Antitrust Act accounted for a majority of all federal antitrust violations alleged. Within the Sherman Antitrust Act, a violation of Section 1 (Conspiracy) was found in 56% of all cases filed in Q2 and 85% of the cases in Q1.

The most frequent antitrust violations alleged in Q2 are as follows (See Table 1):

TABLE 1: Q2 2011 FEDERAL ANTITRUST VIOLATIONS ALLEGED, % OF TOTAL CASES FILED IN PERIOD

The Sherman Antitrust Act - Section 1 - Conspiracy	56%
The Clayton Antitrust Act - Section 7 - Mergers	28%
The Sherman Antitrust Act - Section 2 - Conspiracy to Monopolize	22%
The Sherman Antitrust Act - Section 2 - Monopolization	22%
The Clayton Antitrust Act - Section 2 - Discrimination in Price	17%

In Q1, this report observed the following (See Table 2):

TABLE 2: Q1 2011 FEDERAL ANTITRUST VIOLATIONS ALLEGED, % OF TOTAL CASES FILED IN PERIOD

The Sherman Antitrust Act - Section 1 - Conspiracy	85%
The Sherman Antitrust Act - Section 2 - Conspiracy to Monopolize	32%
The Sherman Antitrust Act - Section 2 - Monopolization	24%
The Clayton Antitrust Act - Section 2 - Discrimination in Price	12%
The Clayton Antitrust Act - Section 3 - Illegal Tying	6%
The Clayton Antitrust Act - Section 7 - Mergers	9%

Antitrust cases often allege multiple violations, and some of those violations are not related to antitrust statutes. For instance, research found that Misrepresentation, Breach of Contract, and Unjust Enrichment were often alleged in the cases filed during the first and second quarters of 2011.

LITIGATION SPOTLIGHT

The antitrust battles have been heating up between distribution services and air carriers. Airlines are filing lawsuits against distribution services alleging anti-competitive and anti-consumer practices. In one case, US Airways Group Inc. alleges that Sabre Holdings Corp., a distributor of airline fares and content to travel agents, imposes penalties on travel agents for booking tickets using other services. The complaint continues to allege that Sabre has imposed anti-competitive requirements on the airliner to sell their tickets. In a separate dispute, a American Airlines Inc alleges that ticket distribution services Sabre Holdings Corp., Travelport Ltd., and Orbitz Worldwide LLC are engaging in unlawful exclusionary conduct because the airline wants to roll out its own system to travel agents that will allow them to book services directly with the airline. In both instances, distribution services control a large part of the overall travel agent booking market in a manner that the plaintiffs believe is monopolistic.

In Q2, 19% of all cases filed contained allegations of Breach of Contract, followed by Interference with Business Relations (14%), and Misrepresentation (11%) (See Table 3).

In Q1, a claim of Misrepresentation was found in 47% of all cases. This represents a large decrease from Q1 to Q2. Other non-antitrust violations alleged in Q1 include (See Table 4).

Violation	Percentage
Breach of Contract	19%
Interference with Business Relations	14%
Misrepresentation	11%
The Lanham Act	6%
Declaratory Relief	6%
Trade Libel & Slander	6%
Termination without cause	3%
Misappropriation of Trade Secrets	3%
Federal Trade Commission - Holder Rule	3%
Good Faith	3%

Violation	Percentage
Misrepresentation	47%
Injunctive Relief	29%
Unjust Enrichment	26%
Interference with Business Relations	24%
Breach of Fiduciary Duty	21%
Breach of Contract	21%
Trade Libel & Slander	18%
Declaratory Relief	12%
Good Faith	12%
Interference with Prospective Contractual Relations	12%

SPOTLIGHT ON NOTABLE ANTITRUST CASES

Plaintiff: Plant Oil Powered Diesel Fuel Systems, Inc.
Defendants: Exxonmobil Corporation; BP, PLC; Chevron Corporation; Conocophillips; ASTM International; BP Products North America, Inc.; Chevron USA, Inc.
Industry: Oil and Gas
Venue: New Mexico Federal District Court
Allegations: New Mexico - Anti Monopoly; New Mexico – Antitrust; The Sherman Antitrust Act - Section 1 – Conspiracy; The Sherman Antitrust Act - Section 2 - Conspiracy to Monopolize
Description: Plant Oil Powered Diesel Fuel Systems Inc., a manufacturer of vegetable oil-based diesel fuel, alleges that major oil companies are conspiring to discourage the plaintiff’s product from coming to market. The complaint asserts that the oil companies are unfairly using their influence to encourage the ASTM International, which sets industry standards, to discourage the use of biofuels in favor of petroleum based diesel, and are seeking to maintain the status quo. The lawsuit is intended to block a new standard from being enacted, and is seeking an injunction to do so. The defendants in the suit are all members of the ASTM and voting members of the committees considering the standards, according to the complaint..

Plaintiff: MedioStream, Inc.
Defendants: Apple, Inc.; Microsoft Corporation; Sonic Solutions, Inc.; Sony Corporation; Sony Corporation of America; James Owen Taylor
Industry: Software
Venue: California Federal District Court
Case Status: Active

Allegations: The Sherman Antitrust Act - Section 1 - Unfair Trade Practices; The Sherman Antitrust Act - Section 2 - Conspiracy to Monopolize; Breach of Contract
Description: MedioStream Inc. accused Microsoft Corp. of antitrust violations after it allegedly stole the plaintiff’s trade secrets. The plaintiff alleges that Microsoft used its size and market saturation to aggressively market its own media processing software in response to the competition posed by MedioStream’s product. They continue to allege that Microsoft has a monopoly in the market for PC operating systems and that it leveraged that power to try to achieve a monopoly in the media processing market.

Plaintiff: Tom Brady (individually, and on behalf of all others similarly situated)
Defendant: National Football League, et al
Industry: Sports
Venue: Minnesota Federal District Court
Case Status: Active
Allegations: The Sherman Antitrust Act - Section 1 - Unfair Trade Practices; Breach of Contract; Interference with Business Relations
Description: NFL players, led by Tom Brady, filed a class action antitrust case against the National Football League and its teams alleging that the league salary cap is an illegal price-fixing scheme. The suit is attempting to stop the NFL from locking out players, and also seeks to strip the league of its power to restrict players from freely moving between teams. In its defense, the NFL states that team salary caps have escalated enormously since the mid-1990s at a rate that greatly exceeds inflation. There is also a dispute over how to share revenue, with the plaintiffs alleging that the owners have proposed a deal that would see the players cede billions of dollars to the owners over the next few years.

NOTES

1. The National Law Journal (NLJ) 250 is an annual ranking of the nation's largest law firms by revenue (<http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202474471097>).
2. For the various entities being sued we identified the Standard Industrial Classification (SIC) codes by Major Industry Group and Major Division (<http://www.osha.gov/pls/imis/sicsearch.html>).

ABOUT NAVIGANT

Navigant (NYSE: NCI) is a specialized independent consulting firm providing dispute, financial, investigative, regulatory and operations advisory services to government agencies, legal counsel and large companies facing the challenges of uncertainty, risk, distress and significant change. The Company focuses on industries undergoing substantial regulatory or structural change and on the issues driving these transformations.

ABOUT NAVIGANT'S ANTITRUST AND COMPETITION ANALYSIS

Our experts have provided testimony in proceedings before District Courts, the Department of Justice, the Federal Trade Commission, the Federal Communications Commission, the Federal Energy Regulatory Commission, and numerous state Public Utilities Commissions.

We provide economic analysis and testimony in connection with mergers and acquisitions and antitrust claims of:

- » Anticompetitive horizontal agreements (price fixing, bid rigging, potential anticompetitive effects of joint ventures)
- » Unilateral conduct (predatory pricing, refusals to deal, monopolization via patent fraud)
- » Vertical restraints (exclusive dealing, requirement contracting, tying/bundling/loyalty rebates)

We also offer economic analysis and testimony on issues of price and rate of return regulation, mandatory access, quality of service, and benefit-cost analysis, with especial expertise in regulatory proceedings involving communications and the Internet (software and hardware sectors, network unbundling and "net neutrality" issues affecting telecom and cable firms, retransmission consent and other content-related issues, and the range of wireless spectrum issues) and all types of energy markets.

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Navigant Economics Managing Director James Langenfeld, along with Associate Director Christopher Alexander recently authored an article titled, "Daubert and Other Gatekeeping Challenges of Antitrust Experts." Their article was published in the Summer 2011 issue of Antitrust by the American Bar Association.