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Recent Developments in Competition and Antitrust Law
I. INTRODUCTION

You’ve just learned that one of your company’s suppliers has pled guilty to an antitrust violation. A quick internet search reveals that international government antitrust authorities raided several suppliers a few months ago. And hot on the heels of the guilty pleas, a series of civil class action suits are filed against your supplier and others. The class actions may already have been consolidated into a Multi-District Litigation (“MDL”), or consolidation may be imminent. At first it may be difficult to believe. How could trusted and long-term suppliers conspire against a major customer? It may be hard to grasp, but the reality is that it happens. If there have been guilty pleas, then almost certainly your company has been overcharged for products. The question is: what to do about it?

Large companies are generally far more used to being defendants than plaintiffs, and figuring out how to proceed as an antitrust victim can be unchartered territory. At the outset, the company’s options and avenues for recovery must be assessed and preserved. One of the most important decisions may be whether and when to opt out of civil class action lawsuits. Large purchasers often opt out of antitrust class actions in favor of pursuing individual recovery. Those who have taken their individual claims to trial have achieved mixed results. Far more commonly, large purchasers pursue their own private resolution with antitrust defendants.

This article discusses practical considerations for large purchasers who are victims of an admitted antitrust conspiracy, and focuses on federal and California-law issues. First, we provide a simple decision-making process for large purchasers comprised of three steps: (1) assess your company’s relationship to the suppliers; (2) preserve your claims; and (3) determine whether to remain in the class or pursue your claims independently. Second, we provide a more detailed analysis of two types of antitrust claims for which the application of California or federal law could yield different outcomes: (1) indirect-purchaser claims with a pass-on defense, and (2) antitrust claims that implicate foreign conduct or injury.

II. HOW SHOULD YOU PROCEED? A THREE-STEP PROCESS

A. First, assess what types of claims you might have: are you a direct purchaser, indirect purchaser, or both?

Different rules—including standing, statute of limitations, applicable defenses, and potential for monetary relief—govern claims by direct and indirect purchasers. Thus, it is important to know at the outset what types of claims your company may have. A direct
purchaser is one that bought affected goods directly from a cartel member. An indirect purchaser is one that bought affected goods sold by a cartel member, but through an intermediary. Direct purchasers can bring federal and California-law claims for injunctive and monetary relief, whereas indirect purchasers can bring federal claims for injunctive relief and California-law claims for injunctive and monetary relief.

Once you learn that you may be the victim of an antitrust conspiracy, investigate your purchasing structure and practices to ensure that you understand whether you have direct and/or indirect claims. Keep in mind that companies may be both direct and indirect purchasers; for example, subsidiary A might buy price-fixed steel and manufacture it into a finished product that subsidiary B sells to customers. Or it might be even more complicated: foreign subsidiary A might purchase directly from the cartel, but the product is then shipped to an intermediary that finishes it into a final product, which may be transferred to subsidiary B for import into the U.S. Is the foreign subsidiary a direct purchaser that can bring claims in the U.S.? Is the product actually sold to the intermediary, or is the intermediary just a contractor? Moreover, you need to figure out the relationship and chain of custody not just for today, but for the life of the conspiracy, which may go back many years.

Unless you are certain that you know the corporate relationships and purchasing history for the entire period of the cartel, and that all your purchases will be considered either direct or indirect by the courts, it is safest to assume that you have both direct and indirect claims.

B. Second, preserve your claims

1. Check the statute(s) of limitations

Before considering your options for participation in litigation and/or private recovery against cartel members, you must first ensure that your company still has claims to bring (or use as negotiating leverage). The statute of limitations for federal antitrust actions for damages is four years. 15 U.S.C. § 15B. California’s Cartwright Act has the same four-year statute of limitations as the federal antitrust statute. See Cal. Bus. & Prof. Code § 16750.1 (four-year statute of limitations in civil actions). However, the limitations period generally does not begin to run until the plaintiff discovers or should have discovered the injury. See, e.g., In re Scrap Metal Antitrust Litig., 527 F.3d 517, 536 (6th Cir. 2008); Grisham v. Philip Morris U.S.A., Inc., 40 Cal. 4th 623, 634 (2007). The discovery rule is fact dependent, but a conservative approach assumes that the latest date the statute begins running is when a defendant’s plea agreement is announced. Thus, your company may have four years from

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2 The extent to which federal antitrust claims can reach foreign conduct is a hotly-debated area of law. See, e.g., United States v. Hsiung, --- F.3d ----, No. 12-10514, 2014 WL 3361084 (9th Cir. July 10, 2014); Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., --- F.3d ----, No. 13-2280, 2014 WL 2487188 (2d Cir. June 4, 2014); Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842 (7th Cir. 2014), reh’g granted and opinion vacated (July 1, 2014). The article by Craig Corbitt and Aaron Sheanin in this issue addresses this question, so we do not address it here, other than to note that it affects large companies and potential opt-outs just as much, if not more, than class members.

3 See Areeda & Hovenkamp, Antitrust Law, ¶ 320c2 (4th ed. 2013) (hereinafter “Areeda & Hovenkamp”) (“[C]ourts tend to start the statute of limitation once the cartel becomes publicly known----for example, when one of its members is caught or convicted.”).
the date of the plea agreement to decide what to do. In individual cases, defendants may try to argue for an earlier date (for instance, the date of the government raids) or you may argue for a later date (for instance, based on tolling of the statute.)

2. Consider whether government investigations or pending class actions toll the statute

Although the statute of limitations generally begins to run at the time of injury or discovery of that injury, government investigations and civil class actions may toll the limitations period under federal and California law.

The four-year limitations period for federal-law claims is suspended while related antitrust enforcement actions by the United States are pending and for one year thereafter. 15 U.S.C. § 16(i). In order to receive the benefit of this suspension provision, however, a private plaintiff must bring suit within one year of the termination of the enforcement proceeding. Id. The government enforcement period begins when the government files an indictment, criminal information, or complaint for injunctive relief, and continues until litigation against all defendants is completed. The limitations period is suspended with respect to all conspirators, rather than just those conspirators named in an enforcement action. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 335-36 (1971) (holding that the statute of limitations is tolled “against all participants in a conspiracy which is the object of a Government suit, whether or not they are named as defendants or conspirators therein”). This tolling statute does not, however, explicitly apply to California-law claims. Federal courts addressing the issue have generally relied on the parties’ agreement that tolling did or did not apply. Compare *In re Reformulated Gasoline Antitrust & Patent Litig.*, No. MLCV 05–1671 CAS, 2006 WL 7123690, at *15–16 (C.D. Cal. June 21, 2006) (holding that the statute of limitations was tolled where the parties agreed that commencement of an FTC action tolled the Cartwright Act claims), with *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07–1827 SI, 2013 WL 1164897, at *4 n.3 (N.D. Cal. Mar. 20, 2013) (dismissing claims where “Plaintiffs concede that . . . 15 U.S.C. § 16(i) does not toll state law claims” under the Cartwright Act). Thus, while your company may be able to take advantage of a short tolling period due to prosecutions for your federal claims, you should not assume that California-law claims are similarly tolled.

As to class actions, the limitations period for a federal antitrust claim is suspended during the time that the plaintiff could have been covered by a pending federal class action. *See Amer. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552-54 (1974). Likewise, California law allows tolling of the Cartwright Act’s statute of limitations by a class action where “the class action and the later individual action or intervention are based on the same claims and subject matter and similar evidence.” *Becker v. McMillin Constr. Co.*, 226 Cal. App. 3d 1493, 1499 (1991). Before relying on class-action tolling, however, you must be sure (a) your company is a member of the putative class; (b) all claims your company might bring are asserted in the putative class action; and (c) all potential defendants are named in the putative class action. Generally, a pending class action tolls the statute of limitations for putative class members until a class is certified or denied. *Crown, Cork & Seal Co. v. Parker*,

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4 Areeda & Hovenkamp ¶ 321a. Courts have considered criminal litigation completed on the date that the court clerk enters judgment of conviction of the last remaining defendant. *See Marine Firemen’s Union v. Owens-Corning Fiberglass Corp.*, 503 F.2d 246, 250 (9th Cir. 1974).
Thus, a class action tolls the statute of limitations for only those claimants that fall within the putative class definition. Similarly, the statute of limitations may not be tolled for claims that were not raised in the class complaint. For example, in the Cathode Ray Tube litigation, Sharp, an opt-out plaintiff, could not avail itself of class-action tolling for claims under certain state laws where the class complaint did not allege claims under those same state laws. See In re Cathode Ray Tube (CRT) Antitrust Litig., No. 07-5944 SC, 2014 WL 1092293, at *3-4 (N.D. Cal. Mar. 13, 2014). Finally, class-action tolling may not operate against defendants that are not named in the class complaint. In the Processed Egg Products litigation, individual grocery-store plaintiffs could not use class-action tolling against a defendant that had not been named in the class complaint. See In re Processed Egg Prods. Antitrust Litig., No. 08-md-2002, 2013 WL 4504768 (E.D. Pa. Aug. 23, 2013). Companies should carefully examine the class definitions and allegations before relying on class-action tolling.

3. Request tolling agreements from potential defendants

Regardless of when the statute of limitations is anticipated to expire, your company should request tolling agreements from potential defendants. Parties can agree that statutes of limitations will not run for a set period of time or during the pendency of a tolling agreement. Many potential defendants—especially those who have already admitted criminal antitrust liability—will be eager to avoid or delay additional civil litigation and willing to suspend the statute of limitations while private negotiations occur. Often, the cartel members are still your company’s business partners, and the last thing they want is for their customers to sue them.

To preserve the most claims, tolling agreements should cover both federal and state-law claims. The facts and law concerning whether your company’s purchases are direct or indirect may be unclear, so it is best to preserve all possible claims. Moreover, tolling agreements should be with all cartel members, even if they are not your company’s suppliers. Your company can seek recovery against any cartel member regardless of whether they sold to you or only to your competitors. At the outset, there is little harm in seeking a tolling agreement with all defendants, particularly if your purchasing history is unknown or complicated.

C. Third, decide whether to take advantage of class recovery or proceed independently

Once you have preserved your potential claims, you now have time to learn more about the various civil class action lawsuits and determine whether it is in your company’s best interest to remain in the class as an unnamed class member or proceed independently.

1. Should you pursue a claim independently?

To determine whether to remain in the class or pursue a separate claim, your company should compare the relative cost of litigating as an absent class member/third party or as a sole plaintiff, the risk of loss on the merits, and the potential upside of a higher recovery
as an individual plaintiff. If it decides to pursue a claim independent of the class, it must decide whether to file a lawsuit or negotiate in private, or some combination of the two. Many companies will decide to negotiate a settlement in private for a variety of reasons – the confidentiality, the desire to avoid being a plaintiff that sues its suppliers, and the lower risk and transaction costs. An independent lawsuit is a significant expense, both in costs and the time of company employees, and will probably be worthwhile only if the company’s potential recovery is very large and the suppliers recalcitrant. Even if the company settles with its suppliers before the start of trial, modern pre-trial litigation, and particularly discovery (including extensive e-discovery) is capital and labor-intensive. Unfortunately, even if it settles independently, a large-volume purchaser may not avoid discovery, because the large-volume purchaser is likely to possess documents and knowledge regarding the supplier, affected volume of commerce, or pass-on defense that may be subpoenaed by both plaintiff and defendant in the class case. If your company is a small-volume purchaser, it may make more sense to remain in the class and let class counsel take care of managing the litigation and taking discovery.

An example of the above scenario can be found in In re Automotive Parts Antitrust Litigation, No. 2:12-MD-02311 (E.D. Mi.). Ford Motor Company, a large-volume purchaser of automotive parts, pursued a claim against Fujikura independent of the ongoing class actions. At least with respect to Fujikura, both Ford’s and the class plaintiffs’ claims allege price fixing and overcharges by Fujikura (and other suppliers in the case of the class actions) for sales of a particular automobile component known as a “wire harness.” The various class actions were consolidated in the Eastern District of Michigan, and Ford’s lawsuit was similarly consolidated with the MDL. Even though Ford sued only a single supplier, the MDL court allowed Ford to (1) receive all discovery produced to the class plaintiffs by the other wire harness supplier-defendants, subject to specific objections, and (2) enforce discovery that it requested jointly with the class plaintiffs. In exchange, Ford will likely face its own broad discovery obligations to all the wire-harness-supplier defendants, including those it did not individually sue.

Another consideration is whether the company should control its own litigation. Your company and class counsel will likely have differing opinions concerning case strategy, including discovery, expert and witness presentations, and damages. For example, will the damages model used by class counsel and its experts sufficiently represent your company’s injuries? Or will it be adequate for the class action process, but because of certain assumptions and modeling, not sufficiently tailored to the facts specific to your company? Is class counsel suing the defendants your company would choose to sue? Does your company desire nonmonetary remedies (such as favorable business terms) from some suppliers but monetary awards from others? Under these circumstances, a separate lawsuit or private negotiations will provide greater control of the case and of the settlement.

5 If the largest-volume purchasers pursue their own claims, then the remaining volume of commerce may not yield a compelling recovery to the class. See In re Vitamins Antitrust Class Litigation, MDL No. 1285 (D.D.C.), in which the largest purchasing companies opted out of the class action and obtained a substantial recovery relative to the class settlement. Research from other types of class actions suggests that larger plaintiffs who opt out of a class action settlement may succeed in obtaining a larger recovery than would have been possible had they remained in the class. See Amir Rosen, Joshua B. Shaeffer, and Christopher Harris, Opt-Out Cases in Securities Class Action Settlements, (Cornerstone Research 2013) (available at http://www.cornerstone.com/Publications/Reports/Opt-Out-Cases-in-Securities-Class-Action-Settlements.aspx).
2. If proceeding independent from the class, decide when to proceed

If you have decided that it is in the company’s best interest to pursue claims separate from the class plaintiffs, you must then decide when to proceed. A company can pursue its own claims at any point, either by filing a case or negotiating in private. Regardless of whether the company decides to pursue its own claims early or late in the litigation, when a class is certified, either for trial or as a settlement class based on at least one defendant’s settlement, the company should file an opt-out notice.

At least three factors will help inform a company’s decision regarding the timing of when to pursue its claims. First, pursuing claims relatively late in the litigation will likely provide the company with the most fulsome discovery at the lowest cost because the parties will have almost certainly completed substantial document productions and fact and expert depositions. However, a plaintiff that pursues claims late in the litigation and benefits from class counsel’s work on the case may be obligated to pay a share of the class counsel’s attorneys’ fees as a form of “common fund.” See, e.g., In re Linerboard Antitrust Litig., 292 F. Supp. 2d 644 (E.D. Pa. 2003).

Second, as discussed above, allowing class counsel effectively to run your company’s litigation through class certification will strip the company of influence and control over litigation strategy and discovery. Class counsel may do an excellent job of pursuing the claims of the entire class, but whether the approaches and sought-after recovery match up with the needs of your particular company must be determined independently. As a large purchaser, your company may be subpoenaed in any event and dragged into the litigation.

Third, depending on the forum and the timeliness of your company’s claims, you may have to wait until the class is certified in order to benefit from tolling and preserve your claims. In most courts, a putative class member may benefit from tolling at any time up to the point at which the class-action court issues its decision on class certification. See, e.g., State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1234 (10th Cir. 2008); In re Hanford Nuclear Reservation Litig., 534 F.3d 986, 1009 (9th Cir. 2007). But a minority rule in the First and Sixth Circuits provides that the statute of limitations is tolled only for a putative class member who waits to file an independent suit until the class-action court issues its decision on class certification, and not for putative class members who file their own lawsuits before class certification is resolved. See Wyser-Pratte Mgmt. Co., Inc. v. Telxon Corp. Eyeglasses, 413 F.3d 553, 568-69 (6th Cir. 2005); Glater v. Eli Lily & Co., 712 F.2d 735, 739 (1st Cir. 1983).

In any event, a large company that knows it will eventually opt out of class actions should monitor the proceedings closely and keep track of all associated class certifications, dismissals, or settlements.

III. LAST, BE SURE TO CONSIDER SPECIAL FEDERAL/STATE ISSUES FOR CALIFORNIA-LAW CLAIMS BEFORE YOU DECIDE TO PURSUE YOUR STATE-LAW CLAIMS INDEPENDENTLY

There are several special considerations that a company deciding to bring California state-law claims should weigh in their overall litigation strategy. First, when assessing your prospective recovery in a California action, you may need to factor in the availability of
a pass-on defense for the defendants. And second, you should assess whether you will be able to recover for any damages resulting from antitrust conduct involving solely foreign or export trade or commerce.6

A. Your company’s indirect purchaser damages award may be limited only to the overcharge not passed on to downstream purchasers

The “pass-on defense” is an antitrust defense whereby a supplier-defendant argues that the plaintiff passed on the alleged overcharge to others down its distribution chain and therefore suffered no damage. Federal law does not permit a pass-on defense.7 However, because California’s Cartwright Act explicitly allows indirect-purchaser claims, the California Supreme Court, in Clayworth v. Pfizer, Inc., 49 Cal.4th 758 (2010), suggested that the defense may be available where there is a risk of multiple or duplicative recovery:

In instances where multiple levels of purchasers have sued, or where a risk remains where they may sue, trial courts and parties have at their disposal and may employ joinder, interpleader, consolidation, and like procedural devices to bring all claimants before the court. In such cases, if damages must be allocated among the various levels of injured purchasers, the bar on consideration of pass-on evidence must necessarily be lifted; defendants may assert a pass-on defense as needed to avoid duplication in the recovery of damages. Id. at 787. Thus, although the Clayworth decision left significant room for uncertainty, some form of pass-on defense might be available in California if multiple levels of purchasers have or might sue concerning the same antitrust violation. While the facts of some antitrust cases will not implicate the Clayworth exception, cases involving lengthy supply and/or distribution chains present multiple levels of purchasers, both direct and indirect, who have already filed or may file claims against the various price-fixing cartels. See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig., No. 07-1827, 2012 WL 6709621 (N.D. Cal. Dec. 26, 2012) (finding a likelihood of duplicative recovery because multiple levels of purchasers were seeking to recover for the same overcharge); Best Buy v. AU Optronics, No. 10-cv-4572-SI, Dkt. 579 (N.D. Cal. Aug. 28, 2013) (jury instructed to reduce plaintiff’s recovery to deduct the downstream pass-on from any damages awarded).

In light of Clayworth, if your company’s antitrust injuries occurred along a lengthy chain of multiple purchasers, it would be prudent to factor any potential pass-on reduction in damages into your company’s overall strategy and decision-making process when analyzing which claims to pursue as an opt-out plaintiff.

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6 We address here only the state-law issues. See supra note 2.

7 This rule derives from two well-known Supreme Court cases holding, respectively, that (i) antitrust defendants cannot assert a pass-on defense to defeat or reduce their liability, see Hanover Shoe, Inc. v. United Shoe Machine Corp., 392 U.S. 481, 494 (1968), and (ii) that antitrust plaintiffs cannot demonstrate harm by showing that an overcharge was passed on to them—which means only direct purchasers may bring suit, see Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).
B. Your company’s foreign antitrust claims may not be protected by the Cartwright Act

There is an additional consideration if your company’s antitrust claims involve either foreign commerce, such as a sale from one foreign entity to another foreign entity, or export commerce, such as sales from a U.S. entity to a foreign entity. The Foreign Trade Antitrust Improvements Act (“FTAIA”), 15 U.S.C. § 6a limits federal antitrust claims involving foreign trade or commerce or export trade or commerce, subject to the exceptions described below. While plaintiffs may hope to avoid the FTAIA by litigating their claims under state law, they should exercise caution before bringing state-law claims for foreign antitrust violations.

The first question you should ask when foreign commerce or a foreign entity is implicated in an antitrust conspiracy is whether the defendant’s conduct involves only domestic trade or commerce (i.e., trade within the United States between two U.S. entities) or import trade or commerce (i.e., trade from a foreign entity directly to a U.S. entity). If so, the conduct is subject to U.S. federal antitrust law under the Sherman Act, and the FTAIA does not apply. However, when there is either (i) trade between foreign entities or (ii) trade from a U.S. entity to a foreign entity, the FTAIA is triggered, and there is a presumption that the foreign trade or commerce at issue is not subject to U.S. federal antitrust law unless the conduct at issue meets the “domestic effect” exception articulated in the FTAIA. To meet this exception, the plaintiff must first prove that the defendant’s conduct had a “direct, substantial, and reasonably foreseeable effect” on the domestic market, whether on domestic or import trade or commerce, or on opportunities to export from the United States. The plaintiff must then prove that the effects analyzed in the previous step “give rise to” the plaintiff’s Sherman Act claim. In other words, did the direct, substantial, and reasonably foreseeable effect (i.e., supracompetitive prices) proximately cause the plaintiff’s injuries? See Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267, 1271 (D.C. Cir. 2005).

If your company is bringing indirect-purchaser claims under state antitrust law, consider whether the FTAIA’s bar on foreign-commerce-based federal antitrust claims also bars your company’s Cartwright Act claims. Although there is almost no case law addressing this question, both state and federal cases suggest that California’s antitrust law cannot reach further than the bounds of federal antitrust law. See, e.g., In re Static Random Access Memory (SRAM) Antitrust Litig., No. 07-MD-01819, 2010 WL 5477313, at *4 (N.D. Cal. Dec. 31, 2010) (finding that the FTAIA would bar indirect purchasers from reaching foreign market transactions under state laws unless plaintiffs could prove “jurisdictional facts” bringing their claims within the FTAIA’s domestic injury exception); In re Potash Antitrust Litig., 667 F. Supp. 2d 907, 927 (N.D. Ill. 2009) (“[T]here could potentially be conflict with certain constitutional provisions if state antitrust laws reached foreign commercial activity that [the FTAIA] did not.”); In re Intel Corp. Microprocessor Antitrust Litig., 476 F. Supp. 2d 452, 457 (D. Del. 2007) (“Congress has spoken under the FTAIA with the ‘direct, substantial and reasonably foreseeable effects’ test, and the Court is persuaded that Congress’ intent would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not.”).

8 See supra note 2.
For their part, California courts have not been wholly consistent in applying the FTAIA to Cartwright Act claims. For example, a California appellate court has explicitly adopted the FTAIA’s limitations on extraterritorial commerce. See Amarel v. Connell, 202 Cal. App. 3d 137, 150 (1988) (concluding that the FTAIA does not preclude state law claims “[s]o long as the anticompetitive conduct in question has a direct, substantial, and reasonably foreseeable effect within the state”). But a different state court has also found that the FTAIA “does not apply to plaintiff’s claims brought under the law of California.” See In re Hynix Antitrust Cases, Nos. 4607, 04-043 1105, 1-06-CV-076688, 2010 WL 4256345, at *1 (August 17, 2010) (no discussion of the merits).

Although state courts have ruled both ways, the decisions discussed above suggest that plaintiffs cannot apply the Cartwright Act to harm from restraints on trade in foreign markets having no direct, substantial and foreseeable anti-competitive effects on trade or commerce in the United States, as would be required for federal antitrust jurisdiction under the FTAIA. Moreover, for those plaintiffs litigating their Cartwright Act indirect-purchaser claims in federal court, it is even less likely that a federal court would find that the plaintiff’s state-law claims may reach foreign commerce or trade where the plaintiff’s Sherman Act claims would clearly not. If your company has a mix of (i) foreign or export claims and (ii) domestic or import antitrust claims, consider how best to present the facts related to your foreign or export claims such that they demonstrate a direct, substantial, and reasonably foreseeable effect on your domestic business or commerce.

IV. CONCLUSION

For a company that does not often find itself in the role of antitrust victim, determining what to do when faced with a supplier cartel can be difficult. At a minimum, we recommend following the steps outlined in this article, setting up a procedure for tracking and setting deadlines related to the class action settlements and notices, and working with in-house and outside counsel, along with the procurement teams and business leadership at your company, to analyze and resolve the claims in a way that balances maximizing potential recovery with the costs of investigation and litigation.