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19. While these cases are important examples of civil non-merger enforcement actions brought by federal and state enforcement agencies, most civil non-merger antitrust cases are brought by private enforcers. A high volume of private civil non-merger litigation in the United States means a constant flow of new competition law decisions. Indeed, outside the cartel and merger areas, competition law in the United States is developed largely in private litigation. U.S. courts are often presented with new questions, new slants on old questions, and new factual settings, all of which can provoke rethinking of the rationales of older decisions and restating core principles with added clarity. Those judicial precedents often apply to government enforcement actions, so the common law is developed through decisions in multiple circuits. The Antitrust Division and FTC monitor the cases closely and participate as *amicus curiae* where important principles are implicated.

## 6. The Role of Courts in Developing U.S. Antitrust Law

20. One feature of the U.S. federal court system is the role of the 12 regional circuit courts of appeals. In each circuit, decisions from other circuits might be persuasive but are not binding precedent, so each circuit has the opportunity to take a fresh look at every interesting question in competition law. Review by the Supreme Court in competition cases, as in most cases, is taken by that Court only on a discretionary basis, and most petitions for review are not granted. Generally speaking, the Supreme Court does not take up a question unless and until a split in the circuit courts develops. The Supreme Court will then have the benefit not only of the opposing views of the litigants, but also the conflicting analyses of the courts of appeal, along with economic literature and legal commentary.

21. The Supreme Court has decided important cases in recent years on such issues as using the rule of reason in minimum resale price maintenance cases, the scope of any duty to deal with competitors in a regulated sector context, when and under what standard pharmaceutical patent settlements are subject to antitrust scrutiny, the viability of price squeeze theories of exclusionary conduct, when the action of state governments displaces federal power. Although some of these decisions have been seen as limiting the scope of private damages actions, many antitrust cases continue to be brought by private plaintiffs in the U.S.

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See, e.g., Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party, *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015) (No. 14-8003), available at [https://www.ftc.gov/system/files/documents/amicus\\_briefs/motorola-mobility-llc-v-au-optronics-corp./140905motorolaamicusbrief.pdf](https://www.ftc.gov/system/files/documents/amicus_briefs/motorola-mobility-llc-v-au-optronics-corp./140905motorolaamicusbrief.pdf) Trade Commission as Amicus Curiae Support of Plaintiffs-Appellants, *In re Lamictal Direct Purchaser Antitrust Litig.*, No. 14-1243 (3d Cir. Apr. 28, 2014), available at [https://www.ftc.gov/system/files/documents/amicus\\_briefs/re-lamict99633 Tm\[\(la\)-12\(pTm\[](https://www.ftc.gov/system/files/documents/amicus_briefs/re-lamict99633 Tm[(la)-12(pTm[)



22. In nearly all antitrust cases that reach the Supreme Court, the federal government shares its views through and is represented by the Solicitor General of the United States, the chief appellate officer in the DOJ. When DOJ and FTC cases are before the Supreme Court, the Office of the Solicitor General works closely with the Antitrust Division and FTC. That office also consults with the Agencies and other interested components of the federal government when it participates as amicus curiae in private antitrust and related cases. The Supreme Court often seeks the views of the Solicitor General on whether to take particular cases.

**7. Benefit of Agency Proceedings for Private Plaintiffs in Non-Cartel Cases**

23. Like a conviction in an Antitrust Division criminal proceeding,



accordance with agency regulations.<sup>64</sup> For requests under any provision of law other than those under FOIA, the Agencies generally will assert all applicable privileges and exemptions from disclosure permitted by law and use best efforts to provide the company such notice as is practicable prior to disclosure of appropriately designated confidential business information.<sup>65</sup>

## **9. Conclusion**

29. Public and private enforcement play different, yet complementary, roles in the United States. The courts develop the common law of antitrust, and private plaintiffs benefit from the disposition of public enforcement actions. When private proceedings threaten to interfere with the investigations of the federal agencies, the courts are available to protect the integrity of public enforcement.

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<sup>64</sup> See 5 U.S.C. § 552(b)(4); 16 C.F.R. § 4.10; 28 C.F.R. § 16.7.

<sup>65</sup> See Antitrust Division Model Voluntary Production Letter, available at Division Manual, [http://www.justice.gov/atr/public/divisionmanual/supporting\\_documents/206430.htm](http://www.justice.gov/atr/public/divisionmanual/supporting_documents/206430.htm).