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The US plaintiffs' bar

Although recent court decisions have diminished its power somewhat, the US plaintiffs' bar remains the driver behind a sizeable number of the country's antitrust cases. **Ron Knox** *profiles the leading antitrust practices bringing cases on behalf of those wronged by anti-competitive acts*

FOR the past several decades, private antitrust enforcement has been the true driver of antitrust law in the US.

While government enforcers have the power to put cartelists in prison and break up monopolies, it's the country's thriving private bar that can truly threaten a company's bottom line – and get restitution for victims of cartels and other illegal actions.

The treble damages that plaintiffs can win – as well as a relatively straightforward class certification process in the United States – mean that defendants can be forced to pay tens or even hundreds of millions of dollars in damages to their victims – far more than the US government is able to extract from lawbreakers.

Over the past 20 years or so, the US Department of Justice's antitrust division has won settlements or criminal fines of just over US$4 billion against cartelists and others. While no comprehensive research is available on private damages, a recent study of the 40 largest private antitrust cases from 1990 until 2007 documented close to US$19 billion in damages paid by defendants. That's just a handful from among the hundreds of antitrust lawsuits filed in that time. And according to the study, authored by Robert H Lande of the University of Baltimore and Joshua Davis of the University of San Francisco, that total does not include the other costs associated with being sued, including legal fees, corporate disruptions and effects on stock price. In reality, the real financial impact of private enforcement is likely to exceed the headline figure by tens of billions of dollars.

The success of private enforcement has resulted in an active and prosperous US private antitrust bar on both sides of the defendant-plaintiff divide. On the plaintiffs' side, this includes several major firms that, through ability and reputation, have found themselves involved in nearly every antitrust litigation in the country.

In the past, those cases were relatively straightforward. You sue a company – especially one that has already been indicted or charged by the DoJ – and chances are, you'd find yourself in settlement negotiations sooner rather than later.

But things are changing, plaintiff lawyers say. For the US plaintiffs' bar, the road to bringing successful cases has become rockier in many ways.

Over recent years, several court cases in the US have sought to limit the power of private antitrust enforcement to push cases through to pre-trial motions and onto discovery, where the most telling documents and testimony comes to light. The Supreme Court's *Twombly* decision, and its later decision in the *Iqbal* case, increased what plaintiffs must show to survive a motion to dismiss. And several cases, including the Third Circuit court of appeal's decision in the hydrogen peroxide antitrust litigation, made winning class certification more challenging.

"The hurdles are many, early on, and significant," says Max Blecher, who leads Blecher & Collins. "The hurdles are higher now by far then when I started practising, or even 10 or 15 years ago."

Many of the judgments that have contributed to this case law were intended to weed out sham or frivolous antitrust lawsuits. Indeed, many of the precedential cases themselves were based on relatively weak antitrust theories – *Twombly* is a prime example.

But practitioners say that the judgments and the precedents they set have affected many antitrust actions. While bringing cases is far from impossible, they take far more time and money to survive pre-trial motions and class certification – two of the major hurdles to private antitrust cases.

"Cases have gotten slower, and part of that is due to *Twombly*. And that includes the criminal cartel cases," says William Isaacson, partner at Boies Schiller & Flexner. "It's hard to believe that *Twombly* was intended to get at a criminal cartel case. But there is now a motion in every [litigation], no matter how strong the case."

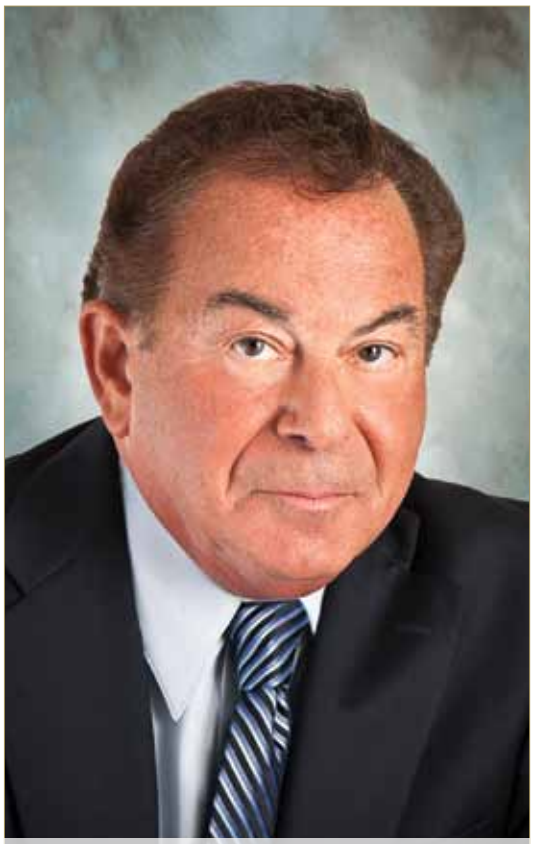
Not only have cases become slower, but the participants in private antitrust enforcement have themselves changed.

In years gone by, lawyers would bring antitrust cases on behalf of "the little guy" – the smaller company whose business had suffered because of anti-competitive activities. Although those cases still exist, most private litigations now are either enormous class actions on behalf of consumers, or opt-out or one-off cases that pit two industry heavyweights against one another.

And, more often than not, those Goliath-versus-Goliath cases go to the country's largest law firms.

"The defence firms that never did this kind of work before are now doing a lot more of it," Blecher says. He calls most private antitrust cases now "a war between the ruling class," with major corporate plaintiffs versus major corporate defendants. "And those plaintiffs don't wind up at the boutiques," He says. "They end up at Cleary Gottlieb or someone else."

Even with those challenges, the US plaintiffs' bar is still vibrant and active. While there are far too many to name here, *GCR* spoke to the heads of some of the more distinctive, active and successful US plaintiff practices to hear their take on private enforcement.



Max Blecher

Blecher & Collins

Max Blecher remains, in many ways, the heart and soul of the US plaintiffs' bar. Since splitting with former San Francisco mayor and antitrust lawyer Joseph Alioto in the early 1970s, Blecher has run his own boutique antitrust practice in Los Angeles and brought the kind of old-school antitrust claims that have become a rare breed in the era of government follow-ons and multimillion-dollar class actions.

Blecher is perhaps one of the last antitrust attorneys who view themselves as part of a David-versus-Goliath battle. Blecher and his firm deal almost exclusively with section 2 cases, alleging a wide spectrum of monopolisation infringements, from pricing to exclusive dealing and so on. He and his modest nine-lawyer antitrust team handle hardly any price-fixing cases, and hardly any cases that follow on from government investigations. They get requests from companies or referrals from other law firms, and if they think the case is right, they take it.

In what Blecher calls "a declining antitrust world", the firm knows the case has to be exactly right for it to have even a chance of success in court. "The system is not receptive to antitrust cases anymore," Blecher laments, adding that private section 2 monopolisation cases have, by now, a long history of losing at multiple levels of the US judicial system.

"The key is to be selective," Blecher says. The firm does all it can to ensure that its clients, and their claims, align themselves with consumer interests. He says that in his view, the courts have turned antitrust into a kind of consumer remedies act – so clients that have suffered direct consumer harm are much more likely to have a good chance in court than those who are perhaps at a different point in the supply chain, far away from the average persons' wallet. "If the plaintiff and the consumer interest are opposed, the case will go down the tubes," Blecher says.

The firm has also begun to view state courts as more favourable venues for plaintiffs, especially those in California. Although the firm's caseload remains tilted in favour of federal courts, local judges have been more favourable to the cases Blecher's clients are attempting to put forward, he says. "The state court remains more receptive to cases where the little guy got screwed," he says. "It's a much more friendly forum to plaintiffs."

The team has indeed elected to take on major cases over the past year or so. Blecher recently won a case for a client against FedEx and UPS, who the plaintiffs charged with refusing to deal with third-party shipping consultants – a case in which both the shippers and the consumers were seeking lower prices. The team is also prosecuting an exclusive dealing case in southern California, along with several others.

While Blecher admits that the markets' for antitrust plaintiffs' boutiques has dwindled in recent years as more and more corporate firms venture onto the plaintiffs' side, he says there's still a need for smaller firms to fight for the little guy: "We are still available to David to fight Goliath."

Boies Schiller & Flexner

Boies Schiller & Flexner has been at the forefront of private antitrust enforcement in the US since the earliest days of cross-border cartel cases and the ensuing follow-on litigation. From the vitamins litigation in the late 1990s to the municipal derivatives case today, the firm has consistently been involved in the largest antitrust litigations, securing millions for its clients.

The Boies Schiller antitrust group is one of only a handful of plaintiffs' practices that is consistently chosen as lead or co-lead counsel in multi-district antitrust cases. Over the past decade, the firm had helped lead antitrust litigations in the vitamins, scrap metal, First Databank, polyurethane foam and municipal derivatives cases, as well as the Chinese Vitamin C litigation that was the product of Boies Schiller's own investigation.

Boies Schiller partner William Isaacson says the firm wins its lead counsel role through its track record in both securing pre-trial settlements, and in stand-up, courtroom trials.

"We're ready, willing and able to try the case at the end," Isaacson says. In a recent lead counsel hearing in the polyurethane foam litigation, Isaacson says, the judge asked to see the hands of those firms that had actually tried a price-fixing case. "It was a very crowded courtroom with very few hands," he says.

The Boies Schiller team won an US$11.5 million jury verdict in the scrap metal antitrust litigation prior to trebling, and Isaacson acted as trial counsel in *Animal Science Products v Mitsui & Co*, winning a jury verdict of nearly US$50 million before trebling.

The team also handles an impressive amount of opt-out cases for clients who decide to pursue their own damages from cartelists. The team acted for retailers PC Richard & Son and Harris Teeter in the LCD and CRT litigations, for example.

William Isaacson

Cohen Milstein

Since Michael Hausfeld left the firm in late 2008, the team at Cohen Milstein Sellers & Toll has gone through something of a transformation – and a period of significant growth that reaffirmed the firm's reputation as one of the strongest and most capable antitrust plaintiffs' teams in the country.

Shortly after Hausfeld left, the firm hired veteran defence litigator Kit Pierson to co-head the antitrust group, along with long-time Cohen Milstein lawyer Dan Small. Pierson, a former Heller Ehrman partner, says the firm revisited what kinds of antitrust cases it wanted to take and the ways it planned to be successful in the antitrust plaintiffs market.

Since then, the antitrust group has grown considerably, from about 10 lawyers when Pierson joined the team, to 18 practitioners today. That includes five new partners from a combination of lateral hires and internal promotions. Much of the team has significant litigation experience, including those such as Pierson who have defence litigation experience, as well as former government enforcers.

That growth has been spurred by an increasing caseload. Over the past few years, the team has earned lead or co-lead counsel status in multiple antitrust litigations, including in the e-books, dairy, blood plasma, polyurethane, nurse wages and others. Section 2 cases are also a part of the Cohen Milstein portfolio;

Pivotal cases

The past five years have seen US courts hand down decisions that promise to have lasting effects on private antitrust litigation. Three recent decisions stand out, specialists say, in their potential to shape litigation for years to come.

- **Bell Atlantic Corp v Twombly**
  Twombly, as the case came to be known, reached the Supreme Court in 2007 after the Second Circuit court of appeals reversed an earlier ruling that had dismissed the price-fixing allegations against Bell Atlantic. Twombly and others had alleged that Bell Atlantic had conspired with other telephone companies to allocate markets and otherwise harm smaller telephone companies – based almost entirely on evidence of parallel pricing.

  The Supreme Court found that Twombly's allegations were not enough for its claims to survive a motion to dismiss. In the process, the court heightened pleading standards for all antitrust cases. The new standards put pressure on plaintiffs to include in their complaints "plausible" evidence that an antitrust violation had occurred.

  Some practitioners say *Twombly* has prevented good cases from being heard, while others say they would never bring a case that couldn't meet the heightened standards in the first place. But almost all plaintiff lawyers agree that *Twombly* has forced claimants to spend far more time and money gathering evidence of an alleged conspiracy before bringing a case to court. However, more recent decisions have tempered pleading standards in *Twombly* and its sister case, *Ashcroft v Iqbal*, including a recent judgment in the text messaging antitrust litigation authored by Judge Richard Posner in the Seventh Circuit.

- **In re Hydrogen Peroxide Antitrust Litigation**
  Over the past several years, numerous appeals courts have handed down rulings that have raised the standard for certifying an antitrust class. But in late 2008, a unanimous ruling by a panel of the Third Circuit court of appeals appears to have placed strict new standards on class certification that practitioners say have made litigation more challenging and costly.

Gordon Schnell

the team is currently bringing a monopolisation case against truck transmission manufacturers in Delaware.

The team is also involved in many other antitrust cases, including those in the chocolate, compressors, aspartame, automotive filters and other industries. Plus, Pierson says he was drawn to the firm because of its commitment to pro bono and social justice cases, including those on behalf of prisoners in Guantanamo Bay, and environmental activist group Greenpeace.

Constantine Cannon

While the antitrust team at Constantine Cannon handles both defence and plaintiff work, no other plaintiff practice can claim to have won two of the three largest antitrust settlements in US history.

Both of those settlements came in cases against Visa and MasterCard, accusing the companies of tying the merchants' acceptance of debit cards to credit cards. For a class of merchants, the firm helped secure a record US$3 billion in payments, as well as fee reductions estimated to be worth as much as US$86 billion. And for rival Discover, the Constantine Cannon team secured a US$2.75 billion in settlement fees – the third largest settlement in the history of antitrust litigation.

"That put our firm on the map as a strong plaintiffs antitrust firm," says Gordon Schnell, partner at Constantine Cannon. "It's good to be able to say: hire us and we'll secure for you the next largest antitrust settlement."

On the class side, the firm is currently advising individual customers and the Funeral Consumers Alliance against the country's three largest funeral home chains, alleging a price-fixing scheme for caskets. The team is also involved for consumers in the title insurance antitrust case against Fidelity National Title and others.

Schnell says that other than those few class actions, the firm typically advises individual companies and clients in antitrust matters, rather than classes of consumers. Among those, the firm is currently advising technology company True Position in a standard-setting case against Qualcomm, Ericson and Lucent Technologies. Other antitrust plaintiff clients include Johnson & Johnson and News Corp.

During an appeal in the hydrogen peroxide cartel litigation, the Third Circuit panel found that to win class certification, courts must weigh the facts of a case to prove that antitrust damages were common to the entire proposed class – even if proving those facts overlap with the merits. The decision has essentially transformed class certification hearings into mini-trials in which plaintiffs have to present considerable evidence and testimony for a case to move forward – all without the benefit of extensive pre-trial discovery. Defence lawyers say the decision levelled the playing field, but many plaintiffs' attorneys say the decision threatens to stunt otherwise-worthy antitrust class actions in the Third Circuit and elsewhere.

But not all hope is lost for the plaintiffs' bar. Over the past few years, several circuit court decisions have aimed to temper prior case law that increased the standards for class certification – including the Third Circuit's own decision last year backing class certification in the *Comcast* antitrust litigation.

- **Wal-Mart Stores v Dukes**

  Last year, the US Supreme Court again raised the bar for class certification when, in a 5-4 decision, it ruled against certifying a class of former Wal-Mart employees who had sued the store for sex discrimination. Although not an antitrust matter, practitioners say the case has the potential to deeply affect the class certification process in price fixing and other antitrust cases as well.

  The Supreme Court ruled that the Dukes class failed to show the evidence required to prove "commonality" for class certification purposes. Some in the antitrust bar feared that the case could require antitrust plaintiffs to present even more evidence of common harm and other relationships before winning class certification. The results, so far, have not seen that pan out as some had feared. In the aftermarket automotive lighting litigation – the first antitrust case to reach class certification post-Wal-Mart – the court last year rejected defendants' arguments that Wal-Mart should bar the court from certifying the class.

Freed Kanner London & Millen LLC

Four years ago, when Michael Freed set up Freed Kanner, the focus was not only contingency fee work, but specifically class action antitrust price-fixing cases. The resulting practice has become one of the only true plaintiff antitrust boutiques in the country, with a practice as active as any of its larger rivals.

The eight-lawyer team is based in Chicago, and it currently has two major Chicago-based multi-district cases on its docket – the aftermarket filters litigation and the containerboard price-fixing case. Over the past few years, the firm has also served as lead counsel to the plaintiffs in the flat glass litigation, as well as the parcel tanker case – generally known now as Stolt-Nielsen – hydrogen peroxide, fructose and others.

But in many of the litigations in which the Freed Kanner team isn't chosen as lead counsel, they often play a major role, including in the Chicago-based steel and potash antitrust litigations, as well as the SRAM and nearly-concluded LCD litigation in California. The firm has developed a speciality for e-discovery – a hot topic in class action litigation. "We've really developed a specialised ability with e-discovery and we're often called on to create the paradigm – which vendors to work with and what to push for," Freed says. The group's eight lawyers also specialise in other parts of what comprises the nitty-gritty of class action litigation, including expert discovery, writing briefs and so on.

Freed says his firm's clients and cases come from a variety of places. A portion of their work comes from what Freed calls "proprietary cases" – a group of clients who come to the firm with matters they believe constitute antitrust violations. The team also has a solid base of local law firms from which it gets referrals and the firm also tracks down cases on their own, monitoring newspaper reports and indictments alleging anti-competitive behaviour.

Michael Freed

Gray Plant Mooty

Practice leader Daniel Shulman and his team at Gray Plant Mooty form another antitrust group that continues to swim against the tide. While the firm does get involved in the occasional class action – they've played a major role in the flat panel litigation – the lion's share of its work is representing individual clients in the kinds of cases most plaintiff firms turn down.

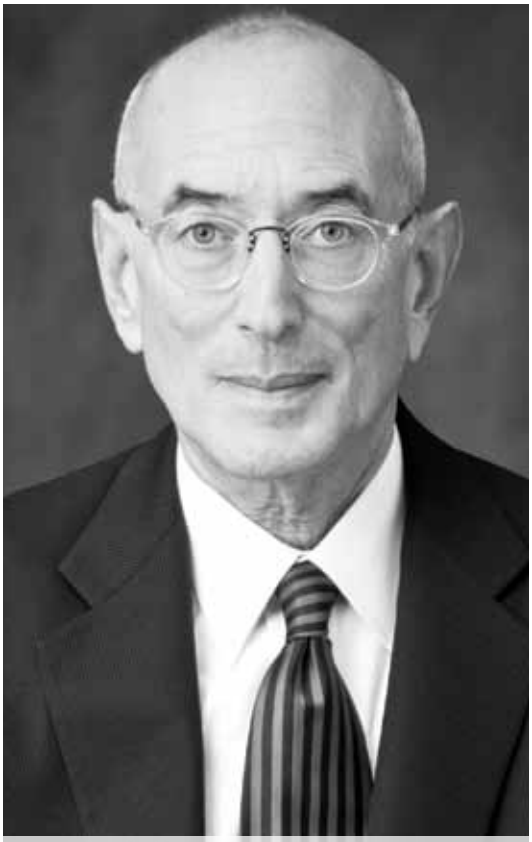
For example, the team has tried four or five merger cases over the past decade, Shulman says. Private merger cases are perhaps the kind of private antitrust case with the slimmest chance of success. Still, the firm has sued two newspaper mergers in the San Francisco area. One challenged Hearst's acquisition of the *San Francisco Chronicle*, and the other against MediaNews and its consolidation of newspapers in the region.

Shulman and his team have also filed lawsuits on behalf of travel agents against both Delta's merger with Northwest in 2008, and United/Continental the following year. They brought two significant antitrust cases on behalf of a 3M spin-off, including a case against Appleton Papers and the other against Quantum, Maxell and Fuji early last decade.

While class action antitrust cases have become the norm for many in the plaintiffs' bar, Shulman prefers to represent companies and individuals. "It doesn't suit my temperament to be in a class action," he says. "The class action bar has its own way of proceeding. It just doesn't fit with the way I practise law."

Shulman says that from his perspective, class actions have become bogged down with judicial regulations that create roadblocks to bringing successful cases – something that is likely to continue "until they really try some cases."

Hollis Salzman



Michael Hausfeld

Barry Barnett

Hausfeld

Since opening the practice in 2008, Michael Hausfeld and the 20-lawyer team at Hausfeld have established themselves as one of – if not the – top plaintiffs' antitrust firm in the US.

The Hausfeld team's record speaks for itself. Over the past three years, the firm has gained leadership positions for plaintiffs in more than 25 antitrust cases, many of which are multi-district cases where the firm has won lead or co-lead counsel status. The firm is leading or co-leading the air cargo, chocolate confectionary, flat glass, aftermarket auto lights and LIBOR antitrust litigations, to name a few. What's more, in the three years since it formed, Hausfeld has secured close to US$700 million for its antitrust clients.

The substantial victories for clients have come both from Hausfeld's reputation as one of the top plaintiff lawyers in the country and from courtroom tactics that secure the information needed to win co-lead counsel status and secure settlements from defendants. In multiple cases, Hausfeld has struck "zero dollar" settlements with defendants, in which those accused of price fixing can exit the case in exchange for crucial documents and testimony to help the prosecution. While the practice has ruffled feathers, those who have worked with Hausfeld say the practice has paid dividends for his clients.

"While the early settlements in the air cargo litigation incited some controversy at the time, they ultimately stood up to scrutiny both by the co-lead counsel in the case as well as the court," says Hollis Salzman from Labaton Sucharow, which serves as co-lead counsel in the air cargo litigation alongside Hausfeld. "In hindsight, time has shown that Michael Hausfeld's strategy proved to be in the best interests of the class."

Since the firm's inception, Hausfeld has also worked to expand the firm's horizons beyond the US. The team's sister practice in London, Hausfeld & Co, has been at the forefront of private antitrust litigation in Europe. While the team has yet to collect damages on behalf of European cartel victims, it is currently involved in nine active EU cases, including several in the UK.

"When we started out, there was this perception that we would be bringing these cases on behalf of [small businesses] or classes of consumers," says Anthony Maton, a partner in the firm's London office. "But the reality is that we are bringing cases on behalf of larger businesses, including global businesses."

Those clients have included Deutsche Bahn, Volvo, H&M and many others. Plus, the team has more than 100 companies – including major global brands – prepared to go to court in the UK against those involved in the air cargo cartel.

Labaton Sucharow

Few plaintiff firms can claim the kind of track record that the antitrust team at Labaton Sucharow has over the past decade or so. At the moment, the class action firm is either lead or co-lead counsel in about one-third of all multi-district litigations in the US – a true gauge of a plaintiff firm's ability.

To get chosen as co-lead counsel in class litigations, judges have to know that a firm can perform in myriad ways. Firms have to be able to coordinate often complex relationships between other class counsel, and it has to be skilled enough to navigate the details of what are frequently difficult cases. Winning redress for clients doesn't hurt, either.

"We generally produce a work product that shows we have put time and resources into investigations before filing," says Hollis Salzman, partner at the firm. Plus, Salzman says, the firm has good relationships with many other plaintiff firms around the country who must support the push for co-lead status on a litigation.

The firm's reputation also helps it secure clients. The team's high profile leads potential clients to contact it directly when they believe they have been affected by, or witness to, a price-fixing agreement. What's more, Salzman says, "the firm has been around for nearly 50 years. And through that, we have a large network of counsel who represent a variety of clients in different businesses, and they often reach out to us."

The firm's work has certainly paid off. The Labaton antitrust team is currently co-lead counsel on the continuing air cargo litigation in New York – by most accounts the largest and most complex antitrust class action in the country. The plaintiffs' counsel has already secured nearly half a billion dollars in settlements, with many other defendants still involved in the litigation. At the moment, the case is pending class certification, but discovery is well under way.

The team has a significant caseload otherwise. It's currently co-lead counsel in litigations targeting alleged price-fixing conspiracies in the auto lights, marine fenders, transition lenses, flat glass and cabotage cases, among several others.

Susman Godfrey

Texas litigation firm Susman Godfrey is wholly composed of stand-up trial lawyers who specialise in courtroom battles both for defendants and plaintiffs in complex litigations. Antitrust is a major component of that, says Barry Barnett, who leads the firm's antitrust practice from Dallas. "There are a great many of our lawyers who have handed a significant percentage of antitrust cases over the years." While five partners make up the firm's core antitrust group, Barnett says that at least a third of the firm's 91 lawyers, and an even higher percentage of the partnership, have significant experience in antitrust cases.

While the firm does defence work as well, the Susman Godfrey antitrust practice revolves around its work for plaintiffs – both as lead and co-lead counsel for classes of claimants, and for large companies choosing to opt-out of class actions and pursue damages on their own. Barnett says the practice takes pride in being one of three or four groups around the country capable of handling both types of cases – and it handles a considerable number of them.

Class action work typically comes to the firm through referrals from a network of local lawyers around the country. The Susman Godfrey team became involved in a recent US Federal Trade Commission price-fixing case against pipe fitters in precisely that way. Courts certify the firm as lead or co-lead counsel, Barnett says, because of its reputation.

"I'm convinced that the key thing is that we're willing to try cases and we have tried cases," he says. "We're going to get a premium settlement (for class plaintiffs) because we're willing to go to trial." The team is currently co-lead counsel in the aftermarket filters and municipal derivatives antitrust class actions, among many others.

In opt-out cases, Barnett says the team tends to act for institutional clients who want to step away from class litigation and pursue the recovery of damages. T-Mobile is a major client, and the firm is helping the telecommunications company sue those involved in the alleged LCD cartel. The Susman Godfrey group is also advising computer makers in that litigation, as well as claimants in the pharmaceutical industry.

Susman Godfrey's other cases include heavy lift barges and marine hose.