

Partner, New York

Complex Litigation and Trials; Antitrust/Competition



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Education

J.D., Yale Law School, 2004
(Managing Editor, *The Yale Law Journal*)

B.A., Stanford University, 1999
(with honors)

Bar Admissions

New York

Languages

Russian

Boris Bershteyn litigates complex antitrust and competition matters before trial and appellate courts, and advises clients on regulatory and enforcement actions by government agencies and related internal investigations. He also represents businesses, sovereign entities, nonprofits, and individuals in administrative, appellate and constitutional disputes.

Mr. Bershteyn's recent antitrust litigation representations include:

- JPMorgan Chase in:
 - antitrust class actions and other litigation alleging that foreign currency dealers conspired to manipulate benchmark currency exchange rates;
 - antitrust class actions alleging conspiracy in the trading of federal agency bonds;
 - antitrust class actions and other litigation alleging a conspiracy among Visa, MasterCard and certain banks to set credit and debit card interchange fees and network rules;
 - antitrust class action alleging a conspiracy among Visa, MasterCard and certain banks concerning ATM access fees (lead counsel on successful *certiorari* petition to U.S. Supreme Court);
 - antitrust class action alleging a conspiracy among credit card networks and card-issuing banks in connection with the conversion to "chip" cards; and
 - antitrust class action alleging a conspiracy to restrain competition in the credit default swaps market;
- Barclays Bank in:
 - antitrust class action and enforcement litigation by the Federal Energy Regulatory Commission related to alleged manipulation of energy markets; and
 - antitrust class actions and related state False Claims Act litigations alleging anticompetitive activity related to variable rate debt obligations;
- HSBC in an antitrust class action alleging a conspiracy among dealers of Mexican government bonds;
- Peco Foods in antitrust class actions alleging a conspiracy among broiler chicken producers to reduce output; and
- multiple financial institutions in a range of antitrust investigations and enforcement actions.

Mr. Bershteyn's recent administrative, appellate and constitutional representations include:

- Republic of Argentina in proceedings before the U.S. Supreme Court concerning the scope of its foreign sovereign immunity;
- underwriters of Petrobras bonds in appeal of class certification in securities action (class certification vacated by the Second Circuit);
- Stilwell Value LLC and Joseph Stilwell in the first litigation challenging the constitutionality of the Securities and Exchange Commission's administrative law judges under Article II of the U.S. Constitution. In 2015, the Stilwell settlement was shortlisted for the *Financial Times'* North America Innovative Lawyers report's award for Protecting Client's Business;
- Canadian Imperial Bank of Commerce in commercial appellate litigation;
- California Association of Postsecondary Schools in litigation challenging a regulation by the Department of Education;

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- UniCredit S.p.A. in proceedings before the U.S. Supreme Court involving claims by the trustee for the liquidation of Bernard L. Madoff Investment Securities LLC; and
 - Estée Lauder in appellate litigation involving putative consumer fraud class actions.

In addition to having argued multiple appeals, Mr. Bershteyn maintains an active appellate *amicus* practice, including:

- on behalf of 25 U.S. senators in *Planned Parenthood v. Smith* (Fifth Circuit 2019) (reproductive rights);
- on behalf of Intel Corporation in *Helsinn Healthcare v. Teva Pharmaceuticals* (U.S. Supreme Court 2018) (patent);
- on behalf of a coalition of businesses in *Texas v. United States* (U.S. Supreme Court 2016 and U.S. Court of Appeals for the Fifth Circuit 2015) (executive action on undocumented immigrants);
- on behalf of organizations of physicians and nurses in *Whole Women's Health v. Cole* (U.S. Supreme Court 2016) (reproductive rights);
- on behalf of the American Public Health Association and Whitman-Walker Health in *Obergefell v. Hodges* (U.S. Supreme Court 2015) (same-sex marriage equality);
- on behalf of former government officials in *King v. Burwell* (U.S. Supreme Court 2015) (interpretation of the Affordable Care Act);
- on behalf of the Carter Center in *Williams-Yulee v. Florida Bar* (U.S. Supreme Court 2014) (First Amendment in judicial elections);
- on behalf of the Domestic Violence Empowerment and Legal Appeals Project in *Ohio v. Clark* (U.S. Supreme Court 2014) (Confrontation Clause of the Sixth Amendment);
- on behalf of the Center for Budget and Policy Priorities and several law professors in *Council of the District of Columbia v. Gray* (U.S. Court of Appeals for the District of Columbia Circuit 2014) (fiscal and appropriations law); and
- on behalf of criminology experts in *Linares v. Evans* (New York Court of Appeals 2015) (procedures for parole determinations).

From 2009 to 2013, Mr. Bershteyn held a number of senior legal and regulatory positions at the White House and its Office of Management and Budget (OMB). As acting administrator of the Office of Information and Regulatory Affairs (OIRA), Mr. Bershteyn headed the federal agency charged with reviewing significant regulations promulgated by other executive branch agencies. His tenure included significant rulemakings in such areas as health care, environmental protection, transportation and financial services. Mr. Bershteyn also oversaw federal policy on information, including privacy, and led the Obama administration's initiative to promote international regulatory cooperation.

Before heading OIRA, Mr. Bershteyn served as general counsel of OMB. He coordinated all of OMB's litigation and compliance matters and counseled the OMB director on a range of administrative, regulatory, fiscal and legislative issues. Mr. Bershteyn led OMB's legal team during the debt ceiling crisis of 2011, potential government shutdowns and significant congressional investigations. He also was responsible for preparing draft executive orders and similar presidential documents. Mr. Bershteyn previously served as OMB's deputy general counsel.

From 2010 to 2011, Mr. Bershteyn was a special assistant to the president and associate White House counsel, advising senior administration officials on legal aspects of regulatory, economic, health and environmental policy.

In 2019, Mr. Bershteyn was named as a senior fellow of the Administrative Conference of the United States (ACUS), an independent federal agency charged with improving the federal regulatory and administrative process, after having served as a public member since August 2013. Additionally, from 2011 to 2013, Mr. Bershteyn served on ACUS' 10-member governing council, to which he was appointed by President Obama.

Earlier in his career, Mr. Bershteyn served as a law clerk to Justice David H. Souter on the U.S. Supreme Court and Judge José A. Cabranes on the U.S. Court of Appeals for the Second Circuit. He also is a recipient of the Paul and Daisy Soros Fellowship for New Americans.

Mr. Bershteyn also serves as the chair of the advisory board of the Institute for Policy Integrity at New York University Law School, as a board member of PeerForward and as a member of The American Law Institute. Mr. Bershteyn serves on the Firm's Hiring and Ethics committees. He has been named to *Chambers USA*, *The Legal 500 U.S.* and was named as a 2015 Rising Star by the *New York Law Journal*.

Experience

Acting Administrator, Office of Information and Regulatory Affairs (2012-13)

General Counsel, White House Office of Management and Budget (2011-12)

Special Assistant to the President and Associate White House Counsel (2010-11)

Deputy General Counsel, White House Office of Management and Budget (2009-10)

Law Clerk, Hon. David H. Souter, U.S. Supreme Court (2006-07)

Law Clerk, Hon. José A. Cabranes, U.S. Court of Appeals for the Second Circuit (2004-05)

Publications

“DOJ Wades Deeper Into No-Poach Advocacy,” *Skadden, Arps, Slate, Meagher & Flom LLP*, March 19, 2019

“US Supreme Court Construes Scope of Immunities in *Jam*,” *Skadden, Arps, Slate, Meagher & Flom LLP*, March 6, 2019

“Antitrust in the Technology Sector: Policy Perspective and Insights From the Enforcers,” *Skadden, Arps, Slate, Meagher & Flom LLP*, March 4, 2019

“DOJ is Trying to Rein In Franchise No Poach Suits,” *Law360*, February 19, 2019

“No-Poach Update: DOJ Seeks to Rein In Franchise Suits,” *Skadden, Arps, Slate, Meagher & Flom LLP*, February 11, 2019

“2018-19 Supreme Court Update,” *Skadden's 2019 Insights*, January 17, 2019

“Decisions, Decisions: Leading Cases on the Supreme Court’s 2018 Business Docket,” *U.S. News – Best Lawyers “Best Law Firms” 2019*, December 2018

“The Supreme Court’s Business Docket for the October 2018 Term,” *Skadden, Arps, Slate, Meagher & Flom LLP*, October 23, 2018

“Supreme Court Holds American Express Rule Is Not an Antitrust Violation,” *Skadden, Arps, Slate, Meagher & Flom LLP*, June 27, 2018

“2017-18 Supreme Court Update,” *Skadden's 2018 Insights*, January 23, 2018

“Second Circuit Clarifies Class Certification Requirements in Significant Securities Class Action Decision,” *Skadden, Arps, Slate, Meagher & Flom LLP*, July 10, 2017

“Inside the Courts: Supreme Court Rules That Equitable Tolling Does Not Apply to Section 13 of the Securities Act,” *Skadden, Arps, Slate, Meagher & Flom LLP*, June 26, 2017

“Supreme Court 2016-17 Recap,” *Skadden, Arps, Slate, Meagher & Flom LLP*, June 20, 2017

“U.S. Supreme Court’s 2016 Term: Some Highlights of What It’s Done So Far,” *BNA’s The United States Law Week*, May 25, 2017

“Agency Independence From Presidential Supervision: Changes Ahead,” *New York Law Journal*, April 10, 2017

Speaking Engagements

“Prioritizing Presidential Policies: How Does the Office of Management and Budget Influence Executive Policy Making?” Hofstra University, April 11, 2019

“Antitrust in the Technology Sector,” Skadden Seminar, March 4, 2019

“U.S. Supreme Court October 2018 Term,” Skadden Webinar, September 26, 2018

“Supreme Court Watchers,” Yale Law School Association of New York City’s Constitutional Law Event in NYC, June 27, 2018, June 28, 2017, June 29, 2016, June 29, 2015 and June 30, 2014, and Chicago, June 30, 2016

“Tenth Annual Securities Litigation and Regulatory Enforcement Seminar,” Skadden Seminar, December 1, 2017

“Ninth Annual Securities Litigation and Regulatory Enforcement Seminar,” Skadden Seminar, December 2, 2016

“Deference in Doubt? The Future of *Chevron* and the Administrative State,” American Constitution Society National Convention, June 11, 2016

“Eighth Annual Securities Litigation and Regulatory Enforcement Seminar,” Skadden Seminar, December 4, 2015

“Presidential Executive Orders: A Bridge Too Far?” Federal Bar Council, December 1, 2015

“Hot Topics in Commercial Litigation: What Every In-House Lawyer Should Know,” Skadden Seminar, April 23, 2015

“Administration in an Age of Political Dysfunction,” Columbia Law School Center for Constitutional Governance’s Third Annual Conference, April 13, 2015

“The American Budget Process,” The American Budget Process in Comparative Perspective, Stanford University’s Center on Democracy, Development, and the Rule of Law, May 8-9, 2014