

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 antitrust work has earned him a place on Lex Machina's list of the top 10 most active antitrust attorneys in the country over the course of 2021-23. His 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 a 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
 - an antitrust class action alleging a conspiracy concerning ATM access fees (lead counsel on successful *certiorari* petition to U.S. Supreme Court)
 - an antitrust class action alleging a conspiracy to restrain competition in the credit default swaps market
- Barclays Bank in:
 - an antitrust class action and enforcement litigation by the Federal Energy Regulatory Commission related to alleged manipulation of energy markets
 - antitrust class actions and related state False Claims Act litigations alleging anticompetitive activity related to variable rate debt obligations
- Greystar in antitrust class actions and actions by state attorneys general alleging that multifamily property managers inflated rents through the use of revenue management software
- Caesars Entertainment in antitrust class actions based on allegations of algorithmic pricing of hotel rooms. In recognition of his work in securing a groundbreaking defense win for Caesars, Mr. Bershteyn was named an *AmLaw* Litigator of the Week in May 2024
- Pioneer Natural Resources in antitrust class actions alleging a conspiracy among shale oil producers to reduce output
- International Flavors & Fragrances in antitrust class actions alleging a conspiracy to restrain competition in the fragrance industry
- HSBC in an antitrust class action alleging a conspiracy among dealers of Mexican government bonds
- subsidiaries of Glencore in antitrust class actions concerning warehousing and trading of aluminum and zinc
- Peco Foods in antitrust class actions alleging a conspiracy among broiler chicken producers to reduce output and employee wages
- Citigroup in an antitrust class action alleging a conspiracy among dealers of U.K. government bonds
- UniCredit in an antitrust class action alleging a conspiracy among dealers of European government bonds
- multiple financial institutions in a range of antitrust investigations and enforcement actions

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

- New York and Presbyterian Hospital in litigation against the federal government
- the Republic of Argentina in proceedings before the U.S. Supreme Court concerning the scope of its foreign sovereign immunity
- underwriters of Petrobras' bonds in an appeal of class certification in a 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
- California Association of Postsecondary Schools in litigation challenging a regulation by the Department of Education
- 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 and has represented:

- over 250 members of Congress in *FDA v. Alliance for Hippocratic Medicine* (U.S. Supreme Court 2023) (administrative law)
- scholars of *habeas corpus* in *Shinn v. Ramirez* (U.S. Supreme Court 2021)
- criminal law scholars in *New York Rifle & Pistol Assn. v. Corlett* (U.S. Supreme Court 2021)
- 25 U.S. senators in *Planned Parenthood v. Smith* (Fifth Circuit 2019) (reproductive rights)
- Intel Corporation in *Helsinn Healthcare v. Teva Pharmaceuticals* (U.S. Supreme Court 2018) (patent)
- 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)
- organizations of physicians and nurses in *Whole Women's Health v. Cole* (U.S. Supreme Court 2016) (reproductive rights)
- the American Public Health Association and Whitman-Walker Health in *Obergefell v. Hodges* (U.S. Supreme Court 2015) (same-sex marriage equality)
- former government officials in *King v. Burwell* (U.S. Supreme Court 2015) (interpretation of the Affordable Care Act)
- the Carter Center in *Williams-Yulee v. Florida Bar* (U.S. Supreme Court 2014) (First Amendment in judicial elections)
- the Domestic Violence Empowerment and Legal Appeals Project in *Ohio v. Clark* (U.S. Supreme Court 2014) (Confrontation Clause of the Sixth Amendment)

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, a board member of PeerForward and Volunteers of Legal Service, a member of The American Law Institute and a trustee of the U.S. Supreme Court Historical Society. Mr. Bershteyn serves on the firm's Diversity, Ethics, Hiring and *Pro Bono* committees.

In recognition of his work, Mr. Bershteyn has been named to *Chambers USA* and *The Legal 500 U.S.* and as one of Lawdragon's 500 Leading Litigators in America, in addition to being previously honored as a Rising Star by the *New York Law Journal*.

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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)

Recent Publications

“Algorithmic Pricing Under the Antitrust Microscope: Lessons From Recent Developments,” *Financier Worldwide*, August 2024

“Supreme Court Opens the Door to More Rule Challenges by Extending Accrual Date for APA Cases,” *Skadden Publication*, July 9, 2024

“Supreme Court Clarifies Standard for Analyzing National Bank Act Preemption,” *Skadden Publication*, June 6, 2024

“DOJ and FTC Release Final 2023 Merger Guidelines Formalizing Aggressive Merger Enforcement Playbook,” *Skadden Publication*, December 21, 2023

“Antitrust and Sustainability: EU, UK and US Take Divergent Enforcement Approaches,” *The CLS Blue Sky Blog*, November 16, 2023, and *Skadden Publication*, November 10, 2023

“DOJ and FTC Propose a New Playbook for Merger Reviews,” *Skadden Publication*, July 19, 2023

“ESG in 2023: A Mid-Year Review,” *Skadden Publication*, July 18, 2023

“SCOTUS Unanimously Endorses Early Challenge to Agency Proceedings, Limiting Enforcement Agency Power,” *The CLS Blue Sky Blog*, April 26, 2023, and *Skadden Publication*, April 17, 2023

“The Evolving Climates in the US and UK for Environmental Damage Claims,” *Skadden’s 2023 Insights*, December 13, 2022

“Fifth Circuit Holds SEC Proceeding Brought in Agency’s In-House Court Unconstitutional,” *Wall Street Lawyer*, June 2022, and *Skadden Publication*, May 20, 2022

“The Pandemic Brought Some Welcome Innovations to the Justice Process, But Also Many New Challenges,” *Skadden Insights*, January 19, 2022

“It Takes a Team to Raise an Executive Order,” *Yale Journal on Regulation*, November 2, 2021

“Financial Services & the Biden Antitrust Enforcement Agenda,” *Bloomberg Law*, October 8, 2021

“Antitrust Enforcement Takes a Sharp Left Turn,” *Skadden Publication*, October 7, 2021

“Protocols Exist for Operating the Government During a Shut-down but Not During a Debt Ceiling Crisis,” *Skadden Publication*, September 29, 2021

“Executive Order Launches ‘Whole-of-Government’ Antitrust Initiatives but Implementation Faces a Long Road Ahead,” *Skadden Publication*, July 13, 2021

“Skadden Discusses Antitrust Enforcement in Biden Administration,” *The CLS Blue Sky Blog*, May 10, 2021

“Antitrust Enforcement Expected To Intensify,” *Skadden Insights: Biden’s First 100 Days*, April 30, 2021

Recent Speaking Engagements

“A Review of Federal Antitrust Trial Developments,” Skadden webinar, December 13, 2023

“Panel of OIRA Administrators,” ABA 2023 Fall Administrative Law Conference, November 30, 2023

“Building Regulatory Foundations and Bridging to the Future,” IBM Center for the Business of Government, November 16, 2023

“Recent Updates in Antitrust Regulation and Litigation Regarding Information Sharing,” Skadden webinar, June 13, 2023

“Regulatory Reform and OIRA,” American Enterprise Institute, May 17, 2023

“OIRA Administrators: Revisiting Regulatory Review,” GW Regulatory Studies Center and the Society for Benefit-Cost Analysis, May 9, 2023

“A Review of Federal Antitrust Trial Developments,” Skadden webinar, December 14, 2022

“Modernizing Regulatory Analysis,” Society for Cost Benefit Analysis Annual Meeting, March 18, 2022

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“Current Developments in Federal Civil Practice 2022,” PLI Webcast, January 28, 2022

“Forum on Underserved Communities and the Regulatory Process,” Administrative Conference of the United States, November 8, 2021

“2021 Presidential Inauguration: Judicial Discussion,” Skadden Webinar, January 19, 2021

“Election 2020: The State of Congressional Investigations and a Look Forward to 2021,” Skadden Webinar, December 17, 2020

“Key Supreme Court Cases From the 2019-2020 Term,” Skadden Webinar, September 23, 2020

“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

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