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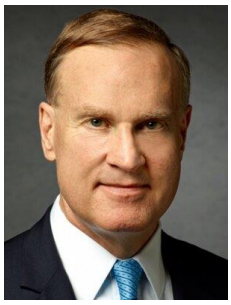
# How Antitrust Enforcers Might Think Like Plaintiffs Lawyers

By **Barry Barnett** (April 7, 2022, 10:27 AM EDT)



Barry Barnett

Stephen D. Susman, the founder of my firm and a titan in the antitrust bar, pioneered representing private antitrust plaintiffs on a contingent-fee basis.

Nobody knew better than Steve how to manage risk in antitrust cases — how to choose them, staff them, litigate them, win them. And no one knew better than Steve how to maximize his clients' recoveries — and his law firm's profits — from the many private antitrust cases the firm took on a contingent-fee basis.

I have thought a lot about whether the approaches Steve pioneered would help government lawyers at the Federal Trade Commission and the Antitrust Division of the Department of Justice make the most of the limited resources available to them for enforcement of antitrust laws. Over the last decade, the urgency of optimizing use of scarce resources has grown along with greater interest in blocking anticompetitive mergers, bringing more and bigger cases to remedy and deter antitrust violations, and improving antitrust doctrines in the courts[1] even as the agencies' funding remains well below the levels in the 1970s.[2]

Below, I will discuss how the plaintiffs-lawyer experience might translate for these government lawyers.

**Thinking Like a Plaintiffs Lawyer?**

Lawyers who represent plaintiffs in private antitrust cases typically work on a contingent-fee basis — meaning they share the risk that the lawsuits they bring for their clients to recover damages may fail, either at trial or before.[3] Often they also advance the considerable out-of-pocket costs for litigation expenses like expert fees, travel costs, and payments to court reporters and jury consultants.

The contingency lawyers' exposure to potential loss has a disciplining influence. Over years of practice, it instills habits of mind. Because the outcomes of cases determine whether they get paid or not, they learn to evaluate the odds of success, to do only those things that matter to the outcome, and to focus on finding the best way to persuade the judge or jury to change the status quo in their clients' favor.

A profit-maximizing law firm working on a contingent-fee basis cares a lot about the cost of achieving favorable results. Cost, in this context, means the expense of lawyer time plus payments to experts and other outside vendors. Speed and efficiency in pushing cases to favorable resolutions tend to lower the firm's cost and enhance returns on the firm's investment.

**Contingent-Fee Lawyers' Approaches**

Now we come to approaches Steve developed over the years for embracing risk while achieving optimal results.

***Choose Carefully***

Good plaintiffs lawyers know that the most valuable investment they make is the time and money they spend evaluating potential engagements they reject. Government lawyers who do not already have this mindset may find it useful in resisting the good-money-after-bad effects of what our economist friends call sunk costs.[4] Nothing hurts a plaintiff-side practice more than accepting loser cases — especially ones that have a voracious appetite for resources, as almost all antitrust lawsuits do. You will need to say no to many more cases than you accept.

***Involve Everyone***

Evaluating cases week in and week out makes a lawyer much better at coming to the right decisions about them. Reading case evaluations, hearing senior lawyers discuss potential cases, asking questions, and then voting attune you to the things that matter, lower the risk of error, and give everyone at least a cheering interest in the outcome of every case.

***Require Rigorous Proposals***

The lawyers who sponsor a case must explain why the firm should invest in it, first in writing and again orally at a weekly firm meeting. They must provide a road map that starts with the players and ends with victory at trial. Their analysis recites the facts, analyzes the facts under the relevant law, estimates costs, quantifies damages, describes staffing, identifies the tribunal and projects the premium the firm will receive if the case prevails at trial.

The premium often should equal at least three times the likely investment and, in any case, must compensate for the risk of an unsuccessful outcome. Might a similar case-sponsoring process be useful to government lawyers in making their go or no-go decisions on bringing antitrust cases?

***Define Victory***

Plaintiffs lawyers must quantify what they and their clients will receive should they win. That allows them to define what victory will look like. It also permits them to assess the resources (mainly lawyer time and expense money) that they should plan to invest in striving to achieve a successful outcome.

Spending $2 million to win a $1 million award makes no sense, but risking $2 million on a claim for $10 million might.

An economist presumably could make an analogous forecast of benefits from a potential enforcement action's happy outcome — the granting of an injunction blocking
an anti-competitive merger, say — to provide a data point in choosing among possible enforcement actions to bring.

***Focus on Trial From the Start***

Plaintiffs lawyers who work on a contingent-fee basis must determine that the claims have enough legal and factual support to get to trial and why at trial their clients will likely prevail, and a trial-centric approach might also benefit from enforcement actions.

Plaintiffs lawyers must in addition conclude that the potential upside of a case justifies what they would have to spend to handle the case through final judgment. Successful plaintiffs lawyers do not take cases in the hope they will settle quickly, even when that appears likely. They focus on trial.

***Do What Matters***

Spending time on unproductive work at best reduces the profits of plaintiffs lawyers and may mire them in more distractions. That some expense might help to win a case provides insufficient justification for incurring it. Every investment, whether of time or money, should advance the case towards a successful trial.

***Don't Think Like a Defense Lawyer***

Defense lawyers' clients win by avoiding changes to the status quo. If nothing happens, they declare victory. Preventing a loss, moreover, carries twice as much psychological charge as achieving an equivalent gain does.[5] Nor do defense lawyers have an incentive to limit investment in their clients' cases. Although losing a case may affect a defense lawyer's reputation, it will not forfeit their compensation. Thinking like a defense lawyer thus tends towards overinvestment and less early and ongoing attention to case-dispositive merits issues.

***Tell the Human Story***

Plaintiffs lawyers must motivate decision makers to make defendants pay money. Judges and juries seldom disturb the status quo unless they feel it is necessary to correct real injustices to actual people. The same is true in enforcement actions.

A story about a young woman who lost her American dream of owning a small business because a big company favored its own products will beat a claim that accuses an online digital platform of self-preferencing its algorithm.

***Right-Size Trial Teams***

The default staffing on each case's trial team should start small — typically one senior lawyer, one junior lawyer, and a paralegal. The actual size should depend on the minimum number necessary to do the work. A docket coordinator who monitors each lawyer's workload should have discretion to detach members from trial teams that have excess capacity and reallocate them to others in order to make best use of human resources.

***Track Investments***

Senior lawyers should receive a monthly tally and cumulative total of the value of time and expenses their teams have invested in each matter. The report may classify each case as a probable win, possible win or likely loss depending on a rough sense of the likelihood of achieving the case's relevant

objectives. This sort of tracking will allow identification of problems and making adjustments to address them.

***Conduct Case Reviews***

Subject all active cases twice yearly to review by senior lawyers and other members of multiple case review teams. Reviews will identify potential issues and, if appropriate, result in corrective measures. They will also educate younger lawyers about a variety of cases and how to deal with common problems. Each team generates a list of things to do and reports the results of the review to leadership.

***Develop a Deep Bench***

Train every junior lawyer to become a first-chair trial lawyer. Give them important speaking roles in trials. Nothing motivates up-and-coming lawyers so well or strengthens the capabilities of the lawyers so much.

**Conclusion**

Reinvigorating antitrust enforcement requires tolerance for litigation risk and skill in managing it. The orientation, habits of mind, and instincts of contingent-fee lawyers offer approaches the FTC and Antitrust Division may profitably consider.

But not everything from the experiences of private plaintiffs lawyers will translate into good guidance for government lawyers who enforce antitrust laws. I have gently suggested that at least some precepts of successful plaintiffs lawyers might assist government lawyers in enforcement actions, but would they really? It's an idea that might be worth exploring.

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[1] The Spring 2022 issue of Antitrust highlights the push for more assertive enforcement across multiple domains. Articles include "What Next for the Horizontal Merger Guidelines?" by Nancy L. Rose and Carl Shapiro and "Antitrust Reform: A Litigation Perspective" by Jonathan Sallet.

[2] From 1978 through 2021, gross domestic product rose 977.95 percent (or 9.7795 times). Multiplying the appropriations for the FTC and Antitrust Division in 1979 and 1978, respectively, by 9.7795 yields almost $1 billion—$635,667,500 to the FTC and $316,572,194 to the Antitrust Division. That represents a 42 percent increase over the stretch appropriation levels in the pending America COMPETES Act of 2022 and a 31 percent jump from the $490,000,000 and $272,524,000 the Biden administration has proposed for the FTC and Antitrust Division, respectively, in fiscal year 2023.

[3] For discussion of contingent-fee arrangements generally, including "negative" or "reverse" ones for reducing or defeating adverse claims, see Barry Barnett, Fee Arrangements, Ch. 77 in Business and Commercial Litigation in Federal Courts (5th ed. 2022).

[4] See Wikipedia, "Sunk cost" (available at https://en.wikipedia.org/wiki/Sunk_cost).

[5] As the Nobel prize-winning behavioral economist Daniel Kahneman noted in Thinking, Fast and Slow (2011), "people are loss averse" and on average would reject a gamble in which they stood to gain $150 or lose $100. Experiments estimating the "loss aversion ratio" put it usually in the range of 1.5 to 2.5."