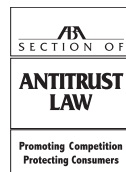




Antitrust Evidence Handbook

Third Edition



CONTENTS

<i>Foreword</i>	xi
<i>Preface</i>	xiii

Chapter I

Hearsay Issues Most Relevant in Antitrust Cases	1
A. Procedural Matters	6
1. Evidentiary Burden	6
2. Standard of Review	6
3. Harmless Error Doctrine	6
B. Statements Considered Non-Hearsay Under Federal Rule of Evidence 801	7
1. Statements Not Offered to Prove the Truth of the Matter Asserted	7
2. Prior Inconsistent Statements as Non-Hearsay Under Federal Rule of Evidence 801(d)(1)(A)	8
3. Prior Consistent Statements as Non-Hearsay Under Federal Rule of Evidence 801(d)(1)(B).....	12
4. Coconspirator Statements Under Federal Rule of Evidence 801(d)(2)(E).....	16
C. Hearsay Exceptions Where the Availability of the Declarant Is Immaterial	23
1. Statements of a Declarant’s Then-Existing State of Mind Under Federal Rule of Evidence 803(3).....	23
2. Prior Statements as a Recorded Recollection Under Federal Rule of Evidence 803(5).....	26
3. Records of Regularly Conducted Activity Under Federal Rule of Evidence 803(6).....	30
4. Public Records Under Federal Rule of Evidence 803(8)	33
5. Market Reports and Similar Commercial Publications Under Federal Rule of Evidence 803(17)	36
6. Statements in Learned Treatises, Periodicals, or Pamphlets Under Federal Rule of Evidence 803(18)	37
D. Exceptions to the Hearsay Rule Where Unavailability of Declarant Is Material	39
1. Former Testimony of an Unavailable Witness Under Federal Rule of Evidence 804(b)(1)	40

Chapter II

Relevance	47
A. Overview of Relevance.....	47
1. Liberal Policy of the Federal Rules of Evidence.....	47
2. Liberal Policy in Antitrust Cases.....	48
B. Evidence of Other Conduct.....	48
1. Other Conduct and Relevancy in Merger Cases.....	48
2. Character Evidence	51
3. Habit Evidence	56
C. Relevance of Prior Litigation and Agreements or Settlements With Other Parties.....	58
1. Evidence Concerning Similar Litigation With Third Parties	59
2. Consent Decrees and Prior Settlements.....	60
3. Judgment Sharing Agreements.....	62
4. Agency Decisions.....	65
5. Corporate Leniency Proffers Made Pursuant to ACPERA and the U.S. Corporate Leniency Program	69
D. Informing the Jury About Trebling and Award of Attorneys' Fees	72
1. General Principle.....	72
2. Most Courts Prohibit this Type of Evidence	73
3. Insufficient Grounds for Reversal	74
4. In Limine Motion	75

Chapter III

Privileges.....	77
A. Attorney-Client Privilege in the Antitrust Context.....	78
1. Overview of the Privilege	78
2. Scope of the Privilege	78
3. Common Interest or Joint Defense Privilege.....	85
4. Exceptions to the Attorney-Client Privilege Applicable in Antitrust Cases.....	89
B. Attorney Work Product Doctrine in the Antitrust Context.....	93
1. Overview of the Privilege	93
2. Elements of the Work Product Doctrine	96
3. Limitations on the Work Product Doctrine	105
4. Exceptions to the Work Product Doctrine.....	108
5. Waiver of the Work Product Doctrine	113

- C. Physician-Patient Privilege in the Antitrust Context 122
 - 1. Overview of the Privilege 122
 - 2. Scope of the Privilege 122
- D. Governmental Privileges..... 123
 - 1. Grand Jury Proceedings 123
 - 2. Grand Jury Materials Subject to Rule 6(e)..... 124
 - 3. Matters Not Subject to Rule 6(e)..... 125
 - 4. Evaluation of Need for Continued Secrecy 126
 - 5. Evaluation of Need for Disclosure 128
 - 6. Balancing Test..... 130
 - 7. Government Use of Grand Jury Information in Civil Cases 130
 - 8. Disclosure of Presentence Materials Utilized in a Prior Criminal Case 131
 - 9. Other Governmental Privileges 131
- E. Other Privileges 133
 - 1. Psychotherapist-Patient Privilege..... 133
 - 2. Accountant-Client Privilege 134

Chapter IV

- The Privilege Against Self-Incrimination 135**
 - A. When May the Fifth Amendment Privilege be Invoked? 136
 - 1. Type of Proceeding 136
 - 2. Stage of Proceeding 136
 - B. Threshold Requirements for Invocation 137
 - 1. Risk of State or Federal Prosecution 137
 - 2. “Link in the Chain” 139
 - 3. Witness Bears Burden 140
 - 4. Guilt Not Necessary 140
 - C. Who May Invoke the Privilege and Under What Circumstances? 141
 - 1. Natural Persons 141
 - 2. Required Records Doctrine 142
 - 3. Privilege Does Not Extend to Corporate Documents 144
 - 4. Privilege Applies Only When the Activity Involved Is “Testimonial” 146
 - 5. Privilege Protects Only Against Compelled Self-Incrimination 146
 - D. Limitations on Invocation of the Privilege 147
 - 1. Double Jeopardy 147
 - 2. Statute of Limitations 150

3. Immunity	151
4. Foreign Prosecution.....	152
5. False Statements	152
6. Foregone Conclusion Exception	153
7. Court Must Determine Whether Witness's Invocation of the Privilege Is Justified.....	153
E. Effects of Invoking the Privilege	155
1. Corporation Cannot Rely on the Privilege of Employees	155
2. Corporate Discovery Responses.....	157
3. Blanket Assertions Sanctionable.....	157
4. Treated as Denial of Allegations by Defendant	157
5. Invocation by Plaintiff.....	158
6. A Party May Not Use Privilege as Both a Sword and a Shield.....	158
7. Adverse Inferences	159
F. Waiver of the Privilege	159
1. Voluntary Disclosure.....	159
2. Waiver Limited to Same Proceeding.....	160
3. Scope of Waiver	160
G. Compulsion of Testimony in Civil Cases	161
1. Federal Witness Immunity Statute, 18 U.S.C. §§ 6001-05	161
2. Application of the Immunity Statute	162
H. Use of Other Evidence When Fifth Amendment Privilege Is Asserted	164
1. Use of Prior Trial or Deposition Testimony.....	164
2. Use of Grand Jury Testimony	164
3. Release of Grand Jury Material.....	165
I. Adverse Inferences From Invocation of Fifth Amendment Privilege	165
1. Nature of Proceeding.....	165
2. Relevant Factors	167

Chapter V

Experts	173
A. Issues on Which Experts Often Testify in Antitrust Cases	179
1. Elements of Antitrust Liability.....	179
2. Class Certification Issues	193
3. Ultimate Issues	195

B. Qualification of Witness as Expert	196
1. Expert Requirement.....	196
2. Trial Court Discretion	199
C. Expert Testimony Post- <i>Daubert</i>	199
1. U.S. Supreme Court Decisions Regarding Admissibility of Expert Testimony	199
2. The Effect of <i>Daubert</i> on the Admissibility of Expert Testimony: Gatekeeping Role	201
3. The Scope of <i>Daubert</i>	212
D. Scope of Expert Testimony Under Federal Rule of Evidence 705.....	212
1. Purpose of Rule 705	212
2. Burden of Challenging Foundation for Expert Testimony.....	213
3. Rule 705 Does Not Affect Disclosure Obligations	213
4. Rule 705 Does Not Affect Substantive Use of Expert Testimony.....	213
E. Court-Appointed Experts.....	215
1. Federal Rule of Evidence 706(a) Permits Court to Appoint Experts.....	215
2. Use of Court-Appointed Experts.....	217
3. Compensation.....	218
F. Testifying Expert Witnesses: Discovery and Evidentiary Issues.....	218
1. Reports, Opinions, and Underlying Facts or Data Are Discoverable.....	218
2. Computerized Data or Models Relied Upon by Experts Are Generally Discoverable	220
3. Depositions of Experts Who May Testify	220
4. Discovery of Work Product Used to Prepare Experts	221
G. Retained, Non-Testifying Experts: Discovery and Evidentiary Issues	222
1. Facts and Opinions Not Discoverable Except on Showing of “Exceptional Circumstances”	223
2. Discovery of Identity of Retained, Non-Testifying Expert	224
H. Experts Not Retained: Identity and Opinions Not Discoverable	224
I. Demonstrative Evidence	225
1. Generally	225
2. Standards for Use and Admissibility.....	225

3. Use at Trial	231
J. Summary Evidence Under Federal Rule of Evidence	
1006	233
1. Scope of Rule 1006	233
2. Requirements.....	234
3. Jury Instructions	237

Chapter VI

Collateral Estoppel and Prima Facie Effect	239
A. General Principles.....	240
1. Res Judicata and Collateral Estoppel Compared.....	240
2. Who Is Bound?.....	241
3. Offensive v. Defensive Collateral Estoppel	241
4. Mutuality	242
B. Mutual Collateral Estoppel	244
1. Requirements.....	244
2. Preclusive Effect of State Court Decisions	248
3. Limitations on the Application of Collateral Estoppel.....	249
4. No Preclusive Effect for Settlement Unless Intended by Parties	254
5. Arbitration May Be Accorded Preclusive Effect.....	255
6. Findings in Prior Criminal Cases May Be Accorded Preclusive Effect	256
7. Findings of Non-FTC Administrative Agencies May Be Accorded Preclusive Effect Under Certain Circumstances	258
8. Preclusive Effect of Writ of Mandamus	262
C. Nonmutual Collateral Estoppel.....	262
1. Definition	262
2. Requirements.....	263
3. Trial Court Discretion	264
D. Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)).....	264
1. Prima Facie Effect	264
2. Scope of Prima Facie Effect.....	265
3. Collateral Estoppel Compared.....	265
4. Requirements for Prima Facie Effect Under Section 5(a)	267
5. Consent Decrees and Nolo Contendere Pleas Generally Not Given Preclusive Effect Under Section 5(a)	268

6. Limitations 268
7. Evidentiary Use 269

Chapter VII

Electronically Stored Information..... 271

A. The Federal Rules of Evidence Governing the
Introduction and Use of ESI as Evidence in Antitrust
Proceedings..... 272
1. Relevance 272
2. Authentication 272
3. Hearsay 282
4. Original Writing Rule..... 286
5. Probative Value and Unfair Prejudice/Confusion of
Issues/Misleading Jury 289
6. Judicial Notice..... 290

Table of Cases 293

PREFACE

The *Antitrust Evidence Handbook, Third Edition* was prepared under the aegis of the Trial Practice Committee of the Antitrust Section of the American Bar Association. This edition updates the second edition of the *Handbook* published in 2003, and retains the user-friendly organization and format of that version. This new edition also incorporates the latest statutory and case law developments in the evidence field. The most significant developments in antitrust evidence in the last decade have been the expansion and usage of electronically stored information (ESI) and the development of expert testimony in the class certification context under the Supreme Court's *Comcast* decision. The chapter on ESI issues is a new chapter and the chapter on experts has been significantly updated to reflect these changes over the last decade.

Many members of the Antitrust Section contributed to this Third Edition of the *Handbook*. We are especially grateful to the Trial Practice Committee's Vice Chairs, Cynthia Cohen and Alana Bassin, for their contributions and oversight of this project. We thank contributors Brian Hom (Chapter 1), Gerald Stein (Chapter 2), David Brenneman (Chapter 3), Greta Burkholder and Swati Rawani (Chapter 4), Mark Krotoski (Chapter 5), Bob Cox (Chapter 6), and Gregory Wrobel, Joshua Nichols, Martin McElligot, Jill O'Neill and Michael J. Waters (Chapter 7). The lead editors for this handbook consisted of Brendan McShane, John Pellegrini, Stephanie Song, and Andrew Bertolli. A special thanks is also warranted for Leo Caseria, Vice Chair of the Antitrust Section's Books & Treatises Committee, for his leadership on this project.

Finally, we are grateful for the hard work of the support staff and volunteers at Latham & Watkins LLP and Sheppard, Mullin, Richter & Hampton LLP.

January 2016

Brian Grube
Chair, Trial Practice Committee
Section of Antitrust Law
American Bar Association
2015-2016