



## Andrew Frackman

Partner

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Andrew Frackman is one of the firm's most experienced trial lawyers, having tried, as lead or co-lead counsel, more than 20 cases or arbitrations through the close of evidence or arbitral award in state and federal courts and before numerous arbitral panels. His trial experience has involved such diverse disputes as antitrust, contract/commercial, intellectual property, insurance coverage, and federal tax claims. In the past 18 months, he has led trial teams for two week-long ICC arbitration hearings and a week-long bench trial in Delaware Chancery Court.

In addition to his courtroom experience, Andrew has handled and won numerous arbitrations before the following, among other, arbitration tribunals: American Arbitration Association - Commercial Rules; American Arbitration Association - ICDR Rules; International Chamber of Commerce; FINRA; New York Stock Exchange; NASDAQ; and ARIAS Reinsurance Panels. In addition, Andrew has extensive experience handling SEC investigations, including investigations involving alleged violations of the Foreign Corrupt Practices Act and municipal underwriting rules. The FCPA investigations have involved, among other things, alleged misconduct in Asia and the Middle East.

Andrew's extensive antitrust experience includes defending some of the largest cases involving the financial services industries. He has represented Capital One Financial, Robertson Stephens, Banc of America Securities, Merrill Lynch, and The Goldman Sachs Group. He also has extensive experience in the airline industry, having represented several different airlines, including United Airlines, US Airways, and American Airlines, in antitrust litigation. And he was co-lead partner on the O'Melveny team that won a jury verdict in *US Airways v. Sabre* in the Southern District

### Admissions

#### *Bar Admissions*

New Jersey

New York

#### *Court Admissions*

US District Court, District of New Jersey, District of Colorado, Northern, Eastern and Southern Districts of New York

US Court of Appeals, Second, Third, Fourth, and Ninth Circuits

US Tax Court

US Supreme Court

### Education

Columbia University, J.D., 1981:  
Harlan Fiske Stone Scholar (1979-81); Finalist, Harlan Fiske Stone Moot Court Competition (1980)

Harvard University, A.B., History,  
1977: *cum laude*

of New York in 2016. He has handled the full range of litigation involving federal securities law claims under Sections 10(b), 11, and 12, derivative actions under Delaware law, breach of fiduciary and related claims involving public and closely held corporations, as well as SEC investigations.

## Experience

### Antitrust

- *AngioDynamics v. C.R. Bard*, Case No. 1:17-cv-00598-BKS-CFH (N.D.N.Y.) Currently serving as lead counsel for C. R. Bard defending Sherman Act Section 1 tying claim by a competing provider of medical devices. Trial anticipated in late 2020.
- *US Airways, Inc. v. Sabre Holdings Corp., et al.*, Civ No. 1:11-cv-2725(MGC) (S.D.N.Y.). In 2016, successfully represented US Airways and American Airlines in an eight-week jury trial in the SDNY, obtaining jury verdict that the airline reservation system, Sabre, violated the antitrust laws.
- *American Airlines, Inc. v. Despegar.com USA, Inc. et al.*, Case No. 13-22773-CV (Gayles) S. D. Fla. Represented American Airlines on antitrust counterclaims brought by online travel agent.
- *In re IPO Antitrust Litigation*, decided by the Supreme Court sub nom. *Credit Suisse Securities (USA) LLC, et al. v. Billing*, 551 U.S. 264 (2007). Represented Robertson Stephens and Banc of America Securities in this leading case on the implied immunity doctrine in which defendants successfully dismissed the action.
- *In re Compensation of Managerial, Professional and Technical Employee Antitrust Litigation*. Represented ExxonMobil and served as lead defense counsel defending claims that the defendant oil companies violated Sherman Act §1 to reduce pay of employees. Successfully defeated class certification twice and prevailed on summary judgment. 2006 WL 38937 (D.N.J. 1/5/06); 2006 WL 361383 (D.N.J. 2/15/06); 2008 WL 3887619 (D.N.J. 8/20/08)
- *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* (MDL 1720, E.D.N.Y.). Represented Capital One Financial in class action brought by merchants against Visa, MasterCard, and major payment card issuing banks alleging that the defendants conspired to set the fee that merchants pay for accepting payment cards.
- *American Express v. Visa, et al.* (S.D.N.Y.). Represented Capital One Financial in action brought by American Express against the payment card networks and issuing banks alleging that they conspired to prevent American Express from competing in the network services market.
- *Ross v. Bank of America, et al.* (S.D.N.Y. 05 CV 07116). Represented Capital One Financial in class action alleging that the largest payment card issuing banks conspired to impose arbitration agreements in their cardholder agreements.
- *In re Late Fee/Over-Limit Fee Class Actions*. Represents Capital One Financial in putative class action brought by cardholders against credit card issuers alleging that they conspired to set late and over-limit fees. Defendants successfully dismissed the action. 528 F. Supp. 2d 953 (N.D. Cal. 2007).
- *FTC v. CCC Holdings Inc. and Mitchell International, Inc.* (D.D.C. 08-2043(RMC)). One of lead trial lawyers for Mitchell in action in which FTC challenged proposed merger. 605 F. Supp. 2d 26 (D.D.C. 2009).
- *American Airlines v. United Airlines* (S.D.N.Y.). One of lead lawyers representing United Airlines against claim that its merger with Air Wisconsin violated Section 7 of the Clayton Act.

## Securities and Commercial Disputes

- *AM General Holdings, et al. v. The Renco Group, et al.* (C.A. Nos. 7639 and 7668, Delaware Chancery Court 2019). Lead partner for Renco in Chancery Court trial arising from joint venture. Week-long bench trial in July 2019.
- *In re IPO Securities Litigation*, 471 F.3d 24 (2d Cir. 2006). Represented Robertson Stephens and Banc of America Securities in the largest group of securities class actions ever brought, in which defendants defeated class certification in 310 coordinated market manipulation and Section 11 actions.
- *In re Short Selling Cases*. Successfully represented Banc of America Securities and Merrill Lynch in seven securities and antitrust cases in New York, California, Washington, and Georgia alleging misconduct by prime brokers relating to short selling. Still pending: *Overstock v. Morgan Stanley, et al.* CGC-07-460147 (Ca. Super. Ct. County of San Francisco); *Raser Technologies, Inc. et al. v. Morgan Stanley et al.*, 2012 CV 214140 (Ga. Super. Ct. Fulton Co.), and *Manning v. Merrill Lynch et al.*, L-1173-12 (N.J. Super. Ct. Morris Co.)
- *Simmonds v. Credit Suisse Securities (USA) LLC, et al.* Successfully represented Banc of America Securities, Merrill Lynch, and Robertson Stephens in numerous Section 16(b) actions coordinated under this caption in the W.D. Wash. *Credit Suisse v. Simmonds*, 132 S. Ct. 1414 (2012).
- *Aveta v. Bengoa* (Del. Ch. Ct.). Successfully represented Aveta in shareholder dispute, winning key ruling on binding role of shareholders' representative, *Aveta v. Cavallieri*, 23 A.2d 157 (Del. Ch. 2010), and obtaining \$750,000 contempt award, *Aveta v. Bengoa*, 986 A.2d 1166 (Del. Ch. 2009) and 2010 WL 3221823 (Del. Ch. 2010).
- *DeMarco v. Robertson Stephens*, 318 F. Supp.2d 110 (S.D.N.Y. 2004); *Podany v. Robertson Stephens*, and *Finazzo v. Robertson Stephens*, 318 F. Supp.2d 146 (S.D.N.Y. 2004); 2004 WL 1161247 (S.D.N.Y. 5/24/2004). Represented Robertson Stephens in successfully dismissing two and resolving the third of these Section 10(b) actions alleging misstatements in analyst reports.
- *In re Crompton Corp. Securities Litigation* (3:03-CV-1293) (D. Conn.). Represented Crompton/Chemtura in 10b-5 shareholder class action and the related shareholder derivative action.

## Appeals

- Argued appeals in the US Court of Appeals for the Second and Third Circuits, the New York Court of Appeals, the New York Appellate Division, First and Second Departments, the US Board of Immigration Appeals, and the Massachusetts Appeals Court.

## Professional Activities

### Chair

- Chairman, New York Regional Board, Anti-Defamation League (2015-2017)
- Anti-Defamation League, Legal Conference (N.Y. 2003)
- New York State Bar Association "Federal Court Practice" Seminar, New York City (Spring 1995)

### Member

- New York State Bar Association, Antitrust Section, Executive Committee (2008-2013)
- Association of the Bar of the City of New York, Committee on Antitrust and Trade Regulation (2002-2005), Committee on Federal Legislation (1987-90)

- American Bar Association (Litigation and Antitrust Law Sections)

#### Author

- *Internet Privacy: A Legal and Business Guide* (American Lawyer Media 2002)
- “An Update From the Patent Wars,” *The New York Law Journal* (November 29, 2000) and *The National Law Journal* (December 25, 2000)
- “Patent Law: E-Commerce Damages Awards,” *The National Law Journal* (July 3, 2000)
- “Surf’s Up: Wave of E-Commerce Patent Litigation Coming,” *The New York Law Journal* (April 17, 2000)
- “Surfing the Wave of On-Line Privacy Litigation,” *The New York Law Journal* (March 14, 2000)
- *Cross-Examination in Law and Practice of Insurance Coverage Litigation* (West 2000)
- “Despite Supreme Court’s ‘Kodak’ Ruling, Manufacturers Continue to Fend Off ISO’s Claims of Sherman Act Violations in Aftermarkets for Parts and Service,” *The National Law Journal* (August 14, 1995)
- *ACTWU v. Wal-Mart: Is This the Cost of Corporate Democracy? Insights* (August 1995)
- “Shareholder Public Policy Proposals and the No-Action Letter Process,” *27 Rev. of Securities and Commodities Reg.* 43 (March 9, 1994)
- “Restricting a Former Employee’s Use of Trade Secrets in New York,” *New York State Bar Journal* (December 1993)

#### Co-Author

- “The Capper-Volstead Act Exemption and Supply Restraints in Agricultural Antitrust Actions,” *Competition: The Journal of the Antitrust and Unfair Competition Law Section of the State Bar of California*, Vol. 19, No. 2, pp. 69 et seq. (Fall 2010) (with Kenneth R. O’Rourke)
- “Alien Concepts for the Chinese,” *International Financial Law Review* (May 2008) (with Bingna Guo)

#### Speaker

- Antitrust Expert Training Academy, New York State Bar Association (N.Y. October 2018)
- IQPC Conference on Subprime and the Credit Crisis, “The Subprime Crisis: Emerging Litigation Trends” (N.Y. Feb. 2008)
- West LegalWorks 17th, 16th, 15th, and 14th Annual Institute on Litigation and Resolution of Class Actions, “Recent Developments in Antitrust Class Actions” (N.Y. 2007, 2006, 2005, 2004)
- Mealey’s Reinsurance 101 Conference “The Arbitration Process” (Boston, February 2004)
- PricewaterhouseCoopers Intellectual Property Leadership Conference, “Your Business, Their Business and the Role of Business Method Patents” (Palm Desert, California, February 2001)
- ABA Intellectual Property/Antitrust Roundtable, “Walker Process Claims after *Nobelpharma*” (May 1999)

#### Honors & Awards

- Recognized by *Chambers USA* in Litigation: General Commercial
- Recommended by *The Legal 500 US* for General Commercial Disputes (2020), Antitrust Law (2016, 2018-2019), Cartel (2021), and Civil Litigation/Class Actions (2021)

**Languages**

- Russian