

The Need for Special Masters in Complex Antitrust Cases

The ABA resolution advises the bench and bar that utilization of special masters has evolved over the last 50 years from the rare exception to a commonplace tool to manage complex litigation, including antitrust cases.

By Carl W. Hittinger and Tyson Y. Herrold

In 2019, the American Bar Association issued a resolution “urging” state and federal courts “to make greater and more systematic use of special masters to assist in civil litigation” “to aid in the just, speedy and inexpensive determination” of cases, as mandated by the federal rules of civil procedure. The ABA resolution advises the bench and bar that utilization of special masters has evolved over the last 50 years from the rare exception to a commonplace tool to manage complex litigation, including antitrust cases.

Still, courts and parties are occasionally reticent to use masters, perhaps due to inexperience with the concept, misconceptions about the benefits or unfounded concerns about the costs. This article intends to discuss the law governing special masters, detail the various ways special masters can benefit the courts and litigants, and provide some best practices concerning their engagement.

What Rules Govern Special Masters Engagements?

In 1957, the U.S. Supreme Court in *La Buy v. Howes Leather*, an antitrust case, held that the appointment of a special master by a district judge was not justified by docket congestion, issue complexity and the substantial time commitment demanded by the case; rather, “exceptional circumstances” were necessary. By 2003, however, the law had shifted as Federal Rule of Civil Procedure 53 was amended due to swelling federal dockets to expressly authorize appointment of special masters where pretrial or post-trial matters “cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.” The advisory committee notes recognize: “The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation.”

Recognizing this shifting legal landscape, the U.S. Court of Appeals for the Third Circuit in *Glover v. Wells Fargo Home Mortgage*, a 2015 consumer protection case involving mortgage foreclosures, affirmed the appointment of a special master, over the objection of the plaintiff, to assist the district judge and the assigned magistrate judge with escalating discovery

disputes. Judge Patty Shwartz of the U.S. Court of Appeals for the Third Circuit, writing for the court, explained: “While the 1957 *La Buy* court viewed docket congestion, issue complexity, and the time-consuming nature of a case as not justifying the appointment of a special master, the 2003 version of Rule 53 reflects the changing practices in using special masters. As the advisory committee specifically recognized, the appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades to aid district courts in managing complex litigation.”

How Do Courts Benefit From Special Masters?

Court-appointed special masters are especially useful in antitrust and other complex litigation due to the myriad of issues presented and multiple parties frequently involved. In *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, for example, U.S. District Judge Cynthia Rufe of the Eastern District of Pennsylvania appointed several special masters to monitor the discovery process in a multidistrict antitrust case involving pricing of generic pharmaceuticals.

Similarly, in *Santana Products v. Bobrick Washroom Equipment*, former U.S. District Judge Thomas Vanaskie of the Middle District of Pennsylvania used a special master’s services extensively and praised his work in that multidimensional antitrust case involving massive and contentious discovery: “The court is most grateful for the work performed by Mr. Reihner in superintending the sometimes contentious discovery problems that are often encountered in litigation of this complexity.” In *Santana Products*, the author suggested the appointment of a special master in the initial case management plan. The special master vastly benefited the administration of the case by attending depositions, ruling on problematic discovery objections, holding hearings on spoliation issues, and overall streamlining the discovery process, as the court acknowledged.

Other recent examples of special master appointments in complex cases include: *Behrens v. Arconic*, where U.S. District Judge Michael Baylson of the Eastern District of Pennsylvania appointed

a special master with expertise on French law to assist with potentially thorny international discovery issues, *Jordan v. Mirra*, where U.S. District Judge Gerald McHugh of the Eastern District of Pennsylvania appointed a special master to assist with discovery due to his temporary role as a visiting judge in the U.S. District Court for the District of Delaware, in addition to his Eastern District of Pennsylvania responsibilities, and *In re K-Dur Antitrust Litigation*, where erstwhile Chief District Judge Anthony Greenaway of the District of New Jersey appointed a special master to, among other things, issue a report and recommendation on motions for class certification and dispositive motions for summary judgment.

Relying on special masters can be a critical safety valve when district courts experience understaffing due to judicial vacancies or heavy caseloads. For example, the U.S. District Court for the District of New Jersey currently has six judicial vacancies that have been designated judicial emergencies by the Judicial Conference. Weighted filings per judgeship in the district tally 903 cases. Similarly, the U.S. District Court for the District of Delaware recently witnessed a snappy uptick in filings as a result of the Supreme Court's *TC Heartland* decision, which drove patent cases into a district that coincidentally saw several judicial retirements. These courts have successfully employed special masters to help manage unusually heavy dockets.

Special masters can wear many hats, particularly if litigants consent to their appointment. Examples drawn from actual appointments in the Third Circuit include:

- Monitoring discovery and resolving motions to compel and for protective orders.
- Assessing privilege logs and reviewing in camera withheld documents.
- Supervising public and private consent decrees that require retention of jurisdiction.
- Overseeing distribution of settlement proceeds to qualified applications.
- Mediating complex settlement negotiations that cannot be resolved in a single conference.
- Solving e-discovery disputes concerning search terms and custodians.
- Monitoring compliance with and designations under confidentiality agreements.
- Conducting accountings to compute damages or disgorgement.
- Holding hearings concerning sanctionable conduct, such as spoliation.
- Reviewing petitions for attorney fees and costs.
- Drafting reports on motions for class certification and summary judgment.

How Do Parties Benefit From Special Masters?

How can litigants benefit from special masters? After all, they are responsible for paying the special master's fees, usually split evenly between the parties, though awardable to the prevailing party in motion practice if permitted by the appointment. Even considering this added expenditure, special masters are worth the cost in complex antitrust cases for three reasons. First, the cost is usually a drop in the bucket compared to the cost of complex litigation, not to mention the potential liability.

Second, utilized properly, special masters can proactively monitor proceedings and therefore anticipate and circumvent avoidable disputes, saving litigants the substantial cost of formal motion practice and occasionally delayed rulings. They can also steer clear of internecine fights that cause litigation costs to spiral and can result in court sanctions. Third, if courts choose a special master with expertise in the relevant subject matter, as they should, the parties will save the cost of teaching generalist courts about esoteric economic and other challenging concepts inherent in the practice of antitrust law.

Moreover, special masters can significantly shorten the duration of litigation and can avoid the judicial limbo that often results from an antitrust case's demand on judicial resources. Illustrative of judicial resources needed to shepherd an antitrust case to verdict, the U.S. Judicial Conference assigns antitrust cases a "complexity weight" of 3.42, representing the average amount of time needed to resolve them, compared to 1.41 for insurance contract cases, .75 for prisoner civil rights cases, and .90 and .61 for personal injury and products liability cases, respectively. Masters can alleviate this demand on judicial resources, break logjams and accelerate the timeline for a verdict or summary judgment.

Litigants should feel free to customize the procedures governing special masters, with court permission, to suit the needs of each case. Take discovery disputes, for example. Under Rule 53, district courts review special masters' factual findings de novo, procedural matters for abuse of discretion. To accelerate the process, litigants may stipulate to the clear error standard for factual findings and agree that procedural decisions are unappealable. Similarly, litigants can modify Federal Rule 37's fee-shifting provisions by providing for payment of fees to the winning party on appeal or even provide for sanctions in the case of frivolous appeals. Finally, litigants may agree to impose a page limit on briefing, which can save clients' money.

But why pay for a special master when magistrate judges are assigned to most cases? Several reasons. Special masters are immediately available at the parties' request, while magistrate judges may not be due to their other responsibilities. Moreover, special masters can do things magistrate judges may not be willing or able to do, such as attend depositions to issue immediate decisions on objections to, for example, relevancy and privilege issues. In deposition-heavy antitrust cases, there is no guarantee the court will be available to take a discovery call at a moment's notice. Further, special masters can offer specialized knowledge that, frankly, a generalist magistrate judge sometimes cannot for lack of experience with particular issues.

Practice Pointers for Special Master Engagements

Special master appointments are most successful when courts follow several best practices. First, courts should raise the possibility of using a master at the beginning of litigation, preferably the initial case management conference, as suggested by Federal Rule 16, rather than wait for the case to spiral out of control. By appointing a special master at the beginning of discovery, the court can prevent internecine disputes and bellicose motion practice before they start, helping to take the heat out of often heated disputes. In other words, the ideal appointment will be proactive, rather than reactive once things get out of hand and the egg is already scrambled.

Second, the appointing order should enumerate the master's responsibilities, outline the issues to be decided by the master, and frame how and when appeals may be taken from decisions. It should also specify when a special master may communicate ex parte with the parties and with the court. Courts should also apprise the parties how the special master will keep the judge informed about matters, which can alleviate unfounded fears that it is relinquishing control over their important case. Laying these boundaries at the outset will avoid disagreements and delays later.

Third, the court should get buy-in from the parties, if possible. While courts can, and should, appoint special masters in complex antitrust cases even where one or more parties object, the process will be more productive if the court can convince the parties that the appointment is in their best interest. To facilitate consensus, the court should therefore hold a conference on the appointment, explain exactly what role(s) a special master would play in the case, advise the parties that the judge will keep a close eye on the litigation, and provide the parties an opportunity to propose their

own candidates for the appointment. If the parties cannot agree, the court can always appoint a special master of its choosing, one it believes can get the job done fairly and with dispatch.

In conclusion, the use of special masters has rightfully expanded over the years, and courts should continue to tap them as an invaluable resource, especially in often-daunting antitrust cases. Like any other case, however, the most complex cases can be contained, controlled and tamed with the measured use of qualified special masters. Stay tuned.

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