

# Litigators of the Week: Covington Team Beats Back Rare Breed Of Antitrust Case At ITC

By **Ben Hancock**  
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When the U.S. International Trade Commission decided in May of this year to open an unfair trade investigation into imports of almost all steel from China, it also waded into a legal issue that the quasi-judicial agency hadn't touched in almost 40 years: how to handle allegations of price-fixing.

That, of course, also meant that most lawyers who appear before the ITC hadn't touched it either.

Sturgis Sobin of Covington & Burling has regularly done battle before the commission in "section 337" patent cases--which allow for imports of infringing products to be banned. But he was navigating unfamiliar waters when U.S. Steel Corp. invoked a rarely used corner of the statute to try and get the same remedy based on allegations that Chinese steel-makers were breaching antitrust rules.

Critical to U.S. Steel's case was the idea that at the ITC the pleading standard is not as high as



**Sturgis Sobin, Derek Ludwin and James O'Connell, partners at Covington & Burling**

it is in district courts. Sobin turned to antitrust partners James O'Connell and Derek Ludwin to help map out an argument that the standard is, in fact, the same. And this week, that argument carried the day.

Administrative Law Judge Dee Lord, in an initial determination issued Monday, terminated U.S. Steel's antitrust claim in the steel investigation, concluding that "the antitrust law that applies in federal courts must be applied the same way under section 337."

While price-fixing alone may constitute an unfair act under the Sherman Act, it doesn't give a private party standing to sue, Lord ruled. To do that, plaintiffs must plead "antitrust injury" such as predatory pricing designed to wipe out competitors with the intent of jacking up prices later. U.S. Steel's claims that low-cost imports were hurting domestic producers, she continued, don't make the hurdle.

For Sobin and his team, it's a significant win on behalf of their client Baosteel, which is poised to become the world's second-largest steelmaker in an upcoming merger. But it also was a significant feat because of the complexity and political ramifications of the case.

The argument, Sobin said in an interview Thursday, was as much about educating the judge about the evolution of antitrust law as it was about making a forceful case.

"We sort of understood right from the start because the commission had not seen one of these cases for [more than] 30 years, really none of the ALJs or commissioners or the staff was likely to have any grounding in the basics of antitrust law," Sobin said

Covington is just one of a host of other firms that are representing Chinese respondents in the case. They organized to make Sobin's team the lead in arguing the antitrust issue. It was probably a smart move, with O'Connell drawing on more than five years' experience at the Department of Justice Antitrust Division and Ludwin having a background defending international cartel cases.

The case has unfolded as the political environment around trade with China was becoming even more acrid with the U.S. presidential election. The commission also received a letter from 30 members of the House of Representatives who are part of the Steel Caucus just a month before the ALJ issued the decision, who not-so-subtly urged the ITC to let all claims move forward.

To be sure, the case is far from over. U.S. Steel's lawyers at Quinn Emanuel Urquhart & Sullivan have until this coming Wednesday to petition the full ITC to review the case. They will almost surely do so, and the commission is also nearly certain to take a second look given such a rare issue.

"I would be shocked if they didn't," Sobin said.

There are also two separate pending actions in the case that threaten to block at least some Chinese steel imports. One is a claim of illegal transshipment to evade existing trade remedy duties; the other is an allegation that Baosteel gained access to U.S. Steel's trade secrets in a computer breach in 2011, and is now selling products that use its technology in the U.S. market.

But for now, Covington can revel in the win of convincing the ITC that it doesn't have its own special brand of antitrust law. Whether that will hold for the next 40 years remains to be seen.

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