



The great gamble

Over the past 40 years, Michael Hausfeld has built one of the strongest plaintiffs' antitrust practices in the US, securing hundreds of millions for those wronged by cartels and monopolies. Now, Hausfeld is attempting to lead the charge into Europe, where the prospects for US-style collective actions remain dim. **Ron Knox** examines his journey, and the path that lies ahead

FOR the moment, let's forget all that can be said about Michael Hausfeld. It's a lot, of course. The chairman of Hausfeld has been called many things. A catalyst, an enigma, a lightning rod – and one or two less complimentary sobriquets. You spend nearly 40 years as a plaintiff lawyer, suing some of the world's largest companies and doing all you can to outpace your peers, and you'd get called a few names too. Does Hausfeld mind it? Perhaps. But let's forget all of that for now and just remember this: Michael Hausfeld wants to change the world.

Right now, Hausfeld is sitting in a nondescript meeting room at the London offices of his eponymous firm, Hausfeld & Co. It's early yet – just a few minutes after 8am – but he is already outlining his plans in detail. These stop at nothing short of achieving wholesale change to the way private antitrust class actions are brought in Europe – a strategy that many of his contemporaries have scoffed at.

Hausfeld speaks in a quiet, measured tone, his thoughts in complete sentences, each one a tidy paragraph.

“The other means of achieving enforcement is by working within the systems as they exist, bringing the cases, making the changes literally case by case, some prevailing at the lower court levels and some having to wait for higher court decisions.” He continues like this for some time, expounding on plans he has to make work within a system that is seemingly rigged against him.

For the past three years, Hausfeld, a pillar of the American plaintiffs' bar, has been leading the push for private antitrust litigation in Europe. His contemporaries say it's simply the next challenge for a man who has overcome most hurdles he's faced. “He's very audacious,” says Daniel Shulman, partner at Gray Plant Mooty, who has worked on litigations with Hausfeld. “He's definitely always on the cutting edge, and out in front in all of these things. He moves very quickly where he sees opportunities. He's fearless.”

So far, that fearlessness has served Hausfeld well. “Michael is an empire-builder,” says Michael Freed, partner at Freed Kanner London & Millen in Chicago and occasional colleague of Hausfeld. “It's a different outlook on life.”

But, for perhaps the first time, those who heap praise on Hausfeld for his fearlessness and passion say in the same breath that his latest project – the latest empire he seeks to build – might be the one he can't conquer.

Hausfeld looks at Europe and sees opportunity – both for himself, and for those companies and consumers who have been harmed by price fixing and other anti-competitive deeds. But as it stands now, the roadblocks to those opportunities are manifold –

legal, institutional and, above all, cultural. Progress has been slow – some say stagnant – and prospects for European courts and authorities creating a favourable environment for US-style class litigation in the near future appear slim.

“My overall sense is that they are still far away,” says Gordon Schnell, a plaintiffs’ lawyer at Constantine Cannon who has spoken in Europe in favour of private antitrust enforcement. “I just don’t think they’re ready yet.”

But Hausfeld remains optimistic – which is vital, considering his continuing foray into Europe has already cost him so much. It was, in many ways, the undoing of his tenure at his former firm, Cohen Milstein Hausfeld (now Sellers) & Toll. His firm’s London office has been a major investment that has seen precious little return in terms of damages awards or collected fees.

And yet, Hausfeld has a plan. It’s just that no one is certain it’s going to work. Including him.

On the wall of a corner conference room in the Hausfeld headquarters in downtown Washington, DC, amid the numerous newspaper clippings, photographs and letters of gratitude from friends and clients, there’s a small plaque with a biblical quote, in both English and Hebrew, and embossed in gold: “Justice, only justice, shalt thou pursue.”

Since his days at George Washington University law school, the Brooklyn native has pursued exactly that. Hausfeld attended law school at a time of considerable civil unrest in the US. The Vietnam War was unfolding rapidly, as were protests against it, and the civil rights movement was nearing its crescendo, with protests and rallies from one end of the country to the other. “It was a time that focused you on the importance of rights, and the exercise of rights, and the position of the law with regard to respecting and protecting those rights,” Hausfeld says.

At law school, Hausfeld also came to appreciate antitrust law – specifically, in the way economics helped to shape antitrust and vice versa. That appreciation grew when, out of law school, he came to work with former US Federal Trade Commission chairman Earl Kintner, at what was then called Arent Fox Kintner Plotkin & Kahn. Under Kintner, he “became even more enraptured in antitrust” and the way economics applied to it, he says.

Hausfeld says he’s always viewed antitrust laws as being to the economics field what the US Constitution is to the social civil rights field. “They’re broad, and they are intended to open trade and prevent interference with integrity of the markets and free trade, and they were broad enough in scope that there was a lot of room for creativity. And mischief,” he says.

When Hausfeld left his first firm, he met a young lawyer named Jerry Cohn, a former marine and

antitrust attorney who, at the time, was acting as chief counsel to the US Senate antitrust subcommittee. Soon after, in 1969, Cohn opened the Washington, DC, office of Philadelphia firm Dilworth Kalish Cohn & Coleman, where he was joined by Herbert Milstein and, soon after, Michael Hausfeld.

When he and Cohn met, “We hit it off immediately,” Hausfeld says. Cohn was close to 20 years older than Hausfeld, but the two shared mutual legal interests, including civil rights and antitrust law. “It was not just as practising partners,” Hausfeld says of their friendship. “It was a surrogate father-and-son relationship. We were the best of friends. And he was brilliant.”

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Hausfeld joined Cohen Milstein at a transformative moment in the history of US private antitrust litigation. In the late 1960s, federal litigation rules were amended to include a new version of Rule 23 – the tool with which private plaintiffs could band together in classes and sue alleged lawbreakers for damages. The changes to Rule 23 streamlined class action procedures and clearly defined the opt-out nature of class litigation.

After its passage, there was a drastic increase in antitrust class actions following on from government indictments and investigations. A newly created panel on multi-district litigation was busy corralling parallel cases filed around the country into single courtrooms for pre-trial matters.

Hausfeld and the Cohen Milstein partners were quick to take advantage of the new system. “There were a great many trade associations, which, in the 1970s and 80s, were acting as if they could ignore the antitrust laws,” Hausfeld says of his caseload in those days. Around this time, Hausfeld and Cohen Milstein became heavily involved in Section 2 monopolisation litigation as well, including a series of cases against AT&T following the US Department of Justice’s lawsuit that eventually forced the breakup of the Bell telecommunication system.

This is, of course, alongside Hausfeld’s numerous social reform cases. Hausfeld’s victories include a racial discrimination case against Texaco that settled for a then-record US\$176 million, a case brought by native Alaskans who were affected by the Exxon Valdez oil spill, and, most prominently, a case on behalf of victims of the Holocaust whose assets were

accumulated and held by Swiss banks before and after World War II.

But antitrust cases at the time were dependent on government investigations. For the most part, plaintiff lawyers would leap into action only after an indictment, investigation or prosecution had been made public. “We sought to change that by getting with companies before there were investigations or indictments so we could bring cases of our own,” Hausfeld says.

Hausfeld had at that point taken over the chairmanship of Cohen Milstein, and was effectively shaping the firm as he saw fit. His profile at the time was increasing as well; indeed, he was continually making headlines for both his casework and his occasionally aggressive litigation style – so much so that the *Wall Street Journal* kept one of the newspaper’s pin-dot portraits of Hausfeld on file to use with stories of his cases.

Meanwhile, the world of antitrust was going through another period of drastic change – a change that would eventually open Hausfeld’s eyes to the possibility of exporting private enforcement to distant shores.

Looking back, Hausfeld says that he and a few other former Cohen Milstein partners first envisioned the possibility of a private damages practice in Europe sometime around the turn of the last decade. At the time, antitrust litigation was changing again, this time as a result of the DoJ’s focus on international cartel cases.

One case in particular struck Hausfeld as a kind of window into the future of private enforcement, he says – a part of the follow-on vitamin cartel litigation that came to be known as the *Empagran* case. The case was a considerable loss for the plaintiffs; the Supreme Court heard the matter, and it and successive lower courts found that the US could not be the world’s courtroom for foreign claimants whose damages did not occur within US borders. But in those rulings, Hausfeld found a glimmer of hope that European courts were beginning to allow private claimants to pursue cartelists for damages they couldn’t recover in the US.

“That’s when we started focusing on the concept that antitrust was essentially a US-centric subject which had global implications that were largely ignored. And we proceeded with the *Empagran* case and the vision kind of exploded from there,” he says.

By 2007, the plan to expand Cohen Milstein’s European litigation presence was in full swing. Just a month after the UK’s Office of Fair Trading published a consultation paper on private antitrust actions – a paper in which the office offered to “facilitate more effective redress for consumers and business” – the firm opened its London headquarters. The office was the first claimants’ practice to open in the country,

and Hausfeld and others at the time said the firm would focus on collective redress for businesses and consumers who had been harmed by cartels.

The London office was a major investment for Cohen Milstein. Records indicate the firm poured several million dollars into the office, including rent, expenses and salaries for the three partners and other junior lawyers working there. According to records cited in court documents, the office lost close to US\$2.6 million in 2007 before turning a small profit the following year.

But back at firm headquarters in DC, things had begun to quickly spiral out of control. In early 2008, it became apparent that the firm was struggling financially. Fees from several major litigations had yet to come in, and eventually the partners had to turn to the bank to get an extension on their typical line of credit. Meanwhile, Hausfeld’s vision of a European litigation practice – as well as the general direction of the firm – had created friction within the partnership, Hausfeld and others say.

A source familiar with the situation says Hausfeld’s ambitions for the London office exceeded those of Cohen Milstein financially rather than philosophically. When the London office opened in 2007, the firm provided it with a five-lawyer staff and a US\$3 million budget. By the following year, Hausfeld told the firm he wanted to double the office’s budget and number of lawyers – something many of the firm’s other partners found unpalatable, given the still-dim prospects for European class actions.

Meanwhile, Hausfeld claims, the core Cohen Milstein partnership began to focus on its securities practice. This included, Hausfeld claims, the firm travelling to conferences and seminars and handing out “little pen knives and trinkets, and other kinds of souvenirs” intended to increase awareness with major investors. “I didn’t think that was the way the law should go,” he says. “And there became a kind of divide.”

Other Cohen Milstein partners saw the same philosophical chasm, including “severe disagreements on how to manage the firm, how to run practice groups, where to put our resources and how to go forward as a firm,” said Richard Lewis, partner at Hausfeld and former Cohen Milstein partner, during court testimony.

That friction, coupled with the money woes, left the firm on a precarious footing and struggling to make even the most basic decisions. While no one but those involved can know the intimate details of Hausfeld’s eventual removal from the firm, many of the allegations from both sides came to light during a four-day hearing before US Magistrate Judge Timothy Rice in early 2009.

According to Joseph Sellers, whose name would eventually replace Hausfeld’s on the firm’s door,

Hausfeld had made life at the firm difficult in a number of ways in the months leading up to his departure. Sellers said in court testimony that he had tried to broker a deal to keep the firm together, but it became clear that Hausfeld did not intend for that to happen. Meanwhile, even day-to-day decisions became nearly impossible.

“We had a partnership meeting where we couldn’t even agree on whether we or anybody had authority to have a vote, whether we had to have a vote to have a vote. We were tied up in knots. And it got worse and worse,” Sellers told the court.

By the summer of 2008, the firm had essentially fractured into two groups – one group including Hausfeld, Lewis, Michael Layman and Robert Eisler, and another comprising the eight other partners. Hausfeld had proposed that the firm stick together but separate their business financially, but Toll and the other partners rejected that and neither side felt the other’s formal counter-proposals were adequate.

Court records suggest that at the alleged midnight meeting of the compensation committee, the eight Cohen Milstein partners agreed to reduce Hausfeld’s share in the firm from 28 to 14 per cent, retroactive as of the beginning of 2008. The three other Hausfeld-aligned partners also had their shares reduced and reallocated, giving the remaining Cohen Milstein partners the authority to expel Hausfeld from the firm.

It was around noon on 6 November 2008. Michael Hausfeld had just walked into the Cohen Milstein offices in downtown Washington, DC. It was a perfect autumn day in the nation’s capital, and Hausfeld felt good. He had just returned from a settlement negotiation he thought had gone well. “I had no inclination of anything tragic about to occur,” he says. Until he saw his two assistants nearly in tears.

When he walked into his office, both of his assistants followed him in – something they almost never did, Hausfeld says. And on his office chair was a note. According to Hausfeld’s recollection, the note said that there had been a late meeting of the firm’s compensation committee that shuffled the partners’ voting shares in the firm, and that eight of the firm’s partners had used their new two-thirds majority stake to immediately expel Hausfeld from the firm.

“I was notified that if I did not leave the premises, the security was told that I was to be escorted out of the building for being a trespasser,” Hausfeld says. “At best, someone could have spoken with me, face to face. But given the fact that the letter said I was to leave immediately, to take nothing with me, my two assistants came with me and we left.”

Hausfeld pauses. “After almost 40 years.”

The first settlement negotiations between the two sides began as part of the oriented strand board (OSB) antitrust litigation. At the centre of the negotiations were fees both Hausfeld and the Cohen

Milstein firm believed they were due, and how much Hausfeld and Lewis should be paid from their capital accounts – the liquidated equity they would take with them when leaving the firm.

During a 23 January mediation session, Hausfeld agreed to give up his termination allowance – of half a million dollars – in the expectation that he would receive the full US\$5 million he believed was in his capital account. He also declined to fight Cohen Milstein’s claim to all of the nearly US\$3 million in OSB settlement fees – a gesture Hausfeld’s lawyers called “one of the larger concessions Mr Hausfeld and his side made.”

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But a month later, after the OSB fees had landed in the Cohen Milstein account, Hausfeld was told his capital account had been reduced by US\$2 million, from US\$5 million to about US\$3 million. The firm claimed that the reduction was because of losses the firm had suffered up until Hausfeld’s departure date, and that Hausfeld’s percentage of the losses would be tagged at his prior 28 per cent stake, rather than the 14 per cent share the compensation committee had decided upon.

After the firm broke the news to Hausfeld, partner Steven Toll sent an e-mail to Sellers, court records show. “Now can’t wait for the Hausfeld explosion regarding the capital accounts,” Toll wrote to Sellers, records indicate.

Hausfeld says that when he saw his capital balance, he was both “outraged and disappointed,” according to court testimony. “It was totally inconsistent with everything I thought we had negotiated and compromised during the mediation,” he said in court. “The capital account was my equity that I put into this firm since I joined it in 1970, almost 40 years, and I felt I was being cheated.”

The settlement agreement quickly fell apart. Soon after, records show that after he learned of the loss in his Cohen Milstein capital account, Hausfeld unilaterally sent close to US\$3 million of the US\$10 million air passenger litigation fees to the London office to help fund its operations. The Cohen Milstein partners claimed it was retribution on Hausfeld’s part, and that they were entitled to half of the air passenger fees in total.

In his decision, Judge Rice chastised both sides for intentionally misleading one another during

the settlement negotiations. He found that the Cohen Milstein partners were wrong in penalising Hausfeld's capital account at the 28 per cent rate when they simultaneously voted to reduce his share by half in order to expel him from the firm. Judge Rice also found that Hausfeld had no right to have his firm "dispense its own form of justice" by sending the US\$3 million in fees to London.

The court settled on giving Hausfeld US\$4 million as his liquidated capital, as well as dividing the air passenger settlement evenly between the two firms – including the money Hausfeld sent to London.

Hausfeld says that since that time, he has not been in contact with his former partners. "It was always my position that, like Lot's wife, you don't look back," he says. Still, when Hausfeld was expelled from Cohen Milstein, he says the plan to open a new firm unfolded quickly for a number of reasons.

Hausfeld knew he wanted to continue practising and continue his push for private enforcement outside the US. But it was also a point in time when various high-profile lawyers, including Dickie Scruggs and others, had been indicted for misconduct. Hausfeld felt it was crucial to let clients and other lawyers know immediately that his fate at Cohen Milstein had nothing to do with such impropriety or anything of the sort. "There was clearly a sense within the bar that there may be a cloud in regard to why my departure was so swift," Hausfeld says. "So we had to instantly respond."

Working out of offices loaned to him by the Venable law firm, Hausfeld says he and a few others spent days calling and writing to thousands of firms and clients letting them know they were going to open the Hausfeld practice in a matter of days. "We had no telephones, no fax machines. Other than my two assistants, we had no secretaries. Everyone was just running around with mobile phones calling everyone they could think of," he says.

Over the next few months, Hausfeld's new firm would quickly find success. He took over many of the US antitrust cases he or his fellow Hausfeld partners had been leading for Cohen Milstein. But in Europe, the process for securing major damages has been far more difficult.

Suffice to say, Hausfeld's vision of follow-on, class-wide antitrust lawsuits in Europe hasn't panned out the way he and other plaintiff lawyers once believed it would. "There," he says, "I guess the vision has always outrun the reality."

One of the more notable setbacks came in November 2010, when the UK's court of appeals shot down the firm's attempt to certify a class of claimants that had sued British Airways for its alleged involvement in the air cargo price-fixing cartel.

A week before the Court of Appeals' decision, the European Commission fined BA and 10 other airlines nearly €800 million for their roles in the cartel. Still, the claimants couldn't come up with the evidence the court required to prove the class had all suffered similar injuries, and Lord Justice Mummery ruled that the attempt at a US-style class action against BA was "fatally flawed" from the outset.

So it has gone for collective redress and follow-on antitrust litigation in the UK and throughout Europe. The whole process has been frustrating, Hausfeld says. Most national courts fear the nuances of US-style litigation, many of which the plaintiffs' bar sees as crucial to private class actions. Schnell, from Constantine Cannon, says that whenever he's gone to Europe to speak about class actions, he's tried to convince UK and European lawyers that their concerns about the US class system are unfounded. But many European judges and lawyers have innate "cultural inhibitors" against US-style litigation, he says, including those aspects that are integral to bringing actions on behalf of a class.

For one, you have to have contingency fees if you're going to have class actions – they are the primary way plaintiffs lawyer get paid for their work. "But there's such an aversion to contingency fees there and no one has ever really explained why," Schnell says. Treble damages are another important incentive, Schnell claims, but that is a non-starter in the European market. "They will never allow treble damages there. That just seems universally abhorrent [to EU judges and lawyers]," he says.

Some observers see his fight for class-based, follow-on claims in Europe as a losing battle. Regardless of Hausfeld's expectations when he entered Europe, the collective redress system there simply hasn't developed, says John Majoras, partner at Jones Day and the lawyer who sat across from Hausfeld during the Parker ITR settlement negotiations. "It just simply hasn't happened. And it may never happen," Majoras says.

For the most part, follow-on actions in Europe have also been more difficult than their American counterparts. European courts require a considerable amount of documentation up front for a follow-on action to have a chance at surviving. But that information – namely unredacted authority decisions and documents included in leniency and amnesty applications – remain firmly locked behind enforcers' doors.

Hausfeld and others say the result has been a maddening double standard. DG Comp has been among the continent's loudest cheerleaders for follow-on damage claims. Yet it has fought to keep secret the exact document claimants say they need to bring successful follow-on lawsuits in courts across Europe. DG Comp has repeatedly cited the need to keep sensitive business information out of the

public eye, and it says that handing over documents companies voluntarily submit to the enforcer would put the entire leniency system in jeopardy. The result, Hausfeld says, is a system with massive gaps between what DG Comp has proposed and the reality of bringing private antitrust litigation.

What's more, Hausfeld says that even after a year of consultations, DG Comp has declined to contact him or other claimant-only law firms on how best to reconcile those opposing forces at work in European private antitrust litigation.

"We sent letters to them saying: How can you do this? You say you are consulting with practitioners, but you're not consulting with claimant-only practitioners," he says. "You're talking to the major transaction firms, and they have a conflict."

This is, for the moment, where Hausfeld's European experiment stands.

The firm's London office has also undergone significant changes since he took it over from Cohen Milstein. The two original partners in the office have left the firm: former UK Competition Commission member Rob Murray moved to Crowell & Moring, while Vincent Smith, a former OFT official, left last year to form the Sheppard & Smith competition boutique. Current London managing partner Anthony Maton says that while the office is bringing competition law cases on behalf of individual clients, the firm has also begun to do defence work and other types of cases.

It raises the question: Why do it at all? When Hausfeld left Cohen Milstein, he could have easily taken a step back from his practice. He's recovered literally billions of dollars on behalf of clients both large and small. The walls of his offices are lined with awards, letters of thanks and newspaper clippings describing a life spent fighting for – and winning – compensation for those suffering a myriad of wrongs. He's also a wealthy man. When Cohen Milstein sacked him, he could have just walked away.

When asked why he didn't, Hausfeld pauses, then turns to his assistant and asks for a few documents. "Let me show you something," he says.

His assistant shows up with a stack of papers, including a presentation he was scheduled to give at the American Bar Association's midwinter meeting in January. The presentation, on behalf of the Civil Redress Task Force he co-chairs, outlined the group's hopes for the potential growth of private antitrust enforcement around the world.

Hausfeld points to a page in the presentation that features a map of the world bathed in red – with each red country representing a jurisdiction with a functioning antitrust enforcement programme. Indeed, global antitrust enforcement is growing, as are the number of cartel cases brought both in the US and abroad. The presentation also cites several recent EU decisions, including the *Pfleiderer* case and the CDC

Hydrogen Peroxide judgment, that suggest the tide may be turning for private enforcement in Europe.

The second document, Hausfeld says, is the important one. The document is simply a list of companies, all of which have contacted Hausfeld about potentially bringing a claim against airlines involved in the air cargo cartel. While the names of the clients are confidential, the list includes major international corporations, and they number in the hundreds. A modest estimate of the damages they could seek, Hausfeld says, would be in the hundreds of millions of pounds.

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There's progress on other fronts as well. While the potential for a class action is on hold, the High Court continues to add claimants to the continuing litigation against BA. And the firm says they currently have private litigations planned or in progress in countries around Europe and Asia, some of which have been on behalf of headline client Volvo, who has sued for harm it suffered from the car glass and air cargo cartels.

Hausfeld says that from his vantage point, the process of bringing private antitrust litigation should be looked at in its elements, and the firm has already achieved many of those elements. That includes bringing cases on behalf of individual claimants and having those cases accepted in the courts. What's more, Hausfeld says that over the past three years, the firm has entered into non-public settlements worth tens of millions of pounds. "We're past step one," he says. "Now there is private enforcement, and private enforcement by significant companies for significant wrongs."

So despite the setbacks and scepticism, Hausfeld presses on. He feels compelled to, he says. "I guess there's something in my DNA, like a salmon, that makes me want to run against the tide," he says. "I have a passion for integrity. I believe that interference with the markets, at least economically, has the greatest ability to upset economic integrity."

If he breaks new ground for private enforcement in Europe in the process, he says, well, that's part of the plan as well.

"I believe in the necessity of someone taking the vanguard, and being the pioneer. And as we looked around, there wasn't anyone else who was willing to do it, and we were," he says. "We believe in it."