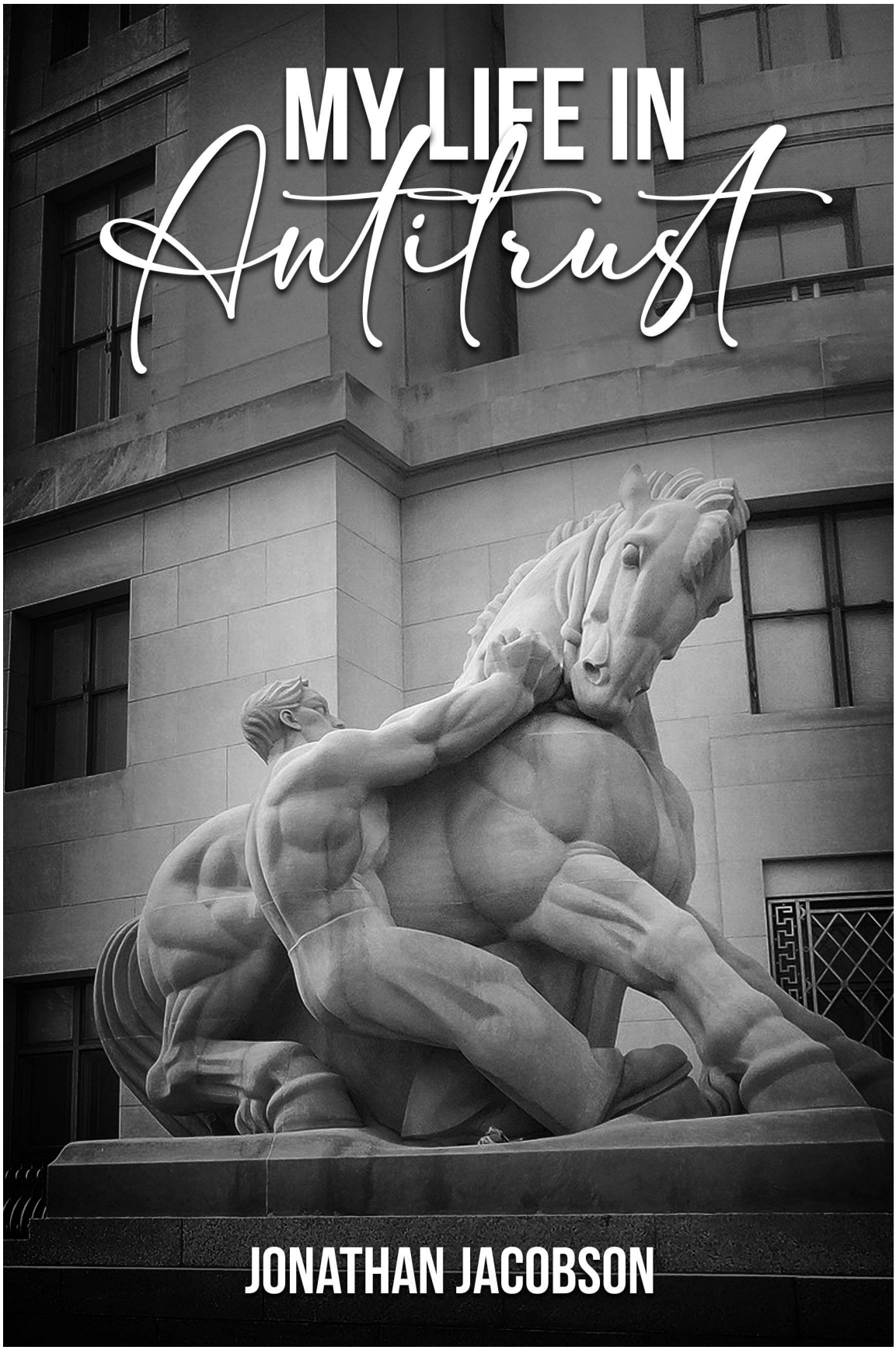
MY LIFE IN
Antitrust
JONATHAN JACOBSON

MY YEARS IN ANTITRUST

by

JONATHAN M. JACOBSON

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PREFACE

Welcome to my book. It is about my 48 years as an antitrust lawyer. There is also some personal background, although I have tried to keep that part of the story to a minimum.

This memoir is fundamentally about legal cases. I have tried to write it in a way that both lawyers and laypersons can understand. There are a number of citations to court decisions. Most can be found on Google Scholar.

I have been incredibly lucky during my career. I've had great cases for Coca-Cola, Google, American Express, Live Nation, and many others. The book addresses the bigger cases, not all of them.

The story is necessarily told from my perspective. Although I'm including a number of compliments, I have been conscious in my effort to limit bias and braggadocio and have done my best to admit my mistakes and failures. I also have tried to acknowledge my compatriots, without whom I never would have gotten as far as I did.

Many thanks in that respect to Scott Sher, Chul Pak, Sara Walsh, Dan Weick, Justin Cohen, Elinor Hoffmann, Paul Hewitt, and especially my assistant of 39 years, Carol Stavros. There are many others who helped and my apologies for not mentioning them all.

May 2024

1. BECOMING A LAWYER

The Jacobson family was in the hotel business. We had a hotel in Spofford, New Hampshire, another in Sebring, Florida, and a third nearby in Avon Park, Florida. All this favored me in learning golf, tennis, and water skiing. But it also meant changing schools twice a year, as well as losing out on learning ice skating and snow skiing. So at the ripe young age of 11, I started boarding at Milton Academy in Milton, Massachusetts. Where I still failed to learn snow skiing and fared horribly at ice skating.

I did well in sports at Milton. I was the second leading goal scorer on the soccer team, number two on the tennis team, a strong-hitting pitcher in evening softball, and number one on the squash team. I was also a 3 handicap golfer. My academics were just okay, but well enough to get into Columbia College as a legacy.

Squash at Milton

At Columbia, it was very hard to get A's, pretty hard to get C's, but if you showed up for class it was easy to get a B,

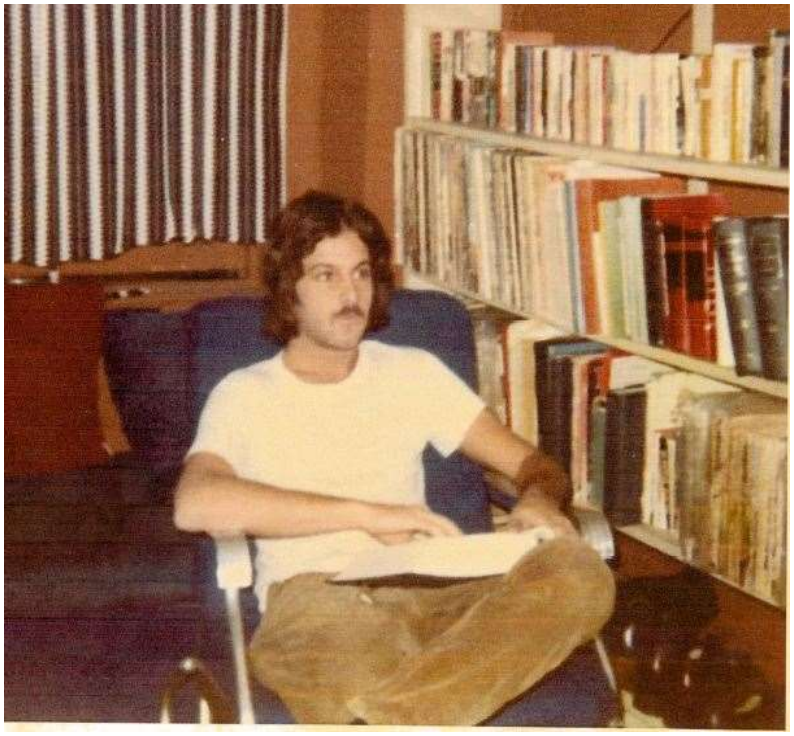
and that's basically what I did. (Some of my friends avoided classes much of the time.) I was at the college from 1969 to 1973, a volatile period in American politics. I learned about drugs, went to the Fillmore East regularly, and participated in many anti-war protests. Three other Milton students in my class made it to Columbia. One was a blue button-wearing former Goldwater supporter. The other two were on the steering committee of SDS (Students for a Democratic Society, a well-known radical group). So I considered myself the normal one.

I had no idea at the time what I wanted to do with my life after college and decided to try law school so that my parents would support me another three years. The best choice would have been Columbia Law School. But after my raucous freshman year, my floor counselor in the dorm was appointed Director of Admissions at the Law School. That, plus my B average, meant no Columbia Law for me. As among the other options, Brooklyn Law School was the most affordable and an easy subway ride. And off I went.

I did well at Brooklyn and learned to love the law. Following a poor first semester, my grades were good. I made the Journal of International Law as a founding member and was appointed co-editor in chief of the Law Review. I wound up fifth in my class, magna cum laude. After the first year in school, my father was able to get me a job as an intern in the West Palm Beach State's Attorney Office. I spent the Summer of 1974 there – my parents had settled in Palm Beach – and it was amazing. Interns could take depositions and I took two! I sat at counsel table for a

murder trial and a robbery trial; wrote two appellate briefs; helped in the funeral home consumer protection investigation; and spent two weeks as the clerk for a local trial judge sitting on the Fourth District Court of Appeal by designation. I even had two opinions published in Southern Reporter, 2d.

I had expected to return to the State's Attorney Office the next Summer but found out late that I had to write my Law Review note and commence editing chores. This meant I had to stay in New York. Summer associate hiring season was long over, but my father (again) was able to get me a job at what is now Davis & Gilbert. It was a really good experience; good people, good lawyers. They asked me back for a permanent job but I had my sights set on the New York "Big Law" firms and began the hiring process.



Studying law in 1975

I had a mustache. While I had it, I had four or five job interviews and was turned down each time. Coincidence or not, I shaved the mustache, cut my hair, and got job offers following the next three interviews – Skadden Arps, Weil Gotshal, and Lord, Day & Lord. Weil at that time had a reputation as a nasty sweatshop. At my Skadden interview, the discussion among the associates went like this: "I did 60 hours last week." "That's nothing; I did 75." "You guys are pikers; I did 90." I had loved securities and antitrust law in school and, at that time, tender offer litigation involved both. It was all the (legal) rage, and was just what I wanted to do. Skadden was a leader in that field, but so was Lord, Day &

Lord. (See Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969).) Thinking that 90-hour weeks were not for me – little did I know – I chose Lord, Day & Lord, founded in 1717, with the greatest law firm name ever.

Harder Hall, Sebring FL

Pinecrest, Avon Park, FL

Lake Spofford Hotel – Main Building & Gazebo

2. STARTING IN THE LAW

I started as an associate attorney in August 1976. Lord Day, like most New York Big Law firms, had a rotation system. My first rotation was to Corporate, and specifically to the Admiralty section of Corporate. My assignment was to change Gotaas-Larsen I to Gotaas-Larsen II about 12 zillion times in the draft loan agreement. This was before word processing, so it could not be done through a simple Control>H global change and had to be done manually. This was not why I became a lawyer and so I asked out.

The next rotation was Securities, which was great. But while the Securities group was doing well, the Antitrust group was truly bursting at the seams, and that's where I was told to go. The first of my many big breaks.

The Antitrust Group was led by the legendary Gordon Spivack. Gordon had been the number two at the DOJ Antitrust Division, and was largely responsible for many of the highly interventionist Supreme Court antitrust decisions in the mid to late 1960s. After that, he taught antitrust at Yale. Former Eisenhower Attorney General (and Lord Day partner) Herbert Brownell convinced him to come to Lord Day, and he began the Antitrust Group with three of his graduating Yale students (Tom Brislin, Steve Hudspeth, and David Marks) and two former Antitrust Division leaders (Norm Seidler and Harry Sklarsky). The group grew and included about 10 lawyers when I joined. Gordon continued teaching at Yale and commuting daily to Manhattan, but soon gave it up and assumed a saner

schedule. The *American Lawyer* labelled him as the top antitrust lawyer in the country. We all felt the same way. (Our posthumous video remembrance of Gordon is here.)

During my time at Lord Day, our group was neck and neck with Kaye Scholer for the best antitrust law firm in the country (which then also meant the world). This was at a time when New York was the antitrust capital of America, a status that eroded quickly and disappeared completely after the Hart-Scott-Rodino Act's pre-merger notification and filing requirements effectively moved antitrust's geographic center to Washington, DC. The Kaye Scholer group was led by the famous Milton Handler and included some of the really great competition lawyers of the day. One was my contemporary, Richard Steuer, who later preceded me as chair of the American Bar Association's Antitrust Section and who became a good friend.

My first two major cases were memorable. The FTC's challenge to the soft drink industry is addressed next. The other, *Southern Colorprint v. Greater Buffalo Press,* is chapter 4.

3. COCA-COLA AND THE FTC

The soft drink industry has been characterized by exclusive bottler territories since the 1890s. Coca-Cola was the first and all the major brands followed. By the early 1970s, there were exclusive territories for bottlers of Coca-Cola, Pepsi-Cola, Royal Crown, 7-Up, Dr Pepper, and Canada Dry, among others. In 1967, however, the Supreme Court ruled in United States v. Arnold, Schwinn & Co., 388 U.S. 365, that vertically-imposed exclusive territories were illegal per se – that is, illegal with no allowable defense – putting a big target on the soft drink industry's back (and front for that matter).[1]

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[1] In antitrust parlance, "vertical" refers to distribution chains; so a manufacturer and its distributors are in a "vertical" relationship. It is distinguished from "horizontal" arrangements, agreements among competitors. Antitrust law today treats horizontal arrangements far more harshly than vertical agreements.

The Federal Trade Commission commenced an investigation in 1970 and, on July 15, 1971, sued all the soft drink companies to break up the territories. Citing *Schwinn*, FTC staff (called "Complaint Counsel") soon filed a motion for summary judgment based on per se illegality – setting off a political firestorm. In the early 1970s, there were hundreds of bottlers – over 500 in the Coca-Cola system alone. Many, especially the smaller bottlers, feared that they would be wiped out without compensation by larger bottlers if territories were eliminated. Soft drink bottlers, and especially bottlers of Coca-Cola, were often leading members of their communities and frequently had their Representatives and Senators on call. They advanced a number of proposals to stop the FTC proceeding in its tracks. The FTC responded by assuring the legislators (and the bottlers) that it would jettison the per se theory and allow the case to be tried under antitrust law's "rule of reason," which would allow the industry to mount their defense.[2]

The case was tried in 1975, the year before I came to Lord Day. The Pepsi bottlers distrusted PepsiCo. A few Coke

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[2] Under the most important U.S. antitrust law, section 1 of the Sherman Act of 1890, a few practices, mainly price fixing among direct competitors, are considered illegal per se. Most everything else is tested under the rule of reason, under which the finder of fact considers all the facts in order to determine whether the practice in issue restrains or enhances competition. The focus is usually on the effect of the practice on prices, production output, quality, and innovation. So, for example, a practice that leads to increased market output is considered to enhance competition. See Jonathan Jacobson, "Another Take on the Relevant Welfare Standard for Antitrust," THE ANTITRUST SOURCE, August 2015.

bottlers distrusted Coke as well and intervened. Pepsi agreed to let Coke go to trial first. All the other cases were held in abeyance. The trial lasted six weeks. Coca-Cola demonstrated that exclusive territories incentivize bottlers to mine every aspect of their territories to enhance their sales, thus increasing output and enhancing competition against other brands. The administrative law judge handling the trial agreed and ruled in Coke's favor. Milton Handler, representing Pepsi, concluded that the trial record Gordon had created was "perfect," and agreed to stipulate to the Coke case record and avoid a separate trial. Complaint Counsel had proven only that the territories eliminated "intrabrand" competition among Coke bottlers, resulting in occasionally different prices for Coke beverages from one territory to another. They argued that was enough to prove illegality. Since this was really nothing more than per se illegality in new garb, we pointed out that this was inconsistent with the agreement to hear the case under the rule of reason. The ALJ agreed.

Complaint counsel appealed the ALJ decision to the full Commission, and that's where I came in. The initial appeal briefs and first oral argument were completed before I arrived, but no opinion was forthcoming. Instead, in June 1977, the Supreme Court formally overruled *Schwinn* in a case called Continental T.V., Inc. v. GTE Sylvania Inc, 433 U.S. 36, and held that exclusive territories had to be evaluated under the rule of reason. The decision made clear that *inter*brand not *intra*brand, competition is the "primary concern of antitrust law." We filed a supplemental brief

arguing that *Sylvania* required that the ALJ decision be affirmed. I was fortunate to assist. I also spent time researching and writing a memorandum on the ways in which Coke could limit liability in private damages actions – damages are tripled automatically under antitrust law – in the event that we lost the case.

In April 1978, almost a year after *Sylvania*, and two and a half years after the ALJ ruling, the FTC reversed in a 2-1 decision, written by Elizabeth Dole. The conclusion essentially was that the elimination of intrabrand competition was sufficient proof of illegality. David Clanton disagreed and dissented.

We appealed to the D.C. Circuit. Because the decision portended grave repercussions for hundreds of bottlers, the appeal was expedited. Briefs were filed quickly – I had a decent role – and the case was argued in October 1978. I thought the argument went quite well. The rest of 1978 went by. No decision. 1979 flew by. No decision. In late 1979, the presiding judge, Harold Leventhal, passed away. In 1980, with no decision having been issued, Coca-Cola and the bottlers, aided by the rest of the industry, went back to Congress. The result was the Soft Drink Interbrand Competition Act of 1980, which provided that exclusive territories were lawful so long as there is substantial and effective competition from other brands – which of course was the case given the many battles of Coke versus Pepsi.

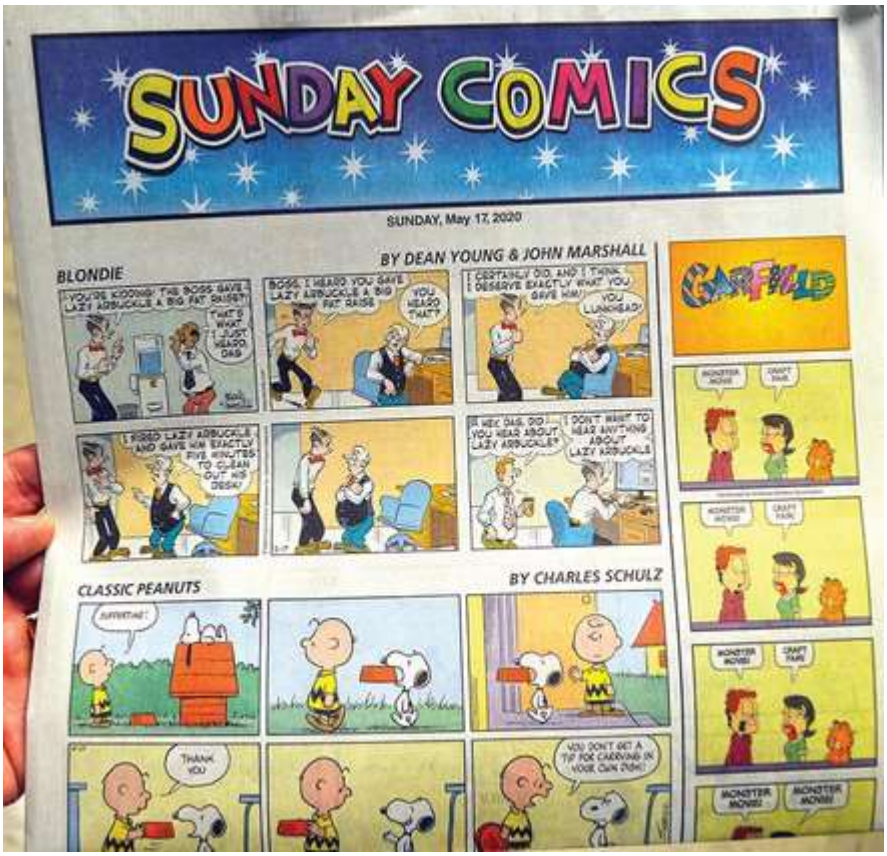
The FTC declined simply to dismiss its cases, so I was tasked with writing our supplemental brief to the court – the

first appellate brief I wrote cover to cover. It was fun. One phrase captured the essence of the argument. "In the words of Senator Dole, 'we are about to vote to overturn an opinion written by a distinguished Federal Trade Commission by the name of [his wife] Elizabeth Dole. [The bill] overrules an opinion of which she is the author.'" The rest of the legislative history I recounted in the brief was to the same effect, although without spousal connection, and even the Commission ultimately agreed that the cases had to be dismissed. Which it was in February 1981. 642 F.2d 1387.

* * *

One feature of antitrust law, well-illustrated by the *Territories* cases, is that the law can and does change rapidly. The strong pro-plaintiff stance taken by courts in the 1960s eroded significantly in the 1970s and was all but gone by the end of the 1980s. Since then, antitrust has been guided by a "consumer welfare" principle under which the economic effects of a practice guide the outcome – focused specifically on prices, production output, quality, and innovation, and the ways in which the effects on those factors benefit or harm consumers. That position is being challenged today by some enforcers and academics, who seek something of a return to 1960s antitrust policy. Europe has moved sharply in that direction. This ability to rethink the most basic concepts of law is what makes antitrust so amazingly interesting. In my next big case, the then-new focus on economic effects led to a favorable outcome in the *Sunday Comics* case, discussed next.

4. THE SUNDAY COMICS



Back in the prehistoric days when people actually read physical newspapers, the comic pages on Sundays were one of life's guilty pleasures. But most people were unaware that only the largest newspapers, such as the *NY Daily News*, printed their own. Most everyone else bought their color comics pages pre-made by a separate supplier. The two largest suppliers were Greater Buffalo Press and The Hearst Corporation's King Features Syndicate. Our client, King,

supplied popular comic features such as Blondie but did not physically print its own comic pages. Instead, it had a long-term exclusive contract for printing with International Color Print in Wilkes-Barre, Pennsylvania. King itself handled all sales in competition against Greater Buffalo for newspaper customers. Greater Buffalo's advantages were its modern, efficient printing plant, and that there was no middleman. King's advantage was that, if you wanted its features, you basically had to take its printing.

In 1954, when I was two, the head of King met with the head of Greater Buffalo and agreed to allocate customers (normally a per se illegal offense). Soon afterwards, they agreed that Greater Buffalo would acquire International Color Print. One former King employee, who had helped form a rival printing operation in Virginia called Southern Colorprint, complained to the Justice Department. Justice convened a grand jury in 1958 to investigate.

The grand jury declined to indict. Instead, in 1960 – I'm now eight – it brought a civil suit against King and Greater Buffalo. The civil suit alleged that King had engaged in illegal "tying" in insisting that customers take its printing to get its features; it also alleged that Greater Buffalo's acquisition of International Color Print violated section 7 of the Clayton Act as an illegal merger.

In 1965 (age 13), King settled, agreeing not to tie if Justice won its case against Greater Buffalo. That other part of the case went to trial in 1967, resulting in a judgment for Greater Buffalo. The district court reasoned that printing for

a comic feature syndicate such as King was in a different "relevant market" than printing directly for newspapers. That meant the two did not substantially compete and that the merger did not eliminate significant competition. Which was nonsense.

Justice appealed directly to the Supreme Court under the (now repealed) Expediting Act, a laughable irony given the pace of the case. The Supreme Court rejected the district court's reasoning 9-0, concluded that the competition between International and Greater Buffalo was indeed substantial, and sent the case back to the district court for an order of divestiture of International. 502 U.S. 549 (1971). But there was a big problem. The Wilkes-Barre plant was well out of date and no one wanted to buy it. So in 1973, Justice's case failed and was dismissed for lack of a buyer.

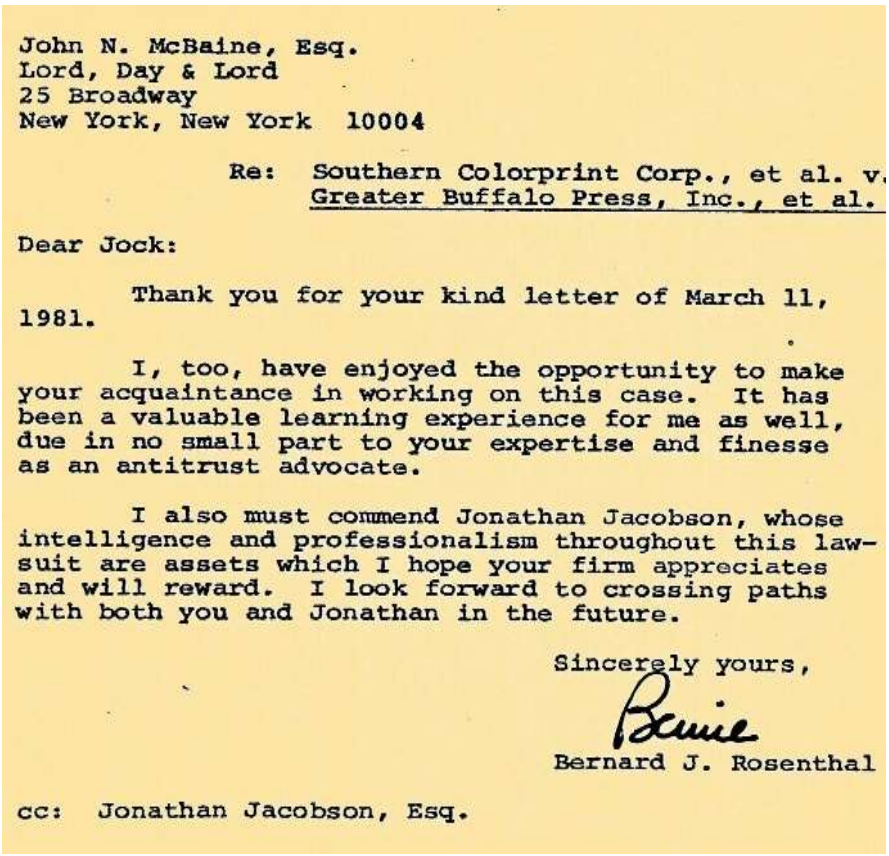
On to the private case. Under the antitrust laws, the statute of limitations does not run during the pendency of a Justice Department lawsuit and is extended for one year after the case concludes. So Southern Colorprint filed its case against King and Greater Buffalo in 1974, when I was 22.

Given the history of the matter, nothing much happened in the private case until after I joined Lord Day. Once assigned, I had two major tasks: write a fact memo based on the contents of King's documents and the file from the DOJ case; and deal with discovery generally.

The fact memo task meant that I had to spend about seven weeks in a storage room at King's offices on East 45th Street. It was not all bad. Many of the documents were from an era when photocopies had white type on a black background, which made the review a bit harder. Some of these had been cited in the Supreme Court's decision. The old files also included copies of Sunday comics pages dating back as early as 1940, which I loved reading. My fact memo was over 500 pages. It started with "In the beginning," which led to merciless ribbing from the other associates. But Gordon said it was exactly what he wanted. So my seven-week exile turned out to be a good thing.

The discovery process dragged on and on. I did get to take and defend several depositions, which was excellent experience. Fortunately, although the case was in Buffalo, all the hearings were in warm weather months. The signature event of the discovery process occurred when documents were being produced at International's plant in Wilkes-Barre. I did not attend as this was our co-defendant's production. Southern Colorprint's legal team was there, however. As they walked in, the Greater Buffalo employees were literally tearing the documents apart. Southern Colorprint's lawyers naturally raised this with the court, and the judge was merciful. Although he would have been justified in simply entering judgment against Greater Buffalo, he instead ordered them to tape the documents back together. Tens of thousands of pages had been torn up, so this took some time. I still recall reviewing a number of documents that had been taped together.

As with most defendants, we were content to let the case drag on. Southern Colorprint's theory of injury was that defendants were selling at prices below *Southern Colorprint's* production costs. That was a viable "predatory pricing" theory when the case began. But the law changes, and it was not viable in 1981 (age 29) when we settled for just $250,000. By then, the law was becoming clear that pricing is predatory (and therefore actionable) only when prices are below the *defendant's own* costs. Greater Buffalo settled much later, and I never knew how much they had to pay. Hearst was thrilled with our result. It also garnered me some decent praise from our adversary.



John N. McBaine, Esq.
Lord, Day & Lord
25 Broadway
New York, New York 10004

Re: Southern Colorprint Corp., et al. v.
Greater Buffalo Press, Inc., et al.

Dear Jock:

Thank you for your kind letter of March 11, 1981.

I, too, have enjoyed the opportunity to make your acquaintance in working on this case. It has been a valuable learning experience for me as well, due in no small part to your expertise and finesse as an antitrust advocate.

I also must commend Jonathan Jacobson, whose intelligence and professionalism throughout this lawsuit are assets which I hope your firm appreciates and will reward. I look forward to crossing paths with both you and Jonathan in the future.

Sincerely yours,

Bernie

Bernard J. Rosenthal

cc: Jonathan Jacobson, Esq.

The *Sunday Comics* cases started in 1958 and ended for us in 1981, a ridiculous period of 23 years. I recounted that fact many years later in a paper called "Tackling the Time and Cost of Antitrust Litigation," published in ANTITRUST, Vol. 32, No. 1, pp. 3-4, Fall 2017. None of the reforms I called for there has been adopted and I have little confidence that they ever will be. But I was glad to speak out about it.

5. OCEAN SHIPPING

The next big case for me involved ocean shipping in the "North Atlantic Trade," i.e., U.S. to or from Europe. Our client, American Export Lines, together with six other U.S. and European carriers, were members of a "shipping conference" under the authority of the Federal Maritime Commission. When approved by the FMC, members of a shipping conference were exempt from antitrust liability for things like price-fixing among the members. The exemption did not apply, however, to activities with non-member carriers. That was what happened here.

In meetings at the Elbow Beach Club in Bermuda and other posh locations, the seven carriers met and agreed to fix prices with non-members of the conference (based mainly in Russia). The meetings were all attended by the conference's counsel, which typically signifies adherence to the law. Apparently not here. The Justice Department convened a grand jury in 1978 and indicted the carriers and

various individuals in June 1979. The individuals indicted included U.S. and foreign nationals as well as conference counsel.

The investigation created something of a fury given the interests of the foreign nationals and the presence of the U.S. antitrust exemption. Several countries, including Britain and France, responded by passing "blocking statutes," which generally made it illegal in the country in issue to comply with U.S. antitrust discovery demands. See Sidney Rosdeitcher, "Foreign Blocking Statutes and U.S. Discovery," 5 NYU J. INT'L L. & POLITICS 1061, 1066 (1984).

My role in the case was small. I attended the numerous meetings of counsel for the defendants, which included several really capable lawyers, one of whom was Sandy Litvack, then of the Donovan Leisure firm. I took notes, reviewed documents, and did basic junior associate stuff together with another associate, Steve Hogan. It was great being in the room with all the other lawyers.

At the time, the Justice Department was announcing a policy under which, if a defendant wanted to avoid trial, they would have to plead guilty. The prior custom of sometimes agreeing to pleas of "nolo contendere" was to be no more. (A nolo plea means "I do not contest" but involves no admission of guilt.) Likely because of the international backlash and the overhang of the antitrust exemption, Justice agreed to accept and the court entered the nolo pleas. Justice has not agreed to a single nolo plea since.

During the course of the case, I happened to be in Gordon's office when the phone rang. It was Benjamin Civiletti, then attorney general of the United States. After brief pleasantries, the point of the call was clear: President Carter wanted to appoint Gordon as the head of Justice's Antitrust Division. Without skipping a beat, Gordon said no (due to client obligations), but you should ask Sandy Litvack. Which they did. And so Sandy became the next assistant attorney general in charge of the Antitrust Division – recused of course from the ocean shipping matters. Gordon never said so, but I had a strong sense that he would have preferred to accept the job.

6. SCM V. XEROX

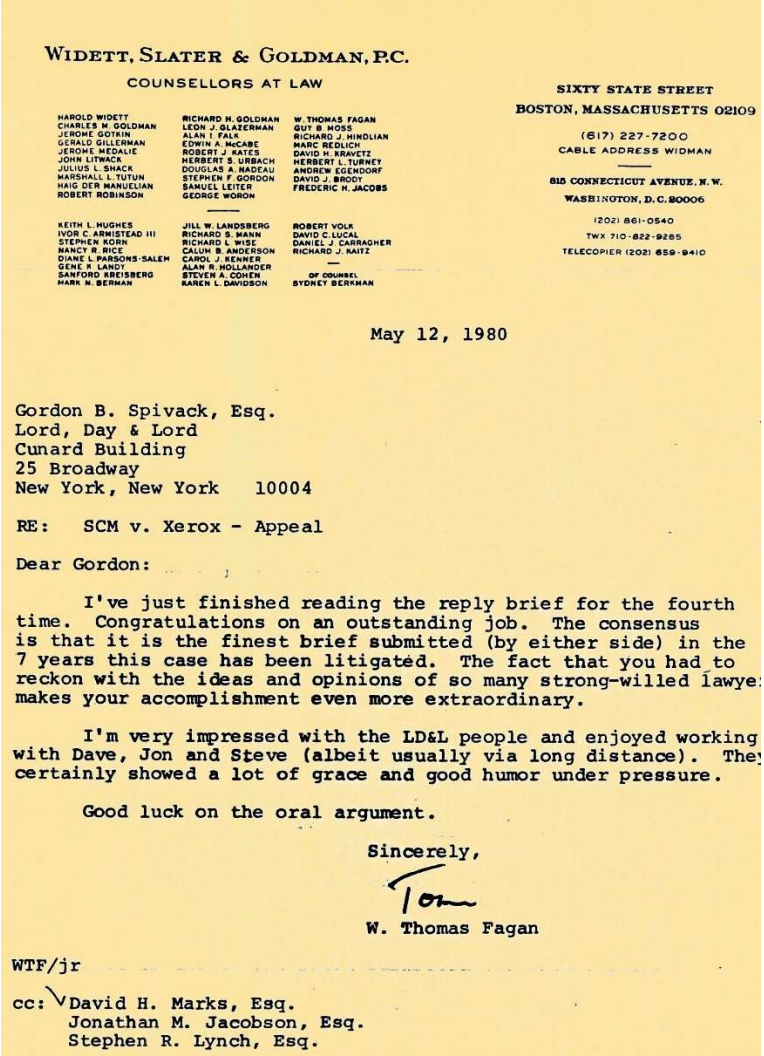
One of the many great innovations of the 20th Century was the plain paper photocopier. Photocopies had been available for several years, but they were *coated paper* copies – which tended to smear, fade, and crack. *Plain paper* copies had a decided advantage and made coated paper copiers obsolete quite quickly.

Plain paper copying, eventually dubbed Xerography, was invented by Chester Carlson in 1937. Efforts to exploit the invention had little success at the time – the machines had not been developed – and Carlson assigned his patents to Battelle Memorial Institute in 1947. Battelle developed the process to the point of commercial feasibility and granted Xerox a non-exclusive license to all the many patents and improvements. Nonprofit Battelle's policy was to license liberally. By 1956, Xerox had been marketing non-office copying xerography products and was reaping substantial profits. As the jury found, it was foreseeable at that time that plain paper copying would be a huge business. It was then that Xerox persuaded Battelle to convert the non-exclusive licenses to exclusive, eliminating the possibility that others would be licensed. Xerox further developed the process and received many additional patents. SCM was then the leader in coated paper copying and sought licenses from Xerox but was repeatedly turned down. The jury concluded that the foreseeable effect of the 1956 agreement would be to let Xerox acquire a monopoly.

We were not involved until the appeal. The trial team consisted of the Proskauer firm in New York as lead, and included the Sonnenschein firm from Chicago and the Widett firm from Boston. The complaint asserted two principal claims: (1) that Xerox acquired monopoly power as a result of the 1956 agreement and maintained that power by refusing to license the patents; and (2) that Xerox's many patents created a "patent thicket" that made new entry or inventing around the patents impossible. The trial in Hartford, Connecticut lasted 14 months in 1977 and 1978, took 258 court days, and produced a transcript of 46,802 pages plus roughly 5000 exhibits. The jury rejected the patent thicket claim but found for SCM on the 1956 agreement claim. Then district judge Jon O. Newman (one of the great judges) granted judgment notwithstanding the verdict to Xerox. He reasoned that, based on patent policy, damages should not be available for an acquisition of patents taking place before the emergence of a relevant market for the product in issue. Injunctive relief was unnecessary because in 1975 Xerox entered into a consent decree with the FTC under which it finally agreed to license the patents. 463 F. Supp. 983 (D. Conn. 1978).

We came in after that, replacing Proskauer, and working with local Connecticut counsel, plus SCM's GC (Dick Sexton), Bud Nussbaum of Sonnenschein, and Jerry Gotkin of Widett. The appeal brief drafting process took months. We were basically locked in a conference room in the Hemsley Building and our internal discussions were heated. Gordon, Bud, and Jerry had strong egos and wanted every sentence

in our 201 page brief written just their way. My role started small. David Marks wrote most of the first draft and I wrote a few sections. My role increased during the editing process. I was repeatedly able to come up with compromise language that advanced the points Gordon, Bud, and Jerry wanted to make without any of the imagined downsides. The result was a terrific brief. Sexton insisted that it be printed by a friend in Hartford, which led to an adventure. The brief was finalized late in the day and had to be helicoptered to Manhattan to make the filing deadline. My colleague, Steve Lynch, and I met the helicopter and Steve raced in a cab to the courthouse, just making the deadline in time. I wrote the reply brief, subject to some (but fewer) of the heated discussions. It was well received.



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OF COUNSEL
SYDNEY BERKMAN

May 12, 1980

Gordon B. Spivack, Esq.
Lord, Day & Lord
Cunard Building
25 Broadway
New York, New York 10004

RE: SCM v. Xerox - Appeal

Dear Gordon:

I've just finished reading the reply brief for the fourth time. Congratulations on an outstanding job. The consensus is that it is the finest brief submitted (by either side) in the 7 years this case has been litigated. The fact that you had to reckon with the ideas and opinions of so many strong-willed lawye makes your accomplishment even more extraordinary.

I'm very impressed with the LD&L people and enjoyed working with Dave, Jon and Steve (albeit usually via long distance). The certainly showed a lot of grace and good humor under pressure.

Good luck on the oral argument.

Sincerely,

Tom

W. Thomas Fagan

WTF/jr

cc: David H. Marks, Esq.
Jonathan M. Jacobson, Esq.
Stephen R. Lynch, Esq.

Writing the briefs was time consuming but fascinating. During the course of the case, I was routinely billing 300-hour months and had one month on the reply brief of over 400 hours. Ouch. One night while writing the reply brief, Bud Nussbaum and Jerry Gotkin took me out to a late dinner. They asked about my career and wanted to know

where I went to law school. When I said Brooklyn, they both said "very funny, where did you really go?" It was sobering and reminded me that I could not be "as good" as others in the field. I had at least to try to be better.

We lost the appeal. 645 F.2d 1195 (2d Cir. 1981). The court took Judge Newman's stance a step further. It held that not just damages claims, but all antitrust claims, based on acquisitions of patents prior to the emergence of a relevant market, were lawful under patent policy. Xerox introduced the first "Xerox machines" in 1960, so there could have been no relevant market for the product in 1956.

We decided to try the Supreme Court. My research had found statements by the Department of Justice saying that an acquisition of patents covering the drug somatostatin while the product was undergoing FDA approval was unlawful. That was prior to the emergence of a relevant market but still subject to the antitrust laws. Perhaps focusing on this point, the Court asked the Solicitor General for its views as to whether to take the case. In the very first brief that was submitted by the Reagan Justice Department (and Antitrust AAG William Baxter), they took the Second Circuit's expansion of Judge Newman's rationale even further. The brief said that, *irrespective* of patent policy, an acquisition of *any* asset prior to the emergence of a relevant market was automatically lawful. A former assistant Solicitor General, Frank Easterbrook, later a Seventh Circuit judge and a prolific writer, was retained to assist on our response. He and I put together a good brief explaining

why the government was wrong, but to no avail. The Court denied review, and so we lost the case.

History has not been kind to the *SCM* decisions. Today, the agencies routinely examine and sometimes challenge acquisitions where the market has not yet come into being. So the decision today is something of an anomaly. But the concerns about innovation that led to the decisions were not frivolous. As I have written, it remains important to intervene when anticompetitive effects are reasonably probable as in *SCM* – just not where the concern is based on simple speculation. "Acquisitions of 'Nascent' Competitors," THE ANTITRUST SOURCE (Aug. 2020) (with C. Mufarrige).

7. PRO BONO CASES

The work I was doing was terrific experience, but Big Law junior associates do not get up in court and argue multi-million-dollar cases. They instead await their turn watching more experienced lawyers. I wanted more so I decided to take on pro bono appeals on referral from Legal Aid. In the pro bono context, appeals had an advantage over trial work for me. They let you argue the ultimate merits of a case, avoid getting bogged down in discovery, and involved a substantially lower hours commitment – as well as the contribution to the public good.

The first case was *People v. Joseph Rice*. Rice had been convicted of armed robbery. But no gun was ever found and the testimony was only that he had deployed an object that looked like a gun. Under New York law, if there is a "reasonable view of the evidence" that the defendant was guilty of a lesser included offense (here unarmed robbery),

the trial judge must give the jury the opportunity to consider that offense as well. Rice's trial counsel requested that jury instruction but the court refused and charged armed robbery only. The jury was initially deadlocked but submitted a note: "We the jury would like to know whether or not the defendant could possibly be found guilty *without the use of a gun*." "Another way of putting it," the note said, "was whether or not the defendant could be found guilty of robbery to a lesser degree." The judge answered the questions "no." Some five hours later, the jury submitted a second note. It said "Some jurors feel that a robbery was committed with what *appears* to be a gun and cannot vote guilty." Both times, defense counsel renewed the request to charge the lesser included offense, but the trial judge refused. Mr. Rice was ultimately found guilty of armed robbery. Had a lesser included offense been charged, the sentence would have been seven years less.

The oral argument before the New York Appellate Division could not have gone better. My wife, Fran, came to observe (after hearing me rehearse a few million times). Our case was second on the calendar. The first was a libel case against the *Daily News*, represented by the infamous Roy Cohn. Cohn proceeded to deliver the worst appellate argument I had ever heard then or since. It gave me great confidence knowing I couldn't do worse than such a renowned advocate. And I felt I did well. So did opposing counsel, who actually congratulated me on what seemed to be a unanimous reversal.

Nope. A few weeks later, the decision came down. Affirmed, 3-2. No opinion, but a vigorous dissent by Justice Bloom, joined by Justice Carro. In New York, a dissent in a civil case means an automatic appeal to the Court of Appeals (New York's highest court). But in a criminal case, you need permission from a judge of the Court of Appeals or a justice of the Appellate Division. I figured my best chance was Justice Bloom, but there was nothing in the rules saying what kind of document was required. So I called Bloom's chambers to ask a clerk for the correct protocol. The clerk transferred me directly to Justice Bloom for an uncomfortable (for me) ex parte conversation. It was short. He said the best procedure was not a letter or a motion, but to go directly to a judge of the Court of Appeals! I followed that direction and submitted the request to appeal to the high court, which assigned it to Judge Wachtler. A week or so later, I'm in my office and the phone rings. It was another arguably improper ex parte call, this one from Judge Wachtler. We talked about the case. The judge said that he thought the decision was plainly wrong, but the law was clear on the point and the court had a limited number of cases to take each year. I made the argument about seven years of Rice's life and how we wouldn't even be having this discussion if it were a civil case. Judge Wachtler said he understood and would consider it. Three days later the letter arrived in the mail denying the request for leave to appeal. He evidently did not consider my plea very long.

I later found out that my inexperience led to a bad mistake. I learned that Justice Carro, who had joined

Justice Bloom's dissent, *always* granted leave to appeal in cases where he has dissented. I should have gone to him. The mistake cost Rice seven years. It sticks in my memory.

The second appeal I argued was *People v. Pedro Hernandez*. Hernandez had been convicted of burglary and assault. The main issue was that the prosecutor argued in summation (to cover holes in her case) that Hernandez was assisted by an accomplice. The problem was that there was zero evidence of any accomplice. Trial counsel asked the judge to instruct the jury to that effect but the judge refused. Once again, the Appellate Division affirmed with no opinion. And once again, Justice Carro dissented. This time, I went straight to him and he granted leave. I did not get to argue in Albany, however. The court took the case on the briefs alone and reversed 7-0. A satisfying win.

There were a few other unremarkable criminal appeals. Soon after completing them, I applied to the pro bono program of the U.S. Court of Appeals for the Second Circuit. My first case was *Davidson v. Scully*. 694 F.2d 50 (1982). This was a case in which prison officials at Dannemora in upstate New York routinely opened prisoners' *outgoing* mail even where, as in this case, the letters were being sent to lawyers and were presumably protected by the attorney-client privilege. Davidson was a really bad guy. He had murdered three people and had been sentenced to three consecutive life terms. He filed lawsuits to pass the time. This time, he sued to enjoin the mail reading practice. A prior en banc decision of the Second Circuit (*Sostre v.*

McGinnis) had authorized the practice, and the district court dismissed Davidson's complaint on that basis.

Our appeal argued that subsequent cases had undermined *Sostre*'s authority and that the decision should be overruled. The Second Circuit, in an opinion by Judge Oakes, reversed, overruled *Sostre*, remanded for further proceedings, and enjoined the offending regulation. A complete victory. Davidson had asked me to figure out how he could attend the argument, but the answer, and my answer to him, was a simple "no." After the decision, he asked me to handle the trial (for damages) on remand, but I did not have the time and declined.

Davidson's case then went on the "wheel" to locate counsel for the remand. He drew Cravath, and a lawyer there by the name of Robert Feltoon. Feltoon was set to meet him upstate, but had to postpone due to a client emergency. Davidson was furious. He sent a letter to the district court, the chief judge, every Senator and Representative from New York, and more. He asked that Feltoon (a terrific lawyer) be "removed," and added:

> Maybe I'm spoiled. The treatment Jonathan M. Jacobson, Esq. of Lord, Day and Lord gave me was superb (he is the attorney who got the reversal on the legal mail case and its reinstatement. Unfortunately, he cannot do the trial work, which I had hoped he could.). He promptly answered my questions, sent me several draft briefs and kept me

> posted at all stages of the case, to the smallest detail. He actually treated me like a free, fee-paying client.
>
> Am I expecting too much by hoping for the same treatment from your firm?

The Davidson story did not end there. Feltoon made it to Dannemora shortly afterwards. Davidson told him "the trouble with guys like you is that you think guys like me won't get out." Yikes! To his great credit, Feltoon stuck with the case. A few months later, I received a call from Feltoon to tell me about the trial. It turned out there wasn't one. Davidson had been with Feltoon in the courthouse, starting with jury selection. Right after his chains were loosened, Davidson bolted for the door and made it down two flights before the marshals captured him. That was the end of the case.

I thought we had heard the last of Ronald Davidson but no. Several years later, when I was at Akin Gump, the Second Circuit pro bono clerk called me with another one of his many cases – this one involving access to Kosher food. I assigned it to a junior associate, and she won for him again. No escape attempts this time, fortunately. Following these cases, I had several more much less interesting pro bono cases. As I got older, I began assigning these cases (as with Davidson's later case) to more junior lawyers. I would supervise the briefs and help them prepare for argument. Good fun for me, good experience for them.

8. BAYOU BOTTLING

The pro bono cases had an additional, personal benefit: they provided a basis for client confidence that I could handle an antitrust appeal. That was the situation with the *Bayou Bottling* case.

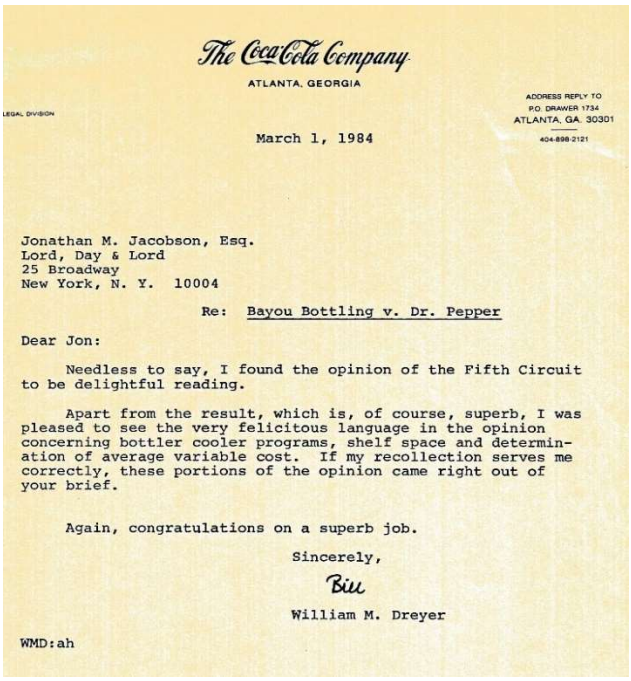
Bayou Bottling was a Pepsi bottler in Lake Charles, Louisiana. It lost a bidding war for Lake Charles Dr Pepper, which was instead acquired by Lake Charles Coke (LCC). Bayou sued; it contended that the acquisition gave LCC a near monopoly with a 75%-80% share of the Lake Charles soft drink market. Bayou also challenged some of LCC's marketing practices. Specifically, LCC supplied vending machines and coolers without charge, and serviced them for free, on the condition that the machines serve Coca-Cola/Dr Pepper products exclusively. LCC also charged very low prices and told retailers that it expected to receive shelf space consistent with its market share.

Coca-Cola management had offered to aid in the defense of the case and asked Gordon for our group's help. I had done extensive work on the *Territories* case, some counseling, and a fountain syrup dealer termination matter; so I knew the Coke system pretty well and got assigned. Discovery was largely completed by then and the case had moved to the summary judgment stage. I wrote the moving and reply briefs and travelled to Lake Charles for the hearing. Our local counsel, Bill Shaddock, knew the judge well and he argued the motion. The motion was granted, dismissing the case. 543 F. Supp. 1255 (W.D. La. 1982). Bayou appealed.

I wrote our appeal brief. The main argument was that Bayou suffered no "antitrust injury" from the acquisition – for if the deal led to price increases, that would help Bayou, not harm it. We also defended the challenged marketing practices as just good old-fashioned competition. Everyone at Lord Day expected that Gordon would argue the appeal. But Coke's lead inhouse competition lawyer, Bill Dreyer, called me to ask about my appellate experience. I recounted the various matters I had argued pro bono. Bill decided that, because I knew the case backwards and forwards, had written the brief, and had adequate oral argument experience, I should handle the argument. I was thrilled. Oddly, I was not nervous.

In the Fall of 1983, I flew down to New Orleans. I was there with Bill Shaddock, who happily showed me some of the sights. We dined over the two days at Galatoire and Antoine's. Argument was at the spectacular Fifth Circuit courthouse before a panel of three judges. Again, to my surprise, I was not nervous. I was asked one tricky question from Judge Goldberg, and he seemed satisfied with the response. Counsel for Bayou argued well but took something of a beating.

On February 21, 1984, my phone rang. It was Bill Shaddock calling to tell me that we won. It was a great opinion, endorsing all the points we had made in the brief. 725 F.2d 300. LCC was thrilled, and Coke too was happy. Bill Dreyer sent me this:



The Coca-Cola Company
ATLANTA, GEORGIA

LEGAL DIVISION

ADDRESS REPLY TO
P.O. DRAWER 1734
ATLANTA, GA. 30301
404-898-2121

March 1, 1984

Jonathan M. Jacobson, Esq.
Lord, Day & Lord
25 Broadway
New York, N. Y. 10004

Re: Bayou Bottling v. Dr. Pepper

Dear Jon:

Needless to say, I found the opinion of the Fifth Circuit to be delightful reading.

Apart from the result, which is, of course, superb, I was pleased to see the very felicitous language in the opinion concerning bottler cooler programs, shelf space and determination of average variable cost. If my recollection serves me correctly, these portions of the opinion came right out of your brief.

Again, congratulations on a superb job.

Sincerely,

Bill

William M. Dreyer

WMD:ah

The *Bayou Bottling* win solidified my position as one of Coke's go-to lawyers. That would become increasingly important for my career.

Fifth Circuit Courthouse in New Orleans

9. ECONOMICS

The 1977 decision in *Sylvania* made clear that economics would be important and often decisive in antitrust cases. I had taken Economics 101 in college, but that was a far cry from the knowledge required in the wake of *Sylvania* and the larger movement to base antitrust rules on economic effects. Gordon always believed that the facts should determine the outcome, not economic theory. So when Standard Oil of California gifted him an opportunity to take an advanced antitrust economics course at UCLA, he declined but – in another big break – gave the opportunity to me.[3]

The course at UCLA was basically right-wing, Chicago School economics. Our reading list started with Robert Bork's *Antitrust Paradox*, and the course focused us on why the 1960s Supreme Court decisions were all wrong – at least in our teachers' view. The teachers were outstanding, Armen Alchian and Ben Klein. Although I left the course with a lot of skepticism about the conclusions, I learned a lot. One other student and I pushed back on some of the harder propositions to swallow, but the exposure to the concepts being taught was great. Getting an understanding of price theory, welfare effects and tradeoffs, and merger impacts

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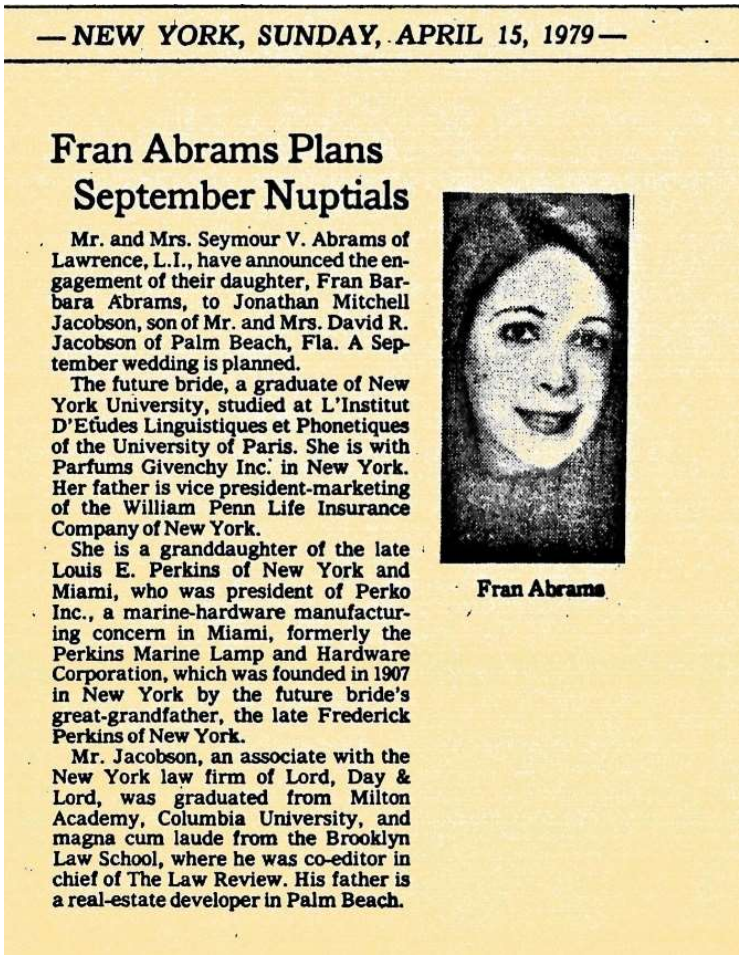
[3] Gordon had just won a major case for Standard Oil of California (now Chevron). The case was brought by the Hunt brothers against all the major oil companies. Gordon was lead counsel and broke Nelson Bunker Hunt down on the witness stand, following which the legendary Judge Edward Weinfeld ruled for the defense in the bench trial. The UCLA gig was meant as something of a prize for the accomplishment.

was invaluable and would be a real boost to me in my career. I learned also that largely the same course was given (by Alchian and Henry Manne) in Miami to federal judges on an all-expense paid basis. It went unnoticed at the time but would (rightly) be a major scandal today.

The UCLA course was a boondoggle. I had just gotten engaged to the wonderful Fran Abrams. I cashed in my first class ticket to get two coach tickets. It was a two-week course, and Fran flew out for the middle Friday to Sunday weekend. It was amazing. The hotel near the campus was luxurious and I rented a bright yellow Camaro. We did Disneyland, Universal Studios, and Fran even got on a game show pilot and won.



— NEW YORK, SUNDAY, APRIL 15, 1979 —

Fran Abrams Plans September Nuptials

Mr. and Mrs. Seymour V. Abrams of Lawrence, L.I., have announced the engagement of their daughter, Fran Barbara Abrams, to Jonathan Mitchell Jacobson, son of Mr. and Mrs. David R. Jacobson of Palm Beach, Fla. A September wedding is planned.

The future bride, a graduate of New York University, studied at L'Institut D'Etudes Linguistiques et Phonetiques of the University of Paris. She is with Parfums Givenchy Inc. in New York. Her father is vice president-marketing of the William Penn Life Insurance Company of New York.

She is a granddaughter of the late Louis E. Perkins of New York and Miami, who was president of Perko Inc., a marine-hardware manufacturing concern in Miami, formerly the Perkins Marine Lamp and Hardware Corporation, which was founded in 1907 in New York by the future bride's great-grandfather, the late Frederick Perkins of New York.

Mr. Jacobson, an associate with the New York law firm of Lord, Day & Lord, was graduated from Milton Academy, Columbia University, and magna cum laude from the Brooklyn Law School, where he was co-editor in chief of The Law Review. His father is a real-estate developer in Palm Beach.

Fran Abrams

The UCLA course, short as it was, enhanced my understanding of the economic concepts that were becoming increasingly important in our cases and was very important for my career. Given Gordon's reluctance to deal with the economists, I became our group's main economic "expert," and was tasked with handling the economists in my cases going forward. I even joined the American Economic Association.

10. THE TEXAS UTILITIES SAGA

In 1981, Gordon came back from the American Bar Association's annual meeting in New Orleans with a new potential case. The client was Texas Utilities, which, as the name suggests, was the largest provider of electricity in Texas.

My true partner-in-arms on the case was Elinor Hoffmann, who had been a year behind me at Brooklyn Law School, and who also made Law Review. She interviewed at Lord Day at my recommendation, and the firm made the happy decision to offer Elinor a job.[4] We drafted the complaint, not suspecting that the case would last a dozen years.

The case was about coal in New Mexico's San Juan Basin, a remote area in northwest New Mexico. Santa Fe Industries and Peabody Coal both owned significant deposits. But instead of competing, they decided to join forces and market the coal jointly. In this period following the Arab oil embargo, alternative energy sources were in great demand. TU was interested in securing a long-term coal supply at cost-effective prices. It entered into a 35-year "take-or-pay" contract with Santa Fe and Peabody – meaning that TU had to take the specified quantity of coal for the relevant quarter or pay for it anyway if it chose not to take the full amount. TU's plan was to fulfill its coal needs

[4] Elinor later became Chief of the New York State Antitrust Bureau and was honored with the New York State Bar's prestigious Lifland award in 2024.

and to market the excess to others in order to reduce the overall cost. The ability to market to third parties was key for TU.

Marketing the coal (or securing it for TU's own use) faced a natural problem, however. You needed a railroad to get it anywhere. But no worries, after all Santa Fe is a railroad. Makes sense, right? Actually no. Santa Fe said in the take-or-pay negotiations that it could not commit to building the spur to its own main line because of the Commodities Clause of the 1909 Hepburn amendment to the Interstate Commerce Act. That provision prevented railroads from carrying "any article or commodity . . . manufactured, mined, or produced by it or . . . in which it may have any interest." So the excuse was facially credible even though it was to be TU's coal, not Santa Fe's, that would be carried. Santa Fe executives assured TU in the negotiations that it would not be a problem. Wink wink. Not the greatest idea for TU to agree to pay all this money without a guarantee that it would be able to actually get the coal to market.

The killer came less than a year after the contract was signed. Santa Fe announced new coal deposits, wholly owned, of greater quality than what TU had bought, and closer to its main line. And started marketing it to third parties with assured rail access. Somehow now the Commodities Clause was no longer a problem. Apparently, creating a separate subsidiary – here called Hospah Coal Company – could cure the problem.

Elinor and I were supervised by Gordon and another partner, John McBaine. Our complaint charged price fixing, monopolization, and fraud. The client wanted the case filed in Dallas, and so we did so on December 18, 1981, a Friday. Dallas counsel faxed a copy to Santa Fe as a courtesy. When we returned to the office the following Monday, there was another fax. A temporary restraining order from the U.S. District Court in Albuquerque, New Mexico, enjoining us from proceeding anywhere but New Mexico. The reasoning was that the take-or-pay contract had a venue selection clause specifying that any litigation would have to be brought in New Mexico.

The temporary restraining order became a preliminary injunction, an order that can be appealed. Which we did. I wrote the brief with Elinor's assistance. Gordon argued. Our primary argument was that the court where the first complaint was filed, Dallas, should be the court to determine whether to keep or transfer the case. The Tenth Circuit agreed, and so we went back to Dallas. Hospah Coal Co. v. Chaco Energy Co., 673 F.2d 1161 (10th Cir. 1982). Not much good came from that. The Dallas judge agreed that the venue clause was lawful and enforceable and transferred the case back to New Mexico. Texas Utilities Co. v. Santa Fe Industries, 553 F. Supp. 106 (N.D. Tex. 1982).

Santa Fe filed a motion to dismiss, which was eventually denied. Texas Utilities Co. v. Santa Fe Industries, 627 F. Supp. 44 (D.N.M. 1985). In the meantime, Elinor and I flew to Albuquerque, where Santa Fe's initial document production was to take place. We struck gold on the first day

there, finding the key document that we would rely on throughout the case. In it, John Schmidt, then executive vice president of Santa Fe and the lead executive on the deal, explained that he had gotten together with Peabody, and

> my research to date indicates that [the transaction] is the *highest priced, long-term, take-or-pay agreement made for western coal of this quality in modern times*. Peabody sales representatives corroborated this conclusion. Based on January 1, 1974 costs, the life of mine price would have been $9.26 per ton F.O.B. mine. The current cost will be higher. *Two months prior to our entering the picture [Peabody] had offered its Star Lake reserves to [the Phoenix, Arizona utility] for $3.28 per ton F.O.B. mine*.

Combining with Peabody, in other words, raised the price some 300%. Elinor and I spent many weeks in Dallas reviewing TU's own documents and strategizing with Dallas counsel. The lead lawyer there, Merlyn Sampels, was a named partner in his firm and operated as TU's outside general counsel. Picture JR Ewing with a law degree. That was Merlyn. Strangely, he really liked Elinor and me. So much so that he demanded we spend most of our time in Dallas, and he even had his assistant scope out apartments for us. The last thing I wanted was to live in Dallas. Not that it affected my view, but one of the secretaries in Merlyn's offices volunteered that I was the first Jewish person she had ever met.

Fran accompanied me on a few Texas trips – loving the dining at the Mansion on Turtle Creek – but having her husband basically move there was not something she or anyone but Merlyn actually wanted. Elinor and her husband equally adamant. Fortunately, Gordon came to our rescue. We didn't have to move to Dallas. But we still had numerous trips there. The Plaza of the Americas hotel was our home away from home.

Later in the case, Merlyn made the sensible decision for our team to visit the San Juan Basin to get a sense of the terrain and what might be required to build the necessary railroad. The only ways to get there were horseback or helicopter. So we decided to fly. The problem was that, when the day arrived, the sky was almost black due to massive thunderstorms in the area. Our group arrived nevertheless at the Albuquerqe airport. We were greated by the helicopter pilot, a tough-as-nails ex-Marine. He spat out: "I don't know if we can complete the mission," and asked if we still wanted to go. Without waiting to hear from anyone else, Merlyn immediately said "we're going," and that was that. Gordon, Elinor, and I grimaced but went along. I think my knuckles are still white. The pilot was able to steer away from the storms and we made it. The trip was worthwile, and gave us a better understanding of the fix TU was in. The ride back was in sunshine.

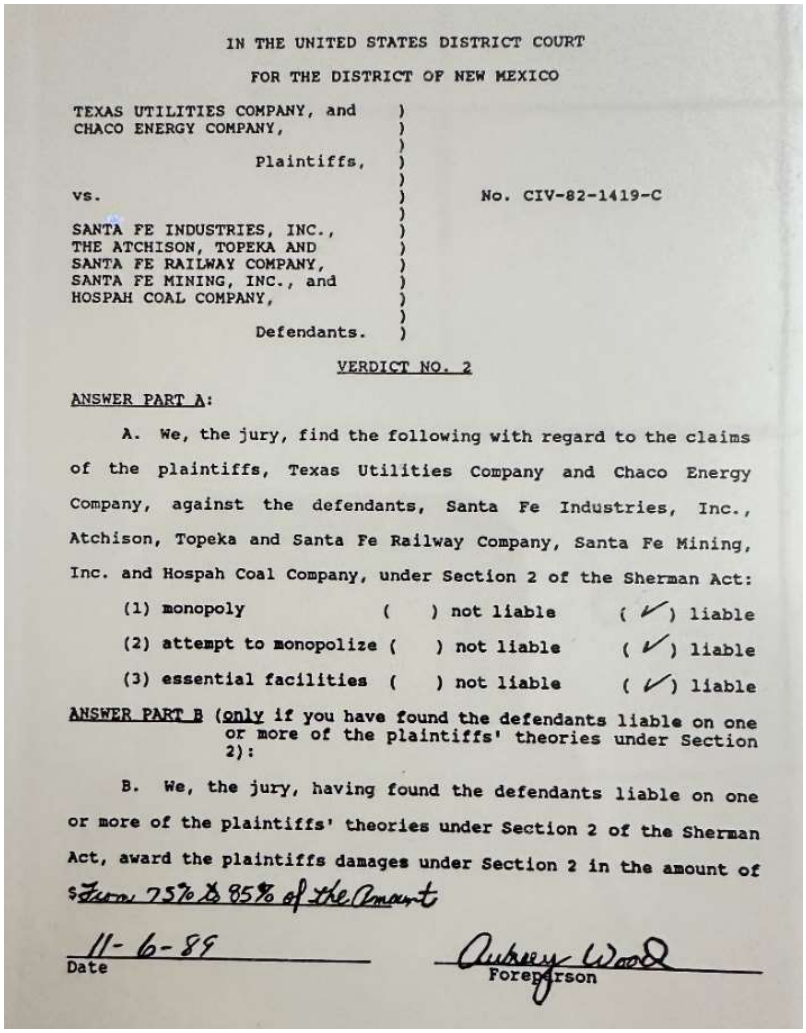
I spent much of the case dealing with the economists, Charles Kolstad on our side and Joseph Kalt on Santa Fe's. In Kolstad's deposition, the Santa Fe lawyer tried to be tough. He said "you can run but you can't hide" to Kolstad,

who had never been an expert before. I said "we're taking a break." The other lawyer said, no, he hadn't agreed to a break, but he couldn't stop us and so we spent a few minutes cooling down. When we returned, the first question was "what did your lawyer tell you just now?" I said that normally I'd object to revealing such a conversation, but this time I insisted that a full answer be given. It was: "Mr. Jacobson told me that you are a sad excuse for a lawyer and I should continue to answer questions and to pay your insults no mind." A good chuckle.

The case was eventually transferred to another New Mexico judge, Judge Campos, who was based in Santa Fe. Facing what both sides had told him would be a nine month trial, he asked the parties if we and they would agree to a "non-binding summary jury trial" to see if the case could be settled. Santa Fe had refused even to discuss settlement before then. Neither side truly wanted this non-binding, one-day trial, but no one wanted to tell the judge no.

The mock trial took place over one day in November 1989 in Santa Fe before a visiting judge from Oklahoma. My role was to draft and argue the jury instructions. Gordon had fallen at his New Haven home a week before and was sporting a cane. It proved to make him quite sympathetic to the jury, and as he usually did he handled all of our two hours of presenting evidence himself. We won. Big. The jury found Santa Fe liable on all claims, and awarded "75%-85%" of the amount sought – which amounted to roughly $2 billion, a lot of money at the time. The case settled that day. Without

skipping a beat or asking, Gordon sent a bill for a $3 million premium. The check arrived three days later.



IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

TEXAS UTILITIES COMPANY, and CHACO ENERGY COMPANY,

Plaintiffs,

vs.

No. CIV-82-1419-C

SANTA FE INDUSTRIES, INC., THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE MINING, INC., and HOSPAH COAL COMPANY,

Defendants.

VERDICT NO. 2

ANSWER PART A:

A. We, the jury, find the following with regard to the claims of the plaintiffs, Texas Utilities Company and Chaco Energy Company, against the defendants, Santa Fe Industries, Inc., Atchison, Topeka and Santa Fe Railway Company, Santa Fe Mining, Inc. and Hospah Coal Company, under Section 2 of the Sherman Act:

(1) monopoly ( ) not liable (✓) liable

(2) attempt to monopolize ( ) not liable (✓) liable

(3) essential facilities ( ) not liable (✓) liable

ANSWER PART B (only if you have found the defendants liable on one or more of the plaintiffs' theories under Section 2):

B. We, the jury, having found the defendants liable on one or more of the plaintiffs' theories under Section 2 of the Sherman Act, award the plaintiffs damages under Section 2 in the amount of

$ From 75% to 85% of the Amount

11-6-89
Date

Aubrey Wood
Foreperson

11. ROYAL CROWN & 60 MINUTES

In 1985, bottlers of Royal Crown and a drink called Sun Drop (think Mountain Dew) sued Coca-Cola Consolidated (the Charlotte, North Carolina, Coke bottler) and the local Pepsi bottler there for antitrust violations. The case centered on "calendar marketing agreements" (CMAs) in Charlotte. Those were (and are) agreements under which Coca-Cola reduces its prices to supermarkets and convenience stores in return for their agreement to feature the products with an end-aisle display, prominent shelf space, a significantly reduced price, and a prominent ad in the newspaper. Pepsi's CMAs were largely the same. Charlotte was known as a "parity" market (as between Coke and Pepsi). The result was that Coke and Pepsi would battle each other but would each have to settle for 26 weeks or so of promotion in supermarkets (and six months in convenience stores), and still continue battling for holidays like July 4. They both tried for more than 26, but retailers liked playing one off against the other and keeping them on equal terms. RC and Sun Drop got a small few such promotions, but an ad for Sun Drop will draw far fewer customers to the store than an ad for Coke brands at reduced prices. Sun Drop and RC claimed that this was not actually intense competition (which it was) but a Coke-Pepsi conspiracy (which it was not). As a result of CMAs, Charlotte consumers could get Coke or Pepsi products in two-liter bottles every week at 99¢, sometimes less. Most consumers preferred one or the other and knew they just had to wait a week to get the on-sale price.

The case was filed before Judge James McMillan. He was the courageous jurist that ordered desgregation of the Charlotte schools. See Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971). His home was shot at weeks and months after his ruling. Judge McMillan was one of the trial court judges in the mold of Hugo Black and William O. Douglas. Basically, he thought Rule 56 (the rule permitting motions for summary judgment before trial) was a mistake. If you filed a case, in his view, the jury should decide it. If the case was as silly as you claimed, the jury should figure it out. In 1985, Supreme Court precedent was also wary of summary judgment in antitrust cases. See Poller v. CBS, 368 U.S. 464 (1962). That changed completely in 1986, but the 1986 decisions of course were of no help in 1985.

Similar to *Bayou Bottling*, Coke wanted us to be involved in the case. Before we were retained, the plaintiffs filed a motion for a preliminary injunction banning CMAs from the defendants. Coke Consolidated's Charlotte counsel, Ozzie Ayscue, had been partners with the judge before he went on the bench and knew him really well. He thought that Judge McMillan would find the agreements illegal and enjoin them absent some concessions. With that in mind, he conceded that the earlier agreements – which specified that only Coke would be given the featured promotion during Coke weeks – were illegal; but an injunction was not necessary because those provisions had been removed. The judge agreed and denied the motion. Sun-Drop Bottling v. Coca-Cola Bottling Co. Cons., 604 F. Supp. 1197 (W.D.N.C. 1985). In discovery, it became clear that exclusivity here meant "no Pepsi," and

did not apply to RC, Sun Drop, or anyone else. Pepsi's were reciprocal.

My role in the case was to examine the other side's expert economist (David McFarland) and to present ours, the late Gary Dorman (who became a close friend). The deposition of McFarland was a trip. He testified repeatedly that the CMAs were "illegal price-fixing." In a trial, only the judge says what is illegal, so this was completely improper. But I had an answer. I asked him whether it would be illegal for half the songwriters in the country to offer blanket licenses to all their copyrighted music at a single price. He said yes, that would be illegal price-fixing. Completely wrong. A recent 9-0 decision of the Supreme Court had held otherwise. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979). But I was not telling him that then; I was holding it for trial. I followed with a few other questions based (without telling him) on other rulings involving failed allegations of price-fixing. And he blew every one of those answers too. So I had plenty for trial.

We tried our luck on summary judgment, knowing it was a long shot. The motion was denied almost immediately.

The trial took three weeks. Pepsi settled the morning before jury selection, leaving us to defend a conspiracy case with no help from them. Fran came down to Charlotte and observed parts of it. The evidence came in quite favorably. There was a focus on the now-abandoned "exclusive" promotion clauses in the CMAs. I believed strongly that they were not illegal and certainly not per se illegal, and our draft

jury instructions were consistent. McFarland testified, over my objection, that the Coke CMAs (and Pepsi's) were illegal. That gave me the opportunity to ask the songwriter question, and forced him to admit that his answer had been contrary to a 9-0 decision of the Supreme Court. I followed that with one, then another, of the other cases he got wrong. This led Judge McMillan to stop me; he told the jury that he, not any witness, would advise the jury on the law. When it was our turn, Gary Dorman demonstrated that Sun Drop and RC got plenty of promotions, even during "Coke weeks," just not with the same end-aisle requirement, and with the newspaper ad smaller than Coke's. Gary's NERA colleague, Tom McCarthy, poked large holes in the plaintiffs' damages presentation.

A low point was the cross-examination of Coke Consolidated's CEO, Marvin Griffin. Just before he got on the witness stand, he asked me what the other side could possibly want from his testimony since he had no role in drafting or negotiating the CMAs. I told him that Ward McKeithen, the lead lawyer for Sun Drop and RC, would give him the "Jerry Falwell" treatment. Which he did. Ward had the look of a tall, distinguished, white-haired, preacher. And he gave Marvin the very treatment I told him to expect. "You're the CEO and you didn't know?' "Are you saying that your deals with supermarkets aren't important enough for you?' "You didn't know?' I had not been involved in Marvin's preparation, and no one told him to expect this. It was brutal.

I did not handle our summation. McKeithen summed up first. He started with a large posterboard showing the

transcript where Ozzie had formally conceded that the "exclusive" CMAs were illegal. That was impossible to come back from. The plaintiffs had been seeking tens of millions of dollars in damages, but the jury awarded only about $1.5 million (which would be trebled). McKeithen congratulated me afterwards, but I was in no mood for it because I thought we should have won outright. I started working on an appeal, but our client wanted this behind us and so the case settled for roughly $2 million. I was not happy.

A few months later, we discovered that, at RC's instigation, CBS' *60 Minutes* was having a segment on CMAs. Morley Safer was the reporter. The featured witnesses were George Kalil, an RC bottler from Phoenix, and our very same David McFarland. A total hatchet job. Coke didn't want any of its employees (or counsel) involved, so it was as one-sided as you can imagine.

The *60 Minutes* feature led to an FTC investigation of CMAs. Gary Dorman, Jim Koelemay (terrific inhouse Coke competition counsel), and I went to Washington for a meeting with the staff. We presented compelling data (largely from A.C. Neilsen) demonstrating that CMAs increased Coke-Pepsi competition and led to lower prices overall. Staff terminated the investigation without even issuing any subpoenas.

12. DR PEPPER

On January 25, 1986, PepsiCo announced that it was acquiring 7-Up. At the time, Coca-Cola management had wanted to acquire Dr Pepper, but Jim Koelemay had advised that any such acquisition would be challenged by the FTC. So when Pepsi's announcement was made, Coke's senior management asked whether Pepsi just had better lawyers (!) and (more seriously) determined that, if Pepsi could do it, so would Coke. And on February 21, 1986, Coca-Cola announced that it would buy Dr Pepper.[5]

The two announcements made a big splash. Royal Crown sought a preliminary injunction against both deals in a Georgia district court, but the motion was quickly denied as there could be no irreparable harm from a transaction at the beginning of FTC review. Coke and Pepsi sought to persuade the Commission that the deals would increase market output and benefit consumers, but the FTC was having none of it and voted in June 1986 to challenge both transactions. We spent many weeks in Atlanta at Coke headquarters, locating, analyzing, and producing tons of documents in response to the FTC's "second request." Pepsi, true to form, abandoned its proposed merger before any complaint could be filed. Coke did not.

The Commission voted out a complaint on June 24, 1986, and the parties proceeded to trial in the District of Columbia

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[5] Some of this narrative appeared previously in my paper, "The FTC's Prior Approval Mischief," CPI ANTITRUST CHRONICLE, November 2023.

in delightful July DC weather before Judge Gerhart Gesell. Judge Gesell was the renowned advocate who, among many other accomplishments in private practice, won the important *duPont/Cellophane* monopolization case in the Supreme Court. But he was no shill for defendants in antitrust cases, with his basic 1960s antitrust outlook. As we would soon learn.

Trial lasted two weeks. My job was to prepare our economists (Will Baumol and Bill Lynk) and depose the FTC's (Larry White). I was able to get Professor White to concede that, because of competition from Pepsi, the acquisition would not confer monopoly power to Coke nationally or in any local market. Gordon argued the case and handled the witnesses at trial. The evidence was essentially undisputed that the acquisition would increase the share of the leading firm in carbonated soft drinks, which was found to be the relevant market and highly concentrated. But it was also undisputed that the acquisition would increase market output, and that there were significant efficiencies as Dr Pepper was predominantly sold by Coke bottlers. Judge Gesell was unfazed. On July 31, he issued an opinion preliminarily enjoining the merger. FTC v. Coca-Cola Co., 641 F. Supp. 1128 (D.D.C. 1986), *vacated as moot,* 829 F.2d 191 (D.C. Cir. 1987). We appealed. But just as I finished our appeal brief, Dr Pepper pulled the plug on the deal and soon afterwards was sold to the Hicks & Haas investment firm. (See Dr Pepper Halts Plan to Merge with Coca-Cola, L.A. Times, https://lat.ms/42S8SwC, Aug. 6, 1986.) The case had become moot as a result of the

sale, and we revised our appeal to argue that Judge Gesell's ruling should be vacated as a result. FTC staff opposed our motion, but the Court of Appeals agreed and vacated the ruling. FTC v. Coca-Cola Co., 829 F.2d 191 (D.C. Cir. 1987). The D.C. Circuit panel on the case included Robert Bork and Douglas Ginsburg. We were left to wonder what the outcome of a merits appeal would have been.

Back at the FTC for administrative proceedings, the case was still moot and Coca-Cola argued that continuation of proceedings would "not be in the public interest" (the FTC standard whether to pursue a case). Ultimately, Complaint Counsel and the ALJ agreed and recommended dismissal of the case. But the Commission, by a 2-1 vote (Chairman Oliver dissenting), found otherwise, saying: "We are not persuaded that subsequent events have eliminated the need for some form of prior approval relief if a violation of law is established. Notwithstanding Respondent's arguments to the contrary, continuation of this proceeding is therefore in the public interest." So the case was sent back to determine whether the acquisition in fact was unlawful and, if so, to enter a 10-year prior approval requirement for any proposed acquisition in the carbonated soft drink industry.

Most companies in this context submit to prior approval orders and settle. That was not an option for Coke. Prior approval would put Coke in a position where, if an asset or company came up for sale, Pepsi could buy it (subject of course to the normal HSR pre-merger notification process), but Coke could not – at least without a long review by FTC staff and the consent of a then-hostile FTC. The owners of

the asset would obviously prefer Pepsi in that context, and Coca-Cola would be at a serious disadvantage in this famously competitive business. So a moot case went to trial solely because of the prior approval threat.

By this time, Gordon's whole team had moved to Coudert Brothers as I discuss next. We tried the *Dr Pepper* case over several weeks before the ALJ, the first time in memory that a genuinely moot case went to trial – and this one was a major resource commitment from both sides. Gordon tried the case with principal assistance from Jim Eiszner, an associate at the time. I was busy on other cases but was brought in to examine George Kalil of *60 Minutes* fame and to help with the economists. ALJ Parker ultimately concluded that the merger violated Clayton Act § 7 and FTC Act § 5. He declined, however, to enter a prior approval order, finding it unnecessary and contrary to the public interest.

Both Coke and Complaint Counsel appealed to the full Commission, which unsurprisingly affirmed the merits ruling in a 3-0 vote and ordered a 10-year prior approval requirement. The order provided that, without the Commission's prior approval, Coca-Cola could not acquire anyone "engaged in the manufacture and sale in the United States of branded concentrate or branded syrup . . . or engaged in the franchising or licensing of any brand, name, or trademark used in the United States in connection with the production, marketing, or sale of branded concentrate, branded syrup, or branded carbonated soft drinks." Prior approval was not required for tiny acquisitions; for those there was a prior notice requirement.

Coca-Cola appealed once again to the D.C. Circuit. The arguments on the merits were largely the same, but the disparity between the treatment of Pepsi (who after all started the whole mess) and Coke was an additional point. While the appeal was pending, President Clinton appointed Robert Pitofsky to be the Chairman of the FTC. Pitofsky was firmly committed to aggressive antitrust enforcement. But he disagreed with the Commission's prior approval policy, and so there was room for a settlement.

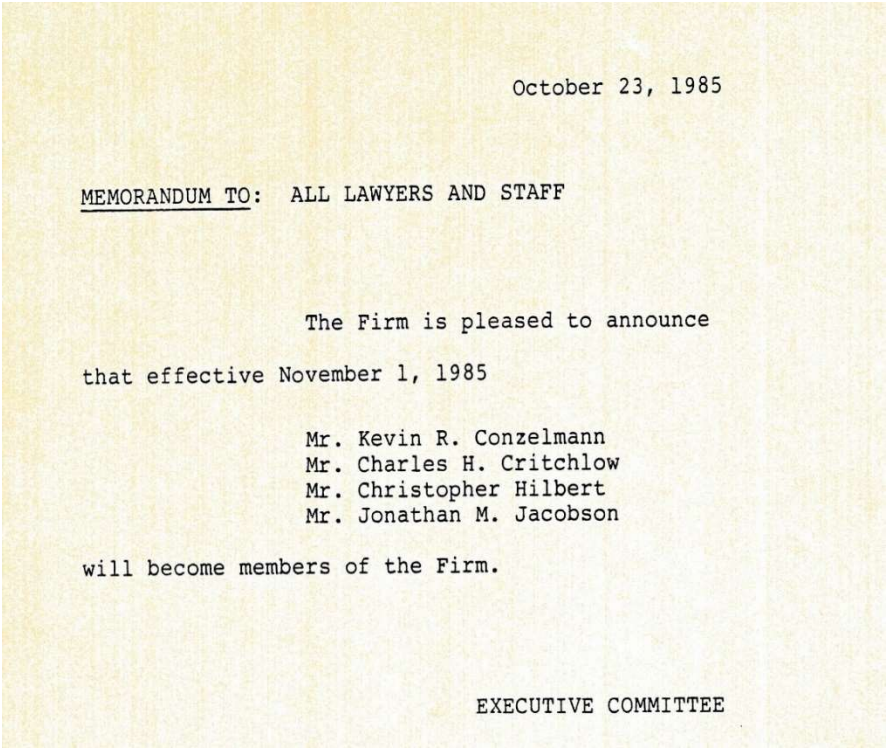
On May 18, 1995, a little over a month after Pitofsky became FTC Chairman, the case settled. Coke withdrew its appeal and the Commission entered a modified order under which: "Coca-Cola [was] required to *notify* the FTC and the Department of Justice before" any acquisition valued at $15 million or more. Prior approval was no longer required except if Coke sought to acquire Dr Pepper again. A final order to that effect was entered May 25, 1995. Coca-Cola Co., 119 F.T.C. 724 (1995).

13. MOVE TO COUDERT

I had always thought that, if I did well, I could make partner and could stay at Lord Day for the rest of my career. Sadly, that never happened. I was up for partnership consideration in October 1985, after the conclusion of the *Sun Drop* trial. At the same time, three others in our group, all one-year senior to me, were also up for consideration. Carolyn Ellis, who was two years senior to me, made partner in 1984. Gordon insisted that all of us make partner, and he was clear that Elinor, Doug Broder, and Jim Eiszner should also be made partner in the next few years. The majority of the partners in other groups were strongly opposed. Antitrust was doing great but, in their view, could not support seven new partners. Gordon was adamant and advised the other partners that our group would leave if our request was turned down.

There were several knock-down, drag-out partner meetings lasting late in the nights. Those of us who were up for consideration were in the dark due to partner confidentiality. Since we all thought our very futures were at stake, this was hard. Eventually, Carolyn Ellis left the partner meeting room and gave me a big smile. The next day it was announced that Charles Critchlow and I were elected partner, but Steve Hogan and Darrell Prescott were not; they were given the title of Counsel (a new concept then, quite prevalent today). When I got home, we had some wine with our good friends, Jeff and Barbara Bookman. But this was not a happy occasion. Everyone in our group was sad for Steve and Darrell, and worried about our other up-and-

comers. Gordon and the other antitrust partners were furious. Gordon was quite clear with the other partners that our group would look to leave.



October 23, 1985

MEMORANDUM TO: ALL LAWYERS AND STAFF

The Firm is pleased to announce that effective November 1, 1985

Mr. Kevin R. Conzelmann
Mr. Charles H. Critchlow
Mr. Christopher Hilbert
Mr. Jonathan M. Jacobson

will become members of the Firm.

EXECUTIVE COMMITTEE

Starting soon afterwards, Gordon and the more senior partners started looking for new homes for the group. The process took almost a year. We came close to joining the Sutherland Asbill firm, but that did not work out. Eventually, the decision was made to go to Coudert Brothers, another firm with a venerable history starting in 1853, and with excellent lawyers in offices around the world. The New York offices were in the PanAm building (now Met Life) above Grand Central Station. We moved with 20 lawyers,

plus our secretaries and paralegals. The media coverage was extensive. There were stories in the New York Times, Wall Street Journal, US News & World Report, Time, Newsweek, and all the major legal papers. Here is US News & World Report:

WORK ■ Higher pay and better opportunities are prompting job hopping with a new twist

Taking the whole team next door

■ Citicorp had a problem. Although the banking giant was paying key government-securities traders in its investment-banking unit up to $350,000 a year in salary and bonus, some of its most talented staff were being wooed to other Wall Street firms for two and three times as much. To stem the exodus, Citicorp did what it said it would not do. It recently upped compensation substantially.

These days, Citicorp isn't the only company feeling the draft from an open door. But the long accepted business practice of moving to greener pastures has a new twist: Entire units are leaving to set up shop at another company. The reason, explains executive recruiter John Franklin, Jr., of Russell Reynolds, is that "companies starting new departments find it easier to hire away entire units and often will pay a premium to land an entire group."

Most mass defections occur in service firms, where the expertise stored in people's heads and their personal relationships with clients, not factories and capital equipment, are business's biggest assets. In October, legal star Gordon Spivack, who started the antitrust department at New York law firm Lord, Day & Lord, shocked the legal world by leading his team of 19 lawyers, four paralegals and nine secretaries to rival firm Coudert Brothers.

A long-simmering dispute over how many of Spivack's lawyers would be offered partnerships precipitated the move—and the group's work was too intertwined to consider splitting up. "We're like a family. We had grown up as a team. We all worked closely together, some of us for 14 years," Spivack says.

After 17 years with Lord, Day & Lord, a dispute over how many associates would become partners caused Gordon Spivack to lead his entire antitrust unit to a rival Wall Street law firm

When real-estate company Coldwell Banker's parent firm stopped a joint real-estate venture with mutual-fund company T. Rowe Price—to manage real-estate portfolios for individual investors and institutions—Price hired away Coldwell's group of six professionals and two support staffers.

Threatening lawsuits

Defections are most prevalent in the financial-services industry, where esoteric new products—such as mortgage-backed securities and interest-rate and currency swaps—can mean millions of dollars in new business overnight. "We're in a hot labor market for a few narrow specialties," says Mark Bieler, senior vice president of human resources at Bankers Trust. "People go with the highest bidder." Last September, for instance, Chase Manhattan Bank's senior vice president and managing director, Robert Kern, left after 21 years, with four associates, to go to the American unit of British merchant bank Morgan Grenfell Group PLC.

Threatening a lawsuit is the only club a company has over defecting groups, and in most cases, it's not a very strong weapon. When four former Citibank executives who specialized in interest-rate swaps went to Bear, Stearns, Inc., last December, Citicorp sued the securities firm, alleging that its former employes stole six large boxes of confidential bank documents and trade secrets. To settle the case, Bear, Stearns paid $25,000 in legal fees to the bank—a mere token for two such financial giants.

Employment contracts for middle managers and top executives at many companies often include a "noncompete clause" that bars the employe from working for a competitor for a certain time period and from revealing trade secrets or other proprietary information learned on the job. Severance pay and pension benefits may be tied to the terms of the employment contract. But the enforceability of noncompete clauses varies by jurisdiction. It's a murky area of the law, notes employment lawyer Andrew Kramer of Jones Day Reavis & Pogue. "You can try to discourage employes from leaving, but you can't stop them."

Nor can a company stop clients from following. "All of our clients came with us," says lawyer Spivack, including Coca-Cola, Smith Barney, L. F. Rothschild and Texas Utility. An exodus also creates a public-relations problem, inside the firm and out. "It looks bad," reports executive recruiter Franklin. "It shows the collegiality in the organization is to the unit and not to the firm."

A group pullout can lower morale among those who stay or can make others wish they were going, too. "Some people at Coldwell expressed interest in what we were doing, but we made a conscious decision not to disrupt the [employes still at Coldwell] for a while," says Reid Samuelson, president of T. Rowe Price Realty Advisers and former president of Coldwell Banker Capital Management Services.

Moving to the new place isn't stress-free, either. Organizations "react in funny ways to foreign elements," says Bieler of Bankers Trust. That's especially true when the newcomers have been lured by higher salaries and special perks. There's always the danger that the new guard may set the old stars searching for a new home of their own. ■

by Beth Brophy

The *American Lawyer* was very critical. In an article titled "Nobody's Partner," https://bit.ly/3SXC6H6, it slammed Gordon and our group for what they claimed was a disregard of long-term profitability. All the other coverage was favorable. Steve, Darrell, Elinor, Jim, and Doug all made partner upon the move. We moved from 25 Broadway to the Pan Am Building on October 1, 1986. All our matters came with us. We felt that the *American Lawyer* story had it all wrong. Here was a guy who could have stayed in a cushy job for as long as he wanted, but looked past his own well-being for the benefit of more junior lawyers.

My assistant (called secretaries then) was Carol Stavros.

Carol did not come with us from Lord Day to Coudert. She had been at White & Case but joined us when that firm moved from Wall Street to midtown. Carol lives in Staten Island. Lord Day's offices at 25 Broadway were a short walk from the Staten Island Ferry. So when we moved to Coudert in midtown, that was a big negative and she decided to stay at Lord Day. I was upset but understood that the geography made a lot of sense. But I would miss her many skills and wonderful can-do attitude.

On the first day at Coudert, around noon, I answered the phone. It was Carol. Could she *please* come with us after all. It took me zero seconds to say "yes of course." She joined us in midtown the next day. It was great news. The move to Coudert went smoothly but I was still nervous about it. I had proven myself at one firm but now I was starting fresh in another. Knowing that Carol would be with me made it much easier.

Carol started working with me in the Spring of 1985. She is still with me, and I with her, today – 39 years later. We've been through her marriage, divorce, and the birth and growth to adulthood of her son, Johnny. Apart from my marriage, this is the longest and best partnership of my career.

Carol and Johnny

14. THE SEWELL PLASTICS STORY

On August 6, 1986, the *Wall Street Journal* front page had two articles relating to Coca-Cola. One reported on Dr Pepper's announcent terminating the proposed merger. The other announced that Sewell Plastics was suing Coca-Cola and all the many Coke bottlers in the Southeast. Sewell was a commercial plastic soft drink bottle manufacturer. It claimed that the formation and operation of the Coke bottlers' plastic-bottle-making co-op was illegal. When the co-op, Southeastern Container, was formed, the bottlers all agreed to take 80% of their requirements from the co-op for five years so that Southeastern would have enough volume to justify the investment in expensive, state-of-the-art bottle-making machinery. Sewell claimed that this was a group boycott of commercial suppliers – if you were getting 80% of your bottles from Southeastern, then you weren't getting that volume from Sewell. Sewell also claimed it was price-fixing because Southeastern was comprised of several different bottler purchasers, but they all had agreed (of course) to the prices Southeastern would charge them.

Getting beverages into cans was also capital intensive. Canning facilities required high-speed machinery that was quite expensive. Smaller and even some larger bottlers could not afford their own. So bottlers of the same brand had come together in canning co-ops to pool their volume to make the investment justifiable. In the Southeast, the Pepsi co-op was known as Carolina Canners. In the early 1980s, Carolina Canners and its members formed a plastic bottle cooperative. At the same time, in west Texas, a group of Coke bottlers

formed their own plastic bottle co-op called Western Container. Commercial suppliers were charging over 30¢ for every two-liter bottle, a huge expense when two-liter drinks were regularly on sale at 99¢ a bottle. Reports in beverage media indicated that the bottlers in Carolina Canners were paying 20-25¢ a bottle. That 5-10¢ cost advantage was huge, and required the Coke bottlers to respond.

The Southeast Coke canning co-op was called South Atlantic Canners. The members were joined at the outset of this venture by Coca-Cola Consolidated, the Charlotte bottler from the *Sun Drop* case. With the volume from Consolidated and the members of South Atlantic, there was critical mass. The members hired John Dunagan, who was instrumental in the formation of Western Container, as a consultant. He advised on the volume commitments and the types of equipment to be purchased. He also enlisted Richard Roswech as Southeastern's president. Roswech had substantial plastic bottle-making experience.

The lawsuit was filed when we were still at Lord Day. Several firms sought the representation. We did not pitch. Marvin Griffin, Consolidated's CEO, remembered me from the *Sun Drop* case, and insisted that I be hired. Consolidated was the largest bottler in the group, and we had a good track record. The Coca-Cola Company supported our retention and was comfortable enough that they used Bill Dreyer and other inhouse counsel to litigate rather than an outside firm. Southeastern itself was represented by Ozzie Ayscue and his firm. We were retained to represent all of the many bottlers. This was the first matter in which I personally received

orgination credit for bringing in the case. I operated as lead trial counsel for the defense group, also a first.

Sewell filed its case in Charlotte, where it was assigned to Judge McMillan. We later found out this was no accident. In discovery, we uncovered two prior complaints that had been filed. They were both assigned to a different judge and then dismissed voluntarily before we could be served. Only the third-filed case went to Judge McMillan. Sewell loved the fact that he just didn't grant dismissals or summary judgments. Having just been through *Sun Drop*, we knew we were in for a long haul. That was so even though the entire defense team agreed that the case was ridiculous. How could it be illegal to form a co-op to make bottles and close the competitive gap with Pepsi?

Discovery was extensive. Our witnesses held their own. A high point was my deposition of Sewell's CEO. Before asking the traditional background questions, I started right in by asking him about the injunctive relief being sought in the complaint. The answer was that they wanted Southeastern to be sold to Sewell! That would have given Sewell a near monopoly and was the best answer we could have hoped for from him.

Sewell had no interest in competition. It wanted only to pad its own profits. Sewell confirmed this in its litigation strategy. Sewell hoped that the bottlers would not want the expense and hassle of dealing with a major antitrust suit. So it approached bottlers asking them to settle and get dismissed from the case. It turned out that Sewell had made

the same offer to The Coca-Cola Company. The response referred to an area of the anatomy where the sun does not shine. The approach worked, however, with the Wilmington, NC, bottler. Wilmington was dismissed in return for agreeing to take 100% (not 80%) of its plastic bottle requirements from Sewell. The entire case was thus a cynical ploy to get more Coke bottler volume. No one else took the bait. Sewell's documents revealed that Southeastern's low prices, based on the most modern state-of-the-art equipment, were causing Sewell to lose volume and to respond by lowering its prices. This is the essence of competition and no basis for a lawsuit. I drafted and we soon filed a counterclaim against Sewell for unfair competition under North Carolina state law. We retained two expert economists, Gary Dorman and Will Baumol. Will was a giant in the field. He had also just published an article called "The Use of Antitrust to Subvert Competition," which fit Sewell's behavior perfectly.

We knew Judge McMillan's views on summary judgment but decided to try anway. We filed a reasonably short set of papers, arguing that the creation and operation of Southeastern could not possibly be illegal per se and that the rule of reason case failed for lack of harm to competition. Sewell cleverly responded with lengthy briefing and a huge set of papers in their appendix. And the judge slammed *both sides*. Sewell Plastics, Inc. v. Coca-Cola Co., 119 F.R.D. 24 (W.D.N.C. 1988). He had his clerk stand next to the papers and said: "The stack is nearly two-thirds the thickness of Dr. Elliot's famous 'Five Foot shelf' of books. Placed on a low

table, they extend above the head of Cindy Schwartz, the 5-2 deputy clerk shown in the photograph."

Fortunately, the judge did not deny our motion. Instead, he ordered the parties to reduce their submissions to ten pages only. Which we did. We had hoped that the judge was sufficiently tired from *Sun Drop* that spending another long trial with us was not his first choice. And he actually granted the motion in part, dismissing the per se claim but sustaining the rule of reason claims. Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1186 (W.D.N.C. 1988). That would not shorten the trial at all and we asked his permission to appeal the rule of reason denial to the Fourth Circuit Court of Appeals. Typically, you can only appeal a final order or judgment. But appeals in the middle of a case are allowed if both the district court and court of appeals agree. Judge McMillan authorized the appeal. But just as we were filing our brief in the Fourth Circuit, there was some very bad news. Three of my bottler clients were indicted for price-fixing and one pleaded guilty. Those facts were entirely irrelevant to the question whether to accept the

appeal, but our request was denied and back we went to Judge McMillan.

We had to get ready for trial. I was joined in Charlotte by Carolyn Ellis and a wonderful associate, David Schwartz-Leeper. Carol also was with us for parts of the preparation. Fran was pregnant and could not come. A few weeks before trial, to our pleasant surprise, Judge McMillan entered an order, on his own, requiring the parties to reargue the summary judgment motion. By this time in 1988, Southeastern had reduced the cost of two-liter bottles to just 13¢ a bottle, almost 60% less than the 30¢ they had previously charged. Working again with Gary Dorman, we developed a correlation with soft drink prices: as bottle costs declined, so did soft drink prices. The data also showed that whatever market Sewell was claiming had become less "concentrated" and so more competitive after Southeastern's formation. And of course, we had Sewell's documents explaining that their fears were about competition. The most they had was an exclusive dealing case in a context where the partial exclusivity was essential to the creation of a new, significant competitor.

We reargued the summary judgment motion. When we were done, Judge McMillan said "I don't see how this plaintiff can possibly win," but denied our motion anyway. We got to jury selection. After the jury was picked and excused for the day, the judge asked that our motion be argued again, and it was but with the same result. Jury selection itself was noteworthy. After one juror was excused and replaced, the judge forgot to ask the question (which is

always asked) whether the new juror knew any of the parties or counsel. Ozzie got up and reminded him. The juror then responded: "Why, yes, Mr. Ayscue, I know you. You teach Sunday school to my children and we go to church together. I know you would never represent anyone who had done something wrong." I stood up and consented to her removal for cause. Judge McMillan said: "I don't see any cause." Sewell naturally excused her anyway.

Trial began the Tuesday after Easter 1989. The huge ceremonial courtroom was filled. Every Coke bottler in the South was there, as were reporters and representatives from Sewell, Southeastern, and The Coca-Cola Company. Bill Dreyer and Ozzie gave short opening statements. Mine was more extensive, focusing on the data points showing that everyone benefitted, except Sewell. It went really well, which was a miracle. I was so nervous that I had thrown up a few minutes before the opening statements.

After all the opening statements, with the jury out of the room, I stood up and moved to dismiss on the basis of the plaintiff's opening statement – a motion almost never made and never granted. Judge McMillan surprised everyone by saying: "I'd like to hear argument on that motion." So we essentially argued summary judgment for the fourth time. We all broke for lunch after the arguments.

When we came back, just as Sewell was rolling out the big screen TV for the opening video, Judge McMillan dismissed the case. He said:

The Court has spent the last hour trying to figure whether there was a rational way not to do what I felt I should do, and I haven't been able to figure out such a rational way. . . . The proposed evidence, as I hear it, does not propose to demonstrate a violation of the antitrust laws. The combine in question is a group of purchasers who organized a manufacturing facility essentially for their own needs, and set it up for that purpose. The aim was limited to provide lower cost bottles for the members. The results were obviously in the public interest. . . .

I apologize to all concerned for not making this decision last week. I thought I might well hear something more but I did not hear it. . . . Although I have often deprecated the practice of dismissing a case until you've heard it – I guess I've always been a minority on that score – and it's a first time venture on my part into dismissal, [but] no showing had been made before the ruling of the entitlement to recover. If the case could have tried to a jury in two or three days, I might still have said "Let's let the jury decide," instead of

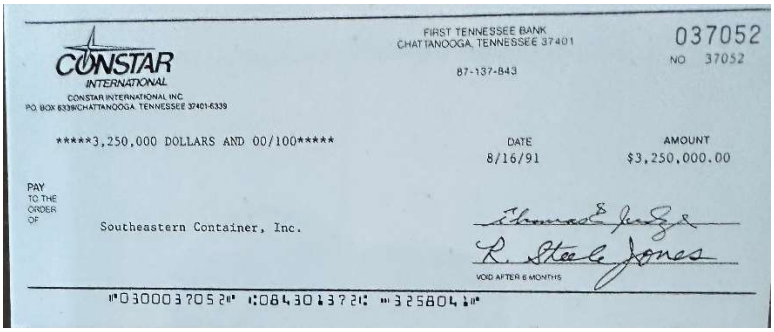
> having the Court decide it, [but given the time and cost of going forward] I decided that I had better vote my conscience on the merits right now instead of going through that other process first.

The room was stunned. All the many Coke bottlers and my co-counsel were delighted and showed it. My reaction was surprisingly muted. I was thrilled beyond words that we had won the case after all the lengthy battles and hard work. But the thought that kept going through my head was: "I'm 36 years old. Will this forever be the high point of my career? Is it all downhill from here?" Fortunately, my melancholy was broken quickly by our celebrations. But, in fact, it was a real high point and would prove difficult to top.

The next step was submitting proposed findings of fact and conclusions of law, which is normal after a bench (judge) trial but not for a pre- or mid-trial dismissal. We styled it as summary judgment, which is what the judge wanted. Sewell submitted mountains of their own materials. The judge issued a long opinion, endorsing most of the points, and all the dispositive points, we had made. Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196 (W.D.N.C. 1989). Sewell complained that parts were word-to-word from our papers. It was Judge McMillan's first opinion granting summary judgment in a business case. Sewell appealed but the Fourth Circuit affirmed "on the opinion below," i.e., adopting McMillan's opinion. 912 F.2d 463 (4th Cir. 1991). The oral argument was a rout. Sewell sought rehearing and then

petitioned the Supreme Court to hear the case but did not get a single vote.

That left only two things: payment to us of statutory court costs and, more importantly, resolution of our counterclaim. Sewell and its parent Constar, wanted it all to be over. They paid us $3.25 million to settle, plus $250,000 in court costs.


CONSTAR INTERNATIONAL
CONSTAR INTERNATIONAL INC
P.O. BOX 6339/CHATTANOOGA, TENNESSEE 37401-6339

FIRST TENNESSEE BANK
CHATTANOOGA, TENNESSEE 37401
87-137-843

037052
NO 37052

*****3,250,000 DOLLARS AND 00/100*****

DATE
8/16/91

AMOUNT
$3,250,000.00

PAY
TO THE
ORDER
OF

Southeastern Container, Inc.

VOID AFTER 6 MONTHS

"037052" "084301372" "3258041"

The *Sewell* case today remains one of my most favorite memories. Through citations in the American Bar Association's *Antitrust Law Developments* and elsewhere, the opinion helped move the law of exclusive dealing and joint buyer purchasing in positive directions. It also inspired one of my most widely-cited articles, co-written with Gary Dorman. "Joint Purchasing, Monopsony & Antitrust," 36 ANTITRUST BULLETIN 1 (1991). And it also increased my stature in the firm and the bar.

During the course of the *Sewell* case, moreover, my daughter Lauren was born. The pride and joy of my life.

15. KODAK

In 1991, with *Sewell* winding down, I found myself back in the copier business. Our San Francisco partner, Ron Katz, had overlapped with our Washington, DC, partner, Doug Rosenthal, when they were both at DOJ Antitrust. Ron had developed a portfolio of "aftermarket" cases. These were cases where independent service companies (ISOs) provided service for already-installed machines in competition with the original equipment manufacturer (OEM). The suits were based on tactics by OEMs designed to thwart ISOs, for example refusing to provide replacement parts, even for a fee. Ron had consulted with another ISO lawyer, James Hennefer, who had been representing ISOs in a case against Eastman Kodak. James had gotten his case dismissed on summary judgment in the district court, but the Ninth Circuit reinstated the case on a 2-1 vote. Kodak was petitioning the Supreme Court to take the case and reverse. It was supported by the G.H.W. Bush Justice Department. The Court granted certiorari to review the case.

There were two basic claims. First, that Kodak had "tied" the use of replacement parts to the use of Kodak service; second, that Kodak had unlawfully monopolized the market for servicing Kodak copiers. Elinor Hoffmann and I wrote our brief, with help from Doug and Steve Salop. Steve is a well-known antitrust economist. Since we had won in the court below, our brief would be due in after Kodak's and the friend-of-court (amicus curiae) briefs supporting it. A critical issue on all claims was whether Kodak had market power in the antitrust sense.

Kodak's argument was that competition in the original equipment market (photocopiers) would be a sufficient discipline of conduct in the service aftermarket such that market power and anticompetitive effects were impossible. If Kodak charged too much in the aftermarket, the argument went, it would lose business to Xerox, Canon, and others. Economic theory should resolve the case, Kodak said, without delving into factual details. This was pure "Chicago School." Kodak was supported by five amici. One was the Justice Department. This was a huge negative for us. The Supreme Court typically, but not always, adopts the DOJ position in antitrust cases. Another brief favoring Kodak came from the Motor Vehicles Association. I viewed that as a big plus, regardless of what they were saying.

The Motor Vehicles Association brief left us with an opening. I drafted the following, which appeared in the brief introduction to our submission:

> Under the new order Kodak seeks, ISOs would exist only at the whim of basic equipment manufacturers. Service for copiers would be available only from manufacturers. *Corner garages would provide service and repair only if manufacturers allowed it.*

Chief Justice Rehnquist had just been stopped for speeding. We figured that, while the justices probably had little contact with copier service, they surely knew cars – and that

you could get far more timely and often better service from a corner garage.

Jim Hennefer argued the case versus Donn Picket from McCutcheon Doyle for Kodak and Jim Rill, the assistant attorney general in charge of the Antitrust Division. It did not go well for us. The consensus after argument was that we would lose 7-2 or 6-3. The two were White and Stevens; Blackmun was the third.

On June 8, 1992, I was in a meeting at Coudert when one of our legal assistants rushed in the first few pages of a fax. (There was no Supreme Court website at the time.) We had won, 6-3. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992). Rehnquist was in the majority. The antitrust bar was floored. Although the opinion, by Justice Blackmun, did not mention "Chicago School" by name, it was a full-throated rejection of the argument that theory trumps factual evidence: "Respondents offer evidence that consumers have switched to Kodak service even though they preferred ISO service, that Kodak service was of higher price and lower quality than the preferred ISO service, and that ISO's were driven out of business by Kodak's policies. Under our prior precedents, this evidence would be sufficient to entitle respondents to a trial." The Court explained:

> Kodak contends that there is no need to examine the facts when the issue is market power in the aftermarkets. A legal presumption against a finding of market power is warranted in this

situation, according to Kodak, because the existence of market power in the service and parts markets absent power in the equipment market "simply makes no economic sense," and the absence of a legal presumption would deter procompetitive behavior.

We conclude . . . that Kodak has failed to demonstrate that respondents' inference of market power in the service and parts markets is unreasonable, and that, consequently, Kodak is entitled to summary judgment. It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so. It is also plausible, as discussed above, to infer that Kodak chose to gain immediate profits by exerting that market power where locked-in customers, high information costs, and discriminatory pricing limited and perhaps eliminated any long-term loss. Viewing the evidence in the light most favorable to respondents [as courts must on summary judgment], their allegations of market power "mak[e] . . . economic sense."

The *Kodak* case was another boost to my career, both within the firm and in the antitrust bar.

16. DETOUR INTO BANKRUPTCY

After *Sewell*, *Kodak*, and *Texas Utilities* wound down, I did not have much antitrust work. Antitrust practice was down quite broadly. Our group was still representing Fischbach & Moore in a series of bid-rigging cases, and had some other work, but we were not as busy as we had been for the past many years. The Reagan Justice Department had cut back sharply on antitrust cases and investigations, and this had a reverse "trickle down" effect on antitrust practice. One case we did have involved the acquisition by General Electric's CNBC of rival FNN. Dow Jones protested the deal, but FNN was in bankruptcy and the suit would have to be heard in bankruptcy court. We were able to settle the case, and CNBC wound up acquiring FNN.

Coudert had just set up a bankruptcy practice and was hired to represent the bondholders' creditors' committee of Allied Department Stores in the bankruptcy case of Allied (Bonwit Teller and others) and Federated Department Stores (Bloomingdales and others). Robert Campeau and his companies had purchased Allied and Federated at very high prices supported by mountains of debt. One of his tactics was to use the money poured in by Allied's bondholders to pay down some of the Federated debt. Allied received nothing in return. This was a "fraudulent conveyance" under bankruptcy law. If, as here, an insolvent company makes a payment for less than fair consideration, the payment is returnable in bankruptcy. The benefit to Federated does not count because it does not enhance *Allied*'s balance sheet (and thus its creditors).

I was brought in to litigate. I learned quickly that bankruptcy lawyers filed the most pedantic pleadings, starting with details everyone knew – identity of the debtors, date cases were filed and creditors' committee(s) appointed, and similar details. I was having none of that, and our more direct and readable pleadings made an impact on the judge and, eventually in later cases, the bankruptcy bar. Campeau filed the Allied and Federated cases in Cincinnati but filed the cases for the parent holding companies in San Francisco. This was a tactic designed to frustrate our fraudulent conveyance claim. I had to go to San Francisco to get the parent company cases transferred to Cincinnati so that corporate structure arguments would not impair our ability recover. We proceeded to get the largest fraudulent conveyance recovery in history.

INVESTMENTS

The Might of the Living Buyout Victims

Investors hurt by the Campeau collapse are hitting back

By Robert J. McCartney
Washington Post Staff Writer

NEW YORK—The excesses of Wall Street in the 1980s made casualties out of investors great and small. But in the aftermath of the failed junk bond buyouts, mergers and bankruptcies, one thing is coming clear: Some of the big victims can hit back.

That is an unexpected outcome of the collapse of Robert Campeau's department store empire in 1990, which has dumped Bloomingdale's and other Campeau-owned retailers into bankruptcy court.

Campeau's demise was a long nightmare for hapless investors, who saw the value of their stock and bond holdings plunge toward a vanishing point.

Now, however, a group of investors who contend they were cheated by Campeau stands to receive stock valued at $192 million from Campeau's old U.S.-based holding company and some of his former bankers as compensation for their losses, which were many millions of dollars more.

The tentative settlement is by far the largest of its kind. Experts expect it will add momentum to similar investor demands for reparations arising from some of the notorious takeovers and buyouts of the past decade.

"You're going to see a lot more of these [buyouts] from the 1980s being undone," with victims compensated in bankruptcy court, says Douglas G. Baird, a University of Chicago law professor and bankruptcy expert.

Investors and others have made comparable legal claims in bankruptcy proceedings of drugstore chain Revco D.S. Inc., shoe manufacturer Interco, convenience store operator Circle K Corp. and dress design maker McCall Pattern. In a related case that involves claims by former employees rather than investors, pensioners of Kaiser Steel Corp. are seeking to recover millions of dollars lost in a takeover of the company by Minneapolis-based corporate raider Irwin L. Jacobs.

"There is a message sent [by the Allied case] here to the banking, investment banking and financial community, and its professional advisers, that maybe you shouldn't do this sort of thing, because you might be called to account," says John J. Remondi, a senior executive at Fidelity Investments, the nation's largest mutual fund company. Remondi headed a group of powerful bondholders that pressed the case against Campeau.

Their counterattack was based on a series of ill-fated checkerboard moves that the Canadian financier made in 1988 and 1989.

First, Campeau's Allied Stores Corp. sold two valuable properties, Brooks Brothers and AnnTaylor clothing chains. Then it transferred $693 million—all the proceeds from the two sales, plus a bit more—up the corporate ladder to Campeau holding companies.

At the same time, Campeau acquired Federated Department Stores Inc., the owner of Bloomingdale's and other store chains, employing a $500 million loan from Bank of Montreal and the French-based Bank Paribas. Most of the $693 million from the Brooks Brothers and AnnTaylor deals was used to repay that loan. Allied Stores became the controlling shareholder of Federated.

But it became clear almost immediately that Federated was too big for Campeau to swallow. The money drained from Allied to finance the Federated acquisition had left Allied mortally wounded. Some Allied stores could no longer afford to stock shirts and other items for the 1989 Christmas shopping season. And Allied no longer had the money to pay interest owed to a large group of investors holding bonds that matured in 1997.

It was these Allied bondholders who took the offensive, charging they were defrauded by Campeau's decision to use the $693 million in Allied money to finance a Federated deal that they said was doomed to fail.

"This is a classic case of robbing Peter to pay Paul," says Jonathan M. Jacobson, an attorney with Coudert Brothers in New York who represents the bondholders.

The bondholders' case, and all of the similar legal efforts being mounted, are based on a once-obscure provision in bankruptcy law called "fraudulent conveyance." It dates back to a statute passed by England's parliament in 1571 in the reign of Queen Elizabeth I, but it is rapidly gaining attention because of its potential value in the recent wave of U.S. bankruptcies.

The law's key element is to provide strong financial remedies when a company's assets are taken from it unfairly—that is, without the return of something equally valuable—at a time when the company is insolvent or when the transaction makes it insolvent. The Allied bondholders claimed that the withdrawal of cash from Allied was just such a "fraudulent conveyance" that drove it into bankruptcy.

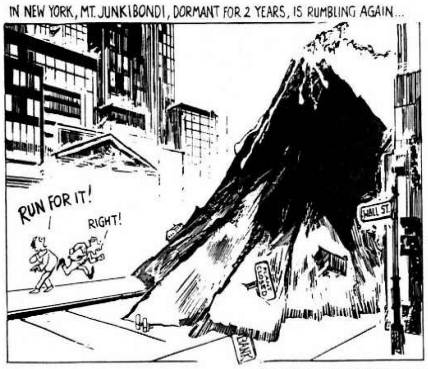
G. William Miller, the former Treasury secretary who now is the Allied holding company's chairman, says the investors' accusations "were not frivolous; therefore, they had to be dealt with."

The settlement proposed by Allied—which is the parent of retail chains Jordan Marsh, the Bon, Maas and Stern's—becomes final only when the entire bankruptcy case is resolved. That means an agreement also must be reached in the bankruptcy of Allied's sister company, Federated.

But the basic structure of the proposed settlement is expected to remain intact, according to lawyers and investment bankers on both sides of the case.

Both Allied and Federated are currently operating while in bankruptcy. They are striving to cut a deal with banks, bondholders and other creditors that will allow them to emerge as a single, restructured, solvent company in February 1992. The compensation to be given to bondholders will be stock in that new company.

Under the tentative settlement, which was officially disclosed in court papers released in July, the holders of $605 million of the Allied 1997 bonds are to receive stock that the plan values at $192 million. That means the bondholders are being repaid at a rate of only 32 cents for each dollar of bonds, and the stock's value is very likely to fall, and mean they get even less. But they would have gotten nothing without the settlement.



Although big financial institutions are to get the most direct payoff in the tentative settlement, it also benefits mutual fund companies that invested in Allied on behalf of individuals. The Fidelity mutual fund group, for example, took the unusual, costly step of playing a leading role in the case "to protect our shareholders in future transactions," says Fidelity's Remondi.

Some of the big winners were not victims at all, but canny investors who sensed an opportunity to cash in by buying the Allied bonds for near nothing and seeing their value rise as the bondholders' legal claim advanced.

The biggest single holder of the bonds is Talton Embry, a New York-based money manager who specializes in buying securities of financially troubled companies. Both Embry and the Los Angeles-based Trust Company of the West have doubled or tripled their profit on the bonds, whose value has indeed risen sharply because of the tentative settlement, according to Wall Street sources and attorneys familiar with the case. The bonds, which were selling for as little as 2 cents on the dollar at the end of last year, now are fetching between 12 cents and 14 cents.

"People put on big positions [in the bonds] at the time of the bankruptcy, because they knew of the fraudulent conveyance possibilities," says Andrew J. Herenstein, an investment analyst for the Delaware Bay Co. in New York, a research and trading firm that specializes in securities of troubled companies.

In return for the package, the bondholders are to pledge that they will not sue Campeau, his holding companies, the banks that financed and advised him or the directors and officers who approved the questionable transactions.

The Allied offer leaves open the question of whether the transactions that hurt the bondholders actually were illegal. All of Campeau's financial backers whom the bondholders threatened to sue—including Bank of Montreal, Bank Paribas, First Boston Corp. and Citicorp—say they have not yet given final approval to the settlement, and they strongly deny that they did anything wrong.

But Allied, after negotiations with all parties, proposed in a court document that the bondholders should be paid something for their claims that they had been victims of "fraudulent transfers," "breaches of fiduciary duty" and "civil conspiracy."

Allied said it concluded after an exhaustive investigation that those claims had "substantial value."

"From the bondholders' perspective, we don't care that anybody admits that they were wrong. All we care about is getting an appropriate recovery," says Ellen R. Werther, another attorney at Coudert Brothers who represents the bondholders.

The plan provides for bondholders to be paid in large part with assets that otherwise would have gone to Bank of Montreal and Bank Paribas, which the bondholders had threatened to sue over their parts in the transactions.

"Clearly, Bank of Montreal and Paribas gave up the most, because they received the most" in the transfer that the bondholders said was fraudulent, says Mark L. Kaufman, vice president and securities analyst at Oppenheimer & Co. in New York.

As part of their inquiry, the bondholders recovered documents from the Bank of Montreal that they submitted to back their claim that the bank had been aware that Allied would be left insolvent when the $500 million loan to buy Federated was withdrawn, according to Wall Street sources familiar with the case.

Robert F. Finke, an attorney from Mayer, Brown & Platt in Chicago who is representing the Bank of Montreal, says the bank still was seeking a better deal than the one that Allied proposed, and in any case it was convinced that it had "not engaged in any conduct which was improper." Paribas has declined to comment.

The plan also provides for the bondholders to get some assets that would have gone to First Boston and Citicorp. The former had issued an opinion supporting the $500 million withdrawal. The latter provided some of the financing for Campeau's moves, for which it received $17 million in fees. Fear of lawsuits against the directors and officers is believed to have encouraged Allied to settle with the bondholders. One potential target was former Treasury secretary Miller, who was a director of Allied at the time of some of the deals.

Miller says that he has no regrets about his role with Allied, but he emphasizes that he played only a small part in approving what he called Campeau's "jerry-rigged deals."

"The board was Campeau-controlled. I was a very small voice," Miller says of his vote for the transaction in which Allied gave up $500 million. Miller says he was not present at the meeting, but phoned in his vote while traveling on business. In retrospect, he says, "it might have been better to have been absent" and not voting.

Robert Campeau's spokeswoman says he has no comment on the Allied case. The effect of the settlement on Campeau would be minimal because his interest in the holding company was virtually wiped out at the time of the bankruptcy filing. ■

With *Allied/Federated* behind me, but with antitrust work hard to come by, I took on another bankruptcy case – which turned out to have an actual antitrust component. The case was the bankruptcy of New Valley Corporation, the parent company of Western Union. New Valley was under mountains of debt, including *senior secured* bonds paying 19¼% interest. The bonds, held largely by Carl Icahn and Apollo Management, were secured by the valuable Western Union trade name. The antitrust component was due to First Data Corporation's dogged pursuit of Western Union. First Data owned MoneyGram, Western Union's only real competitor, so a combination of the two would be a monopoly. New Valley rejected First Data's overtures, but First Data responded by pressuring New Valley creditors to support the acquisition so that they could be paid and by engaging in campaign of selling money transfers at a small fraction of what MoneyGram had been charging – and a small fraction of what Western Union charged.

We responded in three ways. First, I went to the FTC to ask that they start an investigation. Second, we sued in Los Angeles for below-cost pricing under California state law. And, third, we asked the bankruptcy judge to enjoin First Data from pressuring the creditors. The FTC approach worked. They commenced an investigation, sending out Civil Investigative Demands (CIDs) to First Data, others, and us. The California suit was a complete failure. First Data's lawyers (Skadden Arps) objected to my request to appear before the California court (called a pro hac vice motion). That's an objection that is almost never made and, here,

totally baseless and rude. Local counsel was going to argue anyway so it did not matter much. But over the weekend before the hearing, I got a call from Bill Pelster in Skadden's New York office. The Los Angeles Skadden lawyer had a bad cold, so Bill was flying in to argue – and would I consent to his pro hac vice motion? After a major giggle, I of course said yes. Our claim under state law was solid and should have prevailed, but the California courts couldn't get over the fact that the company with the 90% market share was suing the company with a 10% share for unfair competition. So we lost. Badly. Western Union Fin. Serv., Inc. v. First Data Corp., 20 Cal. App. 4th 1530 (2d Dist. 1993). The effort in bankruptcy court fared better. First Data was enjoined from pressuring creditors.

The most positive aspect of bankruptcy for a litigator was that you would get lots of trials, usually short, without extensive discovery. In the *New Valley* case, we went to trial over the value of the Western Union trade name. This was the security held by Icahn (and some others). We were seeking to prove a lower value of the name because Icahn, as a secured creditor, would get the value of the security and any claim in excess would be treated as unsecured. As New Valley was deeply underwater, a lower value of the security would mean more value for unsecured creditors. Our litigation position was that the value to Western Union was in its retailers' network, not the name. We tried the case over three weeks. Icahn's expert made a terrible mistake, highlighted at trial, overstating the value of the name. (It was another instance of asking him a plain vanilla question

at his deposition, saving the mistake for trial.) The judge ruled in our favor in a lengthy opinion, but she held off on issuing it because of a major current development. The development was that Western Union was doing fabulously well, there were many suitors, and the best way to maximize value was an auction. So who won the auction? First Data! They agreed to divest MoneyGram. The bidding went so high that all creditors were paid in full with all post-petition interest – including Icahn's 19¼% senior secured bonds. Even equity holders got a big return. This was a stunning and very unexpected development and was an actually historic end of the case.

The *New Valley* case started while I was Coudert but ended after I moved to Akin Gump. That 1993 move separated me from the rest of the Spivack group after 17 years and was very hard personally. But Gordon was starting to slow. He had always actively discouraged us from seeking out new clients, reasoning that we had plenty of work and we all were needed to handle the matters he had brought in. Gordon himself never actually solicited business and never worried about it. He was confident that, with his reputation and track record, cases would come to him. They did so for a long time, but Gordon started to age at a time when the shortage of antitrust work engendered a greater level of competition for business, and our group's work dwindled. Moving to Akin allowed me to continue with *New Valley* and offered what I thought would be a better opportunity for antitrust work. So, with Carol, we moved to Akin Gump in April 1993. With three other partners, one

associate, one paralegal, and one other secretary, we created the first New York office for Akin. Over time, the office became highly successful and grew dramatically to what is now a complement of over 200 lawyers. My hope for a robust antitrust docket never emerged, but I did get two huge matters while at Akin that furthered my career. I'll discuss those next.

17. AMERICAN EXPRESS

In 1996, American Express, represented by Hogan & Hartson, complained to the Justice Department because Visa would not let its bank members issue Amex branded credit cards. Right after Amex's initial complaint, the leaders of MasterCard met and decided (over several objections, including Citibank) to do the same. That MasterCard would do this while DOJ was starting to look at Visa was shocking to Joel Klein, who was running the Antitrust Division at the time, and so a full investigation began. The problem was that staff was resistant. Visa's lawyers were (unfortunately for us) really good, Steve Bomse and the late Larry Popofsky. They had argued that there was no "foreclosure" because, even without banks, Amex could reach every potential customer through the mail. Amex had a solid relationship with Akin's government relations lawyers, including Vernon Jordan and Sylvia de Leon. Sylvia got me involved. In reality, it was not a governmental relations issue. It was an antitrust law issue.

As we told staff, they had foreclosure all wrong. The foreclosure was not of cardholders as such, but of banks – and that foreclosure was total. Competition for bank business could have been significant. We also said they should consider this to be a horizontal arrangement – one among competitors – because governance of Visa and of MasterCard was controlled by their bank members. Making matters worse, the bank members of both the associations were largely the same. So this was really a conspiracy

among all the banks in the United States (save the dissenters) to boycott Amex.

As the investigation proceeded, Mel Schwartz was added to the staff. I had gotten to know Mel in the *New Valley* case. Mel sat me down in August 1998 and asked whether there were any landmines in Amex's documents. I pointed out that there were some that needed context, but the basic answer was "no." That Mel was going through this process gave us confidence that the investigation was finally moving in the right direction. And, yes, DOJ filed a complaint in New York City federal court to enjoin the associations' exclusionary rules in October 1998. That was delightful, but DOJ also included a claim that issuing cards on competing networks was anticompetitive, and argued for "single-homing," i.e., that banks should have to choose just one as between Amex, Visa, MasterCard, and Discover. That was much less desirable to Amex. Visa and MasterCard were accepted at many more locations and choosing Amex or Discover would mean fewer merchant locations. This proposed remedy would help competition between Visa and MasterCard but would likely leave Amex and Discover out in the cold. I was retained to handle the trial and any appeal.

Discovery took a while. It was mostly professional, with two MasterCard lawyers being difficult. Our witnesses were key. Our role was to support the argument that competition for the business of banks would be important and that preventing that competition was harmful. All the Amex witnesses, including Chairman Harvey Golub and President Ken Chenault, testified truthfully and persuasively.

When it came time for trial, Steve McCurdy (who would have a role in getting banks to issue Amex cards), Golub, and Chenault were all on the witness lists. Just before trial, Visa started placing full-page ads – I saw at least four – in the *Wall Street Journal* saying that the entire case was just a put-up job by American Express with its political connections. This was outrageous and totally false.

Given the scheduling of Golub's testimony, general counsel Louise Parent had me and several others ready to fly on a private jet to prepare him in Santa Fe. Sadly, it was not to be. Back in Westchester, Ken Chenault was playing basketball at his home with his kids and somehow tore *both* of his Achilles tendons. Courageously, he pushed back his testimony only one week. We were able to prepare Harvey Golub (whose scheduled testimony was advanced) in New York and missed Santa Fe.

Trial was in the big ceremonial courtroom on the Foley Square courthouse's ground floor before Judge Barbara Jones. Ken took a room in Waldorf Towers and we prepared him there. In his deposition, Ken was asked about a document called "Trench Warfare," which addressed how Amex might defeat Visa and MasterCard. Ken explained that this was a document prepared by Bain Consulting hustling business and that Amex never paid for it. It made Amex's card business look a lot stronger than it was and if misread would be unhelpful for our position. We much later found the cancelled check for $25,000 earmarked for this report and we were confident that Visa-MasterCard would find it too. It would be absolutely critical, therefore, to bring

that out in Ken's direct testimony to show that we had nothing to hide. Ken had simply forgotten.

When the day came for Ken's testimony, his legs had to be kept prone and watered periodically by a registered nurse. We used a side entrance to wheel him in. When he took the stand, he was unable to sit in the witness box and had to testify from the much larger jury box, with the nurse administering to him throughout his testimony. It was the most amazing thing I ever saw in a court of law. He made all the key points in Mel Schwartz's direct, spoke clearly, and disarmed the cross-examiners completely. He got in everything. They got nothing.

But what about the Bain document? Well . . . Mel was getting to the end of his direct and had not raised it as planned. I could not send him a note or try to get his attention as you normally would: Visa had put out four full-page *WSJ* ads accusing us of being the Rasputin behind the case! The DOJ staff had a large preparation room behind the courtroom. (Visa-MasterCard had theirs too.) I asked Jason Koral, a young associate, to remind Mel's colleagues in the back room that this had to happen. Jason ran all the way. Mel received staff's note moments before he was concluding and asked the questions without skipping a beat. My heart is still pounding from that one.

The trial lasted through the Summer of 2000. Even though Amex was not a party, we asked for and I was granted an opportunity to argue as amicus curiae. We submitted a solid amicus brief. I planned to argue in support

of enjoining the exclusionary rules and against single-homing as our brief had argued. But a few weeks before the argument was to be held, Judge Jones cancelled the hearing. We saw this as a bad sign.

Over a year passed, increasing our nervousness. September 11 happened and Amex was very hard hit. The World Trade Center buildings were visible from the east end of Amex's tower, and Amex colleagues of mine were confronted with sights of people jumping. The Amex building itself became uninhabitable due to the ash and other debris. The building's personnel were exiled to offices in New Jersey and elsewhere. My two main contacts in the legal department, Anne Segal and Marcy Wilkov, had to find a place to work. We offered space in Akin's offices, but they were able to find space elsewhere. Amex's earnings took a beating as travel was shut down for so long. It took many months to return to normal. There was no Zoom then. Things were bleak.

Then, on October 9, 2001, I got a call to come to the courthouse to pick up the opinion. We had no idea what to think. I was in the middle of preparing my *Pepsi v. Coke* Second Circuit argument, and asked my colleague, Abid Qureshi, to go to pick it up. He raced down to the courthouse, and soon called me on his cell phone: "We won!!" I asked for details. How did the single-homing point turn out? Abid said it's a long opinion but he was rushing back so we could read it. It was a joy. We won on both parts of the case. The opinion was a great pleasure to read. Parts seemed to be based on our amicus brief. United States v. Visa USA, 163 F. Supp.

2d 322 (S.D.N.Y. 2001). The celebrations were somewhat muted given 9-11. Ken Chenault came to our offices (then in the IBM building at 57th and Madison) and it was great to see and celebrate with him. But I had to cut the celebration short because of the *Pepsi v Coke* argument preparation – something I deeply regretted. Many years later, I had moved to Wilson Sonsini. After Judge Jones had left the bench to become a neutral/arbitrator/mediator, she was in our offices at Wilson with a former clerk, Jessica Margolis. She recognized me from the *Visa* case and we talked about it for a short while. One of the things she said was that it was our amicus brief that helped her reach the result she did. Hearing that made my day (and maybe my decade).

Visa and MasterCard appealed. During the course of the appeal, we consulted with Robert Bork – former judge, former Solicitor General, former Yale professor, and the author of the *Antitrust Paradox* and other Chicago School orthodoxy. He was a true gentleman and made it easy to forget how much I disagreed with his writings. In the *Visa* case, he strongly supported our arguments and helped enhance them. The brief was a major team effort, with input from Louise, Anne, Marcy, Abid, and Jason. I was happy with the final product. A copy of the brief is at https://bit.ly/3K5CwWN.

The Second Circuit affirmed in all respects in an excellent opinion. United States v. Visa USA, 344 F.3d 229 (2d Cir. 2003). Visa and MasterCard sought certiorari in the Supreme Court, but were denied, sealing our win.

* * *

The aftermath of our victory was lousy for me. With the win, Amex had a slam dunk treble damage case for billions of dollars. I was excited. But Visa and MasterCard are owned by banks, and Akin Gump was trying to develop a banking practice. So I was told that I could not take on the private case. As explained later, this led to my departure from Akin. Amex hired David Boies and his firm handled the case. I would have been co-counsel and was quite upset.

I still had two other cases for Amex that came with me to Wilson. One, called *Ross*, resulted in two appellate arguments but was scheduled for trial despite my efforts at summary judgment. I was replaced by my co-counsel, Cravath, and they prevailed at trial. In the other case, called *Marcus*, Cravath was retained as co-counsel and Evan Chesler argued against class certification. I argued for summary judgment. No decision. The case settled by rolling it into the MDL pending in Brooklyn where class plaintiffs were challenging Amex's rule forbidding merchants from steering cardholders to other cards. Combining the cases made sense because the damages, if any, would overlap. Amex, with Evan Chesler arguing, won the case in the Supreme Court. Ohio v. American Express Co., 138 S. Ct.2274 (2018).

18. PEPSI V. COKE

On May 8, 1998, I flew into a small town in Oklahoma to argue a motion to dismiss on behalf of Albertson's in state court. We had a Tenth Circuit case on identical facts going our way; the *only* difference was that the defendant in the Tenth Circuit case was Super Valu. I made my argument with no questions. When I was done, and before the other side could speak, the judge said: "Thank you, Mr. Jacobson, but we don't grant motions to dismiss in Oklahoma." And that was that. (We soon settled the case for the whopping amount of $5000.) To fly back to Dallas to get back to New York, the propeller plane had to make another stop. At the stop, I picked up *USA Today* and saw that Pepsi had sued Coke in New York City. I also called the office and Carol told me to call Tad Lipsky at Coke. The plane was boarding but I called Tad when I got to Dallas and was asked if I could come to Atlanta. I was already in the airport and caught the next flight. The complaint was faxed to my hotel.

The meeting in Atlanta was run by my old friend, Jim Koelemay. Tad was there with inhouse lawyers Ken Glazer, Joel Neuman, and a few businessmen. Jim was then the lead lawyer for Coke's fountain business. Pepsi's complaint charged that Coke had monopolized a "relevant market" comprised of soft drink fountain syrup *delivered by independent food service distributors*. Proof of a relevant market is essential in a monopolization case because otherwise you have no idea of what's being monopolized. Our admittedly biased view was that Pepsi's s purported market was a gerrymander. I added that we might have a solid

motion to dismiss. I was retained, together with King & Spalding, Coke's long-time counsel.

The background was that, back in 1899, Coke started franchising bottlers to manufacture and sell bottles and later cans. But Coke kept the fountain syrup business for itself. As that business grew, it entered into agreements with foodservice distributors to distribute syrup that Coke had sold. McDonalds, Burger King, Wendy's, and hundreds of others got their fountain beverages in this manner. McDonald's was big enough that its distributor was captive, i.e., wholly-owned. The Pepsi system grew up differently. Pepsi gave its bottlers the rights to handle fountain syrup as well as bottles and cans. That changed in 1997, when Pepsi decided that it wanted foodservice distributors too and revised its bottler contracts to permit this. The problem was that Coke's longstanding contracts with foodservice distributors specified that it was an impermissible conflict of interest for the distributors to carry similar soft drink products. This provision was designed in part to prevent cheap knock-offs – very easy to do with fountain beverages as they did not then come in pre-packaged containers – and clearly applied to Pepsi too. We all regarded Pepsi as a cheap knock-off anyway.

Pepsi trailed Coke badly in fountain sales. But Coke's fountain advantages had little to do with foodservice distribution. Its major advantage was that quick service – don't say fast food – restaurants made the vast majority of their profits from fountain drink sales, and Coke products generated much better returns. Customers made finished

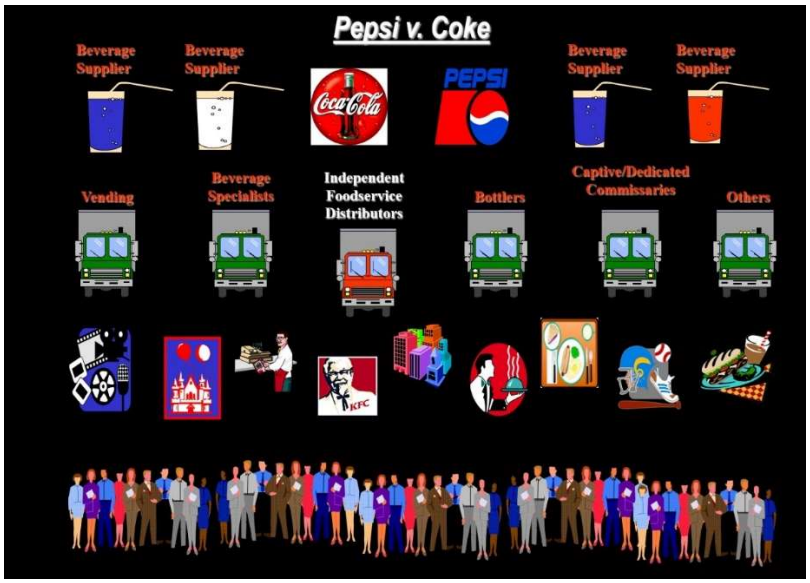
beverages from the syrup Coke sold. Coke had world class service available on the shortest notice, a critical advantage because restaurants cannot afford to allow their fountain dispensers to go down for any stretch of time.

To try to overcome Coke's advantages, Pepsi purchased Taco Bell, Pizza Hut, and Kentucky Fried Chicken. That gave it some fountain sales but infuriated their quick-service restaurant competitors and made expansion very difficult for Pepsi. In 1987, a major Pepsi effort won the Burger King account, but the customer was unhappy with the sales and switched back to Coke in 1990. It was then that Pepsi closed its fountain division to focus on bottle-can sales. Pepsi had created its own foodservice distributor, Pepsi Food Service. But when Pepsi spun off the restaurants in 1997, PFS was spun off too.

Spinning off the restaurants was part of a major effort to boost Pepsi fountain sale led by Brenda Barnes, CEO of Pepsi North America. After initial successes (using bottlers) Pepsi sought out foodservice distribution by major foodservice distributors. This effort ran into the roadblock of Coke's exclusive distributor agreements. Those agreements were all terminable on 10-days' notice – normally a dispositive point for the defense – but Pepsi was unable to get any of the distributors to give up Coke for Pepsi.

We did move to dismiss. I argued against Dick Steuer of Kaye Scholer before Judge Loretta Preska. The argument essentially was that delivery through foodservice distributors could not be a monopolizable market because

there were so many other ways to get fountain syrup to restaurants. Pepsi's argument was that "[t]here are restaurants and theater operators across America that want Pepsi . . . and Coca-Cola is preventing them from getting Pepsi." I made the point that 8th floor cafeteria below us carried Pepsi, and there was no Coke. I also made some more serious points. The media picked up my argument, focusing on the cafeteria point. But we lost. Judge Preska ruled that Pepsi had pleaded enough to go forward to discovery. She loved the demonstrative I used, however, and had her law clerk ask me for a copy.



Discovery turned into a route. Joel Neuman, Ken Glazer, and Jim Koelemay, with Jeff Cashdan and Mike Russ from King & Spalding, did a great job preparing and defending the Coke witnesses and taking and defending customer depositions. My job, together with Dan McGinnis and our

team at Akin Gump, was to handle discovery of Pepsi and some of the customers. Of the 67 customers who were deposed or provided statements (called declarations), *none* said that the method of delivery was the decisive or even the primary factor in selecting a fountain syrup supplier.

Discovery of Pepsi was fascinating. It turned out that the company's strategic plan was to "take the margin" out of fountain for Coca-Cola to reduce its profits. And Pepsi succeeded. Coke retained the business at most, not all, of its major accounts but at sharply reduced prices due to loss-leader bids from Pepsi. As Phillip Marineau, Barnes' successor as PCNA CEO, testified: "During my tenure, we competed against everything. [T]here was no profit haven for Coca-Cola." Sure didn't sound like Coke was a monopolist. There was more. A professionally-commissioned survey conducted for Pepsi, called the "Voice of the Customer Survey," determined that, of 41 categories of attributes customers wanted, foodservice delivery was 38th. The biggest plumb of all was the deposition testimony of Brenda Barnes, who said: "I have to clarify. *Never ever would I think of or refer to a delivery method as a market.*" Boom. I called Joel Neuman after this to say that I thought we might have just won the case.

After this testimony, the Pepsi lawyers decided to cancel the resumption of her deposition scheduled for the following day and reschedule it for September 15. But I asked her again then if she stood by the statement, and she acknowledged that she did.

Amother fond memory from discovery was the deposition of Pepsi's economic expert, George Hay of Cornell. George had served in the Justice Department and was widely recognized as one of the top economists of the time. The deposition was in Ithaca. It went late and we went after each other pretty aggressively. By the time it ended, the last flight back to New York had left. George offered to, and did, drive me all the way to Syracuse to catch a flight back, a 90 minute drive. After 8+ hours of deposition. It was a great and welcome jesture. I will never forget it.

The summary judgment hearing went well. I had a lot of exhibits, as did Pepsi. One of my favorities was a chart of the

top 10 fountain customers, who represented some 75% of total fountain volume.

This chart demonstrated that Coke had no monopoly power, no power to raise price over competitive levels. We had shown that all the reasons for denying summary judgment were disproven in discovery. Our brief began:

> When this case began, PepsiCo successfully opposed Coca-Cola's motion to dismiss by claiming that "[t]here are restaurants and theater operators across America that want Pepsi . . . and Coca-Cola is preventing them from getting Pepsi." The discovery process focused on ascertaining just who those customers are – and now we know. There aren't any. There never were.

My main argument, harking back to the motion to dismiss, was that Pepsi had not shown that foodservice

distributor delivery could be a relevant antitrust market. I was mostly through the argument when I got to the Brenda Barnes video clip. Judge Preska said; "I was wondering when you'd get to that." Made us feel good about our chances. On September 19, 2000, I got a call from Judge Preska's chambers to come down to court. It was just to be me and one Pepsi lawyer. When we arrived, the judge gave us the opinion and said she had called us down to make sure she was not revealing any confidential material. She wasn't. I had the sense that she just wanted to see us again after a long, memorable case. We won. 114 F. Supp. 2d 243 (S.D.N.Y. 2000). It was an elegant opinion. To say we were thrilled was an understatement. We had beaten Pepsi! My colleagues at the company and King & Spalding were delighted.

Pepsi appealed. The case was argued October 11, 2001, in the Foley Square courthouse – a short walk from the World Trade Center area. The stench from the terrorist attack was still powerful. The panel was Chief Judge Walker, Amalya Kearse, and Jon Newman – about as strong a panel as you could get. Pepsi elected to have a Jones Day lawyer argue and he was grilled mercilessly. I was asked just one question – what did we say the market was? – a softball. We were confident we'd won.

Fourteen months went by before hearing anything from the court. On December 24, 2002 – Christmas Eve – the clerks' office called. "We have an opinion in *Pepsi*. Please come down and pick it up." It was 11:45. "When do you close," I asked, my heart racing. "Noon." We were in midtown, Foley

Square all the way downtown, so this was impossible. The Second Circuit clerks' office is notoriously rude and unhelpful, but they really outdid themselves this time. There was no electronic record-keeping then so we couldn't get it online. I asked to get an email copy. No. A fax. No. "Can you at least tell me the result?" No. Can you read me the last line? No. "This is big news and it's Christmas eve; are you really saying we can't find out until next week." Yes. Sorry.

I was beside myself but decided to call Chief Judge Walker's chambers. His law clerk got on the line and advised me that he had to recuse himself – we never learned why – but she would email the decision. And was happy to tell me we won.

The opinion was a masterpiece, at least from our perspective. 315 F.3d 101. It had important and memorable passages on the requirement of proving a relevant market, monopoly power, and the standards for summary judgment. Pepsi did not seek Supreme Court review. Media coverage was extensive. (The WSJ"s was at https://on.wsj.com/42MxpTG.) The win was not just satisfying; it significantly enhanced my profile in the antitrust bar. With *Visa* and *Pepsi*, I was becoming quite well known in our circle.

19. THE ABA AND WRITING

I received some ribbing about claimed inconsistencies in the *Visa* and *Pepsi* arguments I had (successfully) made. There was foreclosure in *Visa* where distribution (banks) was tied up but Amex could reach any cardholder through the mail – while exclusives with distributors in *Pepsi* were just fine. There was no inconsistency; Pepsi had many alternative means of distribution and had even sold off its own foodservice distributor. But there was lots of confusion about when exclusive dealing was, or should be, problematic, and I decided to write an article about it. "Exclusive Dealing, 'Foreclosure,' and Consumer Harm," 70 ANTITRUST LAW JOURNAL 311 (2002). The article remains my most cited – some 196 times according to Google Scholar. It had a positive impact on exclusive dealing law. I had written several other articles since law school, so the *Exclusive Dealing* piece was far from my first. My goal was to publish at least one significant paper a year, and I did. The major papers are linked on my Wilson Sonsini website, https://bit.ly/3PKI5My.

With the recognition I was getting, I decided to try getting involved more in the American Bar Association's Section of Antitrust Law. I did not want to start at the bottom and approached the Section's Chair in 2000, Ky Ewing. Ky appointed me to be the co-editor-in-chief of the *Annual Review of Antitrust Law Developments*, an excellent starting slot. After that, I was appointed vice chair and then chair of the Section's important Books & Treatises

Committee. From there, I became a Council Member, then an Officer, and eventually Chair of the Section.

While I was chairing Books & Treatises, I approached then-Chair Don Klawiter about also chairing the Section's most important and by far most profitable publication, *Antitrust Law Developments*, published in two volumes every five years. Don made the appointment. Mine was the Sixth Edition and was published when I was at Wilson in 2007. This was a massive effort, especially given my case load, Books & Treatises job, and (as I will discuss next) my appointment to the Antitrust Modernization Commission. We had a Board reporting to me, which helped. I also enlisted Matthew Bye, then at Wilson, for help. Matthew, who later became head of Competition at Google, provided fantastic assistance. But the book was ultimately my responsibility. And I read, edited, re-read, and edited some more every page. It came out great. We were even able to add a Supreme Court decision, *Weyerhaeuser*, that came out on the very day we had to get a final version to the printer. Without counting appendices and tables, the book came to 1500 pages.

The ABA gave me numerous speaking opportunities, which I loved. From 2003 through 2022, I spoke at every Spring Meeting – ABA Antitrust's most significant event, with almost 4000 attendees from around the world. The exposure I was getting led to numerous other speaking engagements as well. I continued to write extensively, despite my case load. I was able to publish at least one peer-reviewed article each year. Without requesting it, or even

knowing about it, I even got a page on Google Scholar. My major speaking engagements and articles are collected at https://bit.ly/3PKI5My. The Google Scholar page is https://bit.ly/3wuI0Xs.

20. ANTITRUST MODERNIZATION COMMISSION

In 2002, in the wake of the *Microsoft* case and settlement, Republicans were claiming a concern about state attorney general participation in antitrust cases and about the application of existing antitrust laws to the "new economy." Microsoft was correctly found liable but State AGs had objected to the settlement proposals and prolonged the case, even though their remedy arguments were eventually rejected. To gain broader congressional approval, this concern was folded into a bill, ultimately passed, creating the Antitrust Modernization Commission with no set agenda. There would be twelve commissioners, to be divided equally between Republicans and Democrats.

I wanted in. I spoke to my Akin Gump antitrust partner, Paul Hewitt, who told me to talk to our partner, Bob Strauss, former Chair of the Democratic Committee and a major power broker in DC. Strauss called Tom Daschle, Senate Majority Leader. I provided my background and a copy of an article I had written slamming one of Microsoft's main arguments. "Do We Need A 'New Economy' Exception for Antitrust?" Antitrust, pp. 89-93, Fall 2001. I got the appointment. Deb Garza (then at Covington & Burling) was appointed chair and Jonathan Yarowsky (then at Patton Boggs) as vice chair. Our task was to examine everything we wanted to about the antitrust laws. We could and did set our own agenda.

The AMC was one of my favorite experiences. It took two years to get started, as a government bureaucracy had to be

created. But then we went to work. Everyone contributed. Our final report, hearings, meetings, and our many associated documents are all available at https://bit.ly/49Frnqh. There were 17 meetings and 18 hearings, starting in July 2004 and concluding in February 2007. Deb Garza did a fantastic job. So did our staff. I was at Akin when we began but at Wilson when we concluded.

Our hearings were extensive and we covered just about everything under the sun. There were hearings on State Enforcement Institutions; Federal Enforcement Institutions; New Economy; Civil Remedies Issues; Criminal Remedies; Government Civil Remedies; Exclusionary Conduct; Merger Enforcement; Statutory Immunities and Exemptions; Regulated Industries; Indirect Purchaser Actions; the Robinson-Patman Act; the State Action Doctrine; International Antitrust Issues; and McCarran-Ferguson Act and the Shipping Act. We also had an Economists' Roundtable on Merger Enforcement, and a hearing with the then-heads of the antitrust agencies, Tom Barnett (DOJ) and Debbie Majoras (FTC).

It was a great group. It included Makan Delrahim, who became a Deputy Assistant Attorney General and later, in 2017, Assistant Attorney General in charge of the Antitrust Division. We also had two former AAGs, John Shenefield and Sandy Litvack, and a well-known economist, Dennis Carlton. The rest were active practitioners like me: Don Kempf; Bobby Burchfield; Steve Cannon; Deborah Valentine; and John Warden. Here we all are:

On the issues that I cared about the most, I was happy with the conclusions we reached. On the new economy issue, our unanimous conclusions were the same as I had reached in my article:

> There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features. In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive

> effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis.

I emerged as a leading defender of *not* recommending changes to existing laws regarding state attorney general enforcement or revising the civil remedies provisions, including treble damages. These denied recommendations were not unanimous. We did recommend repealing the anti-consumer Robinson-Patman Act. I had hoped that would be unanimous, but it came out 11-1. The analysis of another controversial issue, indirect purchaser recovery, was difficult. The Supreme Court had ruled in 1977 that only direct purchasers could sue for overcharges and that allowing indirect purchasers to recover as well would be too complex and could result in duplicative recoveries. Roughly half the U.S. states responded with statutes allowing indirect purchaser recovery under their state laws. The result was chaotic. There were cases with multiple state court class actions as well as federal class actions. I proposed a solution consistent with what an ABA task force had suggested. We concluded: "Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury." And we

specified changes that would allow this type of consolidation to happen. There were a number of disagreements as to the details but the basic idea was not very controversial – except among lawyers who had benefited from the chaos.

We devoted much of our time to exemptions from the antitrust laws and regulated industries. Antitrust practitioners who subscribe to the consumer welfare standard generally despise exemptions and regulation, preferring the free market instead as the governor of industrial outcomes. But on this issue, there were lots and lots of self-interested parties who liked exemptions just fine and were happy to tolerate regulation as well. Our thinking derived from the deregulation experience of the 1970s and 1980s. Deregulating telecommunications and many forms of transportation such as air travel led to sharp price reductions and the entry of new competitors. We wanted to spread those benefits.

At one of first meetings – devoted to determining what our agenda would be – the public contingent included representatives of companies in Webb-Pomerene Associations and Export Trading Act groups. These companies were allowed to fix prices for *exports*. We did not think much of those exemptions. The DOJ has often indicted foreign nationals for fixing prices on goods exported to the U.S. These exemptions, therefore, were hypocritical as well as harmful. When we arrived for the hearing, there were representatives of many such companies as well as letters from congresspeople basically telling us to stay away. We did not want to do that, but we also did not want to be shut

down. So the compromise was to address regulation and exemptions in the abstract, but with the Shipping Act of 1916 (governing ocean carriers) and the McCarran-Ferguson Act (insurance) as examples.

What I remember most was how much fun we had. Every one of the Commissioners (and our great staff) knew antitrust and had spent much of their careers in the practice. Most had agency experience. We all felt pretty strongly about the issues and did not always agree. But our deliberations were uniformly cordial and pleasant even where we did not agree. When we wound up, I considered every one of the others as a friend. I'm confident that they each feel the same. Six Democrats, six Republicans, and we all got along.

The AMC produced a great report. It has had close to zero impact. The Ninth Circuit adopted our recommendation for the legal standard governing "bundled discounts," a form of pricing sometimes challenged under section 2 of the Sherman Act. Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008). The report has also been cited several times, but that's it. No legislative changes. Terribly disappointing, but we have a great report that will live forever and our meeting and hearing materials remain online.

21. MOVE TO WILSON

I had thought I'd be at Lord, Day & Lord my whole career. But I had changed firms twice and had absolutely no desire to do it again. Apart from the simple dislocation, every time you move, you have to prove yourself all over again.

I had met Charles Biggio when he was in the DOJ front office in the Clinton Administration. Charles was one of the main decision-makers on mergers and had particular expertise in radio. We were handling a radio sales representative merger (Katz Media and Chancellor Radio) and that road led to Charles. Patty Brink and Renata Hesse were two of the other DOJ lawyers on the deal. After a white paper, some depositions, and several meetings, the deal cleared without challenge. I admired Charles and he apparently liked us. Not long afterwards he joined me at Akin Gump New York. (Renata much later joined both of us at Wilson.) I was the managing partner at Akin New York at the time but stepped down shortly afterwards. I did not like the hassle of administration or the complaints about this or that from other lawyers.

Charles grew unhappy at Akin and started to explore the idea of leaving. I was loyal to Charles (and the firm) and was not looking to leave. But at the end of 2004, my compensation was cut because I had brought in less business than the year before. I had never ever complained about compensation then or since and had never asked to be paid more than I was. But if Akin had not blocked me from taking on the co-counsel role in Amex's case against Visa and

MasterCard, the billings would have been in the low eight figures per year. To cut me for bringing in less business under those circumstances made no sense. But I still had no wish to leave.

At the 2005 ABA Spring Meeting in DC, Scott Sher of Wilson asked to have breakfast. He made a strong push for me to join the firm. I was intrigued enough to fly out to the mother ship in Palo Alto and met several other partners. They were all quite impressive. Charles and I were offered jobs. Charles wanted to go. I was on the fence. I took a trip to Napa with my wife and friends and thought about it. I decided no. It would just be too much to change firms once again. I called to decline.

Wilson was not accepting my decision. John Roos, then firm Chairman, and Boris Feldman, a senior litigation partner, flew from California to take Fran and me to dinner at Aureole in New York. Great restaurant. We had a wonderful discussion. I was left to think: do I want a firm that does not care about me and feeds little antitrust work, or instead a firm that really needed more antitrust expertise and had a corporate department generating huge deal flow? That John and Boris actually came to New York convinced me in the end. So I said yes.

I joined Wilson in September 2005. Carol came with Charles and me. It was the best decision I ever made.

22. HARMAR

One of the cases that started at Akin but concluded at Wilson was *Coca-Cola Co. v Harmar Bottling Co.* in the Supreme Court of Texas. This was my last litigation for Coke. I did some work afterwards as co-counsel with Cleary Gottlieb in clearing Coke's acquisition of Coca-Cola Enterprises, its largest U.S. bottler. The FTC cleared the deal with a few conditions, so it was not litigated. There was also a preliminary *criminal* inquiry by the Justice Department into "category management," a practice where groceries and other retailers enlist food and beverage suppliers to help them determine how to stock their shelves. See "Antitrust Implications of Category Management: Resolving the Horizontal/Vertical Characterization Debate," THE ANTITRUST SOURCE, July 2004 (with Brian Henry and Ken Glazer). The criminal inquiry was ridiculous and dropped quickly by DOJ after one meeting without even thinking about litigation.

As of my retirement, no one had sued Coke in the U.S. under the antitrust laws following our victories in *Pepsi* and *Harmar*. So *Harmar* was my last litigation matter for the client. *Harmar* was brought in plaintiff-friendly east Texas. The plaintiffs were Royal Crown bottlers in Texas, Oklahoma, and Louisiana. As in *Sun-Drop* and the FTC investigation, the issue was the legality of calendar marketing agreements, this time under Texas state antitrust law. The RC bottlers called – you guessed it – David McFarland of *Sun-Drop* fame as their expert economist. The plaintiffs prevailed at trial, gaining a $16

million judgment (before trebling) against Coke and Coca-Cola Enterprises. True to form, Pepsi, which had also been sued, settled on the eve of trial. The Sixth Court of Appeals in Texarkana affirmed the judgment in all respects. 111 S.W.3d 287 (Tex. App. 6th 2003). In Texas, as in federal court, review in the Supreme Court was far from automatic; you had to petition the court to take the appeal. I was not in the trial or first appeal, but was brought in at the petition stage for Coke. Jerry Beane of Andrews & Kurth represented CCE. The Texas Supreme Court grants review in only about 5% of the cases submitted. So our chances statistically were rotten. And Texas antitrust decisions were sparse, so we could not make the usual argument of a conflict among lower courts needing Supreme Court review. But we had a good argument that the lower court was simply punishing competition and also had no basis for projecting Texas state law into Oklahoma and Louisiana. The court granted review.

The appeal was argued in November 2004 (pre-Wilson) and decided almost two years later in October 2006 (at Wilson). The court has nine justices. They each have nameplates in front of them, making it easy to address them by name. I argued the merits and Jerry Beane handled extraterritoriality. When the decision finally came out, we won 5-4 but with a vigorous dissent. We won both on the merits and the extraterritoriality issue. 218 S.W.3d 671. The dissent disagreed on both issues.

The case was not over. A petition for rehearing was filed. The drill is that you don't respond unless the court asks for

a response. They did. Never a good sign. There were numerous amici in support of the plaintiffs, including some prominent law professors from the University of Texas. Their argument was that the jury's verdict should have controlled and that the court had usurped the jury's role. Most of the other amici said the same.[6] Ben Klein, a very highly regarded economist, submitted an amicus brief in our favor. (Ben was one of the UCLA professors in my 1979 course, and our expert in the *It's My Party* case discussed later.) With all this attention, we were figuratively sweating the outcome for months. Finally, in May 2007, rehearing was denied. Whew!

[6] The truth is that, starting with *Matsushita* in 1986 (summary judgment) and *Twombly* in 2007 (motions to dismiss on the pleadings), courts across the board have found greater freedom to reject antitrust jury verdicts on economic bases than in other areas of the law. So the plaintiffs' amici had an argument that was not at all frivolous.

23. FIRST GOOGLE CASES

WSGR's most famous client is Google. Wilson incorporated the company, took it public, and has handled much of its litigation. In 2006, soon after arriving at Wilson, David Kramer asked for my help in a case brought by Kinderstart.com. David is Google's key lawyer on Internet-related issues and is nationally-recognized for his work in the field.

Kinderstart operated a website that was a directory and search engine for links to information and resources on subjects related to young children. It sued when its rankings on Google search fell sharply and it was unable to advertise on google.com. Kinderstart asserted the proverbial kitchen sink of claims, including antitrust claims, unfair competition, violations of the Lanham Act (trademark protection), defamation, and violations of free speech rights. We moved to dismiss, the type of motion that requires the court to accept the facts alleged as true. This meant we could not assert, let alone rely on, the actual reasons for the demotion. Essentially, Google had found that some of the links to which Kinderstart had been directing to users actually included inappropriate content. The court concluded that demotion decisions were not a type of anticompetitive conduct. Judge Fogel dismissed the claim that Google had unlawfully monopolized "search advertising" on that basis and also because search advertising was not a relevant antitrust market that could be monopolized. The actual market was all advertising. 2007-1 Trade Cases ¶ 75,643 (N.D. Cal. 2007). David

Kramer also had the idea of advancing a claim back against Kinderstart under California's anti-SLAAP statute. That statute allows a claim to be brought against someone who has unsuccessfully challenged its adversary's free speech rights. Kinderstart was in fact attacking Google's speech rights – how to rank websites in search results – and the court granted that motion too. As complete a win as you can get. Kinderstart appealed to the Ninth Circuit but eventually agreed to withdraw the appeal in connection with a mutual walk-away settlement.

In 2007, it was at least arguably correct that search advertising was not a relevant antitrust market. Another court had reached that same conclusion in an AOL case. And I believed it was correct. But I was nervous about whether we could sustain that part of the Kinderstart ruling on appeal. A reversal on that ground would be detrimental to Google. So I was happy that we settled.

The next case was *Langdon v. Google* in the District of Delaware. Langdon sued Google, Microsoft, Yahoo, and AOL for refusing to run his ads on their websites. The allegation was that his websites exposed fraud perpetrated by various North Carolina government officials, and atrocities committed by the Chinese government. He asserted another kitchen sink of claims, which the court readily dismissed. 474 F. Supp. 2d 622 (D. Del. 2007). The antitrust claims had dropped out earlier, when he amended his initial complaint.

The third of these early cases was *Person v. Google*. Carl Person (pronounced Pearson) was a lawyer, known best for

asserting aggressive antitrust claims that wound up going nowhere. When in law school and I was student-clerking for Judge Dooling, we had and the judge dismissed one of his cases. His Google case resulted from the "quality score" used by Google in its AdWords program. Quality score is an important part of the auctions that Google runs for websites seeking to advertise on google.com. Auctions are run on search "keywords." The winning bidder on a given search term (for example, [big screen TVs]) gets its ad in the first slot (on top or the right) and the next winning bidders get the next slots. Bids are adjusted for quality. If a website seeking to advertise has substantive, relevant conduct and is well-designed, the owner of that site will receive a good quality score. With a good quality score, ads cost less. If the site is *not* relevant (for example, a funeral home site bidding on [big screen TVs], the resulting poor quality score will adjust the bid down and cause the ad to rank lower or not at all.

Person claimed to be running for New York State Attorney General and wanted to advertise on a variety of low-cost keywords (i.e., keywords that are common words but rarely used as search terms) to direct to his campaign website. The words in question had nothing to do with his campaign. He sued in the Southern District of New York claiming that Google had unlawfully monopolized "search advertising" by applying a low quality score to his ads so that the ads would rarely if ever show. The Google AdWords agreement that advertisers sign specifies that any related litigation be brought in the Northern District of California.

We moved in New York to dismiss and alternatively to transfer to California. Judge Patterson transferred the case. 456 F. Supp. 2d 488 (S.D.N.Y. 2006). I was aided in the case by Sara Ciarelli (now Walsh), the first associate I hired at Wilson. Sara is phenomenal. Sadly for me but not for her, Google recruited her way and she is still is there, as Product Counsel for Google Maps, as this is written.

Back in California, the case was assigned to Judge Fogel as related to Kinderstart. Judge Fogel easily concluded that having and applying quality scores was not anticompetitive conduct. He also concluded, as he had in *Kinderstart*, that search advertising was not a relevant antitrust market but simply a part of the broader advertising market. 2007 WL 832941 (N.D. Cal. 2007). Person's second try was also dismissed and he appealed to the Ninth Circuit.

On appeal, we were again concerned about getting an opinion saying that, on a motion to dismiss, a search advertising market might be upheld. So we downplayed that argument and asked the court to rule only that the conduct was not anticompetitive. The court did just that, affirming the dismissal. 346 Fed. App'x 230 (9th Cir. 2009).

These cases were fun. Once *Person* resolved, I was 3-0 in Google cases – all dismissals on the pleadings with no discovery.

24. UPMC

Scott Sher and I were friends with a former FTC official, David Balto, who had gone into private practice. In 2009, David was consulting for UPMC, the University of Pittsburgh Medical Center. UPMC was facing a DOJ investigation and a private suit from West Penn Allegheny Health System. UPMC was the much larger Pittsburgh hospital system. Its constant nemesis was Highmark, the dominant insurer in the area. UPMC reached a "truce" with Highmark. Highmark would no longer discriminate against UPMC. It would not prefer West Penn by steering subscribers to it, or place UPMC in a lower reimbursement tier; in return, UPMC would give a preference to Highmark in terms of referrals. West Penn claimed that UMPC also declined to contract with some other insurers and slowed the expansion of its wholly-owned insurance plan. West Penn asserted that the truce violated the antitrust laws by solidifying UPMC's monopoly in the area while insulating Highmark from competition as well. David believed that UPMC's outside counsel was not up to the task and advised the client to hire us, which they did.

We had a long meeting with the DOJ staff. The lead lawyer for staff was Josh Soven. (Josh is Renata Hesse's husband and well after this joined us at WSGR before departing again for Paul Weiss. Renata, who had joined us earlier, herself left for a DAAG slot at DOJ. She became the acting AAG at the end of the Obama administration.) Our WSGR team included at various times Chul Pak, Charles

Biggio, Scott, Sara Walsh, David Reichenberg, and several others. It was a complex matter and required a lot of work.

The founder of UPMC and its CEO was Jeffrey Romoff. He was a real character, incredibly knowledgeable about the business and the marketplace. He also had a long, deep dislike for Highmark. To him, and to us, the idea of a conspiracy with Highmark to monopolize the Pittsburgh market was laughable. At DOJ, Josh and his team were tough on us. But we had a good argument that this was simply a vertical arrangement with significant efficiencies and led to lower health care costs for Pittsburgh area consumers. Eventually, staff closed the investigation. This made our client happy of course.

The next step was to deal with West Penn's lawsuit. It was assigned to Judge Schwab, a very bright conservative judge who was regularly reversed on appeal. He granted our joint motion with Highmark to dismiss the complaint. West Penn of course appealed. At the Third Circuit, we drew as bad a panel as you could get, led by Judge Sloviter, a former plaintiffs' class action lawyer. The panel threw a few softballs to West Penn but grilled me and Dan Booker, who argued for Highmark, mercilessly. Highmark had challenged West Penn's standing to raise its claims, but I thought that was a losing argument and we did not advance it. Nevertheless, Judge Sloviter asked me about a case on the subject that West Penn had raised in a post-briefing letter. I only vaguely remembered the case, and delivered a generic and unpersuasive response. We left the court with

our heads down, mine the lowest of all. The Third Circuit reversed. 627 F.3d 85. So back we went to Judge Schwab.

During this time, UMPC's general counsel, Bob Cindrich, decided to retire. Bob had been a federal district judge, was very knowledgeable, and a great guy. Mr. Romoff called me and asked if I would take Bob's place as general counsel. This was immensely flattering, but I could not abandon my other clients and cases and was not about to move to Pittsburgh. UPMC brought in an excellent replacement. But in light of Romoff's offer, I was seen as a threat – understandably but incorrectly – and so we were replaced.

25. HEALTH CARE MATTERS

Through the good work of our DC partner, Seth Silber, we had a number of matters for Mylan and other health care clients.

Lorazepam & Clorazepate. The first case involved Lorazepam and Clorazepate, generic drugs sold by Mylan. Mylan had entered into exclusive agreements for the active pharmaceutical ingredient (or API) of both drugs with a company named Profarmco. Profarmco agreed to supply its Lorazepam and Clorazepate API exclusively to Mylan in exchange for an upfront payment and a share of Mylan's profits from the sale of the two drugs in the form of royalty payments. The FTC challenged the agreements as unlawful and Mylan settled by terminating the exclusivity. The argument was that the agreements tied up (foreclosed) the supply of these API and allowed Mylan to raise prices without fear of competition. The FTC sought and received a lot of favorable press for its action. In truth, the brand suppliers could supply unlimited quantities of API. The question of liability was therefore less than clear. Mylan was socked with many class actions. It was able to settle all but one. That was a case brought by Blue Cross plans in a handful of states as indirect purchasers under state law. Federal courts have limited ability to hear state law claims but can exercise "diversity of citizenship" jurisdiction. That was the basis for the Blue Cross plans' suit. The plans were from Minnesota, Massachusetts, and Illinois, and they alleged the defendants were from different states. The plans also were representing their "self-funded" customers. These

are companies that employ the insurance company to administer and process the claims but are themselves responsible for paying for care and pharmaceuticals.

Under diversity jurisdiction requirements, there must be complete diversity. That means that *none* of the parties can be from the same state as anyone on the other side, determined by a company's state of incorporation and its principal place of business.

Another firm tried the case valiantly, but the plaintiffs won a $77 million verdict, with pre- and post-judgment interest accumulating daily and putting the true exposure in nine figures. We were brought in to handle the appeal. We submitted our briefs arguing that the agreements were not illegal and that the judgment should be reversed. In preparing for oral argument, I read the appendix (mostly papers filed in the lower court and the trial transcript) cover to cover as I always did. In reading through, I saw that one of the self-funded customers was 3M. I checked to confirm that 3M was incorporated in Delaware. On further checking, many others were as well. I knew that some of the defendants were incorporated there too. That meant there was no diversity jurisdiction and the case should have been dismissed much earlier. We had not raised the issue in our briefs, which normally waives your right to raise it later on. But this related to the court's subject matter jurisdiction and objections on that basis cannot be waived and can be raised for the first time on appeal. That is what we did. With the help of Dan Weick, I sent a letter just a few days before

argument arguing that the case should be dismissed for lack of jurisdiction.

The panel was very unhappy with me for raising the issue so late. They knew we were right but instead of simply dismissing a case that had used lots of resources before and during the three week trial, the Court instead sent the case back to the district court to see if the offending plaintiffs could be removed. *In re* Lorazepam & Clorazepate Antitrust Litigation, 631 F.3d 537 (D.C. Cir. 2011). We sought Supreme Court review but were denied. Sorting out who was where was a long and difficult task. We were prepared to argue that the plans had failed to meet their burden of proof on the excisions, but instead settled the case for a fraction of the verdict.

Doryx. The next case involved an especially powerful prescription-required acne medication called Doryx. Warner-Chilcott made the branded version, which they were marketing at a significant profit. Warner sold the drug in capsule form. Mylan wanted to sell a generic version. To do that, under the legal regime governing generic drugs, the generic had to be identical to the branded version to get timely FDA approval. That meant Mylan would have to offer capsules as well. To prevent Mylan from entering with a generic version, Warner withdrew all its capsules from the market and started selling a tablet version. The tablet had no therapeutic advantages over the capsule, and in fact was harder to swallow, but it meant Mylan had to go back to the drawing board in manufacturing and getting FDA sign-off. This delayed generic entry for about two years. The tactic in

issue is called "product hopping." Federal and state enforcers agreed that it was illegal. My old colleague, Elinor Hoffmann, tried a New York State case challenging product hopping of a drug called Namenda. Which the State won. New York *ex rel.* Schneiderman v. Actavis plc, 787 F.3d 638 (2d Cir. 2015).

In our case, I was not involved at the district court stage, where the judge granted summary judgment against Mylan. The reasoning was that the relevant market had to include other acne medications, not just Doryx. That makes some sense superficially. But Warner's own expert provided data showing that patients would only switch away from Doryx if the prices increased by 500% to 1900%. A product is in the same market if people would not switch way in response to a 5-10% increase. If it would take more – here vastly more – then those other products are not in the market. So the other acne medications were clearly outside the relevant market, and the product hopping was a device to maintain Warner's monopoly. The judge was just wrong.

We appealed. As our brief was going in, Mylan was in the news and not in a good way. Mylan had raised EpiPen prices by some 500% over seven years and patients were apoplectic. The bad press continued into an avalanche.

Our panel on the Third Circuit court of appeals included Maryann Trump Barry (on the phone, not live) who yelled at me constantly. The other two asked few questions but their body language was hostile. We still thought we might have a shot. The FTC and several academics had submitted

amicus briefs in our favor. But no. We lost in a simply terrible opinion. Mylan Pharmaceuticals v. Warner/Chilcott, 838 F.3d 421 (3d Cir. 2016). Mylan chose not to seek Supreme Court review. You can't win them all, but we should have won this one.

Celgene. The next Mylan case for me was against Celgene Corporation. The case involved Mylan's efforts to market generic versions of two brand-name drugs marketed by Celgene — Thalomid® and Revlimid®. These were seriously dangerous drugs. Thalomid notoriously caused birth defects when first introduced, and Revlimid was simply an updated version. It was discovered that Thalomid was an important drug to take if you had advanced cancer. Both drugs were subject to the FDA's Risk Evaluation and Mitigation Strategy (REMS). REMS are required risk management plans that use risk minimization strategies to ensure that the benefits outweigh the risks.

As with all generics, the proposed drug must demonstrate to the FDA that it is identical in form and content to the already-approved brand. You can't actually go to the drug store to get REMS drugs. You need a prescription for a specified quantity. Mylan didn't have one, and the quantities needed for testing were far in excess of what you could get in a drugstore. The only way to get the samples was from Celgene. Mylan asked and Celgene gave it the runaround for a few *years* before simply saying no. Our case was that Celgene was unlawfully maintaining its monopoly over these treatments by refusing to deal. One hurdle was the Supreme Court's 2005 decision in a case known as

Trinko. A number of courts had interpreted the decision to require proof that the defendant terminated a prior course of dealing – which we of course did not have here. Susan Creighton and I had written a paper (well before the case) saying that is wrong. "Twenty-Five Years of Access Denials," ANTITRUST, Vol. 27, No. 1, pp. 50-55, Fall 2012. The paper had received an award at the Antitrust Writing Awards. The FTC cited it in an amicus brief supporting our position in the case.

Celgene moved to dismiss on the pleadings. In an odd stroke, Celgene's lawyer cited our article in his slides accompanying the argument. The judge ruled in our favor but certified her decision for an appeal to the Third Circuit. The circuit court refused to take the appeal. So we passed that hurdle.

After extensive discovery, Celgene sought summary judgment. It was a long and challenging argument, with many difficult questions for me and my opponent. But we won. The court limited Mylan's potential recovery but otherwise denied the motion, saying "the Court finds that, until the FDA approved Mylan's protocols and Celgene was so notified, it had a legitimate business justification for refusing to sell Mylan samples." But after those approvals were obtained, Celgene's refusal to sell samples was unlawful. Mylan Pharmaceuticals, Inc. v. Celgene Corp., https://bit.ly/3uOKDTx (D.N.J. 2018). The case proceeded towards trial without me, and we were able to obtain a very favorable pre-trial settlement.

Eisai. Another case in this time frame was *Eisai v. Sanofi-Aventis*. Sanofi was selling Lovenox, a blood thinner, to hospitals and doctors under a loyalty discount program. Under these programs, the greater the percentage of your needs that you commit to buying, the greater the discount. See Jonathan Jacobson, "A Note on Loyalty Discounts," THE ANTITRUST SOURCE, June 2010. Eisai's competing drug, Fragmin, was struggling to gain customers and sales and believed that Sanofi's programs were the cause. Eisai also believed that the programs were unlawfully exclusionary and hired us to draft a complaint. Sanofi moved to dismiss for failure to state a claim. We drafted the opposition papers and retained Einer Elhauge, a Harvard law professor and dabbler in economics, to submit an expert report. The argument was in Trenton and went long. Sanofi was represented by Cleary Gottlieb, and they did a good job. I was able to persuade the judge that we had a case and she denied the motion.

Eisai told Seth afterwards that they wanted to keep us to argue the merits and give high level advice but was hiring a less expensive firm to handle briefing and discovery. Seth and I discussed and elected to resign. It is sad but true that law firms make more money on those tasks, not so much on counseling. Eisai was cherry-picking, and this was not something we wanted to support. Eisai naturally continued with the case but lost on summary judgment, which the Third Circuit affirmed. Eisai, Inc. v. Sanofi Aventis US, LLC, 821 F.3d 394 (3d Cir. 2016).

26. TRADECOMET & MYTRIGGERS

Microsoft was coming after Google on many fronts. It complained to the FTC and numerous state attorneys general. Although those efforts went nowhere, it had its lawyers – Rick Rule and Jonathan Kanter – take on two cases of small companies with gripes about Google. Rick and Jonathan sought out and received a lot of press for their work, calling themselves the "Google slayers." They asserted that they had "figured out the algorithm to go against [Google]." See The Google Slayers, American Lawyer (2010), at https://bit.ly/3IeKhbO. Rick and Jonathan even chose to debate me and Scott Sher on these issues at Stanford. We wiped them out in a lopsided audience vote. The debate was recorded and can be found at https://bit.ly/4bkG3wc.

The first of their cases was brought by a company called TradeComet. TradeComet operated a website, SourceTool.com, which attracted "search traffic of businesses seeking to buy or sell products and service to other businesses," and provided a "B2B" (business to business) directory. TradeComet purchased advertising through Google's AdWords program. It alleged that Google attempted to reduce traffic at TradeComet's own website by increasing the cost of advertising through a low quality score.

SourceTool's business model was arbitrage. The strategy was to use its AdWords ads to attract users searching on Google for a wide variety of items, in the hope that they would then come to its site and click on other companies' AdSense ads. Under Google's AdSense program, third party

websites enter into agreements with Google under which Google agrees to deliver advertisements to *their* websites. If a user visiting the site of an AdSense participant clicks on one of the ads Google delivers, the advertiser pays for the click, generating revenue for both Google and the website (here SourceTool) that directed the user to the advertiser's site. As an example, if users searched for "pumps," these users might see a SourceTool ad placed through a successful AdWords bid for the keyword "pumps." The user might then click through to the SourceTool landing page, and then click further on AdSense ads (purchased, for example, by companies actually selling pumps) in an effort to find the product she was actually looking for – with each AdSense click generating income for SourceTool. If SourceTool's cost of buying the AdWords ads was less than the revenue generated from the AdSense ads, SourceTool would make a profit. And in fact SourceTool was very good at this arbitrage and began to make a lot of money.

Google recognized that arbitrage sites like SourceTool provide a poor user experience. A user clicking on ad for pumps will expect to see sites selling pumps, not sites with ads for yet other sites. SourceTool's landing page was basically all ads, with little to no original content. Consequently, Google would provide an adjustment through the quality score. TradeComet advanced the ridiculous claim that this was an antitrust violation. Trade publications scoffed at TradeComet's claims. E.g., Mike Maasnick, "Once Again: Making Search Results Better Isn't An Antitrust Violation," TechDirt, https://bit.ly/3IasItJ (2009).

We never reached the merits. TradeComet brought suit in New York City, but its AdWords agreement specified that any litigation relating to Google's advertising programs could be brought only in the Northern District of California. So we moved to dismiss the case for having been filed in an improper venue. Sara Walsh and I had to put up with a ton of nonsense in responding to the arguments that the venue clause was unenforceable as contrary to public and antitrust policy. That sort of argument has lost every time – including our Texas Utilities case addressed in Chapter 10. And it did here as well. The district court dismissed the case. TradeComet.com LLC v. Google Inc. 693 F. Supp. 2d 370 (S.D.N.Y. 2010).

On appeal, TradeComet made the same arguments about enforceability we had made unsuccessfully in *Texas Utilities*, and with the same result. It also claimed that the venue clause could be enforced only through a motion to transfer and that dismissal was impermissible. The Second Circuit disagreed and upheld the dismissal. TradeComet.com LLC v. Google, Inc., 647 F.3d 472 (2d Cir. 2011). The argument was really a sham anyway. TradeComet could have filed its case again in California but made no effort to do so. Ironically, two years later the Supreme Court agreed with the argument (which I still disagree with) that venue clauses can be enforced only through a motion to transfer. Atlantic Marine Const. v. U.S. Dist. Court, 571 U.S. 4 (2013).

After *TradeComet*, the next Microsoft-based case was *Google Inc. v. myTriggers.com*. This case was originally filed by Google in state court in Ohio to collect a large amount of

unpaid advertising fees. Because Google itself had filed the suit, dismissal or transfer to California could not happen. We were stuck there. We retained Jim Wilson of the Vorys Slater firm in Columbus, Ohio to help litigate the case with Sara and me.

myTriggers' case was filed under Ohio's Valentine Act. Unlike the Sherman Act, the Valentine Act condemns only anticompetitive *agreements*. Unilateral conduct falls outside the act's scope. myTriggers was a comparison shopping site. That meant, if you searched on Google for a product, myTriggers would provide prices and links to sites where the product could be purchased. Google lowered myTriggers' quality score, with the result that it paid much more for ads. It alleged that other comparison shopping sites were not affected. All of the injuries claimed by myTriggers – the higher minimum bid requirements and the resulting loss of traffic to its site – stemmed from the March 2008 adjustment to myTriggers' quality scores.

Largely because the conduct in issue was undeniably unilateral, we moved to dismiss. Rick, Jonathan, and Joe Bial continued to make things difficult for us but ultimately, with Jim arguing, the trial court dismissed the case. Google Inc. v. myTriggers.com, Ohio Common Pleas, Aug. 31, 2011, at https://bit.ly/42SeQh0. myTriggers appealed and, to our dismay, obtained an amicus brief from the Ohio Attorney General supporting their position. The case was argued September 25, 2012, before the Tenth Appellate District, and could not have gone better. A few days after the argument, myTriggers voluntarily abandoned the appeal.

These two cases made my Google record 5-0, all motions to dismiss.

27. GOOGLE SEARCH AT THE FTC

The maneuvering by Rick and Jonathan succeeded at getting an FTC investigation launched. My role was limited. I attended a few meetings with staff and met with Commissioner Tom Rosch in his chambers. Google's defense was led instead by Susan Creighton. Susan had been Director of the Bureau of Competition at the FTC under Bush II and was one of the most respected antitrust lawyers in the country. Prior to going to the FTC, she had been at Wilson (before my time) and had written the legendary white paper on behalf of Netscape that helped provide the legal and economic background to DOJ's case.

Apart from my few FTC meetings, I helped out in the public domain. In addition to the Stanford debate against Rick and Jonathan, I debated Rick and others on an ABA panel with largely the same result. I also debated Tom Barnett (former AAG, then at Covington & Burling, representing Microsoft) at the annual conference of State attorneys general. That again was a bit of a route. I did not think Tom's heart was truly in it. He had been a terrific AAG (although I disagreed with his Section 2 report and his clearance of Sirius/XM) and became a friend. It was hard for him to counter our arguments given what was said in the now-repealed Section 2 report.

With Tom Barnett at the Antitrust Writing Awards

A unanimous FTC finally closed the investigation, saying:

> A key issue for the Commission was to determine whether Google changed its search results primarily to exclude actual or potential competitors and inhibit the competitive process, or on the other hand, to improve the quality of its search product and the overall user experience. The totality of the evidence indicates that, in the main, Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to

> that purpose. While some of Google's rivals may have lost sales due to an improvement in Google's product, these types of adverse effects on particular competitors from vigorous rivalry are a common byproduct of "competition on the merits" and the competitive process that the law encourages.

We hoped that this forceful rejection of the claims of Microsoft and other competitors would end the series of complaints about Google, but it did not. The European Union came after Google on the same issues with the opposite result and commenced a series of equally meritless investigations on other issues resulting in huge fines. To understand how silly this was, the EU was claiming that setting Google as the default on Safari and Firefox (and Google's own Android) was problematic, so it forced browser makers to present users with a "choice screen" rather than the convenience of an easy-to-change default. Google's market share went *unchanged*. It turned out that defaults did not matter. Users just preferred Google. But that didn't prevent the Trump DOJ, supported by Kanter, to sue later anyway. In my personal opinion, these cases and investigations are all meritless – seeking to punish Google for having great products that provide massive benefits to society.

28. NETFLIX

When joining WSGR, one of my first introductions was to David Hyman, general counsel of Netflix. This proved great for us when, on January 2, 2009, a massive class action was filed against Netflix and Wal-Mart in connection with the now-obsolete (but then very hot) business of DVDs by mail. The claim was that Netflix and Wal-Mart entered into an unlawful "Promotion Agreement." What had happened was that Wal-Mart's fledging DVD-by-mail business was a bust. Netflix was the clear leader with Blockbuster (remember them?) a distant second. Wal-Mart elected to exit the business. Pursuant to the 2005 Promotion Agreement, Netflix agreed to pay a 10% revenue share to Wal-Mart for each subscriber who transferred, and a $36 bounty for each new subscriber gained through Wal-Mart referrals. There were no covenants not to compete; and nothing restricted Wal-Mart from offering an online DVD rental service should it choose to re-enter.

The first class action was filed in the Northern District of California by very capable lawyers from Howrey & Simon. As is typical, many other plaintiffs' class action firms jumped on the bandwagon. The other firms just needed to find a Netflix DVD customer willing to act as a named plaintiff. Eventually, a steering committee would be appointed, and they would dole out the work, generally in proportion to the other firms' contribution to the expenses of the case (including things like expert fees, travel, deposition court reporters, and copying costs, and the like). Part of what some plaintiff lawyers like to do is to make discovery

for the defense costly and intrusive to pressure a settlement. We saw that big time in this case. Sara Walsh handled all the nonsense with great skill. Later in the case, we added Dylan Liddiard and Tony Weibel from our Palo Alto office. The team was terrific; they made discovery manageable.

On the last day of discovery, plaintiffs were scheduled to take the deposition of Reed Hastings, Netflix CEO. Well after that was scheduled, District Judge Whittemore in Tampa scheduled a preliminary hearing in the *Transitions* class action cases discussed in chapter 30 below. Lead counsel for the parties were required to attend, although telephone attendance was permitted. Since I had Reed's deposition as an unmovable conflict, I wrote the most obsequious letter imaginable asking if Chul Pak could handle the hearing instead of me. The judge wrote a one-word answer on the letter: "Denied." The plaintiff lawyers in both cases thought this was great and had many laughs at my expense. But what to do? The *Transitions* case had just begun and I did not want to irritate the judge. But Reed's deposition had to go forward and I had to defend it. Eventually, David, Reed, and I agreed to take an extra-long lunch recess where I could go into another room to handle the *Transitions* hearing. The plaintiff lawyers did not like it or consent, but we gave them no choice. Eventually, they had the grace to agree. Reed was a true gentleman. Other CEOs would not have taken it so well.

A class action requires approval ("class certification") by the judge. The Northern District of California is notorious for certifying many class actions, including dubious ones.

Here, plaintiffs were seeking certification of a class of all Netflix subscribers from the date of the Promotion Agreement. That made little sense given the changes in Netflix's offering and the different rivals in the market at various times. But District Judge Phyllis Hamilton had a reputation for being an easy mark on class certification. We divided a lot of the work with Wal-Mart. And one of Wal-Mart's excellent lawyers was set to argue our side on class cert. I was to take care of summary judgment. The class cert hearing was set for the Monday after the WSGR partner retreat at Pebble Beach (Spanish Bay). As I'm driving from the airport to the event, and just while I'm passing Netflix's headquarters in Los Gatos, my cell phone rings. It's Wal-Mart's lead counsel. "Jon, I'm calling to tell you that we've settled [for $38 million]." Great, that means I have to argue class certification with zero preparation. To rub it in, when settling a class action before class certification, Wal-Mart had to agree to a provisional class. That doesn't bind Netflix but it never helpful. I did the best I could at the hearing but to no avail.

So the case careened towards summary judgment once discovery had finally closed. With Judge Hamilton, this was going to be an uphill battle as she is known for giving plaintiffs lots of leeway. Our two main arguments were, first, that the Promotion Agreement could not be viewed as an antitrust violation, and second, that plaintiff's injury theory was infirm. The plaintiffs contended that Netflix would have reduced the price of its most popular subscription plan due to competitive pressure from Wal-Mart if Wal-Mart had not

exited the market. This was plaintiffs' only theory of injury. Injury is an essential element of any antitrust claim, so this issue was crucial.

Judge Hamilton did not rule in our favor on the violation issue but, to our pleasant surprise, granted summary judgment for lack of injury. The ruling was plainly right. Netflix was never concerned about Wal-Mart, just Blockbuster and the threat of Amazon. When Wal-Mart entered, Netflix actually raised its prices. And upon Wal-Mart's exit, Blockbuster, a real threat, reduced its most popular plan to a price well below Netflix's. But Netflix stood firm. The idea that continuation of Wal-Mart's failing business would cause Netflix to reduce prices (while Blockbuster did not) was preposterous. Judge Hamilton agreed and granted our motion.

Sara soon departed for Google but was able to attend the Ninth Circuit argument. I was again nervous for this one – not in terms of affecting my delivery, but the outcome. Two of the judges on the panel were Stephen Reinhart and Sidney Thomas, both famous for their pro-plaintiff views. The third was a senior district judge from Utah, who clearly would not buck the other two. Yet we won. The argument went well, with some softballs for me and harder questions for Bob Abrams, the Howrey lawyer who brought the case. The court affirmed the decision slightly longer than one year later. We sweated the year but reveled in the final outcome. *In re* Online DVD-Rental Antitrust Litigation, 779 F.3d 914 (9th Cir. 2015). The argument audio is online. It was a great result for a wonderful client.

29. CONCERT CASES

Charles and I represented Clear Channel, later known for its concert business as Live Nation, in a series of cases claiming monopolization of the popular music concert industry. When Live Nation later acquired Ticketmaster, we were conflicted out because of our prior representation of StubHub against Ticketmaster. But concerts gave us plenty to do, and I was happy to stay out of the Ticketmaster battles that came later.

The first case was called *Heerwagen v. Clear Channel*. It was filed in the Southern District of New York (Manhattan) before the late Judge John Sprizzo. Clear Channel had recently completed a "roll-up" of the concert business by acquiring local promoters and venues, such as Bill Graham Productions and the Fillmore West. The result was a substantial presence in many but not all geographic areas. Melinda Heerwagen attended a few concerts in Chicago. She became the named representative of a proposed class of all rock concert goers in the United States claiming that Clear Channel's conduct had raised ticket prices.

Judge Sprizzo was a curmudgeon. He was also getting older. We had three hearings with him on class certification issues. A typical day would mean court scheduled for 10:00 am, with the judge arriving around 11. We'd then break for lunch at noon or 12:30 and be scheduled to resume at 2. The judge would arrive around 3 and then break for the day at 4:30. The upshot was that a typical hearing would actually

be three hours, with all of us in court much longer. A one-day hearing took three.

Judge Sprizzo was not easy on anyone but was especially tough on the plaintiff lawyers. They wanted extensive discovery before any hearing on class certification, but Judge Sprizzo was having none of it. He interjected his belief that the lawyers were just trying to get into discovery to make the case annoying and expensive in order to pressure a settlement. We certainly agreed, but the other side's lawyers denied it vehemently. There would be no meaningful discovery of Clear Channel.

The key point on class certification was that a national class made no sense. A national class means a national geographic market. That would require proof, for example, that ticket prices in Seattle would be affected by prices in Miami. Our expert, Rich Gilbert of Berkeley, explained convincingly that markets were local, metropolitan areas. There are a few large tours with prices largely flat across the country, but the vast majority of concerts are priced based on the venue owner and local considerations. My cross-examination of Heerwagen's expert was effective, and Ms. Heerwagen admitted in her deposition that she never travelled far from Chicago to attend a concert. Judge Sprizzo asked what happens to the case if he were to reject the national class. The plaintiffs' response was unequivocal: it's a national class or nothing. The court denied certification of a national class. That meant they could represent Ms. Heerwagen individually but not everyone else, which made the case worthless for the lawyers. So they sought

permission from the Second Circuit to appeal and the appeals court allowed it.

Prior to this appeal, the Second Circuit had been absurdly easy on class certification. As Charles put it, "if their expert can fog a mirror," the Second Circuit would allow class cert. Among other things, the prior decisions in two cases, *Visa Check* and *Caridad*, had said that a court cannot consider the antitrust merits on class certification or compare the weight of the expert testimony. The question whether there was a national market or not was a merits issue and Judge Sprizzo had clearly agreed with Professor Gilbert's testimony rather than plaintiffs' expert. Plaintiffs argued that not much more than their mere allegation of a national class was enough under *Visa Check* and *Caridad*.

The resulting decision in our case was important. The court said: "The comparison of the weight of the experts' testimony here did not amount to error inasmuch as the district court was resolving the sufficiently independent question of whether plaintiff had made a proper showing" that questions common to the putative class predominated over individual issues. The court also addressed the argument that "the district court [had] impermissibly considered the merits of her action in requiring her to show that common issues would predominate . . . by a preponderance of the evidence." It said: "Complying with Rule 23(b)(3)'s predominance requirement cannot be shown by less than a preponderance of the evidence." The decision did not go all the way to overruling the earlier decisions, but it set the court on that path. *Heerwagen v. Clear Channel*

Communications, 435 F.3d 219 (2d Cir. 2006). It remains one of my most favorite cases. We were up against a lot of bad precedent.

Remember how the plaintiff lawyers had said that it was a national class or nothing? Well . . . that was then. After their loss on appeal, and in rapid succession, 22 local and regional class actions were filed. We asked the Judicial Panel on Multidistrict Litigation to centralize the cases in Los Angeles, where the newly-named Live Nation was headquartered. *In re* Live Concert Antitrust Litigation, 429 F. Supp. 2d 1363 (JPML 2006). The case was assigned to Judge Stephen Wilson. We agreed with plaintiffs, and the court agreed too, to focus on Denver and Los Angeles as test cases to make the 22 cases more manageable.

Once again, the initial battle was on class certification. Our point was that there was no relevant market of "rock concerts" because rock concerts competed with other concerts (pop, country, R&B, etc.) for consumer dollars; questions common to the class, therefore, could not predominate. Nor did it make sense to put tickets for the Rolling Stones to be in the same class as Modest Mouse. It would even be challenging to put rafters seats for the Stones in the same market as first five rows for the same show. The class certification hearing could not have gone better. Rich Gilbert did a terrific job, explaining that there was little cross-elasticity of demand among artists – the main economic criterion for defining a relevant product market. My cross-examination of the other side's expert, Owen Phillips, went well too. After the hearing, lead counsel for

the plaintiffs called me to request a settlement. I tossed the question to the client – as a lawyer's duty requires – and the answer was an unequivocal "no." Everyone thought we would win.

Three months later, Judge Wilson proved us wrong. Sara and I left court in another case in October and received an email from Pacer (the service for federal courts) that a decision had come out. We were delighted – for a few seconds. We lost. Badly. Deferring to Ninth Circuit precedent that was just as awful as *Visa Check* and *Caridad*, he certified classes in the test markets. *In re* Live Concert Antitrust Litig., 247 F.R.D. 98 (C.D.Cal.2007). We tried to appeal to the Ninth Circuit but that court denied leave to appeal.

On to merits discovery. Lucy Yen and Chul Pak, together with Sara, did a terrific job. The deposition of Owen Phillips was fun. I focused on his purported separation of "rock" from "pop" and country. Only "rock" was in his market. In his deposition, he said a number of really silly things. My favorite was his testimony that Madonna was "rock" and the Kinks "pop." The Supreme Court had held long ago that experts cannot just make stuff up but have to show that their methods are sound and tied to the facts of the case. We filed what is called a *Daubert* motion to exclude his testimony on these bases. We also filed a motion for summary judgment. Before the decision, we went into a mediation to see if the cases could settle but we were too far apart.

Less than two weeks before trial, the judge issued a decision. *In re* Live Concert Antitrust Litigation, 863 F. Supp. 2d 966 (C.D. Cal. 2012). It was a grand slam. He excluded Phillips' testimony and granted summary judgment on the merits. Importantly, based on a then-recent Supreme Court decision called Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011), he also concluded that his class certification ruling was wrong and he de-certified the classes. We were able to settle the cases for a trivial amount after that. Plaintiffs agreed in turn not to appeal. Case over. Very satisfying win.

Judge Wilson's decision was not the end of concert monopolization litigation. The main competing promoter in the Baltimore area sued, alleging unlawful monopolization of concerts in that market. The case centered on a claim that Live Nation was booking artists to national tours and that this left independent promoters out in the cold. The Baltimore promoter was (and still is) Seth Hurwitz, the owner of the 9:30 Club in DC; his company is It's My Party, and his featured Baltimore venue is the Merriweather Pavilion. He claimed that IMP and Merriweather had been denied concerts they otherwise would have had. The evidence, however, including the testimony of Trent Reznor of Nine Inch Nails, was to the contrary. Sure, Live Nation negotiated national tours and, sure, the economics was better if the concert was played in a Live Nation venue – but none of this was required. Artists could, and often did, carve out other venues and promoters out of national tours and could book a tour through a series of local concerts.

Hurwitz's argument, supported by his expert, Einer Elhauge, was that the relevant venue market was limited to amphitheaters, and that Live Nation, through its conduct, had monopolized the Baltimore market.

The case was referred to Judge Motz, one of the really good judges and one with considerable antitrust experience. We moved to dismiss, but he denied the motion. This led to very long and extremely acrimonious discovery. A high point, however, was Hurwitz's deposition. He insisted that the bidding for artists' performances has gotten "crazy" – to the point that he tried, without success, to get Live Nation to agree to stop bidding so aggressively, and to "close up shop" and "leave town." Live Nation of course refused these overtures; any agreement of that sort would be a felony violation of the Sherman Act. He also testified that there were "too many shows," again contrary to antitrust policy under which greater output is a positive good.

Seth Hurwitz at his deposition

We eventually moved for summary judgment and to exclude Elhauge's testimony under *Daubert*. Kim Piro provided a lot of help. Elhauge's venue market definition was excluded. He relied on "artist preference." But he could not identify a single artist who would not perform in other venues. Amphitheaters have some advantages over other types of venue but not nearly enough to carve out a separate market. Venue selection also depends on the season; outdoor amphitheaters are open only in warm weather months and are a poor choice for any rainy season. A band wanting to play in the Winter has decided to play indoors. Even Nine Inch Nails, Elhauge's best example, performed only 35% of its shows in amps. Our expert was Ben Klein and he did a fantastic job. This was the first reported case to "*Daubert*" Elhauge. I felt he had really gone beyond the bounds in numerous respects and I was happy with this outcome.

Judge Motz also granted summary judgment. 88 F. Supp. 3d 475 (D. Md. 2015). He rejected the amphitheater-only market, and concluded that Live Nation had not acted in an anticompetitive manner. Giving artists a better deal is not unlawful.

Hurwitz and team appealed to the Fourth Circuit and made the process unnecessarily difficult. But the case was ultimately heard in December 2015 and a decision came down two months later (short than usual). Judge Motz was easily affirmed. It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676 (4th Cir. 2016). The presiding judge, a conservative named J. Harvey Wilkinson, savaged Hurwitz's case, even referring near the end of his opinion to the episode in which

Mr. Hurwitz had tried to enlist Live Nation in an unlawful cartel. The most significant part of the opinion established that it is not anticompetitive for even a company dominant in one product to provide a better deal if the customer takes a second product as well. This is only unlawful "tying" if the dominant firm *coerces* the purchase of the second product. There was nothing like that in the *It's My Party* case as the many customers who declined package deals demonstrated.

The Hurwitz matter was my last concert case. I truly enjoyed the experience. I even was awarded Litigator of the Week from Global Competition Review for the win.

GCR USA

Litigator of the Week: Jonathan Jacobson

Harry Phillips
25 February 2015

Thanks to the Wilson Sonsini antitrust partner, one of the country's more colourful antitrust battles came to an end last week after a Maryland federal judge tossed out claims that entertainment giant Live Nation illegally forced touring artists to perform at its own arena.

Live Nation had been fighting claims since 2009 that it forced singers and bands to perform at its own venues when it promoted their national tours. The lawsuit was brought by DC music mogul and outspoken Live Nation critic Seth Hurwitz, who runs the Merriweather Post Pavilion south of Baltimore and alleges Live Nation pressured artists into playing at its own amphitheatre in Virginia instead of his.

The lawsuit survived motions to dismiss and a motion for summary judgment. Plaintiffs' lawyers, energised by the charismatic Hurwitz, were looking ahead to trial on the plaintiffs' central theory: that Live Nation used its national clout in tour promotion to keep some of the world's biggest bands – the Goo Goo Dolls, Jonas Brothers and Panic! at the Disco among them – out of rival venues. Backing up their case was testimony from Harvard Law professor Einer Elhauge, a former Supreme Court clerk, adviser to President Obama and author of several influential antitrust textbooks.

That testimony ultimately proved the case's downfall, however. Not only did Judge Frederick Motz say Elhauge had it wrong about the market definition – tour promotion is an entirely local activity so it doesn't matter for this case that Live Nation runs tours all around the country, he said – he also excluded vast swathes of the antitrust expert's report for its methodology, which he said was "not based on sound logic or reasoning".

For instance, Judge Motz said, Elhauge failed to show a market for artists who "prefer amphitheatres", large open-air stadia with grass in the middle, because his figures about how much money musicians made from amphitheatre performances versus arena gigs did not show whether price increases would change that preference. He also faulted Elhauge for including data from plays and musicals that skewed the calculations in the plaintiffs' favour. These performances take place only once, either in an amphitheatre or not, Judge Motz said, and are therefore incapable of switching.

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www.globalcompetitionreview.com/usa

30. TRANSITIONS

Transitions Optical makes treatments for eyeglass lenses to make them darken in sunlight and lighten otherwise; the lenses "transition" from dark to light and back. Transitions does not make eyeglass lenses itself. Those are made by "lens casters." They send the lenses to Transitions. Transitions treats the lenses and sends them back. Most lens casters had an exclusive agreement with Transitions. Under these agreements, the lens caster could not substitute or contract with another similar treatment provider. Nothing, however, prevented any lens caster from using its own photochromic treatments. One, Vision-Ease (VE), had done just that. An issue, however, is that consumers cannot easily tell Transitions lenses from VE's or anyone else's. Exclusivity mitigated that issue but did not eliminate it. Sitting in the office of Gretchen Walsh, Transitions' terrific general counsel, I watched as she opened two packages with letters complaining that the photochromic treatment was separating from the lenses (attached in the packages) and falling off. Both consumers thought the lenses were Transitions. They were not. Transitions infuses the lenses with photochromic properties. VE and others fasten a treatment to the lens, a method that usually works but sometimes does not and they fall off. It is easy for retailers to sell eyeglasses claimed to be Transitions but that in reality are not.

In 2009, the FTC commenced an investigation. It was settled in 2010 with Transitions' agreement to forego lens

caster exclusivity except when developing a new treatment or method (where exclusivity was necessary to induce the investments). Transitions Optical, Inc., FTC Docket No. C-4289 (Apr. 2010), at https://bit.ly/3IgzGgu. Settling with the FTC means that the consent decree cannot be used as prima facie evidence of liability in a follow-on private case, as it would be if there were a litigated judgment – but it is also a loud invitation to the plaintiffs' class action bar to file litigation. Which happened here in spades.

We did not handle the FTC investigation or the settlement. Once it was entered, I got a call from Ilene Gotts. Ilene is one the very best antitrust lawyers in the country. She does not do litigation and here was representing Transitions' majority owner PPG, based in Pittsburgh. She called me and recommended that Transitions hire us to handle the follow-on litigation. After a brief beauty contest, we were hired. Chul Pak worked with me throughout the case, as did two great associates, Dan Weick and Robert Corp, together with our Palo Alto Counsel, Lisa Davis, and soon to be partner, Jeff Bank. A lens caster, Essilor, was Transitions' minority owner. They were joined as a co-defendant, represented by Jones Day.

Some 22 class actions were filed. Most were brought on behalf of eyeglass purchasers, all of whom were necessarily indirect purchasers, meaning that they could not sue under federal law but had to sue under state laws in those states that allowed such suits. Some cases were brought by claimed direct purchasers, but the main direct purchasers were lens

casters who did not want to sue. A separate suit was brought by VE in Delaware. Facing all these cases, we went again to the Judicial Panel on Multidistrict litigation, which centralized the cases in Tampa, where Transitions is located. *In re* Transitions Lenses Antitrust Litigation, 730 F. Supp. 2d 1381 (JPML 2010).

Our motions to dismiss were optimistic and easily denied in light of the FTC consent decree. The big battle, apart from the dent in Reed Hastings' deposition, was over class certification. We had a lengthy evidentiary hearing before the Magistrate Judge on both the direct and indirect purchaser motions for class certification. I handled the directs, Chul the indirects. Hal Singer was the expert for the directs. Greg Leonard was our expert and did a wonderful job. Singer ultimately had to admit that he could not show injury to at least 14% of the direct purchasers. That was fatal. Magistrate Judge Jenkins rejected class certification as the law is clear that there can be no commonality unless all or almost all of the class members incurred financial injury. If there is insufficient commonality among direct purchasers, that dooms indirect purchaser class certification too because their injuries are definitionally derivative of the directs'. Judge Whittemore confirmed both of her decisions. Rather than appeal, both the directs and indirects settled with us for a song.

That left Vision-Ease. VE asked the JPML to send their case back to Delaware, where it was filed, on the basis that there was no continuing need for centralization with all the

class actions gone. We opposed but to no avail. Back in Delaware, it was a disaster. We filed a *Daubert* motion regarding VE's expert and we also moved for summary judgment. Both motions were meritorious and should have been granted. Both were denied and so we headed to trial. But at this point, Transitions had been fully acquired by Essilor and Essilor was in the process of acquiring Luxottica, a major retailer. That acquisition, although eventually approved, was undergoing close scrutiny both here and in Europe. Essilor management understandably did not want the pendency of the VE suit to interfere. So we settled. Our WSGR team had been excited about trial but we reluctantly had to admit that our client's judgment made sense.

It was fun working with Chul, Dan, and the others, as well as Gretchen Walsh and our expert team. I didn't like the VE settlement, but the cases as a whole were a big success.

31. A FEW OTHER NOTABLE CASES

I was fortunate to have many cases and matters over the years. I really cannot address them all, and that would be boring anyway. But here are a few other matters of interest.

Valassis. In this case, Valassis Communications sued News America, a subsidiary of News Corp. – think Fox News – for illegal tying and bundling. The matter involved competition in the sale of free-standing inserts (FSI), i.e., the printed advertisements that often accompany hard copy newspapers, and in-store promotional materials (ISP), i.e., product specific promotions such as on-shelf coupons. In a state court case, Valassis obtained a judgment of $300 million. It later asserted claims in federal court that had accrued afterwards. In that case, the parties entered into a settlement agreement. Pursuant to that agreement, the court in Detroit appointed an antitrust advisory panel to prepare a report and recommendation regarding the appropriate scope of an order regarding future business practices. Jim Wilson was selected as Valassis' panelist, and Larry Popofsky as News'. Jim was a predecessor as ABA Antitrust Chair as well as our co-counsel in *myTriggers*, and I knew Larry well from the *Visa* case. They selected me as the neutral third.

After a lot of briefing and a long hearing at the WSGR New York office, we issued our report. We essentially adopted the AMC test for bundling as the *PeaceHealth* court had framed it. That was "*Vlassis* I." After that, Valassis argued that News was violating the law as we had laid it out

and submitted a "notice of violation," which became *Valassis II*. There, Valassis asserted that News had violated our prior order by bundling and tying FSI and ISP. Our report recommended dismissing the main new claims, leaving the rest for another day. Valassis was unhappy with our outcome, of course, and persuaded the district judge that our work was done and he dismissed us while transferring the case to New York. Valassis Communications v. New America, https://bit.ly/48BXF4v (E.D. Mich 2016).

This was a lot of fun. I always enjoyed being with Jim and Larry (before he passed) and our discussions were at a very high level. I did the drafting on our two reports with the aid of Elyse Dorsey, an amazing associate from DC and the equally amazing Dan Weick.

Arista. Arista Networks was a long -time client of WSGR. It had a truly long and drawn out series of battles with Cisco. Both were rivals in computer networking solutions, a field in which Cisco was by far the larger firm. The main part of the dispute centered on "CLI" or command line interface for Ethernet switches. CLI is a user interface that allows users to interact with network devices through commands using only the keyboard; for Ethernet switches, it is essential. Because Cisco networking had been the original and the leader, programmers were familiar with its CLI. Cisco freely allowed this use, as programmer familiarity with Cisco CLI was seen as an important long-term benefit. Arista, however, was becoming an aggressive competitor, and Cisco sued claiming copyright infringement. We drafted a complaint asserting that this "open early,

closed late" strategy unlawfully maintained Cisco's Ethernet switch monopoly. Cisco moved to dismiss but I was successful in arguing against dismissal. David Reichenberg, then a mid-level associate, provided excellent assistance, as did Brad Tennis, then a more junior associate from DC. The judge was Beth Freeman in the Northern District of California.

Arista had a very aggressive hands-on inhouse lawyer team. My perception was that they were asking a lot of unnecessary work and would balk when the bill came due. To say the least, this did not go over well and they did not continue to use me anymore. They did continue to use David and Brad, who stuck with the case through discovery, getting a successful denial of summary judgment and a favorable settlement. Cisco Systems, Inc. v. Arista Networks, Inc., https://bit.ly/3uHWEdC (N.D. Cal 2016). We were helped by the analysis of our expert, Fiona Scott Morton of Yale.

Amphastar. Another plaintiff case we took on was Amphastar v. Momenta. The suit was based on Momenta's misrepresentations to the United States Pharmacopeial Convention (USP), a private standard-setting organization (SSO) charged with ensuring the quality of drugs. We alleged that Momenta knowingly failed to disclose to USP that its proposed method for testing generic enoxaparin might be covered by Momenta's pending patent application. The USP, in reliance on the nondisclosure, adopted the method in issue, and the Food and Drug Administration (FDA) required Amphastar to comply with it. SSOs almost

invariably refuse to set a standard on a patent-encumbered method absent a promise that the patents will be license on fair, reasonable, and nondiscriminatory (FRAND) terms. Because of the nondisclosure, there was no such requirement for Momenta here. Our claim was that this behavior gave Momenta monopoly power.

Chul, Dan Weick, and I wrote the briefs. We also got amicus briefs from the FTC (a big deal then) and a public interest group represented by our friend, David Balto. Chul did an amazing job at oral argument and we won, eventually getting a significant settlement. Amphastar Pharm. v. Momenta Pharm., 850 F.3d 52 (1st Cir. 2017).

Symantec. We were back before Judge Freeman defending Symantec in a case called NSS Labs, Inc. v. Symantec Corp. NSS was a company that provided testing of security software to ensure its efficacy. NSS sued Symantec, the Anti-Malware Testing Standards Organization, Inc. (AMTSO), and other AMTSO members. The allegation was that Symantec and the other members participated in AMSTO's adoption of a testing standard and agreed to abide by that standard. The standard in question did not mandate any particular testing methodology. Instead, it required advance disclosure of a test plan to security vendors. According to NSS, the purpose of the standard was to let the vendors know in advance exactly how their products will be tested. NSS refused to adhere to the AMTSO Standard, and it continued its practice of testing without giving vendors advance information about how the tests will be performed. NSS Labs claimed that, as a result,

the vendors boycotted it. NSS also complained to DOJ, and DOJ's San Francisco office commenced an investigation.

We explained that, although testers and vendors must retain their independence, anti-malware testing is more likely to be transparent and fair if there is communication between the parties regarding the solution being tested, and the testing methodology. To call this an illegal conspiracy made no sense. The obvious purpose was to make anti-malware security products perform better. DOJ closed the investigation and Judge Freeman dismissed the lawsuit, but with leave to replead. NSS Labs, Inc. v. Symantec Corp., 2019 WL 3804679 (N.D. Cal. Aug. 13, 2019). NSS declined to replead, and so the case came to an end.

Spotify. Music licensing is messy. You need rights both to the music and the performance; playing music in public or online requires a license to both copyrights. Artists sign up with one of the performing rights organizations (PROs) and the PROs handle licensing. Most music licensing operates on a "blanket license" basis, meaning that the PROs license everything they have. That is critical for TV networks, radio stations, arenas, and many others because licensing each song individually would be a nightmare for everyone. The largest PROs are ASCAP and BMI. Another, Global Music Rights, entered more recently with the rights to the Eagles and some other major acts. A fourth PRO, called SESAC, has a smaller catalogue. Yet another, Pro Music Rights (PMR), was formed, but with a catalogue of performers no one had ever heard of and no one wanted. Unsurprisingly, none of the major licensees wanted a license

from PMR. PMR then sued. It named basically everyone in the music industry, including Spotify, Apple Music, YouTube, Amazon Music, Deezer, Pandora, SoundCloud, and several licensee groups. The claim was a group boycott, that is that all these diverse companies agreed among themselves not to take a license from PMR.

If that sounds ridiculous, that's because it is. PMR's complaint contained nothing to suggest that any of the defendants conspired or even needed to conspire to decline a license from PMR. I was nominated to argue the motion to dismiss on behalf of all the defendants. Judge Meyer in Connecticut granted the motion and PMR never appealed. PRO Music Rights v. Apple, Inc., https://bit.ly/49YX6Df (D. Conn. December 16, 2020).

Twitter. A far-right-wing group called Freedom Watch – mostly one guy, Larry Klayman, a lawyer – sued Twitter, Google, Facebook, and Apple for "conspiring to suppress conservative voices on the Internet." He had no facts to support any such thing and so we moved to dismiss the antitrust conspiracy claim. There were additional, equally specious claims, but I handled the antitrust. We were concerned because the judge was a Trump appointee, but he quickly dismissed the case. Klayman appealed and even sought certiorari but both were denied.

32. TWO DISAPPOINTMENTS

I was incredibly fortunate to have so many great cases and to win as many as I did. *SCM* and *Doryx* were losses but the law has since corrected their errors so I do not worry about them anymore. But there were two cases that were real disappointments.

Plantronics. One was a case called GN Netcom v. Plantronics. The product was high-end headsets. This was a purported exclusive dealing case brought in the District of Delaware and assigned to Judge Stark. It turned out there was no exclusive dealing at all. The issue was Plantronics' "Plantronics Only Program (POD)" agreements. That may sound like exclusive dealing but was not. The POD program applied only to distributors, not end users – typically call centers. And if a distributor's end-user customer asked for a GN product, the distributor was permitted under the POD program to provide GN headsets. GN knew this; it had an active salesforce calling on end-users, so there was not a single customer that was foreclosed. Nevertheless, Judge Stark denied our motion to dismiss. GN Netcom, Inc. v. Plantronics, Inc., 967 F. Supp. 2d 1082 (D. Del. 2013).

As discovery began, Robert Corp (an excellent associate) came into my office. He told me that Don Houston, Plantronics' senior vice president, had sent at least three emails that we were about to produce to GN in which he directed subordinates to destroy after reading. Apparently, this was a longstanding practice of his; one of the three was written well before the lawsuit. But two were written after

and one mentioned the lawsuit specifically although its contents were otherwise entirely benign. Destroying these two emails was entirely improper. I discussed what to do next with Robert and David Reichenberg. I suggested that we proactively go to Judge Stark, provide him with the emails, and get any next steps from him. David and Robert had been abused by really bad behavior by GN's counsel and did not want to do GN any favors. I raised the issue with the client, who was adamant that we do not go first to Judge Stark. I followed the client's direction. This was a huge mistake. I should have pushed back.

As I feared, the case morphed into one about document destruction. GN had no case on the merits so document destruction was all they had. They took simple and appropriate statements, such as the CEO's comment in a meeting that GN might discover problematic documents, and made it appear falsely that he was urging destruction of the documents. They took statements by our associates that were entirely appropriate to pretend that they were covering up the wrongdoing. Judge Stark bought it all and even reversed some of his own prior rulings in doing so. He held a hearing after which he fined Plantronics $5 million. The ruling was littered with numerous and serious errors, but we could not appeal then because this was not a final ruling disposing of the entire case.

This naturally did not sit well with Plantronics' board and soon they replaced the CEO and the general counsel. The new general counsel brought in another firm to act as our co-counsel. We finalized discovery with them and then

moved for summary judgment. The motion should have been granted. GN could not identify even a single customer from which it had been foreclosed. Nevertheless, Judge Stark denied the motion. He said that "Plantronics has shown that the record contains substantial evidence from which a jury might reasonably find that GN could adequately compete for the business of any (and possibly even all) end-user(s), [but] Plantronics has failed to show that this is the only conclusion a jury could reasonably reach." 278 F. Supp. 3d 824, 831. He identified no basis on which a jury could possibly reach a contrary conclusion. But the case was headed to trial.

That was it for us. Our co-counsel concluded that no one connected with the document destruction issues should be involved and the new general counsel agreed. GN sought to focus on those issues myopically, and Judge Stark let them but declined to allow an "expert" to testify that the document destruction might have been more pervasive and might have caused damaging documents to be destroyed. The jury ruled for Plantronics. My deposition of GN's economic expert – Einer Elhauge yet again – proved very helpful. He had strayed so far from the facts and economics that his bias was obvious. The expert I had hired, Rich Gilbert of Berkeley, did his typical excellent job. The jury was out for just two hours.

GN appealed to the Third Circuit. The only issue raised was that Judge Stark should have allowed their document expert to testify about the extent the document destruction might have caused relevant documents to disappear. We were stunned, however, that Plantronics did not cross-

appeal the order fining the company $5 million with no credible basis. Had they done so, that ruling would have been cut down if not reversed entirely. As importantly, a cross-appeal would have included an argument that the entire document destruction dance was an irrelevant side show, which would have been a big help on the issue of excluding a part of their expert's testimony. But no. So with Plantronics *uncontested* bad behavior before them, the Third Circuit reversed and sent the case back for a new trial. 930 F.3d 76 (3d Cir. 2019). A settlement was reached soon afterwards. I was and remain disgusted.

Bazaarvoice. The other big disappointment was a case we lost. This was not a matter of mistakes. We did a great job. It was just not enough. The case was United States v. Bazaarvoice, Inc., 2014 WL 203966 (N.D. Cal. Jan. 8, 2014), where the government challenged Bazaarvoice's acquisition of a rival called PowerReviews. Most substantial acquisitions these days go through the Hart-Scott-Rodino pre-merger filing process. In this case, however, the dollar values were below the HSR thresholds and there was no pre-merger filing. But someone must have complained and DOJ commenced an investigation and eventually filed a lawsuit after the acquisition took place.

The market in issue was ratings and reviews for websites. Many sites do not have enough traffic to generate an adequate number of reviews on their own, so they purchase the technology from independent providers. Some obtain syndicated reviews, allowing reviews from other sites to be included to generate a greater critical mass. Bazaarvoice

was the largest provider and PowerReviews its largest competitor. If the "relevant market" included companies that did their own ratings and reviews, their market shares would have been much tinier given the presence of Amazon and others. But DOJ alleged and the court eventually found that inhouse provision was outside the relevant market. We had a large team that included Chul, Scott, Boris Feldman, and numerous associates. My principal aide was Dan Weick, who did his usual fantastic job.

Courtroom in *Bazaarvoice* case

Our biggest problem was that our client's documents have been widely acknowledged as the worst and most damaging documents in merger case history. Co-founder and former CEO Brett Hurt described PowerReviews as Bazaarvoice's "fiercest competitor," "only real competitor," and "biggest competitor." He viewed PowerReviews as "challenging [Bazaarvoice's] price points" and winning "key

accounts like REI and Staples." Bazaarvoice documents similarly said that competition between Bazaarvoice and PowerReviews resulted in lower prices to its customers, saying it was "common for PowerReviews to provide extremely low pricing to our clients to push them in their favor." The evidence was that PowerReviews' low prices were a prime reason why it was not expected to survive for long but Judge Orrick relied on these and other horrible pre-merger documents to conclude otherwise. We countered with evidence that "none of the 104 customers whose depositions are part of the record [or who testified at trial] complained that the merger has hurt them." But the court said that "it would be a mistake to rely on customer testimony about effects of the merger." I thought this was crazy. The entire point of anti-merger law is to protect the customers.

The government's expert was Carl Shapiro of Berkely. Carl had two stints as economics DAAG at DOJ and is one of most widely respected competition economists in the world. But with Dan's help, my cross-examination of Carl could not have gone better. I made inroads on his conclusions about the relevant market and likely anticompetitive effects. Towards the end, I asked: "who knows better than the customers claimed to be affected by the merger, whose livelihood depends on it, as to whether the merger will help or harm them?" The answer was "Me." Mic drop. I had a few minutes more of questions, but this was too good. I said "No further questions," and sat down. Ultimately, Judge Orrick agreed with Carl (!) but we all thought we might have won the case then and there. Nope.

We also thought we had a good argument about Amazon that should also have won the case. Everyone acknowledged that if Amazon entered, they could eat Bazaarvoice's lunch. Entry that is likely to restore effective competition is a complete defense in merger cases. The only issue here was whether Amazon's entry would be likely if Bazaarvoice raised prices. The Amazon witness, in a videotaped deposition we played at trial, testified that he and his team think and talk about entering "every day." There was no contrary testimony and no contrary document, but Judge Orrick said he just didn't believe it. So we lost.

The result could not have been worse but we had fun. Trial days were mornings only for most days, which allowed both sides ample time to prepare for the next day without losing too much sleep – a pleasant change from the normal sleepless nights one gets in a long trial. Plus, the WSGR office in San Francisco is stunning, with great views of the harbor. This turned out to be pretty special, as we got to see Oracle's boat win the America's Cup. The black sailboat northeast of the large white sailboat on the left of the picture below is the Oracle boat crossing between the two buoys marking the finish line. It was truly exciting to watch.

33. ABA CHAIR

In 2015, I received a call from Ted Voorhees. Ted was a former Section Chair and that year was chair of the Section's Nominating Committee. This was the call you want if you had toiled sufficiently in the Section. Ted advised me that I was being appointed Vice Chair. The year after being Vice Chair, you automatically become Chair Elect and the year after that, Section Chair. So Ted's call essentially told me I'd be Chair of the Section in 2017-2018, commencing in August 2017.

As Section Chair, you have to handle all sorts of administrative stuff but you also get to have fun. The hardest thing is the Appointments process. Section leadership has expanded to over 450 persons out of roughly 8000 members. We have some 30 substantive committees, 15-18 commenting and administrative committees, five publications committees, and nine task forces. Committees typically have a chair or two co-chairs, five or six vice chairs, and one or two young lawyer representatives. Making 450 appointments is obviously a huge job, mitigated slightly by the three-year duration of most appointments. Lawyers are not shy about asking for what they want and, despite the many available slots, there are invariably some disappointments. Section Chairs are allowed helpers called Counsel, and I chose Elyse Dorsey in our DC office as mine.

The fun part of the job is the conference planning. In my year, we had an International Cartel Conference in Paris, Antitrust in Asia in Hong Kong, and Antitrust in the

Americas in Brasilia. Our domestic conferences included our "Post-Annual Meeting," so named because it follows the annual conference of the big ABA of which we are just a part. All Section Leadership is invited to that one. There is also the "MidWinter Meeting," typically held in January, with attendance still large but Vice Chairs are not invited to that one absent special cause, just task forces and committee chairs, as well as Section Council and Officers. The big event every year is the "Spring Meeting" in Washington, with some 4000 attendees from around the world. It is *the* big event of the competition year globally.

My Post-Annual was at the Ritz Carlton Laguna Niguel. We had great food, great meetings, and a spectacular evening out at "7 Degrees," a multi-story place with a country music band and food on the top floor, Motown plus pizza on the second floor, and pick what you want plus lip-sync on the ground floor. Absolutely amazing.

With my daughter Lauren and Elyse Dorsey at 7 Degrees

The MidWinter was at the Ritz Carlton Cayman Islands on Grand Cayman. Also wonderful. The beach was great, the food amazing, and the meetings excellent. One of the many attractions was the amazing array of caves.

Grand Cayman beach with Fran and Margaret Stafford

One of the caves

The Paris Cartel meeting was also great. Fran came with me and we had a wonderful time.

With Rose Ashford, Joanne Travis, and Margaret Stafford in Paris

With Fran at Le Cinq

The Spring Meeting was at the Marriott Marquis in DC. The meeting runs from Tuesday through Friday each year and several news outlets and companies seeking business have their own events at off hours to attract the lawyer customers coming from around the world – typically over 60 countries each year. The Chair's job is to approve the program, which involves roughly 60 panels with experts from all over the world. It is a great honor to speak at our Spring Meeting. I was fortunate to speak every year from 2003 through 2022. Most of the panels are in breakout groups with 75-300 attendees. Two events are before the full 4000 attendees, and it is the Chair's responsibility to organize and moderate those events. One is the "Chair's Showcase" program. Mine was a retrospective on the work of a great judge and writer, Richard Posner. We had luminaries including Eleanor Fox to talk about his contributions. Two other Chairs, Howard Feller and Jonathn Gleklen, had me on their Showcase program. And during Ted Voorhees' year I was a questioner at the Roundtable. The other program is the "Enforcers' Roundtable," which involves a panel of the Antitrust AAG at DOJ, the Chair of the Federal Trade Commission, the leader of the state attorneys' general antitrust task force, the Competition Commissioner from the European Union, and one other foreign leader – in my case, the head of the UK's Competition and Markets Authority. All pictured below.

Enforcers Roundtable at 2018 Spring Meeting

After the year as Chair, the next year's slot is "Immediate Past Chair." You go to all the Council meetings and other events, but when you get your very last job the year after, Chair of the Nominating Committee, that's it. Fortunately, you have a lifetime pass to all future MidWinters, Post-Annuals, and Spring meetings. It took me 16 years to become Chair – faster than most, believe it or not. But after all that time and hard work, getting a permanent invite to these meetings is a decent reward.

34. VITAMIN C

China's Ministry of Commerce has regulated China's transition from a "command economy," where all productive assets were state-owned, to a "socialist market economy," where the state allows some degree of private ownership and enterprise. The Ministry – "the highest authority in China authorized to regulate foreign trade" – had authority to make trade-related laws, regulations, policies, and directives. In the 1990s, the Ministry created a number of "Chambers" to control trade. The one for Vitamin C and other medicines was called the Chamber of Commerce of Medicines & Health Products Importers & Exporters. These Chambers were governmental arms of the Ministry. The members were exporting companies. The Chambers' duties were to regulate exports, including the fixing of export prices. In 2002, the Ministry changed the procedures used but the requirement to fix prices was unchanged.

Under U.S. law, where a foreign government compels conduct that would otherwise violate U.S. antitrust law, the conduct cannot be the basis for legal liability. There are two doctrines. One is called "foreign sovereign compulsion," which is what it sounds like. The other is called "international comity," under which a U.S. court will decline to exercise jurisdiction over foreign conduct where the foreign law conflicts with U.S. law, where most or all the parties involved are citizens of the foreign country, and where most of the conduct is undertaken abroad. A related principle called the "act of state doctrine" prohibits U.S.

courts from questioning the validity of a foreign sovereign's acts within its own territory.

In 2005, several class actions were filed in Brooklyn alleging that the Chamber members had unlawfully fixed prices of Vitamin C. The defendants filed a motion to dismiss, which was denied because the late Judge Trager believed there were disputed issues of fact as to whether the price-fixing was actually compelled. *In re* Vitamin C Antitrust Litig., 584 F.Supp.2d 546 (E.D.N.Y. 2008). After extensive discovery, defendants moved for summary judgment. They were supported by the Ministry, which filed an amicus brief saying, basically, yes, we compelled the price-fixing. This was the first time the Chinese government had ever appeared before a U.S. court. District Judge Cogan denied the motion. He refused to believe the Ministry's position and said that episodes of cheating among the members indicated that the price-fixing was "voluntary." *In re* Vitamin C Antitrust Litig., 810 F.Supp.2d 522 (E.D.N.Y. 2011). The case then went to trial. All the defendants settled except for our clients, Hebei Welcome Pharmaceutical Company and North China Pharmaceutical Group Corporation. The jury was not permitted to consider the applicable regulations or to hear from the Ministry. It rendered a verdict of about $150 million, and Judge Cogan denied Hebei and NCPG's post-trial motions.

That's when WSGR came in. Scott Sher was able to persuade the clients that we should take the appeal and asked me to handle it. Over the course of the case, I had enormous help from Justin Cohen, Yuan Ji, Brad Tennis,

Elyse Dorsey, Scott, and others. But the biggest contributions came from Dan Weick. Dan provided much of the drafting on our first appeal brief. He also handled contempt proceedings (!) against the clients. Hebei and NCPG declined to post a bond, which meant that the plaintiffs could try to collect. As part of that effort, the plaintiffs sought discovery of Hebei and NCPG's assets. Hebei and NCPG had no assets in this country and refused to provide information on their assets in China. Dan had to explain that to Judge Cogan. Judge Cogan held Hebei and NCPG in contempt for failing to provide post-judgment discovery, but he declined to impose a fine or other penalty since it would be unenforceable. Whether or not there were assets here, they still were obligated to pay. There was nothing Dan could do about that. But it also meant that plaintiffs' collection efforts failed.

In the merits appeal, the oral argument before the Second Circuit went well. There were documents in the case using the term translated as "voluntary," but I explained to the three-judge panel that the Ministry's command was "Thou shalt enter into *voluntary* agreements to fix the price of exports." This was catchy but also conveyed accurately what the regulations said. The 20-month wait for a decision was worth it as the judgment was reversed. The court agreed with us that the regulations on their face required price-fixing and that plaintiffs' contrary construction made no sense. But the court based its ruling instead on the premise that it was "bound to defer" to the Ministry's construction. A 1944 Supreme Court case involving Russia had so ruled. But this was 2018 and China.

Plaintiffs' sought review in the Supreme Court. The Court nibbled initially by asking the Solicitor General for his views. This made logical sense as the degree of deference to foreign nations' explanations of their own laws is ultimately a foreign relations issue, the province of the Executive Branch. We met with the SG, who was accompanied by lawyers from DOJ Antitrust and the FTC. The meeting was a partial success. Plaintiffs had raised in their petition two main issues: the degree of deference to China, and whether the Second Circuit was just wrong in holding that the conduct was compelled. The SG brief filed urged rejection of the compulsion question but recommended that certiorari be granted to review the deference question. And that was what the Court did, agreeing to hear arguments on the deference issue only.

This was to be my first and only Supreme Court argument. The audio is at https://bit.ly/3WDvtw1. The argument was unusual in that there were four counsel arguing, unlike the typical two. In addition to the plaintiffs and us, the SG was arguing in support of plaintiffs' position on deference and the Ministry, by Carter Phillips, was arguing the contrary. We recognized that, with the SG's position as it was, we had no chance on the deference issue. We did not want to be "reversed," and so our argument was that compulsion was required irrespective of any deference to the Ministry. We asked the Court to affirm on that alternative ground. We also knew there was zero chance of that but emphasized the argument anyway so that the Court would not reach the issue, giving us a solid basis to win on remand to the Second Circuit. Plaintiffs had cleverly timed

the briefing so that we were the second to last argument of the Term, which in light of the important rulings to come, meant the Court would likely take the easy route and simply follow the SG's brief. I had one small glitch in my presentation but no one noticed and I was able to make all the points we wanted. My wife, sister, and daughter all made it to DC for the argument and we had a terrific time.

There was also a portrait artist. Not a good likeness though.

We lost 9-0. Animal Science Products v. Hebei Welcome, 138 S. Ct. 1865 (2018). But our strategy worked. The Court ruled against us on deference. It said that "bound to defer" is incorrect; the standard should be "respectful" deference. I wondered if the result would have been the same if our clients were Canadian, but nothing could change the outcome. And we still had our argument on compulsion; the ruling below was vacated, not reversed.

So back we went to the Second Circuit. Both sides submitted letter briefs and we awaited the argument. In the meantime, Judge Hall, who had written the first opinion, had passed away. Although the letter briefs went in during September 2018, the argument did not take place until March 2021. Judge Nardini replaced Judge Hall on the panel. Argument was over the phone due to Covid. Both Carter Phillips and I were nervous; we had made all our points but you can't see the judges' reactions on the phone.

The decision came down five months later. We won, 2-1. *In re* Vitamin C Antitrust Litig., 8 F.4th 126 (2d Cir. 2021). Judge Nardini wrote the decision and concluded that the Ministry's explanations warranted respectful deference and, most importantly, that China had in fact required the price-fixing in issue.

The plaintiffs went back to the Supreme Court. But we outmaneuvered them this time. We had the clerk's office approve a briefing schedule under which the case would not come before the Court until the "long conference," in which the Court has to deal with all the petitions that come in over the Summer before the "first Monday in October." This timing makes denial easier for the Court and, indeed, the petition was denied.

The win in *Vitamin C* was a long, long time coming. But in the end, it was very satisfying.

35. MY LAST TWO GOOGLE CASES

I had two more Google cases towards the end of my career: *Google Advertising* and *Dreamstime*. In the end, winning both made my Google record 7-0. All were motions to dismiss and spared the client the hassle of discovery. I had hoped for more assignments but, with my looming retirement, it was not to be. Still, it was great to end up 7-0.

The *Google Advertising* cases involved several different proceedings. A number of class actions were filed, mostly in the Northern District of California. Texas and several other Republican state attorneys general filed their own case in Texas, and much later on DOJ filed its own case in the Eastern District of Virginia. Ultimately, we sought centralization of all the cases. My briefing and argument were prior to that and were directed at the private class actions filed in N.D. Cal. before, once again, Judge Beth Freeman.

The cases all involved display advertising – ads that appear on a third-party website, in contrast to search advertising where ads are shown on Google search result pages. The plaintiffs were advertisers and the owners of third-party websites (called "publishers"). The claims challenged various Google advertising initiatives as anticompetitive. A key claim was that Google had a "conflict of interest" in providing services to both sides, advertisers and publishers.

We moved to dismiss and Judge Freeman granted the motion, with leave to the plaintiffs to replead. She concluded

that none of the plaintiffs had alleged enough factual matter to proceed. *In re* Google Digital Advertising Antitrust Litig., 2021 WL 2021990 (N.D. Cal. May 13, 2021).

Following Judge Freeman's decision, we asked the JPML to centralize all the cases in the Northern District of California. They did centralize, but in the Southern District of New York instead. The Texas case was included in the transfer to New York, but the states much later got back to Texas in light of an ambiguous new statute that exempted state attorneys general from the JPML process. In the meantime, DOJ filed its case in Virginia. So roughly the same allegations are proceeding as this is written in three different courts and on three different schedules. Not good government. I personally was saved by retirement.

The *Dreamstime* case was more straightforward. Google contracted with Shutterstock and Getty Images as the primary providers of images for Google's Image Search. Dreamstime is a Bulgarian stock photo site. It was doing well enough but its quality waned. It dropped in search result rankings and had to pay more for ads. At the same time, it was not chosen as one of Google's Image Search partners. So of course it sued.

The case was filed in N.D. Cal. and assigned to Judge Alsup. Alsup is a conscientious judge and a curmudgeon. Among the many traits I like is his insistence that firms have junior lawyers argue non-dispositive motions, such as discovery disputes. I was brought into the case by David Kramer's team and worked closely with Brian Willen and

Lauren Gallo White. I was tasked with the antitrust; they handled the other aspects of Dreamstime's claims.

The antitrust claim was revised in what seemed like every hour. Although the contours at every hearing were different, the gist was that the deals with Shutterstock and Getty enhanced Google's search advertising monopoly by excluding Dreamstime. Judge Alsup granted the antitrust aspects of our motion to dismiss but denied the motion on the other issues. On the antitrust, he pointed out that Dreamstime never alleged and in fact disavowed any "leveraging" claim, i.e., that Google was leveraging its search monopoly to also monopolize Image Search. Its only claim was that Google's supposed exclusion of Dreamstime enhanced its alleged search advertising monopoly. But that claim necessarily failed because Dreamstime had no facts to suggest that any of Google's conduct was anticompetitive. There was also the logic gap – how could the exclusion of Dreamstime conceivably have any effect in enlarging or maintaining the alleged search advertising monopoly? It made no sense. So we won. Dreamstime.com LLC v. Google LLC, 2019 WL 341579 (N.D. Cal. Jan. 28, 2019). Following discovery on the other issues, Judge Alsup later granted summary judgment. 470 F. Supp. 3d 1082 (N.D. Cal. 2020).

By the time we got to the Ninth Circuit, Dreamstime never even mentioned Shutterstock or Getty. The premise of Dreamstime's new theory instead was that it competes with Google as a "vertical Image Search rival" – so injury to Dreamstime now becomes injury to a competitor – and that Google squelched "competitive innovation" that "could have

come from vertical Image Search providers." It also claimed that Google was "self-preferencing" Google Images over rivals. I have written that there is and really can be no such claim because preferring your own stuff over rivals' is the essence of competition. "Competition or Competitors? The Case of Self-Preferencing," 38 ANTITRUST, No. 1, pp. 13-20, Fall 2023 (with Ada Wang) (winner, Antitrust Writing Awards, April 2024). But the court did not need to reach the issue directly. It just needed to rule that "Dreamstime had not sufficiently alleged anticompetitive conduct in the [alleged] relevant market of online search advertising." The appeal was argued on Zoom, which was awkward but much better than telephone. Lauren Gallo White argued the other issues. The Ninth Circuit affirmed in all respects, ending the case. 54 F.4th 1130.

36. RETIREMENT

I had always had it in my head that I would retire at age 70, which would be in 2022. So in 2020, I opted into a WSGR program under which your "points" – the way partners are compensated, points times point value equals compensation – would be reduced about 5% in the first year (2020) and another 10% the next (2021). The program's rationale is that, when approaching retirement, you should be able to work less without fear of the bottom dropping out of your comp. When 2021 came around, I decided that, the program notwithstanding, I would like to continue working. The firm extended me a position as Senior of Counsel for two years. In 2023, I tried to see if I could continue working further still, but I had already gotten one extension inconsistent with the retirement program and the answer was no. Even if it had been yes, it is very hard for a litigator to be working part time. So, effective February 1, 2024, I am now a retired person.

But I'm not gone entirely. I am keeping my office at the firm and Carol will stay with me. I'm still on the website. I come in once or twice a week, and will handle some training programs for the younger lawyers. I'm also writing this book you just finished, have an article coming out with Keith Klovers on some market definition issues, and expect to publish at least two articles every year. Also, as a former Chair, I can attend any Antitrust Section event at no cost – and I expect to go to many more Spring Meetings, MidWinters, and Post-Annuals.

I also went out on top. I won my last cases for Google (twice), Spotify, Symantec, Twitter, and Gray Line Bus Tours, as well as Vitamin C. These led to my selection by Global Competition Review as "Litigator of the Year."

Litigator of the Year

Jonathan Jacobson (Wilson Sonsini Goodrich & Rosati)

A competition litigator whose superior technical skill, practical judgement and excellence in serving clients in court in 2021 demonstrates that they are among the very best in the field.

Wilson Sonsini senior of counsel Jonathan Jacobson is renowned as one of the leading antitrust litigators in the US. He achieved some notable victories in 2021, including representing two Chinese vitamin exporters before the US Court of Appeals for the Second Circuit, which vacated $162 million in antitrust damages awarded to bulk purchasers of vitamin C. Jacobson is also defending Google against claims from a Texas-led coalition of states and Puerto Rico – as well as multiple groups of plaintiffs – that the tech company used a series of anticompetitive tactics to maintain its dominance in the online advertising market. The cases, which comprise the *Google Digital Advertising* antitrust litigation, have been centralised in a federal New York court. Jacobson also secured dismissal of royalty-free photography company Dreamstime's monopolisation case against Google, which involved self-preferencing allegations. Jacobson also won dismissals in significant antitrust litigation cases for Spotify, Twitter, Gray Line and Netrush.

EPILOGUE

In retirement, I have a lot to look forward to. I now have two grandsons, Skyler James and Noah Leo Bernstein. As I'm writing, Skyler is now 3¾ and Noah is four months. Both were born through the miracle of IVF.

My daughter, her husband, and the grandsons live just 12 blocks away and we get to see them a lot.

The Rolling Stones are coming back again this year. Fran and I have tickets with our great friends, Patty and Peter Silverberg, to see them twice in May at MetLife. This will be my fourteenth and fifteenth Stones concerts, Peter's seventeenth and eighteenth.

Patty & Peter Silverberg, Fran , and me – 2019 tour

Fran and I also plan to travel – not just ABA events, but France, Italy, other spots in Europe, and Japan. So my legal career is (mostly) over but I have a lot left!

MY LIFE IN *Antitrust*

Jonathan Jacobson practiced antitrust law for 48 years. During that long stretch, he handled many of the most important cases in the field – including major cases for Coca-Cola, Google, Netflix, American Express, and many others. This book covers those cases and more, including his service on the Antitrust Modernization Commission, as Chair of the American Bar Association's Section of Antitrust Law, and his many influential articles on topics of importance in the field.

"Jon's career has been epic and over the years his successes remain unrivaled in the antitrust bar. His cases—detailed here—represent a compendium of critical precedent in antitrust and his academic writings remain must-read analyses of the law. His impact on antitrust over the decades is rivaled only by the impact he has had on the careers of lawyers with whom he has practiced. A true one-of-a-kind attorney." Scott Sher, Partner, Paul Weiss

BY
JONATHAN JACOBSON