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Litigators of the Week: A Delicious Win for Gibson Dunn and Squire Patton Boggs

By Jenna Greene

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Our Litigators of the Week are Rachel Brass and Scott Edelman of Gibson, Dunn & Crutcher and Mark Dosker of Squire Patton Boggs.

The trio represented ramen noodle companies from Korea that were hit with a $500 million class action for price fixing. After a five-week trial, a jury in the Northern District of California on Dec. 18 took just three hours to find for the defense across the board.

They spoke with Lit Daily about the case.

Lit Daily: Who is your client and what was at stake?

Rachel Brass: Gibson Dunn represented Ottogi Company, Ltd. and Ottogi America, Inc., companies that make and distribute delicious food products including curry, ramen and mayonnaise. They were accused of price fixing. At stake was their reputation and approximately $500 million. They did nothing wrong and sought to clear their name.

Mark Dosker: Squire Patton Boggs' client Nongshim Co. Ltd. is a large publicly traded company which is the leading maker of Korean ramen noodles. Our client Nongshim America, Inc. is Nongshim Korea's U.S. subsidiary.

Nongshim America is the only defendant which has a factory here in the United States. As a practical matter, this meant that if the plaintiffs had prevailed in the case in the full amount of damages they sought, with statutory trebling and attorneys' fees, plaintiffs literally could have taken the factory.

Lit Daily: When I hear the word 'ramen,' I think of the super-cheap packages of dried noodles favored by broke college students. Is that what we're talking about here?

Mark Dosker: Sort of. Indeed, near the start of the case five years ago, my youngest son—now a college freshman, then 14 years old—said this upon hearing a basic explanation of the case at the family dinner table: "Dad, if you do anything to increase the price of ramen, I'll disown you."

But there's a key difference between the super-cheap products this question fondly recalls, and the products at issue here. In the U.S. market, ramen comes in multiple price points ranging from less than 25 cents to more than $1.50 a pack. So the quality of the product, and the inclusion in it of meats and vegetables and seasonings and spices as well as the noodles, make for extensive competition over a wide variety of products and price points for American consumers.

(l-r) Rachel Brass, Scott Edelman, and Mark Dosker.

The ramen at issue in this case was high quality product in the mid-to-higher price points.

Lit Daily: What happened in Korea and how did that give rise to this case?

Scott Edelman: In Korea, ramen is a staple food product, and prices are regulated by the Korean government. Before any company can increase its prices, Nongshim—the market leader—must seek prior approval of the timing and amount of any increases. The other ramen makers follow these changes.

Mark Dosker: In early 2008, however, in the midst of the global recession and skyrocketing ingredient costs, together with a new government in Korea and related political uncertainty and a new CEO at market leader Nongshim Korea who had come from outside the food industry, the company facing those unique circumstances raised prices before getting Korean government review and approval.

This led to a political storm so serious that Nongshim Korea was required to make a personal apology at the Blue House, Korea's equivalent of the White House.

About 90 days after that price increase, the first dawn raid by cartel investigators from the Korean Fair Trade Commission ("KFTC") hit the various Korean ramen companies. One of them, Samyang Food Co. Ltd., had relatively recently emerged from bankruptcy protection in Korea. After further dawn raids in ongoing investigation, Samyang Korea applied for leniency—providing information the KFTC could characterize as a conspiracy, in return for not being fined.

KFTC issued a 158-page order imposing large fines—some exceeding US$100 million—on each of the other competing ramen companies in Korea

The U.S. plaintiffs' counsel, seeing this and finding that the companies all imported product into the U.S., filed their cases within a year after the KFTC order, quoting it extensively in relying entirely upon it.

On Christmas Eve 2015, however, the Korean Supreme Court unanimously reversed the KFTC order. Soon after remand, the KFTC abandoned the case and refunded the fines. Here in America, the plaintiffs' counsel pushed ahead with the U.S. litigation, however, professing confidence that using U.S. discovery tools, they would present convincing evidence to a U.S. jury.

Six to eight of the plaintiffs' counsel spent virtually all of January through April 2016 in Korea taking scores of depositions. Three defense counsel, two from Squire Patton Boggs and one from Gibson Dunn, defended them. Immense amounts of transactional data were produced for analysis by all parties' economics experts.

Lit Daily: How did the legal teams work together to coordinate the defense?

Rachel Brass: Gibson Dunn and Squire Patton Boggs worked hand-in-glove from the first day of the lawsuits. We jointly retained experts, prepared briefing, coordinated openings and closings, and made the decision to present a joint defense, rather than turn against each other. This efficient collaborative approach let everyone always put their best arguments forward.

Mark Dosker: Specific expert witnesses had a lead attorney from one firm responsible for examination, with an attorney from the other firm batting cleanup. So for example John Gall of Squire Patton Boggs took the lead in examining the defendants' economics expert witness, followed by Scott Edelman of Gibson Dunn.

At closing we divided up the argument. One of the Nongshim companies' counsel (John Gall of Squire Patton Boggs) argued the "affirmative" case telling the defendants' story and why the defendants were in the right. One of the Ottogi companies' counsel (Scott Edelman of Gibson Dunn) argued the "reflexive" case—methodically tearing down the plaintiffs' case piece by piece.

Everyone on the defense side checked their ego at the door. By the end of trial, we were literally calling each other sister and brother.

Lit Daily: I understand this was the first private class action in which price-fixing claims brought by both direct and indirect purchasers have been tried to verdict before a single jury. Was that something you were pushing for? What effect did it have on how you tried the case?

Rachel Brass: Yes. Defendants believe that bifurcation would have enhanced the likelihood of prohibited duplicative recovery and violated their due process rights. A single trial forced the plaintiffs to choose between two conflicting economic analyses regarding alleged damages and to present conflicting damage models; we sought to take advantage of that conflict to undermine the reliability and trustworthiness of the expert who ultimately calculated the alleged overcharge resulting from the supposed conspiracy.

A single trial also forced the direct purchaser plaintiffs to acknowledge that they had passed on all of their alleged damages to the indirect purchasers (the consumers).

Lit Daily: Who were the lead lawyers for the plaintiffs, and how did you counter their main arguments?

Scott Edelman: Chris Lebsock and Bonny Sweeney (Hausfeld LLC), Kevin Ruf (Glancy Prongay & Murray), Dan Birkhaeuser (Bramson, Plutzik, Mahler & Birkhauser LLP) and Craig Raabe (Izard Kindall & Raabe LLP).

Plaintiffs had a very complicated story that didn't align with anyone's common sense. We tried to move away from convoluted tales of conspiracy and collusion and let the jury hear from the actual people involved in selling ramen every day speak to the practical realities of their jobs.

This was particularly true with attacks plaintiffs tried to make regarding supposed document deletion and alleged manipulation. But when the employees involved got on the stand and explained to the jury what actually happened, the air fell out of plaintiffs' narrative. The fact that ramen is subject to government price control in Korea also greatly weakened plaintiffs' allegations of price-fixing.

Mark Dosker: The defense countered plaintiffs' argument that market behavior in Korea must have been the result of a conspiracy by showing that the only reason for price increases was increases in the cost of ingredients to make ramen, that all such ramen price increases had to be fully justified to and

approved by the Korean government, and that it would be natural for the competing ramen companies to follow market leader Nongshim Korea when a price increase was allowed.

Lit Daily: What were some of the high points at trial?

Rachel Brass: As in many antitrust cases, the end of this trial was a battle of the experts. The defendants' expert, Dr. Alan Cox, told a clear straight analysis. And the plaintiffs' expert got caught manipulating the data and being sloppy. That allowed the jury to make a pretty straightforward credibility determination.

Another high point was the testimony by the Nongshim America and Ottogi America sales people about what it's like to compete against the big Japanese ramen makers and American soup companies to just break into the market in the U.S. That testimony put the lie to any suggestion that small upstart companies from Korea were somehow controlling the prices paid by big box supermarkets and retailers. They did not have the market power to do so.

Mark Dosker: One of plaintiff's themes was that Korean ramen is particularly spicy and different and more expensive than typical ramen. So for the defense, we showed that in America all types of ramen are sold by the Korean companies and their U.S. subsidiaries, both spicy and mild, that there are other non-Korean competitors in the U.S. ramen market, and that the 800-pound gorillas in the U.S. ramen market are still two Japanese companies Nissin and Maruchan—which of course were not involved in the case.

And so we explained to the jury that such competition means that there is no way that either of the Korean companies or their U.S. subsidiaries could have charged conspiratorially high prices in the U.S. market.

Lit Daily: Any unconventional strategic choices?

Scott Edelman: It was very unusual to try a case in the United States after a foreign regulatory body has found a conspiracy and that finding has been reversed in that country. Plus we had to counter the testimony of an alleged co-conspirator which sought leniency in Korea and was cooperating with the plaintiffs here. There was a large body of evidence from the co-conspirator that the jury was asked to consider, but they found it to be unreliable because of the questionable motivations of the leniency applicant.

Mark Dosker: We were able to use opinions of one of the plaintiffs' two economics experts to make points critical of the other, who was the lead plaintiffs' economics expert upon which plaintiffs' core damages evidence depended. The cross-examinations of them both, led by Rachel Brass of Gibson Dunn, were withering and displayed mastery of the complex subjects that equaled or exceeded that of the experts themselves.

Her cross-examination of the indirect purchaser plaintiffs' economics expert ended in him essentially conceding that in his opinion the direct purchaser plaintiffs' economics expert's damages calculation had only a two in a million chance of being right.

That allowed for the "cleanup" questioner, in this instance me, to use the time-honored principle of knowing when to say nothing: I limited my cross-examination to stating that I had no further questions for that witness.

This combination immediately led to one of plaintiffs' lead counsel proclaiming "Brilliant", and the judge [William Orrick of the Northern District of California] stating—to appreciative laughter from the jury— "The finest examination we've seen yet, isn't it?"

Lit Daily: The jury heard evidence for five weeks and took less than a day to return a verdict. What do you make of that?

Scott Edelman: Our witnesses were credible. The plaintiffs' were not. Our story made sense; the plaintiffs' did not. The Korea Supreme Court and this jury both made the same decision: there was no conspiracy in Korea. That a hard-working and thoughtful jury was able to readily see the same evidence and reach the same result was no surprise to us.

Mark Dosker: The jury was eight women and two men. They were quite diverse in life experience, age and ethnicity. The jury was attentive, engaged and active in note-taking throughout the five weeks of trial. This was particularly noteworthy because a sizeable part of the fact witness testimony was taken via interpreter from Korean-speaking witnesses, and a significant amount was presented by playing videos of depositions – again, many through an interpreter from Korean witnesses.

The defense felt confident that the jury would see that the defense evidence on what really happened was indeed the truth, and that what plaintiffs were trying to paint the evidence as was not the truth. So even though in hindsight the jury deliberations took only about three hours, before deliberations started the defense was optimistic that the outcome achieved would indeed be the outcome.

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