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LITIGATION

For Rachel S. Brass, who co-chairs Gibson Dunn's antitrust and competition practice group, now is an exciting and challenging time to be an antitrust defense lawyer. Given the current regulatory and political environment, plaintiffs' lawyers are "very much pushing legal arguments to the knife's edge of the law."

As a defense attorney, "you have to be prepared to be thinking in far more creative ways and ... to really ground your case in precedent and common sense," she said.

One of her newest cases proves her point. Brass is co-leading the defense of T-Mobile against a group of AT&T and Verizon subscribers who assert that T-Mobile's merger with Sprint hurt competition and boosted prices for wireless plans. *Dale v. Deutsche Telekom AG*, 1:22-cv-03189 (N.D. Ill., filed June 17, 2022).

But Brass points out that the plaintiffs aren't T-Mobile customers. They are raising antitrust claims against companies from which they never made

purchases. "No court has ever adopted that theory in this context," she said.

Plaintiffs in two of her other cases also pushed the boundaries of the law, she said.

She represented Jimmy Johns and McDonald's in defeating class actions challenging the companies' ban on franchisees hiring workers away from other franchisees. The plaintiffs alleged that working for one or the other of the companies comprised a discrete labor market.

But Brass argued that franchise businesses are allowed to restrain trade in ways other businesses may not, such as set prices and territories.

In the McDonald's case, "it took five years and a lot of advocacy to convince the court that [the plaintiffs'] theory did not align with the facts on the ground or common sense," she said. In June, she won a judgment on the pleadings for her client. The decision is now on appeal. *Deslandes v. McDonald's*, 22-2333 (7th Circ., filed July 27, 2022).

Brass is handling two other unusual antitrust cases representing the plaintiffs. She is suing the PGA Tour for threatening to ban pro golfers who want to play in tournaments sponsored by the upstart LIV Golf Inc. *Mickelson v. PGA Tour Inc.*, 3:22-cv-04486 (N.D. Cal., filed Aug. 3, 2022).

The second case is actually two cases. She is defending a shipping company sued by a competitor for allegedly abusing its market power over service from the U.S. to Guam. And she is suing the federal government for paying annual subsidies to the competitor. *Matson Navigation Co. v. U.S. Department of Transportation*, 1:18-cv-02751 (D.D.C. May. 30, 2020).

Representing mobile companies, shipping companies, fast-food companies and golfers "is what's so great about being a competition lawyer," Brass said. "It's constantly requiring you to dig into new industries, to new areas, to different ways of competing."

— DON DEBENEDICTIS