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Litigator of the Week: Jeffrey Thomas of Gibson, Dunn & Crutcher

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By Ben Hancock

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Jeffrey Thomas knew how he had to set it up. The three-decade litigation veteran at Gibson, Dunn & Crutcher's Orange County office had worked for years on Hewlett-Packard's breach of contract suit against Oracle Corp., carrying it to success in a phase-one bench trial in 2012. So by the time the phase-two jury trial began this May, with $3 billion on the line, his strategy was clear.

"I thought what was crucial was--first of all--for the jury to understand how the relationship between HP and Oracle had existed," said Thomas. Painting a picture of the once-rosy ties between the companies, and establishing that the contract required the same kind of continued cooperation, set the stage for depicting Oracle as the party that had gotten hot-headed and wrecked it all.

That narrative seemed to crystallize as Thomas grilled Oracle chairman Larry Ellison on the witness stand, getting Ellison to admit that he hadn't even looked at the contract when he decided to pull the plug on software development for HP's lucrative Itanium server business. Ellison also copped to being angry at members of HP's board for forcing out his friend, Mark Hurd, who later moved to Oracle.

"I think at the end of the day it was pretty clear that there was not a lot of consideration given to the contract when he made his decision," Thomas said.

Now, after a five-week trial in state court in Santa Clara County, California, Thomas is reveling in the win. A jury last Thursday decided almost unanimously in favor of HP on almost every element of its suit, handing it the full $3.014 billion in damages it requested.

Although Oracle has already promised to appeal, the strong outcome vindicates HP's story as a company that had been working to preserve a business partnership but got ambushed. The victory was hard-fought; Oracle was represented by a powerhouse team from Boies Schiller & Flexner and Latham & Watkins that put on a compelling counter-narrative.

The contract at the heart of the case was negotiated as a kind of peace deal after Ellison's friend, Mark Hurd, was forced out as HP CEO in 2010 for fudging his expense reports. Hurd then joined Oracle, right around the time it acquired Sun Microsystems and became a direct competitor to HP in the enterprise server market; HP was keen to ensure that their business ties wouldn't get rocky.

Just six months after the pact was inked, though, Oracle announced in March 2011 it would stop developing software compatible with HP's Itanium server. That included its industry-leading database software, which ran on 80 percent of those HP servers. The fallout was immediate. Quarter after quarter, Itanium profits tanked. Between 2010 and 2015, its market share had fallen by half.

HP sued Oracle pretty quickly after the 2011 announcement, and a judge agreed with the company the following year that the contract required Oracle to continue making software for Itanium. Part of the trick in phase two--which centered on whether Oracle breached the contract--was convincing a jury that Oracle failed to uphold its end of the deal even though it had resumed development.

To make that stick, Thomas had to refute Oracle's argument that Itanium would have tanked anyway, and that the lost profits were caused by the announcement the company made. A key piece of rebutting that story was getting the former head of Intel Inc.--which manufactured the Itanium chip--to testify that there was no plan for Itanium's "end of life."

Thomas was far from alone in the trial effort. Robert Frank of Choate Hall & Stewart, Camille Olson at Seyfarth Shaw and fellow Gibson Dunn partner Samuel Liversidge each handled different parts of the testimony. Working in the background was a team at Bartlit Beck Herman Palenchar & Scott.

Behind the scenes, Thomas said, each lawyer's different style helped bring to light new ideas about how to examine witnesses to draw out a point. He said it also made the process more interesting to watch.

At trial, Thomas and his co-counsel spent a fair amount of time with each side's damages experts, digging into their methodology. Despite the old adage that experts don't sway juries, Thomas said getting into the detail--and explaining that the figure was actually conservative--was crucial.

"$3 billion is a lot of money, and so we wanted the jury to understand that this was not something we had done lightly," he said.

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