

Litigator of the Week: Josh Krevitt of Gibson, Dunn & Crutcher LLP



By Jan Wolfe
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After jumping into a \$265 million patent case less than three months before trial, Josh Krevitt of Gibson, Dunn & Crutcher LLP parlayed a risky trial strategy into a slam-dunk victory.

A federal jury in Tyler, Tx., returned a verdict on Monday that Krevitt's client, T-Mobile Inc., doesn't infringe three patents owned by RealTime Data LLC. The jurors, who deliberated for less than two hours, also determined that all three patents are invalid on obviousness grounds. T-Mobile's win in plaintiffs-friendly East Texas was far from a sure bet, especially since the company swapped counsel at the eleventh hour and, in an unusual maneuver, decided not to call two key witnesses at trial.

RealTime derives its revenue by asserting patents relating to data compression. Its founder and chairman is an accomplished electrical engineer, with dozens of patents to his name. Back in September 2010, RealTime Data and its lawyers at Cooley brought infringement claims against six major wireless carriers, including T-Mobile, AT&T, and Sprint Nextel Corp. Krevitt briefly represented defendant Cricket Communications Inc., which opted to settle.

The settlements kept coming, and by October 2012 T-Mobile was the only one of Realtime's targets still left in the case. In November, with a Feb. 11 trial date looming, T-Mobile brought in Krevitt to lead the defense at trial. (The company's original lawyers at SNR Denton remained in the case as co-counsel.) In early January the judge tasked to the case, Leonard Davis, announced without explanation that he was

reassigning it to a colleague. To accommodate his schedule, the new judge, Ron Clark, moved up the start of trial by a week.

As is standard in patent cases, Krevitt had prepared a few fact witnesses—mostly people that worked on T-Mobile's technology—as well as a damages expert and an infringement expert. After RealTime Data rested its case, Krevitt decided not to call his experts on either damages or infringement. Instead, he relied only on his fact witness to flesh out T-Mobile obviousness defense, since Krevitt had the burden of persuasion on the issue. The tactic isn't unheard of in patent cases, but in an abundance of caution defense lawyers rarely go through with it.

It could be that Krevitt, who declined to comment for this article, felt that RealTime Data clearly didn't meet its burden and wanted to forcefully signal his thoughts to the jury. Or he may have been anxious about the witnesses and decided wrapping up early was his best move. Jurors sometimes reward such boldness as a sign of confidence. Or they conclude that the defendant didn't have much of a defense to begin with. RealTime's lead lawyer, Cooley's Wayne Stacy, tried to plant that idea in their heads during his closing, telling them that Krevitt "wouldn't back [his story] up with evidence."

Whatever he was betting, the gamble paid off for Krevitt. After pegging damages at \$256 million (a figure that Krevitt sliced to \$18 million at trial on a motion in limine), RealTime Data took home nothing. Despite the twists and turns of the last three months, T-Mobile walked away with a straight-up win.