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How to Win the "Bet Your Company" Antitrust Trial

By Robert H. Bunzel*

No company CEO wants (and most do not foresee) a lawsuit challenging the very business model and future of his or her company – but that is where Norman Wright Mechanical Equipment Corporation of Brisbane, California found itself eight years ago when two failed competitor companies filed a massive antitrust suit seeking treble damages against the privately held distributor of heating, ventilation and air conditioning equipment (commonly called "HVAC"), and a host of public and private co-defendants. The newspapers at the time reported:

Suit charges collusion on UC projects

Sacramento Business Journal - by Kathy Robertson

Date: Monday, December 2, 2002, 12:00am PST

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The suit alleges that Norman S. Wright Mechanical Equipment Corp. of Brisbane colluded with other companies to monopolize the market for certain ventilation products used to construct new buildings on the two UC campuses. The plaintiffs' attorney alleged the arrangement has cost the university more than $100 million over the last decade, on this project and others.

Fast forward to September 7, 2010, and the start of a federal jury trial in San Jose, California, with these same plaintiffs represented by nationally renowned San Francisco antitrust counsel Joseph M. Alioto. All defendants had settled out except Norman Wright and one mechanical contractor, F.W. Spencer & Son. Inc., who installs the HVAC equipment. Six years of discovery and pretrial motions in federal court had narrowed the trial to antitrust claims for attempted monopolization, conspiracy, exclusive dealing, unfair discounts, and commercial bribery, as well as a state law claim for interference with contract.

Plaintiffs' theory was that Norman Wright (i) unduly influenced prominent design engineers and other officials to specify its represented products in the plans and specifications for major projects such as University of California labs, Moscone Center, BART, San Francisco Int'l Airport, and the De Young Museum, and (ii) then "bundled" specified and unspecified equipment sold to mechanical contractors, with the alleged effect of excluding competition and increasing price.

Over an eight-week trial, 55 witnesses testified, 7 experts presented opinions, and hundreds of exhibits were shown to the five-woman, four-man jury. Remarkably, the jury deliberated only 2.5 hours before returning a unanimous defense verdict of no liability on any claims. The author believes the following four tenets were critical to corporate defense success at trial.

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Make the Case About "A Tale of 2 Companies"

Norman Wright defended itself by putting forward its technical expertise of a highly trained sales force, service, and its understanding of new technologies and applications. We said in opening statement that the case would be a "tale of two companies," i.e. the defendant which is a 106-year old slowly-built and well respected firm, versus the plaintiff companies which attempted in dot-com fashion to splash into the market and make a big impact on borrowed money. We said in closing argument that the plaintiff companies failed on their own, "like Icarus, flying too close to the sun," and plummeted to earth of their own weight.

While Norman Wright for decades has had positive relations with more than 50 manufacturers of many lines of complex equipment, and grew from 65 employees and just local offices in 1973 to 165 employees in several states and international locations today, the plaintiff companies repeatedly lost money and had tenuous relations with their factories. One of the defense experts, Joe Anastasi of LECG, used the following chart with the jury to summarize relationships with plaintiffs' own vendors:

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Plaintiffs' credit and payment problems were compared with the economic successes of the defendant in the defense closing argument. Frequently, corporate defendants downplay their market successes and make a narrow presentation at trial. That is a mistake. Proving success arose through better products, service and trained employees will transcend the plaintiffs' attempt to portray negative competition conduct and will shift the jury's analysis to an area of defense strength.

Expose the Plaintiff as Undeserving Without Alienating the Jury

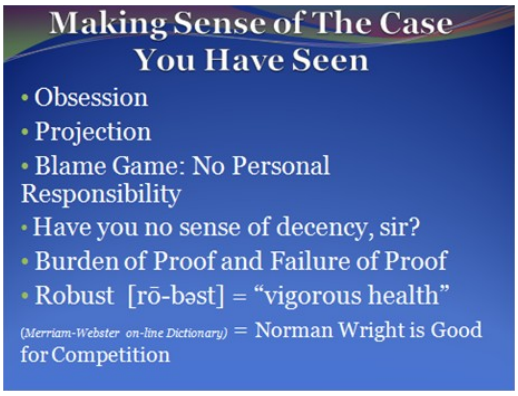
Mr. Alioto presented damage theories of between $19-34 million to the jury at trial, which would be trebled under the antitrust laws. The defense countered that plaintiffs were never profitable, and failed due to their own practices in the market. For example, even when they were successful and won business, plaintiffs failed to collect key receivables.

AMT Accounts Receivable Older than 90 Days

Date	Accounts Receivable over 90 Days Old	Total Accounts Receivable	Over 90 Days Old as % of Total
12/31/1998	$537,340	$1,452,067	37.0%
12/31/1999	$708,741	$1,490,512	47.6%
12/31/2000	$1,111,305	$1,111,305	100.0%

If the defense over a long trial collects and calibrates enough evidence showing that the plaintiff is undeserving, the defendant can close the case as we did here by describing the plaintiff as looking for a jury "handout." This is especially compelling today, with many jurors having lost money or businesses but without legally blaming others by filing lawsuits.

Testimony from unbiased third parties is by far the best way to characterize the plaintiff, and locating and vetting such witnesses and their documents is perhaps the most important task of counsel in a bet the company case where the defendant needs to put the plaintiffs' own reasons for failure on trial. This power point summary was used to start the closing argument and to focus on the undeserving plaintiff versus the vigorous health of the relevant market:

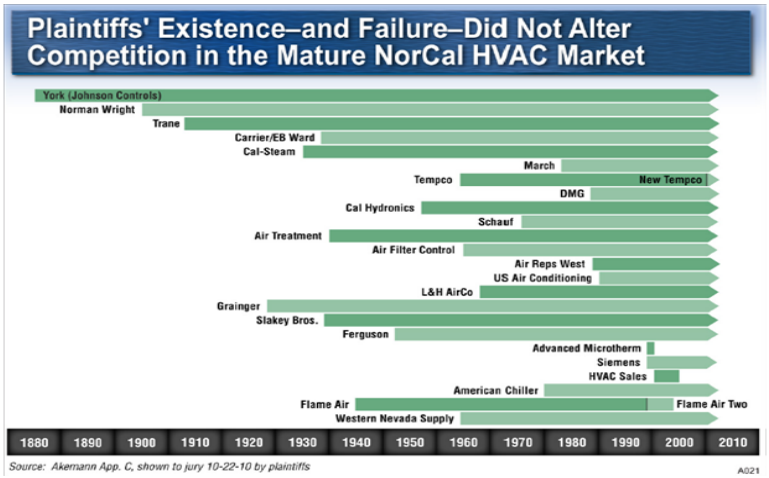


Such screens after a long trial are a must before today's visually-oriented juries.

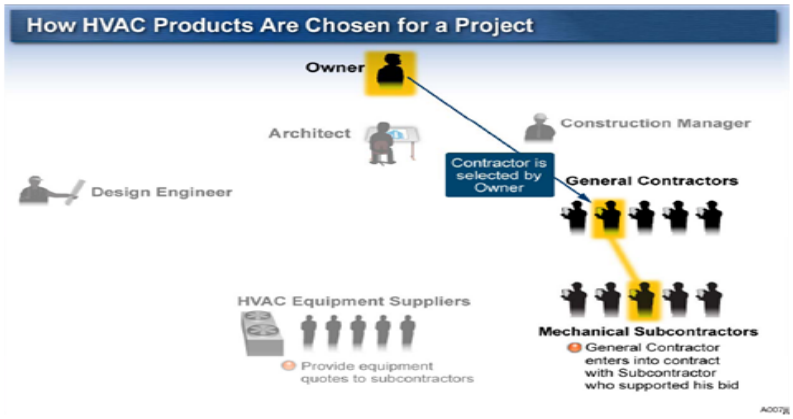
Bolster a Broad Perspective of Products, Markets and Service by Highlighting All Competitors

The alleged bribery in the case (customer entertainment, factory trips, e.g.), and the packaging (bundling) of equipment were shown to be common in the industry, and not unique anticompetitive practices of Norman Wright. The relevant product and geographic markets involved several multi-billion dollar competitors (Trane, Carrier, and York), such that there was little dangerous probability of Norman Wright becoming a monopolist.

We used this chart (which was conceived by a Norman Wright executive working closely with counsel) to demonstrate how unlikely it was that Norman Wright could control price or competition in an industry with so many vibrant competitors:



An antitrust bet the company case is not the time to be insular or to ignore the accomplishments of your competitors and the scope of the industry in general. The defendant should counter the plaintiff's effort to focus on the defendant by looking at the industry as a whole and the corporate defendant's inherently limited role in the broader milieu. Here is one of the slides we used in opening statement to demonstrate the number of players participating at the bid stage on large public projects, graphically minimizing the likelihood of market control or monopolization:



It takes persuasion and a lot of repeat calls to get your clients' competitors or other third parties to appear and be helpful in a complex trial, but when properly done the effect is devastating in a business competition case. If the defense can establish that the marketplace is full of "robust competition" as we argued and proved, the plaintiffs' dual mantra in an antitrust case of raised price and reduced competition will ring hollow.

Challenge Plaintiffs' Junk Science Experts Before Trial

Norman Wright successfully challenged a number of claims in pretrial proceedings, eliminating monopolization, price-fixing and tying claims by partial summary judgment, and excluding several opinions of plaintiffs' experts on market share and damages through Daubert hearings (named after a 1993 Supreme Court decision that changed the trial court's gate-keeping responsibility for expert testimony).

After organizing databases of 500,000 hard-copy pages, 200GB of ESI (over 1 million pages evaluated), and 70 witnesses deposed across the country, we carefully examined plaintiffs' four experts and made successful and focused motions to exclude (i) an engineer's survey of competitors' bid-win ratios used as a lynch pin in plaintiffs' damages models, and (ii) an unsubstantiated 87% market share opinion by a UC Davis economics professor.

Current legal standards favor pre-trial motions excluding expert opinion testimony that is not substantially reliable and relevant. Success in doing so often requires stripping the many opinions of each expert in a complex business case to their separate strands, and then eliminating the most egregious opinions, leaving the plaintiff with something much less strong to rely on.

Conclusion

Bet the company unfair competition cases sometimes have to be tried – especially when you are the primary defendant. Winning is clearly possible in today's climate by (i) playing to the strengths of the corporate defendant's market success, (ii) not shirking in describing why the plaintiff failed, (iii) embracing the complexity of market forces and other competitors in the relevant industry, and (iv) using the tools that exist to strip out plaintiff's expert junk opinions. We closed the case asking the jury to send a message against abusive lawsuits, thus co-opting the plaintiffs' final argument.