

Litigator of the Week: Flipping a Monster Verdict at the Fifth Circuit

By Scott Graham

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Like Fats Domino, Bob Atkins knew long ago that he'd be going to New Orleans.

For almost 10 years the Paul, Weiss, Rifkind, Wharton & Garrison partner has represented BD, the medical supply company formerly known as Becton Dickinson & Co., in an antitrust suit over syringes. The case blew up in 2013 into a \$340 million jury verdict against BD in the Eastern District of Texas.

But Atkins' strategy from day one was to build a record for the U.S. Court of Appeals for the Fifth Circuit.

That paid off last week when the appellate court threw out the verdict, saying BD's patent infringement and false advertising, while perhaps unfair, could not be considered anticompetitive. Had the judgement stood, it would it would have been the largest private civil verdict ever affirmed by the Fifth Circuit, according to Paul Weiss.

Throughout the trial a point of emphasis was that competition remains robust in the market for safety syringes with retractable needles. "We really had a long-range plan from beginning to end, which was trial and appeal," Atkins said.

Plaintiff Retractable Technologies Inc. "may have lost some sales or market share because of BD's false advertising, but it remains a vigorous competitor," Judge Edith Jones wrote.

Retractable Technologies, also known as RTI, had accused BD of using sole-source contracts, loyalty discounts, false advertising and patent infringement to try to monopolize the market for safety syringes and related medical products.

Paul Weiss partner Jacqueline Rubin hunted down doctors, nurses, infection control specialists and purchasers to testify about freedom of choice in the market. "We wanted a whole array of constituents within the health care system," Atkins said. They all testified "they were free to evaluate the RTI product, free to buy the RTI product, and in some cases did buy the RTI product, or one of the other competitors' products."

The health care workers were picked to respond to specific allegations of anticompetitive activity in Retractable Technologies' complaint. "If they made a reference to a hospital in Vidalia, Georgia, I wanted to have someone from there," Atkins said.

The strategy almost ended the case at trial. Eleven of the 12 antitrust claims – including what Atkins describes as the more

dangerous purchasing and contract contentions – were rejected by the jury. But jurors were told, over BD's objection, that Retractable Technologies had won a \$5 million patent infringement judgment in the first phase of the case. The jury awarded \$113 million based on the single claim that the infringement plus BD's misleading advertising amounted to attempted monopolization. Judge Leonard Davis trebled the award to \$340 million.

Atkins said he wasn't worried. The plaintiff's case had been narrowed to an unsupportable theory, and the trial team had developed a deep record showing healthy competition. Fifth Circuit case law was already on his side, but "I believe the court got there more easily and comfortably with this trial record showing that there was no anticompetitive effect," he said.

Atkins credited appellate counsel Russell Post of Beck Redden, who attended trial every day and collaborated on jury instructions, with helping build the trial record. Other key players included trial co-counsel Samuel Baxter of McKool Smith; Paul Weiss partners Rubin and William Michael; and Beck Redden partner Alistair Dawson. Rubin is "the person who gets the credit for finding these health care workers all over the country," Atkins said.

Paul Weiss has been representing BD since former partner Arthur Liman successfully defended the company from a hostile takeover in the 1970s. BD then turned to Paul Weiss in the 1980s and '90s to defend product liability suits over accidental needle sticks that resulted in transmission of HIV. That's when Atkins became involved. When Retractable Technologies brought its first unfair competition suit over syringes in 1998, Atkins was familiar with the technology and a natural to head up the now 16-year-old litigation.

"This trial and appellate decision," he said, "were in many respects a culmination of all that."

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Robert Atkins.

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