GCR USA NEWS

An interview with Steven Benz

Charles McConnell
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Kellogg Hansen Todd Figel & Frederick

Kellogg Hansen Todd Figel & Frederick partner Steven Benz works on antitrust cases for plaintiffs and defendants. He recently served as co-lead counsel in *The Dial Corporation* v *News Corporation*, a Sherman Act monopolisation case involving third-party in-store promotions, in which he secured a $250 million settlement and injunctive relief for his clients and the certified class of 699 consumer product goods companies. Benz also recently spoke on how companies can monetise litigation assets; he shared his thoughts on the issue with **Charles McConnell**.

Steven Benz: There are great opportunities for corporations to maximise their litigation assets. We are trending towards that with corporations serving as class representatives, opting out of class actions and going on their own with recovery practices. If you can turn your general counsel office into a profit centre, that's a beautiful thing for the general counsel, the corporation and its shareholders. Some of the corporate class representatives in our News case were getting cheques for $20 million down to $2,000. Regardless of the amounts, the general counsels were very happy to get these cheques.

I really enjoy representing corporations on the plaintiff's side, either as class representatives, opt-outs as plaintiffs in class action litigation, or in confidential negotiations, with tolling agreements, to monetise my corporate clients' claims.

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There are good things about being a corporate class representative. The corporation gets to control its own litigation, you can recover legal fees and costs, seek incentive fees, make a statement about future antitrust violations and build relationships with other companies and counsel. But there are costs associated with being a class rep as well, including the litigation fees and costs – unless the case is taken on full contingency – document discovery, depositions and the publicity that comes with it.

My firm won the two largest antitrust trial damages verdicts in history. In the Conwood case in the US District Court for the Western District of Kentucky, we won the largest Sherman Act section 2 monopolisation verdict in history. It is still on the books. And then in the Urethane case in the US District Court for the District of Kansas, we were on the trial team that won the largest Sherman Act section 1 trial verdict in history.

From the plaintiff's perspectives, what are some of the most important or interesting issues in antitrust law; or some of the more important trends you've witnessed?

First, antitrust cases are moving into big data as companies move into cloud-based computing and software as a service. Big data cases are both fascinating and challenging as the law adapts to new technology. My firm has two big data cases right now. I am representing Veeva Systems Inc with antitrust claims against Iqvia in the US District Court for the District of New Jersey. My partners have a big data case representing Authenticom in a case against Reynolds and CDK, in the US District Court for the Western District of Wisconsin. Both cases involve the monopolisation of an underlying data set, and the blocking of applications' competitors using data security as a pretextual business justification, and the resulting harm to the consumers of these data sets and applications.

Second, as I noted earlier, I am seeing a trend where corporations are becoming increasingly confident in becoming plaintiffs, either as a corporate class representative, opt-out or private plaintiff, which can be done confidentially. This happens most often in the per se section 1 cases – price fixing, bid rigging, output suppression, group boycotts – and where there are [government] investigations and guilty pleas. But also in the rule of reason monopolisation cases where there is no government enforcement.

There is safety when corporations band together as a group to pursue these cases. The initial reluctance of my corporate clients is, understandably, that "we do not want to sue our suppliers." In my experience, it is very rare for a supplier defendant to cut off a corporate plaintiff, for a number of reasons. It is a business matter and it is generally not a good business decision for a supplier to cut off a corporate plaintiff. And the corporate defendants are usually represented by sophisticated counsel who do not want additional exclusionary conduct allegations added to an amended complaint.

How much, if at all, do shifts in enforcement from the Federal Trade Commission and the Department of Justice affect your work, and what advice would you give to the agencies if you could?

I don't think there's been a lot of shift. I think it's been fairly constant at DOJ and FTC through the various administrations. I haven't seen a huge difference in the non-merger enforcement cases. I have a lot of respect for my colleagues at DOJ – at the Antitrust Division – and at the FTC in the various sections. We meet with them often, and I understand they have resource issues, which is why a lot of times they can't come in and help us. I just want to thank them for taking a good, hard look at some of the things we bring to them and hope that they'll continue to do that. They like private enforcement. They like us out there doing these Sherman Act section 2 cases, and doing these corporate enforcement actions, because the DOJ and FTC – the same as corporate plaintiffs – have resource limitations. When we did our Ritz Camera v Sandisk case in the US District Court for the Northern District of California, the DOJ put in an amicus brief and argued for us in the [US Court of Appeals for the] Federal Circuit saying that the DOJ and FTC support direct purchaser private enforcement actions. We – the DOJ, FTC and corporate

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plaintiffs – are all trying to achieve the same result: promote competition in our economy, greater choices and lower prices for consumers. These are worthy goals, and why I went to law school.

What advice would you give to a young plaintiff's antitrust lawyer?

I love what I do. My advice to someone who wants to become a plaintiff's antitrust lawyer is look around. There are a lot of good firms out there, including smaller boutique firms that do this kind of work. Take a look at firms and practices of all sizes, both plaintiff- and defence-side.

Have you ever thought about working either for the Antitrust Division or FTC; why or why not?

I have thought about working at the Antitrust Division. But have always been busy and satisfied in private practice. I have good friends who have served in high-level positions in the Antitrust Division and they all loved their government service. My government service was 10 years as a reservist deputy staff judge advocate and prosecutor with the DC Air National Guard/Air Force Reserve F-16 wing at Joint Base Andrews. For me, serving as a JAG was the best lawyer job in the world. The only thing better than antitrust litigation is military operations law.

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