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Antitrust Legacy of High Court Nominee Gorsuch in Private Practice

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Last month, we discussed the antitrust jurisprudence of Neil Gorsuch, currently of the U.S. Court of Appeals for the Tenth Circuit judge and nominee to the Supreme Court of the United States. Our discussion focused on three of Gorsuch's opinions during his decade-long tenure with the court of appeals. Even before Gorsuch was nominated to the Tenth Circuit, however, he had already made a name for himself in the antitrust world as a trial lawyer for both plaintiffs and defendants.

In Gorsuch's early years in private practice at Kellogg Huber Hansen Todd Evans & Figel, he defended Bell Atlantic in an antitrust case named *GTE New Media Services v. Ameritech*.

The case arose out of allegations that the five regional Bell operating companies "illegally combined and conspired to restrain trade and to monopolize the internet Yellow Pages by controlling internet access points through which competing internet Yellow Pages providers offer their services." Later, Gorsuch represented so-called "Baby Bell" SBC Communications, a company formed after the breakup of the AT&T Corp. in 1982 pursuant to AT&T's consent decree with the Department of Justice. In that case, *Z-Tel Communications v. SBC Communications*, telecommunications carrier SBC Communications was charged with violating the Sherman Act by refusing to provide Z-Tel Communications with access to its telecommunications facilities and equipment as required by the Telecommunications Act of 1996. Both cases were resolved before trial.

Perhaps Gorsuch's most significant achievement as a private litigator is his victory in the often-cited predatory conduct case *Conwood v. United States Tobacco*. There, he represented snuff tobacco manufacturer Conwood Co. in suing U.S. Tobacco Co. (UST) for monopolization of the snuff tobacco market. The case ended in what is widely considered to be one of the largest antitrust verdicts ever awarded to a private litigant at $350 million, subsequently trebled under the Sherman Act to $1.05 billion. The case, handled by Gorsuch, illustrates the resilience and flexibility of the antitrust laws by showing how conduct often characterized by some as merely aggressive business tactics at best and tortious interference at worst can be transformed into a disastrous antitrust verdict when a pattern of predatory conduct is sanctioned by upper-level management and carried out on a wide scale to the detriment of competition.

At the time of the verdict, both Conwood Corp. and the UST manufactured and sold moist snuff smokeless tobacco in retail stores throughout the United States. UST controlled 78 percent of the market while Conwood (UST's largest competitor) held 13 percent of the market. The remaining two manufacturers of moist snuff controlled marginal shares of the remaining 9 percent of the market. The marketing of moist snuff is unique in several aspects. The product is usually sold in racks on retail shelves adorned with placards advertising the brand name, product type, and advertising promotions. These shelves and the often-colorful placards are provided free of charge by snuff companies to the retailer. Conwood argued that this so-called "point of sale" advertising was vital to the tobacco industry and was, practically speaking, one of the only ways to advertise a tobacco manufacturer's product because of government restrictions preventing radio, television, and sometimes billboard advertising. Therefore, Conwood argued, the point of sale was the only chance it had to convince a customer to purchase its product.

Since the 1990s, Conwood and UST had adopted different and unique business strategies. Conwood began to focus on the "price-value market," while UST maintained an emphasis on the premium market. The budget market had been growing for nearly a decade and cutting into UST's market share, prompting UST to target its low-cost competitors, Conwood included. In 1998, Conwood brought a Sherman Act Section 2 monopolization claim against UST, alleging that UST

employees had for some time engaged in a scheme to disrupt Conwood's point-of-sale marketing by pushing retailers to use UST displays, destroying Conwood's displays and placards, and falsely reporting to retailers that UST's product was more popular than competitors. At trial, the two tobacco companies cast UST's conduct in a dramatically different light. Gorsuch, representing Conwood, painted UST as a ruthless monopolist that feared competing on the merits of its product, instead preferring to bully its competitors out of market share by lying to retailers and physically destroying competitors' marketing materials to get an edge. By contrast, UST defended its conduct as merely aggressive marketing in a competitive industry: "USTC maintains that its marketing practices are standard demand-enhancing activities," constituting, "vigorous, efficiency-enhancing rivalry" among companies. At worst, UST noted, Conwood's allegations provided evidence of merely sporadic tortious conduct that did not implicate the Sherman Act.

The evidence presented to the jury may have looked like mere tortious conduct when viewed through a narrow lens, but the Sixth Circuit concluded that the scale and severity of UST's predatory conduct, taken as a whole, and its endorsement by upper-level executives discredited the company's attempt to cast its conduct as aggressive competition or isolated torts. First, according to testimony at trial, UST convinced a number of retailers to carry exclusive racks, which "refers to one manufacturer supplying a rack to display its moist snuff products and those of all other manufacturers." These exclusive racks, which some retailers preferred because it provides uniformity in product presentation, significantly reduced competitors' opportunities for point of sale advertising.

Second, Conwood witnesses testified that UST representatives even went so far as to systematically remove and destroy Conwood's product racks and placards. Under the guise of "organizing or straightening stores" and often with the permission of inattentive or untrained retail store clerks, representatives would even place Conwood-brand snuff in UST racks or "bag up [competitor's] fresh products and place them under the counter, making it appear as though the store did not carry the brand. According to Conwood's chairman, UST physically destroyed as many as 20,000 Conwood display racks per month, costing Conwood as much as $100,000 for replacements.

Third, Conwood witnesses testified that UST took advantage of retailers' category management practices. Category management practices, according to the Sixth Circuit in the Conwood case, "allow retailers, based on such data as sales volume, to determine which items should be allocated more shelf space. Manufacturers support the efforts of retailers by presenting to them products or a combination of products that are more profitable and 'plan-o-grams' describing how, and which, products should be displayed." Many retailers of moist snuff, even large retailers, often delegate category management functions to the manufacturer because it constitutes a "small category" of product, which makes it infeasible for retailers to devote in-house personnel to the task of category management. In the case of moist snuff, the task was often delegated to UST because of its position as market leader.

Evidence at trial demonstrated that UST had provided false sales information to retailers, making its own products appear to be more popular than rival, price-value products. Using this false information, UST was apparently able to convince retailers to carry more of its own product and less of its competitors' product.

The jury returned a $350 million verdict in Conwood's favor (trebled to $1.05 billion), and the District Court approved the judgment, denying UST's motion for judgment as a matter of law. UST appealed, claiming "the evidence presented at trial amounted to no more than 'insignificant' tortious behavior and acts of ordinary marketing services." Moreover, it argued that its category management services and marketing tactics were "common marketing practices" and that its destruction of Conwood's marketing materials was "nothing more than isolated sporadic torts." The Sixth Circuit rejected UST's position. It explained, "isolated tortious activity alone does not constitute exclusionary conduct for purposes of a Section 2 violation, absent a significant and more than a temporary effect on competition, and not merely on a competitor or customer." However, the Sixth Circuit went on to say, "anti-competitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." The court reminded UST that vigorous competition, the competition that the antitrust laws are intended to encourage, promotes the interests of consumers by promoting low prices, increased production, and consumer choice. "If a firm has been attempting to exclude rivals on some basis other than efficiency," however, "it is fair to characterize its behavior as predatory or exclusionary." The Sixth Circuit concluded that UST had engaged in such exclusionary conduct.

The *Conwood* case represents more than a large verdict for Gorsuch's client. It represents how the Sherman Act can, and often does, extend far beyond the traditional per se antitrust violations such as price fixing, market allocation and tying arrangements. When viewed discretely, UST's marketing conduct may have been

merely tortious conduct or even vigorous competition, as UST suggested and the Sixth Circuit acknowledged. But, as Gorsuch argued, when implemented on a wide scale (and viewed as a pattern), encouraged by upper-level management, and executed in a way that harms competition, that conduct violated the Sherman Act to the tune of $1.05 billion. Like his judicial opinions from the Tenth Circuit, which we discussed last month, Gorsuch's work on the Conwood case demonstrates that he is not only an experienced antitrust trial lawyer, but that he is willing to push the antitrust envelope and pioneer antitrust ideas in a creative and thoughtful way. Stay tuned. •

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