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Litigators of the Week: Defense Lawyers for the Poultry Execs Who Won't Be Facing a Third Antitrust Conspiracy Trial

By Ross Todd
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Two trials. Two hung juries. One perturbed judge.

After a second federal jury Denver, Colorado, deadlocked in the criminal antitrust case the federal government brought against 10 poultry company executives, Chief U.S. District Judge Philip Brimmer ordered that the head of the DOJ's Antitrust Division come to his courtroom to explain why it was in the interest of justice for the feds to move forward with a third trial.

Lo-and-behold, shortly after the judge's demand, prosecutors filed court papers dismissing five of the defendants — Timothy Mulrenin, William Kantola, Jimmie Little, Brian Roberts, and Rickie Blake — from the case. Our Litigators of the Week are **Elizabeth Prewitt** of **Latham & Watkins**, who represents Mulrenin, sole practitioner **Roxann Henry** who represents Kantola, **Mark Byrne** of **Byrne & Nixon**, who represents Little, **Craig Gillen** of **Gillen Withers & Lake**, who represents Roberts, and **Wendy Johnson** of **RMP LLP**, who represents Blake, and their teams. They answered our first question jointly.

Lit Daily: Who were your clients and what was at stake?

All: Our clients were Timothy Mulrenin, William Kantola, Jimmie Little, Gary Roberts, and Ric Blake.

The defendants are former sales executives for Tyson Foods, Pilgrim's Pride, Koch Foods, and George's Inc. In October 2020, the U.S. Department of Justice Antitrust Division added our clients to an existing criminal indictment, alleging a total of 10 executives were involved in a conspiracy to fix prices and rig bids for broiler chicken products.

Simply put, at stake was the freedom of these five innocent men, who were facing up to 10 years in prison, accused of criminal actions they did not commit. They were also facing down devastating reputation damage and $1,000,000 or more in potential fines.

More broadly speaking, our clients faced a Division that chose not to adhere to long-standing DOJ policy that allows defendants to discuss the merits of their case before an indictment, and, as in our matter, further trials, are brought.

Who all was on your teams and how did you divide the work?

Elizabeth Prewitt: I'm a former Antitrust Division prosecutor and I led an all-women team for Mr. Mulrenin. I was joined by associates **Caroline Rivera** and **Karen Kim**; as well as **Marci LaBranche** and **Jamie Hubbard** of **Stimson Stancil LaBranche Hubbard**.

Representing one defendant among ten presented a risk

that our defense could be lost in the crowd so, for our client, we made the strategic decision that I would handle the jury addresses and key witness examinations as lead trial counsel — a heavy load over both six- and seven-week criminal jury trials that was only possible to carry because of an extraordinary team effort. Marci LaBranche joined me at counsel table and took on many of the oral arguments on motions and evidentiary issues and some witness examinations, and we drew upon her deep insight into Colorado criminal practice at every turn. Caroline Rivera, assisted by Karen Kim, earned several battlefield promotions by knowing the facts cold and taking on responsibility for drafting witness examinations and legal briefs. We worked as a lean and integrated team with Jamie Hubbard also playing a key role in developing of our defense case and **Nancy Wickam** providing outstanding paralegal support

Roxann Henry: I'm a sole practitioner based in Bethesda, Maryland. **James Backstrom**, another sole practitioner based in Philadelphia, and I represented Mr. Kantola.

The division of labor was to skip sleep and labor a lot.

Mark Byrne: I'm a former federal prosecutor. For Mr. Little, **Dennis Canty** and I were on-site in the courtroom in Denver, while Byrne & Nixon lawyers **Jennifer Derwin** and **Joseph Park** provided invaluable support from their Southern California offices.

In terms of splitting the work, Dennis and I, both experienced trial lawyers, sat at counsel table with Mr. Little and divided up trial duties — opening and closing statements, cross examinations, etc. Jennifer Derwin monitored the trial remotely and was responsible for preparing all filings and providing advice on all aspects of the trial. As the junior member of the team, Joseph Park provided an encyclopedic knowledge of the exhibits and always had what we needed at his fingertips.

Craig Gillen: My partner **Anthony Lake** in the Georgia-based law firm Gillen Withers & Lake and I represented Mr. Roberts. **Richard Tegtmeier** of the Denver-based firm of **Sherman & Howard** was our co-counsel.

Wendy Johnson: For Mr. Blake, **Barry Pollack** of **Kramer Levin Robbins Russell** and I were lead counsel. The team included **Chris Plumlee**, **Lisa Geary** and **Seth Haines** of RMP and **Courtney Millian** and **Jeff Thalhofer** of Kramer Levin Robbins Russell.

The division of labor was divided equally between RMP and Kramer Levin Robbins Russell. At the first trial, Mr. Pollack gave the opening statement and I gave the closing argument. At the second trial, I opened and Mr. Pollack gave the closing.

What were your key trial themes? Did they change at all between the first and second trials?

Prewitt for Mr. Mulrenin: Our themes remained the same — that our client had no motive or means to fix prices and that the prosecution's case was based on a fundamentally flawed view of the broiler chicken industry and his role in it. We opted to put on a robust defense case in both trials but, for the second trial, we reserved my opening until after the government's case-in-chief so that we could then move immediately to defense witnesses that would amplify our themes in testimony – making good on our promise to the jury right away.

Henry for Mr. Kantola: In both trials the government relied on inferences not based on facts but based on wrong information.

Byrne for Mr. Little: We emphasized (1) Mr. Little had no authority to set prices; (2) he was a salesman and his job was to handle various customer service issues that came up on a daily basis — thus explaining his numerous phone calls, including to competitors; and (3) there is nothing illegal about sharing pricing information with competitors, so long as there isn't an agreement to rig bids or fix prices, which there wasn't.

Gillen for Mr. Roberts: The centerpiece of the government's case was the 2014 negotiations for KFC's 2015 supply of chicken-on-bone. For Mr. Roberts, the defense theme in both trials was that Tyson's Business and Pricing Units were responsible for setting prices and set Tyson's 19 cent price increase months before there was even a request for bids for KFC. The Tyson profit margin never changed during the negotiations, and neither Mr. Roberts nor Mr. Mulrenin possessed any authority to set or change Tyson's pricing. The defense theme was "19."

Johnson for Mr. Blake: Mr. Blake could not possibly have been involved in a conspiracy to rig bids or fix prices. He did not provide any of George's competitors with information about George's bids, nor did he receive information from George's competitors about their bids and had no role in deciding what George's would bid. These themes remained constant through both trials.

The government's star witness was Robert Bryant, a longtime Pilgrim's Pride employee, who testified there was an industry-wide agreement to share price and bid

information to inflate profits and limit losses. How did you work to undermine his credibility?

Henry for Mr. Kantola: Mr. Bryant's testimony consisted of only his "understandings". He didn't actually know anything, and the government knew that because he had told the government about his lack of knowledge in interviews.

Byrne for Mr. Little: Mr. Bryant was an admitted liar. Although he made blanket assertions that there was an agreement, he offered very limited details about Mr. Little's purported involvement, which was directly contradicted by testimony we elicited from two other government witnesses.

Gillen for Mr. Roberts: Bryant and former Tyson employee Carl Pepper were each interviewed and prepped by the government 25 times prior to testifying. The defense attacked witnesses' credibility by emphasizing their immunity agreements with the government, and the necessity for the government's 25 prep sessions.

Johnson for Mr. Blake: Mr. Bryant did not know Mr. Blake. He claimed on one occasion to have advance information from another Pilgrim's employee about what George's was going to bid, from which the government asked the jury to infer that Mr. Blake must have been the source of that information. The defendants were able to show that the information that Mr. Bryant had pertained to Pilgrim's Pride's competitors' current prices, not what they were going to bid for a future contract.

After the latest mistrial, Judge Brimmer ordered Jonathan Kanter, the head of the DOJ's Antitrust Division, to come to court to explain the decision to move forward with a potential third trial. "If the government thinks that the 10 defendants and their attorneys and my staff and another group of jurors should spend six weeks retrying this case after the government has failed in two attempts to convict even one defendant, then certainly Mr. Kanter has the time to come to Denver and explain to me why the Department of Justice thinks that is an appropriate thing to do." How confident were you that the government would drop the charges against your client at that point?

Prewitt for Mr. Mulrenin: We were hopeful that our client would be dropped. The Antitrust Division was under pressure to articulate how a third trial would be different and "streamlining" it with fewer defendants was really its only option. Given that our defense case proved to be troublesome for the government in both trials, leading to 9 votes for acquittal in the first trial, dismissing our client made sense. All defendants should have been dropped though. The remaining five defendants are represented by outstanding trial lawyers who will each valiantly fight the charge, if they end up remaining in the case.

Henry for Mr. Kantola: We had no confidence the government would do the right thing.

Byrne for Mr. Little: We were surprised that the Government dismissed the charges given their stubborn refusal after two lengthy trials to acknowledge they had a fundamental misunderstanding of the industry and Mr. Little's role at Pilgrim's Pride.

Gillen for Mr. Roberts: Based upon the Government's initial charging decision and its refusal to dismiss any of the defendants after the first mistrial, in which the jury was 9 to 3 in favor of acquitting Mr. Roberts, we appreciate the government's decision to dismiss, but had little confidence that it would do so until it happened.

Johnson for Mr. Blake: While we believed that the government should dismiss the case altogether, we were not at all confident the government would drop the charges against any of the defendants, given how zealously the government had pursued these charges through two trials. What was most surprising was the government's decision to dismiss the charges only against five of the 10 defendants. The evidence did not support a conviction of any of the defendants. Having been unsuccessful twice, the government should have recognized this and dismissed the case in its entirety.

What are the lessons here for defendants facing antitrust conspiracy charges?

Prewitt for Mr. Mulrenin: The DOJ has an over 80% conviction rate (out of the mere 2% of criminal cases that actually proceed to trial), but that has nothing to do with your case. Keep in mind that, more often than not, because antitrust trials are few and far between, you will be facing an Antitrust Division prosecutor who has put together the charge with little or no experience of trying complex antitrust conspiracies. As hardworking and talented as these lawyers typically are, experience matters in building and trying these types of cases so that they can withstand the scrutiny of trial by jury and appellate courts. Take heart, these cases can be won.

Henry for Mr. Kantola: Defense counsel should not discount the effect of polarized political opinions affecting jury outcomes.

Gillen for Mr. Roberts: The witnesses for the defense showed great courage in taking the stand and testifying contrary to the government's themes. As I argued in closing, "Nobody is safe unless you sing [the government's] song."

Johnson for Mr. Blake: When the government brings questionable cases, as it did here, defendants need to have the courage to fight the charges, despite the tremendous resulting psychological and financial toll entailed. Each of the defendants in this case should be commended for standing up against the vast resources of the federal government, at great personal risk, rather than succumbing to the pressure to resolve the case with an unwarranted admission of guilt.

What are the lessons for the government?

Henry for Mr. Kantola: There is no substitute for competent witness testimony.

Byrne for Mr. Little: Instead of completing a full investigation prior to bringing charges, the government indicted the case without understanding the industry or the defendants' roles at their respective companies, and then set out to prove their theory of the case. Throughout both trials, the government refused to acknowledge that their theory was fundamentally flawed. They seemed to lose sight of the fact that a prosecutor's job is to seek justice, not convictions at all costs.

Gillen for Mr. Roberts: Hopefully, the government will be more receptive to dialogue with defense counsel prior to making charging decisions.

Johnson for Mr. Blake: The government should never bring a case based on a hunch or a theory. When the evidence simply is not there, justice can only be served when the government exercises restraint and stands down. United States government attorneys have one job, which at all times is to seek justice, not convictions. Government attorneys must have the courage, moral compass, and professionalism to do only that regardless of the length of the investigation, resources expended, or outside pressures. The citizens of the United States deserve nothing less.

What will you remember most about handling this matter and these two trials?

Prewitt for Mr. Mulrenin: Our strategy throughout both trials was to stay on the offense and push the pace while sticking to our core defense themes. Trying a case alongside 30-plus litigators presents a hazard that differing or inconsistent arguments or positions could sink the defense for all. With shared purpose and mutual respect these lawyers demonstrated not only their excellence as litigators but also a remarkable level of self-discipline and humility. There were many instances where defense counsel talked through differences, shared tasks, and showed restraint. This was righteous work with a good outcome that afforded us the privilege to stand shoulder to shoulder with exceptional litigators — it will remain a highlight of my career.

Henry for Mr. Kantola: The fortitude of our client, the tenacity of our defense colleagues and an experience somewhat akin to Groundhog Day.

Byrne for Mr. Little: All 10 defendants are good people who do not deserve what the government has done to them and their families. And the way that all 10 defense teams were able to work together was incredible. We are from big firms, small firms, East Coast and West Coast firms, and everything in the middle. In a lengthy trial where the government seemed to be trying to confuse and mislead the jury, we were able to work together to present a cohesive defense to dispel the government's flawed narrative.

Gillen for Mr. Roberts: It was a pleasure working with the other outstanding defense teams. Counsel for Mr. Roberts will remember how bizarre it was to conduct multi-week trials wherein everyone in the courtroom was masked — the judge, the staff, counsel, the jurors, and the witnesses. Counsel will also remember Chief Judge Brimmer's exceptional patience in hearing all arguments by counsel on both sides.

Johnson for Mr. Blake: We will remember the grace and courage our client displayed throughout this ordeal. Being a defendant in a single federal criminal trial, much less two of them back-to-back, is terrifying. Our client had worked his entire life doing things the right way. Now, years into retirement, the reputation he spent a lifetime building and, indeed, his freedom, were at risk. For weeks on end, he sat through government arguments and witness testimony that attempted falsely to cast him as a criminal. Yet, throughout, he held his head high, knowing that he had done nothing wrong, and placed his faith in two juries of strangers to do the right thing. We will never forget the strength he displayed, which inspired us throughout both trials.