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HIGH STAKES LITIGATION

Big Cases. Big Clients. Big Risk.
By Cathy Madison

When Star Tribune business headlines disclosed recently that Boston Scientific Corp. settled a “potentially $7 billion suit” with Johnson & Johnson for the “relatively bargain” price of $600 million, hardly an eyebrow raised. Maybe seeing all the zeros—$600,000,000—would give a reader pause. Still, it was a bargain. Facing another lawsuit, Boston Scientific has already set aside $972 million to cover litigation costs. But as any high stakes litigator will tell you, high stakes isn’t necessarily about zeros.
“For most clients who come to us, given how expensive litigation is, it’s always something that is high stakes for them. It’s presumptuous to think it’s not.”

—John Hartmann (’87)

“IT’S ALL ABOUT THE IMPACT ON THE CLIENT,” SAYS Greg Joseph (’75), who launched Joseph Hage Aaronson, New York, in 2001 and consistently earns top commercial litigator ratings nationally and internationally. “It can be about dollars in the sense that the outcome will affect the ongoing business or its finances, which are largely one and the same. But think of an antitrust case, where an injunctive proceeding seeking no dollars could change the way an industry operates—that’s high stakes.”

Every field has high stakes. “I recently read about a divorce case in which the husband was ordered to pay the wife just under $1 billion,” says Joseph, whose cases range from securities fraud and intellectual property to takeovers and corporate governance (no divorce). Though clusters of zeros weren’t on his radar, his desire to become a litigator dates back to high school debating and watching Judd, for the Defense on TV.

“I’ve always enjoyed the intellectual combat—not being of the size where real combat is even remotely feasible,” he says. In his view, anyone willing to work hard learning one aspect of the law can succeed in high stakes litigation. “We all have certain innate talents and specific limitations,” he says, admitting his lack of aptitude for tax law. “What it really takes is clients with interesting cases.”

Big clients. With big, intriguing problems that Joseph has learned to recognize on their first phone call. He favors complicated financial cases, often representing major law firms in malpractice suits arising from complex fiduciary issues. He once spent three weeks defending an international firm against an $800 million claim related to both a huge transaction and the banking advice offered afterward.

“We got a defense verdict, and, due to the plaintiff’s recalcitrance, never had the opportunity to make an offer. I always feel good when we are able to achieve a result that’s gratifying to the client,” says Joseph. While trial days are “incredibly fun, nights are incredibly tedious, hard, and draining,” he adds. “Day is heaven. Night is the opposite.”

Stakes aren’t shrinking. “The number of bet-the-company cases is growing, and the size of those cases is growing. Consolidated enterprises are generating more and more disputes, and as the economy produces larger and larger sums of wealth, it gets concentrated and the disputes get larger,” says Joseph. He hopes he won’t run out of clients seeking high stakes litigation any time soon: “I love it. I have no intention of ever stopping. I’m going out of here feet first.”

IT’S NOT JUST ABOUT ZEROS

LITIGATION DREAMS DIDN’T DRIVE JOHN HARTMANN (’87) into law school, but they escorted him into a rewarding career. His strong writing and “reasonably confident” public speaking skills persuaded a recruiter for Chicago-based Kirkland & Ellis; he eventually joined the firm after clerking for the 7th Circuit Court of Appeals and serving as an assistant U.S. attorney in Chicago for four years.

“Kirkland had a stable of good, big clients and a steady diet of work. I didn’t have to pound the pavement to drum up business on my own, and I was told, ‘Do good work and you’ll be fine,’” Hartmann says.

Kirkland’s clients are indeed big—BP is one of them, and a certain oil spill comes to mind—and Hartmann has enjoyed that steady diet since joining Kirkland in 1993. He handles shareholder, antitrust, and commercial litigation as well as white-collar criminal matters. One of his clients was Conseco Inc., the insurance company that, in 2002, filed the third-largest Chapter 11 bankruptcy petition in U.S. history.

Defining high stakes isn’t simple, Hartmann says. It may mean large dollar amounts, yet no threshold exists.
Sometimes the case has significant precedential value, or it could be a “bet-the-company case” for a medium-sized business. “For most clients who come to us, given how expensive litigation is, it’s always something that is high stakes for them. It’s presumptuous to think it’s not,” he says. Hourly rates, which can exceed $1,000 for top lawyers at big firms, are market-driven and market-sensitive; today’s sophisticated clients expect the outcome to justify potentially millions of dollars in costs.

“If the dollar exposure is substantial, it does make a difference, because the client has to deal with the risk,” he adds. “Our job is to reduce or eliminate that risk by either winning or resolving the case in a way that’s tolerable. That has an impact on what we do, how we do it, and the level of resources we provide.” Dollar amounts—exposure, settlements, judgments—have grown substantially. “Juries seem more willing to shift very large amounts of assets and wealth from one party to another,” he says. “That makes high stakes litigation more high stakes, more important, and riskier.”

Hartmann credits his success at Kirkland & Ellis, which employs 1,600 attorneys worldwide, to several factors. “First, I’m surrounded by really good people. No matter how good you are, you’re better with a good team. Second, good lawyers make a difference at the margins, and margins are bigger in bigger-ticket litigation. Mostly it’s about rolling up your sleeves and doing the work, and we often outwork our opponents. Third, you have to be skilled and knowledgeable, and keep improving those skills and staying current on that knowledge,” he says.

Finally, one must master two universes. Most litigators like the factual universe; they’re adept at organizing, marshaling, and introducing facts into evidence. “We focus just as much on the moral universe—why people do what they do, what makes sense,” Hartmann says. “When you try a case, that’s often where the focus is. That’s also where I draw a distinction between the outstanding lawyers and the just really good ones. The outstanding ones have a better grasp on the moral universe.”

Hartmann thrives on novelty as well as challenge. In a recent case involving accidents in an Idaho silver mine, he was familiar with the securities aspects of the case but had to plunge thousands of feet underground to understand the mining aspects. “It was absolutely fascinating,” he says. “We do great work for great clients, and the cases are really interesting. They’re all high stakes, regardless of zeros.”
“I won the trial, for $133 million, with the jury awarding damages right down to the penny that our expert estimated. That doesn’t happen very often. Then we lost on appeal in the 8th Circuit. That’s life.”

—K. Craig Wildfang ('77)

**HIGH STAKES LITIGATION REQUIRES A HEALTHY EGO**

and a willingness to delay gratification, says K. Craig Wildfang ('77), co-chair of the Robins Kaplan antitrust and trade regulation group. Trial dates are often many years in the future. “Defendants like to stretch things out, and judges let them get away with it. They usually have the money in dispute, so the longer it goes on, the better they like it,” he adds. “A person needs to be able to take gratification from small victories along the way.”

Wildfang stumbled into his antitrust affinity with his first big case, filed in 1983. He liked the work, and the case was seared into memory when his father died unexpectedly during his last pretrial deposition, in 1990. Three days later, on the eve of trial and day of the Fort Snelling burial service, he reached a final settlement with the remaining defendants.

Prior to joining Robins Kaplan, Wildfang was a partner at another Minneapolis firm and also served as special counsel to the assistant attorney general for antitrust at the U.S. Department of Justice, where he helped investigate securities pricing on NASDAQ. He liked government work, too, in part because “your phone calls always get returned.”

Rising stakes are a function of both the economy and growth in certain practice areas, such as antitrust, securities fraud, and intellectual property, Wildfang says. His first big antitrust case settled for $53 million. His most recent, a class action suit against credit card industry leaders including Visa and MasterCard, settled, in 2013, for more than $7 billion. “The defense counsel called it the ‘Super Bowl of antitrust litigation cases,’” he says. “We prevailed against substantial odds and the biggest banks and best lawyers in the world. That was particularly satisfying.”

Another favorite case involved independent boat builders suing boat engine maker Brunswick Manufacturing Co.,
whose pricing policy effectively excluded competitors from the marketplace. “What makes these cases interesting is not necessarily the magnitude,” he says. “I won the trial, for $133 million, with the jury awarding damages right down to the penny that our expert estimated. That doesn’t happen very often. Then we lost on appeal in the 8th Circuit. That’s life.”

Antitrust law, with its short, broad, and general statutes, is largely made by judges, thus offering more creative opportunities than other areas, Wildfang points out. High stakes cases are always stimulating; creativity ups the ante. “You get to hone your skills against the best lawyers out there. You’ve got to be at the top of your game,” he says. “And the better you do, the higher the stakes.”

AND FINANCING WHERE IT COUNTS

“SOMETIMES I DESCRIBE MY JOB AS WHAT I DID AT Latham, except I don’t have to do any of the heavy lifting,” says Peter Benzian (’70), who has been managing director at litigation financier Burford Capital since 2010. Previously he was senior partner at Latham & Watkins, where he represented Gulf Oil against Westinghouse’s uranium cartel allegation, defended Capitol Records in a shareholder class action suit, and defended Ernst & Young in several securities fraud cases. He knows high stakes when he sees them.

“I’ve worked on several matters where potential damages are in the high hundreds of millions. Some cases may not involve large damages but have other consequences or circumstances that make them high stakes,” he says.

With high stakes, the scale of everything increases substantially: lawyers, witnesses, discovery. “It’s not a particularly appealing process, particularly for younger lawyers tasked with reviewing hundreds, thousands, even millions of pages of documents, trying to find a needle in a haystack,” he says. “But apart from the logistical issues, the basic trials are pretty much the same.”

Now Benzian brings his experience to bear on the front end without having to dive into trial prep. Launched in 2009, Burford is one of a handful of companies that finance litigation, a common practice in the United Kingdom and Australia but relatively new to the U.S. Many jurisdictions used to have statutes prohibiting or strictly regulating third-party investment in lawsuits, but “most of those have either been abolished or they’re in the dust pile,” he says.

“Essentially,” he adds, “we’re providing financing to help defray the enormous costs of being involved in large commercial litigation. It advances the general concept of ensuring that litigants are on an equal footing, and leads to, we believe, a more fair and equitable means of resolving disputes.” Deciding which cases merit financing can be tough. Benzian cites an international case in which Chevron was accused of causing environmental damage through oil pollution in Ecuador. As the case developed, new information prompted Burford to withdraw.

“To recover our investments and profit, the entity we’re backing has to prevail. We heavily evaluate cases and choose those we think will prevail at trial or after appeal, or which will settle favorably,” he explains. “From our standpoint, the ideal case will settle. Time is our enemy. The longer a case takes to resolve, the more expensive it is for us.”

Benzian, too, sees high stakes cases growing in size and complexity, in part because society as a whole, and the U.S. in particular, is becoming more litigious. But he also sees a trend toward arbitration and mediation as companies seek more economical ways to settle disputes and governments face economic pressure to fund their court systems.

For now, he is happy kibitzing with lawyers in high stakes cases, influencing trial preparation, reviewing briefs, offering suggestions, and sleeping well at night. “I miss the courtroom,” he says, “but being a trial lawyer is a young person’s job.”

Cathy Madison is a freelance writer and editor based in the Twin Cities.