

>>WINNING<<

Successful strategies from some of the nation's top litigators.

>>JAMES P. BENNETT<<

Hammer the experts

Facing the jury with a coherent story, a chart and humanizing pictures.



JAMES P. BENNETT: "You're only as good as your ability to win the credibility battle," he said.

RUSS CURTIS

By Pamela A. MacLean

STAFF REPORTER

THE MATH DIDN'T look good.

A \$4 billion company decides to risk a trial with a potential \$20 billion damages claim in a securities class action that includes a dramatic stock-price drop and sales by company insiders.

JDS Uniphase Corp., a fiber optic components company in Milpitas, Calif., bet the farm in 2007 on attorney James P. Bennett's two basic mantras: Give the jury a credible, coherent story they can understand, and knock the credibility out of the other side's experts before they render an opinion.

It became the largest securities class action to go before a U.S. jury. After just two days of deliberation in a four-week trial, jurors handed a complete victory to Bennett and his Morrison & Foerster defense team. *In re JDS Uniphase Corp. Securities Litigation*, No. C02-1486CW (N.D. Calif.).

"A jury verdict on any one of [the plaintiffs'] claims and we would have been bankrupt," said Christopher Dewees, chief legal officer for JDS.

Plunging share value

The case began in 2002, when Connecticut Retirement Plans and Trust Funds, the lead plaintiff, accused the company of maintaining secret internal sales projections for 2000 and 2001 that suggested a sales slump would hit the company, and of hiding the projections from shareholders.

Piling on to that was word that executives sold off \$500 million in JDS stock between 1999 and 2001. In mid-2000, company stock traded at up to \$125 per share, but two years later plummeted to \$3 a share.

Morrison & Foerster also defended three former senior officers with company at the same time. The case came to trial in late 2007, with thousands of documents and e-mail exchanges that Bennett, a San Francisco partner, had to organize into an understandable portrait of the company.

Bennett countered the plaintiffs by arguing that JDS' business forecasts were strong through 2000. He also noted that no one predicted the telecommunications industry's overall crash in 2001, along with many of the dot-com startups, as the stock market plummeted.

The decision to go to trial was not only a risk for the company, but it was made in the post-Enron period, when the defense worried that people would simply hear tales of a stock-price drop and rich executives selling stock early, and that would be enough, Bennett said.

But sticking to the concept of a simple story for jurors, Bennett opened his defense portrayal with a chart of five bullet points, described as "the facts." The "facts" included that JDS' business and forecasts were strong in 2001, the accounting was accurate, and that the 2001 telecom downturn surprised the entire industry.

He used them as a touchstone throughout the trial allowing the defense to stay "on message."

Then Bennett hammered the experts.

"You're only as good as your ability to win the credibility battle," he said.

The opinions given by the first plaintiffs' expert were inconsistent with a newsletter he had written in 2000, Bennett said. "That damaged the plaintiffs," he noted.

Next, the damages expert for the plaintiffs spent four hours testifying. Bennett sweated the expert's impact on the jury. But Dewees said, "eviscerate may be too strong, but his cross-examination severely undermined their damages expert."

Bennett's ability to show the damages theory was unscientific "was a major positive event for us," Dewees said.

Personalizing a client

During his closing argument, Bennett pulled out a large chart with pictures of JDS employees who had testified. The judge required photos of each witness as

an aid to jurors, and Bennett used it to personalize the corporation and was able to make JDS come alive for the jurors.



TRIAL TIPS

- >> You have to give the jury a coherent story they can understand.
- >> Attack the credibility of experts before they render an opinion.
- >> Show the jurors the verdict you want in closings.

Even his opponent, Mark Arisohn of Labaton Sucharow in New York, said Bennett was "a gentleman and a good trial lawyer in a very hard-fought courtroom battle."

One thing Arisohn found extremely effective was Bennett's blowup of the complex 17-page jury form that he filled out for them in closing arguments. "It was a little presumptuous, but it was a good idea," he said.

"You have to have a coherent story the jury will understand, not something made up but a narrative that gives jurors a sense of equity," Bennett said.

Finally, "the battle of credibility is usually won on cross-examination and takes the stuffing out of the other side. The jury asks the question of the other side, 'this case is billions of dollars and this is the best they can do,'" he said.

This was not Bennett's only big win in the last year.

In two back-to-back three-month long trials, Bennett prevailed for a client, Mercury Cos., accused in the largest corporate raiding case in the title insurance industry.

Two Mercury Cos. subsidiaries in Southern California were accused of hiring away more than 350 employees from LandAmerica Financial Group Inc. in a \$110 million damages case.

Jurors sided with Mercury on 11 of 13 claims, awarding just \$8.5 million and rejecting punitive damages. *Gateway Title Corp. v. Mercury Cos.*, No. BC317441, and *First California Title Co. v. Financial Title Co.* BC327332 (Los Angeles Co., Super. Ct.). **NLJ**

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