

Litigators of the Week: Gibson Dunn Protects Its \$3B Trial Win for HP Against Oracle on Appeal

Appellate courts can be places that multibillion-dollar damages awards go to die. Not this time.

By Ross Todd
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Appellate courts are often where multibillion-dollar damages awards go to die.

But that wasn't the case for this week's Am Law Litigation Daily Litigators of the Week, **Theodore Boutrous, Samuel Liversidge, and Rod Stone of Gibson, Dunn & Crutcher**. The appellate team got their firm's landmark \$3 billion win for Hewlett-Packard Co. to stand up at the California Court of Appeal this week in a case against Oracle Corp. As you'll see in the Q&A below, the story of how these once business partners became litigation rivals is almost Shakespearean.

Litigation Daily: Who was your client and what was at stake?

Ted Boutrous: We represent Hewlett-Packard Company. What was at stake was billions of dollars and the future of HP's high-end Itanium server business, which Oracle crippled with its unprecedented March 2011 announcement that it would immediately stop offering new versions of its software on Itanium servers. For many years, HP and Oracle worked together as part of an informal partnership through which they jointly served hundreds of thousands of shared customers who built their IT infrastructures around the Oracle-HP partnership. These customers relied on HP for server hardware and Oracle for software that was "ported," which basically means adapted for a particular hardware



(L-R) Theodore J. Boutrous, Jr., Samuel Liversidge and Rod Stone of Gibson, Dunn & Crutcher.

Courtesy photos

platform, so that it would run on those servers. These shared customers were typically large corporations, banks and other institutions that used their Itanium servers running Oracle software. Given that these customers were running mission-critical applications on their Itanium servers, it was important for these customers to have access to the latest and best versions of Oracle's software. In suing Oracle for breach, HP sought to protect not only its highly profitable Itanium server business but also the interests of its customers who had invested in Itanium server infrastructures running Oracle software.

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

Boutrous: I argued the appeal and was fortunate to be able to build an appellate team that leveraged off all the extraordinary work by the trial team. We

had strong pure legal issues that provided grounds for affirmance but also a powerful factual record from the trial that bolstered the legal arguments. The appellate team included not only myself, **Sam Liversidge** and **Rod Stone** but also Gibson Dunn of counsel **Brandon Stoker** and associate **Andrew Kasabian** and our co-counsel from **Choate Hall & Stewart LLP**, **Robert Frank**. The team worked together to strike the right balance in our briefs between the law and the facts. The trial in this case was bifurcated, with the first phase involving a bench trial to determine the meaning of the contractual provision at issue and the second phase involving a jury trial on the issues of breach and damages. Our partner, **Jeffrey Thomas**, led the trial team in both phases of the trial. In addition to Jeff, three other lawyers presented HP's case at trial, **Sam Liversidge**, **Robert Frank** and **Camille Olson** (our co-counsel from **Seyfarth Shaw LLP**). Other Gibson Dunn members of the trial team included **Jay Srinivasan**, **Rod Stone**, **Dhananjay Manthripragada**, and **Eugenia Varela**. In addition, we were lucky to have as part of the core trial and appellate teams members of HPE's in-house legal team, including **John Schultz**, **Rishi Varma**, **Robert Particelli**, **Dan McGuire**, **Susan Roach**, **Maura Logan**, and **Deborah Eaton**. The appellate team worked with the trial team to synthesize the voluminous record and hone the most compelling arguments based on the powerful evidentiary trial record. It was also important to tailor the arguments on each issue to the applicable standard of review. For example, the trial judge in the Phase 1 trial made some important credibility determinations in resolving disputes in the extrinsic evidence that were very favorable for HP, findings that are entitled to special deference on appeal.

The genesis of this dispute goes back more than a decade. Can you explain where the reaffirmation clause between these two companies came from?

Sam Liversidge: In 2010, two things happened that caused HP to be concerned about the future of the HP-Oracle partnership. First, in January of 2010, Oracle acquired Sun Microsystems, a manufacturer of

high-end servers. Previously, Oracle only sold software, but suddenly it was a direct competitor with HP on hardware. Then, in August of 2010, HP's board asked Mark Hurd to resign as CEO. Oracle's CEO, Larry Ellison, who was a personal friend of Hurd's, was angry over the decision and he made public statements that were highly critical of HP. Within a month, Oracle hired Hurd to be Oracle's co-President overseeing its newly acquired Sun hardware business. This understandably concerned HP. Hurd knew everything about HP's server business and now would be running Oracle's hardware sales and marketing in direct competition with HP. So HP filed suit to protect its interests. This drew further criticism from Ellison, who stated publicly that HP was "making it virtually impossible for Oracle and HP to continue to cooperate and work together in the IT marketplace." The partnership appeared to be at risk. Executives at the highest levels of both companies immediately started trying to negotiate a resolution of the dispute. It was critical for HP to obtain an enforceable commitment from Oracle that, despite recent events, it would continue to make its software available on HP's platform as it had in the past before it hired Hurd. And Oracle agreed to do exactly that in the challenged provision of the contract. The language of the provision is clear, and Oracle's executives understood fully that this provision made the parties' past voluntary course of dealing mandatory, as the Court of Appeal found.

HP and Oracle had cooperated for years prior to this dispute to allow Oracle software to run on HP servers for the benefit of their mutual customers. About 99% of that work happened without any payment or contract between the two companies. How did that lack of underlying contracts prior to the settlement in the Mark Hurd case impact this litigation?

Rod Stone: As the Court of Appeal noted, the strategic relationship that the parties sought to preserve in the contract was based on a course of dealing in which Oracle made available, typically without contract or fee, and through mutual cooperation and joint efforts,

the latest versions of its product suite on HP's server platforms. This prior history was baked right into the contract and supported HP's position on appeal. While Oracle pointed to the lack of certain detailed contractual terms, the Court of Appeal recognized that the reaffirmation clause was not a comprehensive porting agreement and instead it created a straightforward obligation to continue with an expressly identified course of dealing (offering and supporting Oracle's products on HP's existing platforms) that was no different from the course of dealing that had defined the strategic partnership prior to Oracle's hiring of Hurd. And in that course of dealing, the vast majority of porting was done without written contracts and, even in the rare instances where there was a contract for a particular product, subsequent releases were ported without further contracts.

The Court of Appeal wrote that “the parties’ disagreement stems not from an ambiguity in the language or from conflicting extrinsic evidence but from distinct views of what defines the HP-Oracle partnership.” What was HP’s view of that partnership and how did you convince the court it was more compelling than Oracle’s view of it?

Liversidge: HP's view of the partnership was based on a course of dealing over many years in which the two companies jointly served thousands of shared customers who had chosen to build their IT infrastructures around HP hardware and Oracle software. As the Court of Appeal found, the parties' desire to commit to continue that strategic partnership is reflected in the plain language of the provision, which states “Oracle and HP reaffirm their commitment to their longstanding strategic relationship and their mutual desire to continue to support their mutual customers.” And the provision goes on to say exactly what continuing that partnership obligated the parties to do, namely that “Oracle will continue to offer its product suite on HP platforms” and “HP will continue to support Oracle products” on its hardware as the parties had in the past. And, as the Court of Appeal noted, the record is “replete” with evidence of how the companies viewed and portrayed their

strategic partnership. On appeal, we recognized it was important to lay out in detail the evidence about the partnership and the course of dealing to show that what the language of the contract plainly said was consistent with and supported the manner in which the partnership had operated in the past. The evidence showed that once an Oracle product was made available on HP's platform, new versions of that product were always offered as well. In fact, the evidence showed that never before in its history had Oracle ever stopped all software development for a hardware platform like Itanium before the hardware manufacturer stopped selling that server platform.

The Court of Appeal agreed with the trial court below that the contemporaneous email of Oracle’s general counsel Dorian Daley describing the agreement didn’t match up with her trial testimony. Can you explain the discrepancy and how you highlighted it?

Boutrous: The key contract provision stated, “Oracle will continue to offer its product suite on HP platforms” in a manner consistent with the Oracle-HP partnership before Hurd's arrival at Oracle. Despite the use of the mandatory term “will” in the provision, Oracle took the position that it retained absolute discretion to stop offering its products on HP's platform essentially whenever it wanted to, a proposed interpretation that was found to be illusory by both the trial court and the Court of Appeal. In one of the key pieces of extrinsic evidence that we emphasized in our briefs and during the oral argument, Ms. Daley sent a draft of the parties' proposed settlement agreement to HP explaining that she had drafted language reflecting an agreement reached between the companies' executives in which they agreed “to continue to work together as the companies have—with Oracle porting products to HP's platforms and HP supporting the ported products and the parties engaging in joint marketing opportunities—for the mutual benefit of customers.” This was important because it communicated to HP what Oracle's contemporaneous interpretation of the language was, namely that it would

require Oracle to continue “porting” its products to HP’s Itanium servers. At trial, Daley testified that her email “made a reference to porting and joint marketing as examples of the kind of things that would *not* become obligatory as a result of that reaffirmation provision.” As the Court of Appeal found, Daley’s testimony at trial could not be reconciled with the text of her email. The Court of Appeal expressly deferred to the trial court’s credibility finding that “Daley’s testimony is the precise opposite of what [her] email actually stated and is entitled to no weight.”

This wasn’t your first time to go to the Court of Appeal in this case. Can you tell me a little bit about how you ended up side-tracked fighting off Oracle’s anti-SLAPP attempt for more than two years?

Liversidge: In April 2013, this case was on the eve of the Phase 2 jury trial that would decide the issues of breach and damages. A month before the trial was set to begin, Oracle filed an anti-SLAPP motion and noticed it for hearing just three days before the trial’s start date. The motion was untimely and utterly baseless, and the trial court denied it. Nonetheless, although the parties were fully prepared for trial and were at the courthouse ready to proceed, Oracle invoked the immediate-appeal provision of the anti-SLAPP statute the day before trial was scheduled to start, which automatically stayed all proceedings. Having lost the Phase 1 trial, Oracle’s obvious strategy was to delay the Phase 2 trial on breach and damages and in that Oracle succeeded. Oracle’s appeal was ultimately resolved two-and-a-half years later and the case was stayed throughout that time. In its decision the Court of Appeal did not mince words, calling Oracle’s motion and appeal “frivolous” and “utterly without merit.” The Court recognized that its only purpose was to “generate an expensive and time-consuming delay.” The Phase 2 trial on breach and damages finally went forward in June 2016.

What was the key to getting this big damages number to stand up on appeal?

Stone: HP’s damages expert was Jonathan Orszag of Compass Lexecon. Even though his estimated damages were over \$3 billion, his estimate was actually conservative in light of the historical profitability of HP’s Itanium business. The key on appeal was to explain that long, stable track record of profitability on which the damage estimate was based. Prior to Oracle’s breach, HP’s Itanium server business was generating over \$2 billion in annual profits. And industry data relied on by Mr. Orszag showed that HP’s Itanium servers had held a stable share of the high-end server market for many years so it was reasonable to assume it would have continued to do so but for Oracle’s breach. So, while a \$3 billion award may appear very large on its face, we were able to show the Court of Appeal that it was very reasonable. The award amounted to just one and a half times the annual profits generated by HP’s Itanium business prior to the breach. Oracle’s own statements about the impact of its announcement on HP’s Itanium business also helped support the damages award. After Oracle made its announcement cutting off software development for Itanium, Oracle wrote internally that the announcement would force HP’s Itanium customers to “spend billions of dollars replatforming” their servers. Statements like these put Oracle in a poor position to credibly dispute the amount of damage caused by its breach.

What will you remember most about handling this matter?

Liversidge: Undoubtedly, one of the most memorable aspects of the case was the genuine esprit de corps that developed among the members of our trial team. It was a uniquely collaborative and focused group. If I had to pick one moment that I will always remember, I would say being in the courtroom and watching the jury deliver its verdict. But the oral argument before the Court of Appeal last month was also memorable and it was of course extremely gratifying to see the thoughtful 94-page decision from the Court of Appeal affirming the judgment across the board.