

Demoulas: An Inside Look at the Twists and Turns of a Legal Blood Feud

By Meghan S. Laska and Wendy L. Pfaffenbach



THOMAS S. FITZPATRICK

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One family. Ten years. \$800 million. More than a dozen lawyers. One witness on the stand for 17 days. One case that wouldn't end.

The Demoulas Super Markets case was a monster, a modern-day Hydra: every time one evil head would be severed, two more would sprout in its place.

But this June the Supreme Judicial Court finally closed the books on the 10-year saga with an order that allowed the family of George A. Demoulas to achieve control over the Demoulas Super Markets chain.

Now, the lawyers from the victorious side of the family, Carol R. Cohen, Thomas S. Fitzpatrick and Robert C. Gerrard of the Boston law firm of Davis, Malm & D'Agostine, are savoring their success and reflecting on the case.

Family Empire

In 1917, Arthur Demoulas and his wife, Ephrosine, opened a small grocery store on Dummer Street in Lowell and 40 years later sold it to their sons, George and Telemachus.

Within a decade, the brothers had opened five new stores, creating a small empire of North Shore supermarkets.

In 1964, the brothers executed wills with their wives, promising each other that if one died, the surviving brother would take care of the other's family.

In 1971, while vacationing with his family in Greece, George died suddenly. When the family returned home, Telemachus told Evanthea Demoulas, George's widow, that he would honor

the promise he made to his brother.

And, according to Gerrard, it wasn't until a routine tax audit 16 years later that anyone suspected Telemachus had broken his promise.

Telemachus had filed a non-resident Massachusetts return from New Hampshire for Evan Demoulas, George's older son. But at the time, Evan was living in Dracut.

It was an unusually alert employee at the Massachusetts Department of Revenue who spotted the discrepancy. The worker knew Evan lived in Dracut and suspected something was amiss.

What followed were subpoenas for Evan, Demoulas Super Markets and its accounting firm.

Telemachus sent Evan to a lawyer, telling him that the investigation was merely a technical matter, according to Cohen.

But Evan wasn't satisfied with his uncle's explanation and kept drilling the lawyer about what was going on.

Finally, the lawyer told Evan that the whole matter concerned the sale of his stock.

Sale of stock? The transaction was news to both Evan and his brother Arthur S. Demoulas, and the two decided to dial up a lawyer of their own.

The brothers contacted Cambridge attorney Anthony S. Pelusi, who had done some legal work for Arthur. Pelusi, in turn, introduced the case to Gerrard, an expert in corporate family disputes.

Gerrard recalls that Arthur's ignorance of his family's affairs was nearly complete.

"All he knew was that his brother Evan's stock had been transferred without his knowledge," Gerrard says.

And even that was an understatement.

In fact, over the years a series of stock transfers and financial transactions had apparently left one of George's sons with only 8 percent of the stock in the supermarket chain and Telemachus and his family with more than 92 percent.

Round #1

In the beginning, the three lawyers for the plaintiffs would meet in an enormous conference room, a "war room," with Fitzpatrick and Gerrard stationed at either end and Cohen in the center.

A football once owned by hall-of-fame Pittsburgh Steelers running back Franco Harris proved a good luck charm.

Fitzpatrick and Gerrard would toss the ball back and forth, perhaps hoping a connection with Harris — responsible for the legendary last-second Immaculate Reception in the 1972 playoff win over the Oakland Raiders — would ensure victory for their cause.

On April 5, 1990, the lawyers filed suit in Middlesex Superior Court, contending that Telemachus had defrauded George Demoulas' family (wife Evanthea, son Arthur S. and two daughters) of assets believed to be worth as much as \$800 million.

After a lengthy and contentious discovery, the trial began in January 1994.

The jury, comprised of all women and one man, found that Telemachus defrauded his late brother's family of its share of stock and real estate in the supermarket business.

Cohen scoffs at the notion that she and her colleagues had deliberately chosen a predominately female jury so as to play on their sympathies regarding family matters.

"It was our first time picking a jury ourselves," she recalls. "It just happened we ended up with a [predominantly] female jury. We just picked who we wanted, following our gut instinct."

All three attorneys for the plaintiffs maintain that they entered the courtroom fairly confident in their case.

But just to be sure, Fitzpatrick wore his lucky striped tie to the first day of trial and Gerrard wore the same pair of galoshes to and from the courthouse throughout the trial.

The team's strategy was simple: They would tell their side of the story ad nauseam until the jury understood why George's side of the family unquestioningly trusted their uncle, never imagining that he could have transferred their stock.

But they had to overcome the hurdle of explaining away their clients' own carelessness in not keeping closer tabs on their stock interests in the family business.

"If I could get that story told the way I wanted to tell it before the other side even opened their mouths, then I knew they would have an uphill battle," says Gerrard.

The strategy worked.

Gerrard relates that "by the time we rested, I was convinced we were way ahead."

For Cohen, Gerrard's cross-examination of Telemachus was the turning point in the trial.

"My personal belief is that Telemachus was our best witness. He was so angry and couldn't keep his story straight," she says.

The family patriarch remained on the stand for 17 days, an exhausting exercise for both the jury and the lawyers.

Even during the trial, Gerrard learned that his examination of Telemachus was helping the plaintiffs.

As Gerrard tells it, one juror, who wanted to be excused from duty because the case was extraordinarily draining, told Superior Court Judge Maria I. Lopez that she just wished "Mr. Demoulas would answer Mr. Gerrard's questions."

Telemachus' testimony also led to one of the more infamous incidents in the trial.

Cohen thinks that Arthur T. Demoulas, Telemachus' son, was so frustrated with what was happening to his father on the stand that it led to his fistfight with Arthur S.

"[Arthur T.] was upset and he couldn't punch [Gerrard], so he just punched Arthur S.," she suggests.

But the tale of the fistfight has been greatly exaggerated, Fitzpatrick insists.

"It was one punch, and Arthur S. had the good sense not to retaliate," he explains.

Still, the scuffle seems to have gone down as part of the lore of Middlesex Superior Court.

Every time Fitzpatrick sees the court officer who had been assigned to the case that day, the two recall the incident.

Judgment Day

Before reaching a verdict, the jury stayed out for 13 days, during which time Gerrard and Cohen tortured themselves with "that awful business lawyers go through."

Each time the jury would ask a question, the team would ask each other: "Is this good for us?" If they decided it was, the next few days would still be filled with agonized questioning.

Each day, twice a day, the lawyers drove to the court with their clients, parking in the exact same spot on the parking garage's fourth floor, right under a giant number "four."

"We'd go everyday when the judge brought the jury in," Gerrard recalls. "We'd make sure the jury saw us — when they came back from deliberating, we would all be there."

Cohen remembers being a nervous wreck, unable to work, during this period and Gerrard describes his state (by the time the jury reached a verdict) as comatose.

Fitzpatrick, on the other hand, says he remained unfazed by the 13-day deliberations.

"I was not nervous about it," he states. "I've

always thought the most thrilling part of being a trial lawyer is sitting at the table waiting for the jury to come back."

Whether the jury would even reach a decision, however, became a real problem for the lawyers.

As Cohen explains it, if the jury deliberations lasted past Memorial Day, they would lose two jurors (one to a job and the second to a graduation). At the time, she knew that this would cause a serious disintegration on the jury.

Late in the afternoon on May 26, 1994, the lawyers were told the jury had reached its decision.

The jurors walked in like the living dead.

"No one grinned at me. There were no thumbs-up," remarks Gerrard. "They all looked like they were 'at attention.'"

The first question asked whether Evanthea had been defrauded by Telemachus in a series of real-estate transactions.

In his opening and closing statements to the jury, Gerrard had told the story of how, two months after George died in Greece, Telemachus showed up at Evanthea's front door with a stack of papers. By the time her brother-in-law left the house, Gerrard had emphasized, the widow's interest in the family's real estate had been severely reduced.

"For a lawyer, the story was made in heaven," he admits.

Both Gerrard and Cohen knew that if the jury answered "yes" to the first question, they could breathe a bit easier.

The jury found that the matriarch indeed had been defrauded.

But the second question, which dealt with the statute of limitations, was the higher hurdle.

The defense had argued that the family knew what was happening all along, and thereby had lost their right to bring a claim some 20 years after the actual events occurred, explains Gerrard.

But the jury answered that it wasn't until April 1987 that Evanthea knew what had really happened that day in 1971.

"When I heard those two questions I knew we were home free," recalls Cohen.

The issue of damages, however, was left unresolved at that time. The question was whether the plaintiffs should receive stock or money damages.

The family's reaction, immortalized in a photo that ran in *Fortune* Magazine, was what one would expect: smiles, tears and hugging.

The firm celebrated that night at the Capital Grill in Boston, with one exception: "I went home to my wife," says Gerrard.

Jerome Gotkin of Boston, lead trial counsel for the defendants, was unavailable for comment prior to deadline.

Round #2

Although the plaintiffs had won the fraud trial, Gerrard looked at the second trial — a shareholder derivative suit in which the plaintiffs were trying to prove that Telemachus had wrongfully diverted Demoulas Super Markets' assets — in a slightly less optimistic light.

This time around, the plaintiffs were facing Judge Lopez, not a jury, he notes.

And before he got into court, Gerrard also wasn't sure whether their arguments were convincing.

The plaintiffs planned to argue that assets worth

nearly \$1 billion were wrongfully diverted from the Demoulas Super Markets chain to corporate entities, including the Market Basket Corp., owned by the Telemachus branch of the Demoulas family.

"Until you actually hear the words spoken, you don't know whether it has the ring of truth," he explains.

To complicate matters, the defendants had already begun attacking Lopez's impartiality, which, according to Gerrard, makes "judges bend over backwards to prove they aren't biased."

But these concerns faded fast once the trial began.

The team's strategy was to debunk the other side's justification for the transfer of the Demoulas Super Markets' assets.

"They had an elaborate story for why they set up the [Market Basket] company," Cohen explains.

But, she says, their elaborate story unraveled when the company's chief financial officer took the stand.

According to Cohen, the witness, who was the architect of the plan, simply could not keep his story straight.

There was also a significant gap in the company's general ledger that just happened to occur during the 17-store transfer of the Demoulas Super Markets to the Market Basket chain, Gerrard notes.

He recalls that after the missing pages were pointed out, the defendants "came in one day [with the missing pages] saying they had found the general ledger behind a radiator."

The shareholder derivative trial was also marked by the defendants' hiring a raft of attorneys from numerous large Boston law firms in Boston, including Foley, Hoag & Eliot; Skadden, Arps, Slate, Meagher & Flom; and Kirkpatrick & Lockhart.

Perhaps after Telemachus lost the first trial, the family decided more was better, Cohen suggests.

"At one point, there were the three of us at our table and 19 lawyers at their table. They brought in extra chairs and pushed the tables together," she adds, describing it as "comical."

Fitzpatrick says he found the discrepancy in numbers and the big-firm dynamic invigorating.

"It was as it should be," he says. "If you are competing and litigating against excellent lawyers, as we were, it makes it more exciting and makes victory sweeter."

But Cohen candidly recalls that it was scary to watch the ever-increasing list of firm-names.

In the end, however, numbers alone did not influence the outcome.

A Healing Decision

On Aug. 2, 1995, Cohen, suffering from a summer flu, was on her way to Massachusetts General Hospital for antibiotics when she received a phone call telling her the judge's decision was out.

She forgot about the penicillin and went straight to the office.

When she got there, the staff was huddled around the fax machine, waiting for the decision.

Pelusi, who had assisted the plaintiffs' team throughout and whose office is located near Middlesex Superior Court in Cambridge, had obtained a copy and was sending it over.

"By the time we got to page 217 [the last page of the decision] we had the champagne open," Cohen recalls.

The decision — in which the judge held that the assets worth nearly \$1 billion were wrongfully diverted from the Demoulas Super Markets chain to Telemachus' branch of the family — seemingly cured her flu, Cohen remembers.

The whole firm celebrated, unaware that the cause for celebration would create a five-year appellate hangover.

Round #3

Before the appeals hit full steam, the plaintiffs' legal team had to battle it out in federal court over alleged surreptitious hearing devices.

Fitzpatrick explains that the defendants and individuals affiliated with them brought a claim against Arthur S., alleging that Arthur had installed listening devices to overhear conversations and intercept fax transactions.

Gerrard asserts that this was part of the defendants' flanking strategy.

"Their plan was that they would say my client, Arthur S., bugged them and they would get a jury in federal court to find that he did. Then, they would take that judgment to state court and say, 'You see, the plaintiffs have defrauded the court and you have to set aside the judgment,'" he maintains.

Fitzpatrick notes that Arthur's defense was not only that he didn't plant the bugs, but that the other side had actually bugged themselves in an attempt to frame him.

Gerrard recalls that one of the main aspects of the case involved presenting the incomprehensibility of the alleged scheme to the jury.

He explains that the listening devices needed new batteries every 48 hours.

"The [person doing the bugging] would have to break in to change the batteries," he says, laughing at the absurdity of such a scheme.

Making the case even more curious was the charge against a federal juror that he tried to fix the outcome of the bugging case for a \$200,000 bribe.

"As I recall, the way this came about was that the juror went into the coffee shop of someone who was an informant for [a defense lawyer's] investigator and they advised the U.S. Attorney's Office of it," says Fitzpatrick.

The charge under the federal bribery statute was based on an affidavit by an FBI agent who said that the juror told him he could sway the jury in exchange for the cash.

"This was one more crazy thing that happened in the case," says Fitzpatrick, noting that he was not aware of the incident until the court informed the plaintiffs' lawyers of the FBI investigation.

The bribery charge did not cause too much delay and the focus of the case returned to the bugging issues.

"That trial was actually a lot of fun in some ways," says Gerrard, noting that a federal jury found for Arthur S. not once but twice.

He explains that after the first trial in 1994 was unsuccessful for the defendants, they claimed they had found more evidence and were able to get a second trial in 1997 in U.S. District Court.

"Their new 'evidence' came from 'a friend of a friend' who dated a woman who talked to a defense investigator. We took that woman's deposition and it was clear that she didn't have any credibility at all," he says.

Gerrard notes that after a month-long trial,

the jury took only one hour to deliberate before returning the second verdict for his client.

Round #4

While the bugging allegations were being sorted out, the plaintiffs' legal team was also deeply engrossed in complex appellate battles.

"We had a great sense of satisfaction from winning the jury trial and, at that point, we were simply trying to finish the case," recalls Fitzpatrick.

He explains that the mood among the plaintiffs' legal team had become more serious.

"Appellate work requires a tremendous amount of effort and is different from trial work" so the good luck charms and footballs were put away, he says.

Cohen notes that in 1995, as a result of the jury verdict in the fraud trial, the plaintiffs filed a motion for equitable relief in Superior Court asking for the return of their stock, which they valued at about \$800 million.

"The defendants wanted to pay damages instead of returning the stock, but they wouldn't tell the judge how they would raise that kind of money and kept demanding an evidentiary hearing, which the judge refused," says Cohen.

Lopez, without an evidentiary hearing, ordered a return of 43 percent of the stock to George's side of the family (amounting to a total of 51 percent in their control), which was upheld by the SJC, states Fitzpatrick.

Meanwhile, a whole new hotbed of issues had cropped up in the shareholders' derivative case, which also had been appealed by the defendants.

Ultimately, "the SJC essentially upheld everything Lopez had decided," Cohen explains, "but found that when the money was returned, it should not include the taxes paid by the defendants on behalf of the corporation."

She notes that it took until September 1997 to sort out the tax issue for both the fraud and derivative cases.

Ultimately, the judgment issued in the fraud case was the same, except that Lopez included a provision for a tax credit to the defendants, and in the shareholders' suit as well, says Cohen.

Round #5

Although there was plenty of appellate work to keep both sides busy, yet another round of appeals lay ahead.

At that time, says Cohen, the defendants were refusing to transfer the assets back to Demoulas Super Markets in accordance with the SJC's decision in the derivative suit.

"The judge appointed a receiver who took title and then transferred the assets back to Demoulas Super Markets," explains Cohen.

She also notes that in September 1997, the amended judgment in the fraud case was entered and the defendants again appealed.

"The SJC found that [the defendants'] appeal of the judge's refusal to recuse herself was too little too late, and they upheld everything she did except in respect to 400 shares, which Lopez had found were wrongly transferred to Telemachus' children," says Cohen.

The lawyer explains that Lopez had determined the Telemachus' children were not bona fide purchasers, but the SJC disagreed with that

theory and remanded the matter back for an evidentiary hearing.

Gerrard recalls that the case was harder to try on remand than it was to argue before the SJC.

He explains that he and his colleagues had to get the witnesses to say things that would deprive them of \$100 million.

Both parties filed motions for summary judgment and the judge decided that Telemachus had 347 shares of Demoulas Super Markets, but rather than taking 400 shares from Telemachus' children, she would instead take 347 from Telemachus, and give it to George's side of the family, says Cohen.

The judge, she notes, then found that with respect to the remaining 53 shares she would hold a hearing with the defendant's children.

After that hearing, Lopez again decided that the children were not bona fide purchasers and the defendants appealed.

Cohen adds that prior to that hearing, the defendants filed a motion to recuse Lopez based on the now-infamous incident involving Lopez's clerk, Paul M. Walsh. (See sidebar, page B15.)

"Lopez denied the motion and they appealed on that basis too," she says.

So the plaintiffs' team once again rolled up their sleeves to write appellate briefs.

By then, the case had become a test of endurance, says Gerrard.

"It went on and on and every time we thought we had it done, the imagination of the other side would figure out something else to throw a monkey wrench into the proceedings in the last four years," he recalls.

Lopez observes that the case was indeed becoming a "trial of patience, endurance and civility."

But in June, after a decade of legal battles, finger-pointing and intrigue, the SJC issued its final opinion on the matter, quietly ending the case once and for all.

"The SJC upheld Lopez's decisions, including her denial of the motion to recuse," says Cohen, stressing that the case truly is over.

Although earlier victories had resulted in champagne toasts, this time around the plaintiffs' lawyers didn't do anything special to celebrate, according to Fitzpatrick.

"The truth is that it was anticlimactic because we had worked hard on the appeal and were quite confident that we would win," he says.

While some observers may question whether there is any money left in the family business to even fight about, Cohen confirms that Demoulas Super Markets is healthier than ever.

"Demoulas paid us \$155 million in March 1999 and it didn't even make a blip on their financial statements," she says, noting that there is still a significant amount of cash in the company.

"I credit Telemachus because he is a fabulous businessman, but a very bad uncle," Cohen observes.

Looking Back

In retrospect, Gerrard reflects that this was a magnificent case, even though it caused him to defend two complaints at the Board of Bar Overseers, which he says were filed by one of the defendants' attorneys, Gary C. Crossen.

"The BBO both times threw the complaints

out within a week or two so there have been no personal ramifications other than being infuriated that I have been complained about at the BBO," he says.

But personal attacks aside, Gerrard calls the case the most important thing he has ever done as a lawyer and his biggest challenge to date.

"I thought I was a good trial lawyer 10 years ago, but I received quite an education in the last 10 years that I didn't expect I would have," he says.

Fitzpatrick notes that he, too, received an unexpected education.

"Demoulas was the best thing that ever happened to me," he says.

Fitzpatrick explains that, as a new associate, it allowed him to become involved in every conceivable evidentiary, procedural and strategic decision and brought him a wealth of experience

most young associates never receive.

Cohen agrees that it was a "life-changing" event. "It was 10 years, but I never got tired of it because there were always interesting issues involved and we even had some issues of first impression," she says.

For instance, Cohen points out that the U.S. Supreme Court has held that the defendant in a derivative case is entitled to a jury if it's the kind of case a corporation could have brought on its own.

"We argued that the judge should not go along with that because it's a proceeding in equity and the SJC agreed with us," she says.

Lopez, meanwhile, reflects that the "power of money" is what stands out to her the most about the case.

Gerrard notes that, after spending so much time on one case, he is now looking forward to handling other matters.

"We are trying a lot of mini-Demoulas-like cases now — people who call up and say, 'I had an uncle too and let me tell you what he did,'" says Gerrard.

But the trial lawyer doubts that he will ever have another case that lasts as long as Demoulas.

"Lots of other lawyers could have done this, but we were fortunate to have gotten the opportunity and I am proud of the fact that the three of us, with support from our law firm, were able to take on almost every law firm in the city," says Gerrard.

Of course, not everyone involved with the case will take away such pleasant memories.

Lopez quips that in 10 years time, she hopes she will have forgotten about it.

Judith G. Dein, now a U.S. magistrate judge and who previously represented two of Telemachus' children, adds: "I don't think it was the high spot of the judicial system." **MLW**

The "Walsh Affair": An Unresolved Story

By Meghan S. Laska and
Wendy L. Pfaffenbach

The Demoulas case spawned a bizarre chapter when the defendants filed a motion to recuse Superior Court Maria I. Lopez, who was presiding over the case, based on alleged improper contacts between her and one of the plaintiffs' attorneys, Robert C. Gerrard.

Carol R. Cohen, co-counsel for the plaintiffs, explains that "in June 1997, based on what [the defendants] alleged were improper social contacts between Gerrard and Lopez at the Charles Restaurant in Boston, [owned by Lopez's husband, Stephen Mindich, publisher of the Boston Phoenix], they filed the motion to recuse."

Lopez denied the motion.

Gerrard says he was disturbed to hear the accusations against him.

"You would think that after practicing for 34 years that you are pretty inured to the devious imagination of humanity and suddenly you realize something even more shocking has happened," he says.

Gerrard maintains that there was absolutely no truth to the allegations and that the defense attorneys had the facts wrong.

"It angered me enormously, but it was almost

more disappointing than anything else that the case had to turn dishonorably that way," he says.

Lopez, who declined to comment about specifics of the case, states only that it was a "long summer" and that the allegations against her were not true.

But the summer was not over yet.

More allegations surfaced, this time involving two attorneys for the defendants, Gary C. Crossen of Boston's Foley, Hoag & Eliot, and Richard K. Donahue of Donahue & Donahue of Lowell.

After the accusations against Lopez and Gerrard, the plaintiffs' lawyers were startled to learn about the charges of Lopez's former law clerk, Paul M. Walsh, regarding Crossen and Donahue.

Walsh claimed he was the victim of a scheme cooked up by Crossen and Donahue to help get Lopez removed from the Demoulas case.

According to an affidavit by Walsh, he was duped into revealing information about Lopez through a phony job-interview process crafted by the two lawyers that took him all the way to Nova Scotia.

Walsh asserted that the defense attorneys had set up the scheme with the goal of obtaining information from him that might suggest Lopez was biased and unfit to rule in the case.

The lawyers allegedly recorded a meeting with Walsh in Nova Scotia, where wiretapping laws are more lenient than in the U.S.

Crossen denied any wrongdoing, but resigned almost immediately as chairman of the Judicial Nominating Council, and the FBI launched a probe of the two lawyers.

Even though federal authorities have been investigating the matter for nearly three years, no formal action by the U.S. Department of Justice has been announced.

Rumors of an "imminent" decision by the federal government have been circulating for months.

Gerrard says that he was and remains "completely puzzled" by the "shenanigans" that went on with the judge's law clerk.

"I believe the clerk was gulled into thinking that he had an opportunity for a good job and he may have enlarged his role in writing the opinion, but I don't think it's possible that any clerk would say that the judge made up her mind ahead of time I can't see how that would help the clerk get the job," he says.

Judith G. Dein, who represented two of Telemachus' children in the case as a lawyer with Kirkpatrick & Lockhart (she is now a U.S. magistrate judge), comments only that it was very frustrating not having a full hearing on the matters.

Neither Crossen nor Donahue returned phone calls from Lawyers Weekly. **MLW**

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