

PAY DIRT



Recycler undeterred in fight vs. major trash hauler

By Barbara Rabinovitz

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In that classic David v. Goliath brand of legal confrontation, a small Woburn recycling business went up against a solid-waste management company of gargantuan proportions and won big in U.S. District Court in Boston last month.

A jury sat through a three-week trial, with U.S. Magistrate Judge Judith G. Dein presiding, before returning a verdict for Atlantic Packing of \$10,375,247 — or approximately \$20 million including pre-judgment interest.

At issue was an agreement between Atlantic and Allied Waste Industries that the trash-trucking firm was to bring all the fiber it collected in Greater Boston and the North Shore to Atlantic's plant in Woburn for processing into recycled paper and cardboard.

From left: Thomas S. Fitzpatrick, Neal J. Bingham and Laurence M. Johnson, who represented Atlantic Packing in its lawsuit against Allied Waste Industries

The contract was to cover the 10-year period between

October 1997 and October 2007, but five years into the agreement Atlantic was sold to The Kraft (as in New England Patriots owner Robert Kraft) Group.

The lawsuit pertained to what happened after the two parties entered into their agreement and before Atlantic was sold to Kraft, according to Atlantic's lead counsel, Laurence M. Johnson, who brought suit in 2003.

Five years later and with a major courtroom victory for his client in hand, Johnson, of the Boston firm of Davis, Malm & D'Agostine, says the outcome holds a lesson for lawyers contending with Goliath-size defendants.

"Try to hang in there and last against an opponent obviously much larger and better financed," he says. "I think that the defendant never believed from the beginning that [Atlantic's owner] would have the guts or staying power to hang in there for five or six years."

Boston attorney William H. Kettewell, of Dwyer & Collora, was lead counsel for the defense and was joined by Kathleen Massey, a partner in Dechert's New York office, and Anthony L. Bolzan, an associate in Dechert's Boston office.

Asked about the size of the jury verdict, Kettewell points out that the plaintiff had asked for a verdict of more than \$18 million and that the defense had conceded nearly \$1.1 million, "so it looks to me that the jury split it in half."

He also says that the plaintiff's claims of intentional misrepresentation, negligent misrepresentation and breach of a covenant of good faith and fair dealing resulted in a jury verdict for Allied on the intentional misrepresentation claim and a judgment of law by Dein on the other two claims, "meaning they simply didn't have any facts to support the claims."

As for an appeal, Kettewell says there are still open counts with no final judgment, "so it would be presumptuous to decide what we are doing just yet."

An issue of believability

Although the jury was exposed to all the dry details that a breach-of-contract dispute between two businesses can generate, there were also moments of high drama that Johnson believes clinched the case for his client.

Atlantic owner Michael Vining was no stranger to the trash-hauling business that his adversary, Allied, was engaged in. According to Johnson, a young Vining worked in his father's trash-collection business in Stoneham, which eventually expanded to include the recycling operation.

The trucking component of Atlantic was sold to Allied in 1997 for approximately \$22 million. Allied wanted to buy Atlantic's recycling entity as well, Johnson notes. But, he says, Atlantic held onto its recycling unit and made the sale of its trash-hauling business to Allied contingent on Allied agreeing to bring all the fiber it collected at locations throughout Greater Boston and the North Shore to Atlantic's recycling facility in Woburn. There, the paper and cardboard retrieved by Allied would be cleaned of contaminants, compressed, baled and resold by At-

lantic for recycling into new paper products.

Vining, recalling the volume of fiber delivered to Atlantic when his company included the trash-hauling unit, "knew he wasn't getting what he had been bringing to his own recycling business," Johnson says. "He was seeing less than half of what he was bringing to himself."

Allied did not contest Vining's claim that it had breached the contract with Atlantic, by Johnson's account. "The issue was how much and how often and what the damages were," he says.

During trial, Johnson recalls, a principal witness for Allied was shown two reports prepared by the waste-management firm, each containing columns indicating — in terms of tons and cubic yards — the volume of trash Allied had disposed of. The witness, Johnson says, "agreed that tons meant tons and that cubic yards was totally irrelevant."

The point of eliciting that testimony, Johnson says, "was to prove they weren't being very candid with the jury."

At another potentially pivotal moment during the trial, an Allied expert testified under cross-examination that several assumptions underlying his report "weren't the product of his independent

"The lead counsel appear more prominent than they really are; this was truly a team undertaking," Johnson says. "[We] consulted together on every significant tactical decision in the case. It was just an example of the old saying that two heads are better than one' ... and three are better than two."

The team eschewed elaborate exhibits, favoring "mainly the traditional kind," Johnson says. "We had 20 to 30 blowups of one thing or another."

Allied, on the other hand, relied on a large screen to display documents electronically.

"We didn't want to do that," Johnson says. "We were happy with the contrast between the big company — with its high-tech defense and six to eight lawyers in the courtroom all the time — and the small plaintiff, doing the best we could. It was quite deliberate."

Sharing another aspect of his team's strategy, Johnson says the three lawyers pursued discovery "very rigorously" in an attempt to find out the extent of Allied's breaches. "We didn't know how much [fiber] Allied had disposed of, other than bringing it to Atlantic."

Johnson examined the principal witnesses, and Fitzpatrick and Bingham questioned others. He calculates there were "upwards of 30 depositions and probably 20 potential witnesses," with each side calling about six or seven to the stand.

More to come

In the end, the jury assessed damages of \$10,375,247 against Allied, which included \$9.3 million for lost profits that the jurors figured Atlantic would have earned, if Allied had complied with the contract, and more than \$1 million for a reduction in the value of Atlantic's business.

According to Johnson, pre-judgment interest was based on the jury's determination of the amount of damages incurred by Atlantic year by year from 1997 to 2002.

"That's significantly larger than the interest would have been if the jury had simply assessed damages for the whole five-year period," he says.

If that had been the case, Johnson explains, the court would have had to assess interest as of the end of that period, starting in December 2002. But, because the jury calculated the amount of damages on a year-by-year basis covering the five-year period in question, the court could go further back in time, beyond the end of December 2002, and come up with what Johnson says was "well over \$2 million in additional interest."

Yet another claim by Atlantic against Allied, this one under G.L.c. 93A, remains to be resolved in Dein's courtroom.

"The essential theory of the 93A claim is that Allied was breaking the contract for malevolent purposes — maybe to drive down the value of Atlantic so it could buy it cheaply, which would be unfair and deceptive practices," says Johnson.

U.S. District Court Chief Judge Mark L. Wolf is also holding a claim with some post-closing adjustments regarding the sale of Atlantic's trucking business, but the stakes in that claim, Johnson says, are "not nearly as big" as what was awarded in the trial and what could be obtained under the 93A claim.

MLV

VERDICT SPOTLIGHT

Type of action: Contract

Injuries alleged: Lost profits, reduction in value of business

Name of case: 20 Atlantic Avenue Corp. and Michael P. Vining v. Allied Waste Industries, Inc.

Court/case no.: U.S. District Court, No. 03-10987-JGD

Tried before judge or jury: Jury

Name of judge: Judith G. Dein

Amount of verdict: \$10,375,247 (approximately \$20 million with interest)

Date: Oct. 3, 2008

Attorneys: Laurence M. Johnson, Thomas S. Fitzpatrick and Neal J. Bingham, Davis, Malm & D'Agostine, Boston (for the plaintiff)

judgment; they were simply what he had been instructed to do by Allied and their lawyers," Johnson says.

The plaintiff's legal team knew from that expert's deposition that such an admission would be forthcoming, says Johnson, adding that it furthered his team's goal of convincing the jury that the plaintiff's witnesses were "more believable than the defendants."

'Three better than two'

Johnson, who was joined on the team by Davis Malm partner Thomas S. Fitzpatrick and associate Neal J. Bingham, offers some clues to their winning strategy.