

# An Antitrust Saga – Taking On Goliath And Winning – Big!

The Editor interviews **R. Laurence Macon**, a partner at the San Antonio, TX office of Akin Gump Strauss Hauer & Feld LLP. Mr. Macon headed an Akin Gump team that recently won a \$173 million antitrust verdict for Kinetic Concepts, Inc., a manufacturer of specialty hospital beds. The ruling is considered one of the largest antitrust verdicts in history.



**R. Laurence Macon**

**Editor:** Could you give us a little of your own background?

**Macon:** I've been practicing law for 32 years. After graduating from law school in Texas, I practiced in Atlanta with Powell, Goldstein, Fraser & Murphy. After two years, I came back to Texas, and I've been with Akin Gump for about 11 years. I spend most of my time trying cases.

**Editor:** How did you become involved in this case?

**Macon:** I had represented Kinetic Concepts previously, obtaining an \$84 million judgment for them in a patent infringement case. Their chief competitor was engaging in activities that threatened to destroy KCI's business. KCI asked me to become involved. We contended the competitor violated antitrust laws. The case began seven years ago. It took that long to wind its way to trial. It wasn't a new area for me. I had handled a number of antitrust cases before that.

**Editor:** What is the focus of the case?

**Macon:** The case involves hospital beds. There are two basic types of hospital beds — standard hospital beds, which provide no specific therapy themselves, and specialty hospital beds, which are designed to counteract some of the side effects of long-term hospital care. Kinetic Concepts was an early entrant in the specialty bed industry and has been one of the leaders in developing specialty bed technology.

Specialty beds address two major problems associated with lying in a hospital bed for an extended period of time. One is bedsores. If you lie on a bed 24 hours a day, seven days a week, your bones start rubbing against the hard surface of the bed producing bed sores. The second problem is pneumonia. When patients lie immobile for long periods of time, fluid sometimes collects in their lungs.

To prevent bedsores, specialty beds employ computerized air cushions that alternate the pressure on the body of the person lying in the bed. This ensures that no part of the body is on a hard surface for very long. The patient doesn't notice this. To prevent pneumonia, specialty beds turn the patient gradually, in a barely perceptible way.

Standard beds cost hospitals between \$10,000 and \$20,000 each. Specialty beds are much more expen-

sive. They are leased by the hospital because they aren't needed for every patient.

**Editor:** What were the facts?

**Macon:** The defendant was the Batesville, Indiana-based company Hillenbrand. For years it had two major businesses. One is the casket business, in which they have had 70 to 80 percent of the market. They are also in the standard hospital bed business, in which they have had about 90 percent of the market. They don't go into a niche unless they can dominate the business. At one point, they owned American Tourister luggage. However, they got out of that business because the luggage industry had become incredibly competitive.

In the late '80s, Hillenbrand got into the specialty bed market by buying what was then the largest company in the industry. Kinetic Concepts was a small company at that time. Kinetic Concepts patented several technological innovations and eventually passed Hillenbrand and its subsidiary Hill-Rom, gaining a market share of more than 50 percent.

Hillenbrand implemented a strategy to keep Kinetic Concepts from taking market share and from getting a dominant position in the market. They did this with what they called "bundling," which is a form of what constitutes "tying" in antitrust law. Hill-Rom went to hospitals, most of which were part of group purchasing organizations, and made them a discount offer. They told hospitals that if they agreed to rent at least 90 percent of their specialty beds from Hill-Rom, they would receive a seven percent discount on the purchase of standard hospital beds — something Hillenbrand didn't normally offer. One hospital, for example, was going to spend \$1 million for standard hospital beds, and their rental needs were in the range of \$70,000 for specialty beds. The seven percent on the purchase of standard beds would be \$70,000, which was as much as they would pay for all their specialty beds. Even if Kinetic Concepts gave their beds away, they

couldn't match Hillenbrand's offer. It was dramatically effective. We found smoking guns describing the strategy in Hill-Rom's e-mails and memos.

Antitrust laws say you can't use a monopoly position in one industry to attempt to obtain a monopoly position interest in another. There have been cases that have defined "monopoly position" as between two-thirds to 70 percent. Basically, it is whatever puts you in a position to dominate pricing and determine what is sold. Hill-Rom was certainly in that position with respect to standard hospital beds. They were in the process of running Kinetic Concepts out of the specialty hospital bed business.

**Editor:** Tell us about the trial?

**Macon:** We tried this case for five weeks. When the jury came back after deliberating for more than two days, they gave us exactly the damages we requested — \$173 million. If the court enters this as the judgment, it will automatically be trebled to \$520 million plus attorneys' fees. This is serious money.

**Editor:** What was your trial strategy?

**Macon:** The jury needed to see this in terms of a small company being able to compete. The jury also needed to see the impact of the case on the consumer. We showed how Kinetic Concepts had started literally in a garage. It had been successful because it came up with technology that people needed. We also showed how, if Hill-Rom was successful, consumers would be denied a choice of therapy. This ties in with the growing concern among consumers that their relationships with doctors and hospitals are becoming distant and their range of choice is being limited.

**Editor:** Were you able to point out that Kinetics Concepts' product offered something beneficial that was unique?

**Macon:** We showed that Kinetic Concepts provided a therapy that doctors said was very helpful to some patients with particular needs. We offered testimony from doctors and nurses who said they really wanted the Kinetic Concepts product for their patients. They expressed concern that their patients were being denied what these medical professionals thought was the best treatment because accountants sitting in the hospital's main office had been offered a deal they couldn't refuse.

**Editor:** What is your reading of the jury's rationale?

**Macon:** We believe the jury saw this as a choice that was being denied, and that Hillenbrand, the big company, was

using its power to squeeze out a smaller company with an innovative product.

**Editor:** Were jurors able to take notes or ask questions?

**Macon:** They were able to take notes, but they were not allowed to ask questions. It was a working class jury. No one on the jury had a college degree. They paid a lot of attention. And, they knew when people were telling the truth and when they were not.

**Editor:** Did you use any technology to dramatize to the jury what was involved?

**Macon:** Trials have changed. Previously, you would mark a document, hand it to the witness and then hand it to the jury. Now, every document is digitized and projected on a screen or monitor. The jury never really sees the hard copy. The wonderful thing now is that, as you ask a question, you can highlight on the screen key parts of a document. We were also able to project graphs showing how Hill-Rom's market share soared after it adopted its bundling strategy and the disastrous effect that had on our client. We find that use of visuals projected on a screen is very effective because most jurors were raised on television.

**Editor:** Did you have much pre-trial discovery?

**Macon:** Oh yes. The pre-trial documents included several million pages of discovery. Over 350 depositions were taken.

**Editor:** Did you use technology to monitor testimony at trial for inconsistencies with information developed in discovery?

**Macon:** We were able to make effective use of real time transcripts. We use LiveNote technology. We find this to be very effective, particularly in a case like this where discovery has gone on over seven years and there are millions of pages of documents and deposition transcripts. It's amazing how often people say inconsistent things. Under the old technology, you'd never catch it.

**Editor:** Let me ask you about the tactics of the other side.

**Macon:** Their position was that they were engaging in good, clean competition, something that made America great. They said they just wanted to be number one. What we pointed out in closing is that they didn't just want to be number one, they wanted to be the *only one*. Our position was that we were one hundred percent in favor of competition, but it needs to be on a level playing field.

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