

Litigator of the Week: Kirt O'Neill of Akin Gump Strauss Hauer & Feld

By John Council

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Defending a company accused of monopolizing an unusual but lucrative segment of the bovine industry in the heart of dairy country is no easy task.

Not only did Akin Gump Strauss Hauer & Feld partner Kirt O'Neill successfully defend his client, Sexing Technologies, against allegations that it injured a competitor by cornering the market on specialized bull semen, he also convinced a Wisconsin federal jury that the plaintiff should pay \$2 million for violating Sexing's patent rights and misappropriating a trade secret.

Plaintiff ABS Global sued Sexing in the U.S. District Court for the Western District of Wisconsin in 2014, alleging that the Texas-based company violated the Sherman Antitrust Act by establishing a monopoly over "sexed bovine semen"—separated bull semen that produces more female calves through an artificial insemination process.

Because female calves are highly prized among dairy farmers, sexed bovine semen is a \$50 million industry in the U.S., with worldwide sales of

\$220 million. The complaint alleged that Sexing used anti-competitive methods to establish 100 percent dominance over the U.S. sexed bovine semen market by entering into "take-or-pay contracts" with customers



Kirt O'Neill, partner at Akin Gump.

and potential competitors, and buying up numerous patents related to sexed bovine semen.

Sexing denied the antitrust allegations and filed a counterclaim alleging that ABS breached its contract with the company, misappropriated trade secrets and infringed on many of its patents.

On Aug. 11, the Wisconsin jury ultimately sided with Sexing, ruling that ABS had suffered no antitrust injuries. The jury awarded Sexing a total of \$2 million in damages on the patent infringement and trade secrets claims. Still, it wasn't a complete

defense win, since the plaintiffs also invalidated some of the company's patent holdings.

"The fight came about because a longtime customer of our client decided that it no longer liked a service agreement it signed in 2012 and tried to get out of it. At the same time they copied our client's technology," said O'Neill, a partner in the Akin Gump's San Antonio office. "When you have that type of situation, lawsuits will follow."

One of the key issues in the case was whether Sexing engaged in antitrust behavior by acquiring the patents necessary to develop its product, O'Neill said.

"The jury said there was nothing anti-competitive about it," O'Neill said. That's because he argued that when his client was developing its separated semen product between 2006 and 2009, there was no demand for it at the time.

"The evidence showed that that patent acquisitions were accomplished during the infancy of the technology when there was no market for the product and the buyers were very negative on the potential of sexed semen," O'Neill said.

That was a difficult argument to make before a jury in Wisconsin--"America's Dairyland"--where people don't look favorably on defendants who try monopolize one of the state's biggest industries.

"What made it tricky was being in front of a hometown jury with natural plaintiffs in the dairy state and being accused of monopolizing practices that drive up prices for the dairy industry," O'Neill said.

The pursuit of countersuit claims --- especially the patent infringement claims--also come with some risk, he said.

"The plaintiff tried to leverage the patent infringement claims into their antitrust litigation by alleging the patent infringement claims were in furtherance of the anti-trust scheme," O'Neill said.

David Pritikin, a partner in Sidley Austin who represents ABS, did not return a call for comment.

O'Neill said the verdict was huge for Sexing Technologies. "If we lost, it could have severely affected the value of the company's patent portfolio thereby threatening the business," he said.

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