

Litigators of the Week: William Isaacson and Karen Dunn of Boies, Schiller & Flexner

By David Bario
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Some class actions burn out quickly. Some rage for couple of years and then fizzle. Plaintiffs lawyers kept a billion-dollar antitrust class action against Apple Inc. smoldering for a whole decade, until Bill Isaacson and Karen Dunn of Boies, Schiller & Flexner stepped in to douse the flames.

Just three hours after Isaacson and Dunn delivered their closing arguments in the case on Tuesday, a federal jury in Oakland rejected claims that Apple used a 2006 software and firmware update to lock iPod customers into its iTunes store and thwart competition for portable tunes. Plaintiffs lawyers at Robbins Geller Rudman & Dowd had sought more than \$1 billion in trebled damages under the Sherman Act. Instead they walked away from the trial with nothing but 10 years of litigation expenses.

The Boies Schiller duo made their first appearance in the case in September, in the wake of a failed summary judgment bid, joining longtime Apple counsel David Kiernan of Jones Day. As some of Apple's most senior executives took the stand during the 10-day trial, Isaacson and Dunn took turns using cross-examinations to establish that the iTunes update was meant to enhance security, honor Apple's copyright obligations, and improve the iPod for customers—not to strangle competition. They also dealt a huge setback to the plaintiffs' standing to bring the case in the first place, after a colleague discovered midtrial that the sole remaining class representative hadn't purchased the iPod model in question.

As far as we know, knocking out a class representative in the midst of a major class action trial is unprecedented. U.S. District Judge Yvonne Gonzalez Rogers allowed Robbins Geller to name a new rep on the eve of closing arguments, so it wasn't a death blow. But the new plaintiff never testified, and the episode helped set the stage for Tuesday's blowout defense win.

In the end, the judge asked the jury on Tuesday to decide a single threshold question that would make or break the plaintiffs' antitrust case: Did Apple's update amount to a genuine product improvement? Robbins Geller's Patrick Coughlin argued that the update included



William Isaacson and Karen Dunn

features that were "lethal" to Apple's customers and competitors, since it blocked non-iTunes content from the iPod.

The features "were like a one-two punch" that degraded the iPod for consumers, Coughlin said.

Isaacson countered that the plaintiffs' own witnesses had testified that the update was meant to improve both security and customers' experience. And, he said, there was a gaping hole in the case: the absence of any customers complaining that they lost music.

"A one-two punch usually connects with somebody," Isaacson told the jury. "Usually someone walks in the court and says, 'I got hit.' Never happened here. This is a case with no evidence."

Dunn took her own swipes at the plaintiffs' case during her closing. With the Sony data breach unfolding outside the courtroom, she hammered home Apple's argument that the update served to protect customers against hackers. "Waiting to get hacked when you can predict you are going to get hacked is reckless," she said. "And it's irresponsible."

The jury's verdict capped a whirlwind three months of preparation and trial for Isaacson and Dunn, who both live in Washington, D.C. It caps a big year in general for Isaacson, named Litigator of the Week in August for persuading a judge that the National Collegiate Athletic Association hampers competition by prohibiting athletes from being paid for the use of their names and likenesses.

Dunn, unlike Isaacson, is a Big Law newcomer. She joined Boies Schiller just 10 months ago, after stints in all three branches of government. Before trying her hand at private practice this year for the first time, she was an associate counsel to President Barack Obama (and helped him prep for his reelection debates), prosecuted cases as an assistant U.S. attorney in Virginia and clerked for U.S. Supreme Court Justice Stephen Breyer.

Now Dunn has a trial under her belt outside government service. A billion-dollar defense win in a class action antitrust trial against Apple? Not bad for a first assignment.