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The Legacy Of Larry Popofsky, An Antitrust Titan And Friend

By **Stephen Bomse**

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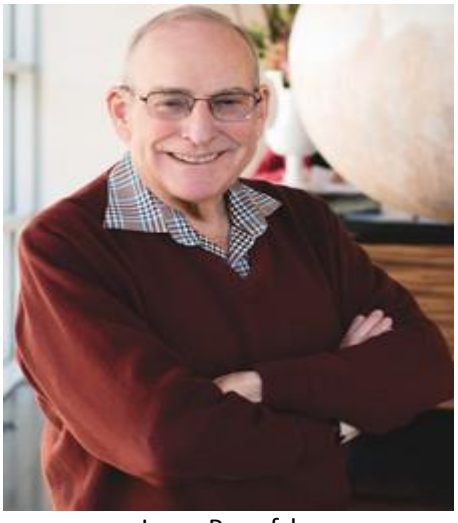
Law360, New York (June 5, 2017, 9:27 AM EDT) -- Fifty years on, few lawyers can recall the precise day when their legal careers began. But I can. It was June 12, 1967, the date when the U.S. Supreme Court announced its decision in U.S. v. Arnold, Schwinn & Co., holding that nonprice vertical restrictions on dealer freedom were illegal per se based largely on the ancient common law rule forbidding "restraints on alienation." On that day, I received my first legal research assignment from a then-senior associate at the firm of Heller Ehrman White & McAuliffe, M. Laurence Popofsky. Though neither of us knew it at the time, it was — to quote Humphrey Bogart — "the beginning of a beautiful friendship" that lasted until Larry passed away last month at the age of 81.

In those intervening 50 years, I had the enormous honor of spending a significant portion of my career working alongside one of the true titans of American antitrust law and, more important, one of the finest human beings it has been my pleasure and great good fortune to know. We spent those years arguing cases together across the country, while arguing with each other about just about everything (legal and otherwise) in his office, over lunch or, in later years, in emails filled with acerbic comments (mine) and frequent misspellings and inadvertent malapropisms (his).



Larry Popofsky

In the process of his magnificent career, Larry not only earned the well-deserved respect and devotion of innumerable clients, lawyers, colleagues and judges, he fundamentally changed the course of American antitrust law. That, of course, came 10 years after our first meeting, when the Supreme Court confessed error in Schwinn, formally overruling it in Continental T.V. v GTE Sylvania.

There is no way that a single case — even one as epochal as Sylvania — could begin to capture Larry's career, let alone his life. But it represents an important moment in time involving a singular development in the law that evokes for me the essence of what made Larry the renowned and beloved figure that he was.

The decades after the Second World War were a time of

considerable ferment in the antitrust world. Echoing President Eisenhower's warning about the dangers posed by the "military industrial complex," and resistant to the notion that what was "good for General Motors was good for the country," a majority of the Supreme Court interpreted the antitrust laws with an eye toward political and social values as opposed to strict economics. That was notably true in the area of restraints imposed by manufacturers on their dealers or franchisees, although it extended to cases involving asserted monopolization and mergers. Meanwhile, Aaron Director and Dean Edward Levi at the University of Chicago were fomenting a counter-revolution and theirg cause was taken up by prominent young legal scholars such as Richard Posner and Robert Bork. Their "Chicago school" views, understandably, also were embraced enthusiastically by the antitrust defense bar and by a number of lower courts.

It was against that background that the Sylvania case played out. The case began in the mid-1960s when Sylvania terminated one of its dealers, Continental T.V., for violating the company's "locations" policy that Sylvania had adopted in hopes of enabling it to compete more effectively with the then-dominant television brands, such as RCA and Philco. The law governing such vertical restrictions at the time the case began was White Motor, a 1963 Supreme Court decision which held such restrictions suspect, but not automatically unlawful, under the rule of reason. However, once Schwinn was decided, Larry had little choice but to focus Sylvania's defense on attempting to distinguish the company's somewhat softer-edged locations policy from the strict territorial restrictions struck down in Schwinn.

Whatever hope Larry may have harbored about his ability to prevail with that argument in the trial court effectively disappeared when, shortly before trial, retired Supreme Court Justice Tom Clark was appointed to preside over the trial. Clark, who had been obliged to resign when his son, Ramsey, became attorney general, had recused himself in Schwinn. However, his dissent in White Motor described the vertical restraints at issue there as "the most brazen violations of the Sherman Act that I have experienced in a quarter of a century." Small surprise, then, that although the justice allowed the case to go to the jury, he did so under plaintiff's per se theory. Inexorably, the result was a verdict for plaintiff.

The Ninth Circuit initially affirmed. However, the case sparked a vigorous dissent from Judge Walter Ely and the court voted to rehear the appeal en banc, resulting in reversal of the trial court's decision, with Judge Ely now writing the majority opinion. The Ninth Circuit, of course, was obliged to follow Schwinn. Therefore, Judge Ely needed to base his majority opinion on the ground that Sylvania's locations clause could be distinguished from the territorial restrictions that were held unlawful per se in Schwinn. The pretzel-like contortions in which Judge Ely engaged in order to do so were more impressive rhetorically than analytically. However, he was not alone in that regard. As Stanley Robinson observed in an article in the Columbia Law Review in 1975, numerous courts "struggled to distinguish or limit Schwinn in ways that [were] a tribute to judicial ingenuity."

There was, in fact, a loud drumbeat within the antitrust community for the Supreme Court to reconsider Schwinn and several post-Schwinn cases had given the court that opportunity, including a 1974 decision in which the Tenth Circuit specifically invited the court to do so. However, each of those requests was rebuffed. Therefore, while Larry had carefully preserved the argument that Schwinn was wrongly decided, there was little reason to anticipate that Sylvania — in which the defendant had prevailed, after all — would furnish the occasion for the court to address yet again the issue of how to deal with vertical nonprice restraints.

Yet that is, of course, what came to pass. The court granted Continental's certiorari petition and set the case for argument during its 1977 term. However, it was by no means certain that Larry — despite his

success in framing the record during trial, followed by his brilliant victory in the court of appeals — would be the one to argue the case. Sylvania was a long-time client of Kaye Scholer and its name partner, professor Milton Handler, one of the country's most distinguished antitrust practitioners and scholars. Larry — who fully anticipated that possibility — was invited to participate in a conference call with Handler and the client, nominally to discuss strategy, although the true agenda was about who would represent Sylvania in the Supreme Court.

As Larry reported to me, Handler's position was that Sylvania should not ask the court to overrule Schwinn, but, rather, only urge the court to affirm on the grounds relied on by the Ninth Circuit. Larry felt strongly that that was a mistake, not only intellectually but tactically, and he made that view clear during the call with the client and Handler.

Whether that position, loyalty to Larry for his past success in the case or some other combination of reasons proved decisive, Larry informed me soon after the call that we would be handling the case for Sylvania in the Supreme Court. And we would ask the court to overrule Schwinn.

At oral argument, Larry began his presentation with a brief recitation of the facts and, then, turned to a defense of the Ninth Circuit's en banc opinion. However, it was clear that neither he nor the court really wanted to talk about that issue. They wanted to discuss Schwinn. And what a discussion it was. I readily confess my bias, both professional and personal, but Larry's argument that day was a tour de force of appellate advocacy. Pitched at the highest level of intellectual sophistication, Larry laid out the case in favor of dealer restraints with clarity and vigor.

It is, of course, impossible to say how impressed the justices were with Larry's rhetorical skills. However, at one point fairly early in his argument, Larry became engaged in a colloquy about whether adoption of its locations restriction was the cause of Sylvania's increased business success. Responding to a question on that point from one of the Justices, Larry said that he did not wish to engage in a "Humian debate" over the issue. Those words had barely escaped Larry's lips when Justice Byron White summoned one of the young court attendants who stand behind the justices during argument. Within minutes the young man returned bearing — as I could clearly see from my seat at counsel table — a copy of the California volume of the Martindale-Hubbell legal directory. I have little doubt about what prompted that request and also suspect that Justice White was gratified to learn that counsel for respondent was, like White himself, a Rhodes scholar.

We left the court with cautious optimism about the outcome. But neither of us expected that the court not only would overrule a major opinion, announced only 10 years before, but that it would take the occasion to resolve the debate over the proper purpose and focus of American antitrust law. With scarcely a bow to literally decades of precedent, the court dispatched the issue in brief, yet unmistakable, fashion: "Competitive economies have social and political as well as economic advantages … but an antitrust policy divorced from market considerations would lack any objective benchmarks."

And, with that, American antitrust law changed fundamentally.

Larry accepted the plaudits that came his way in the wake of the court's decision with customary (and sincere) humility. Then he went on to other things. And not only in antitrust — although it is there that his most enduring reputation lies. He was, for years, one of the principal outside counsel for Arthur Young & Co., for whom he won a hugely important victory about accountants' duties in the California Supreme Court in Bily v. Arthur Young & Co. He also returned to the U.S. Supreme Court and won an important case involving electric utility regulation. In total, he argued more than 60 appeals during his

career, while also trying major antitrust and other types of cases in courts across the country.

As principal counsel for Visa for nearly 30 years (and the source of our most significant work together), he tried and won several cases including the so-called “NaBanco” case that upheld the legality of network “interchange” (now known as “swipe”) fees — a case that led to the development of the so-called “two sided market” theory in network economics.

With somewhat less success, Larry and I were retained as appellate counsel for 3M in one of the earliest, and most important, “bundling” cases (LePage’s v. 3M). After winning before a panel in the Third Circuit, en banc review was granted and, on that occasion, Larry’s magic deserted us as the full court voted to affirm judgment against 3M. Larry and I were far more confident than we had been in Sylvania that the Supreme Court would grant certiorari. But the solicitor general reluctantly recommended against review and that doomed our chances. Even there, though, Larry obtained a measure of revenge when, as special appellate counsel, he won an important bundling case for a dominant Oregon hospital in the Ninth Circuit in Cascade Health Solutions v. Peacehealth.

But it is not for his phenomenal talent or courtroom success that I most remember Larry. I remember him as a person of enormous dignity, graciousness and inexplicable humility. If Will Rogers never met a person he didn’t like, Larry was not far behind. He rarely had a bad word to say about anyone. He never over-argued his position or stretched the facts or the law. And, as a result, he was as liked and admired by opposing counsel as by his colleagues, co-counsel and the many judges before whom he appeared.

He created the careers of many lawyers at Heller Ehrman, taking pride when clients that originally came to the firm only because of him began to call others in the first instance. I suspect that another part of the reason that he found satisfaction in this spreading of the wealth was because he never saw the law as the be-all and end-all of his existence. He worked diligently but left almost every day at five o’clock to be home with his beloved wife Linda, as well as his children. He read books about history voraciously and I learned very early on that I was never going to win an argument with him that turned upon some historical fact. In fact, I rarely won an argument with him on any subject. He was simply too smart and too thoughtful.

I will miss having those arguments, though. Just as I will miss his travel recommendations, his insightful movie reviews and his gentle chiding of me for my frequently expressed disdain and anger that served as such a foil for his own relentlessly hopeful outlook. “The sun will come out tomorrow,” was a favorite cliché of his. And, perhaps, it will. But it will shine somewhat less radiantly now that Larry is no longer among us.

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