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A new dawn

Five years ago, lawyers from the US Department of Justice walked into court haunted by a long losing streak at trial and challenged by top-flight defence lawyers and a difficult case. They left victorious, armed with a new strategy – and confidence – when taking antitrust cases to the courtroom. **Ron Knox** tells the story of *United States v H&R Block*, and how the Obama administration's antitrust winning streak came to pass

This July, at a meeting of the US Democratic Party delegates in Orlando, Florida, Mark Pryor rose to introduce an amendment to the official platform that would be approved two weeks later during the Democratic National Convention – Hillary Clinton's coronation as the party's candidate in the 2016 presidential election. The amendment had been the subject of some consternation; delegates for Clinton rival Senator Bernie Sanders pushed for harsher language, while Pryor, a Clinton delegate and moderate former senator from Arkansas, hoped to mellow its tone. The resulting text read:

> *"We support the historic purpose of the antitrust laws to protect competition, and against the sort of excessively consolidated economic and political power which can be corrosive to a healthy democracy. We support reinvigorating DoJ and FTC enforcement of antitrust laws to prevent abusive behavior by dominant companies, and protecting the public interest against abusive, discriminatory, and unfair methods of commerce…."*

The amendment was remarkable for a number of reasons. It was the first time since 1988 that the party's platform mentioned the antitrust laws at all. What's more, the party made preserving competition a cornerstone of its governance promises for the first time since Walter Mondale's 1984 platform, during the dark antitrust days of the Reagan administration.

The amendment also bridged a policy gap between Clinton, the former Secretary of State, and the populist Sanders, who had suggested during the primaries that Clinton would bow to the interests of big business if elected. Moments after Pryor introduced the amendment, he delivered an impassioned thank-you to Sanders's supporters that garnered a minutes-long standing ovation from the former candidate's delegates. The amendment passed unanimously.

Days later, delegates to the Republican Party convention in Cleveland voted to approve a platform that also mentioned antitrust enforcement, albeit in a more limited context. Suddenly, it seemed, antitrust law was on the mind of leaders in both major political parties. As populist policies become bait for disheartened voters, antitrust enforcement – particularly the kind used to

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prevent abuses by dominant companies – appeared to have become an attractive talking point for major party politicians for the first time in a generation.

Only, it's not the first time. Eight years ago, antitrust enforcement was a stump speech line for then-Senator Barack Obama as he campaigned on his eventual journey to the White House. Frustrated by what he saw as lacklustre enforcement during the George W Bush administration, Obama promised to reinvigorate the antitrust agencies and hold businesses accountable for their wrongdoings. When Obama's first head of antitrust at the Justice Department, Christine Varney, dumped the prior administration's policy paper limiting anti-monopoly enforcement into a trash bin during a press conference less than a month after taking office, it was clear that the president's message had resonated with those whom he had picked to enforce the antitrust laws.

Whether Obama's campaign promise of heightened antitrust enforcement has been fulfilled is a matter of some debate in US antitrust circles. After making a show of binning the so-called "Section 2 report", the current administration has brought few monopolisation cases of its own. Cartel enforcement remains strong, but that was never really in question. Where the two administrations have diverged, as GCR has shown, is in merger enforcement. The antitrust division has been more aggressive when challenging deals than the prior administration, even relative to the high number of mergers filed with the Bush DoJ and FTC. This is particularly true for contested deals – mergers in which the division refused to accept the companies' suggested structural or behavioural changes that might preserve competition, and instead let the courts decide a deal's fate.

No year during the current administration embodied this newfound aggressiveness more than 2011. According to data compiled by GCR as part of its upcoming Enforcer Tracker project, the DoJ challenged more mergers in 2011 than it has in any year before or since, suing to stop 15 deals. Those challenges led to the antitrust division's first courtroom success since 2003 – a litigation victory that set a bold tone for the division, both within the agency and in court, and ushered in the most successful eight years of antitrust enforcement at the Justice Department in the past half-century.

"There was a litigation fever that swept through the antitrust division, starting in 2011", says Larry Buterman, a top trial attorney at the division at the time and now a partner at Latham & Watkins. "It starts with the president, and the president's statement that antitrust enforcement was going to be a priority."

But those courtroom successes – and the willingness to fight in the first place – did not occur in a vacuum. The leadership of the antitrust division spent the first years of the Obama administration revamping how the agency viewed and prepared for litigation, so that when the economy finally thawed from the 2008 financial crisis and dealmakers began bringing often-unprecedented mergers to the antitrust division, government attorneys would be ready to fight.

"There was a litigation fever that swept through the antitrust division, starting in 2011"
– Lawrence Buterman

Now, as the Obama administration draws to a close, GCR presents the story of how the Department of Justice revived its courtroom record, brought and won a fortune-altering merger lawsuit, and began living up to the president's lofty campaign promise – as told by the former officials and lawyers who were there.

Oracle had spoken

For several years, sources say, officials within the antitrust division felt that real and significant obstacles stood between the agency and victory in court, and perhaps led the government to settle cases it might otherwise have litigated. The list of those obstacles begins with the government's challenge to a merger between software makers Oracle and PeopleSoft.

In February 2004, the federal government and 10 states sued to block the merger after their review suggested that the deal would slash competition for specific kinds of software sold to businesses. Were the deal to go through, the government argued, companies in need of human resources and financial management software would have only two choices: the post-merger Oracle and German company SAP.

When the lawsuit was filed, the DoJ appeared to have the wind at its back. PeopleSoft didn't want to be taken

over, and had argued that antitrust issues made the deal impossible. The merger frightened customers, who worried about rising prices and less support service, and corporate documents described head-to-head competition between the two companies.

In court, the case against the deal fell apart. The San Francisco federal court handed the DoJ a defeat so scathing, sources say, it darkened the division's willingness to litigate for nearly a decade, shadowing staff morale and, in some instances, case strategy when deciding whether to challenge a borderline merger. Even in those first few months of the Obama Administration, staff members from the Office of Legal Policy and elsewhere would bring up the Oracle case when discussing potential merger challenges with senior division officials – more than five years after the fact. "They carried that wound in the division," a former senior antitrust division official says. "They really took that loss hard."

The Oracle decision laid waste to what the DoJ at the time believed was the best way to contest a merger. Division lawyers built their case on the back of economic analysis and customer testimony to prove the existence of a narrow market in which the deal would inflict the most harm. Officials' thought process was clear: Show the court data that proved the deal would be harmful, and let it hear from actual customers who feared how the combined company might behave after the merger. Surely the judge would feel compelled to stop the deal from happening.

In the attempt to block Oracle from acquiring PeopleSoft, that didn't go as the division had hoped. In his decision, Judge Vaughn Walker dismissed the testimony of the ten customers that the DoJ presented at trial or through depositions as "largely unhelpful" to the government's central task: proving that the narrow and perhaps convoluted product market alleged in the case was as real and as restricted as the antitrust division alleged. His ultimate ruling took down the division for its inability to prove that there were enough customers that would only use two companies for certain kinds of software. The customers didn't know enough and the government's expert, University of Virginia professor Kenneth Elzinga, didn't do enough. The government put forward a unilateral effects case in a differentiated products market, but Judge Walker found that the 1996 horizontal merger guidelines "are not sufficient to describe a unilateral effects claim". He also noted that the "submarkets" that Brown Shoe allows as relevant product markets were often too fiddly and too onerous to define as proper antitrust markets. As the judge saw it, the narrow product market did not exist as the government described it, so the case – and the government's strategy for how to try such cases – crumbled.

Oracle aside, the division also fretted, some say, when it considered bringing a case on its home turf in Washington, DC. The federal district court in DC had been a graveyard for government antitrust cases for so long, DoJ lawyers did what they could to avoid their local court when bringing cases. A month before

"The Oracle decision laid waste to what the DoJ at the time believed was the best way to contest a merger"

DoJ Merger Challenges, 2004–2016

Year	No. of challenges
2004	4
2005	6
2006	5
2007	8
2008	17
2009	4
2010	9
2011	15
2012	8
2013	6
2014	10
2015	8
2016	7 (as of 25/10)

Notable cases

AT&T/T-Mobile (2011)
The two US telecommunications giants proposed a deal that would have reduced the number of national mobile service providers to just three. The DoJ sued to block the deal, and after a critical preliminary analysis by the US Federal Communications Commission, the sector regulator, the companies abandoned the deal.

Bazaarvoice (2013)
The DoJ sued to unwind a deal between Bazaarvoice and PowerReviews, which combined two of the few makers of online ratings and reviews software. The government used the companies' own documents and econometrics to prove its market definition, leading a California federal court to find the deal had violated the Clayton Act. Bazaarvoice ultimately sold off the PowerReviews assets and agreed to other remedies that would restore competition to the market.

AB-InBev/Grupo Modelo (2013)
When AB-InBev offered to pay more than $20 billion for the remaining shares of Mexican brewer Grupo Modelo, the DoJ stepped in to stop the deal, saying it would eliminate an important competitor from the US beer market and might raise prices for consumers. After four months of pre-trial wrangling, the companies settled the lawsuit, agreeing to a package of divestitures and conditions that most in the antitrust bar saw as a clear win for the government.

US Airways/American Airlines (2013)
When the government sued to block US Airways from purchasing American Airlines, it was easily the most high-profile antitrust lawsuit of the Obama administration – particularly given its harsh assessment of competition in the airline industry and how its absence has harmed passengers. But weeks before the trial was set to begin, the two sides agreed on relatively minor divestitures that the DoJ claimed would allow rivals to enter new markets.

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Judge Walker's Oracle ruling in the Northern District of California, the DC federal court had denied the Federal Trade Commission's preliminary injunction request in Arch Coal – flatly rejecting the agency's attempt to challenge a merger based on the potential for coordinated effects. And before then, in 2001, the SunGard/Comdisco decision had broken a government winning streak in merger challenges before the DC court and rebuked the DoJ on a number of issues, including trial timing and mergers involving a company in bankruptcy.

Staffers in particular expressed reservations about going back to DC to challenge a merger, and it drove at least some decisions. While Chicago was a logical forum for the JBS/National Beef challenge, sources say, it was also just nice to get out from under the spectre of DC federal court and into a friendlier courtroom. "It really made it hard to think about what would go on in DC courts," says William Stallings, a partner at Mayer Brown and former long-time head of the transportation, energy and agriculture section at the division. "There were a lot of bad precedents there."

A team assembles

When Varney took over as head of the division in the spring of 2009, she saw the challenge in front of her. To undo the damage done by the Oracle case and to prepare the department to bring and win a trial the next time the opportunity arose, she would have to overhaul nearly everything about the division's litigation efforts – from its focus during investigations, to its treatment of potential witnesses, and the organisation of the division staff itself.

Every one of Varney's deputies were chosen, observers say, because of their ability to reshape the agency into one that would prepare for litigation as a matter of practice and have the ability to win once it got there.

Top of the list was Bill Cavanaugh. Varney sought the co-chair of Patterson Belknap Webb & Tyler and head of its litigation practice after consulting with a number of practitioners about the right person to become the division's first-ever deputy in charge of litigation. One of those consulted was Bill Baer, then the head of Arnold & Porter's antitrust group, who left impressed with Cavanaugh's courtroom skills after working with him on an antitrust case in Delaware. Varney made it clear to Cavanaugh that winning in court was her top priority, and she wanted the division to be ready and able to try a challenge to a merger if officials found no way to remedy its harm to consumers. Cavanaugh was just what Varney was looking for: a courtroom warrior who tried and won business cases of all varieties, from antitrust to tax, patents, contracts and more.

Cavanaugh says that his first thought when Varney asked him to join the government was "I'm too old". He was 54, at the top of his law firm – not the typical candidate for first-time government service. But Cavanaugh heard he'd be working alongside Molly Boast, a seasoned antitrust litigator whose reputation preceded her, which convinced him of the seriousness of Varney's intentions, he says. Plus, he felt compelled by public service. "I thought it was a challenge," Cavanaugh says.

He wouldn't face that challenge alone. In addition to Boast, Varney had brought back Carl Shapiro as economics deputy. Shapiro was already a giant in the world of antitrust economics, who helped to pioneer modern economic thinking on differentiated product markets and the unilateral effects theory of harm – in which a merged company can harm competition by raising prices even if its rivals do not follow suit. The antitrust division cited his work on the subject in the Oracle case, to little apparent effect. Sources stress that Shapiro was just as crucial to Varney's litigation overhaul as any of the lawyers she brought in. He was deeply critical of the Oracle decision – he believed it veered from economic reality and over-emphasised broad and often-inaccurate market definitions – and Varney brought him to the division to combine those deeply-held economic views with his understanding of what kind of evidence and testimony was crucial to winning in court.

Cavanaugh and others say there was also a deep bench of talent within the antitrust division when they arrived. All of those lawyers were eager to learn from Cavanaugh, Boast and others Varney hired to bolster the division's courtroom experience. While its loss in Oracle may have left the division pensive, it didn't quash anyone's enthusiasm to get back to court when the right case presented itself. The government had had litigation opportunities between its loss in the Oracle trial and 2011, such as a suit to block the *JBS/National Beef* merger in 2008. Pre-trial wrangling extended for months before the companies abandoned the deal. And staff lawyers who cut their teeth during the agency's previous litigation heyday, during the second half of President Bill Clinton's administration, remained at the agency. Scott Scheele, the head of the Telecommunications and Media Enforcement Section at the division, worked on the division's blockbuster challenge to Visa and MasterCard's practices in the late 1990s, and Jeane Hamilton, a veteran of *US v Microsoft*, works in the DoJ's well-respected San Francisco field office. "The division has always been staffed by very talented people who know antitrust law backwards and forwards," says Buterman, whom Varney hired in February 2010.

In meetings and trainings, senior leadership at the division pushed those talented, often young lawyers to embrace a culture of litigation at the division, so that every investigation would be done with an eye towards the courtroom. "I think there was an overall tone that was relayed to staff that the division was interested in being more aggressive when it came to enforcement," Buterman says. "It had an effect on the way depositions were conducted, and the way cases were built." In practice, that meant that mergers from the earliest investigative stages were considered potential candidates for litigation. The DoJ front office pushed staff to think of executives as potential witnesses; of documents and white papers as evidence and trial exhibits.

> "Yes, you need to investigate to figure out what the decision should be. But you also damn sure better be ready to litigate if the decision is to challenge"
>
> – William Stallings

It was a mindset, Stallings says, pitched from division leadership and embraced by staff. "Yes, you need to investigate to figure out what the decision should be. But you also damn sure better be ready to litigate if the decision is to challenge," he says of the front office's message. "There was a recognition and understanding that should the call be to litigate, they could do it, and it wouldn't be an empty bluff."

The division made a host of other changes to help improve its chances once a case did make it to court. At the top of the list: drafting and publishing new horizontal merger guidelines that put in writing the way Shapiro and the division had for years viewed merger enforcement and economics. Oracle was a potential disaster not just because the DoJ lost, Shapiro recognised at the time, but because the language of Judge Walker's decision cut directly against the division's belief that mergers, if harmful, would typically threaten competition in narrow product and geographic markets that could escape analysis under the existing 1996 guidelines. Judges craved guidance, and if the government's arguments did not dovetail with its own guidelines about how to identify antitrust harm in mergers, antitrust division lawyers would struggle to prove their cases in court, DoJ officials believed.

Early in Varney's tenure, the division sued to stop behaviour it felt would harm consumers: a lawsuit against Blue Cross Blue Shield in Michigan for restrictive agreements with hospitals, and a lawsuit against American Express over the fees it imposed on merchants who accepted AmEx cards. But those were typically slow-moving court cases – it would take years before the division's newfound focus on bringing and winning cases would be tested in court.

Instead, it would take a merger, and its fast track to trial, to put the division's new litigation regime to the test.

above
Joe Wayland

Blocking H&R Block

The proposed merger between two of the country's three largest do-it-yourself tax preparation companies landed on the antitrust division's desks in October 2010. H&R Block and TaxAct had struck a deal after an on-again, off-again flirtation that began more than a year before, and both knew that winning regulatory approval for the deal would be their most significant hurdle.

Two months before, Cavanaugh had decided to leave the antitrust division, and Varney spent the better part of the next month looking for a courtroom-savvy lawyer to replace him as the litigation deputy. Her search led her to Joseph Wayland, a partner at Simpson Thacher & Bartlett in New York, who had a reputation among the city's legal community as a serious trial lawyer. Much like Cavanaugh, he had tried cases in a variety of different areas of the law, including a high-profile case challenging the New York public school district. Wayland said he would take the job.

At first blush, Wayland seems to have little in common with your typical courtroom cowboy. He's soft spoken, deliberate. "Joe is somebody with a ton of presence," says a former colleague of Wayland's. He might not dominate the attention of a room when he walks in the door, his former co-worker says – but when he talked, people listened. Especially in court.

Wayland was also no micro-manager. At the antitrust division, he would question witnesses at trial, but otherwise he would entrust the lawyers under him to conduct the investigation, including interviews.

By the time he arrived at the division, many of the major litigation changes Varney envisioned had already been put in place. Wayland sought to institutionalise those changes, he and others at the division at the time say.

As the tax preparation deal moved through the division's pre-merger investigation, it became clear to staff that the deal had competitive problems, and if they could be fixed it wasn't exactly clear how. There was no "ah-ha" moment among the division staff that predicted its decision – no one piece of evidence that led the government to sue – but as investigators dug into the documents and market economics, problems became evident. The companies' own documents

suggested that they were head-to-head rivals in the tax preparation market. Barriers to entry were high, and new companies would struggle to gain traction in a market built on trust and name recognition. And enforcers came to believe that the resulting duopoly of H&R Block and TurboTax, which is owned by Intuit, would threaten to eliminate price and quality competition in the market altogether.

As soon as those initial concerns became prevalent among DoJ staff, Wayland began overseeing the case and told his litigation staff to run the investigation as if the deal would eventually be challenged at trial. The point of the investigation was still to determine whether the deal was anticompetitive. But, as Varney and others had instructed, the staff carried out its investigation as if it would need to argue its findings in court.

In practice, that meant sometimes-forceful depositions of company executives very early in the investigative process. The division's litigation staff quickly called in H&R Block executives for depositions under civil rule 30(b)(6), in which the company was called to give information through its representatives about business strategies and other corporate goings-on. The goal, sources say, was to lock in the company's claims of pro-competitive benefits or efficiencies to which the deal might lead, then test those claims in preparation for court.

Varney's division made consistent use of rules under amendments to the Antitrust Civil Process Act that give antitrust investigators more leeway than other law enforcement officials have when interviewing potential witnesses. Not only could such early interviews lock in witness statements, but they could quickly pinpoint areas of concerns for the DoJ and minimise the amount of time the government needed for pre-trial discovery. "Those were the kinds of tools people recognised and took advantage of in preparing these cases," says Buterman, who acted as lead trial attorney during the H&R Block/TaxAct case.

above
William Cavanaugh and Christine Varney

"Sharis, they're going to litigate," Varney told her deputy. "What are we missing? Why do they think they can win this?"

Eventually, DoJ staff told Varney and other front office officials that only a lawsuit against the deal could protect competition in the market. Varney called a meeting with H&R Block and its advisors. When the executives walked into the spacious meeting room attached to Varney's office, Robby Robertson walked in with them. The team at Hogan Lovells had essentially taken over representation of both companies by that point, and Hogan partner Robertson was, and remains, one of the most respected antitrust litigators on the planet. The firm delivered its presentation as expected, but Robertson's presence made the companies' intentions clear: They were willing and able to fight the DoJ in court to get their deal done.

That meeting happened on a Friday; the following Monday, 23 May 2011, the DoJ sued to stop the deal, filing its lawsuit in DC federal court before Judge Beryl Howell, a newly appointed federal judge who had never previously overseen an antitrust trial. Some in the division still harboured concerns about the case, as is typical in any litigation. Some in the government questioned their chances in DC court, and the loss in the Oracle case remained heavy on the minds of the attorneys who had worked at the division since then.

After that final meeting with the companies, when it became clear that they were prepared to go to court to save their deal, Varney turned to Sharis Pozen, her chief of staff at the time, and questioned whether the division might have a blind spot. "Sharis, they're going to litigate," Varney told her deputy. "What are we missing? Why do they think they can win this?"

The companies were confident because, at the time, they thought they had a better case and better people. They built their case on the back of a simple market share argument: Yes, TaxAct and H&R Block competed with one another in online, do-it-yourself tax services,

where customers use software to help them fill out their sometimes-complicated tax forms and file them with state and federal governments. But the companies argued that they also competed with brick-and-mortar tax preparation shops, where people go to have someone else prepare their tax returns, or pick up the forms to do it themselves. Their research suggested that customers would more often choose to do their taxes at stores than switch to an online, do-it-yourself service from a different company.

The companies were also confident because, as they pointed out in court, at least 18 other companies operated in the free online tax preparation market, including two companies, TaxSlayer and TaxHawk, that company lawyers argued were poised to grow rapidly and fill any gap in the market left by TaxAct's departure. Lawyers for the H&R Block also claimed that efficiencies would offset any market harm that the combined company might inflict, and that it would continue to offer free tax preparation services to some customers. Their arguments leaned heavily on case law from the DC federal district court to try to sway Judge Howell. In addition to Oracle, they also cited the trial court decision in Heinz, which supported the companies' efficiency claims but was ultimately overturned on appeal based on the language of the Federal Trade Commission Act, which does not apply to the DoJ.

Within the division, there was never a conscious decision to shift courtroom tactics from its traditional mix of economic experts and customer testimony, Wayland says. Instead, its strategy when litigating the H&R Block case relied on the facts of that case, which suggested to Wayland and others involved in the courtroom strategy that the documents, and the executives who wrote or signed off on them, should be the focus of the case. One such internal document, for example – a C-suite presentation on the benefits of the TaxAct deal – said that the transaction would allow H&R Block to "regain control of industry pricing and avoid further price erosion". The government understood how strong those documents made their case, and Wayland says the philosophy came to be: "Put their witnesses on the stand and use their documents, which is what we did."

"Might and muscle"

That strategy – to use the examination of company executives to get as many bad documents before the judge as possible – is one the antitrust agencies had rarely, if ever, employed before.

The investigation seemed somewhat traditional throughout the pre-merger investigation, lawyers for H&R Block and TaxAct say. They knew the documents would come into play – quotes from them featured extensively in the government's complaint. But not until the companies saw the government's witness list, stocked with top corporate executives and few others, did they realise the DoJ's plan. "They were going to do exactly what Robby Robertson would do if he were on their side," says Logan Breed, a partner at Hogan Lovells who represented both companies at trial alongside Robertson. "It's very effective."

above
Federal district court, Washington, DC

"They were going to do exactly what Robby Robertson would do if he were on their side"
– Logan Breed

The change made sense, particularly in light of Oracle, which was still fresh in the minds of antitrust division lawyers as the H&R Block/TaxAct trial began. Officials realised that, once in court, they needed to tell a better story to generalist judges and juries. It wasn't a groundbreaking realisation, but it was one the seasoned litigators hired by the DoJ emphasised. Relying on economists' testimony and customers' guesses about how the market might shake out was no way to tell a convincing story in court, division officials believed.

Instead, the division would use the words of the company executives themselves to tell the story of the industry – how the merging companies competed, and their motivations for the merger. The focus on storytelling radiated throughout everything the division did in merger cases during the Obama Administration, Stallings said, from its use of graphs and compelling slideshows, to its short, succinct complaints that allowed the companies' own bad documents to tell the story of how the deal would harm competition.

In court, Wayland, Buterman and other DoJ lawyers introduced document after document from the companies' own files showing that each believed the other, along with third party TurboTax, to be its closest competitor in the do-it-yourself tax return preparation market. H&R Block executives, for example, called the trio the "Big Three", and investment bankers for TaxAct also identified the three companies as head-to-head rivals in the DIY market. The court was swayed. It relied on those documents, along with supporting economic analysis from DoJ experts, to side with the government's definition of the market.

Convincing the court of that market definition was most of the heavy lifting for the government. But

former DoJ officials said the trial presented other points that helped to sway the court in their favour. Two moments in particular played out in court, but took root weeks earlier as Wayland and others prepared for trial.

The first came during depositions, when Buterman questioned William Cobb, then the new chief executive of H&R Block who had taken over at the time of the TaxAct bid. Buterman, the seasoned litigator, conducted the deposition as if Cobb were a hostile witness, and asked him repeatedly whether H&R Block's digital products competed with its brick-and-mortar retail business. Rather than respond to Buterman's question, Cobb repeatedly chose to read from a few paragraphs in an annual report describing H&R Block's business. He gave this answer five times, until Buterman finally noted that Cobb had refused to answer his question and moved on.

When Cobb took the witness stand in court, he told Wayland that he believed the market they competed in was one for all tax preparation services, not just online DIY services, and that their potential customer base was between 130 million and 140 million people. Brick and mortar was the same as online, as far as the company was concerned, Cobb suggested.

"Did you change your mind in the last couple of weeks about that, Mr Cobb?" Wayland asked.

"Don't think so", Cobb said.

Wayland went on to read the entire, often-painfully awkward deposition exchange out loud in court, detailing all five times Cobb read from the annual report rather than answer Buterman's question.

"And that was a month ago, right?" Wayland asked after he finished reading the transcript. "You were asked five times and you weren't able to answer the question. Today you are able to tell us – can you answer the question today?"

In his response, Cobb repeatedly talked about the "steep learning curve" he had been on since taking over as chief executive, and that, despite longer-tenured employees suggesting the two parts of the business did not compete with one another, he needed to be flexible as the head of the company. Wayland asked a few more questions – mainly about H&R Block's ability to lower prices and innovate without the merger – but that was it. Observers in court say that, the reasons for the change aside, Cobb's sudden understanding of market definition, contrasted with the refusal to describe the relevant market a month earlier, ultimately hurt the company's case.

Another turning point began a month or so before trial. It was August, and Wayland was, at least in a physical sense, on holiday with his family. But each night, he would work on how to convince the court that the H&R Block deal would hurt consumers. One night, when reading over the economists' report, it dawned on him: There was a flaw in the companies' expert report.

Based on a survey of what H&R Block's online DIY customers said they would do after a price increase by the company, the economic expert reported that they would most often switch to a professional accountant, rather than switch to another, rival DIY product – which supported the merging companies' claim of a broad tax preparation market. But Wayland realised that Christine Meyer, a managing director at NERA, had neglected to include the actual price of accountants and other alternatives to H&R Block's online DIY tax preparation system when analysing the survey.

In court, Wayland questioned Meyer until she revealed that the choices presented to the survey respondents included no prices, so that doing taxes with pen and paper appeared to cost the same as hiring a professional accountant to do them. "And that's the thing that's wrong with the survey, isn't it, Dr Meyer?" Wayland said in court. "It's a nonprice choice that the people had in front of them for those scenarios."

Meyer explained, but Judge Beryl Howell interjected to ask whether the absence of prices led to some "wishful thinking" from survey respondents. And Wayland came back to ask why Meyer didn't include the price of accountants, if she had that information and if the data showed that switching to accountants was customers' first choice in the event of a price hike.

"Well, look, I didn't do the survey," Meyer said.

Judge Howell issued her opinion on 31 October, agreeing with the government that the merger should be enjoined. It was a smashing success for the antitrust division. The decision cited the new merger guidelines issued in 2010 – a major step toward legitimising the new guidelines in the eyes of the court – and she rewarded the government's strategy of using documents and executive testimony to help prosecutors tell their story. Shortly after, former antitrust division head and Baker Botts partner James Rill wrote to Pozen and congratulated her on the victory. He said the decision read like an antitrust textbook, and the DoJ's trial team spent the night at Bar Louie, celebrating.

She rewarded the government's strategy of using documents and executive testimony to help prosecutors tell their story

The next day, Wayland was exhausted; he told another deputy that the H&R Block trial had drained him. But there was little rest for the weary. As the H&R Block investigation and litigation headed toward trial, the investigation of another, bigger deal was unfolding inside the antitrust division. AT&T, the second-largest mobile service provider in the US, had made a bid for rival T-Mobile. If permitted, the deal would drastically consolidate the industry, from four national carriers to three, and would remove T-Mobile, a price maverick in the government's eyes, from the market.

It was a tricky tie-up, but the companies appeared willing to fight for it – so much so that lawyers from Crowell & Moring, antitrust counsel to AT&T, were seen in court watching the government's tactics closely during the H&R Block trial.

Perhaps, at some other point, such a massive deal and such imposing outside counsel might have given the antitrust division pause. But not then – not after all of the sweeping changes within the division, and certainly not after the H&R Block ruling, which bolstered agency lawyers with both confidence and case law.

A source says, "It showed the might and muscle... that we weren't afraid." **GCR**