

FIRST ARGUMENT IMPRESSIONS OF THE SUPREME COURT*

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For a lawyer who only occasionally argues an appeal the most disconcerting thing about the Supreme Court is that it is truly a court of last instance: It cannot be reversed on appeal. I never realized before my first appearance at the Supreme Court just how comforting it is in day-to-day litigation to know that, although I always want to win on every issue, there is someplace to seek a better result if things don't go my way. It had never occurred to me that I relied on this premise, but when I got to the Supreme Court, its absence loomed large. This was a sobering experience, especially at the end of a road that had until then been very successful.

THE CERT-WORTHY CASE

After a weeklong trial, my firm's client, Samara Brothers, had established to the jury's satisfaction that the defendant, Wal-Mart, had either copied or connived in copying from Samara's line of children's clothing. On appeal, the Second Circuit upheld all of Samara's copyright claims as well most of its trade dress claims, with the result that Samara's recovery after appeal was about ninety-five percent of the district court judgment. So after a smashing victory at trial and a ruling by the Second Circuit that resulted in my client keeping almost all the money the jury had awarded, I was reasonably sure that the case was all but over.

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True, the Second Circuit had split two-to-one, and the dissenter was Judge Newman—possibly the most well-respected judge on the Second Circuit bench at the time. And the adversary was Wal-Mart, which had a well-deserved reputation of never surrendering, ever, and fighting most cases to the bitter end, almost irrespective of the merits. But it is conventional wisdom that motions for rehearing are almost never granted, that the Second Circuit grants en banc rehearings about as often as the planets align, and that the Supreme Court grants certiorari even more rarely than that. So my partners and I were relatively optimistic.

Little did we know.

Wal-Mart moved for rehearing and for en banc review, as we expected. The motion was denied (also as we expected), and Wal-Mart then filed a cert petition asking the Court to hear five different issues, which amounted to pretty much all those on which Samara had won below. It seemed highly unlikely the Court would consider that sort of petition. I drafted and filed an opposition to cert, and then put the matter out of my mind.

I didn't think about the case again until the Friday before the first Monday in October, when I called the Supreme Court Clerk's office to ask how I could go about ascertaining the disposition of the cert petition once the Court convened on Monday. I was told to call on Monday at about 11:00. So I did. And I was dumbfounded when I learned that the Court had granted cert. What is more, the Court had formulated its own question that it wanted the parties to address—one that differed from those the parties had characterized as the issues in the case.¹

I was not surprised that it was the trade dress issue that the Supreme Court wanted us to address. In retrospect, perhaps we should have realized that it was a good candidate for the Supreme Court. First, there was uncertainty in the circuits, several of which had been wrestling mightily to make sense of the Supreme Court's 1992 *Two Pesos*² decision in cases where the claimed trade dress was in the appearance of the item rather

1. The question the Court framed appears in note 4, *infra*.

2. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992). *Two Pesos* held that a plaintiff did not have to prove secondary meaning if the claimed trade dress was inherently distinctive.

than in its packaging. They had enunciated a number of different standards that, upon analysis, seemed to me to be not that dissimilar, though each circuit formulated its standard in different language. And there had not been all that much opportunity for case law development, because only a bit over six years had elapsed between *Two Pesos* and the Second Circuit ruling in *Samara*. But the lower court cases and the scholarly commentary were increasingly noting splits of authority and differing standards, and apparently the Supreme Court took these mentions seriously. Second, although the facts of the case had seemed to us to be hopelessly tangled, the facts did not seem the least bit complicated to the Supreme Court because, after all, there was a jury verdict. (*Two Pesos* was an appeal after a jury verdict as well.)

One thing I could not understand, though—and still don't—is why the Supreme Court ordered what it called “expedited” briefing. It turns out that expedited briefing is actually quite leisurely by lower court standards. The Court directed Wal-Mart to file its brief in about six weeks. We would have something less than five weeks to file ours, and Wal-Mart's reply was due three weeks after that. Oral argument was set for January 19, 2000, about ten days after the last brief was due.

GETTING A FEEL FOR THE COURT

I had never been in the Supreme Court before. I had not appeared there as an attorney, and I had not even been in the courtroom. I had to apply for admission to the Supreme Court bar in order to sign our opposition to cert. I had only a vague idea of what sort of merits brief the Supreme Court expected, what kinds of arguments each of the justices would find convincing or what sorts of authorities (besides Supreme Court opinions) the Court would deem persuasive. Clearly I would need help.

I initially turned to an attorney I knew from when we had both been young associates in our first law firm jobs. He had clerked in the Second Circuit and Supreme Court, and had spent a sizable stint in the Solicitor General's office. Now a partner in the Washington office of a national law firm, he seemed

genuinely happy to learn that I would be appearing in the Supreme Court, and was pleased to offer his assistance. In the course of our conversation I also learned a few very interesting facts about the small coterie of attorneys who make a large part of their living practicing before the nation's highest court. For one thing, it's a very competitive practice. The Supreme Court's caseload has shrunk to the point that getting an opportunity to argue before the Justices is increasingly considered a rare prize. Yes, there is still a lot of business in writing cert petitions and oppositions to cert, but that is hardly as sexy or as interesting as standing at the lectern fielding questions from the Justices. So I was interested to learn that certain firms with Supreme Court expertise offer a lower price to the client if the firm's Supreme Court specialist does the argument. Simply working on the papers without doing the argument costs more. Apparently, the prestige and the thrill of an oral argument in the Supreme Court are, to some firms, worth several thousand dollars.

In the end, I could not engage this attorney to help me because his firm had done some work for Wal-Mart. (I saw no reason to go through the process of getting the conflict waived; it was much easier and quicker to go elsewhere.) We were referred to a fine appellate lawyer at Howrey & Simon, Mark Levy, who had also spent several years in the Solicitor General's office and had argued some fifteen cases in the Supreme Court.

I met Mark in person for the first time in early November, when I made a trip to Washington to watch the Court in action. I thought it would be important, before preparing my argument, to get a feel for the courtroom, to watch how the Justices reacted to different advocates on different issues, and to see which Justices were aggressive questioners, which Justices probed most deeply, and which areas of inquiry seemed most interesting to which Justices. Making the trip in early November was dictated by the calendar—it was the only time after cert was granted that the Court was in session and I wouldn't be busy working on writing the brief. So on the afternoon of November 1, 1999, I got on the Metroliner in New York, and I arrived at the Supreme Court bright and early the next day to watch the arguments.

I discovered that attorneys who are members of the Supreme Court bar do not have to wait on line to get one of the relatively few seats that are available to the general public.

Instead, a few rows of seats are set aside just for members of the Supreme Court bar. These seats are immediately behind the counsel tables, so I had a pretty good view of the Justices and the attorneys. The best view, of course, is from the lectern: It is very, very close to the Justices—so close that when the arguing attorney looks straight ahead, he or she can actually see the whites of the Chief Justice’s eyes. I was also struck by how small the courtroom is. It is imposing and grand, but still small in scale; my layman’s estimate is that it holds somewhat more than 300 people, perhaps 350, with not a lot of room left over.

I spent two mornings watching arguments, and saw nine different lawyers argue. (In one of the four cases I watched, the Solicitor General appeared in support of one side, so there were three attorneys on that case.) The exercise was illuminating, but perhaps not as illuminating as it might have been had I read the briefs ahead of time. The Justices, of course, were very well prepared—they had read the briefs and the record, and clearly had given some extensive thought to the issues before the arguments. Although the Justices were scrupulously courteous to counsel, their questions were pointed and creative, and they did not countenance any evasiveness, or any answers that were less than complete and responsive. As my friend the former Assistant Solicitor General had warned me, these are very smart, very well-prepared people, and they will push you as hard as any other judges in the country, and often harder.

PITCHING THE ARGUMENT AND WRITING THE BRIEF

After the second day of arguments I went to Mark Levy’s office, and the two of us talked about the case. He was only generally familiar with the Lanham Act, but I was impressed with how quickly he picked up the issues and was able to jot down his ideas about the approaches he thought we should work on. (Of course, as the work proceeded over the ensuing weeks, he became a lot more familiar with the Lanham Act.)

When I asked where I should be looking for authority besides Supreme Court precedents and legislative history, Mark had the list at his fingertips. He recommended interpretations by the federal agency that enforces the statute. In our case that was the Patent and Trademark Office. He suggested using the

ranking treatises and law review articles. Cases from the Courts of Appeals could be used as well, but he reminded me that typically the Supreme Court doesn't pay all that much attention to them, though they do give more credence to opinions by certain judges than to others. I was pretty familiar with who the most respected judges are, and I knew that one of them was Judge Newman, the dissenter from the Second Circuit opinion in my case.³ On the other hand, the PTO's position was not that far from mine, and from the bit of reading I had done, the commentators were all over the map on this issue, so I was confident there would be supporting authority. By the time Mark and I were finished talking, I could see that the Supreme Court brief would look not like the briefs I was used to writing as a lawyer, but instead like the legal writing I had done back when I was in law school—it would look like a law review article.

I'll spare you the details about the process of writing the brief. I do have some observations about how to pitch a case to the Supreme Court, though—at least, how to pitch a statutory case. (In constitutional cases the Justices have other considerations.) The biggest difference from normal litigation briefs is that the facts matter virtually not at all. The Supreme Court couldn't care less about the facts. It wants to think only about law, the more abstractly the better. If the Court thought the facts were in issue, it probably would not have taken the case. While I can't say the factual portion of the brief is beside the point, I do think making fact-based arguments is futile, and just takes up precious pages within the page limit. The Supreme Court grants cert for the purpose of making a pronouncement on the law. The equities of the particular case are beside the point. (In my case, Wal-Mart had used up some space in its brief arguing a few factual issues, which compelled me to respond. While I did get to say in the brief almost everything I wanted to say on the legal issues, it took time to edit the brief down to the fifty-page limit. If I hadn't been required to deal with the fact issues, the editing would have been less arduous.) There certainly are cases where the Court has seized on factual issues

3. Another was Judge Edward Becker of the Third Circuit, who also had authored an opinion extremely unfavorable to my position. At least the opinions in this area by Judge Richard Posner of the Seventh Circuit, perhaps the most respected appellate judge in the country, were susceptible of a favorable reading.

as a way to avoid making a decision, but generally the Court wants to decide the issue that it deemed cert-worthy in the first instance, so it will treat the facts as having been already decided.

The Court generally tries to reach a result that makes sense to it, even if normal technical legal standards and reasoning might point the other way. This was something Mark told me very early on: Common sense is at a premium. To take my case as an example, we had some cogent technical legal points. Wal-Mart argued to the Supreme Court that product designs can never be inherently distinctive. It had not raised that argument in either of the lower courts, and indeed, no court had ever held such a thing since *Two Pesos*. In theory, that should have been a bar to having the Supreme Court consider that position on appeal, for parties are generally not permitted to raise new arguments for the first time on appeal. Not only that, but the question the Supreme Court had asked the parties to brief actually assumed the opposite of what Wal-Mart's position was.⁴ In other words, the Supreme Court *assumed* that product designs *could* be inherently distinctive; it just asked the parties to enunciate an appropriate test. Finally, the language of *Two Pesos* is specifically addressed to inherently distinctive product designs.⁵ Ultimately, though, the Court decided that product designs tended not to be inherently source-indicating, and thus adopted Wal-Mart's approach, despite the Court's initial assumption to the contrary, despite the language of *Two Pesos*, and despite Wal-Mart's failure to raise the issue below.

The Court's ruling in *Samara* was a pure policy decision, informed by the Justices' ideas of what seemed to them to be good common sense. I have commented elsewhere on the difficulties with the opinion,⁶ and will not belabor the matter here. For current purposes, suffice it to say that a number of trademark practitioners have told me that the result in my case was hardly inevitable, though probably defensible, but that the reasoning in the opinion was conclusory in the extreme, and thus

4. The question the Court framed was: "What must be shown to establish that a product's design is inherently distinctive for purposes of Lanham Act trade-dress protection?" *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 528 U.S. 808, 808 (1999).

5. *Two Pesos*, 505 U.S. at 772-73.

6. Stuart M. Riback, *Product Design Trade Dress: Where Do We Go From Here?* 90 Trademark Rep. 563 (2000).

highly unsatisfactory. I agree with them on both scores. The lesson here is that, at least in non-constitutional cases, probably the best posture is to make your client's position seem utterly common-sensical, as opposed to correct in a narrow legal sense. Sometimes that can be difficult for lawyers.

I also have concluded that oral argument has little effect on the Justices' thinking. Of the six cases in which I observed arguments (the four cases argued in November and the two on the day I argued), I noted very little correlation between the advocates' skill in argument and the ultimate results. Some of the more impressive oral advocates lost, and the attorney I thought was the least effective oral advocate won. It is clear to me, therefore, that the lawyer's main opportunity to persuade the Justices is in the brief. Oral argument is useful, though, in helping the Justices to sharpen their thinking. It rapidly becomes clear from the questioning that, to the Justices, there is no better advocate than another of the Justices. They pay attention to one another's questions, and use questions as a way to make points to each other.

One aspect of Supreme Court practice that I had not thought about was the need to do lobbying. During the several weeks between the time cert was granted and the time I received Wal-Mart's brief, I spent several hours on the telephone speaking with the Solicitor General's office to try to persuade the Solicitor General to support my position, and several hours trying to line up businesses willing to submit amicus curiae briefs supporting us. I was surprised at the outcome of both these efforts.

The Solicitor General's office submitted a brief that nominally supported Wal-Mart, urging the reversal of the Second Circuit. His ten minutes of argument would consequently come out of Wal-Mart's time, but the legal standard the Solicitor General was advocating was almost the same as ours, so he and I would be advocating essentially the same legal standard at oral argument. True, the Solicitor General disagreed with us about whether applying that standard required an affirmance or a reversal. Realistically, though, Mark and I were pretty sure that, no matter what the Supreme Court decided, it would likely send the case back to have the Second Circuit figure out how to apply the law to the facts. So we cared

less that the Solicitor General was advocating reversal than that his view of the law was close to ours. That meant our view of the case would have forty minutes of argument to Wal-Mart's twenty.

Because we were advocating a broad reading of the Lanham Act, I thought owners of well-known trademarks would be interested in supporting Samara's position before the Supreme Court. I was surprised to find that just about no one I called wanted to join in an amicus brief. They all wished me well, and most of them said they hoped I would win, but none wanted to join the brief. I later learned why: They simply did not want to use part of their legal department's budget on an amicus brief so long as someone else was advocating the position they supported. They felt that they could get the same benefit without spending the money.

In the end, Steve Trattner, a well-known trademark lawyer who had litigated the issue before at the appellate level, assembled a group of companies that submitted an amicus brief. The roster of companies on the amicus brief was composed largely of those that had litigated the issue in the various circuits.⁷ It even included Taco Cabana, Inc., the prevailing plaintiff in *Two Pesos*. Steve teamed up with Bartow Farr of Farr & Taranto, a respected Supreme Court practitioner, to submit a brief that supported my client's position almost right down the line. Bartow's partner, Richard Taranto, had argued and won the *Two Pesos* case, so the Farr & Taranto firm had a history with the issue. It was no surprise that Steve and Bartow produced a good, well-written brief whose arguments, though overlapping considerably with mine substantively, were cast in a somewhat different, and very appealing, way.

In all, six amicus briefs were submitted in addition to the brief from the Solicitor General. Three supported Wal-Mart's position and one supported Samara's position. The remaining two, from the American Intellectual Property Law Association and the International Trademark Association, were nominally in support of neither party but advocated a legal position very

7. These included, among others, the plaintiffs in *Ashley Furn. Ind., Inc. v. Sangiacomo, N.A.*, 187 F.3d 363 (4th Cir. 1999); *Pebble Beach Co. v. Tour 18 I*, 155 F.3d 526 (5th Cir. 1998); *Imagineering, Inc. v. Van Klassens, Inc.*, 53 F.3d 1260 (Fed. Cir. 1995); and *L. & J.G. Stickley, Inc. v. Canal Dover Furn. Co.*, 79 F.3d 258 (2d Cir. 1996).

similar to Samara's and the Solicitor General's. It was interesting to see the lineup of parties: Mass market discounters and knock-off merchants supported Wal-Mart; high-end and niche merchants supported Samara; and the AIPLA and INTA advocated what they thought was the intellectually honest position. In the end though, I'm not sure the amicus briefs had much impact on the Court. The Court's opinion referred to none of them other than the Solicitor General's.

PREPARING FOR THE ARGUMENT

The actual argument experience was not nearly as stressful as I thought it would be. Several weeks before the argument, an appearance sheet arrived in the mail from the Supreme Court clerk's office. The sheet asked for some basic information, including one question that I had never before seen on any court's forms: It asked how to pronounce my surname. I never make an issue when people pronounce my name differently from the way I pronounce it, because the pronunciation of my name is not obvious from its spelling. (I pronounce "Riback" as "ree-back." It is very common for others to call me "rye-back.") But it was very nice to have the Chief Justice of the United States summon me to the lectern of the Supreme Court using the same pronunciation of my name that I use. It underscored for me the courtesy that the Court extends to the attorneys who appear before it.

Two weeks before the argument I started outlining the various points that I thought important to raise with the Court. I made lists of questions, weak spots, and areas that Wal-Mart's attorney was likely to hammer on. These notes grew to an enormous volume of stuff, far more than I could possibly use in my thirty minutes. Mark's advice was to prepare two presentations. One should be about a minute long, consisting of what it was absolutely crucial for the Justices to hear me say. The reason is that the Justices generally start asking questions about a minute into the argument, so the only opportunity to say something without interruption is in that first minute. The second presentation, he suggested, should be about five minutes long, and I should expect that it would take the entire thirty minutes to go through it, because the Justices would be

constantly asking questions. I held off preparing the two presentations until after I went through a moot court, because I wanted first to get a sense of how a court would react to my words and how to order the many points in priority rank.

I had heard different opinions about whether to do one moot court session or two. I could see merit to either position. Ultimately, I decided to go with Mark's suggestion that one should be enough. He thought it would be better to do one long moot court, with aggressive questioners who had read the briefs and thought about the issues, a week or so before the argument. That would give me a baptism by fire, subjecting me to a real ordeal, but would still give me enough time to assess my weak spots, shore up arguments that needed shoring up, and tighten my presentation. A second moot court would probably end up being repetitive (if done with different judges) or descend into a discussion of minor details (if done with the same judges).

The next issue was who would be a moot court judge. One possibility was to ask people who hadn't worked on the case at all and would be looking at it with fresh eyes. Another was to use trademark practitioners, who would know which questions to ask. I thought about what I wanted the moot court to accomplish. I wanted to be tested mercilessly, so I wanted judges who would question aggressively. But I also did not want the judges to be limited by the specialist's perspective of trademark lawyers, who would likely approach the issues differently from the Justices, to whom the Lanham Act is just one statute among many. I wanted a generalist's point of view because, after all, the Justices themselves are generalists. They don't focus on one area of law. So overall, I wanted a combination of trademark expertise and appellate expertise. To get that most efficiently (after all, a client was paying for this), I looked to the people who were already up to speed in the case and wouldn't have to read the briefs anew as a stranger to the case would have to: Mark Levy and Bartow Farr, who both know the Supreme Court quite well and had deep knowledge of appellate practice, and Steve Trattner, who knew trademark law as well as anyone, and had actually handled appeals on this issue. To round out the panel, Bartow's partner, Richard Taranto, who had argued and won *Two Pesos*, also joined us.

We held the moot court in the second week of January in Howrey & Simon's moot court room. The interrogation lasted two and a half hours, and it ended only because I was losing my voice and getting out of breath. As I had hoped, the questioning was brutal and relentless, and went after every weak spot in my arguments. Through it all I worked to keep calm, bearing in mind that the Supreme Court's interrogation would likely be more polite, though possibly more probing. At only one point did I have to step out of character to talk to the panel as friends rather than judges. But it was clear to me when we were done that I had plenty of work to do.

The panelists confirmed what I thought were the areas that needed work. After the moot court, we sat around in the room for about another hour and discussed the argument. I took notes furiously, interrupted only by the occasional break to sip a soft drink and munch on something. By the time I finally boarded the Metroliner for the trip back to New York that evening, I was exhausted. I sat on the train with the laptop open, staring at my argument notes and not doing a thing with them. Finally I shut the computer and just closed my eyes. When I got home, I went straight to sleep.

Of course I worked through the weekend. By the time I got on the train for Washington on Monday afternoon, I was just a bit short of where I wanted to be. Mark had been kind enough to set aside a room at Howrey & Simon's offices for me to work in during the next day, and he periodically checked on me to see how I was doing. I think he believed I was overdoing it, but didn't want to dissuade me from doing what I thought I needed to do.

Finally at about four o'clock I called it quits, packed up, and went for a very long walk. When I got back to the hotel, my wife and daughter were there waiting for me. I couldn't have been happier to see them: Spending the rest of the evening with them was a welcome change of pace from thinking about such matters as how the functionality doctrine interfaced with inherent distinctiveness in the context of product designs. We had a fine dinner at a restaurant near Dupont Circle and took the Metro back to the hotel. To my surprise, I slept quite well.

BEFORE THE ARGUMENT

At about 8:30 the next morning, the Samara team gathered in the lobby of the hotel. The CEO had flown in from Australia for the argument. The President came down from New Jersey. My partner Steve Siller had come as well. And of course, my wife and daughter were there. Outside it was gray and cold, so we bundled up for the walk over to the Supreme Court.

We entered the Supreme Court building on the Maryland Avenue side. I had my pass as arguing counsel, so I had no trouble getting in. The remainder of our contingent were “guests of the Marshal.” As arguing counsel, I was allotted space for six guests to attend the argument. But the Marshal considers them *his* guests. So someone from the Marshal’s office escorted them to the courtroom. I was escorted to an elevator that took me to the attorneys’ lounge.

Mark, who also got a counsel’s pass, was waiting for me when I got off the elevator. He had argued in the Supreme Court many times before, so he knew the lay of the land and took me around to look at parts of the building that the public almost never sees. He showed me the Supreme Court law library, and brought me to the room adjacent to the attorneys’ lounge, where the Assistant Solicitors General were. Mark introduced me to Larry Wallace, who would be arguing for the Solicitor General. Larry had been in the Solicitor General’s office for years, and by that time had earned the distinction of having argued more cases in the Supreme Court than any other attorney in history, having surpassed the legendary John W. Davis not long earlier. I had heard that lawyers from the Solicitor General’s office wear morning coats when they argue, and sure enough, Larry Wallace was decked out in full formal regalia. (The Assistant Solicitor General who had argued the case I watched in November had been a woman, and I was trying to remember whether she was wearing some form of formal attire as well. I just couldn’t remember, though I suspect she wasn’t, because I probably would have noticed if she was.) I also made sure to greet Bill Coston of Venable Baetjer, who was representing Wal-Mart. He was there with his partner Ken Bass, the appellate expert at his firm.

After the introductions and pleasantries were over and we were directed to sit, the Marshal addressed the group of lawyers who would be sitting at the counsel tables for the two cases to be argued that day. “I’m Bill Suter,” he said, and he gave us the basic ground rules for arguing in the Supreme Court, most of which I already knew because they were set forth in the materials the Court sends to counsel: Don’t introduce yourself; the Court knows who you are. Start with “Mr. Chief Justice, and may it please the Court.” Don’t ask how much time you have left. When the red light goes on, stop. Counsel in the first case sit at the front counsel table, and counsel in the second case sit at the second counsel table, and when the first argument is over, the counsel from each of the cases switch places. I remember being relieved when the Marshal said it’s okay to leave to go to the bathroom if need be, though at the same time I knew I couldn’t imagine getting up from the counsel table to go to the restroom with a full courtroom watching.

One other thing hit me while the Marshal was talking. Mark had suggested bringing a candy bar or something I could pop into my mouth right before walking into the courtroom. Because I was the respondent in the second case, I would be the last attorney presenting argument. There would be at least an hour and a half of proceedings before I would stand at the lectern. “It can be a long morning,” Mark had said. “Be sure you have the energy you need.” As the Marshal was talking, I realized that with all the other preparation I had to do, I had overlooked the snack. But as things turned out, it was just as well. I was in adrenaline overdrive and could have done the argument even had I not eaten for a week.

After the Marshal finished his talk, we had a few minutes before going into the courtroom. Mark asked me, “How are you feeling?” It was a good question. I was actually surprised at how I was feeling. I wasn’t the least bit nervous. In fact, I felt precisely the opposite: an unexpected feeling of calm. I don’t remember answering Mark’s question. I just smiled and nodded, and the two of us headed into the courtroom.

THE ARGUMENT

We walked in at about ten minutes to ten. I was struck by how crowded the room was. I suspected that the crowd hadn't come to hear Bill Coston and me argue about whether product designs can be inherently distinctive, and I was right. They had come to hear the case before ours. *Hill v. Colorado*⁸ involved a challenge to a Colorado statute that had been passed to keep anti-abortion protesters at least eight feet away from people going into clinics.⁹ Nothing guarantees a full house at the Supreme Court the way a case even remotely connected to abortion does (nothing, that is, other than a case about a contested presidential election, which at that point was still almost eleven months in the future).

That isn't to say *Wal-Mart v. Samara* had attracted no spectators. Steve Trattner was sitting immediately behind me, in the row of seats that had been set aside for members of the Supreme Court bar. He had with him other attorneys interested in the case, including counsel for some of the amici. I later learned from Bill Coston that Wal-Mart had brought up a large contingent of in-house lawyers from its headquarters in Arkansas. So it's not like our case had no spectators. Still, when the argument in *Hill* was over, a large part of the audience got up and left.

Bill Coston started his argument while the hubbub was still going on, and the Chief Justice seemed annoyed at the noise. It didn't get to the point where he said anything about it, though, and shortly after Bill began the room quieted down. I took furious notes as Bill spoke. I noted every concern every justice had, and fortunately I had answers for everything. It was interesting, though, that they didn't seem to go very hard on Bill. Justice O'Connor seemed to think Wal-Mart was out of luck, and for a while, so did a couple of other Justices. The big concern they had was with whether Wal-Mart's position would

8. 530 U.S. 703 (2000).

9. One thing that stayed with me from the *Hill* argument was the plaintiff's counsel's observation that the distance from the lectern to the bench—from the attorney to the Chief Justice—was just eight feet. I have no idea whether that is accurate, and my own estimate is that it's about ten feet. But I do know that when I did finally stand at the lectern, I was able to look the Chief Justice right in the eyes, almost as if in normal conversation. The lectern is that close to the bench.

require overruling *Two Pesos*. They kept coming back to that over and over again.

The Justices went much harder on Larry Wallace. The Solicitor General's brief didn't tell the Court what the result would be, only what the standard should be, and it recommended a remand to the Second Circuit to have the standard applied. That did not sit well with the Justices at all. They wanted answers, and good ones. They kept after Wallace to explain himself. He struggled, but couldn't quite explain why he couldn't just take a position on what the outcome of the case should be, especially since his legal theory looked an awful lot like Samara's. He did say that the government was skeptical of Samara's position, but would not say that the case should have been decided differently. (On reflection I think the government's skepticism is what doomed my position. The Solicitor General and I were espousing pretty much the same legal test, but I came out one way and he came out another, which convinced the Court that the test wasn't much of a test at all.)

When Wallace was done, the Chief Justice summoned me to the lectern. "Mr. Chief Justice," I began, looking straight at the Chief Justice, "and may it please the Court," I continued, looking at the other Justices. I then launched into my one-minute presentation. That was probably a mistake. I should have started by rebutting what I thought was Bill Coston's strongest argument. I figured I would get to it, but about fifty seconds into my presentation I was interrupted by a question, and after that the questions continued to come, one after another, for the next twenty-eight minutes. I never did get to say what I wanted to say. The five-minute presentation went unused.

One thing I remember about the argument is how focused it is possible to be. When I was done with the argument, I was amazed at how quickly the time had gone. It was the fastest thirty minutes I can remember. I do not think I had ever been absorbed in a concentration so total as when I was responding to the Justices' questions. I was, in fact, coached to avoid looking at the clock above the Chief Justice's head, but now I can't imagine how anyone could even think to do that. The entire experience of the argument is so enveloping that I barely even looked at my notes, much less at the clock. In fact, I wished I had more time because there was plenty more I wanted to say.

I remember too that the lectern is so close to the bench that when a Justice asks a question, it's often necessary to turn to face the speaker to hear the question and answer it. Justice Breyer, who sits at the far right-hand side of the bench, was an active questioner that day, so I was turning a lot. I don't remember being asked any questions by the Chief Justice or by Justice Stevens, who were more or less straight ahead, nor by Justice Thomas, who was next to Justice Breyer, but I think I had to reply to a question from every other Justice. My standing so close to the bench made the argument feel almost like a conversation, similar to the bull sessions I had with friends in law school, where we sat around discussing legal issues. The Justices did not seem the least bit remote. It's hard to seem remote when you are close enough to look someone right in the eye.

About twenty-nine and a half minutes into the argument there was a lull in the questioning, and I realized I didn't have enough time to make another point, so I just thanked the Court and sat down. Bill had reserved two minutes for rebuttal, but it seemed like the Court had heard enough. When he finished and returned to his seat, the Marshal called for all to rise while the Justices filed out. That was it. It was all over now except for the waiting.

I can't really say the aftermath was a letdown. I thought I had handled myself pretty well in front of the Court, and my client agreed. Several trademark lawyers who were in the audience also told me they thought my argument was effective. I knew a couple of the Justices didn't like my position at all, and others seemed somewhat sympathetic. Others were hard to read. More than one person had told me that oral argument doesn't affect much, so I knew at a logical level that I shouldn't have been trying to figure out what each Justice was thinking. Realistically, though, it's human nature to want to read the tea leaves. So I was going over the argument in my mind all the way back to New York on the Metroliner. It didn't help.

Just over two months later, I got a call from a reporter, asking me to comment on the Supreme Court's opinion. I hadn't been aware that the Supreme Court had ruled. I scrambled to get online to get the opinion. It was only then that I learned the Supreme Court had ruled against my client. I spent the rest of

the morning on the telephone, taking calls and making calls and trying to figure out what our next steps were. While I was on the phone, a message was left on my voice mail from the Clerk's Office at the Supreme Court, advising me what the outcome was, that the opinion was available, and that a slip opinion would be sent to me in the mail. The Clerk apologized for not calling earlier.

Now that time has given me some perspective on it, I have to say that the experience was very taxing, that it required very hard work, and that it had a disappointing outcome. It was still one of the most exhilarating experiences of my life. Having done it once, I'd certainly like to do it again. And next time, I intend to win.

