# Smart In Your World

# It’s More Than a Tag Line

# Arent Fox Is

Arent
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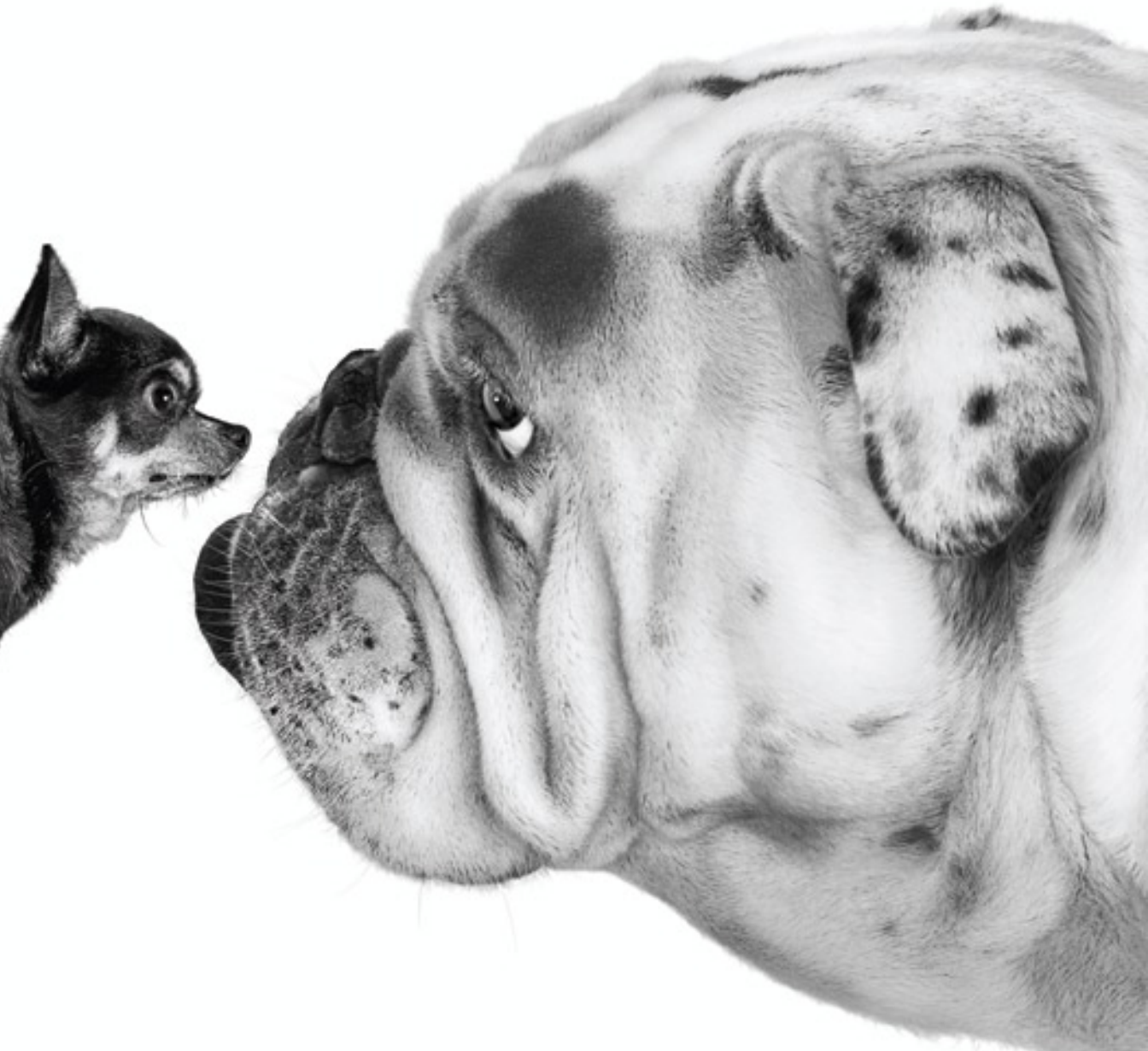
Is

# Thinking Big



# The No-Win Scenario

**A SURPRISING PHONE CALL.** Arent Fox's Carol Connor Cohen, head of the firm's ERISA litigation practice, was in her Washington, DC, office in October, 2004, preparing for a meeting with the senior benefits counsel of W. R. Grace & Co., a premier specialty chemicals and construction materials company, which conducts business in 41 countries and more than 20 currencies, employing approximately 6,500 full-time people worldwide. Grace's top ERISA lawyer was on his way to discuss defense strategy for a class action lawsuit recently filed in federal court in Massachusetts by two former employees who claimed the company's 401(k) plan had breached its duty to retirees by failing to sell Grace stock before the price dropped.

The suit, known as *Evans v. Akers*, alleged that the decision by managers of the Grace's 401(k) plan (including Grace's Board of Directors and various officers and other employees) to hold off selling the stock until early 2004 was imprudent, and cost participants a significant share of their retirement savings. In filing suit against Grace, the plaintiffs sought hundreds of millions of dollars of damages they claimed they incurred because the plan managers (or "fiduciaries") had not sold the stock a few years earlier.

As she reviewed some of the complex documents involved in the case, Carol's phone rang. Grace's benefits counsel was on the line. He had two messages. First, he was stuck in downtown DC traffic and would be a little late to the meeting. But it was the second message that would substantially impact Arent Fox's representation of Grace.

The benefits counsel said he had just received word that another group of employees had filed a class action suit in federal court in Kentucky claiming that Grace breached its duty to 401(k) plan participants. Except these employees were arguing that Grace violated the law, not because it held on to the stock too long, but rather because the company did not hold on to the stock long enough and had sold it prematurely. The plaintiffs in the second suit – titled *Bunch v. W. R. Grace & Co.* – were alleging the plan should have retained the Grace stock absent evidence the company faced imminent collapse, and that plan managers failed to consider the stock's potential increase in value before selling to a third-party at a price of $3.50 a share.

In other words, the company was being hit with two different class actions from two groups of employees (with a substantial overlap among the groups) who were making diametrically opposite claims about the same Grace stock. One side said Grace breached its duty because the company should have sold the stock sooner. The other side said Grace breached its duty because it should have held on to the stock longer.

Whatever it had done, Grace seemingly could not win... Seemingly.

But then Arent Fox went to work.

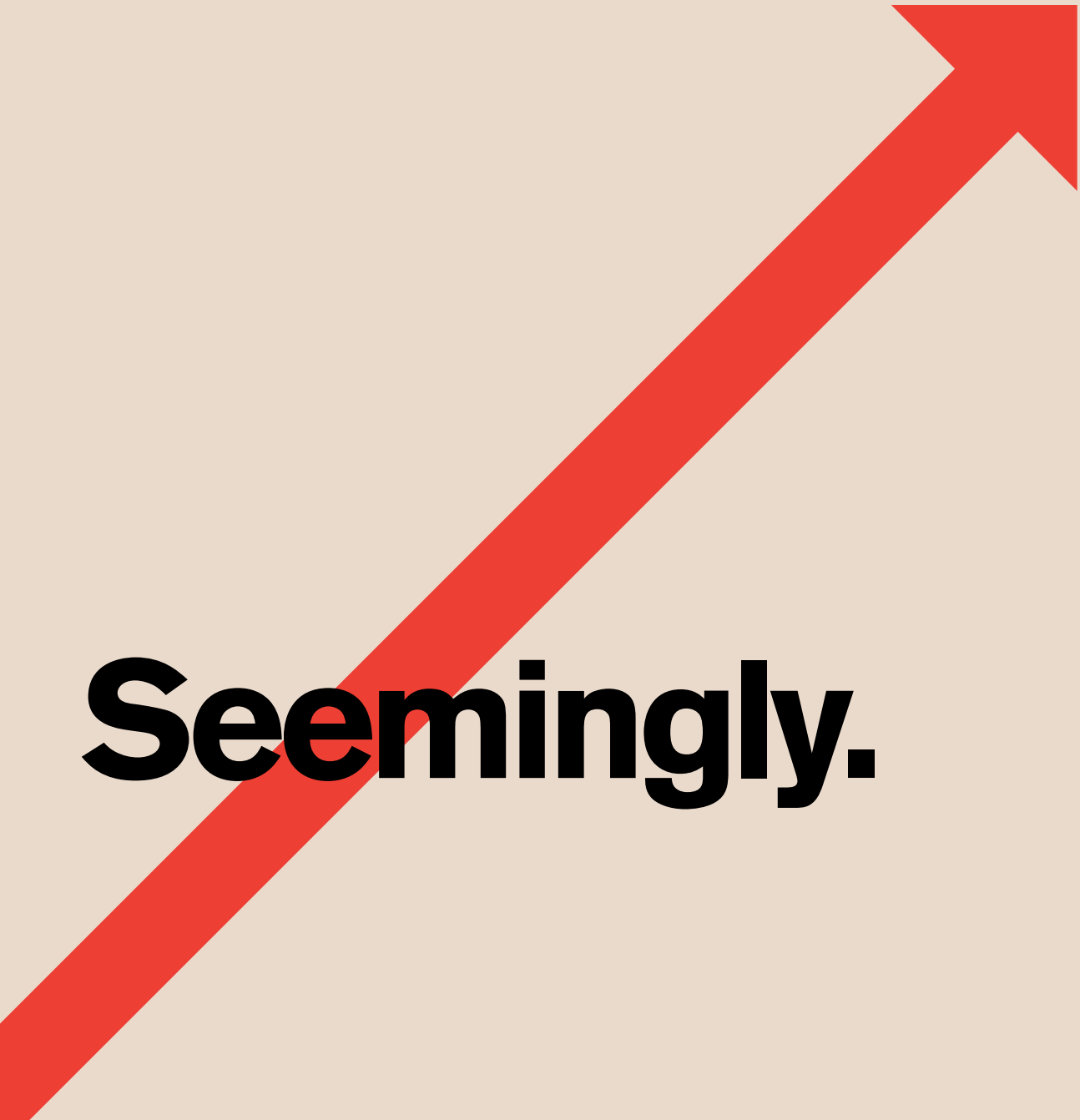
**THE STOCK FUND.** W. R. Grace's 401(k) plan offered participants the opportunity to invest their retirement savings in some 28 different investment options, including the Grace Stock Fund, which invested in company stock.

In 2001, Grace filed for bankruptcy to resolve multi-billion dollar, industry-wide asbestos claims asserted against it. Two years later, as the company began to consider negotiations with its creditors and shareholders over the terms of a plan of reorganization, Grace decided to retain an independent fiduciary to take charge of the Grace Stock Fund. In February 2004, after consulting with outside financial consultants and legal counsel, the independent fiduciary informed 401(k) plan participants that it had determined that keeping the Grace stock was no longer prudent, and it began a program to sell the stock. By May 2009, all of the stock in the Grace Stock Fund was sold.

And then the lawsuits began.

The
No-Win
Scenario

# Whatever it had done, W.R. Grace could not win...



Seemingly.

## The No-Win Scenario

**THE TWO-FRONT WAR AND THE "PRUDENT MAN."** The Arent Fox ERISA litigation team knew what was at stake and what they needed to do. They knew that the most effective and efficient way to show that Grace had done nothing improper, but rather had done everything legally and ethically possible to protect its 401(k) plan participants, was to shift the two-front war onto a single battlefield. Accordingly, Carol, together with partner Caroline English, argued to the courts that the cases should be combined so that they could be heard and adjudicated by one judge. Although opposed by the plaintiffs in both suits, Arent Fox was successful in having the cases consolidated and transferred to the US District Court for the District of Massachusetts in 2005.

After the two suits were consolidated into one case, Arent Fox began to systematically prove to the court that Grace had properly managed the 401(k) fund and had done everything possible to protect the plan's participants. Adding a third Arent Fox ERISA litigation partner, Nancy Heermans, the Arent Fox team reviewed (and produced to the plaintiffs) reams of documents, while working hard to craft effective and persuasive legal arguments.

In January 2009, after years of litigation, including an argument before the US Court of Appeals for the First Circuit, Arent Fox prevailed. The appeals court examined the steps taken before the stock was sold in 2004, and concluded that the plan's investment managers had "unquestionably met" ERISA's "prudent man rule" with regard to investment diversity, market conditions, and risk management and, therefore, did not breach their duties to the class members in the *Bunch* suit.

Arent Fox's victory then rippled through the claims filed against Grace in the *Evans* suit, which had also made a trip to the US Court of Appeals for the First Circuit. Shortly after the appellate and trial courts in the *Bunch* case found that Grace acted properly and prudently in managing the sale of the Grace stock, the plaintiffs in the *Evans* case agreed to settle their claims for a fraction of the amount of money they were seeking.

Arent Fox's successful defense of Grace in this uniquely complex set of ERISA lawsuits provides testament to the fact that, when the stakes are high for the client, there is virtually no shortage of innovation, creativity, energy, and talent that Arent Fox brings in successfully resolving the most Byzantine of cases.

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