

## Competition Group Of The Year: Morgan Lewis

By Bryan Koenig

*Law360 (February 9, 2022, 2:05 PM EST)* -- Morgan Lewis & Bockius LLP helped defeat "gray area" class certification in a major pharmaceutical case, negotiated clearance on a closely scrutinized transaction and scored major defeats of financial services lawsuits, earning the firm a spot as one of Law360's 2021 Competition Groups of the Year.

Morgan Lewis, alongside other firms, helped convince a Fourth Circuit panel in August to hit the reset button on the certification of a class of 35 drug wholesalers suing Merck and firm client Glenmark for allegedly delaying generic entry of Merck's cholesterol drug Zetia.

The appellate court remanded the antitrust case so a Virginia federal judge could reconsider her "faulty logic" when navigating a "gray area" between the 19 or fewer members usually deemed insufficient for certification and the 40 or more usually considered enough. The problem with the August 2020 decision, the panel said, is that U.S. District Judge Rebecca Beach Smith determined the class was numerous enough for certification based on a concern of "multiple individual trials," even though the Federal Rules of Civil Procedure base numerosity on whether joining all class members together in a single proceeding is "impracticable."

Other parts of the Zetia case from different plaintiff groups are moving forward, and the direct buyers, who managed to fight off attacks on the adequacy of their class representatives and their ability to show injury, have once again sought certification at the district court level. On Jan. 25, however, a federal magistrate judge recommended against renewed certification, saying the direct buyers have failed to show it would be "impracticable" for individual buyers to file suit in a joined litigation.

Morgan Lewis' antitrust practice leader, Steve Reed, sees in the Fourth Circuit's certification rejection some of the broader appellate pushback on what it takes to certify a class action. This case required getting the court to look at the "exceptional" requirements to warrant certification, especially for such a small class, he said.

"The Supreme Court has been very clear that this is the exception, not the rule," he said.

For Morgan Lewis, Reed said the approach in this and other appellate cases is to "go back to basic principles."



"Look at the rule, look at the requirement, and press the argument. It seems common sense, and it is," he said. "Our approach is to really focus on the rules and really drill down and make sure that the court is focused on the right question and the plaintiffs are held to their burden."

Representing Pfizer, Morgan Lewis also helped win Federal Trade Commission approval in October 2020 for Mylan's \$12 billion purchase of the company's Upjohn off-patent brand and generic drug in a hard-bargained divestiture deal assailed by the Democrats then in the agency's minority, who argued the agreement focused too much on individual therapy pipelines.

Morgan Lewis transactional practice chief Harry Robins said that the firm's role in the merger, which faced stiff FTC scrutiny, was in finding a divestiture buyer for the six products to be sold. And the buyer had to be just right, according to Robins.

"It was a very challenging factual investigation involving a review of two or three scores of potential candidates to find one that was squeaky clean," with no antitrust allegations against it in other litigation or enforcement actions, a tough find given the prevalence of pay-for-delay litigation and a sweeping multidistrict litigation against much of the generic drug industry.

And the company couldn't just have a clean record, according to Robins. "They had to have the right expertise," he said, and the company couldn't have any overlap with the sellers.

Robins noted that the ultimate buyer, Prasco LLC, was also used as the divestiture buyer in the FTC's next pharmaceutical merger clearance deal. "So we created this playbook," Robins said.

In addition, Morgan Lewis scored important wins for financial services clients.

The firm represented several of the big investment houses that convinced a federal judge in March to permanently cut them out of a lawsuit from the Louisiana state attorney general alleging a conspiracy to rig prices of bonds issued by government-sponsored enterprises like Fannie Mae and Freddie Mac.

That same day, Morgan Lewis client and trading platform Tradeweb evaded long-running multidistrict litigation alleging a conspiracy to manipulate the \$14 trillion market for securities issued by the U.S. Department of the Treasury. A federal judge tossed the allegations against Tradeweb and Wall Street banks including Goldman Sachs and Credit Suisse after finding a dearth of direct evidence against them.

Morgan Lewis' Jon Roellke, who worked on both financial services cases, said the two wins show the "versatility" of Morgan Lewis in the sector. Morgan Lewis, which boasts 38 antitrust partners out of 75 total practice attorneys focusing principally on competition law across 10 offices in the United States, the United Kingdom and Europe, has a deep understanding of markets that can't be grasped intuitively, according to Roellke.

"There's a real complexity of financial products that runs across the cases that we handle," Roellke said. "What makes us special and especially appealing for clients in the space is our understanding of those products."

--Additional reporting by Nadia Dreid and Jon Hill. Editing by Ellen Johnson.  
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