



Photo by: Nanette Kardaszkeski

**L to R:** Michael Banks, Sarah Bouchard, Joseph Costello, Michael Burkhardt.

————— 2012 —————

# PENNSYLVANIA LITIGATION DEPARTMENTS OF THE YEAR



# From ERISA to English Muffins

MORGAN LEWIS' LABOR & EMPLOYMENT PRACTICE COVERS EVERY NOOK AND CRANNY

By Gina Passarella of the Legal Staff



Bimbo Bakeries didn't have a signed noncompete from executive Chris Botticella when he left to join competitor Hostess Brands. And there was no evidence he shared any of Bimbo's trade secrets with his prospective new employer.

But Botticella had something Bimbo was willing to fight for – the recipe for Thomas' English Muffins and how the popular breakfast bread gets its signature “nooks and crannies.” Botticella was one of only a handful of Bimbo executives who knew how to replicate many of Bimbo's products and he knew much of the company's plans for marketing, production and cost control.

Bimbo quickly hired a Morgan, Lewis & Bockius team led by Philadelphia-based partner Michael L. Banks to undergo a complete forensic examination of Botticella's access to electronic information in the months before his resignation. Discovery was fast-tracked and in February 2010, U.S. District Court Judge Barclay Surrick of the Eastern District of Pennsylvania enjoined Botticella from working at Hostess in any capacity.

Surrick extended application of the trade secrets law beyond what previous cases held and ruled that even if the disclosure of the trade secrets was not inevitable, the mere possibility of disclosure was sufficient enough to put such drastic restrictions on Botticella.

Those restrictions, Botticella argued to the U.S. Court of Appeals for the Third Circuit, were unprecedented without the existence of a noncompete or any evidence that he

Morgan Lewis by the Numbers		
	Firmwide	Pennsylvania
Department Size (Headcount)	248	51
Department as Percent of Firm (Headcount)	18	15
Department as Percent of Firm (Revenue)	12	Would Not Disclose

misappropriated trade secrets. But the Third Circuit disagreed and a permanent injunction on his employment with Hostess was upheld.

When that case wrapped up, Banks was on the other side of a high-profile hire, representing Hewlett-Packard Co. in January 2011 in its attempt to hire an IBM executive to run its multibillion-dollar technology outsourcing business.

Morgan Lewis had successfully represented Dell in hiring IBM's head of mergers and acquisitions, so HP turned to the team to defend it in *IBM v. Visentin*. Giovanni Visentin had signed a noncompete with IBM. Within 24 hours of his hire by HP, attorneys at Paul, Weiss, Rifkind, Wharton & Garrison filed an injunction action in the Southern District of New York.

Banks and Morgan Lewis partner Sarah E. Bouchard led HP's response to the litigation and discovery. Less than a month after the suit was filed, the judge denied IBM's request for injunctive relief, finding there was no threat

of irreparable injury or likelihood of success on the merits. The judge also found the noncompete was overbroad. In November, the Second Circuit upheld the ruling.

Trade secret work is far from the only type of matter Morgan Lewis' labor and employment group handles.

Doreen Davis, head of the practice in Philadelphia, said the bulk of the employment side is focused on large-scale, systemic discrimination, ERISA and wage-and-hour class and collective actions.

One example of that was the firm's work in the U.S. District Court of New Jersey on *Bell v. Lockheed Martin Corp.* Lockheed Martin transferred the gender discrimination case from Ogletree Deakins to Morgan Lewis in May 2011 and the firm was successful in winning a motion to deny class certification in December 2011.

The case was one of the largest seeking class certification after *Dukes v. Wal-Mart*, with the plaintiffs seeking to certify a class

of 18,000 over gender discrimination claims similar to those raised in *Dukes*. The Third Circuit upheld the denial of class certification, relieving Lockheed Martin of hundreds of millions of dollars in damages sought by the class.

In April 2010, a Morgan Lewis team led by Philadelphia partner Brian Ortelere secured an order in the Eastern District of Pennsylvania in *Renfro v. Unisys Corp.* dismissing an ERISA class action against client Unisys Corp.

In that case, participants accused Unisys defendants of breaching ERISA fiduciary duties by offering to plan participants and beneficiaries investment options with excessive administrative and investment management fees.

Following the Seventh Circuit's decision in *Hecker v. Deere & Co.*, precedent set by Morgan Lewis' Chicago-based ERISA team in 2009, the district court agreed with the firm's position that Unisys met the requisite standard of care in its investment offerings to participants. In so ruling, the court determined, like in *Hecker*, that plan fiduciaries are not required to select the cheapest investment options available.

The Third Circuit upheld the ruling earlier this year.

Beyond class actions, Morgan Lewis handles large-scale workplace injuries and helps clients with company-wide labor issues.

The firm's OSHA attorneys have packed suitcases in their offices so they can immediately fly out to clients who experience catastrophic events at their businesses that might result in litigation.

The firm's labor lawyers are having the time of their lives, Davis said, working on cutting edge changes to labor law coming from the National Labor Relations Board.

The labor and employment work is countercyclical and has seen an increase



Aramark saw a clear benefit to giving all of its single-plaintiff employment work to Morgan Lewis.

during the recession, Davis said. With every pitch the firm makes, it includes the fact it can successfully handle all of a company's labor and employment needs while saving money at the same time.

That pitch was successful in the cases of both Amtrak and Aramark, which, along with sending class action cases the firm's way, have hired Morgan Lewis as their sole employment counsel.

In August 2011, Amtrak selected Morgan Lewis as its national employment counsel for the next two years. The firm will handle single-plaintiff litigation, certain wage-and-hour litigation and other employment litigation for the transportation company. The firm also handles employment class actions for the company. Morgan Lewis said it was selected because of its expertise, geographic coverage and experience with flat-fee arrangements.

Over the past seven years, Aramark has been narrowing its labor and employment counsel across the country from more than 30 firms to six and now just one — Morgan Lewis.

Associate General Counsel John C. Ryan said his company did a data-intensive review of which firms were handling its cases the most efficiently with the best expertise. Morgan Lewis was the winner and through a collaborative effort with the firm's attorneys, Aramark saw a clear benefit to giving all of its single-plaintiff employment work to the firm.

Ryan said it was an easy decision to make given the deep relationship and

trust his company has with Morgan Lewis, though he admits it wasn't initially an easy sell to Aramark's insurance company. But after the insurer saw the cost savings, it is now using similar models with other clients, Ryan said.

Morgan Lewis has long-term ties to Aramark, with some of its attorneys doing secondments at the company. They have a deep understanding of Aramark's business, Ryan said.

"They are great business partners and understand our business culture very well and, as a consequence, that allows them to operate more efficiently and effectively and with not a lot of time invested by Aramark lawyers," Ryan said. •