



Morgan, Lewis & Bockius' General Litigation Team Sets the Standard

— 2012 —

# PENNSYLVANIA LITIGATION DEPARTMENTS OF THE YEAR





L to R: Eric Kraeutler, Meredith Auten, Gregory Parks, Michelle Westcoat, Eric Sitarchuk, J. Gordon Cooney Jr.

Photo by: Nanette Kardaszski

# Ain't No Mountain High Enough

MORGAN LEWIS' LITIGATION DEPARTMENT TACKLES TOUGH CASES – AND WINS

By Gina Passarella of the Legal Staff

Morgan Lewis' representation of Toys "R" Us in a gift card class action was far from child's play. In fact, even most class action lawyers have never come close to playing in this sandbox.

That is because *Maxwell v. Toys "R" Us* was one of those very rare class actions that made it to trial and a team of Morgan Lewis lawyers led by partner Gregory T. Parks made sure the toy seller came out on top.

"More lawyers will climb Mt. Everest than will try a class action case," Parks said in quoting another commentator.

Parks leads the firm's retail practice group and was called in when a few former



## Morgan Lewis by the Numbers

	Firmwide	Pennsylvania
Department Size (Headcount)	733	208
Department as Percent of Firm (Headcount)	53	61
Department as Percent of Firm (Revenue)	50	Would Not Disclose

Toys “R” Us employees filed a putative class action in California state court alleging the chain violated California’s gift card law. The law requires retailers to redeem gift cards for cash upon a customer request if the card is worth less than \$10.

Parks said this case probably wouldn’t have been certified in federal court or most state courts, but the trial judge took the approach that he would rather certify and deal with the case on the merits. He also agreed to allow survey evidence into the trial regarding information the plaintiffs uncovered when they asked respondents whether they would redeem gift cards for cash.

Class certification almost always means settlement, but Toys “R” Us had “the guts” to take the \$25 million in claims to a bench trial, Parks said.

“It’s definitely a partnership and it has to be a client that has the fortitude to do it and the law firm that has the confidence to do it,” Parks said, adding the client also had a really good case.

The retail chain had evidence of thousands of instances in which it did redeem the cards for cash when asked. The chain also had standard operating procedures in place to handle customer gift card requests. That was enough to beat what Parks considered anecdotal evidence from the plaintiffs that cash wasn’t given in a few instances.

The trial judge had severed the equitable claims from the legal claims and handled the equitable claims first. While Parks said he wasn’t happy that the survey evidence, which he didn’t view as credible, was allowed in, the judge ultimately ruled in Toys “R” Us’ favor. He found the chain complied with the law and granted a motion by the retailer to stop the legal claims from going to a jury trial under the theory of *res judicata*.

The win wasn’t just good for this case. It gives a client “tremendous settlement leverage” in future class actions, Parks said.

Having offices across the globe, and in this particular case in Los Angeles, has been



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– Victoria Silbey,  
SunGard

critical to the firm’s success.

Eric Kraeutler oversees Morgan Lewis’ 130-lawyer litigation team in Pennsylvania and said a big part of the team’s culture and success is working across offices.

In the last two years, Pennsylvania lawyers at the firm have handled cases not just in California, but in the U.S. Court of Appeals for the Eleventh and Third Circuits, Boston, Michigan, Mississippi, Ohio, New York and New Orleans among other places.

When SunGard General Counsel Victoria Silbey, herself a Morgan Lewis alumna, has a case come up in, say, California, her old firm can quickly get her the most qualified attorney in that state at the appropriate level to jump into the case and get them up to speed quickly, Silbey said, adding the firm is incredibly responsive.

“I will send an email and say I need to talk about an urgent matter and the person will get off the plane and call me even on the way to a meeting with another client,” Silbey said.

Along with the firm’s technical proficiency in the law, which Silbey said is second to none, Morgan Lewis provides great customer service and gets to know SunGard’s business. The firm has become a partner and business adviser, as well as legal counsel, she said.

Wherever or whatever the matter, the goal is always to have a firm understanding of the client’s business objectives, Kraeutler said. Pennsylvania is home to 23 Fortune 500 companies and Morgan Lewis represents

all but two of them. The firm represents PNC and SunGard in patent matters in Texas, Aramark in employee litigation in California, and Comcast in a wage-and-hour case in Maryland.

When the economic crisis hit in 2008, Silbey said everyone had to tighten their belts and SunGard was no exception. She went to her longtime counsel at Morgan Lewis and said she needed help. Silbey said the firm was flexible, offered suggestions on alternative financial arrangements and was willing to listen to her ideas.

“That indicated to me that they weren’t just looking at me as a wallet ... but as a long-term relationship,” Silbey said.

Morgan Lewis wanted to be SunGard’s go-to law firm despite the fact that economic times were tough and litigation occurs sporadically, she said. The firm did what it had to do to make that happen. Now Morgan Lewis is called on to handle commercial and customer litigation for SunGard, as well as traditional labor issues, ERISA and employee benefits matters and counseling on SEC matters.

Morgan Lewis’ litigators have shown they work hard, get precedent-setting results and can handle high-stakes litigation in a range of issues.

Philadelphia partners J. Gordon Cooney and Brian W. Shaffer represented AstraZeneca Pharmaceuticals in a case brought by Ironworkers Local Union 68 alleging billions in damages under RICO and consumer protection law claims for AstraZeneca’s marketing of off-label uses for Seroquel.

In its March 2011 ruling in favor of AstraZeneca, the Eleventh Circuit stated that prescribing a drug for off-label uses is “both legal and commonplace in the medical community.” The pharmaceutical industry has hailed that as a major victory.

The victory for AstraZeneca was not an easy one. Morgan Lewis went through two rounds of briefing and oral argument

before the Eleventh Circuit. The panel was ultimately unanimous in its decision, though affirming on different grounds than the trial court relied upon.

While Morgan Lewis can take a case through a full appeal, it has also helped clients stop large-scale litigation before it starts. In *Brincku v. National Gypsum Co.*, partner James Pagliaro represented National Gypsum against several plaintiffs firms looking to initiate a multidistrict litigation proceeding for the American-manufactured drywall industry.

Morgan Lewis has represented National Gypsum in a number of products liability actions, including several national class actions and individual cases claiming property damage and personal injury as a result of alleged off-gassing from American-manufactured drywall. These claims involve tens of thousands of homes constructed over the last decade and potentially millions of dollars of exposure. Plaintiffs in several of these actions moved to create an industry-wide MDL and Morgan Lewis was the leading voice of the industry's opposition. The MDL panel ultimately ruled in the drywall industry's favor and denied MDL status for the cases.

Morgan Lewis said the victory deflated an effort by a consortium of plaintiffs attorneys who had expressed their aim to create "the next mass tort." The firm has since succeeded in obtaining a complete dismissal of a putative nationwide class action brought against National Gypsum in the U.S. District Court for the District of Arizona.

A team of Morgan Lewis lawyers led by Philadelphia partner Marc J. Sonnenfeld worked quickly to get a securities class action in the Eastern District of Pennsylvania dismissed against client CardioNet Inc. The suit was brought after the CEO of the medical startup commented about negative statements on the state of the industry that were published in an industry report.

The judge agreed with Morgan Lewis and

"discounted" the plaintiffs' use of confidential witnesses who were to testify that the CEO acted with the requisite intent to commit securities fraud when he dismissed negative statements in a report that the CEO allegedly knew to be true.

Getting the case tossed was not only a win for CardioNet, but also for other companies that may want to comment on an analyst's report without first contacting the analyst. The case also goes a long way toward minimizing the use of unspecified sources, Morgan Lewis said.

Philadelphia partner Matthew Siembieda's work on behalf of client Sunoco Inc. is a testament to how Morgan Lewis strives to understand its clients' business models and fight to protect their business goals.

In *ArcelorMittal v. Sunoco*, Morgan Lewis won in January 2010 an early dismissal in Ohio of a \$1 billion contract dispute over a long-term contract for the supply to ArcelorMittal of blast furnace coke used in the steel-making process.

The pricing formula of the deal turned out to be a major benefit to Sunoco given the increases in coal prices at the time and ArcelorMittal argued it was paying Sunoco a premium of \$100 million a year for the coke it was required to buy under the contract.

ArcelorMittal filed a suit to get out of the contract and Sunoco won on a motion to dismiss. A second suit was filed in federal court. A settlement was ultimately reached and all court actions were dismissed by January 2011.

Among the cases that earned Morgan Lewis the top spot in our inaugural Litigation Departments of the Year contest were several complex, high-stakes employment law cases. They included ERISA class actions and protecting the secret for how Thomas' English Muffins get those "nooks and crannies." More information on those cases can be found in our article on Morgan Lewis winning the Labor and Employment category of our competition.

Perhaps just as impressive as the work Morgan Lewis has done in the last two years is the work they have in the pipeline.

A Philadelphia partner is representing DuPont in litigation alleging breaches of environmental, health and safety representations and warranties made in connection with DuPont's 2004 divestiture of its worldwide Nylon intermediates facilities. Plaintiffs in the Southern District of New York case are seeking more than \$800 million in damages.

And Amtrak has selected Morgan Lewis as its sole employment law counsel for the next two years. The firm will handle all of the transportation company's single-plaintiff litigation, certain wage-and-hour litigation and other employment litigation.

The firm has shown that its work getting to know a client's business can build a trust level that makes clients comfortable handing over a significant portion of their outside legal spend to the firm.

As another client who hired Morgan Lewis to handle all of his company's employment work said, "We just think the world of them." •