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Litigation Department OF THE Year



GIBSON, DUNN & CRUTCHER

WHEN WE STARTED our Litigation Department of the Year competition ten years ago, we weren't sure if it would catch on. We knew we were asking a lot from firms—requiring them to sift through their litigation matters, choose the best results, and summarize complex cases succinctly. But a decade later, here we are presenting the results of our sixth biennial competition.

As usual, the task of picking winners and finalists involved some excruciating decisions. The submissions—which covered the two-year period ending July 31, 2011—were impressive, and stand as a testament to the excellent work done by the firms of The Am Law 200.

For the first time since we started this project, we changed the format for all four competition categories: general litigation, product liability, labor and employment, and intellectual property. We gave firms more flexibility to select the cases they wanted to present, and we asked each firm to submit an essay on why it should be a finalist. We also invited firms to nominate a partner as Litigator of the Year.

After months of reading, vetting, and interviewing, we arrived at four law firm winners, 11 runners-up, and 14 honorable mentions. We also chose three lawyers for Litigator of the Year, and five as finalists. Congratulations to all of these firms and individuals, and our thanks and appreciation to all the firms that participated in the 2012 contest.







The Complete Game

GIBSON DUNN has compiled another stack of victories in some of the country's thorniest cases. For their brains, bench strength, and bravado, the firm wins the Litigation Department of the Year title—once again.

SOMETIMES MAINTAINING YOUR game is just as impressive as improving it. In 2010 we named Gibson, Dunn & Crutcher Litigation Department of the Year for the firm's dramatic victories and nail-biting turnarounds. The firm had saved Dole Food Company, Inc. from a costly litigation war with a class of Nicaraguan plaintiffs, uncovering evidence of fraud along the way; it had successfully challenged a massive employment discrimination class action for United Parcel Service, Inc.; it won a U.S. Supreme Court victory for a West Virginia mine owner in *Caperton v. A.T. Massey Coal Co.*, a precedent-setting judicial bias case. Repeating a record like that didn't seem possible.

That was until we looked at Gibson Dunn's most recent submission. Over the past two years, the firm has racked up another astounding record of high-stakes victories—across disciplines and venues, and at every stage of litigation. The firm convinced the Supreme Court to reverse class certification of the largest employment discrimination class action in

earned the top award in our Labor and Employment contest). The firm won a historic federal district court ruling that same-sex couples have the constitutional right to marry. It persuaded the U.S. Department of Justice and the Securities and Exchange Commission to drop investigations of Joseph Casano, a former American International Group, Inc. executive widely demonized as one of the creators of the financial crisis. Gibson Dunn also defeated the first rule adopted by the SEC under the Dodd-Frank Act. And in a multibillion-dollar toxic tort suit against client Chevron Corporation, the firm uncovered what it claims is evidence of fraud that put the plaintiffs on the defensive. These victories, and others, earn Gibson Dunn the precedent-setting honor of being named Litigation Department of the Year for a second consecutive term, a first for our magazine's decade-old competition.

Traditional and time-honored strategies, such as cultivating a deep bench of talent and incorporating appellate strategy into trial work, explain some of Gibson Dunn's success. But it's what partner Theodore Boutrous, Jr. calls Gibson Dunn's "affirmative approach" to litigation that has really juiced the firm's

By
**AMY
KOLZ**

game. That means taking a detective's approach to examining the facts of a case, and sometimes using a team of outside private investigators to dig up more. It means waging battles inside and outside of the courtrooms. It's a strategy of action, not reaction. "In some ways, we think about cases more like plaintiffs lawyers," says Boutrous. "We like to be the ones moving the case along, driving the agenda."

"They've got the complete game," says Theodore Ulyot, the general counsel of Facebook, Inc. "They're aggressive and tenacious—they're incredible trial lawyers and superb on appeal. They really dig deep and nail down facts, and then they come up with

FROM LEFT:
Theodore Boutrous, Jr.,
Miguel Estrada,
Theodore Olson,
Debra Wong Yang,
Randy Mastro

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| Department Size | Partners: 155 Associates: 407 Other: 13 |
| Department as Percent of Firm | 53% |
| Percent of Firm Revenue 2010 | 56% |
| On the Docket: <i>Defending UBS AG in London Inter-Bank Offered Rate investigations and class actions; challenging the standing of class members in Toyota Motor Corporation's sudden acceleration cases; challenging a Commodity Futures Trading Commission rule on derivatives.</i> | |



the best legal and factual arguments," he says.

Exhibit A for Gibson Dunn's affirmative approach is its successful defense of Joseph Cassano, the former chief executive officer of AIG Financial Products Group. In the spring of 2009 a firestorm of press and congressional scrutiny had pegged Cassano as the individual responsible for AIG's near collapse. So when Justice prosecutors informed Gibson Dunn partners F. Joseph Warin and Jim Walden that they believed Cassano had repeatedly misled AIG management and auditors, and that they were weeks away from making the decision to charge him, the standard approach would have been to sit tight and wait. But Warin and Walden chose a bolder path.

Over the course of nearly a year, they made several detailed presentations to the government, explaining Cassano's actions and pointing out holes in the government's case. They reviewed documents, e-mails, and spreadsheets that, they asserted, showed that Cassano promptly and thoroughly disclosed his group's activities to management and auditors. The lawyers' final series of presentations in the fall of 2009 lasted more than 40 hours, spread over five days and entailed more than 600 pages of presentations and 400 exhibits. And they agreed to let Justice and the SEC interview Cassano in April 2010. "We ultimately bared our factual soul to them," says Walden.

The strategy paid off. Justice informed Gibson Dunn in May 2010 that it was closing its investigation of Cassano, and a month later, the SEC followed, a remarkable turnaround that a former prosecutor says was in good part due to the defense lawyers' tactics. "The judgment that they made to engage with us in an honest and forthcoming way was unique and important to [their] success," says Paul Pelletier, the former deputy chief of the Justice Department criminal division's fraud section, who joined Mintz, Levin, Cohn, Ferris, Glovsky and Popeo last May.

The most riveting demonstration of Gibson Dunn's dogged approach to fact-finding is its highly publicized defense of Chevron. When Chevron retained the firm in the fall of 2009, the oil company was facing the imminent possibility of a \$27 billion judgment against it in Ecuadorian court for oil pollution in the Amazon jungle, and was battling a steady stream of bad publicity. Led by Randy Mastro and Andrea Neuman, the firm immediately went on the offensive, beginning a tireless campaign to unearth evidence to try to discredit the plaintiffs and exonerate their client.

Using an obscure federal statute permitting U.S. court discovery in aid of foreign litigation, Gibson Dunn dug up what they said was incriminating evidence of falsified expert reports and alleged collusion between the plaintiffs and a supposedly independent court-appointed expert. Fighting the plaintiffs and First Amendment advocates, they filed and won a motion to secure 600 hours of outtakes from the documentary *Crude*, which chronicled the Ecuadorian litigation. Why? A frame-by-frame review of the film revealed that a scene between the plaintiffs and an assistant to the court-appointed expert had been cut.

The outtakes were explosive. One scene appears to show lead plaintiffs attorney Steven Donziger describing the need to intimidate an Ecuadorian judge. Karen Hinton, a spokesperson for the plaintiffs, has said that the outtakes were taken out of context, and that the vast majority of the filmmaker's footage "points clearly to Chevron's misconduct in Ecuador." Nonetheless, Manhattan federal district court judge Lewis Kaplan granted Gibson Dunn's motion to depose Donziger in October 2010. And Kaplan compelled Donziger to produce all privileged attorney-client communications, which turned out to be a "treasure trove" for Chevron, says Mastro. Those documents led Gibson Dunn to file a civil racketeering suit last February,

accusing the Ecuadorian plaintiffs and their lawyers of a conspiracy to extort a multibillion-dollar settlement from Chevron. The plaintiffs called the RICO action "corporate bullying."

The Ecuadorian court did slap Chevron with an \$18 billion judgment in February, but Gibson Dunn's aggressive maneuvering led Kaplan to issue a preliminary injunction blocking any attempt to enforce the judgment anywhere in the world. In September, however, the U.S. Court of Appeals for the Second Circuit reined in Kaplan and reversed his order.

How this litigation will end is far from clear, but Gibson Dunn's efforts have unquestionably changed the litigation's calculus. "Gibson Dunn has stood with tenacity . . . and put sunshine on the truth at every stage of this litigation. That has been tremendously effective," says R. Hewitt Pate, Chevron's general counsel.

Gibson Dunn doesn't work alone: A hallmark of the firm's litigation playbook is to deploy an arsenal of outside consultants, investigators, and experts. The firm has used this strategy with great effect in its recent representation of Facebook and its founder Mark Zuckerberg in a breach of contract case brought by businessman Paul Ceglia, who has claimed half of Zuckerberg's share of the company. Partner Orin Snyder began assembling a team of document, forensic, linguistic, and investigative experts to review the evidence soon after he took over the case from Orrick, Herrington & Sutcliffe in 2010.

"From day one, I viewed this case as the prosecution of massive fraud, not the routine defense of a lawsuit, and we knew we needed to do whatever we could to get at that fraud," Snyder says. In a series of filings beginning this summer, Snyder used the experts' findings to undercut the credibility of Ceglia, and to assert that he fabricated documents and tampered with the evidence. Ceglia denied those allegations, but repeatedly delayed



turning over certain e-mails and electronic evidence, a tactic that led Gibson Dunn to ask for sanctions against Ceglia and his lawyers. In early November, Ceglia's lawyers sought sanctions against Facebook, accusing the defendants of tampering with the evidence, a claim that Facebook has called "baseless." Two days later, a Buffalo federal magistrate judge ordered Ceglia, who had moved to Ireland, to return to the United States and produce additional electronic evidence.

Outside experts have proved just as helpful in M&A litigation. After Community Health Systems, Inc., made a hostile offer for client Tenet Healthcare Corporation, Gibson Dunn worked with two health care consultants to vet Community Health's estimates of the financial benefits of the deal. Using statistical analyses on Medicare and hospital databases, they unearthed evidence that led them to charge that Community Health had been improperly admitting patients and overbilling Medicare. Gibson Dunn used those findings, along with witness testimony, to file a 70-page complaint against Community last April, asserting that the company made materially false and misleading statements in connection with its proxy fight.

Community Health called the allegations baseless, but over the next two weeks the company disclosed investigations by the U.S. Department of Health and Human Services and the Justice Department into allegations of improper billing. The company withdrew its offer for Tenet in early May.

The most important battles can't be won solely with legal filings or courtroom arguments. Gibson Dunn partners strongly believe that public perception can shape the outcome of a case. So its litigators aren't shy when it comes to engaging the media. Take the firm's successful challenge to Proposition 8, the California statute outlawing gay

marriage. In the days leading up to the trial of *Perry v. Schwarzenegger*, partner Theodore Olson penned a 3,000-word cover story for *Newsweek*, entitled "The Conservative Case for Gay Marriage." And Olson estimates that he, along with his cocounsel David Boies, has participated in scores of interviews to explain the team's advocacy for marriage equality.

Gibson lawyers are just as adept at shaping the public dialogue in cases that are more technical and abstract. Case in point: the firm's representation of the U.S. Cham-

GIBSON DUNN lawyers spent months presenting evidence to the government that AIG "villain" Joseph Cassano was innocent. "We bared our factual soul to them," says partner Jim Walden. Justice and the SEC ultimately closed their investigations.

ber of Commerce and the Business Roundtable in their challenge to the SEC's "proxy access" rule, which would have made it easier for shareholders to nominate directors. Partners Eugene Scalia and Amy Goodman participated in the press conference announcing the lawsuit in September 2010. They also compiled critical comments about the rule from current and former SEC commissioners that were posted on the groups' Web sites. And Scalia says he fielded dozens of phone calls and e-mails with reporters.

In July the D.C. Circuit invalidated the proxy access rule, delivering Scalia his fourth victory in six years challenging SEC rules. It's impossible, of course, to gauge the impact of the media campaign. But to Gibson Dunn clients, the firm's media savvy is just one more way these litigators distinguish themselves. "It's a very special skill set [that Gibson Dunn has]," says Robin Conrad, executive vice president at the litigation center of the Chamber of Commerce.

Gibson Dunn uses other tactics to make its case to the public. After the Ninth Circuit affirmed in April 2010 the certification of a class of over 1.5 million women alleging employment discrimination in *Wal-Mart Stores, Inc. v. Dukes*, Gibson Dunn set its sights on a victory at the Supreme Court. One key part of the strategy was an intensive campaign to enlist the support of other prominent companies.

"We needed to explain why this ruling was bad for everyone," says Boutrous. The result:

An all-star cast of 20 companies, including Bank of America Corporation, Altria Group, Inc., and General Electric Company, submitted two rounds of amicus briefs urging the Court to reverse the Ninth Circuit. Boutrous credits those briefs with making a huge difference, reminding the solicitor general and the Court of the case's broad impact.

Almost every revered Supreme Court practice has a star. And Ted Olson is the obvious celebrity of Gibson Dunn's appellate practice. The 71-year-old former solicitor general has argued 58 Supreme Court cases over his career, and he's responsible for two of the firm's highest-profile recent wins: the Prop 8 challenge and the landmark Supreme Court victory in *Citizens United* that invalidated major portions of the McCain-Feingold campaign finance laws restricting corporate political contributions.

But Olson says he's made sure that Gibson's appellate practice isn't a "one-man show." To help keep the pipeline of talent flowing, Gibson's appellate ranks include six



of the 36 Supreme Court clerks from the 2009–10 term.

That long-term focus on recruiting and grooming the next generation has meant that a range of Gibson partners have argued the firm's biggest recent appeals. Along with Boutrous's Supreme Court win for Wal-Mart and Scalia's appellate victory over the SEC, partner Miguel Estrada persuaded a unanimous Supreme Court in 2010 to vacate the felony fraud conviction of former Hollinger International, Inc. CEO Conrad Black because the "honest services" statute had been interpreted too broadly by prosecutors. Mark Perry convinced the Seventh Circuit to vacate an order certifying the largest ERISA class action ever approved for client The Boeing Company last January. Perry also won an important victory for client Janus Capital Management in June with *Janus Capital Group, Inc. v. First Derivative Traders*, a Supreme Court decision that limits corporate liability in federal securities fraud cases. Thomas Hungar, a former deputy solicitor general, argued for client Microsoft Corporation in *Microsoft Corp. v. i4i Limited Partnership*, an important battle over the standards for challenging the validity of a patent, and the firm's only recent Supreme Court loss.

And increasingly, it's Gibson Dunn's deep bench that wins the firm its glitziest assignments. Take the firm's appellate work for the National Football League players in their class action lawsuit against the owners of the NFL last spring. Olson did deliver the much-watched oral argument before the Eighth Circuit, asking the court to enjoin the player lockout. But Gibson Dunn's relationship with the players union began with Andrew Tulumello, the 41-year-old cohead of Gibson's Washington, D.C., office and the vice-chair of the firm's class actions and crisis management practices.

Tulumello began doing work for the players union after assistant general counsel Heather McPhee cold-called him in 2009, asking him to review the union's amicus brief in *American Needle v. NFL*, a Supreme Court antitrust case. The union was so "blown away" with the quality of Tulumello's work and insights, says McPhee, that the union began seeking his counsel regularly on appellate matters. When the Brady case surfaced, McPhee hired Tulumello to focus on appellate strategy. (The union turned to its longtime counsel—Weil, Gotshal & Manges and Dewey & LeBoeuf—to handle the district court litigation.) Gibson also assisted the union on other fronts: Tulumello spearheaded presentations to the New York and California attorney general's offices on the antitrust implications of the owners' lockout. (In July both AGs announced investigations into that action.) And Maurice Suh, a Los Angeles-based partner, is now working with the players association on negotiating the NFL's drug testing policies.

Gibson Dunn is expanding relationships with other major clients as well. On the heels of his Wal-Mart victory, Toyota Motor Corporation hired Boutrous for an interlocutory appeal of a ruling on class standing in the company's sudden acceleration cases. In November the Ninth Circuit granted Toyota's request to appeal a ruling that had allowed consumers who had not experienced the alleged defect to sue for economic damages. Similarly, concert promoters Clear Channel Communications, Inc. and Live Nation Entertainment, Inc. turned to Boutrous in November to defeat class certification of a class of ticket buyers claiming that the companies used monopolistic practices to increase concert ticket prices. Gibson Dunn partners S. Ashlie Beringer and M. Sean Royall represented Facebook in its settlement with the

Federal Trade Commission, announced in late November, over allegations of privacy violations. And partners Estrada and Scalia are representing the International Swaps and Derivatives Association, Inc. in a lawsuit against the Commodity Futures Trading Commission challenging a new rule that sets position limits on derivatives tied to certain commodities.

But the firm's most significant growth may be overseas. Over the last six years, the share of litigation work from Gibson Dunn's non-U.S. offices has grown from 1.6 percent to 11 percent, says Mastro. Following its successful efforts for Dole and Chevron, the firm's global torts practice is thriving. Gibson Dunn is also advising investment bank UBS AG on a massive set of class action lawsuits in the U.S. and a global internal investigation involving the alleged manipulation of the London Inter-Bank Offered Rate.

"They've been able to transfer that heavy-hitting American litigation bench strength from the U.S. to Europe," says Markus Diethelm, group general counsel of UBS. "Not many firms are able to do that."

Not many firms have Gibson's game.

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