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## LITIGATION ♦ DEPARTMENT ♦ *of the* YEAR

**SPECIAL  
ISSUE**

**THIS IS OUR FIFTH BIENNIAL** Litigation Department of the Year competition. It has become a cliché to note that we've never had a tougher time picking finalists and winners from the scores of submissions. Nevertheless, it's true. The last two years have been a time of unprecedented upheaval for American businesses—and for the lawyers who serve them. To quote a partner from one of our finalist firms, the economic meltdown resulted not just in litigation, but in conflagration. The firms we chose in the overall contest and in the three practice area competitions—product liability, labor and employment, and intellectual property—didn't just survive this trial by fire. They were forged into stronger, faster, smarter litigation departments.

As before, we invited every firm in The Am Law 200 to report on litigation activities in a 19-month period, this time January 1, 2008–July 31, 2009. Every submission was read by at least three *American Lawyer* journalists. We vetted the strongest entries with calls to clients and opposing counsel. Panels of reporters and editors picked finalists in each category and invited those firms to our offices in New York to plead their cases. At the end, we arrived at the results that follow: four winners, 12 runners-up, and 24 honorable mentions. Congratulations to all of them.

—ALISON FRANKEL



♦ LITIGATION DEPARTMENT OF THE YEAR WINNER ♦

**GIBSON DUNN**



# Game Changers

*When other firms and  
conventional strategies come up short,  
clients in deep trouble turn to  
GIBSON DUNN  
for fresh, aggressive thinking  
and innovative rescues.*

*By David Barrio*

**MOST JANUARYS**, Gibson, Dunn & Crutcher partner Theodore Olson gives the firm's freshest hires a speech that he calls "How to Fail." One sure way, he tells them, is always to swim with the current. "Sheep, lemmings, and dead fish all learn to head in the same direction at the same time," he warned in a recent version of his talk. The message is clear: Don't be afraid to think for yourself and make your own path.

His bromide has become a market strategy and a hallmark for the firm's practice. Time and again in 2008–09, blue-chip clients in desperate straits have turned to Gibson Dunn lawyers to get them out of trouble at every stage, from subpoena to summary judgment to U.S. Supreme Court final appeal. The litany is breathtaking: helping Dole Food Company, Inc., end a costly war of attrition with Nicaraguan plaintiffs, and uncovering a nasty pattern of fraud in the process; beating back massive, reputation-gutting employment class actions for Wal-Mart Stores, Inc., and United Parcel Service, Inc.; persuading the Supreme Court, on behalf of a teetering West Virginia mine owner, that a state judge must recuse himself if he took money from one of the parties in his last campaign—a now obvious point that was in the couldn't-be-done category two years

ago. "I call them lifeboat lawyers, because our careers depend on them," says Wal-Mart executive vice president and former general counsel Thomas Mars. For those rescues, and a broader record of excellent work for hard-pressed clients, we name the firm Litigation Department of the Year.

The department has marquee partners, a very deep bench, and a guiding sense of creative calm in the face of crisis that helps make it greater than the sum of its parts. "We are the firm that clients in distress have turned to when they are facing their worst problems, or when they have in fact faced defeat," says litigation department cochair Randy Masstro. "And we have been the problem solvers, the game changers." In case after case, Gibson Dunn litigators stepped in when clients needed not just a law firm, but a rescue squad.

The coup that Gibson Dunn pulled off for Dole may have been its most striking rescue yet.

In 2007 plaintiffs lawyers convinced a California jury that the company's pesticide use decades earlier had left Nicaraguan banana farmers sterile. Facing thousands of similar claims from Nicaragua and other countries, Dole general counsel C. Michael Carter replaced his Jones Day lawyers with Gibson Dunn partners Theodore Boutrous, Jr., Scott Edelman, and Andrea Neuman. They, along with Carter, were convinced that the plaintiffs' claims were manufactured. Instead of playing defense, Gibson Dunn attacked.

"We had this strategy to try to break this thing wide open," says Boutrous. "That was our suggestion: Let's go after this, let's expose this for what we think it is."

The fraud that Gibson Dunn uncovered in 2009 was massive: a conspiracy by

## DEPARTMENT SIZE

Partners: 143  
Associates: 353  
Other: 32

## DEPARTMENT as Percent of Firm

51.5%

## ESTIMATED PERCENT of Firm Revenue 2009

56%

**ON THE DOCKET:** Fighting to fend off New York antitrust claims and overturn a \$1.4 billion European antitrust fine for Intel Corporation; defending Amazon.com, Inc., in patent claims over the Kindle; challenging California's ban on same-sex marriage.

the plaintiffs—and their lawyers—to extort huge sums of money based on claims by Nicaraguans who were not sterile and had not even worked on Dole plantations [“The Kill Step,” October 2009]. Neuman coaxed one plaintiff to admit that he had been trained to testify “like a parrot,” and she found others so frightened of retribution for testifying that they nearly collapsed during depositions. Just months after taking over, the Gibson Dunn team convinced California superior court judge Victoria Chaney to dismiss the two leading cases after a three-day evidentiary hearing. “The Gibson lawyers knew how to step back and deal with the whole environment,” says Carter. “Their perspective was, ‘Someone is trying to rip the company off: What do we do about that?’ ”

Gibson Dunn’s win for Dole in California continues to reverberate. A federal district court judge in Miami has since refused to enforce a \$98 million Nicaraguan judgment against Dole and The Dow Chemical Company based on evidence of corruption that the firm presented. In November the Gibson Dunn team won dismissal of seven remaining pesticide cases brought against Dole by Ivory Coast plaintiffs after claims of fraud surfaced there. And other companies facing international toxic torts claims have taken notice: In October, Chevron Corporation hired Gibson Dunn to help defend it in its long-running battle over oil pollution in the Lago Agrio region of Ecuador. Given the apparent evidence of fraud and corruption that has surfaced in the Lago Agrio litigation, “it was a natural fit for us to talk about it with Chevron,” says Boutrous. (He says that he’s also advised other companies in similar cases, but declined to identify them.)

Dole wasn’t the only client congratulating itself for making a switch to Gibson Dunn. When shareholders sued The Williams Companies, Inc., in a \$3 billion securities class

action after a subsidiary went bankrupt, general counsel James Bender, a onetime Gibson Dunn associate, initially turned to Skadden, Arps, Slate, Meagher & Flom, but became frustrated by what seemed like dithering by the Skadden lawyers. “There was a lot of hand-wringing about actually getting things done,” says Bender, who decided to look to his old firm for replacements. Gibson Dunn partners Timothy Roake and Wayne Smith got the case dismissed in federal district court in Tulsa. Then they won on appeal to the U.S. Court of Appeals for the Tenth Circuit, which tightened the standards that plaintiffs must

GIBSON DUNN PARTNERS say their most impressive turnarounds share a common element—what Mastro calls the firm’s “holistic” approach to litigation. “It’s long-term thinking, involving appellate specialists at the outset to anticipate issues and develop a strategy,” he says. That approach requires Gibson Dunn to call frequently upon what is perhaps its greatest asset: the appellate and constitutional law group led by Olson in Washington, D.C., and Boutrous in Los Angeles.

The holistic approach certainly worked for Wal-Mart, which turned to Boutrous after being hit with a federal district court decision

*When Heller Ehrman collapsed, partner Lawrence Zweifach polled his clients about New York’s top litigation practices. “They pointed me to GIBSON DUNN,” he says.*

meet to prove loss causation in federal securities cases. (Skadden declined to comment on its role in the case.)

Gibson Dunn has also been a top choice for law firms in need of their own rescue, particularly in malpractice litigation. The firm keeps most law firm clients out of the spotlight, but in at least one instance Gibson Dunn was called in when avoiding publicity was a lost hope. After Tae Bo creator Billy Banks won a \$30 million malpractice verdict against Seyfarth Shaw in 2005, Seyfarth hired Gibson Dunn partners Kevin Rosen and Daniel Kolkey to lead its appeal. In February 2009 a California state appeals court threw out the jury verdict and remanded the case. Seyfarth is keeping the Gibson Dunn team in the lead for the new trial.

certifying the largest employment class action in history [see “Turnaround Specialists,” page 80]. When Wal-Mart held a beauty contest to find a new team to lead its appeal, Gibson Dunn wasn’t on the company’s radar, and it wasn’t competing for the work. But a lawyer from one of the firms interviewed advised Wal-Mart privately to hire Boutrous—and Gibson Dunn won the assignment without even showing up. Instead of treating the case, *Dukes v. Wal-Mart*, as an employment matter, Boutrous struck at the heart of the standards used to establish class standing. Last year the Ninth Circuit agreed to an en banc rehearing of the appeal. (Boutrous ar-

FROM LEFT:  
Theodore Boutrous, Jr.,  
Andrea Neuman,  
Theodore Olson,  
Randy Mastro,  
Scott Edelman





gued before the en banc panel in March, and a decision was pending at press time.)

The firm also took Wal-Mart's case to the press. "Wal-Mart was being portrayed as an outlier, and somehow evil, and that was the theme when we got involved," remembers Boutrous. "We tried to take a different approach on the legal issues but also explain the situation more thoroughly to the public." That willingness to work beyond the courts is vital to the firm's ability to manage client crises, says Mastro. "Google any of us," he says. "We come up talking to the press a lot, because our clients want us to."

Mars says he was so impressed with the firm's work in *Dukes* that Gibson Dunn now handles all of Wal-Mart's most difficult matters. Those cases have recently included nationwide appeals in employment litigation and defending the company against a civil suit and a local district attorney's investigation stemming from a stampeding death in a Long Island store. "We have never had a firm handle more high-profile, high-risk work and deliver such consistent, excellent results," says Mars.

The firm's recent appellate experience challenging massive class actions extends beyond Wal-Mart. In 2007, after a federal district court judge in Pennsylvania certified a class of nearly 40,000 employees claiming discrimination by United Parcel Service, UPS brought in Gibson Dunn partners Mark Perry and Eugene Scalia to appeal the order. They persuaded the Third Circuit to reverse the district court in a sweeping opinion, which held that plaintiffs' individual circumstances precluded class status under the Americans with Disabilities Act.

Perry says Gibson Dunn's class action battles for Wal-Mart and UPS illustrate another aspect of its holistic approach: a strategic commitment not only to affect outcomes, but to change the law. "Instead of just fending off each particular case, we really try to look forward and ask how we can push the

law or help it develop in a way that's good for our clients overall," says Perry. "We look at where we think the law should be, even if it hasn't arrived there yet," seconds Boutrous, who notes that Olson was already chipping away at the jurisprudence surrounding punitive damages on constitutional grounds when Boutrous joined the firm 23 years ago.

Gibson Dunn's appellate strength sometimes allows the firm to recover after a nasty defeat. In January 2008, in a securities case handled by Smith, a federal jury in Phoenix returned a \$277 million verdict against Gibson Dunn client Apollo Group, Inc., finding that the company misled investors about a U.S. Department of Education investigation into recruiting practices at the Apollo-owned University of Phoenix. But eight months later, Smith persuaded a federal district court judge to vacate the award and grant posttrial summary judgment to Apollo. General counsel P. Robert Moya says Apollo never even considered switching firms after the initial loss. "My feeling about them was always that they had everything covered, all the time," he says.

Nothing illustrates Gibson Dunn's refusal to let precedent or prior results stand in its way more clearly than its recent record at the Supreme Court, where it won six of the nine cases it handled (with a decision still pending in one). Olson alone has argued more than 50 times before the high court, including ten arguments in the court's last two terms alone.

In *Caperton v. A.T. Massey Coal Co.*—litigation in which West Virginia's highest court had already ruled twice against Gibson Dunn's clients—Olson won a 5-to-4 U.S. Supreme Court ruling that the state's chief justice was constitutionally required to recuse himself from a case involving a mining company whose CEO had supported the justice's election campaign. (After the Supreme Court victory, Olson's clients—represented by another firm—lost their case on remand to the state court.) Olson says he was warned

repeatedly—including by a D.C. Circuit judge—that persuading the Supreme Court to take on elected officials for bias would be tough. "They said, you're not going to get cert granted, and if you do, you're not going to win," Olson says. He proved them wrong.

Other standout achievements of the last two Supreme Court terms include convincing the justices to tighten the evidentiary requirements for whistle-blowers in False Claims Act cases, leading to the dismissal of an FCA suit facing Allison Engine Company, Inc.; and winning an 8-to-1 ruling for Medtronic, Inc., that federal law preempts state law liability claims over the labeling and design of medical products. In *Citizens United v. Federal Election Commission*, Olson twice argued for overturning decisions by the Federal Election Commission and the D.C. Circuit blocking a critical documentary about then-presidential candidate Hillary Clinton. The decision in that case, which was still pending at press time, is likely to have far-reaching implications for restrictions on campaign speech under the McCain-Feingold Act.

**THE LAST TIME GIBSON DUNN** was a finalist in *The American Lawyer's* Litigation Department of the Year issue was in 2001. (Jones Day won the competition then.) What—aside from luck and pluck—gave Gibson Dunn an edge this time around?

Part of the answer, says Mastro, lies in the firm's deliberate expansion of its litigation group, particularly in New York. For the first time in Gibson Dunn's history, says Mastro, more than half of the firm's lawyers are now litigators. Firmwide, the group is twice the size it was a decade ago, and the number of litigators in New York has grown from 33 to 110. The New York office welcomed the largest group of lateral partners in firm history last year with the addition of four Clifford Chance litigators, including Mark Kirsch, the firm's former litigation chair. Another new lateral, former Heller Ehrman partner



Lawrence Zweifach, says that when Heller collapsed, he polled at least a dozen of his clients for frank assessments of the top practices in New York. "They pointed me to Gibson Dunn as a first-class firm," he says.

The addition of Weil, Gotshal & Manges intellectual property star Josh Krevitt to the New York office in 2005 also helped to bolster the firm's IP practice. In 2008 Krevitt helped T-Mobile USA, Inc., settle a case involving over \$1 billion in patent claims concerning the routing of 911 calls, and last year Amazon.com, Inc., turned to Krevitt to fend off patent claims in multiple jurisdictions over its Kindle book reader. Orin Snyder, who joined the New York office in 2005 from Manatt, Phelps & Phillips, has continued to expand the firm's media practice. In 2009 he faced down Boies, Schiller & Flexner's David Boies to win a preliminary injunction blocking the television series *Project Runway* from moving to Lifetime Television from NBC Universal, Inc.—a rare achievement in an entertainment dispute.

Mastro has notched some impressive recent achievements of his own in New York, like knocking out a suit by a British television programmer that alleged trade secrets violations on the part of Gibson Dunn client Home Shopping Network. Mastro, who was deputy mayor of New York City under then-mayor Rudolph Giuliani, also took on the Michael Bloomberg administration in multiple pro bono matters, including persuading a state judge to enjoin a \$500 million expansion of a Brooklyn prison. Mastro's greatest battle with Bloomberg was one of the firm's major defeats of the last two years, however. He failed to convince either a federal district court judge in Brooklyn or the Second Circuit to block legislation allowing the mayor to run for a third term, paving the way for Bloomberg's reelection in November.

Gibson Dunn partners have also scored a piece of the action in litigation related to the financial meltdown. A team led by Los Angeles partner Dean Kitchens is defending a consortium of the country's largest financial institutions over their roles as underwriters for the subprime mortgage lenders Countrywide Financial Corporation, Washington Mutual Inc., IndyMac, and Thornburg Mortgage, Inc. F. Joseph Warin in D.C. and James Walden in New York are defending former American International Group, Inc., executive Joseph Cassano in Securities and Exchange Commission and U.S. Department of Justice probes into credit default swaps. Zweifach has already earned the firm one new high-profile representation in defending Ernst & Young L.L.P. in all Bernard Madoff-related litigation.

Still, Gibson Dunn hasn't played as big a role in financial sector litigation as some competitors have. Perhaps that's a function of its practice's broad diversity. In the past two years, Gibson Dunn won multiple challenges to SEC rule making; blocked environmental torts claims against Lockheed Martin Corporation; successfully defended Tessera Technologies, Inc., semiconductor patents before the International Trade Commission; deflected profit participation arbitration claims against NBC Universal by the creator of *Law & Order*; and won dismissal of a high-profile global warming public nuisance case brought by California's attorney general against major automakers. The firm should be equally busy in the coming year, from defending Intel Corporation in antitrust actions in Europe and New York, to fighting to overturn the conviction of former Hollinger International CEO Conrad Black in his highly anticipated Supreme Court appeal.

**FROM CONRAD BLACK** and Joe Cassano to Wal-Mart and Chevron, many of the business world's most controversial personalities and powerful companies have put their faith in Gibson Dunn litigators. But no case has more riding on it, and for more people, than the challenge that Olson has mounted on behalf of two gay couples against California's constitutional amendment banning same-sex marriage. In May 2009 Olson shocked conservative supporters by joining forces with David Boies, his foe in *Bush v. Gore*, to file suit seeking to overturn Proposition 8. The move aroused skepticism among many gay marriage proponents, who felt that risking defeat in a major federal case was too dangerous. (Olson, like most lawyers involved, believes the case will ultimately reach the Supreme Court.) Others feared that Olson was not a genuine ally. Olson says he's already put most of those fears to rest. "We're hearing less and less of that, and more and more of, 'We're so glad you're doing this,' " Olson says.

Trial in the Proposition 8 case is set to begin this month in federal district court in San Francisco. Beyond the high stakes involved, the case is a classic Gibson Dunn challenge: an opportunity to take a defeat—in this case, the marriage ban's passage—and chart a strategic path to success. "Some lawyer, out of the millions of people who are interested in this issue, was going to file a lawsuit," Olson says. "If it was going to be done, we wanted it done by people who know how to do it right, and how to take it all the way." And who better than the litigators at Gibson Dunn?

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