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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.



PHOTOGRAPHY BY MIKE MCGREGOR



Designated **Hitter**

What **GIBSON DUNN'S** labor and employment practice lacks in head count, it makes up for in impact. The Supreme Court's decision in *Dukes* was just one of a number of game-changing employment wins.

UNLIKE ITS LARGER RIVALS, Gibson, Dunn & Crutcher's labor and employment department doesn't boast legions of lawyers. In fact, only 60 of the firm's 1,000-plus lawyers spend a majority of their time on the specialty.

"We don't win the volume contest," says Eugene Scalia, a former solicitor of the U.S. Department of Labor who coheads the practice group from the Washington, D.C., office, "and we're actually kind of proud of that."

What it lacks in head count, however, the practice makes up for in impact. Over the past two years, the group fended off 11 bet-the-company class actions alleging violations of wage and hour, meal-and-rest period, and ERISA laws, and obtained a landmark decision in the largest-ever employment discrimination class action in *Dukes v. Wal-Mart Stores, Inc.* "When it's a significant matter, you turn to a firm like Gibson Dunn," says J. Michael Luttig, executive vice president and general counsel of The Boeing Company. "They understand the gravity of the matters brought to them."

The group uses a winning combination of smarts, creativity, and pluck, clients say, to turn each case into an opportunity to not only win on the facts—often after a case has already faced legal setbacks under previous counsel—but to reshape the legal landscape.

In 2008, for example, Luttig tapped Gibson Dunn partners Mark Perry and William Kilberg, another former Labor solicitor, after a federal district court judge in Illinois had certified the largest-ever class—189,000 employee-investors—in an ERISA claim. Plaintiffs, seeking a staggering \$4 billion, alleged that the company chose imprudent investment options and that

fees paid by the retirement plan were excessive.

Perry and Kilberg convinced a panel for the U.S. Court of Appeals for the Seventh Circuit last January to reverse certification; the court, echoing Gibson Dunn's arguments, found that the class failed to meet the "common interest" requirement in part because the alleged mismanagement actually benefited some plan participants while harming others. "It was a huge victory for us," says Luttig. (The case is currently on remand to the district court.)

Six months later, Gibson Dunn cemented its position at the top of the heap with perhaps the most important recent ruling clarifying certification standards: the U.S. Supreme Court's decision in *Dukes*. The decision decertified a record-breaking national class of more than 1.5 million female employees, who allege that the company has systematically discriminated against them in promotions, pay, and benefits because they are women. Critically, the majority opinion—which overturned rulings by the district court, an appeals court panel, and the full Ninth Circuit—set far more stringent standards for establishing commonality.

The defense bar hailed the win as the death of the class action; the truth appears to be more complex. At press time, judges had cited *Dukes* in more than 200 class action decisions certifying, affirming, or denying classes, many of them outside of the employment area.

In *Dukes*, Gibson Dunn had once again been called in after certification, ahead of the initial circuit court appeal in 2004. Rather than looking at the case as one involving only a particular company and particular claims, recalls Theodore

By
**SARA
RANDAZZO**

Boutros, Jr., who led the Gibson appellate team, "our first reaction was, this order raises a number of really important issues that ultimately the Supreme Court is going to weigh in on." Such long-term thinking soon won over Wal-Mart counsel. Gibson Dunn was great "at providing, in a timely fashion, creative approaches and ideas," says Michael Bennett, a Wal-Mart senior vice president and general counsel for litigation. Courtroom skill helped too. "There seemed to be a powerful dynamic between [Boutros] and the justices," says Ruben Cantu, Wal-Mart's associate general counsel for litigation.

Even before the case made it to the Supreme Court, a team of Gibson Dunn lawyers began readying themselves in the event that the claims returned to the district court. That work has paid off: The firm is now handling the new cases against Wal-Mart that have been filed in the wake of the decision.

Practice Group Size Partners: 26
Associates: 32
Other: 2

Practice Group 6%
as Percent of Firm

Percent at least 2%
of Firm Revenue 2010

On the Docket: Representing Wal-Mart in the appeal of a \$188 million judgment in a meal-and-rest break class action; advising Ford Motor Company on a major workforce reduction; and enforcing a noncompete between Capital One Financial Corporation and two former executives.



Gibson Dunn's ability to think several steps ahead was also apparent in its work defending casino client Wynn Las Vegas, LLC, in a complex federal wage and hour class action. The firm's team, Scalia and new partner Jesse Cripps, quickly realized that the fate of the matter hinged on a ruling in a suit with similar facts—this one brought against an Oregon café—that was further along in its appeal before the Ninth Circuit. Both alleged that tip-pooling policies violated minimum wage laws under the Fair Labor Standards Act.

Instead of waiting for the other case to be decided, the team shot off an amicus brief on behalf of the Nevada Restaurant Association to highlight case law not being presented by the Oregon defense counsel and to counter arguments fielded by the Labor

Department. "We were probably dead in the water if the court accepted the Labor Department's brief," Scalia says. The Ninth Circuit ruled in favor of the restaurant, relying heavily on cases cited in Gibson Dunn's brief in its decision, which in turn paved the way for the complete dismissal with prejudice of the claims against Wynn Las Vegas in June 2010. (The case has been refiled in state court.)

In California, where disputes over state-required meal breaks are raging, the firm is doing battle on behalf of client Tenet Healthcare Corporation in a class action alleging meal break violations. The team, led by Michele Maryott, argues that employers simply need to make breaks available; plaintiffs lawyers

FROM LEFT:

*William Kilberg,
Karl Nelson,
Michele Maryott,
Jesse Cripps,
Eugene Scalia*

argue that the law requires them to ensure that breaks are taken. In February, the firm won a state appellate court decision affirming the lower court's denial of certification. Recently, the California Supreme Court granted review.

But this and other similar cases are on hold until the court rules in an earlier case.

Meanwhile, the firm is cueing up to defend several more clients facing similar litigation. "It's not a situation where we know the lay of the land," says Maryott. "The lay of the land is being developed as we go, and we're doing what we can to help develop it."

And that's the way the firm likes it.

E-mail: srandazzo@alm.com.