The American Lawyer
LITIGATION DEPARTMENT OF THE YEAR
2012 Finalist
How do you identify the best of the best when it comes to litigation? If you are *The American Lawyer*, the leading source of news for the legal industry in the United States, you hold a biennial competition and invite the firms that comprise The Am Law 200 to report on their litigation activities over a 19-month period. Then, after examining the submissions to pick the strongest performers, you interview clients and opposing counsel to narrow the field even further. Finally, you invite a select few for face-to-face interviews to be certain that you have found the cream of the crop.

After a vigorous, multi-month process, Mayer Brown is proud to announce that we have been named by *The American Lawyer* as one of the top six US litigation firms in their 2012 Litigation Department of the Year report. Our submission highlighted the significance of our victories (in terms of their financial and reputational stakes, and their impact on the legal and business landscapes), the breadth of our coverage, the creativity of our litigation strategies, and our inventive advocacy.

“Mayer Brown impressed us with its range of far-reaching victories. Along with its win for AT&T, the firm successfully defended Google’s YouTube in a critical Internet copyright case, won a crucial preemption appellate ruling for medical device maker Medtronic, Inc., helped with the largest Fair Labor Standards Act case ever tried to verdict for Quicken Loans, Inc., litigated the largest NAFTA award ever for Cargill Inc. ($77 million), and beat back challenges to permit Rahm Emanuel to be elected mayor of Chicago.”

– *The American Lawyer*

Mayer Brown's success lies in our ability to tease out the colors in a lawsuit that others don’t perceive. In the 17th Century, Sir Isaac Newton used a prism to show that white light held hidden colors when conventional wisdom said otherwise. Similarly, our litigators do not hesitate to challenge accepted thinking. We do so using a four-pronged approach to litigation matters: specialized knowledge, e-discovery ingenuity, litigation prowess, and appellate insight. These are the four primary colors of Mayer Brown’s spectrum, and the firm’s thoughtful application of each has produced remarkable results.

In particular, *The American Lawyer* took notice of the unique fusion of our trial and appellate strengths, separating us from other firms. Rather than operating as a separate practice, our appellate lawyers are regularly integrated from the start of a case, often spotting issues that can shortcut an arduous litigation process.

“Mayer Brown uses its early warning system—bringing its appellate lawyers into cases at the outset—to win high-profile suits for clients ranging from AT&T Mobility to YouTube to Rahm Emanuel.”

– *The American Lawyer*

In the following pages, we are pleased to share with you some of the stories that were submitted to *The American Lawyer*. In them, you will see how the unique perspective we bring to each case has played a critical role in the firm’s extraordinary success on behalf of its clients. As with the colors from the prism, together they constitute a whole: a unified litigation practice recognized as one of the top six litigation groups in the country.

**Litigation Firm Practice Leaders**

Andrew Marovitz (Chicago)
Evan Tager (Washington, DC)
Steven Wolowitz (New York)
David Allen (London)
Thomas So (Hong Kong)
Mayer Brown’s Litigation practice is the firm’s largest practice with more than 450 lawyers globally dedicated to dispute resolution and complex, high-stakes litigation for a wide variety of clients. We are among the largest law firms in the world and have the resources to successfully handle major legal disputes across national borders in a wide array of dispute resolution venues. Our litigation practices include Antitrust & Competition, Banking & Finance, Commercial Litigation, Consumer Litigation & Class Actions, Electronic Discovery & Records Management, Employment & ERISA, Environmental, International Arbitration, Mass Torts & Product Liability, Professional Liability, Securities Litigation & Enforcement, Supreme Court & Appellate, and White Collar Defense & Compliance.
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Reflections of Excellence: Mayer Brown’s Victories
When the Supreme Court issued its opinion in AT&T Mobility v. Concepcion, it was the culmination of a long and difficult voyage for Mayer Brown and AT&T. In 2002, the head of litigation at Cingular Wireless, now known as AT&T Mobility, selected Mayer Brown’s Evan Tager to lead the company on a bold adventure: replacing burdensome and expensive class actions with an arbitration process that creates a win-win for the company and consumers. He knew that bringing the voyage to a successful conclusion would require foresight, ingenuity, and perseverance.

The journey began with the drafting of an arbitration clause that not only eliminated every impediment to arbitrating claims on an individual basis that had been identified by courts, but also provided monetary incentives for customers to invoke the arbitration process. Armed with this path breaking clause, Tager and his colleagues fended off challenges to it throughout the country. But they did suffer some defeats along the way, particularly in California, where courts succumbed to the sirens’ song of the plaintiffs’ bar and declared AT&T’s arbitration provision unenforceable because it doesn’t permit class actions—even while acknowledging that consumers would fare better arbitrating individually under that provision than being a member of a class. Mayer Brown and AT&T, however, had been planning for that hazard for years, developing and refining a federal preemption argument that would enable them to achieve ultimate victory in the Supreme Court.

Along the way, Mayer Brown had to contend with numerous threats to the vehicle they had chosen to carry them to the Supreme Court. Pro-plaintiff members of Congress proposed federal legislation that would have made pre-dispute arbitration agreements unenforceable and killed any chance of Supreme Court review. Partners Andy Pincus (who argued the case in the Supreme Court) and Archis Parasharami led the charge in resisting that mortal danger. And the team also had to worry about cases with less favorable facts beating them to the Supreme Court. So in a bold stroke, they filed an amicus brief in a case brought by another company, urging the Court not to grant review and instead to wait for a case involving AT&T’s consumer-friendly clause, which is just what the Court did.

But even after the Supreme Court granted review, disaster loomed around the bend. The team believed that Justice Thomas’s vote would be critical. Yet he was on record as being hostile to what Mayer Brown considered to be its most straightforward argument. The team had to chart a course between his hostility to implied preemption and the possibility that express preemption would be less compelling to the other Justices. In the end, they managed to sail between Scylla and Charybdis, securing a narrow 5-4 victory.

Since the Supreme Court’s ruling, courts across the country have relied on Concepcion as controlling precedent in litigation between consumers and corporations. As of December 2011, 54 federal and state courts already had invoked Concepcion in enforcing agreements to arbitrate disputes on an individual basis and/or rejecting arguments that such agreements are unenforceable because they do not permit class actions. Among those are nine decisions—including one by the Eleventh Circuit—in cases in which Mayer Brown successfully relied upon Concepcion to defeat attacks on the requirement in its arbitration clause that claims be arbitrated on an individual basis. Plaintiffs in at least eight other sets of class actions (including two multidistrict litigations) voluntarily dismissed their claims against AT&T Mobility after Concepcion was decided.
With enormous potential liability bearing down on Medtronic, a leading global medical device manufacturer, the Mayer Brown team swung for the fences to stop a multi-district litigation at an early stage.

“[A] home run for fans of federal pre-emption of state law-based product liability claims”

_~ The American Lawyer_

The frightening news for Medtronic came in late 2007, when it appeared that the latest generation of its internal cardiac defibrillator leads might be failing at a greater rate than its predecessor. Running through patients’ veins and into their hearts, Medtronic’s ICD leads act as a literal lifeline, monitoring heartbeats and triggering shocks that can prevent sudden cardiac arrest. For Medtronic, the legal challenges were complex and the stakes were high. Given the value of the devices, the number of patients with the leads implanted (over 200,000 in the U.S. alone), and the health risks involved, the company’s potential liability was substantial.

Following a voluntary field action of Medtronic’s “Sprint Fidelis” lead in 2007 and the initiation of tort suits across the nation, Medtronic asked Mayer Brown to take over its national defense. Led by Dan Ring, the Mayer Brown team, which ultimately numbered over 40 attorneys and oversaw local counsel in nearly every state, quickly got the federal MDL established in Minnesota over the more plaintiff-friendly choice of Puerto Rico.

Then Mayer Brown made its most audacious move.

One issue of prime importance to the MDL—and many other medical device tort actions—was whether the FDA’s pre-market approval of the Sprint Fidelis lead preempted the plaintiffs’ claims. Conventional wisdom held that preemption was an issue for summary judgment, to be decided only after millions of documents had been produced and hundreds of depositions taken. But Mayer Brown, with its eye for appellate issues and long history of developing preemption arguments, saw the opportunity for a game-ender. It filed a motion to dismiss, bringing thousands of individual claims to a halt so the court could decide, first, if they were preempted under the Medical Device Amendments to the Food, Drug and Cosmetic Act. (Meanwhile, the team successfully employed this strategy in the coordinated proceedings in Minnesota state court, obtaining a stay of discovery and a ruling finding thousands of claims to be preempted.)

After a victory before the District Court, the issue went to the Eighth Circuit in 2010 for a crucial appeal. By that point, the case had become ground zero in the preemption battle, for not just Medtronic, but the entire medical device industry. The decision would be the first at the appellate level to interpret a 2008 Supreme Court ruling, _Riegel v. Medtronic_, laying out broad principles of preemption for cases involving devices pre-approved by the FDA.

How _Riegel_ would apply to the Sprint Fidelis leads litigation was a matter of great uncertainty; indeed, the Seventh Circuit has since come down with a decision adverse to another device manufacturer. However, Kenneth Geller’s brilliant argument focused on the pleading of the plaintiffs’ consolidated complaint, knocked it out of the park.

Prior to achieving its victory at the Eighth Circuit, Medtronic negotiated with the Plaintiffs Steering Committee on a global settlement to resolve substantially all filed and personal injury claims against Medtronic over its Sprint Fidelis lead. These claims included over 1,200 lawsuits consolidated into the multi-district litigation (those at issue in the Eighth Circuit), and the 2,800 lawsuits in the state consolidated proceedings in Minnesota, comprising approximately 9,000 individual personal injury cases. One day before the Eighth Circuit released its opinion in favor of Medtronic, the company announced that it had reached a confidential agreement to settle all such claims as well as certain unfiled claims, subject to various conditions and Medtronic’s right to cancel the agreement. The 8th Circuit’s decision and the settlement brought the greatest certainty to Medtronic in resolving the litigation.
Dan Gilbert, founder of Quicken Loans, runs his company by a simple credo: “Do the Right Thing.” His philosophy demands that Quicken Loans treat its employees well, and also that the company stand up for itself when it’s being wronged.

That philosophy was put to the test when 358 mortgage officers at Quicken Loans asserted $25 million in overtime claims. Fearing the bad press and the risk of large verdicts that come with Fair Labor Standards Act cases, many defendants roll over and settle a phenomenon that has caused an explosion in FLSA litigation.

But Gilbert isn’t one to roll over, as any basketball fan knows. After LeBron James deserted his Cleveland Cavaliers in an orgy of self-promotion, Gilbert fired back with a public letter blistering “the King.” And when he was served in the Quicken suit, he didn’t shrink from that fight either. Instead, Quicken Loans searched out the nation’s best FLSA counsel.

It found Mayer Brown’s Bob Davis, who has handled over 100 FLSA and state wage-and-hour cases, and whose work on the Quicken litigation distinguished him as an NLJ “Winning” litigator.

Confronting employees before a jury wouldn’t be easy, but Davis saw the strategic value in taking a firm stance. Gilbert and his management team had done “The Right Thing” for their mortgage officers, providing extensive training, guaranteed salaries, and generous benefits and incentives. With plaintiffs seeking millions of dollars, a jury might well see this as a case of ingratitude, rather than one of corporate overreaching.

To prepare the battlefield, Davis and his team filed aggressive summary judgment motions. They worked from an intimate knowledge of FLSA law—much of it developed through Davis’s past victories and his work as Solicitor for the U.S. Department of Labor. When they were done, they had protected the company’s business model, cut the potential liability period by a third, and gotten all individual claims against Gilbert thrown out.

Davis’s savviest moves paid off at trial—a five-and-a-half-week slugfest. Early on, Davis had supported augmenting the trial team with a local voice that might resonate with the Detroit jury. Quicken Loans enlisted attorneys Mayer and Jeffrey Morganroth, a father-and-son team known for representing John DeLorean and Dr. Jack Kevorkian. On the key question whether mortgage officers are skilled advisors, the defense team subpoenaed several former employees including star witness John Bettis—the brother of Jerome, a local football hero who capped his career with a Super Bowl victory on Detroit’s Ford Field.

At closing argument, the trial team didn’t flinch. Having impeached the testimony of several plaintiffs, they displayed those plaintiffs’ pictures with captions like “lied” and “fraud” splashed across them.

The bare-knuckle strategy was an unprecedented gamble in FLSA litigation. Davis and Quicken Loans were betting everything that a jury could see that the company “Did the Right Thing.”

The gamble paid off. Quicken became the largest FLSA exempt-status case ever tried to a jury verdict and won by the defense. In the words of the judgment, “Plaintiffs take nothing.”

On August 10, 2011, the U.S. District Court for the Eastern District of Michigan confirmed Quicken Loans’ trial victory, denying the plaintiffs’ post-trial motions to dismiss the jury verdict or grant a new trial.
When Ross Perot warned of the “giant sucking sound” that would follow passage of the North American Free Trade Agreement, he was talking about the loss of U.S. jobs, not the enjoyment of soft drinks. But after Mexico implemented a protectionist tax to prop up its sugar industry, soda pop indeed took center stage in a series of NAFTA arbitrations. Representing Cargill, Inc. in one such case, Mayer Brown not only secured the largest award ever given in a NAFTA dispute, but also had the award upheld in a rare appearance by a U.S. firm in a Canadian court.

In 2001, Mexico imposed a 20% tax on beverages using high-fructose corn syrup, a measure designed to encourage soft-drink manufacturers to buy Mexico’s native sugar rather than corn syrup from U.S.-based producers. Mexico is the world’s second-largest market for soft drinks, and thus for makers of soft drinks and the ingredients that go into them, the impact was severe. The U.S. government filed a successful complaint with the World Trade Organization over the tax, which was repealed in 2007.

The WTO action did not end matters, however, as NAFTA’s procedures allow private entities to bring arbitration proceedings against signatories that violate its provisions. Several corn syrup producers did just that in an attempt to collect damages caused by the tax. Archer Daniels Midland and Tate & Lyle collectively won $33.5 million in late 2007, and in what was then the largest NAFTA award ever, Corn Products International won $58.4 million in 2009.

For Cargill, the last of the corn syrup producers to arbitrate its claims, Mayer Brown won a record-breaking $77.3 million award—plus interest and costs—in September 2009.

Mexico appealed the award, filing an action with an Ontario court in an effort to get over half the damages set aside. For Jeff Sarles and his Mayer Brown team, the elevation of the matter to the Ontario court system posed a challenge. Ontario has no pro hac vice process, and it is virtually unheard of for lawyers not admitted to the Canadian bar to practice there.

But with the assistance of the Canadian firm Torys LLP, Sarles obtained permission to co-argue Cargill’s case—and Mexico’s challenge was rejected by the Ontario trial court in August 2010. Mexico then initiated an appeal with the Court of Appeal for Ontario. As it did before the trial court, Mayer Brown again sought special permission to represent Cargill at the appellate level—and again, the Canadian forum granted Mayer Brown’s request. Alongside Canadian co-counsel from Torys LLP, Sarles argued the appeal for Cargill in January of 2011. On October 4, 2011, a three-judge panel unanimously affirmed the ruling of the Ontario trial court and preserved Cargill’s award in its entirety. While Mexico has since filed a discretionary petition to the Canadian Supreme Court, Cargill’s $77.3 million award (plus interest and costs) still stands as the largest award ever secured for violations of the NAFTA treaty.
When Chicago Mayor Richard Daley announced that he would not seek re-election in 2011, attention immediately focused on President Obama’s then-Chief of Staff, Rahm Emanuel. But some pundits asserted that Emanuel, who had been serving in Washington for the past year, could not satisfy the one-year residency requirement for mayoral candidates.

With the election just months away, Emanuel chose as his legal team Mayer Brown partners Andrew Pincus, an experienced appellate lawyer who had worked closely with William Daley in the Clinton Administration, and Michael Forde and Michael Gill, veteran Chicago litigators; respected solo practitioner Kevin Forde; and Hinshaw & Culbertson partner Michael Kasper.

Recognizing that an ironclad legal theory would provide the best path to victory, Pincus conducted an exhaustive review of Illinois residency cases dating back to 1867, from which the team formulated a litigation strategy to guide the legal fight ahead.

After Emanuel filed his nominating petitions, 32 different objectors claimed that he had not met the residency requirement. At the ensuing three-day hearing before the Chicago Board of Elections, the examiner allowed all 32 parties to participate, keeping Emanuel on the stand for 12 hours.

At 2:00 a.m. on December 23, 2010, the hearing officer issued a ruling favoring Emanuel, which the Chicago Board of Elections adopted the next morning. The Circuit Court of Cook County affirmed two weeks later.

On January 24, 2011, however, the appellate court issued a stunning reversal and found Emanuel ineligible. The Board of Elections began printing ballots without Emanuel’s name.

Relying on the legal theory developed months earlier, the lawyers filed a motion to stay with the Illinois Supreme Court that same day. And after writing through the night, they delivered a Petition for Leave to Appeal to a messenger at 4:00 a.m. for filing in the Supreme Court clerk’s office that morning.

Deciding the case on the appellate briefs, the Court issued a blistering, 7-0 reversal, relying on the line of precedent beginning with the 1867 decision. Less than a month later, Emanuel won the election. ♦
An Electrifying Win
Consolidated Edison Company of New York, Inc.

Fresh off the heels of the I.R.S.’s major victory against BB&T, I.R.S. Chief Counsel Donald Korb told CFO Magazine that in cases involving lease-in lease-out transactions, “[t]he odds are overwhelmingly in our favor.” To anyone listening, the words rang true; the I.R.S. was victorious in a number of such cases throughout the 2000s. They remained true until the I.R.S. set its sights on Consolidated Edison, which became the first taxpayer to defeat the I.R.S. in a leaseback case.

Lease-in lease-out transactions like Con Ed’s were nothing new in the world of high finance. In a so-called “LILO,” one party sells an asset to another entity, and then leases the asset back. The seller benefits from the capital received, while the buyer enjoys profits and the tax benefits that come with ownership.

Con Ed entered its first LILO as an experiment in diversification. New York deregulated its energy markets in the early 1990s, opening Con Ed to competition and requiring it to exit the power-generation business. To continue thriving, Con Ed contemplated investing in projects as far away as Guatemala, Indonesia, and China, and ultimately settled on a new type of opportunity—a LILO—in the Netherlands. In 1997, it entered its LILO with a Dutch utility, with the central asset being a generation plant.

Several years later, the I.R.S.’s position on LILOs had hardened. The agency saw the transactions not as honest business deals, but as mere tax-avoidance schemes. And for the many who had entered LILOs, its success in the courtroom was ominous. The government won case after case—first against BB&T, then KeyCorp, and then Fifth Third Bancorp. When the I.R.S. looked to Con Ed, the utility turned to David Abbott and Joel Williamson at Mayer Brown.

The team took a unique approach; where others treated the tax issue as primarily a legal question, Mayer Brown developed an exhaustive factual record demonstrating the thinking and strategy behind Con Ed’s decision to enter the transaction. At the six-week trial, the defense called over 40 witnesses—including the Chairman of the Board, the CEO, and the CFO—and flooded the court with evidence explaining Con Ed’s decision-making. The approach was crafted to paint a vivid portrait of the leaseback as a transaction completely consistent with—and at the heart of—Con Ed’s new business strategy.

The approach worked: Judge Horn of the Court of Federal Claims issued a lengthy decision favoring Con Ed and establishing an important tax precedent for future defendants. The I.R.S. has since appealed the decision and we expect litigation to continue in 2012. ☰
Miriam Nemetz had never been in a courtroom so charged with electricity. The Mayer Brown appellate partner and former Associate Counsel to the President of the United States was no stranger to practice in the federal courts of appeals, but she had never seen an audience packed so tightly, or so rapt with attention, as the one spilling out of the D.C. Circuit on January 12, 2010.

The gallery, many from the Capitol’s Iranian-American population, had come to witness a legal challenge to the Secretary of State’s designation of the People’s Mojahedin Organization of Iran as a “foreign terrorist organization.”

There were plenty of reasons for the intense interest. The case would have profound implications for the United States’ delicate relations with Iran, which makes it a capital offense to belong to PMOI, a group intensely opposed to the mullahs’ oppressive regime. It also stoked public debate between PMOI’s detractors, who point to the group’s violent history, and high-profile supporters like Rudy Giuliani, Howard Dean, and former CIA Director James Woolsey. The quality of argument, too, promised to be exceptional. Joining Nemetz at the counsel table for PMOI was Andy Frey, an appellate advocate with 66 Supreme Court arguments under his belt.

If not for Frey’s remarkable track record, which includes victories like his Supreme Court win on a punitive damages issue in Phillip Morris USA v. Williams (2007), the case might have been thought unwinnable. There are inherent challenges, after all, in representing a group which was engaged in military activity against the Iranian regime until 2001, even though it has since rejected all acts of violence. Beyond that, Frey and Nemetz faced a history of judicial deference to national security decisions of federal officials. Even more challenging, Frey and Nemetz did not even know the content of the decision they were appealing. After rejecting PMOI’s petition to revoke its FTO status, Secretary Rice provided PMOI only a heavily redacted “summary” of its record, concealing all the classified information that had been considered. They might as well have been appealing a blank piece of paper.

PMOI’s challenge to its “FTO” designation was two-pronged: that Secretary of State Rice lacked any substantial basis for maintaining the group’s terrorist designation; and that the procedures followed in reaching her decision failed to afford PMOI a fair opportunity to respond to the charges against it. At argument, Frey went on offense and built an affirmative case for PMOI, one focused on its decade-long rejection of violence, its delisting as a terrorist organization by the U.K. and EU, and its cooperation with U.S. forces in Iraq (where many PMOI members reside). And while PMOI did not win an outright reversal of its FTO status, the Court agreed with Frey’s argument that the State Department had not met its due process requirements. The case has gone back for reconsideration by the Secretary—a considerable victory for PMOI and its supporters, who have every reason to hope for a favorable outcome this time.
A Ticket to Nowhere for the FTC
Solvay Pharmaceuticals

For Solvay Pharmaceuticals, developing an innovative drug was the easy part. Keeping an overzealous Federal Trade Commission from taking away duly-earned patent exclusivity was another matter—and for that, Solvay called on Mayer Brown.

A decade ago, a Solvay subsidiary developed AndroGel, a medication that delivers a steady dose of testosterone. AndroGel offers advantages over injections, which needle-fearing patients avoid, and which cause peak-and-valley testosterone levels. Focusing on AndroGel’s “steady-state” delivery, Mayer Brown secured a patent for Solvay. Doctors and patients embraced AndroGel— to the tune of $800 million in sales last year—but getting the patent would not be the last time Mayer Brown helped Solvay with AndroGel.

In 2006, Solvay settled patent infringement litigation against generic companies seeking to copy AndroGel. The settlement allowed the generics to enter the market five years before the expiration of Solvay’s patent. Simultaneous with the settlement, Solvay and the generic companies entered into mutually beneficial joint ventures to help market AndroGel and provide valuable back-up supply capacity.

The FTC saw red. One of the FTC’s top priorities is thwarting “pay-for-delay” deals—the FTC’s disapproving term for agreements in which an innovator pharmaceutical firm supposedly compensates generic patent challengers for settling their patent case. The FTC broadly attacks settlements that involve joint ventures even when the ventures standing alone are beneficial to both companies. Courts, including those in Georgia, where Solvay is headquartered and where the patent litigation had taken place, have rejected the FTC’s theory.

During the FTC investigation, Mayer Brown told the FTC Commissioners that if the FTC filed suit anywhere but Georgia, the case would be transferred to Georgia, then dismissed, and then rejected on appeal.

Despite this warning, the FTC filed suit in the Central District of California. Desperate to keep its case in California, the FTC convinced the California Attorney General to join its suit. Plaintiffs’ lawyers quickly brought copycat suits in California, New Jersey, Pennsylvania, and Minnesota—anywhere but Georgia.

Now fighting on multiple fronts, Solvay turned to its litigation team, led by antitrust lawyer Mark Ryan (Ryan joined the DOJ’s Antitrust Division as Director of Litigation in January 2012), FTC veteran John Roberti, and intellectual property/antitrust partner Christopher Kelly. Although Mayer Brown’s prediction that the case would wind up in Georgia was a bold one—given the federal courts’ ordinary inclination to honor plaintiffs’ choice of venue, particularly when one of the plaintiffs is the Attorney General of that state—it was right.

The California court agreed to send the FTC back to Georgia. And then, notwithstanding skeptical questioning by the Multi-District Litigation Panel, Ryan’s skillful argument won a transfer of all the private plaintiffs’ suits to Georgia as well. There, with the cases consolidated in accordance with Mayer Brown’s litigation strategy, Solvay secured dismissal of the FTC’s case and a substantial part of the private actions in early 2010.

It was the first such case by the FTC to be dismissed outright without any discovery—and for the agency, it was a very short trip back to square one.
Neither Lori Lightfoot nor Tim Bishop can predict the future, but you might have thought otherwise after their victory in *McReynolds et al. v. Merrill Lynch*.

Filed in 2005, the suit accused the nation’s largest brokerage firm, Merrill Lynch, of pervasive racial discrimination against its black financial advisors. Although Merrill Lynch denied the charges, the case exposed the firm to hundreds of millions of dollars in potential damages. The threat was not an idle one—in the preceding decade, three large financial institutions alone had paid more than $400 million to settle separate sex discrimination suits, with several of the biggest settlements in cases handled by the same lawyers who brought the *McReynolds* case.

The proposed nationwide class action set up a legal battle on many fronts, but one that plaintiffs’ counsel may not have expected involved the requirement that the plaintiffs’ claims share “commonality.” That threshold requirement is found in Federal Rule of Civil Procedure 23(a), and it had become an article of faith that its low hurdle was met, in cases like *McReynolds*, whenever the plaintiffs worked for the same employer. Indeed, everyone involved in the litigation spoke of commonality as a foregone conclusion. Everyone except the litigators from Mayer Brown. The firm had begun testing the “commonality” requirement in appellate courts across the country and had won a measure of success. After being brought on as co-counsel with Weil Gotshal, the Mayer Brown appellate team suggested a trial strategy that went against prevailing wisdom. They recommended attacking the plaintiffs’ case on commonality, rather than ceding that ground and making their stand on other requirements within Rule 23, as defendants typically do.

They were exploring new territory, but they had a guidebook. Mayer Brown partner Steve Kane had prepared a 50-page white paper on class certification, laying out the structure of the defense and the facts needed to assert it. Armed with its insights, the defense team elicited key admissions from the plaintiffs and obtained supportive affidavits from Merrill Lynch supervisors, all demonstrating the individualized nature of the allegedly discriminatory employment decisions at issue.

By the time the lengthy discovery period ended in 2009, the law was shifting in the defense’s direction. As Mayer Brown’s appellate lawyers predicted, courts of appeals were increasingly focusing on whether class members’ cases were “common” enough to be tried in a practical manner.

Mayer Brown briefed the issue with Weil, and the evidence that Lightfoot and others gathered struck home: reversing his assumptions from earlier in the proceedings, the judge found a lack of common issues and denied class certification.

Months later, the Supreme Court would decide the *Wal-Mart v. Dukes* case on the very same grounds, completing a five-year-long shift in the law that no one saw coming. Well, almost no one.

Since August, Merrill Lynch has achieved a string of victories arising from the plaintiffs’ continuing attempts to reverse their loss on the class-certification issue in *McReynolds v. Merrill Lynch*. Following Merrill Lynch’s original victory in the U.S. District Court for the Northern District of Illinois, the plaintiffs attempted to take an interlocutory appeal to the U.S. Court of Appeals for the Seventh Circuit. That attempt was denied by the Seventh Circuit on April 12, 2011. The plaintiffs then filed a petition for certiorari with the Supreme Court; that petition was denied on October 3, 2011. As they pursued their appeal, the plaintiffs simultaneously filed an amended motion for class certification, based on a claim that its motion was supported by the Supreme Court’s *Wal-Mart v. Dukes* opinion. That motion was denied on September 19, 2011. The plaintiffs again sought permission for an interlocutory appeal in the Seventh Circuit, which the court granted. Merrill Lynch filed its brief on the merits in December 2011.
An Uncommon Approach, Redux

Merrill Lynch

If class certification appeared likely in McReynolds, it was virtually guaranteed in Superior Offshore. And yet, for the second time in the span of a year, Mayer Brown took a unique approach that defeated the plaintiffs’ attempt to pursue a class action against Merrill Lynch.

The case stemmed from the rapid rise and fall of Superior Offshore International, which provided underwater construction and other services to the offshore oil and gas industry. In the wake of Hurricane Katrina’s devastation, the company seemed well-positioned for success. Only ten short months after a promising IPO, however, plaintiffs filed a series of class actions accusing the company of making misrepresentations to the SEC in the lead-up to its IPO. The so-called “Section 11” cases were consolidated in the Southern District of Texas. One year after going public, Superior Offshore’s shares were trading at $1. The company soon liquidated.

The solvent corporate defendants, including Merrill Lynch, were now a primary target of the plaintiffs’ claim for $142 million in damages. All Section 11 claims are based on the defendant’s public representations in SEC documents, and thus every plaintiff’s lawsuit would seem to raise similar if not identical issues—a critical requirement for the certification of class actions. And indeed, plaintiffs in Section 11 cases generally expect to succeed in persuading courts to certify a class in such cases.

But Mayer Brown saw an opportunity to argue that even if common issues existed among the plaintiffs’ cases, they did not “predominate”—an indispensable requirement for certification of a damages class. In opposition to the plaintiffs’ motion for class certification, Mayer Brown argued that the knowledge of individual investors was relevant to the action (for instance, their potential knowledge of the bankruptcy of a prior company led in part by Superior Offshore’s COO, which plaintiffs argued had not been properly disclosed in the company’s documents). What individual investors knew, and how they used that knowledge in their own investment decisions, Mayer Brown argued, would be a primary issue in any litigation. Judge Atlas agreed and denied class certification.

The ruling led to a swift settlement among all defendants of $1.9 million—just one percent of the original claim—of which Merrill Lynch was responsible for a de minimis amount.
Putting the Brakes on Trade-Secret Theft

Faiveley Transport USA, Inc.

Commuters don’t often think about subway brakes, unless perhaps the short squeaking sound gets past the song playing on their iPods. But a tremendous amount of thought and research goes into designing and manufacturing these safety components, producing valuable trade secrets in the process. And on June 26, 2011, subway brakes became the unlikely subject of one of the largest trade-secret verdicts ever recorded in New York State.

When partners John Mancini and Andy Schapiro walked into the courtroom to try Faiveley USA v. Wabtec, they had already won a summary judgment ruling that Wabtec, a former licensee of Faiveley’s braking technology, had stolen Faiveley’s trade secrets. Wabtec’s misappropriation, borne out by Mayer Brown’s diligent investigation, was confirmed at every turn in a complicated procedural history. But unraveling the truth of Wabtec’s theft was decidedly more difficult. Because the relevant documents were for “attorneys’ eyes only,” Mayer Brown could not turn to its client—the global expert in this highly specialized braking technology—for help. Consequently, Mayer Brown’s litigation team spent long hours reconstructing Wabtec’s so-called “reverse engineering” process.

After schooling themselves on dimensions, tolerances, material specifications, and other brake-related arcana, Mayer Brown unpacked the truth: Wabtec continued to use Faiveley’s trade secrets after the license agreement ended, and its reverse engineering effort relied on Wabtec employees familiar with Faiveley’s trade secrets. Mayer Brown’s efforts culminated in the summary judgment ruling, now a leading opinion in the area, clarifying the standard for evaluating reverse engineering in trade-secret cases.

But that victory, while sweet, posed a potential problem. With Wabtec’s liability established, the focus was now solely on damages, which had the very real chance of boring the jury. Moreover, Wabtec sought to dismiss Faiveley’s claims for future damages as too “speculative” under the relevant legal standards.

To capture the jury’s attention, Mancini began with the human tale of the whistleblower who first alerted Faiveley to Wabtec’s theft. He then laid out his story for the jurors, walking them through the technology behind the loud squeaking noise on the subway, Faiveley’s history as the preeminent global brake supplier and, most importantly, Wabtec’s theft and continuing use of Faiveley’s technology. The trial unfolded according to script and highlighted the reasons Faiveley was entitled to damages. Senior associate Vanessa Biondo conducted a hard-nosed cross of a senior Wabtec executive, eliciting the key admission that Wabtec continued to use Faiveley’s technology. Schapiro’s masterful examination of another Wabtec witness left no doubt that Faiveley’s future damages claim was supported by Wabtec’s own projections and far from speculative.

In the end, the jury awarded Faiveley $18.1 million, a figure that includes both past and future damages. With interest, the judgment should rise to $19.6 million. And suddenly, subway brakes were making headlines.

On August 29, 2011, the defendant filed a notice of appeal with the U.S. Court of Appeals for the Second Circuit. Briefing and oral argument have not yet been scheduled.

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Home values had collapsed, lifetime savings had dwindled, and the financial system had sunk into a malaise. In the midst of a severe recession, Wall Street financiers had become the target of the public’s fury. Against this backdrop, the trustee of a bankrupt investment firm, Sentinel, took aim at one of the biggest: The Bank of New York Mellon.

The bankruptcy trustee acted on behalf of Sentinel clients who lost money when the credit crisis revealed a scheme in which Sentinel had mixed client funds with its own and used them to secure a bank loan. Arguing that the Bank knew or turned a blind eye to Sentinel’s alleged fraud, the trustee, represented by Jenner & Block, claimed that Sentinel’s customers should have first dibs on the investment firm’s remaining funds, ahead of the bank’s $312 million secured loan.

The Bank of New York Mellon, the world’s leading asset servicer and one of the two major financial institutions in the United States authorized to clear transactions involving government securities, called on Mayer Brown. The trial team—which included, among others, Matthew Ingber and Sean Scott, both recently named as Law360 “Rising Stars” in litigation and bankruptcy, respectively—ambitiously aimed for a complete victory on behalf of the Bank.

They found a legal hook in the Commodity Exchange Act and successfully removed the case to the federal district court in Chicago. Once there, they convinced the court to rehear a motion to dismiss and won dismissal of all the trustee’s common-law claims. The second-chance victory was a huge one, eliminating the plaintiff’s right to a jury.

The trustee produced 11 million pages of documents, claiming no need to review Sentinel’s mountain of records for relevance. With the four-week, twenty-witness trial looming in April 2010, Mayer Brown’s e-discovery team sorted through the haystack looking for needles.

The Bank had far more than $312 million at stake. The plaintiff’s theory called for enhanced policing of those who clear government securities, a role in which the Bank processes 150,000 transactions worth $3-4 trillion on a daily basis.

Over 15 days of trial, Mayer Brown built a persuasive case—one that went against the prevailing mood—that although Sentinel’s scheme had since come to light, the Bank did not know of it while processing a huge volume of transactions for Sentinel and thousands of others.

In November 2010, the judge filed a 40-page opinion, giving The Bank of New York Mellon a complete and unqualified victory. ▲
Reflections of Excellence:
Pro Bono Victories

Mayer Brown is proud of our commitment to pro bono, participating in a broad range of pro bono public service and community activities around the world. For *The American Lawyer*, we highlighted two examples of the extraordinary work done by our litigators on behalf of pro bono clients.
George W. Bush’s fate hung in the balance as he awaited a decision in Bush v. Gore. Much more was on the line for Texas death row prisoner Claude Jones.

While the election dispute raged, Jones’s attorneys sent then-Governor Bush a petition to stay his execution. Jones had been convicted of murder based mainly on the shaky testimony, later recanted, of an alleged co-conspirator. Such inherently suspect testimony had been allowed only because of the existence of a single piece of corroborating evidence—an inch-long hair found at the scene. Although an expert admitted that his microscopic comparison could determine only so much, he testified repeatedly that the hair “matched” Jones, “scientific” evidence emphasized by the prosecution in closing and by the majority of the court of appeals in affirming the conviction. With Jones’s execution looming, his lawyers argued that a new type of DNA testing, one that could rule out a match with Jones, should be performed on the rootless hair.

Bush, who only months earlier advocated using DNA evidence whenever it could prove guilt or innocence, was never told that Jones was asking for a stay of execution to allow DNA testing that had not been possible at the time of his trial. Unaware of this crucial fact, Bush denied the petition. Claude Jones was executed on December 7, 2000.

An admitted career criminal, Jones had told his son Duane that he hadn’t committed the murder. Duane later said he was “98 percent sure” that his father was telling the truth. His lingering doubt remained, years later, when Innocence Project Co-Director Barry Scheck called Mayer Brown.

Partner Bill Knoll, who had succeeded in getting another death sentence thrown out in 2007, agreed to take up Jones’s cause. Just getting in the courtroom door required acrobatics. Only those with a personal stake in a case have “standing” to assert it, and Knoll represented not Jones but the Innocence Project and The Texas Observer. Drawing on the Texas Public Information Act, the First Amendment, and English common law, Knoll constructed an argument that his clients were merely asserting the long-standing right of the citizenry to open criminal trials. Former FBI Director William Webster, among other notables, supported the request. Even the district attorney defendant admitted at deposition that the public had an interest in the testing—whatever the tests would show.

In his summary judgment argument, Knoll was sensitive to the perception of a witch hunt aimed at Bush. He carefully avoided the case’s political aspects, emphasizing the importance of the true facts to the death penalty debate.

He waited a year for a decision. When it came, he had scored a victory that would alter the death penalty debate in Texas and across the nation. Mayer Brown and the Innocence Project shared the cost of the testing, which established that the hair had not come from Claude Jones but rather the victim himself.

“Now I believe him 100 percent,” Jones’s son said at last.
First, Illinois announced its decision to opt out. Then, New York. Then, Massachusetts. In the spring of 2011, each withdrew from a federal immigration enforcement initiative known as “Secure Communities.” Through this program, fingerprint records taken by local law enforcement are automatically shared with the U.S. Immigration and Customs Enforcement Agency (ICE) to identify potential candidates for deportation. However, there was mounting evidence that Secure Communities was not the program DHS advertised it to be.

The fight for that evidence started with Bridget Kessler, who had little idea she would be affecting national debate on immigration policy—much less establishing law on the government’s e-discovery obligations—as a former Mayer Brown summer associate. Before returning to the firm as an associate in October 2011, she took a teaching fellowship at Cardozo Law’s Immigration Justice Clinic. There, alongside the National Day Laborer Organizing Network (NDLON) and the Center for Constitutional Rights, her clinic filed a FOIA request seeking information about Secure Communities. Familiar with Mayer Brown’s pro bono commitment, as well as its e-discovery savvy, Kessler called on Mayer Brown and partner Anthony Diana for help in what would be a substantial document battle with federal agencies.

Secure Communities was sold to states as an enforcement effort targeting only serious criminals for deportation, and one they could opt out of at any time. But there were serious questions about how Secure Communities actually operated in practice. The FOIA request was intended to illuminate those questions.

The plaintiffs secured a decisive preliminary injunction requiring the government to produce responsive documents. The government, however, insisted that it would not generate those documents with metadata.

Agreeing with Mayer Brown’s contentions, Judge Scheindlin ordered production of the documents in a reasonably usable format. It marked the first time a court had spoken with such clarity to the government’s e-discovery obligations, and has established a template now routinely followed by FOIA litigants.

Ultimately, the documents obtained as a result of the FOIA request revealed powerful evidence about government misrepresentations concerning Secure Communities. Judge Scheindlin also took issue with the government’s withholding of information, noting that “ICE and DHS have gone out of their way to mislead the public about Secure Communities.” The revelations have landed like a bombshell in the immigration debate.

Mayer Brown’s efforts continue to result in other important findings regarding the program. The team obtained summary judgment in favor of NDLON in its quest to obtain an important document prepared by the DHS ICE Office of the Principal Legal Advisor. In doing so, an important precedent was established regarding the requirements necessary for a government agency to withhold documents based upon attorney-client privilege.

Also, following argument and negotiation, ICE agreed to generate a spreadsheet containing statistics on a random sample of individuals apprehended through Secure Communities. ICE’s eventual acquiescence to NDLON’s request for those statistics was an exceptional result given that the government generally has no obligation to create documents in response to FOIA requests.

Mayer Brown’s representation has helped pull back the curtain on misguided actions by the federal government, made headway in defining the federal government’s e-discovery obligations, and, eventually, will lead to a healthier immigration policy.
Reflections of Excellence: The Story Continues

Since making our submission to The American Lawyer in July 2011, Mayer Brown’s success continued throughout the rest of the year. The following is a sampling of the victories achieved for our clients in the latter half of 2011.
AXA Rosenberg, established as a joint venture between Paris-based global asset manager AXA Investment Managers and quantitative investment pioneer Barr Rosenberg, was one of the first well-known registered investment adviser “quant shops,” which use mathematical computer models to inform investment decisions. When AXA Rosenberg’s senior management and Board of Directors learned that its secret recipe—its proprietary computer model—had failed to account fully for a defined risk factor over a certain period, it retained Mayer Brown to help address the multiple legal issues at play — including corporate, regulatory (US, UK, French, Hong Kong and others), litigation, tax, insurance, and ERISA implications. Lead partner Fred Reinke drew on the firm’s wide base of experience across numerous practice areas and offices in the US, Europe and Asia, and when the SEC launched an investigation in Q2 2010, Mayer Brown took quick action, including overseeing the company’s internal investigation into this error and leading negotiations with the SEC. By February 2011, a deal settling all charges against the company had been successfully negotiated with the SEC which allowed the company to come to an efficient resolution of this matter. Mayer Brown is now working with AXA Rosenberg to settle follow-on class actions filed by certain AXA Rosenberg clients.

Just one month before trial began in a case with broad ramifications for employers’ duties under state and federal family medical leave laws, Foster Farms called in Mayer Brown. Lead trial attorney and partner Carmine Zarlenga accepted the short-notice assignment. The case was brought by a former employee represented by a public interest group with seemingly unlimited resources and no interest in settlement. Over two weeks of trial in a Fresno courtroom, he and the Mayer Brown team defended the company against the plaintiff’s claims that a vacation she had taken qualified as protected family medical leave since, just before leaving, she mentioned she would be caring for an ill family member. Foster Farms was forced to fire the plaintiff after she failed to return within three days of the end of her scheduled vacation. The case held large implications—and potential administrative nightmares—for workplaces subject to leave laws. After only two hours of deliberations, however, the jury returned to the U.S. District Court for the Eastern District of California courtroom and delivered a unanimous verdict in favor of Foster Farms.

In a new wave of lawsuits, consumers have begun asserting privacy-related claims against websites and smartphone manufacturers and service providers that allegedly collect and publish information about individuals. At the front of that wave was Robins v. Spokeo, a proposed class action suit in which the named plaintiff sought relief for alleged inaccuracies in his profile on Spokeo.com, a website that allows users to search for information about people. In an allegation with potentially wide-ranging ramifications for Internet search engines, Plaintiff claimed that Spokeo was a “consumer reporting agency” under the Fair Credit Reporting Act. Led by partner John Nadolenco, the Mayer Brown team representing Spokeo argued for dismissal of the action based on the plaintiff’s lack of any “injury in fact,” which Article III of the U.S. Constitution requires of all litigants in federal court. This defense has since become a pivotal issue in a number of other suits, including those against Apple and Google based on tracking features in their products. After initially agreeing with Spokeo, the court subsequently found that an amended complaint filed by the plaintiff alleged sufficient injury to proceed. Facing Mayer Brown’s request to immediately take the issue before the U.S. Court of Appeals for the Ninth Circuit, however, on September 19, 2011, the District Court reinstated its initial order and dismissed the action in its entirety.
About Mayer Brown

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We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world’s largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world’s largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

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