

Litigation Powerhouse: Morrison & Foerster

By Jess Davis

Law360, New York (August 18, 2016, 9:21 PM ET) -- Morrison & Foerster LLP's litigators have helped drugmaker Sandoz bring a generic multiple sclerosis treatment to market, forced a \$2.5 billion rate reduction in the Trans-Alaska Pipeline System and staved off a potentially disastrous class action against LinkedIn, earning it a spot on Law360's list of Litigation Powerhouses.

With a remarkable record of trial and appellate successes, the firm's litigators are even more remarkably free of ego. They describe an environment where collaboration trumps competition, where egos take a back seat to client service and where law is a profession first and a business second.

"There's no internal competition at MoFo," appellate practice co-chair Deanne Maynard said. "We are all on the same team, pulling the oars in the same direction for our client. That gets back to the way we staff matters — putting the best team together. The feeling here is we're all stronger working together toward one end."



Morrison & Foerster

Litigation Attorneys: 383

Litigation Partners: 131

Big Wins: Teva Pharmaceuticals USA Inc. v. Sandoz Inc. - After two rounds in the Federal Circuit and a win on a claim construction issue in the U.S. Supreme Court, MoFo won the right for Sandoz to begin marketing generic versions of an in-demand multiple sclerosis drug.

Global Community Monitor v. Lumber Liquidators - Amid a California state court trial that sought tens of billions in civil penalties against Lumber Liquidators for alleged failure to disclose chemicals in flooring, MoFo convinced a judge the plaintiffs had failed to prove their case, ending the trial and sending stock prices soaring.

Warsaw Orthopedic Inc. v. NuVasive Inc. - Brought in on appeal, MoFo's team convinced the Federal Circuit to vacate a \$101 million patent verdict against NuVasive in a dispute over devices and implants used in spinal surgeries.

Whole Woman's Health v. Hellerstedt - MoFo teamed up with the Center for Reproductive Rights to provide legal muscle in a high-profile case challenging Texas abortion restrictions, winning an injunction in the trial court and eventually convincing the U.S. Supreme Court the law placed an undue burden on access to abortion.

Sweet v. LinkedIn Corp. - Staving off a potentially disastrous precedent for LinkedIn that could have been accompanied by large penalties, MoFo trial lawyers shut the door on a putative class action in California federal district court that argued the company was considered a consumer reporting agency under the Fair Credit Reporting Act.

Trial Tip: "If it's not in the record, it didn't happen. We take the long view with our cases. If we don't win at trial, we want to win at appeal. And if we do win, we want to preserve it." — Ben Fox, co-chair, global litigation department

The 383-lawyer litigation department, with 131 partners, has a policy of staffing each case with the best lawyers for the matter, no matter their location. So while its San Francisco office has the most litigators, followed by Washington, D.C., Los Angeles and New York, MoFo lawyers are just as likely to be working on a case with their colleagues in Tokyo as they are with lawyers down the hall.

In a case for client Sandoz Inc., the firm fought appellate battle after appellate battle, invalidating a patent held by Teva Pharmaceuticals Inc. before the Federal Circuit then securing a ruling from the U.S. Supreme Court that claim construction is largely a legal decision reviewed de novo. When the case returned to the Federal Circuit, MoFo lawyers in 2015 again succeeded in invalidating the Teva patent, clearing the way for generic versions of Teva's lucrative multiple sclerosis drug Copaxone to come to market.

"I'm really proud of that win," said Ben Fox, co-chair of the firm's global litigation department. "Copaxone for multiple sclerosis is really a miracle-type drug that is benign in terms of side effects. Having greater availability of that drug where virtually all the other MS treatments have significant side effects is really important."

In an administrative trial before the Federal Energy Regulatory Commission that stretched on for 50 days in both Alaska and Washington, D.C., MoFo attorneys won an unprecedented decision that required Trans-Alaska Pipeline System carriers to reduce their past, current and future rates by about \$2.5 billion — by far the largest disallowance ever ordered by FERC.

And before a class action Fair Credit Reporting Act case against LinkedIn Corp. could get off the ground, MoFo litigators won a ruling destroying the argument LinkedIn could be considered a consumer reporting agency within the meaning of the act based on "reference reports" available through the networking site. The firm stopped in its tracks a potentially disastrous precedent for the company and others with similar business models, because the act provides for large statutory penalties for each violation.

The firm is a leader in high-pressure patent disputes, and bet-the-company cases in multiple industry sectors are a significant part of its caseload. But the litigation department is also seasoned at handling more discrete matters for institutional clients where there is a sharper focus on tying litigation dollars to the valuation of the case, and was hired to work on 1,500 new litigation matters between 2015 and 2016.

Michael Jacobs, who co-founded and co-chairs the firm's intellectual property practice group and previously led the firm's life sciences practice group, said while some people shy away from matters in which the firm has to adapt and manage costs, his group treats managing smaller cases as another set of skills to learn.

Jacobs said his job also entails reminding his colleagues "just how much fun this is and the amount of learning we get to do about the work of outstanding scientists and engineers and the ferment in the IP system."

In April 2015, Jacobs won a patent infringement jury trial for client Microscan Systems Inc. against Cognex Corp., both manufacturers of high-end bar code scanners. The case included a hard-fought issue he thought could easily confuse a jury at trial: how to properly measure the angle at which light was being beamed at a very small bar code so that the bar code could be properly read.

The firm sought summary judgment on infringement of the broadest claim at issue, presenting technical evidence that swayed the judge and eliminated the risk of jury confusion. But with Cognex arguing the

Microscan patents were invalid, Jacobs knew he didn't want to go into a trial without any infringement case at all — thereby ending up the defendant in an invalidity case instead of as a plaintiff alleging infringement — so the summary judgment portion of the case was limited.

"It minimized our trial risks," he said. "I've become a big believer in thinking about these cases on both the plaintiff and defense side as an exercise in managing risk. That strategy was designed to manage risk."

In another matter for Sandoz, the firm won a 2015 ruling in the Federal Circuit that provides an abbreviated pathway for U.S. Food and Drug Administration approval of generic versions of biologic-based drugs, allowing Sandoz to launch the drug Zarxio, which helps prevent infections in cancer patients.

The firm's appellate lawyers in 2015 convinced the Federal Circuit to vacate a \$101 million verdict against NuVasive Inc. in a patent dispute involving implants and devices used in spinal surgeries, against Medtronic Somafor Danek USA Inc. unit Warsaw Orthopedic Inc.

The appellate team also fought on behalf of auction house Sotheby's Inc. in the Ninth Circuit, eventually leading to an April ruling holding California's Resale Royalty Act is preempted by federal copyright law and could not be the basis for class action litigation on behalf of artists who claimed they were owed royalties after their work was resold.

The firm also scored victories in high-profile cases outside the business realm, working with the Center for Reproductive Rights to win a U.S. Supreme Court ruling striking down a restrictive Texas abortion law and playing a role in a March decision from the high court that held states must recognize same-sex parent adoption judgments issued by other states.

"It was a significant win for thousands of families bonded together through second-parent adoption," Maynard said.

And she said the win was even more impressive because the high court decided the case on the merits of the briefing, without hearing argument.

Looking ahead, the firm will flex its muscle in several sprawling cases with hundreds of millions at stake. It represents Lumber Liquidators in more than 130 class actions filed in 28 states, along with investigations by multiple state and federal agencies, all focusing on claims the company's Chinese-produced laminate flooring releases higher levels of formaldehyde gas than legally allowed.

It also represents FanDuel Inc. in more than 40 multidistrict litigation class action matters alleging false advertising and misuse of confidential or proprietary information, with plaintiffs claiming FanDuel employees used confidential information to gain an unfair advantage in contests on other competing fantasy sports websites. It represents Fitbit Inc. in consumer class action litigation regarding its activity trackers and in securities litigation.

And the firm represents Sumitomo Electric Industries Ltd. in the largest MDL proceeding ever, which consolidated dozens of class actions asserting price-fixing conspiracies related to more than 30 different auto parts. The civil cases follow numerous corporate and individual guilty pleas in the U.S., Japan and the European Commission, while government investigations around the world continue.

Several recent new hires have also livened up the litigation department, among them a trio of former prosecutors: Southern District of New York prosecutor Carrie Cohen, who joined the firm's white collar

defense and securities litigation groups in May, James Koukios from the U.S. Department of Justice Criminal Division's Fraud Section, and Chuck Duross, the former head of the DOJ's Foreign Corrupt Practices Act.

And while the firm's litigation department has typically grown organically, through internal promotions or hiring in ones and twos, it made an unusual move earlier this year when it hired an eight-partner government contracts group from Jenner & Block LLP. MoFo's existing government contracts group had been just nine lawyers before their arrival, but the way that team has integrated with the firm "has just been so fabulous," Fox said.

"There's work immediately going back and forth between their group and longtime partners," Fox said. "The firm takes a lot of pride in viewing clients as the firm's clients, not as the clients of individual lawyers, so getting that group that shares really MoFo-esque values has been really successful. I think they opened 92 separate matters in their first 30 days."

Jacobs said the firm's drive to deliver wins time after time comes from self-motivation on behalf of all members of a litigation team, down to the youngest associate. The firm invests heavily in its associates, often giving them a high degree of responsibility early on, whether it's taking depositions or arguing motions.

It does so knowing that every young lawyer is bound to make a mistake — and Jacobs is quick to admit he isn't exempt from that list, recounting a time he inadvertently produced privileged documents to opposing counsel.

"It's not that we reward mistakes," he said. "But at the same time, none of us do our best work when we're in terror. We do our best work when we are challenged to perform at the highest level."

--Editing by Katherine Rautenberg and Catherine Sum.