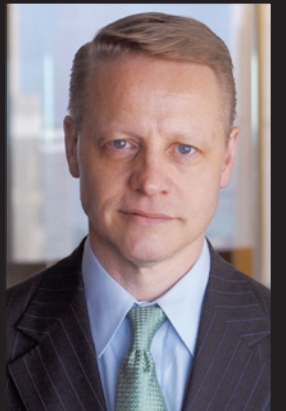


THE NATIONAL
LAW JOURNAL

WINNING

SUCCESSFUL LITIGATORS, POWERFUL STRATEGIES



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We asked our readers to nominate trial attorneys with at least one significant win at jury or bench trial within the past 18 months and a track record of success over many years. We supplemented these submissions with our own research. The criteria for a “significant win” included substantial damages at stake, establishment of an important precedent being altered or unfriendly jurisdictions overcome.

—MICHAEL MOLINE

In defending tobacco companies, less was more

Litigator helps defeat hospitals’ bid to recover \$4 billion for treating smoking-related illnesses.

BY KAREN SLOAN

“It’s not the notes you play. It’s the notes you don’t play.” That saying, often attributed to jazz great Miles Davis, is something Andrew McGaan of Kirkland & Ellis said he keeps in mind every time he heads into court.

“One of the most difficult things at trial is deciding what not to do—not putting up witnesses or not telling certain stories,” the Chicago partner said. “That involves making a difficult judgment call and it runs counter to our instincts to do everything, say everything, ask everything, put everything in. But that’s not the way to do it.”

This less-is-more strategy was key to the successful defense by several major tobacco companies last year in a suit brought by a consortium of Missouri hospitals. The hospitals sought more than \$4 billion in costs they incurred during decades spent treating patients who smoked and never paid their hospital bills.

In three months, 26 jurors (including 14 alternates) heard testimony from 49 witnesses. McGaan and his fellow defense attorneys had planned a full-

scale defense, but ultimately called just three witnesses in three days, feeling that they had made their case during cross-examination. The jury agreed, and after two weeks of deliberations returned a verdict in favor of the tobacco companies—the largest defense trial victory in a tobacco cost-recovery suit to date.

The suit originally was filed in 1998 by more than 60 Missouri hospitals against six major tobacco companies. McGaan was the lead attorney for three of the defendants: R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp. and The American Tobacco Co. He worked closely with attorneys representing the other defendants, including Dechert partner Diane Sullivan for Philip Morris and Thompson Coburn partner Carl Rowley for Lorillard Inc.

Bypassing the planned defense testimony “was not an easy strategic decision to make,” said Sullivan, who took the lead at trial on matters pertaining to the conduct of the plaintiffs. “But keeping it simple was the key. In a long trial, there are a lot of witnesses and sideshows, but focusing on the core issues ended up being the right thing to do.”

After bouncing around federal court

and state appellate courts, the suit came to trial in St. Louis County, Mo., Circuit Court in January 2010. The hospitals originally sought more than \$4 billion in unpaid treatment costs, but that fell to \$455 million plus punitive damages as a result of summary judgment motions and because nearly half the original hospitals dropped out voluntarily.

DESIGN DEFECT?

The hospitals, represented by Kenneth Brostron of St. Louis firm Lashly & Baer, argued that they lost money for years treating patients with smoking-related ailments, both through their charity programs for the indigent and because some patients simply never paid their bills. They argued that cigarettes are defective and the manufacturers were negligent in failing to make them reasonably safe. Brostron did not return calls for comment.

“We saw the cases as having two big parts: Did the hospitals lose money because there were more smokers or not? And was it true or plausible to say that every cigarette in the U.S. market for the past 50 years was defective or negligently designed?” McGaan said.

ANDREW MCGAAN | KIRKLAND & ELLIS



CHOICES: "One of the most difficult things at trial is deciding what not to do—not putting up witnesses or not telling certain stories."

"They needed both of those to win."

McGaan and the rest of the defense team attempted to undermine the idea that the hospitals lost money as a result of smoking. To the contrary, they offered evidence that cigarettes were quite effective at generating business for hospitals. They produced minutes from hospital board meetings in which executives discussed plans to bring in more patients. They discussed the profitability of areas like oncology, cardiology and pulmonology—specialties that treat smoking-related illnesses. During cross-examination, defense lawyers questioned hospital executives about their plans to boost revenue by increasing their number of patients.

"First and foremost, hospitals don't lose money because more patients come through the door," McGaan said. "It was a real common-sense proposition that the plaintiffs never really answered. They, instead, wanted the jury to ignore

the fact that 95% of all patients who come through a hospital door pay their bills or have insurance that pays their bills."

Regarding the products defect claims, rather than dispute the fact that smoking is a health risk, the defense team argued that cigarettes don't qualify as defective because there is no proven way to manufacture cigarettes that are safe. Even without nicotine, tobacco remains carcinogenic, McGaan told the jury.

"To my mind, one of the key points was to listen carefully to what the plaintiffs' lawyers were saying when they defined the standard for a defective product as one a manufacturer would recall and fix," McGaan said. "They set a standard they couldn't satisfy."

The defense laid the groundwork for success weeks before the opening statements during an intense voir dire process that spanned months. About 600 jurors

TRIAL TIPS

Deal straight with judges and understand how they want the case to run. Jurors will pick up on how the judge responds to you, and that will tell them whether you can be trusted.

Tell a story across a kitchen table that your mother can understand.

The decisions about what not to do are key. Don't get overwhelmed by the amount of information.

filled out 80-page questionnaires. Live voir dire lasted two weeks, with groups of 60 potential jurors questioned during two-day sessions.

"Smoking is unpopular today," McGaan said. "The way you begin dealing with that is in voir dire. You make it clear to potential jurors what the case is about. We emphasized that this was a fight between two large businesses over money."

On April 29, 2010, the jury returned a verdict that cigarettes are not defective and the tobacco companies were not negligent in manufacturing them. As a result, the jury did not consider subsequent charges of conspiracy and did not award any damages. The plaintiffs have indicated they will not appeal.

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