

2014

PENNSYLVANIA LITIGATION DEPARTMENTS OF THE YEAR



**GENERAL LITIGATION
— WINNER —**

Ballard Spahr
LLP

L to R: Stephen J. Kastenber, Geoffrey A. Kahn, John B. Langel, Leslie E. John, David H. Pittinsky and M. Norman Goldberger.

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Photo by Nanette Kardaszkeski.

GOING THE DISTANCE

BALLARD SPAHR CONVERTS RELATIONSHIPS INTO PRECEDENT-SETTING VICTORIES

By Gina Passarella
Of the Legal Staff

With all eyes on Facebook's IPO in May 2012, NASDAQ had a technical glitch at one of the worst times imaginable. Their systems went down that Friday afternoon, delaying the social networking site's opening on the exchange and leaving trades of millions of shares unconfirmed for hours, forcing traders to estimate what moves to make next.

Ballard Spahr partner Stephen Kastenberg saw on the news what was happening to his client—he and his firm had been kept on to work for NASDAQ after the exchange bought his longtime client Philadelphia Stock Exchange in 2007.

"Like everyone else, it was a Friday and I saw it over the wires," Kastenberg said. "I certainly didn't call anyone, because you don't need to call in the middle of a crisis if you're not sure you are going to be helpful."

But it was Kastenberg who got the call. A few of them actually. While walking to a dinner party, Kastenberg got a call from an associate at the office that the head of litigation at NASDAQ was looking for him. The head of litigation called, too.

Kastenberg was quickly signed on to the case and his advice was needed before NASDAQ's board meeting the following day. He then got on the phone with securities litigation partner Justin Klein and Ballard Spahr general counsel and litigation partner William Slaughter to talk strategy.

"Then it was kind of like drinking from a fire hydrant," Kastenberg said. "It was fascinating—a lot of media coverage, governmental inquiries, potential litigation. NASDAQ announced almost immediately that they wanted to come up with a voluntary compensation program. That was unprecedented and unique for a stock exchange."

It was an intense several months as Kastenberg and his team worked with the Securities and Exchange Commission to approve the \$62 million compensation program and resolve the enforcement action the SEC brought against NASDAQ. The team is also in the midst of fighting

two lawsuits brought by those who didn't want to participate in the compensation program. As of press time, both were on appeal to the U.S. Court of Appeals for the Second Circuit and both were being handled by the Ballard Spahr team that had successfully argued their positions in the lower courts.

Kastenberg and the firm's work on this case is just one example of how the firm's litigation department operates. The team can jump onto cases quickly, handle the litigation and regulatory components of a matter and handle both trial and appellate issues. And its work for longstanding clients begets bigger and bigger matters.

Much of the litigation Ballard Spahr attorneys have handled over the past two years is a testament to the foundation former firm chairman Arthur Makadon helped build. Makadon, a longtime leader of the firm's litigation department before chairing the entire firm, died in July 2013. While the loss was a huge and unexpected blow to the firm's culture, his work lives on through the several partners he either hired as young attorneys or successfully recruited as laterals years ago.

It was Makadon who brought on the Philadelphia Stock Exchange as a client, and he shared that work with Kastenberg. It was Makadon who hired or recruited almost all of the firm's current leading litigators.

"Arthur deserves great credit for that," litigation department chairman John Langel said.

It was Makadon who, back in the 1990s, hired a team of attorneys that included the late litigators Alan Davis and Steve Arbittier, as well as current Ballard Spahr litigators David Pittinsky and Burt Rublin. Later, Makadon hired securities litigator Norm Goldberger and white-collar defense attorney Henry Hockeimer, among others, Langel noted. Makadon also helped foster homegrown talent such as Mark Stewart, the current firm chairman, and litigators Geoffrey Kahn, Slaughter, David Fryman and Shannon Farmer.

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It was also Makadon who helped grow Ballard Spahr's longtime relationship with client GlaxoSmithKline.

Makadon pulled Kastenberg into an antitrust matter for GSK in 1993 as the first case Kastenberg ever worked on at Ballard Spahr. Twenty years later, Kastenberg led the firm's

representation of GSK in a massive antitrust case against the company in *In re Flonase Antitrust Litigation*.

The firm was invited to participate in a beauty contest to work on the matter.

"As often happens in general with antitrust, we are usually competing against firms from New York and Washington, where the majority of antitrust firms are," Kastenberg said. "Our approach is to always not just check the boxes, but think creatively. Are there ways to do something different and achieve a favorable resolution?"

The firm's creative proposal—something Kastenberg didn't want to detail too greatly—combined with its long-term relationship with GSK helped it get a matter that presented issues of first impression and the dissection of 40 states' laws.

With patent protection set to expire on Flonase, a prescription nasal allergy spray responsible for billions in revenue, GSK filed citizen petitions asking the U.S. Food and Drug Administration to finalize standards for generic nasal spray.

It took two years for the FDA to reject GSK's petitions and greenlight the entry of generic nasal sprays to the market. That caused direct purchasers, health care providers and consumers to file an antitrust suit alleging GSK purposefully delayed entry of a generic to the market.

Such cases usually involve patent infringement issues, and that meant the district court in the Eastern District of Pennsylvania had little case law to rely on. So Ballard dissected the FDA's processes and developed an argument based on the Noerr-Pennington doctrine of a First Amendment protection of immunity for petitioning the government on a theory that isn't objectively baseless.

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The Ballard Spahr team was able to reduce the size of the case and the number of plaintiffs. The case was settled a month before trial for less than 4 percent of what the plaintiffs were seeking.

Ballard Spahr’s litigators pride themselves not only on taking a case from start to finish, but also on being called in to handle appeals on a last-minute basis.

Pittinsky, with 47 years of practicing law under his belt, did a lot of that in the last two years.

Pittinsky wasn’t involved in *Coben v. Chicago Title Insurance* when a U.S. District Court for the Eastern District of Pennsylvania judge granted class certification to thousands of purchasers of title insurance who claimed they were overcharged when they refinanced. But he was successful in using case law that came down in the intervening years after the class was created, and he was hired in order to convince that same judge to change his mind and decertify the class.

Chicago Title wasn’t Pittinsky’s client, but the company asked him to step into the case given his strong oral advocacy skills and his familiarity with the court and the judge.

Pittinsky’s skills were put to the test one day in November 2012 when he had to argue two cases involving issues of first

impression before the U.S. Court of Appeals for the Third Circuit. Being the senior partner that he is, Pittinsky certainly has earned the ability to pass off brief-writing duties to a more junior attorney. But he didn’t. And that is a big part of why he won both appeals, he said.

“One of the things that helped me in those two cases is that I had actually written the briefs,” Pittinsky said. “I didn’t have someone else do it. I was fully familiar with what the issues were. ... I think that makes a big difference. In a Third Circuit argument, I would never feel comfortable coming in to argue it unless I had a close connection to the briefs.”

In *Edmonson v. Lincoln National Life Insurance*, Pittinsky focused on highlighting certain facts he said would help the court decide the law in his client’s favor. And his win was a win for the entire insurance industry.

The Third Circuit upheld the company’s use of retained-asset accounts for the payment of life insurance benefits. Virtually all major life insurance companies in the United States use retained-asset accounts, according to Ballard Spahr.

The court held that Lincoln National did not breach its fiduciary duties under the Employee Retirement Income Security Act when it chose to pay the plaintiff with a retained-asset account and then invested the retained assets for its own profit. The majority opinion also held that the retained assets were not plan assets as defined by ERISA.

In his second victorious argument that day in November, Pittinsky was able to convince the panel hearing *Rodriguez v. National City Bank* that a \$7 million settlement his client had previously agreed to was unenforceable.

The proposed class sued National City Bank over alleged discriminatory lending practices to Hispanics and blacks. The parties reached a proposed settlement of \$7 million, but the district court didn’t

approve the class or the settlement, as it was awaiting the U.S. Supreme Court’s decision in *Dukes v. Wal-Mart*. When the high court ruled in *Dukes* that the proposed class members couldn’t satisfy the commonality element because each alleged discriminatory act was made at the discretion of the local manager, the district court asked the parties in *Rodriguez* whether a class could be certified.

“I settled before *Dukes* became relevant, so I couldn’t say anything,” Pittinsky said, noting the plaintiffs said *Dukes* would have no impact on the settlement.

But when the district court ruled it couldn’t certify the class and the plaintiffs appealed, Pittinsky was free to argue the class should not be certified. He won and the plaintiffs did not appeal.

Langel said the firm’s philosophy is to provide clients with the “very best quality, efficiently.”

Some of Ballard Spahr’s largest clients might not be the largest clients of other firms, Langel said, but they get “great attention” from Ballard Spahr because the firm is accessible and responsive.

“We talk about being ready on an emergency basis 24 hours a day to run into court on matters of first impression,” Langel said. “We have to be able to sprint and we have to be able to run a marathon.”

Throughout 2012 and 2013, Ballard Spahr got a lot of miles under its proverbial belt. ♦

BALLARD SPAHR BY THE NUMBERS

Department Headcount

Firmwide	207
Pennsylvania	89

Department as Percent of Firm

Headcount	40
Revenue	39