

Public Citizen Litigation Group: Industry's Relentless Adversary

Public Citizen Litigation Group has had plenty to cheer about this year. It argued four cases before the U.S. Supreme Court, winning three of them. Its one loss was particularly disappointing, though.

The court ruled in *Riegel v. Medtronic* that FDA pre-market approval of medical devices pre-empts individuals from filing product liability suits against the manufacturers. The Litigation Group had won an earlier pre-emption case in the device arena, *Medtronic v. Lohr*, in 1996.

Despite the loss this time around, Public Citizen did not concede defeat. The morning after the ruling attorneys began working on legislation to override the decision and providing advice to Rep. Henry Waxman's staff.

On June 26, Waxman, D-Calif., and Rep. Frank Pallone Jr., D-N.J., introduced the Medical Device Safety Act of 2008. The bill specifies that individuals may continue to bring state product liability suits against device manufacturers. A companion bill will be introduced in the Senate.

"We're relentless. We don't quit," Brian Wolfman, director of the Litigation Group, said. "We're eventually going to win the fight on pre-emption on devices and on drugs."

Industry has reason to be wary given the group's successful track record. Since its founding in 1972 as an arm of Ralph Nader's organization, the group has argued 55 cases before the Supreme Court, winning 32 of them.

The nine-lawyer staff focuses on a broad range of issues from suing administrative agencies to get them to follow statutory mandates to fighting unfair class action settlements and advocating for free speech on the Internet.

Thomas Goldstein, a partner at Akin Gump Strauss Hauer & Feld, said there is no other public interest group devoted to litigation in the Supreme Court. "They are absolutely unique," he said. "There is no substitute for them."

The Litigation Group helped prepare Goldstein for his first argument before the Supreme Court in 1998 when he was a third-year lawyer. Alan Morrison, the founder of the group, helped him with his brief and then held moot court practice sessions to hone

his argument. Goldstein has argued 17 cases before the court since then and the Litigation Group has mooted most of them.

From Pre-emption to FDA Litigation

Public Citizen Litigation Group is also a prominent adversary of the pharmaceutical and medical device industries, most notably on the issue of pre-emption. In addition to *Riegel*, it represented the respondent plaintiff in *Warner-Lambert v. Kent* before the Supreme Court this year. The court reached a tie vote, upholding a lower court ruling and allowing litigation to proceed against the company ("The Pink Sheet," March 10, 2008, p. 16).

That case involved the narrow question of whether federal law pre-empts a state statute that allows someone to bring a product liability suit only if the manufacturer concealed information from FDA. The Supreme Court will address the broader question of whether FDA drug labeling requirements pre-empt state product liability claims in *Wyeth v. Levine* during its next term.

In that case the Vermont Supreme Court sided with the plaintiff, ruling that manufacturers can avoid state failure-to-warn claims without violating federal law by making unilateral changes to FDA-approved labeling. The plaintiff's trial lawyer turned to the Litigation Group for help, and it filed a brief in opposition to Wyeth's certiorari petition.

Public Citizen won't get to argue the case before the Supreme Court, however, since the plaintiff brought in David Frederick of Kellogg, Huber, Hansen, Todd, Evans & Figel, to do so.

The Litigation Group has also squared off against industry in class action settlement disputes. Last year it objected to the proposed settlement of a class action against GlaxoSmithKline involving its antidepressant *Paxil* (paroxetine).

The group revised the terms of the settlement so class members did not have to submit drug receipts and it got the company to agree to provide additional notification of the settlement offer to class members. And for the first time, Public Citizen sent out its own notice to the public via a YouTube video.

The Litigation Group also provides the legal muscle for Health Research Group, its sibling organization. It has filed several suits under the Freedom of Information Act to force FDA to disclose information. And when FDA does not respond to HRG petitions for the agency to remove drugs from the market or strengthen their warning labels, the group steps in with a lawsuit.

Last month it sued FDA for failing to withdraw products containing the painkiller propoxyphene (including AAIPharma’s *Darvocet*) from the market and in January it sued FDA for not requiring a “black box” warning on fluoroquinolone antibiotics such as ciprofloxacin (Bayer’s *Cipro* and generics) about the risk of serious tendon injury.

HRG director Sidney Wolfe says the group has submitted 50 petitions to FDA to either ban a drug or require a black box warning and has been successful about two-thirds of the time.

A Different Litigation Model

Wolfman spoke about the history of the Litigation Group in an interview at Public Citizen’s headquarters in Washington, D.C. The consumer advocacy group owns a spacious three-story brick house off Dupont Circle which it bought from the government 13 years ago. Built in 1887, the place has the charm and beauty of an old estate.

The entrance way has a non-working fireplace with a broad stairway leading to the upper floors. The room to the left was once a ballroom. Now used as a press room, it has a large conference table and a timeline of Public Citizen posted along the wall. A sliding wooden door blocks off a smaller room which is used for meetings and moot court sessions. The walls in this room and throughout the house are painted a gray-blue the color of the sea.

Sitting at an oak table in a small room off the foyer, Wolfman talked about the defining characteristics of the Litigation Group. He said it is able to take on such a large number of substantive cases because of the kind of lawyers it hires and the way it sets up cases to go through the courts.

The Litigation Group looks for individuals who are “really grounded, know who they are and what they want to do and are self-starters,” said Wolfman, who has headed the group for the past four years.

One lawyer does most of the work on a case and unlike at most firms where a senior lawyer takes over in court, the person initially assigned the matter takes it through trial. As a result, Public Citizen attorneys get to argue important cases early in their career. Adina Rosenbaum, who is four years out of law school, successfully argued *Taylor v. Sturgell* before the Supreme Court this year.

Wolfman argued his first case to the high court a year after he joined Public Citizen in 1990. He had previously worked as a staff attorney at a legal services program in Arkansas representing poor people. William Schultz was assigned two cases the day he joined the Litigation Group in 1975. He argued one of them at the Supreme Court within two years and the second was still going on when he left 14 years later in 1989.

Schultz, now a partner at Zuckerman Spaeder, said few lawyers ever have an opportunity to handle the kind of high-level matters Public Citizen takes on. “It’s a dream kind of job for a lawyer,” he said.

“There is no better litigation job in the country, period,” seconded David Vladeck, who left the group in 2002 after 27 years to become a professor at Georgetown University’s Law Center. The caliber of litigation is unsurpassed, lawyers have a lot of autonomy and anyone who has worked there has had at least one Supreme Court argument, he said.

Money Isn’t Everything

The one downside to the job is the low pay. The most senior lawyers in the group make around \$80,000, which is half of what a first-year lawyer at a top-grossing law firm earns. But despite the economic hardship, lawyers at Public Citizen stick with the organization. The group has not lost an attorney in more than four years and the most senior lawyers have been there 30, 18 and 14 years.

Vladeck said it was a difficult decision for him to leave but with two kids about to go to college he felt pressure to boost his income.

When he told the hiring committee at Georgetown one of his reasons for taking the job was to make more money, “they cracked up,” Vladeck recalled. Most lawyers take a pay cut when they take a teaching position but Vladeck said he almost doubled his salary.

As a public interest shop, the Litigation Group does all its work pro bono, operating on an annual budget of \$800,000 to \$900,000 (*see chart*). Public Citizen is funded by foundation grants and donations from its 80,000 members and the Litigation Group occasionally receives court-awarded attorney fees.

Alan Morrison’s Legacy

Current and former staffers say the camaraderie in the group, as well as the chance to tackle groundbreaking cases, makes Public Citizen a great place to work. They point to Alan Morrison, who founded the Litigation Group with Ralph Nader, as the reason people have stayed and the place has flourished. He left in 2004 to teach at Stanford Law School and now serves as special counsel for Fair Elections Legal Network.

Advocacy Lawyering By The Numbers

Public Citizen Litigation Group delivers a great deal of bang for the buck with its involvement in many Supreme Court cases despite its limited staff and budget. The setup allows relatively inexperienced attorneys a chance to argue cases before the high court.

Founded: 1972

Number of Attorneys: Nine

Annual budget: \$800,000 to \$900,000

Notable Supreme Court cases:

- INS v. Chadha (holding the legislative veto unconstitutional)
- Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council (establishing the doctrine of commercial-free speech)
- Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio (establishing First Amendment protection for certain lawyer advertising)
- Medtronic v. Lohr (establishing that design-defect claims involving 510(k) devices are not preempted by the Medical Device Amendments)
- Amchem v. Windsor (class action case establishing protections for class action settlement objectors)
- Jones v. Flowers (establishing important due process protections for homeowners before a state can take their home on the ground that taxes are unpaid)

“Alan was a fantastic director,” Wolfman said. “He engendered enormous loyalty to the organization, principally because people who were brought in expected to be the lead” in cases and argue them in court.

“He is an absolutely brilliant lawyer and wonderful teacher,” added Vladeck.

Retired professor Barbara Hinkson Craig documents the early years of the organization in her book “Courting Change: The Story of the Public Citizen Litigation Group.” She describes how Nader sought a “litigation tiger” to launch the group and found Morrison, who was then assistant chief of the Civil Division in the U.S. Attorney’s office for the Southern District of New York.

“My proudest achievement at Litigation Group was not all the cases we won but to walk away and have people take it over without missing a beat,” Morrison said. Part of the reason for its success, he said, is that “people really believe in the work and there is a spirit of cooperation, no backbiting or fighting over promotion or salaries.”

The group has helped change public policy in numerous areas. For example, Morrison noted that the group was the first to begin filing objections to class settlements on behalf of absent claimants. “We were the skunk at the garden party,” he said, as the parties in these cases were content with the settlement terms. But as a result of these cases, he said, federal courts understand hearings on the fairness of a settlement are essential.

Morrison said the group’s open government cases have also pushed FDA and other agencies to disclose information. In one of its most famous cases Public Citizen and historian Stanley Kutler sued the National Archives and Records Administration and President Nixon’s estate for the release of Nixon’s White House tapes. In 1996 the parties reached a settlement agreement for their release.

Public Citizen not only won the case, it also snagged one of its chief adversaries. Scott Nelson, then a partner at Miller, Cassidy, Larroca & Lewin represented Nixon and his family. After Miller Cassidy was acquired by Baker Botts, Vladeck said he and Morrison convinced Nelson to join the Litigation Group in 2001.

It is an indication of how highly Public Citizen lawyers are regarded by their opponents and others in the legal community.

"They've got top-flight lawyers," said William Vodra, senior counsel at Arnold & Porter. Vodra worked opposite Wolfman in negotiating how to notify patients about the risks of the Bjork-Shiley heart valve.

An initial draft of the letter to patients informed them they had a one-in-three chance of survival if the valve, which had a tendency to fracture, was located in one position in their heart but a greater chance of death if the valve was removed. Vodra said after holding focus groups with patients they learned the wording of the letter needed to be altered.

"I've found Brian to always be scrupulous in terms of integrity and careful about the interests of patients," Vodra said.

Some corporate opponents have had a hard time believing the group was working out of altruism, however. General Motors hired private detectives to get information on Ralph Nader after he wrote "Unsafe at Any Speed," which exposed automobile design defects, particularly in General Motors' Corvair.

Vodra said the detectives learned Nader lived in a boarding house with a pay phone in the hallway. Nader subsequently filed an invasion of privacy suit against GM and settled the case for \$425,000.

The Litigation Group is clearly motivated by something other than money. "They can stand up for truth, justice and the American way," Vodra said. "That's a potent reward."

Lending a Hand to Other Lawyers

Over the years the group has launched initiatives to help other lawyers. In 1990 Morrison began the Supreme Court Assistance Project to assist lawyers who are either seeking Supreme Court review of their cases or, more often, trying to prevent the high court from granting their opponent's certiorari petition.

The goal of the project is to correct an imbalance in the system since businesses are able to hire lawyers with a lot of Supreme Court experience. During any

term of the court the project is involved in 15 to 20 cases that have been granted cert, helping to write briefs and prepare for oral arguments.

Public Citizen offers a one-year fellowship to recent law school graduates to work on the project. A fellow's job is to screen Supreme Court cert documents that have not yet been granted and coordinate Public Citizen's assistance. Deepak Gupta, who started with the Litigation Group as a fellow on the project, said it finds cases that the Supreme Court would not otherwise take up.

For example, Gupta said he got a phone call from a woman after her father's house was sold out from under him in a tax sale. The Litigation Group found there was a split in the courts on a constitutional issue and convinced the Supreme Court to take up the case, *Jones v. Flowers*.

The court ruled in its favor, establishing due process protections for homeowners and enabling their client to get his house back.

Gupta now heads up Public Citizen's Consumer Justice Project, which was founded in 2005 to work with private and non-profit lawyers on consumer rights cases, such as predatory lending class actions.

One of its current cases is a suit against the Department of Justice for failing to establish a consumer database on auto safety, which was mandated under a 1992 statute.

In addition to the annual fellowship, the Litigation Group also hires three summer law clerks. Wolfman said these young students offer a counter to the staff, which can become set in its ways.

"We look for people who will give us a little hard time and challenge our assumptions," Wolfman said. "Law students or new lawyers know a little about a lot of things" and can look at a problem from a different angle.

Wolfman believes the Litigation Group has been so successful because its lawyers have experience on a broad number of issues. "Expertise is important but if I had to choose between expertise and general knowledge I'd choose the latter every time," he said. "Generalists are more likely to see connections between what appear to be disparate areas of the law."

– Brenda Sandburg (*b.sandburg@elsevier.com*)