

Small Firms Katherine Gaidos

Horvitz & Levy's
Barry Levy, Ellis
Horvitz, David
Axelrad, David
Ettinger and
Mary-Christine
Sungalia, from
left.



Photo by Sammy Davis@mediaone.net

Award Busters

When a company finds itself saddled with a costly **verdict**, who do they call? Horvitz & Levy, the state's biggest **appellate** boutique, with a 75-percent success rate.

They're a plaintiff's worst nightmare. Before the ink dries on a jury's decision awarding big damages to a plaintiff, defendants often place a phone call to the San Fernando Valley. There, Ellis Horvitz or one of his colleagues is likely to answer the plea to overturn the judgment, or at least get a reduction in damages.

An indication of the dominance of Horvitz & Levy in the appellate field is provided by looking at the 10 largest state court judgments in California in the past two years. The firm is handling half of the appeals – and already it has obtained reversals or hefty reductions in the judgment leveled against six of its 10 clients.

In June, Horvitz and company succeeded in overturning a \$174.9 million jury award over genetically engineered corn seed against Monsanto in *Mycogen Corp. v. Monsanto Co.* The firm also spoiled Francis Ford Coppola's fun by whittling an \$80 million verdict against Warner Bros. to \$20 million, in a dispute over Coppola's "Pinochio" movie.

And, it seems, the bigger the verdict, the better the chances that Horvitz & Levy will be asked to draft an appeal. This is particularly true in the area of punitive damages where, in the last decade or so, the firm has kept a lid on the increased number of punitive damage claims.

Founding partner Ellis Horvitz describes the firm's clients as "corporate America," which is regularly found to have injured, infringed or otherwise harmed plaintiffs.

It didn't start out that way, however. Up until about 20 years ago, Horvitz's specialty was representing plaintiffs on appeal.

"The defense started calling," recalls Horvitz, "and I must say the pay was more regular."

Fees from litigation-plagued companies have made Horvitz & Levy the largest appellate boutique in the state. And, with a success rate of 75 percent, it's clearly one of the most successful. (In the past 10 years, the firm has helped get favorable results for its clients in 24 of 29 cases taken to decision in the California Supreme Court, 448 of the 605 cases it handled to decision in the California Courts of Appeal and 40 of 52 cases it handled before the 9th U.S. Circuit Court of Appeals.)

Typically, appellate lawyers have been brought in after the trial. That's changing, however, as Horvitz attorneys are beginning to be consulted during the trial itself, with an eye to an appeal.

"There are some cases where everybody will have a pretty good idea that no matter how it comes out, whoever loses is going to take it up on appeal," says partner David Ettinger. "Increasingly we've found clients are wanting an appellate specialist involved at an early state to make sure that the case is as well ready for appeal as can possibly be."

According to Horvitz lawyers, increased punitive damage awards have made the appeals process more central to civil litigation.

"Our juries, God bless them, tend to be very generous," says Horvitz.

Horvitz has watched damage awards skyrocket since 1957, when he founded the firm. "I'm astonished at the size of it. I don't tell people in the office because they look at me as if I must be as old as Methuselah, but I remember in the mid-'60s I got a \$50,000 appeal, and I said to myself, 'Wow, Ellis, you have arrived,'" says Horvitz.

Their specialty has made Horvitz & Levy lawyers experts in reversing

punitive damages: In the past 10 years the firm has successfully reversed or reduced \$1.3 billion of the \$1.4 billion in punitive damage awards it appealed, prevailing in 50 out of its 66 punitive damage appeals.

As an appellate firm representing corporate America, it's perhaps no surprise that Horvitz & Levy lawyers point to the plaintiffs' bar as one factor in the ever-increasing size of damage awards.

"One of the things that generates a lot of litigation and big awards is that we have a very able, imaginative and aggressive plaintiffs' bar. There are a lot of good lawyers out there representing plaintiffs, and a lot of them are just terribly effective in front of juries," says Horvitz. "They can get a jury steamed up. They know how to do it and they do it again and again.

"They're absolutely good lawyers," adds Horvitz. "And we're their opponents after they get the judgment."

Nowhere is that more true than in the area of punitive damages, often enacted against deep-pocket corporate defendants as a slap on the wrist. "That's the kind of thing where we're going to get a call, because they come in so big, and so unexpected, and usually undeserved, that the client is somewhat blindsided," says Horvitz. "It used to be a routine lawsuit for breach of contract or personal injury, the party would just go in for regular compensatory damages, but now the plaintiffs bar will attach a punitive damages claim to anything."

The firm also represents clients that simply want to challenge the basis for liability so a pattern is not set for other financially disastrous verdicts.

"[We represent], normally, people with institutional issues," says partner Lisa Perrochet. "It's not necessarily corporations in the sense that you would think of, but the kind of groups who may have an interest beyond the outcome of one particular case."

To make a punitive damages award stick, plaintiff often needs to show conduct that is oppressive. "Oppression requires a showing of despicable conduct, which is as onerous as it sounds," says Horvitz. "Very often in these cases you have nothing more than simple negligence."

Among the awards Horvitz has denied by showing its clients may have been negligent – but not downright evil – was the \$760 million in punitive damages against Ashland Chemical and other defendants that a judge trimmed to \$380 million even before the appeal. The case involved health hazards at the Lockheed Skunk Works in Burbank.

There are limits, however, to what appellate lawyers can do. While the ability to convince a court that a corporate client was only negligent may be sufficient to reduce punitive damages awards, it will rarely make the firm or its client popular. That's of little consequence to Horvitz & Levy lawyers, who mostly chose appellate work for its intellectual challenges. They see their clients as organizations with a side of the story to be argued and a set of legal points to make.

"A lot of our clients, especially when they're big entities against a small person, don't have the popular side of the case," says Horvitz. "The argument we make is a legitimate expression of their interests. And in many of these cases, particularly the bigger ones, you're not talking good and bad. What you're seeing is a clashing of interests where they're both legitimate interests, but in a complex world they clash, and the purpose of the law is to resolve the conflict in such a way that each side's needs are met."

Partner David Axelrad explains their position in another way. "If we find that a serious error has been made or there's been a serious miscarriage of justice, then that needs to be pursued in the appellate courts. Whether or not you might from the outside view that as the less popular position, to me it's a position that needs to be pressed... to correct that error," he says.

Perrochet agrees punitive damages should exist, but believes they are sometimes abused.

"There are appropriate punitive damages cases. Oftentimes, it's going to be the more personal ones – somebody really has a desire to screw somebody else, that's the obvious situation [for punitive damages]," she says. "And when you really want to smack somebody for that, punitive damages are there to do

bulk of their clients.

"We have to be very careful about actual ethical conflicts and also about issue conflicts that might arise," says Axelrad. "There are a number of issues that are near and dear to our clients that we just wouldn't take an opposing position on."

The firm's policy of sticking to the institutional side of cases provides an interesting juxtaposition for Horvitz & Levy's pro bono work, which focuses on individual rights. The 34 Horvitz & Levy lawyers fit neither the stereotype of "bleeding heart" activists nor steely-browed corporate representatives. The firm has engaged in pro bono appellate work for groups including the National Organization for Women, and has filed amicus

briefs in a number of U.S. Supreme Court cases. Associate Mary-Christine Sungaila, partner David Ettinger and partner Lisa Jaskol have taken a stand on a number of individual rights, including: an individual's constitutional right to bodily integrity in *U.S. v. Lanier*, in which Sungaila filed a brief on behalf of the Southern Poverty Law Center in a case involving a sexually harassing judge (unsuccessful, by 5-4 margin); for the student against the school district in 1999's student-on-student sexual harassment case *Davis v. Monroe County Board of Education*; and supporting the federal Violence Against Women Act on behalf of several women's rights groups, including Los Angeles' Harriet Buhai Center and House of Ruth Domestic Violence Legal Clinic, in *Brzonkala v. Morrison*. The Court voted 5-4 against the Violence Against Women Act, but in his dissenting opinion Justice Breyer quoted from the Horvitz & Levy brief – one of 20 filed for Brzonkala's side of the case.

"The justices read it, we just needed one more to be persuaded," says Sungaila, counsel of record for both the Davis and Brzonkala briefs.

According to Sungaila, those two cases have helped build the firm's pro bono reputation.

"We have sort of gotten this reputation for filing briefs in the U.S. Supreme Court, but particularly with these two cases, in the area of women's rights," says Sungaila, the ringleader of the firm's pro bono efforts.

Because of the firm's previous brief-filing activities, NOW and other organizations will bring cases to Sungaila's doorstep and ask for assistance in swaying the Supreme Court. Amicus activities are not the only sign of community involvement in the firm, however. Ettinger is also on the board of directors for the Harriet Buhai Center, and Perrochet helps North Hills' Monroe High School students set up mock trials through the Constitutional Rights Foundation.

Whether they are representing corporations or institutions or doing pro bono work, Horvitz & Levy lawyers try to keep an emphasis on staying civil. "We really try to avoid the kind of nastiness that goes on, that has become so prevalent," says Horvitz, who maintains that "the best lawyers are the ones who behave like ladies and gentlemen."

Horvitz & Levy lawyers suggest that the nature of appellate work also helps keep their practice friendly.

"It's a smaller pool of people that you're dealing with regularly, and maybe there's a certain sense that if you're too much of a jerk it really gets around," says Perrochet.

Between the friendly practice environment and fighting to correct errors against their institutional clients, Horvitz & Levy lawyers seem content with their lot.

"I sleep at night," says Perrochet. ■

Reversal of Fortunes

Horvitz & Levy has proven a major player in the appellate field, handling some of California's largest appeals. In the last two years, the firm has obtained reversals of hefty reductions in judgments leveled against six of these 10 clients.

VERDICT	CASE	STATUS
■ \$380 million	<i>Lockheed Litigation Cases, Group v. Judicial Council Combination Proceeding</i> Case No. 2967 (Los Angeles Sup. Ct. 1998)	Reversed
■ \$225 million	<i>Piscitelli v. Friedenbergl</i> Case No. 707862 (San Diego Sup. Ct. 1998)	Pending
■ \$175 million	<i>Mycogen Plant Sciences v. Monsanto</i> Case No. 699882 (San Diego Sup. Ct. 1998)	Reversed
■ \$121 million	<i>Goodrich v. Aetna U.S. Healthcare of California</i> Case No. RCV020499 (San Bernardino Sup. Ct. 1999)	Pending
■ \$80 million	<i>Coppola v. Warner Bros.</i> Case No. BC135198 (Los Angeles Sup. Ct. 1998)	Reduced to \$20 million
■ \$31 million	<i>Cabanillas v. Thrifty Payless</i> Case No. 780749 (Orange County Sup. Ct. 1999)	Confidential settlement
■ \$40 million	<i>Howard v. Roman Catholic Bishop for the Diocese of Stockton</i> Case No. 28768/2752237 (San Joaquin Sup. Ct. 1998)	Reduced to \$9 million
■ \$27 million	<i>Kolodziej v. Kmart</i> Case No. GC012107 (Los Angeles Sup. Ct. 1998)	Pending
■ \$22 million	<i>Vasquez v. Lin</i> Case No. BC191183 (Los Angeles Sup. Ct. 1999)	Pending
■ \$17.2 million	<i>Balli v. Loma Linda University Medical Center</i> Case No. SCV 21631 (San Bernardino Sup. Ct. 1998)	Reduced to \$8.7 million

it. But when you're talking about a business, I think in this climate it's very easy for all of us, American society in general, to have a kind of conspiracy-theory attitude that big capital 'B' business is evil. And I think jurors can get carried away a little bit. For the most part, businesses are just out there trying to do their thing."

Though Horvitz & Levy enthusiastically defends businesses in all manner of cases, there are some cases they won't accept. "On occasion, we've turned down what I'd call conscience cases, where in good conscience I couldn't take that side of the case," says Horvitz.

Many of the firm's clients are also repeat customers, like insurance companies. According to Perrochet, one of the benefits of long-standing client relationships, on an appeal rather than a trial basis, is the ability to say no to a particular case.

"I've felt that I have a luxury, which is that ... the clients who come to us are prepared to hear me say, 'You pay this one,'" she says. "I think trial lawyers may have to be, appropriately so, a little more aggressive and fight the case to the end. But when I see a case that just smells wrong, the clients we have are typically sophisticated enough that they don't shoot the messenger when, for example, I say that 'You did wrong here, and you're going to lose on appeal, and what's worse, the decision could be published.'

Horvitz & Levy's cases frequently result in published decisions, which is part of the reason the firm almost exclusively defends corporate clients. Were it to alternate between defendants and plaintiffs, the firm would run the risk of producing published decisions that would negatively affect the