

## Rising Star: Latham's Brendan McShane

By Erin Coe

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In defense of Toshiba Corp., Latham & Watkins LLP partner Brendan McShane has thwarted attempts by direct and indirect purchaser plaintiffs to certify nationwide classes in suits alleging the electronics maker took part in a conspiracy to fix the prices of optical disk drives, earning him a spot on Law360's list

of top class action attorneys under 40.



Brendan McShane

The Rising Star, a 37-year-old attorney in San Francisco who has been with the firm for 11 years, focuses his practice on litigating large-scale and multijurisdiction antitrust and unfair competition cases and boasts key expertise in defending clients facing consumer class actions.

While recent changes to the Rule 23 standards for class actions require plaintiffs to present a lot of evidence up front, McShane says he enjoys the challenge of sifting through class certification motions and pulling out key defenses to present to the judge in a clear and concise way. He also works closely with experts to undercut the opposing expert's theories.

"It's never a boring job," he said. "There is a ton of complexity to these cases, and they are large suits with a lot on the line for our clients. The way lawyers can best make themselves of value to their clients is sitting down and thinking through the issues, not just going with what comes first or what comes the easiest."

McShane was part of a team of Latham litigators who last year secured the closure of a five-year U.S. Department of Justice grand jury investigation into allegations that Toshiba Samsung Storage Technology Korea Corp. rigged bids and fixed prices with other electronics makers in the optical disk drive industry.

He also has defended Toshiba and the joint venture firm and served as liaison counsel for a group of nearly 30 defendants in follow-on civil actions brought by purchasers of optical disk drives. After initially narrowing the claims, he helped convince U.S. District Judge Richard Seeborg in October 2014 to reject bids for class certification, marking one of the first rulings to deny certification of both direct and indirect purchaser classes in the post-Comcast and Dukes arena.

The parties filed a mountain of paper briefing in the case, including expert reports, rebuttals, objections of evidentiary submissions and Daubert motions, and the trick for the defendants was to boil down the

complexities of the case to a digestible argument for the judge, according to McShane.

“We and our experts were able to break down the wide differences among the class,” he said. “The class proposed including the largest [original equipment manufacturers], smaller OEMs, distributors, retailers, mom-and-pop retailers and those who went to defendants’ websites to purchase disk drives. We were able to demonstrate that the alleged conspiracy was not common to the whole class and couldn’t be shown in one fell swoop.”

Although the Ninth Circuit denied the plaintiffs’ petition to appeal the judge’s ruling in January, the district court in a case management conference later that month allowed the plaintiffs to renew their class certification motions, which are set to be filed in May.

“We continue to have strong arguments to oppose the certification of any class, and Judge Seeborg was clear that a repackaging of the same arguments wouldn’t cut it,” McShane said.

McShane also secured a major victory for Orbitz Worldwide LLC, which was accused in a consolidated action in the Northern District of Texas composed of more than 40 nationwide proposed class actions alleging that Orbitz and other online travel companies had entered into an industrywide conspiracy among themselves and with major hotel chains to fix the prices of online hotel room reservations.

He helped brief the defendants’ motion to dismiss the consolidated complaint, and the court granted the bid in early 2014. The plaintiffs were allowed to file an amended complaint, and they decided to drop the hotels as defendants and focus on the travel companies. The amended complaint alleged they forced rate parity on the hotels in order to block new entrants into the online travel company space.

In October, the judge found in the online travel companies’ favor, holding that the conspiracy claims were implausible and that any parallel conduct was the product of independent and rational business judgment, rather than a sign of an illegal agreement. The judge dismissed the case with prejudice.

“This was a huge win for defendants,” McShane said. “The case never got passed the pleadings, and our clients didn’t have to incur costs of needless discovery and years of fees.”

McShane’s interest in the law was sparked as a child on road trips with his father, a generalist and real estate attorney who would often talk about his cases, gauging gut reactions to his theories of facts or mulling different ways to describe a suit.

“I loved hearing about a case and trying to tell him what I thought about a case,” he said. “Even to this day, my favorite part of the job is when I’m sitting around the table with other folks working on a case and talking about strategy.”

McShane, who summered with Latham in 2002 and was hired on at the firm in 2003 after graduating from University of California, Hastings College of the Law, said one of the reasons he enjoys the firm so much is its collegial nature.

“I think so much is to be gained by sitting around a table and swapping ideas,” he said. “Whether you’re the most senior partner or the most junior associate, each person brings a different perspective, and through that process, attorneys can come up with something that no individual would come up with on their own.”

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