

LITIGATION 2004

A SUPPLEMENT TO THE AMERICAN LAWYER & CORPORATE COUNSEL **ALM**

LITIGATION | TOP GROSSING



A Well-Oiled Machine

REASON TO SMILE: ARTHUR
LUXENBERG (LEFT) AND PERRY WEITZ

A Well-Oiled Machine

Perry Weitz and Arthur Luxenberg engineered their sophisticated operation with specialized departments, a national feeder network, and an appetite for risk.

ALL THAT'S MISSING FROM THE OFFICES OF New York's 60-lawyer Weitz & Luxenberg is the British accent. They already have the dark wood paneling, the overstuffed leather furniture, the heraldic crest, and the hunting prints—yes, hunting prints—on the walls. The firm took over this space, in a highly desirable downtown building that also houses Goldman, Sachs & Co. and Stroock & Stroock & Lavan, from an old-line defense firm, and made it even more respectable-looking than it had been. The message here is as obvious as the view of New York Harbor. This is no fly-by-night, ambulance-chasing operation. This is not your father's plaintiffs firm.

Or, in the case of Perry Weitz, the firm's cofounder and chief visionary, your father-in-law's. Weitz, a tall, lean man with slicked-back black hair and a gleaming, almost wolfish smile, began practicing law at the firm of his father-in-law, prominent New York personal injury lawyer Morris Eisen, in 1984, after graduating from law school at Hofstra University. Weitz had some early successes in court, notably pioneering a theory that landlords are liable for knowingly harbor-

ing dangerous dogs, but left the Eisen firm in 1986, several years before Morris Eisen and seven other people from the firm were indicted and convicted for fabricating evidence and bribing witnesses. At Weitz & Luxenberg, the firm he founded with fellow Eisen refugee Arthur Luxenberg, Weitz was determined to reinvent the very idea of a plaintiffs firm.

To a measure unimaginable 18 years ago, he's succeeded. Weitz & Luxenberg today is no grubby slip-and-fall shop, but a sleek and diversified business with annual revenue well in excess of \$75 million. The firm still has a unit practicing negligence and medical malpractice law, almost as a nod to Weitz and Luxenberg's roots, but it specializes in mass torts: asbestos, pharmaceutical and medical device cases, and environmental litigation. The firm's lawyers are deployed in units devoted to specific areas of litigation. Senior litigators are designated as trial lawyers, negotiators, and unit managers. Prospective mass torts are evaluated by Weitz, Luxenberg, senior trial attorney Robert Gordon, and mass tort manager Paul Pennock. If they decide to enter a new litigation

arena, Weitz & Luxenberg generates cases through advertisements whose production is overseen by Weitz himself, and through a carefully cultivated nationwide network of referring lawyers. The firm now has muscle in the courtroom, where its trial lawyers continue to win multimillion-dollar verdicts; at the negotiating table, where its thousands of cases give it leverage in structuring settlements; and in Congress, where Perry Weitz, an early supporter of Democratic vice-presidential nominee John Edwards, is one of the principal opponents of tort reform. Weitz refuses to talk about money, but the firm's size and breadth make it one of the handful of highest-grossing plaintiffs firms not only in 2003 and 2004, but likely for years to come.

Weitz & Luxenberg exists because of two law school classmates of Perry Weitz and the grace of the New York State legislature. In the mid-1980s, after years of lobbying by unions whose members were exposed to asbestos but were barred from suing manufacturers because of New York's statute of limitations laws, the state legislature finally revised the law, basing the statute of limitations on a

BY ALISON FRANKEL
PHOTOGRAPHS BY WILLIAM MEBANE

victim's discovery of his injury, rather than the date of his last exposure. Lawmakers also left open a one-year window during which victims whose cases had been barred could sue. Thousands of New York asbestos clients needed to find personal injury lawyers and file cases, quickly.

For referrals, many of them relied on Colleran, O'Hara & Mills, a Long Island-based labor firm that represented the New York AFL-CIO and several building trade unions. Two of the young lawyers at the firm, the son and son-in-law of name partner Richard O'Hara, had gone to Hofstra law school with Perry Weitz, who was then practicing with Morris Eisen's firm. "We knew he was a bright, young, dynamic guy," says Christopher O'Hara, who was a couple of years behind Weitz at Hofstra. "And we

accent becomes more pronounced. Only politics gets him as excited as corporate wrongdoing. "I always had a Robin Hood thing," he says. "There's nothing greater in the world than to help somebody who needs help and doesn't have the resources to help themselves."

The Eisen firm, meanwhile, was coming apart. Weitz asked Arthur Luxenberg, who was known at the Eisen firm as a legal researcher rather than a trial lawyer, to start a new firm with him. "He had an uncanny ability to get business," says Luxenberg, a smiling, round-faced man who still seems shocked to find himself in his cushy office, atop the letterhead of a 60-lawyer firm. "I was the guy who had answers, the guy who could figure solutions." In 1989 they sublet space from Mudge Rose Guthrie Alexander



ROBERT GORDON JOINED WEITZ & LUXENBERG AS THE FIRM'S THIRD—AND LAST—PARTNER.

**IN 1989 THERE WAS NO MASS TORTS
PLAINTIFFS FIRM IN NEW YORK.
WEITZ SAW AN OPPORTUNITY.**

knew the Eisen firm had the capability to handle the litigation." New York came late to the asbestos litigation, which by the mid-1980s was already big business for plaintiffs firms like Provost & Umphrey Law Firm, Baron & Budd, and Ness Motley Loadholt Richardson & Poole. But it wasn't clear, says O'Hara, that it would be as profitable in New York. "This was very much a fight that had to be won," he says. The O'Hara firm negotiated a discount for its union member clients—they'd pay a 25 percent contingency fee rather than the then-standard 33 percent—and referred its asbestos cases to Weitz.

Weitz threw himself into asbestos litigation. "I flew out to Ness Motley and to another asbestos firm in Ohio. I read the documents, the trial transcripts. The outrageous misconduct of these manufacturers made me crazy," he says. Weitz talks extra fast when he gets excited, and his Long Island

& Ferdon and founded what in 1991 was renamed Weitz & Luxenberg. "Those were very tumultuous times. We worked 15, 16, 17 hours a day," Luxenberg recalls. "If a genie had come down and said, 'Sign here, and you'll make \$75,000 every year for the rest of your life,' I'd have taken the offer. Perry wouldn't have. That's why Weitz and I make a good team."

Weitz, with counsel from Luxenberg, saw a unique opportunity. In 1989 there was no mass torts plaintiffs firm in New York. The city's best personal injury lawyers were so successful in their one-at-a-time negligence, product liability, and malpractice cases that they didn't need to bother with the complexities of mass torts. Weitz and Luxenberg, who were already taking on clients affected by diethylstilbestrol (DES), as well as asbestos clients, believed they could represent hundreds of clients at a time, instead of just a few. "The beauty of this," says

Luxenberg, the legal memo writer, "was that it was all new. Tons of law was flowing out."

Weitz first had to persuade his friends at Colleran, O'Hara to let him keep the asbestos work they'd referred to him when he was at Eisen. "We had a lot of meetings," O'Hara says. "Perry showed us he had the ability to buy the risk." Weitz had actually mortgaged his house, as well as taking out bank loans, to finance the asbestos litigation, a display of bravado that impressed the Colleran lawyers. "He's not kidding when he says he went way out on a limb," O'Hara says.

FOR ITS FIRST TWO YEARS Weitz & Luxenberg had almost no revenue. The future of the firm depended on the outcome of a consolidated asbestos trial involving men who had worked at the Brooklyn Navy Yard in the 1940s and 1950s. Weitz had 36 clients in the case. The jury verdict came in 1991: \$75 million. All at once, Perry Weitz was a force in the asbestos bar, New York was a center of the litigation, and Weitz & Luxenberg could pay its bills.

Weitz thinks of himself as a great trial lawyer, but his greatest talent is his business sense—not just in the complex economics of multicase settlements, which became his specialty, but in figuring out how to build his firm. He and Luxenberg didn't want simply to run an asbestos

shop. They wanted to diversify into other mass torts, but in a way that didn't threaten the core asbestos practice. "I wanted to create a structure that allowed for different litigation areas to build on one another without stepping on each other's toes," Weitz says. "To do that, I needed strong unit heads, strong trial lawyers."

During the Navy Yard trial, Weitz became friendly with Robert Gordon, a boyish-looking partner at the Philadelphia asbestos firm of Greitzer and Locks. A onetime assistant district attorney, Gordon was a wizard in the courtroom; Weitz considered him "the best trial lawyer I'd ever seen next to myself." After the Navy Yard trial, Weitz and Luxenberg convinced Gordon to join their firm, making him Weitz & Luxenberg's third—and last—partner. Gordon quickly justified his hiring. In 1992 he tried another consolidated asbestos case in New York. The verdict this time was \$91 million for 45 plaintiffs, of whom 28 were Weitz & Luxenberg clients.

By then Weitz had decided on Weitz & Luxenberg's next venture, the burgeoning breast implant litigation. Gordon left the asbestos docket in capable hands—Michael Roberts, who'd worked with Weitz on asbestos cases since the Eisen firm days, would try the cases, and Charles Ferguson, another Eisen veteran, would negotiate settlements—and stepped over to breast implants. "Perry had the idea of taking the cases," Gordon says. "I ran with it."

The battle among plaintiffs firms for control of the litigation was fierce and epic. Weitz concentrated on finding clients, realizing that, as in asbestos, the size of a firm's docket would dictate its leverage, not only with defendants but also with other plaintiffs firms. He and Luxenberg hired Denise Dunleavy, a New York personal injury lawyer who'd successfully tried a breast implant case and had contacts among referring lawyers and physicians. They also, for the first time, began running television advertisements. Weitz has a love-hate relationship with advertising. "I had never liked it," he says, "but I wanted to tell

people who we were, what kind of cases we handled." He was also sick of sharing fees with lawyers who advertised for clients, then referred the cases to Weitz & Luxenberg to litigate.

Through its advertising, Weitz & Luxenberg built a roster of thousands of breast implant clients, which led to a spot on the plaintiffs steering committee of the multidistrict litigation for Robert Gordon. With his work as the cochair of the science committee, Gordon helped establish Weitz & Luxenberg as a player outside of asbestos.

The decade-long implant litigation, which consumed huge amounts of time and money at Weitz & Luxenberg, taught Weitz, Luxenberg and Gordon some important lessons.

■ First, they needed asbestos—which still accounts for about half of the firm's practice—to fund other ventures. Gordon, Michael Roberts, and a



NO AMBULANCE-CHASING ALLOWED: WEITZ & LUXENBERG'S PALATIAL LOBBY

lawyer named Jerry Kristal continue to rack up big asbestos verdicts, which in turn help Charles Ferguson and Weitz to negotiate settlements with an ever-widening circle of defendants. Weitz & Luxenberg remains in the vanguard of asbestos litigation, pioneering new theories of recovery from new generations of defendants.

■ Second, they needed to understand the science underlying a potential mass tort before committing to it. Weitz & Luxenberg always took an expeditious approach to the breast implant litigation, focusing on localized injuries caused by the silicone gel

implants instead of the more devastating, but more speculative, immune system impairment. Firms that held out for settlements based on systemic injuries were hurt by scientific evidence that emerged during the litigation, indicating that no link existed.

■ And third, Weitz & Luxenberg needed to look hard at potential mass tort defendants. The firm was able to settle implant cases with Bristol-Myers Squibb Company, Baxter International Inc., and 3M Company relatively quickly, but is still, more than ten years after the litigation began, wrapping up cases involving Dow Corning Corporation, which went into Chapter 11 bankruptcy in 1995.

Running a mass tort firm like Weitz & Luxenberg is an expensive proposition, as both Perry Weitz and Arthur Luxenberg mention habitually. The firm has about 300 support staff, mostly paralegals of various specialties. It operates a client services department, as well as an estates department that assists clients in preparing their wills at no charge beyond their contingency fee. For every litigation Weitz & Luxenberg contemplates, there are trial consultants, expert witnesses, and mock trials at Hofstra; once the firm decides to proceed, there are new ads to produce and advertising time to buy. It costs something like \$25 million, Weitz says, to start up a new mass tort onslaught.

And once the firm commits to a litigation, it ramps up quickly. The Sulzer Ltd. hip replacement cases are a good example. After Sulzer quietly announced a recall of certain of its artificial hips in 2000, Weitz & Luxenberg began an advertising campaign, advising patients with Sulzer hip replacements to call the firm. In two or three months, says Glenn Zuckerman, the Weitz & Luxenberg lawyer who headed the Sulzer case, the firm's call center fielded about 1,500 inquiries from as far away as Hawaii and Europe. Zuckerman was in charge of returning all the calls, which yielded hundreds of clients. Another batch of cases came from the dozens of firms across the country that regularly refer cases to Weitz & Luxenberg in exchange for a

portion of the recovery. Weitz expends considerable energy keeping his referral network happy, since overall, referring firms account for about half of Weitz & Luxenberg's caseload.

The firm ended up with more Sulzer cases, says Zuckerman, than any other plaintiffs firm. Zuckerman traveled around filing suits for individual plaintiffs, which is Weitz & Luxenberg's preferred mass tort model. He worked with other plaintiffs lawyers to kill a proposed class action settlement, and, along with Richard Heimann of Lieff, Cabraser, Heimann & Bernstein, negotiated with Richard Scruggs, whom Sulzer hired to resolve the litigation. In the end, with Sulzer threatening bankruptcy, Zuckerman and Heimann agreed to a \$1.07 billion settlement class for 40,000 people. Attorneys' fees amounted to less than 20 percent of the settlement.

RIGHT NOW, WEITZ & LUXENBERG has bets riding on several pharmaceutical targets, including Baycol, a cholesterol-lowering drug voluntarily withdrawn from the market by Bayer Corporation; ephedra, a dietary supplement banned by the government; rheumatoid arthritis drug Arava; and Rezulin, a diabetes drug the Food and Drug Administration asked Warner-Lambert Corporation to remove from the market. Mass torts unit head Paul Pennock is working with labor lawyer Christopher O'Hara of Collieran, O'Hara to evaluate the prospects of suits involving union members who claim to have been injured by manganese contained in welding rods. The

with breast implant cases, Weitz & Luxenberg at first stayed out of the fen-phen litigation, which yielded a \$2.5 billion settlement. (As it happened, the firm wound up with about 100 high-value fen-phen cases for clients who opted out of the settlement.) Weitz & Luxenberg was not involved with the state attorney general tobacco cases, though it is currently cocounsel with Lieff, Cabraser in a sweeping smokers class action before U.S. district court judge Jack Weinstein of the Eastern District of New York. The biggest investment that didn't pay off for the firm involved a drug called Parlodel, which was supposed to help women stop lactating after giving birth. Some women who took the drug suffered strokes. Weitz & Luxenberg hired New York litigator Ellen Relkin to run its Parlodel group. Some of the cases settled, but the litigation never took off. "Causation is a problem," says Weitz. "We had a bad experience with Parlodel." Relkin, who now works on ephedra and groundwater pollution cases for Weitz & Luxenberg, remains grateful for the firm's commitment to the Parlodel litigation, even after it ran into problems. "The firm did the right thing by our clients," she says.

Between them, Weitz and Luxenberg have a knack for keeping the firm's lawyers happy, which is remarkable considering Weitz's insistence on keeping the partnership closed. Lawyers at all levels share in the profits from cases they bring in themselves, but the vast majority of cases are generated by the firm. So compensation is set by Weitz and Luxenberg,

know up front that they won't be partners." Kristal, like fellow asbestos trial lawyer Michael Roberts, says he'd rather be sure he's getting all the support he needs at trial, which he does at Weitz & Luxenberg, than worry about partnership. "Generally, the boys make the right decisions," he says. Occasionally Weitz & Luxenberg loses an accomplished lawyer—for instance, Denise Dunleavy, who left to start her own firm, and Steven Fineman, who started up the New York office of Lieff, Cabraser—but it doesn't happen often enough to force Weitz to change the partnership model. "Had I not had the opportunity to start the business here, I would not have left," says Fineman, who says, however, that he was bothered by the lack of partnership prospects. "As long as Perry is active, there's no reason why the firm won't continue to be successful."

If there is a threat to Weitz & Luxenberg's future, it comes not from the prospect of Weitz, Luxenberg, or Gordon retiring—Gordon is 48 and Weitz and Luxenberg are 45—but from tort reformers. Luxenberg and Weitz, in particular, despise trial-lawyer bashing. "We go crazy," says Luxenberg. "We feel we're so not that. People attack our advertising. Do you know how many people are able to file lawsuits because they learned of litigation through us? We spend hours, days investigating, making sure we're going into litigation that's not frivolous, that's meaningful and worthy. We bend over backward so no one can say we warehouse cases. We're overstuffed, but we need more people. We never want to be at a point where someone can say we're understaffed." The firm is acutely aware how tempting a target it is. When a company called G-I Holdings Inc., a successor to asbestos defendant GAF Corporation, filed a racketeering suit against Weitz & Luxenberg, Baron & Budd, and Ness Motley—accusing Weitz & Luxenberg of, among other things, conspiring with a court employee to backdate asbestos suits—the firm hired criminal lawyer Elkan Abramowitz, who disproved the backdating allegations and got G-I to drop them.

As mass tort litigation has become a political issue, Weitz & Luxenberg has

IT COSTS SOMETHING LIKE \$25 MILLION, WEITZ SAYS, TO START UP A NEW MASS TORT ONSLAUGHT.

firm is also in a joint venture with Baron & Budd in cases involving groundwater contaminated by the gasoline additive methyl tertiary butyl ether.

Weitz & Luxenberg's track record in predicting the value of mass torts is good, but not perfect. Overloaded

who are smart enough to make sure they pay their senior lawyers well enough to retain them. Jerry Kristal, who came over from Greitzer and Locks in 1997, is typical. "I could care less about [partnership]," he says. "People who join Weitz & Luxenberg

become politically active. On the state level, Weitz & Luxenberg recently brought on assembly speaker Sheldon Silver as of counsel, agreeing to pay him not as an employee, but according to the recovery in cases he attracts to the firm. (Silver had previously been

two years, Weitz has spent two days a week in Washington, lobbying against a proposed nationwide trust to end the asbestos litigation. In 2003 Robert Gordon lobbied against the energy bill that threatened to block MTBE litigation; working with the Conference of

companies for FDA-approved drugs and devices hasn't daunted Weitz & Luxenberg. In the meantime, Weitz is keeping his strategic brain busy. A couple of years ago, he and Luxenberg increased their investment in a company called Counsel Financial Services LLC, which is not a law firm but functions as a sort of bank for plaintiffs lawyers. Counsel Financial, of which Weitz and Luxenberg are now principals, lends money to plaintiffs lawyers who need to finance big cases, with the law firms' receivables as collateral. According to Weitz, who declines to name the company's clients, Counsel Financial has about \$20 million lent out, and has begun to turn a profit. Why does a successful plaintiffs lawyer like Weitz want to be chairman of another company, one unaffiliated with Weitz & Luxenberg? "In this business," he says, laughing, "you've got to stay one step ahead of the game." ■

PERRY WEITZ'S LATEST VENTURE LENDS MONEY TO PLAINTIFFS LAWYERS WHO NEED TO FINANCE BIG CASES.

of counsel at Schneider, Kleineck, Weitz & Damashek.) Silver took a beating in the New York press, which questioned whether he had a conflict of interest; Weitz insists that Silver's affiliation has nothing to do with politics: "New York hasn't been a tort-reforming state." The firm's federal politicking is more significant. For the last

Mayors, the League of Cities, and a variety of environmental groups, the trial lawyers killed the bill. "It's probably the proudest thing I've done as a lawyer," Gordon says, "whether I make a dime on the litigation or not."

So far, even the Bush administration's attempts to preempt personal injury suits against pharmaceutical

Perry Weitz's Recipe for a Delicious Mass Tort

1. Be ahead of the curve. Read medical journals and FDA reports, stay in touch with physicians, listen to prospective clients and referring lawyers. "We like to be on the cutting edge of knowing about adverse reactions," says Weitz. "Once we begin to see an incidence of disease and death, we research it. Hopefully we'll hear about it before *The New York Times*." And before the Association of Trial Lawyers of America establishes a working group.

2. Do your prep work. Weitz says he's looking for two things when he evaluates a potential mass tort. First is science: "Is there causation? Will I be able to survive a Daubert motion?" Next is damages: "Are there serious injuries or death? Is there punitive conduct?" he says. "I look at the punitive conduct of a company, particularly if the damages are not serious. Punitive conduct gives us the ability to try lesser damage cases." Before filing a suit, Weitz says, the firm will get hold of liability documents, consult with potential expert witnesses, and conduct mock trials. "We spend an

extraordinary amount on due diligence," he says, "to make sure we're making the right choices."

3. Spread the word. Weitz & Luxenberg advertises for clients, and informs its referral network of dozens of firms in all areas of the country that it's looking for new mass tort cases. "A lot of times the cases end up being filed here," says Weitz. "New York is better than being in Arkansas, Tennessee, or wherever."

4. File individual cases, not class actions. Weitz & Luxenberg only resorts to settlement classes in dire circumstances, such as the threatened bankruptcy of Sulzer in the hip replacement litigation.

5. Work up cases for trial. If defendants still aren't scared into settling, let Robert Gordon or another of the firm's trial specialists try a case or two. Spare no resources—manpower, experts, technological support—at trial.

6. Settle everything else. Let Weitz handle the economics and negotiations.

—A.F.