

## Litigator of the Week: Diane Sullivan of Weil, Gotshal & Manges

By Scott Flaherty  
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Everyone knows class action trials are rare. After a defense verdict this week for Diane Sullivan and her client Philip Morris USA, an unusual type of class action facing the tobacco industry may soon be extinct, at least in Massachusetts.

Capping a 10-day trial, a jury in Boston on Wednesday refused to force the cigarette maker to pay for chest scans for thousands of smokers in the state. The case, *Donovan v. Philip Morris*, marked the most important test in years for the viability of medical monitoring claims against Big Tobacco. Healthy smokers have been blocked from bringing such claims in state after state, leaving plaintiffs lawyers hoping for a breakthrough in the Massachusetts litigation.

Thanks to Sullivan and her co-counsel, Latham & Watkins' Kenneth Parsigian, it doesn't look like that's going to happen.

Similar medical monitoring claims were recently tested in New York, where the state's highest court found against the smoker plaintiffs in 2013. The Massachusetts Supreme Judicial Court, however, ruled in 2009 that the smokers' medical monitoring suit made for a viable claim under state law, keeping the Donovan case alive.

In the Massachusetts case, which dates back to 2006, plaintiffs lawyers led by Kevin Peters of Arrowood Peters and Steven Phillips of Phillips & Paolicelli alleged that Philip Morris knowingly sold cigarettes that contained high levels of carcinogens and could have adopted a less dangerous design.

The suit also maintained that the company should be required to provide medical monitoring in the form of low-dose CT chest scans to longtime smokers to try to catch signs of lung cancer. The class, certified in 2010, comprised people in Massachusetts who were older than 50 and had smoked at least 20 "pack-years" worth of Marlboros—the equivalent of smoking a pack of cigarettes per day for 20 years. The class members had not yet developed known smoking-related diseases, but were at greater risk from their tobacco use.



Diane Sullivan

Todd France

Although the case dates back nearly a decade, Sullivan, who served as lead trial counsel, took the reins in 2012, only after the plaintiffs lawyers convinced a judge to certify the case as a class action. A tenacious trial lawyer who's defended the likes of Merck & Co. and Johnson & Johnson Inc., Sullivan joined a defense team led by Latham & Watkins' Parsigian, who went on to serve as second chair at trial.

Sullivan and Parsigian pushed a couple of key themes for the jury. For one, they said a finding for the plaintiffs could have troubling implications for a whole host of businesses, ranging from fast food chains to chemical companies, that sell potentially dangerous products.

The defense also focused on the plaintiffs' claim that Marlboro cigarettes were defective, an allegation that underpinned the smokers' bid for medical monitoring. To prove that defect claim, the plaintiffs lawyers would have to show that there was some other safer cigarette design that Philip Morris could have adopted—a contention that, the defense lawyers argued, couldn't be backed up by evidence.

In the end, the jury cleared Philip Morris of any potential liability, finding that the plaintiffs hadn't proven Marlboro cigarettes to be defective and unreasonably dangerous—once again keeping medical monitoring at bay.