

## Appellate Group Of The Year: Mayer Brown

By **Stewart Bishop**

*Law360, New York (January 18, 2012, 5:27 PM ET)* -- In a long-planned move that turned the world of consumer class action law on its head, the appellate team at Mayer Brown LLP successfully argued AT&T Mobility LLC v. Concepcion before the U.S. Supreme Court, earning the firm a top spot on Law360's Appellate Groups of 2011.

Tasked nearly 10 years ago by its client Cingular Wireless LLC, now AT&T, with finding a way to address what its client said had become the rampant and abusive class action system, Mayer Brown worked to craft the right argument and find the proper vehicle to take to the high court.

"It was nine years in the making, with lots of twists and turns," Mayer Brown's appellate practice group head Evan M. Tager said. "We had to revise [AT&T's] arbitration clause along the way."

The Ninth Circuit had affirmed a California federal court's denial of AT&T's motion to compel arbitration against a California couple — Vincent and Liza Concepcion, who alleged that the practice of charging sales tax on a cellphone advertised as "free" was fraudulent — after the couples' complaint was joined to a class action.

While the district court and the Ninth Circuit both ruled against them, the appellate pros at Mayer Brown were actually encouraged by favorable statements to AT&T's position that both courts had made, despite their opinions ruling against the company.

"This case was particularly appealing because the trial judge had made these favorable statements even while ruling against us," Mayer Brown appellate practice group head Evan Tager said. "The district court essentially said, 'My hands are tied,' and the Ninth Circuit said the same thing. That teed it up for us to take it to the Supreme Court."

In overturning the lower courts' decisions, the Supreme Court said the California rule against class action waivers in arbitration agreements — which are common in consumer contracts for cable television, cellphone service contracts, credit cards, deposit accounts, auto loan agreements and in employment contracts — interfered with the objectives of the Federal Arbitration Act.

The landmark April decision has had massive ripple effects that have reached many corners of the sea of consumer class action law.

As of October, 48 federal and state courts had invoked *Concepcion* in enforcing agreements to arbitrate disputes on an individual basis or rejecting arguments that such agreements are unenforceable.

Among those are eight decisions that Mayer Brown successfully parlayed using *Concepcion* to defeat attacks on the arbitration clause requirement that claims be arbitrated on an individual basis.

To date, plaintiffs in at least nine other sets of class actions, including three MDLs, have voluntarily nixed their claims against AT&T after *Concepcion* was decided.

It was a win not only for the client, but for the process of consumer justice, according to Andrew J. Pincus, who argued the case for Mayer Brown.

"It's had a very significant effect, especially when you consider that state courts are cutting back. ... This provides an alternative dispute resolution," Pincus said. "Most claims that consumers have are small individualized claims."

Pincus said that by opening up the arbitration process to more people, the high court's decision will mean real relief to people who don't have the time to pursue their own claims.

"People aren't going to do it; small claims courts are clogged," Pincus said. "This means consumers can resolve these disputes. This is about what gets more justice to more people."

In another major-league case that is now pending before the Supreme Court, Mayer Brown successfully convinced the high court to take up the case of *Mayo Collaborative Services v. Prometheus Labs Inc.*, in a closely watched dispute over the patentability of a blood test method that could elaborate on last year's *Bilski v. Kappos* decision in establishing what makes an invention eligible for a patent.

The high court granted certiorari to Mayer Brown on behalf of the highly regarded Mayo Clinic, which argues that a patent on a testing method held by Prometheus, and ruled valid by the Federal Circuit, provides an unlawful monopoly on a natural phenomenon and bars other health providers from conducting research.

According to Mayo, Prometheus' patents should be rejected under Section 101 of the Patent Act, which courts have ruled prohibits patents on abstract ideas and natural phenomena.

Stephen Shapiro, the founder and senior member of Mayer Brown's Supreme Court and appellate litigation practice group, argued the case Dec. 7. The high court's decision is still forthcoming.

Mayer Brown handed its client a win in another high-profile case that pitted a group of foreign producers of the fertilizer ingredient potash against a class of direct and indirect potash purchasers who claimed a staggering increase in U.S. potash prices between 2003 and 2008 was the result of a global price-fixing conspiracy.

The Seventh Circuit tossed the suit in September, finding the plaintiffs had not drawn a sufficient connection between the alleged plot involving foreign producers and the U.S. potash market.

A panel reversed a district court's decision by quorum, saying the plaintiffs had not established a plausible "direct, substantial and reasonably foreseeable" connection between the alleged conspiracy and the U.S. market as required under the Foreign Trade Antitrust Improvements Act, handing a victory to Mayer Brown's client The Mosaic Co., a Canadian potash producer.

Pincus and Mayer Brown also successfully defended Chicago Mayor Rahm Emanuel during his run for mayor, arguing against allegations from multiple parties that due to his time spent in Washington as President Barack Obama's chief of staff, he was ineligible to serve as mayor because of residency restrictions.

Despite a state appeals court's ruling that found the infamous Emanuel ineligible for office, Pincus and the Mayer Brown team took the case to the Illinois Supreme Court, where they ultimately prevailed.

The victory was largely due to an intensive probe into the history of residency requirements, Pincus said.

"We did a really in-depth investigation into ... a surprising number of cases from the 1800s on residency," he said.

Besides its high-profile work, Mayer Brown also lists an impressive pro bono practice in conjunction with the Yale Law School Clinic, founded by Pincus and counsel Charles Rothfeld.

Over the past year, the firm took up three pro bono cases before the Supreme Court, delving into such issues as whether a posthumously conceived biological offspring has a right to child-survivorship benefits under the Social Security Act.

The firm also took on two other pro bono cases, one of which considers whether a government official who acts as a "complaining witness" by providing false grand jury testimony leading to the initiation of a prosecution against an innocent citizen is entitled to absolute immunity. The other questions whether the term "cocaine base" encompasses every form of cocaine or is just limited to crack cocaine, with implications for mandatory minimum sentences.

Much of Mayer Brown's success on the appellate level can be traced to its "big gun" approach.

The firm has approximately 50 appellate lawyers spread across the country that have argued approximately 220 cases before the Supreme Court, including 13 in the three most recent terms.

The firm boasts dozens of appellate arguments in courts across the country this year, with issues ranging from antitrust to securities, and preemption to punitive damages.

"We are able to give clients both a collaborative approach and, because of our breadth of practice areas, a lot of expertise in various aspects of law," Tager said.

Due to its rich history and its scorecard of ever-expanding wins, Mayer Brown's appellate practice is definitely a major focus area for the firm.

"We are arguably the largest appellate group in the country," Tager said. "I think we've been a marquee practice for the firm since the very beginning."

--Editing by Elizabeth Bowen.