

Mayer Brown's Policy Power Player: Andrew Pincus

By **Gavin Broady**



Law360, New York (August 12, 2014, 7:22 PM ET) -- As a Bronx Science high schooler devoted to New York Reform Democratic activism, Andrew Pincus' idealistic belief in the power of social change through policy started earlier than most, but in many ways his real education in the messy reality of the political machine would not come until a quarter-century later.

After successful terms in the solicitor general's office and the Department of Commerce, Pincus was hardly a Washington neophyte in 2000 when he signed on with Al Gore's presidential campaign and became a key player in the Florida recount litigation. Even now, however, he has a hard time wrapping his head around how things went so wrong.

"I remember the Bush people sought a stay of the counting process," he says. "We spent all night writing an opposition and went to bed thinking, 'They're never going to stay this — what could possibly be the irreparable injury of counting ballots?'"

"Then my phone rang early in the morning," he adds with a mordant laugh. "It was the deputy clerk of the Supreme Court, saying he had to read me some orders."

Although the experience would mark Pincus' exit from politics and government work, he has gone on to build a unique appellate practice at Mayer Brown LLP split evenly among litigation, legal strategy and policy reform work.

"One of the main things I've enjoyed doing in my work as a litigator is to take an area of law, think of what it should be and then develop a litigation strategy in a series of cases that would really change the law in a significant way," he says. "I know it sounds corny, but I love that sort of thing because I love the idea of trying to do something for people through policy."

From the Hudson to the Potomac

Though he is now a consummate Washington insider, Pincus came to the capital with great trepidation, following a high-profile clerkship with every intention of returning to Manhattan and taking the New York bar when his year was up.



Three decades later, Pincus still jokingly describes the decision to stay in D.C. as “utterly traumatic,” though he admits that the relocation has paid obvious dividends to both himself and his equally successful wife, Laura Wertheimer, a WilmerHale partner and pending nominee to be inspector general of the Federal Housing Finance Agency.

Pincus grew up on Long Island — and still has traces of the accent to prove it — and flirted with following in his father’s footsteps as a professional journalist while at Yale University, until a post-graduate stint as a paralegal pushed him toward law.

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Partner in Mayer Brown’s Appellate Practice

He attended Columbia Law School, where he met Wertheimer, and together they moved to Washington for his apprenticeship with D.C. District Judge Harold Greene — where he would coincidentally help the judge oversee the antitrust breakup of future client AT&T.

Pincus spent two years at Hughes Hubbard & Reed LLP before Solicitor General Rex Lee hired him on as an assistant, and at the age of 27, Pincus made his first appearance before the Supreme Court.

The SG’s office often has young staffers cut their teeth on either sure winners or sure losers, and Pincus’ first case before the Supreme Court was decidedly the latter — a criminal weapons case so doomed, he says, that the government had actually tried to confess error prior to the oral argument.

Pincus says the experience of facing the nine justices for the first time was no less harrowing for the predictability of the outcome. The argument also marked the inauguration of the young attorney’s unassuming gray- and black-striped lucky tie, a gift from his wife that has brought him much better fortune in his subsequent 22 high court arguments.

It was while working as a government appellate lawyer that Pincus was first introduced to the idea that a shrewd lawyer could field a series of cases dealing with a single issue — his focus was on Miranda rights and the admissibility of confessions — and effectively shift or clarify national policy through litigation

Despite his passion for the work, Pincus eventually grew restless with the limitations of the role.

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Crisis Management

Pincus left the solicitor general's office in 1988 for the newly minted Mayer Brown appellate litigation practice but was tempted back into government work nine years later when firm partner William Daley

became U.S. secretary of commerce and asked Pincus to serve as the department's general counsel.

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After three years that included a leading role in Commerce's efforts to develop legal rules for the Internet, Pincus followed Daley into the political arena, signing on to help Daley manage Gore's ill-fated presidential run.

Following those tense days in Tallahassee, Pincus craved a change of pace and decided to translate his experience working with accounting firms into an in-house position — though where he landed would not exactly turn out to be the drama-free gig he had in mind.

"Arthur Andersen had just elected a new CEO and they were making a lot of changes, including looking for a new general counsel," he says. "I took that job in the spring, and around October we got involved in this little matter called Enron. It was quite a maelstrom."

The scandal saw Andersen accused of helping the energy giant cook its books and led to the surrender of its accounting licenses and effective demise. Pincus dutifully stayed on through the winding-down of the company's global network, then returned to the safe haven of his former practice with Mayer Brown.

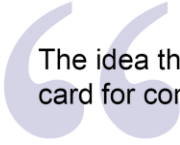
After his tumultuous detour into electoral politics and in-house corporate work, Pincus says, he was happy to be back at a firm that encouraged his policy-focused practice.

Pincus says this type of work, along with his frequent contributions to the development of legislation like the Private Securities Litigation Reform Act and the America Invents Act, is integral to his holistic view of litigation, one that focuses as much on root causes of problems as on their outcomes.

"Sometimes lawyers lose track of the idea that clients often have a problem of which the litigation is merely a manifestation," he says. "It often happens that litigation doesn't solve the real problem because it doesn't answer the question. So it's important to be able to step back and look at the problem and say: Maybe there's another way."

In Defense of Arbitration

These days, Pincus is perhaps best known for his landmark 2011 high court win in *AT&T Mobility v. Concepcion*. Despite the grim prognostications that followed that ruling, he insists that reports of the death of the consumer rights have been greatly exaggerated.



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In *Concepcion*, the high court backed the validity of contractual clauses requiring individual arbitration of claims over class treatment, and while many saw it as yet another decision from a politicized court favoring big companies over consumers and employees, Pincus argues that the last three years have put the lie to that interpretation.

“The idea that arbitration is some get out of jail card for companies is just wrong,” Pincus says. “Frankly, what people don’t realize is that, for a lot of claims that can’t be brought in court, arbitration opens the door to litigation of those claims. And most of the people who have those claims are consumers and employees.”

Pincus says those critical of *Concepcion* often either misunderstand the effectiveness of the arbitration system or have a vested interest in trashing arbitration and protecting the class action status quo.

He notes that his team conducted a study on class actions at the end of 2013 to try to determine just how much benefit they provide to individuals, the results of which were “pretty bleak” for class action proponents.

“In so many of these class actions potential class members aren't identifiable, and the money is going to go to some cy pres bucket,” he says. “That's great for the lawyers hired to represent plaintiffs or the defendants. But to me it has nothing to do with real people.”

He adds that the arbitration process is inexpensive, user-friendly — it often doesn’t even require claimants to miss a day of work — and protected by the strict due process protocols of providers like the American Arbitration Association. More importantly, he says, is that — unlike in most class actions — the claims can be resolved on the merits, leading to the possibility of larger systemic change.

“If you think about it, that’s a potential leverage point for a lawyer who wants to make use of the system,” Pincus says. “In arbitration you can quickly get a series of test claims decided on the merits, and if a company sees it’s losing them all, they’ll probably come to the table and get a deal. To me, that's a satisfying policy result.”

Law360's Appellate A-List is a regular feature presenting in-depth profiles of the nation's leading appellate litigators.

--Editing by Jeremy Barker.