

Appellate Group Of The Year: Mayer Brown

By Emma Cueto

Law360, New York (January 19, 2018, 4:30 PM EST) -- Mayer Brown LLP's Supreme Court and appellate practice group has tallied up an impressive series of wins over the last year, including two victories in the U.S. Supreme Court and circuit court decisions in favor of clients such as Google, Wells Fargo and CitiMortgage, earning it a place among Law360's 2017 Appellate Groups of the Year.

The group, which includes over 40 attorneys, told Law360 that its success stems from having a roster of top attorneys, working closely with the firm's trial litigators and always keeping an eye on the big picture for issues that affect its clients.

"I think what really makes our practice special ... is that we have a long term strategic approach to appellate litigation," said partner Lauren R. Goldman, one of the co-heads of the practice group. "We see issues coming down the pike very early and we're able to develop them in the right courts ... and push those arguments that help our clients and the business community more generally."

One of the issues the firm tracks closely is arbitration, which was also the subject of *Kindred Nursing Centers v. Clark*, one of its two U.S. Supreme Court wins in the past year. Representing Kindred, Mayer Brown successfully convinced the high court to overturn a Kentucky Supreme Court decision that had invalidated a Kindred arbitration agreement.

The U.S. Supreme Court ruling also drew on the 2011 *Concepcion* decision, which was handled by Mayer Brown as well.

Partner Andrew Pincus, another co-head for the group and one of the attorneys who handled the *Kindred* case, said, "In the wake of *Concepcion*, I thought 'Well that's going to be the end of litigation over arbitration clauses. ... We really clarified [this]'. But what's happened is, lots of new arguments are being raised."

In *Kindred*, the Kentucky Supreme Court held that a representative could not sign an arbitration agreement on another person's behalf, even if the representative had power of attorney, unless the power of attorney agreement specifically authorized it. The U.S. Supreme Court disagreed, siding with *Kindred* that the state court's ruling violated the Federal Arbitration Act.



"It did seem that the majority in the Kentucky Court were very skeptical about the Supreme Court's jurisprudence and was trying to find a way around it," Pincus said, which he said he believes helped the case be heard.

In another Supreme Court win, Mayer Brown represented a small company, Impressions Products, in a patent dispute with Lexmark International over Impression's practice of buying used printer cartridges to refurbish and resell. The court sided with Impression, ruling that authorized sales exhaust the rights of patent owners, and created significant protection for secondary markets.

Mayer Brown filed an amicus brief on behalf of Impression when the Federal Circuit reviewed the case en banc and was asked to take over the case after the judges ruled 10-2 in favor of Lexmark.

"It's a little daunting when you look at an en banc split that's as skewed against us as that one was," Pincus said. "But we thought we had very strong arguments on both of the questions," he added, referring to the questions of domestic and international sales.

In tackling the case, the firm focused both on the law, arguing that the Federal Circuit ruling was not supported by the statute, and on the practical implications the lower court's decision could have for secondary markets, according to Pincus.

The case was a must-win for Impression, Pincus said, since its ability to survive as a business hinged on being able to resell refurbished cartridges. "Our client is a small business in West Virginia ... in an economically depressed area. And to fight for their ability to stay in business was very heartening," Pincus said.

The firm also established wins in lower courts as well. It convinced the Ninth Circuit to preserve an \$8.5 million settlement in a proposed class action against Google in October, successfully argued that the Seventh Circuit should affirm the dismissal of a foreclosure discrimination case against Wells Fargo in August, and helped CitiMortgage preserve the dismissal of a proposed class action in May.

The practice group also won key victories in state court in recent months, such as a win in one of the Engle progeny cases playing out in Florida, in which former members of a decertified class have been pursuing individual tobacco-related claims against Mayer Brown client Phillip Morris. The firm was able to vacate a \$13 million wrongful death award by successfully arguing the lower court was wrong to allow the plaintiff to introduce reports from the surgeon general.

Goldman and Pincus say that taking the long view helps the practice group shape issues, and that integrating their work with that of the firm's trial litigators helps the group stay successful.

"One of the things that we do really well is communicate with the trial level litigators at the firm," Goldman said. "They also help us by spotting issues that are percolating in the trial courts and helping us get involved very early on. I think the close relationship between the appellate lawyers and the trial level litigators is another thing that enables us to see issues early on and push them in the right court."

The firm has someone keep an eye on every case from an appellate or legal issues perspective, she said, which helps make sure that both the legal and factual records are robust on appeal.

"I think it's that hands-on work that a lot of our clients appreciate and that really shows itself in the

results,” Pincus said.

--Editing by Alyssa Miller.

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