

Appellate MVP: Gibson Dunn's Miguel Estrada

By **Jeff Sistrunk**

Law360, Los Angeles (December 02, 2013, 5:37 PM ET) -- Arguing for cable giant Comcast Corp. in a consumer class action, Gibson Dunn's Miguel A. Estrada convinced the U.S. Supreme Court to strengthen the requirements for Rule 23 class certification, landing him a spot among Law360's Appellate MVPs of 2013.

Estrada, co-head of Gibson Dunn's appellate practice group, represented Comcast before the high court in a lawsuit alleging the company had monopolized the Philadelphia cable market. In a 5-4 decision in late March, the Supreme Court ruled that the Third Circuit had ignored key precedents like the 2011 Wal-Mart v. Dukes decision when it held that questions about expert testimony on which the plaintiffs relied to calculate the alleged damages in the case were merits issues that didn't belong in the class certification process.

The majority further concluded that because the district court had barred all but one of the plaintiffs' theories of liability, the plaintiffs couldn't use their model to show that damages could be calculated on a classwide basis, meaning that certification should be reversed. The decision decertified a class of 2 million Philadelphia-area Comcast subscribers.

Estrada said the Comcast ruling had an impact on class action law comparable to that of the Dukes decision. A Gibson Dunn team also won the latter case for Wal-Mart.

"Both cases independently had a seismic effect in terms of class action law," Estrada said. "For too many years, the lower courts have been too lenient in allowing class actions that didn't fit the bill. These two cases significantly raised the bar for the requirements of class action certification."

The majority in the Comcast case affirmed the importance of Rule 23's predominance requirement as it pertains to damages, Estrada said.

"Rule 23 (b)(3) requires common issues predominate over any individual issues," he said. "The Comcast case rolls back rulings from lower courts saying damages are not important or may be ignored in the class certification process. When you certify the class, you have to have some sort of scheme as to how this will work for the entire case on a classwide basis."

Estrada's win in the Comcast class action was just one highlight in a year full of them. He notched another victory for Comcast in a suit challenging the Federal Communications Commission's decision mandating that the company carry The Tennis Channel Inc. in the same package as Comcast's affiliated

sports networks.

Ruling on a complaint filed by the Tennis Channel, the FCC said in July 2012 that Comcast had favored the Golf Channel and Versus — both of which are affiliated with Comcast — over the Tennis Channel by relegating the independent network to only high-priced cable packages. The agency hit Comcast with a \$375,000 fine and ordered it to place the sports channels on equal footing.

But Comcast quickly appealed to the D.C. Circuit, which ruled in May that the FCC hadn't met its burden to prove that the cable provider discriminated against Tennis Channel.

In siding with Comcast, the D.C. Circuit said the FCC had not presented any evidence that showed the cable provider would have received some benefit from moving the Tennis Channel into a lower-priced package along with the Golf Channel and Versus, which is now known as NBC Sports Network. As a result, the court said, the FCC was not able to refute Comcast's argument that its decision to place the Tennis Channel in a separate networking package was financially driven, not based on discrimination.

Estrada said the FCC misused the 1992 Cable Act's carriage discrimination rules, which are aimed at preventing a vertically integrated company from providing unfair help to its media subsidiaries. The FCC's decision against Comcast marked the first time the commission had found a cable operator in violation of the anti-discrimination rules.

"This had nothing to do with furthering competition — they were trying to regulate speech," Estrada said. "The full court agreed this was not an appropriate use of the statute. They were troubled by the implications for speech, and found there was no evidence Comcast discriminated."

The industry has evolved dramatically since the Cable Act was passed, and Estrada said highlighting those changes was critical to his argument in the Tennis Channel case.

"When cable regulation first got to the Supreme Court, it was subject to a significant First Amendment challenge, and the government barely won," he said. "That victory was based on technological assumptions about what the world looked like at the time, the working assumption being that cable companies were basically local monopolists."

But 20 years later, with the glut of cable, phone and satellite video providers, "It's a very different technological world in which there is a lot of competition," Estrada said.

"A lot of rules that allow the FCC to interfere with the editorial judgment of cable programmers were created in a world where the need to protect competition was the sole justification for regulation, and the principal basis on which these regulations were upheld," he said. "In the modern world, you must devise a strategy to make courts aware of the technological changes in a diverse, competitive marketplace."

In another landmark case, Estrada represented 45 Republican senators appearing as amici in *Noel Canning v. National Labor Relations Board*, convincing a unanimous panel of the D.C. Circuit to curtail President Barack Obama's recess appointments power. The appellate court in January ruled that Obama's three controversial recess appointments to the NLRB were "constitutionally invalid" because Congress was in session at the time.

In its decision, the D.C. Circuit found that the Constitution only authorizes presidential appointments

during intersession recesses and that the president can only use his recess appointment powers to fill a vacancy that emerged during the recess.

The nation's high court granted certiorari in the Noel Canning case in June, and Estrada submitted an amicus brief on behalf of the Republican senators in late November. Oral argument is slated for Jan. 13.

"The president deserves to be told that this is not how the nomination process should be run," Estrada said.

Estrada's long journey to the top of Gibson Dunn's appellate practice group began when he immigrated to the U.S. from Honduras at age 17, arriving with a limited command of English.

After earning his law degree from Harvard Law School in 1986, Estrada went on to serve as a federal prosecutor in the Appellate Section of the U.S. Attorney's Office for the Southern District of New York before joining the Solicitor General's office, where he first argued cases before the Supreme Court. Upon leaving that office, Estrada joined Gibson Dunn's Washington practice. Estrada entered the national spotlight in 2001 when he was nominated to the D.C. Circuit by then-President George W. Bush but ultimately withdrew his name from further consideration when his confirmation was blocked in the Senate.

Estrada cited support from his colleagues in Gibson Dunn's "amazingly strong appellate group" — which includes a number of partners who argue regularly before the federal courts of appeal and the Supreme Court — as one of the factors in his success.

"I have really experienced and thoughtful colleagues who are able to brainstorm with me," he said. "I have benefited a lot from the ability to have this sort of integrated practice."

--Editing by John Quinn.