

Appellate Group Of The Year: Gibson Dunn

By Erin Coe

Law360, San Diego (January 02, 2014, 8:25 PM ET) -- Gibson Dunn clinched a blockbuster victory for the gay rights movement when the U.S. Supreme Court ruled that backers of California's ban on same-sex marriages lacked standing to defend the law, in a decision that cleared the way for gay couples to tie the knot in the state, earning the firm a spot among Law360's **Appellate Practice Groups of 2013**.

The firm has about 50 lawyers in Los Angeles, Washington, D.C., San Francisco and Dallas who principally focus on appellate litigation, and since 2005, Gibson Dunn has won more than two-thirds of the nearly 30 cases it has argued before the Supreme Court. The appellate team notched victories in three out of four cases before the high court in 2013: for same-sex couples in the hard-fought battle for marriage rights in California; for Standard Fire Insurance Co. in a case over the plaintiffs' attempts to avoid federal jurisdiction under the Class Action Fairness Act; and for Comcast Corp. in a massive antitrust class action over the cable company's price hikes on millions of subscribers.

"These three cases are a good reflection of the varied issues we grapple with," said Theodore Boutros Jr., co-chair of the firm's appellate and constitutional law group. "Our group has really been at the cutting edge of the major issues of the day, including the commercial litigation sector and constitutional rights. I think that's been part of the tradition at the firm."

When Gibson Dunn decided to represent two same-sex couples' challenge to Proposition 8 — the state's gay marriage ban that voters narrowly approved in November 2008, after the California Supreme Court had ruled earlier that year that same-sex marriage was allowed under the state constitution — the firm knew the case was likely to head to the U.S. Supreme Court, according to Boutros.

"We looked at the situation in California when Proposition 8 went into law, and it was such a dramatic example of the ballot initiative process stripping rights to marry from gays and lesbians that had been recognized by the California Supreme Court," he said. "When we brought the case in 2009, there was controversy over whether it was too soon to fight for marriage equality in the federal courts, but we looked at the law and the path to victory and decided the time was right and the time was now."

The profile of the case also was raised after attorneys Theodore Olson of Gibson Dunn and David Boies of Boies Schiller & Flexner LLP — who argued on opposite sides in the 2000 recount battle for president in *Bush v. Gore* — agreed to join forces to represent the plaintiffs in the case, according to Boutros.

"One attorney was viewed as a conservative, and the other was viewed as a liberal," Boutros said. "It emphasized both in court and publicly that [same-sex marriage] is not a partisan issue; it's an equality issue."

In June, the Supreme Court determined that Proposition 8 supporters had no standing to defend the same-sex marriage ban, leaving in place a district court decision that held the law violated the plaintiffs' constitutional rights to due process and equal protection. The Ninth Circuit subsequently lifted its stay of the district court ruling and allowed same-sex marriages to resume in California.

"The ruling had an immediate on-the-ground impact that gave liberty and equality to gay and lesbian citizens in California," Boutrous said.

He said the Proposition 8 ruling and the Supreme Court's June decision striking down the Defense of Marriage Act section defining marriage for federal benefits purposes as "only a legal union between one man and one woman as husband and wife" have unleashed litigation attacks on restrictions on marriage across the country, and he believes they will ultimately result in marriage equality in the U.S.

In March, Gibson Dunn scored a victory for Standard Fire when the Supreme Court unanimously ruled that plaintiffs bringing proposed class actions cannot escape federal jurisdiction under the Class Action Fairness Act by promising to seek less than \$5 million in damages. The high court held that plaintiff Greg Knowles had no power to speak for the proposed class when he stipulated in a lawsuit against Standard Fire that he and the class would not ask for more than \$5 million — the amount of damages that kicks class actions from state court to federal court.

"The case raised issues fundamental to class actions," said Boutrous, who argued the case. "We argued that the named plaintiffs can't affect the rights of the absent class members who they don't represent yet because a class hasn't been certified. It's an important principle, and the Supreme Court ultimately relied on that rationale in rejecting this tactic."

The court also pointed out that a ruling in favor of Knowles would mean the plaintiffs could easily subdivide a class action worth \$100 million that CAFA intends to be heard in federal court into 21 just-below \$5 million actions battled over in state court — an outcome that squarely conflicted with the statute's objective of ensuring that interstate cases of national importance are in federal court, the Supreme Court said.

"Standard Fire outlaws what was a tactic to thwart CAFA and includes language that provides a framework for combating other abuses in the future," Boutrous said.

In *Comcast v. Behrend*, Gibson Dunn convinced the Supreme Court in a 5-4 decision in March to decertify a class of 2 million cable television subscribers alleging Comcast monopolized the Philadelphia cable market, reasoning that questions of individual damage calculations would inevitably overwhelm questions common to the class. The court ruled that the Third Circuit had ignored key precedents like the 2011 major employer win in *Wal-Mart Stores Inc. v. Dukes* 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. Gibson Dunn also represented Wal-Mart in the *Dukes* case.

"Comcast is going to be exceedingly important in state and federal courts, including antitrust cases, wage-and-hour cases and Title VII cases, because the principles articulated in the case recur in every type of class action," Boutrous said. "The Supreme Court made clear that the issue of damages can defeat class certification."

Gibson Dunn's appellate group sets itself apart from competitors by collaborating closely across offices to handle major appeals anywhere in the world and by participating in trial court matters that involve crucial legal issues like the same-sex marriage dispute, according to Boutrous.

“We try to instill the skills lawyers should have in any court anywhere and to be able to win,” he said. “Getting involved at the trial court level helps shape the record on appeal and helps in terms of being able to achieve a victory early on. ... It adds a dimension that is very useful.”

The appellate practice is a major force within Gibson Dunn because many of the firm’s strongest, longest-lasting client relationships in the litigation area — such as with Wal-Mart, Dole Food Co. Inc. and Chevron Corp. — began with an appellate engagement, according to Boutrous.

The group has added nine appellate partners over the last six years, including three in 2013, and is expected to continue to expand at a steady pace, according to Boutrous.

“The appellate group is an engine of growth for the firm,” he said. “We are very careful about making sure we are making the right moves based on what our clients need and the markets they need us in. We are going to see a similar growth pattern going forward in the foreseeable future.”

--Editing by Edrienne Su.

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