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Gibson Dunn attorneys Theane Evangelis Kapur, left, Julian Poon, Theodore Boutrous Jr. and William Thomson.

Practice group performs in spotlight and under pressure

By John Roemer
Daily Journal Staff Writer

The hot spotlight on wins in the big Wal-Mart Stores Inc. class action and the attack on Proposition 8 illuminate Gibson, Dunn & Crutcher LLP's appellate and constitutional law practice group's efforts over the last year. And massive ongoing litigation for client Chevron Corp. in Ecuador and the U.S. remains at the boil.

Those marquee employment law, civil rights and environmental cases involved class certification issues, the crusade for same-sex marriage equality in California and an attack on a multi-billion dollar judgment by a foreign court.

Los Angeles partner Theodore J. Boutrous Jr. and San Francisco partner Daniel Kolkey are California co-chairs of the practice group, which has 50 lawyers firm-wide, 20 based in California.

Gibson Dunn & Crutcher LLP Appellate and Constitutional Law

Gibson Dunn's high profile cases bring in other matters. "Our long-standing representation of Wal-Mart has attracted business, and our earlier work for Dole in Nicaragua led to Chevron," Boutrous said.

The Prop. 8 case came to the firm when gay rights activists conceived a strategy designed to gain public attention by involving a conservative Republican and approached longtime Gibson Dunn litigator Theodore B. Olson, a former U.S. solicitor general under President George W. Bush. Olson, in turn, came up with the idea of

going bipartisan by recruiting David Boies, his opponent in the landmark *Bush v. Gore* showdown.

For Wal-Mart, Boutrous transformed defeat at the 9th U.S. Circuit Court of Appeals into victory at the U.S. Supreme Court as he successfully argued against certification of the largest employment discrimination class in history in *Wal-Mart Stores Inc. v. Dukes*, 10-277. The high court's 5-4 opinion last June reversed a 6-5 en banc decision by the 9th Circuit.

Gibson Dunn got involved in the case following class certification by a district court in 2004. The practice group spotted a host of key legal issues that could both win the case and interest the Supreme Court, which had not ruled on class-action matters for a decade, Boutrous said.

"The law in the lower courts had become very confusing and conflicting," Boutrous added. "We thought that if the case got as far as the Supreme Court, the justices would want to analyze the 'commonality' and 'trial by formula' arguments, which they ultimately did in reversing the class certification order."

With Boutrous on the case were California-based appellate partners Theane Evangelis Kapur, Rachel Brass and Julian Poon.

Litigating the successful attack on Prop. 8, California's same-sex marriage ban, at the federal trial level and before the 9th Circuit were Olson and Boutrous, plus appellate heavyweight Boies of Boies, Schiller & Flexner LLP. Gibson Dunn handled the case largely pro bono.

As the team argued and as a circuit panel concluded, voters "may not employ the initiative power to single out a disfavored group for unequal treatment and strip them, without a legitimate justification, of a right as important as the right to marry." *Perry v. Brown*, 2012 DJDAR 1705.

In another potential class action, this one filed against Gibson Dunn client Hewlett-Packard Co., a unanimous 9th Circuit panel affirmed dismissal of claims relating to alleged defects in more than 12 million of HP computers that purportedly made them prone to overheat and catch fire. The circuit panel held that a manufacturer has no duty to disclose absent a known, unreasonable safety risk and that merely making a product and receiving undated complaints from consumers is not sufficient to establish knowledge of a defect. Los Angeles partner Sam Liversidge and associate Timothy Loose obtained the district court's dismissal order affirmed by the circuit, where Kapur

argued the case. *Wilson v. Hewlett-Packard Co.*, 2012 DJDAR 2143.

In the massive litigation against Gibson Dunn client Chevron Corp. over alleged environmental damage in Ecuador, the practice group has won a series of trial and appellate victories in the 5th Circuit, the 3rd Circuit, the 2nd Circuit and the Southern District of New York. The group most recently persuaded the District Court for the District of Columbia to dismiss two complaints against Chevron filed by counsel for the Ecuadorean plaintiffs. California-based partners Boutrous, William E. Thomson and Julian Poon are handling the appeals at the D.C. Circuit. *Patton Boggs LLP v. Chevron Corp.*, 791 F.Supp.2nd 13.

Boutrous and Kapur are currently pursuing an interlocutory appeal to the 9th Circuit in the Toyota North America multi-district class-action litigation over sudden acceleration claims. At stake is a pivotal trial court ruling regarding those qualified to be class members. The trial court allowed Toyota's appeal of its ruling that purchasers who had not experienced the alleged defect may still have standing to be class members, and the circuit granted Toyota's petition to appeal. *Certain Economic Loss Plaintiffs v. Toyota Motor Corp.*, 11-80187.