

Supreme Court & Appellate Practice

Mayer Brown's more than 55 appellate lawyers have argued over 200 cases before the United States Supreme Court, representing either parties or *amici* in approximately 15 cases each Term for the past several years, and arguing an average of four per Term. In addition, our lawyers have argued hundreds of cases in federal and state appellate courts across the nation.

Chambers USA and *Legal 500 US* have again recognized our Supreme Court & Appellate group's preeminence in the field: for the third year in a row, both *Chambers USA* and *Legal 500 US* rank us as a top tier practice, with *Chambers* noting that our "heavyweight appellate team...is widely regarded as one of the best in the USA." The publications' comments illustrate Mayer Brown's dominance in the field of appellate advocacy:

- Clients interviewed by *Legal 500 US* call Mayer Brown an "analytical powerhouse" and "praise the practice for being 'unbelievably responsive and client-oriented,' and for 'advancing reasonable business interests.'"
- *Chambers USA* observes that our "broad assembly of talented advocates is well known for its sophisticated work across a range of areas and disciplines, including securities, antitrust, IP, environmental and tax."
- *Legal 500 US* reports that "Six of the Supreme Court cases that the firm took on in 2008 were distributed between four of the firm's lawyers, which demonstrates an egalitarian policy and depth of bench within the practice that contrasts with the 'star-centric' status quo in some Supreme Court practices."
- Clients expressed to *Legal 500* 2009 that Mayer Brown's Supreme Court and Appellate attorneys are "master strategists," and the "'best at what they do - high-quality appeals'."

Also, for the second year in a row, the *National Law Journal* named Mayer Brown to its "Appellate Hot List," recognizing firms that practice "exemplary, cutting-edge appellate advocacy."

Recent Major Successes

After a banner 2007 that included three big wins for business in the Supreme Court (*Credit Suisse First Boston v. Billing*; *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* and *Philip Morris USA v. Williams*), Mayer Brown's winning streak continued in 2008 and 2009 with *Stoneridge Investment Partners v. Scientific-Atlanta*, *CSX Transportation, Inc. v. Hensley*, and *Polar Tankers, Inc. v. City of Valdez*.

- *CSX Transportation, Inc. v. Hensley*, 129 S. Ct. 2139 (2009). The Supreme Court held in *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003) that a plaintiff who has asbestosis may recover for fear of contracting cancer under the Federal Employers Liability Act ("FELA") only if he or she proves that the alleged fear is "genuine and serious." We filed a petition for certiorari asking the Court to address whether the jury must be instructed on this requirement for a fear-of-cancer claim. In a highly unusual step, the Court summarily reversed the lower court, without merits-stage briefing or oral argument, and held, in a 7-2 per curiam opinion, that trial courts may not refuse to give a "genuine and serious fear" instruction. The lower court then ordered briefing and argument on whether the instructional error was harmless. Accepting our contention that the federal harmless-error standard applies, the court further

agreed with us that the instructional error was not harmless and proceeded to order a new trial on damages.

- *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009). The Court granted our petition for certiorari in this case as to whether, consistent with the Tonnage Clause (U.S. Const. art. I, § 10, cl. 3), states may impose property taxes that target vessels that frequent the states' ports, and whether, consistent with the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) and Equal Protection Clause (U.S. Const. amend. XIV, § 1), states may tax out-of-state vessels for the period of time that they spend on the high seas. By a vote of 7-2, the Court agreed with our position that the City of Valdez's exaction on vessels exceeding 95 feet in length violated the Tonnage Clause.
- *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008): Hailed by The Wall Street Journal as the "the biggest securities-litigation court clash in a generation," the Supreme Court agreed with Mayer Brown's argument that third parties who do not themselves mislead investors cannot be held liable for damages even if their conduct facilitates the fraud of another. Among the most notable and lasting impacts of the Court's decision was its dismissal of scheme liability as the basis for securities lawsuits, yielding a collective sigh of relief from the world's leading investment banks involved in underwriting securities offerings and marking an important win for investors who are harmed by this type of class action litigation.
- *Credit Suisse First Boston v. Billing*, 127 S. Ct. 2383 (2007): In a case closely followed by Wall Street, the Supreme Court reversed a Second Circuit decision and ruled in favor of Mayer Brown's clients, finding that investment banks and mutual funds could not be sued under antitrust law over losses from the crash of technology stocks when the "dot-com bubble" burst. Mayer Brown's resounding success saved its clients billions of dollars in potential damages and ended the threat of crippling liability in this matter.
- *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007): This case was an important development in the Supreme Court's ongoing review of antitrust law. The Court overturned a Ninth Circuit ruling and unanimously agreed with Mayer Brown that the two-pronged Brooke Group test used in predatory-pricing cases also applies to predatory-buying claims, thus rejecting the Ninth Circuit's more lenient standard.
- *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007): Among its most significant punitive damages decisions, the Supreme Court agreed with Mayer Brown's argument that a jury may not punish a defendant for injuries suffered by non-parties. This case set a critical punitive damages precedent and marked the fourth punitive damages case that Mayer Brown has argued in the Supreme Court. (No other firm has argued more than one.)

Overview of the Practice

The core of our practice is representing parties in US federal and state appellate courts. In the US Supreme Court, this includes briefing and arguing cases on the merits, petitioning for and opposing *certiorari*, and submitting *amicus curiae* briefs. We also monitor cases filed with the Court and advise clients on the potential ramifications. We are also frequently asked by other firms to work as co-counsel, helping with everything from drafting petitions and briefs to preparing for oral argument.

We play a similar role in other appellate courts. Members of our group have argued in every federal appeals court as well as in a substantial majority of the state intermediate appellate and supreme courts. Our work in these courts ranges from briefing and arguing appeals, to petitioning for discretionary review, to assisting other litigators with appellate strategy. We also regularly file *amicus* briefs in cases of importance to the business community.

Our group also assists at the trial level, where we regularly brief and argue pre-trial motions (including motions to dismiss, motions for summary judgment, class certification motions, motions *in limine* and motions for protective orders), handle post-trial motions (including motions for judgment as a matter of law, new-trial motions and motions for *remititur*) and work closely with trial counsel to shape legal strategy and properly preserve the record for appeal.

In addition, we frequently represent clients before various government agencies, including:

- Department of Justice (particularly the Solicitor General's Office, the Antitrust Division, the Civil and Criminal Division, and various offices of the United States Attorneys)
- Federal Trade Commission
- Securities and Exchange Commission
- Surface Transportation Board
- Department of Transportation
- Environmental Protection Agency
- Federal banking agencies

Finally, we regularly work with the lawyers in Mayer Brown's government practice on legislative and regulatory reform initiatives. Members of our practice have frequently testified before Congress in support of securities reform, amendments to the federal RICO statute, federal banking legislation, the communications laws and federal anti-bribery legislation. Our team has also advocated statutory reform before a number of state legislatures.

Practice Strengths

Sophisticated legal analysis, like effective presentation of facts, is critical to our success in court. The lawyers in our Supreme Court & Appellate practice have the skills, training and experience to be successful appellate advocates. The number and diversity of precedent-setting Supreme Court and appellate cases that we have handled are unmatched.

The experience and depth of our team is well known. The group includes seven former senior members of the Solicitor General's office (including one who has argued more cases in the Supreme Court than anyone else in private practice), four faculty members from leading law schools and seven former Supreme Court law clerks. And, because our appellate practice is fully integrated with the firm's global litigation practice, we can provide skillful representation tailored to each client's needs and to the demands and perspectives of any appellate forum.

In addition to our in-depth legal research, our group gives special emphasis to policy analysis, relying on economics and social science literature as well as conventional legal authorities. We are experienced in constitutional interpretation, analysis of complex legislation and presentation of policy arguments through the Brandeis-brief technique. This, combined with our study of the Court itself, helps us to know how best to shape an argument to maximize the chances that the Supreme Court either will grant *certiorari* (or that a state supreme court will grant discretionary review) or, where necessary, will deny it.

A demonstrated strength of our practice is the preparation of *amicus* briefs that influence decisions in important cases. Our *amicus* briefs have been cited (or their arguments embraced) in dozens of cases in the United States Supreme Court, state high courts and the federal courts of appeals.

We Handle Matters Efficiently and Effectively

When staffing an appellate matter, we select the members of our group whose skill and experience collectively encompass each relevant aspect of the project, allowing for efficient identification and analysis of the most fruitful litigation theories. Although senior lawyers receive assistance from junior members of the group, the senior lawyers are directly involved in conceptualizing, drafting and reviewing all appellate briefs. We produce briefs and related documents that are not only meticulously researched, logically developed and correctly attuned to the particular court, but that are also highly readable and engaging to busy appellate judges.

Cases handled by the group also frequently require us to perform a range of tasks beyond simply drafting persuasive briefs. For example, we effectively solicit *amicus* support and participation from influential trade associations in the private sector as well as from state, federal and foreign government units. And we use our contacts and affiliates in the academic world to apply the latest scholarly research on issues of public policy. We have performed these functions on hundreds of occasions, developing effective working relationships with every significant business association that regularly files *amicus* briefs, as well as with numerous key academics.

Appellate.net

Our combination of sophisticated yet practical research and communication skills is evident on the group's award-winning web site, www.appellate.net. Our lawyers update the site frequently to keep clients abreast of the latest Supreme Court news and other appellate decisions, including such information as:

- Descriptions of significant appellate decisions
- Articles about appellate litigation and issues relevant to businesses
- An extensive and growing selection of appellate briefs
- Recordings of oral arguments
- A history of our practice
- Biographies of members of the group.

Areas of Prominence

Mayer Brown is the driving force behind some of the most significant and cutting-edge appellate jurisprudence in the country. If the law does not favor our clients, we look to change the law—and we frequently succeed, as shown by our record in these areas of emphasis.

Punitive Damages: Mayer Brown has been involved in all of the significant punitive damages cases in the United States Supreme Court during the last decade, serving as counsel of record for the business defendant in three of those cases—including the landmark *BMW of North America, Inc. v. Gore* (which established for the first time that a punitive damages award can be “constitutionally excessive”) and the Court’s most recent punitive damages case, *Philip Morris USA v. Williams* (which imposed new curbs in the award of punitive damages). In a number of the cases we have handled, appellate courts have vacated the award of punitive damages against our clients and rendered judgment in their favor. In numerous other cases, we succeeded in obtaining substantial reductions of the punitive awards. Collectively, our clients have saved billions of dollars as a result of our appeals and post-trial motions on punitive damages issues.

Securities Class Actions: Mayer Brown is a leader in the field of class actions. Working with lawyers from our Securities Litigation & Corporate Governance and our Consumer Litigation & Class Actions practices, our group has successfully opposed the certification of consumer class actions in numerous state, federal and international jurisdictions and tribunals. We have a particularly notable record in securities class actions, most recently in the *Stoneridge* decision and in *In re Initial Public Offering Securities Litigation (Miles v. Merrill Lynch)*. In that latter case, the Second Circuit in 2006 reversed the district court’s grant of class certification in 310 consolidated IPO class actions involving trillions of dollars, thousands of plaintiffs, and 55 of the nation’s leading underwriters. The opinion dramatically altered class action jurisprudence in the Second Circuit by tightening the standard that plaintiffs must satisfy.

Insurance Torts: Mayer Brown represents life, disability, auto and home insurers in a wide range of cases in forums throughout the country. Our practice includes not only the representation of insurers in specific cases but also the filing of *amicus* briefs in numerous cases raising issues of interest to insurers, such as *State Farm Mutual Automobile Insurance Co. v. Campbell*. In that case, the Supreme Court agreed with our argument—made on behalf of the United States Chamber of Commerce—that a court may not impose punitive damages on a defendant for conduct directed at individuals who are not before the court.

Preemption: We have secured dismissal on federal preemption grounds—at trial or on appeal—in purported class actions involving everything from bank fees and practices to product liability, and have been involved in virtually every Supreme Court product liability preemption case—representing either a party or *an amicus*—in the past ten years.

Antitrust: Our lawyers have extensive experience litigating at trial and on appeal a broad variety of significant antitrust and competition matters. The published opinions in many of these cases stand as among the leading authorities on such topics as price fixing and monopolization. Along with our Antitrust & Competition practice, our antitrust appellate lawyers have argued or briefed nearly every significant antitrust case to reach

the US Supreme Court during the past decade. In Europe, we handle EU antitrust issues in the European Court of Justice, the German Federal Supreme Court, and UK appeal tribunals.

Intellectual Property: Working together with the firm's highly regarded IP practice, our appellate group is well qualified to handle IP matters in any forum—from the Federal Circuit and the Supreme Court in the United States to the German Federal Patent Court and the German Federal Supreme Court. Our precedent-setting victories include *Illinois Tool Works Inc. v. Independent Ink, Inc.* (a significant victory for all patent holders, in which the Supreme Court ruled that in all cases involving a tying arrangement the plaintiff must prove that the defendant has significant market power in the tying product), and *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.* (in which the Supreme Court redefined and clarified the “doctrine of equivalents”).

Product Liability: Our group has briefed and argued numerous cutting-edge issues in toxic tort and product liability litigation in appellate courts and the United States Supreme Court. These issues include class certification and mass consolidation matters, preemption, the standards for the admissibility of scientific evidence and punitive damages. We also regularly work with trial counsel—both from Mayer Brown and other law firms—to assist in the briefing of such issues at the trial level, as well as to assist with trial strategy.

Environmental Litigation. High-profile Supreme Court and appellate representation is a key part of Mayer Brown's highly regarded environmental litigation practice. For example, in *South Florida Water Management District v. Miccosukee Tribe*, we petitioned for certiorari on behalf of the plaintiff over opposition of the United States and we were successful in overturning the lower appellate court ruling. Mayer Brown also successfully argued on behalf of the plaintiff in *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers*, defeating the United States in this Clean Water Act matter.

Arbitration: Our group frequently represent corporations, companies, partnerships, financial institutions, insurers and governmental entities before the leading international arbitration bodies. Our team has extensive experience with the international institutions that administer international arbitration and dispute settlement, including the International Court of Arbitration of the International Chamber of Commerce, London Court of International Arbitration, the International Center for Dispute Resolution of the American Arbitration Association and the International Centre for Settlement of Investment Disputes. In addition, we have extensive experience with *ad hoc* proceedings under the rules of, for example, the International Institute for Conflict Prevention and Resolution. We also regularly assist clients with domestic arbitration issues, both providing the legal support in arbitrations and litigating motions to compel arbitration and to confirm, modify or vacate arbitral awards in trial and appellate courts.