RECENT HIGHLIGHTS OF MAYER BROWN LLP'S SUPREME COURT AND APPELLATE PRACTICE GROUP

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The following list describes some of the cases that we have handled in the Supreme Court and other appellate courts during the last few years. The list is by no means comprehensive; it is instead intended to illustrate the range of our practice and to highlight some of the important cases we have handled during this period.

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U.S. SUPREME COURT

1. ***Los Angeles County v. Humphries*, No. 09-350 (cert. granted Feb. 22, 2010).** After finding that the Humphries were erroneously included in the California Child Abuse Central Index, the Ninth Circuit found that California and the County of Los Angeles had violated the Humphries' constitutional rights. The Ninth Circuit remanded the case for further proceedings on *Monell* liability, and then later awarded the Humphries attorneys' fees with respect to their appeal. The County of Los Angeles challenged only the fee award through a petition of certiorari, arguing that (1) no judgment can be had against the county—even for prospective relief—until the plaintiffs prove *Monell* liability, and (2) that the declaratory relief obtained here is insufficient to trigger a fee award. On behalf of the Humphries, we filed a brief in opposition to L.A. County's petition for certiorari. The Court granted certiorari, limited to the first question. We will now represent the Humphries on the merits. Andy Pincus (DC) will argued the case. Charles Rothfeld (DC) and Paul Hughes (DC) will assist on the brief.

2. ***Carr v. United States*, No. 08-1301 (argued Feb. 24, 2010).** This is a case we are handling in conjunction with the Yale Supreme Court Clinic. The Court granted our petition for certiorari to address two issues about the meaning of the federal Sex Offender Registration and Notification Act, which requires registration of sex offenders who travel in interstate commerce on pain of

substantial criminal penalties. The questions are (1) does the statute require registration of people who committed their crime and traveled in interstate commerce before the statute was enacted and (2) if so, does the statute violate the Ex Post Facto Clause of the Constitution by retroactively attaching enhanced criminal penalties to past conduct. Charles Rothfeld (DC) will argue the case. Andy Pincus (DC) will assist on the briefs.

3. *Pottawattamie County, Iowa v. Harrington*, No. 08-1065 (cert. dismissed Jan. 4, 2010). The Court granted our petition to address whether the Eighth Circuit erroneously denied immunity to prosecutors in a case in which civil rights plaintiffs alleged that the prosecutors (1) procured false testimony during the investigative phase of a criminal proceeding, then (2) introduced the same evidence in judicial proceedings. Steven Sanders (Chi.) argued the case. Steve Shapiro (Chi.), Jeff Sarles (Chi.), Vince Connolly (Chi.), and Lori Lightfoot (Chi.) assisted on the briefs. The case settled, and therefore was voluntarily dismissed, after argument.

4. *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. Evan Tager (DC) and Dan Himmelfarb (DC) prepared the certiorari papers.

5. *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009). The Court granted our petition for certiorari in this case 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. Charles Rothfeld (DC) argued the case. Andy Frey (NY/DC) and Brian Netter (DC) assisted on the briefs.

6. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). The issue in this case was whether the Due Process Clause requires an elected state

supreme court justice to recuse himself indefinitely from all cases involving a corporation whose CEO contributed substantial amounts of money to a 527 group that used those funds to attack his opponent in the judicial election. After the Court granted certiorari, we were retained to represent the respondent in contending that recusal is not required by the Due Process Clause. By a 5-4 vote, the Court held that recusal was required under the "extraordinary" circumstances of this case. Andy Frey (NY/DC) argued the case. Steve Shapiro (Chi.), Evan Tager (DC), Dan Himmelfarb (DC), academic affiliate Eugene Volokh (UCLA), Melanie Rughani (DC), and Brette Steele (DC) assisted on the brief.

7. *Harbison v. Bell*, 129 S. Ct. 1481 (2009). Federal law (18 U.S.C. § 3559) authorizes funding to provide counsel to indigent death row inmates, including state defendants pursuing federal habeas relief. In this case, the Supreme Court held that Section 3559 also authorizes funding for counsel in state law clemency proceedings where state law does not provide indigent inmates with counsel. As part of the Yale Law School Supreme Court advocacy Clinic, Andy Pincus (DC) and Charles Rothfeld (DC) served as co-counsel for petitioner.

8. *Arizona v. Johnson*, 129 S. Ct. 781 (2009). The question presented in this case was whether in the context of a vehicular stop for a minor traffic infraction, an officer may conduct a pat-down search of a passenger when the officer has an articulable basis to believe that the passenger might be armed and dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense. The court held that the search did not violate the Fourth Amendment. As part of the Yale Law School Supreme Court Advocacy Clinic, we represented the respondent (defendant). Andy Pincus (DC) argued the case. Charles Rothfeld (DC) assisted on the brief.

9. *Philip Morris USA v. Williams*, 129 S. Ct. 1436 (2009). As described more fully in item 16 below, the Supreme Court held in 2007 that the Oregon Supreme Court erred in holding that juries may punish defendants for the impact of their conduct on non-parties. On remand from that decision, the Oregon Supreme Court refused to grant Philip Morris any relief, reasoning that there were two wholly unrelated defects in Philip Morris's proposed jury instruction that made the error identified by the Supreme Court harmless. The Supreme Court granted our petition for certiorari to address whether the Oregon Supreme Court violated the mandate and/or whether that court's post hoc rationale for refusing to afford Philip Morris any relief is an "independent and adequate" state-law ground. Almost four months after oral argument, the Court dismissed the petition as improvidently granted without explanation. Steve

Shapiro (Chi.) argued the case. Andy Frey (NY), Ken Geller (DC), Andy Schapiro (NY), Lauren Goldman (NY), and Scott Chesin (NY) assisted on the briefs.

10. *Fitzgerald v. Barnstable School Committee*, 129 S. Ct. 788 (2009). The case involves grotesque and repeated peer-on-peer sexual harassment of a kindergarten girl by a third-grade boy while riding the bus to school. When the girl's parents complained to school officials, the principal offered to allow the girl to ride on a different bus or to separate the kindergarteners and older students, but would not place a monitor on the bus or require the boy to use a different bus. The parents objected because they believed that requiring their daughter to use a different bus punished her rather than the abuser. When the school offered no further relief, the parents sued on the girl's behalf under both Title IX and 42 U.S.C. § 1983, alleging statutory and constitutional equal protection violations. The First Circuit held that Title IX occupied the field and precluded use of section 1983 to assert a constitutional equal protection claim growing out of the same facts. In conjunction with the Yale Law School Supreme Court Clinic, we persuaded the Court to grant review. A unanimous Court then reversed the First Circuit, holding that Title IX does not preclude a Section 1983 suit alleging gender discrimination in schools. Charles Rothfeld (DC) argued the case. Andy Pincus (DC) assisted on the briefs.

11. *Negusie v. Holder*, 129 S. Ct. 1159 (2009). This case concerns whether an alien who was compelled to act as a military guard in a prison where people were being persecuted on the basis of a protected ground is barred from asylum. As part of the Yale Law School Supreme Court Clinic, we filed a petition on behalf of an Eritrean national who is seeking asylum and represented him on the merits. The Court reversed and remanded, holding that the Borad of Immigration Appeals erroneously relied on an inapposite Supreme Court decision construing a different statute and should exercise its discretion in interpreting the applicable statute in the first instance. Andy Pincus (DC) argued the case. Charles Rothfeld (DC) assisted on the briefs.

12. *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008). The issue in this case was whether federal law expressly or impliedly preempts a state-law claim that the use of the descriptions "lights" or "low tar" on cigarettes is fraudulent. We worked with other firms to prepare a petition asking the Court to decide whether state-law claims may proceed where the FTC has approved statements in cigarette advertising that directly pertain to smoking and health. The Supreme Court granted the petition, but by a vote of 5-4 affirmed the decision of the First Circuit. Ken Geller (DC) assisted on the briefs. Co-counsel argued the case.

13. *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008). This case involves the disposition of $35 million, alleged to have been unlawfully acquired by Ferdinand Marcos during his tenure as President of the Republic of the Philippines. The money is claimed by several parties, including the Republic, and also is the subject of ongoing litigation in the Philippine courts. The Ninth Circuit held that the Republic appropriately could assert sovereign immunity in this litigation, and also held that it is a "necessary" party to the case (as that term is used in Federal Rule of Civil Procedure 19(a)). It thereafter held that the Republic was not an "indispensable" party under Rule 19(b), however, largely on the ground that the Republic's claim would fail on the merits. We petitioned for certiorari (on behalf of the Republic, its Presidential Commission for Good Government, and our client, the Philippine National Bank), arguing that the Ninth Circuit erred in looking to the merits of the Republic's claim to the Arelma assets, thus in effect negating its valid claim to sovereign immunity. The Court agreed, holding that the Ninth Circuit had given insufficient weight to the Republic's sovereign status and incorrectly applied Rule 19(b) in concluding that the Republic was not an "indispensable" party. Charles Rothfeld (DC) argued the case. Ken Geller (DC), David Gossett (DC), Liz Oyer (DC), and Brian Netter (DC) assisted on the briefs.

14. *United States v. Rodriquez*, 553 U.S. 377 (2008). Under the Armed Career Criminal Act, a defendant may be sentenced to a mandatory 15-year sentence if he or she has three previous convictions for a state offense where the state prescribes "a maximum term of imprisonment of ten years or more." The Court granted certiorari and reversed the Ninth Circuit's holding that, for purposes of deciding whether a prior conviction was for an offense carrying a penalty of imprisonment of "ten years or more," a court should disregard possible sentence enhancements for recidivism. As part of the Yale Supreme Court Clinic, we represented the respondent. Charles Rothfeld (DC) argued the case. Andy Pincus (DC) assisted on the brief.

15. *Ali v. Achim*, cert. dismissed, 552 U.S. 1085 (2007). The Court granted our petition for certiorari to decide (1) whether a non-aggravated felony can constitute a "particularly serious crime" that bars eligibility for withholding of removal or asylum under the Immigration and Nationality Act, and (2) the scope of the appellate courts' jurisdiction to review determinations of a "particularly serious crime" made by the Board of Immigration Appeals under 8 U.S.C. § 1252(a)(2)(B(ii) and (a)(2)(D). After we filed our opening brief, the government agreed to settle the case and stipulate to an order by the Immigration Judge pursuant to which Mr. Ali will likely be permitted to remain in the United

States for the foreseeable future. David Gossett (DC), Sarah Sulkowski (DC), and Brian Netter (DC) prepared the brief.

16. *Stoneridge Investment Partners v. Motorola, Inc. & Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). In this landmark case with far reaching ramifications for the business community, the Supreme Court affirmed the decision of the Eighth Circuit and rejected "scheme" liability in private securities fraud actions. Plaintiffs had sought to hold suppliers of cable boxes to Charter Communications liable for a fraud perpetrated by Charter through the misstatement of its contracts with the suppliers. The Court held that the Section 10(b) private right of action did not reach the suppliers, who had made no representations upon which the plaintiffs could have relied. The assertion of "scheme liability" could not compensate for the lack of reliance, as any other rule would extend the reach of Section 10(b) private actions into the realm of ordinary business operations. Mayer Brown represented defendants Motorola and Cisco. Steve Shapiro (Chi.) argued the case. Andy Pincus (DC), Tim Bishop (Chi.), Charles Rothfeld (DC), and Daniel Staroselsky (Chi.) assisted on the brief.

17. *Klein & Co. Futures Inc. v. Board of Trade of the City of New York*, cert. dismissed, 552 U.S. 1085 (2007). The Commodity Exchange Act establishes a private right of action for commodities traders for damage caused by the failure of a commodities exchange to enforce its rules. The Court granted certiorari in this case to review the Second Circuit's holding that the statute does not apply to suits by exchange members based on activities related to trade-clearing. We were retained after the grant of certiorari to represent the respondent, the New York Board of Trade. Andy Pincus (DC) argued the case. Andy Schapiro (NY) and Daniel Kirschner (NY) assisted on the brief. After argument, the parties entered into a stipulation of dismissal.

18. *Credit Suisse First Boston v. Billing*, 551 U.S. 264 (2007). At the intersection of the antitrust and securities laws, this case arose from Sherman Act and Robinson-Patman Act claims asserted against ten leading underwriters and four mutual fund families that challenged alleged conduct during the underwriting of some 900 initial public offerings during the "Internet bubble" in the late 1990s. In a resounding victory for the securities industry, the Supreme Court reversed the Second Circuit and held that the IPO process is impliedly immune from the antitrust laws. The Court agreed with the underwriters' position that interposing antitrust courts and juries in this area, in which the Securities and Exchange Commission engages in nuanced line-drawing between conduct essential to capital formation and conduct that is unlawful, would interfere with the effective functioning of the capital markets and disrupt the

SEC's ability to exercise its regulatory expertise. The Court further rejected the Solicitor General's compromise position, which would have resulted in a remand; it reversed the Second Circuit's decision outright, dismissing the antitrust claims. Representing our client Merrill Lynch, Steve Shapiro (Chi.) argued the case for petitioners. Ken Geller (DC), Tim Bishop (Chi.), and Josh Yount (Chi.) assisted on the briefs.

19. *Altadis USA, Inc. v. Sea Star Line LLC and American Trans-Freight (ATF), Inc.*, cert. dismissed, 549 U.S. 1189 (2007). This case arose out of the theft of a shipping container during the inland portion of a shipment of cigars from Puerto Rico via Jacksonville to Tampa. The entire shipment, both ocean and surface portions, was covered by a single bill of lading that required, consistently with the Carriage of Goods by Sea Act ("COGSA"), that any claim be made within one year from the date of loss; the petitioner's suit was not filed within the contractual period of limitations. However, the Carmack Amendment requires that shippers be permitted at least two years to file claims due to loss arising in the course of interstate surface shipments. The question on which the Supreme Court granted review was whether this requirement applies to the inland leg of an intermodal ocean-land shipment when there is a "through bill of lading" that applies to the entire voyage, rather than separate bills of lading for the two legs of the voyage. The Eleventh Circuit and three other Circuits have held that it does not; two Circuits have reached the opposite conclusion. We were retained to defend the Eleventh Circuit's ruling. The case settled during briefing. Andy Frey (NY/DC), Evan Tager (DC), Andy Schapiro (NY), and Brian Willen (NY) represented respondent ATF.

20. *Hein v. Freedom From Religion Foundation, Inc*., 551 U.S. 587 (2007). The issue in this case was whether a taxpayer had standing to raise an Establishment Clause challenge to a series of conferences conducted by the White House and various executive agencies pursuant to the Faith Based and Community Initiative established by the President. Representing the respondent, we argued that the standing principle recognized in *Flast v. Cohen*, 392 U.S. 83 (1968), and reaffirmed unanimously in *Bowen v. Kendrick*, 487 U.S. 605 (1988), permits taxpayers to challenge on Establishment Clause grounds an expenditure of funds pursuant to a congressional appropriation when that expenditure is fairly traceable to the allegedly unconstitutional conduct. By a 5-4 vote, the Court rejected our argument, holding that the taxpayer lacked standing under the facts of this case. Andy Pincus (DC) argued the case. Charles Rothfeld (DC) and Liz Oyer (DC) assisted on the brief.

21. *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Association*, 550 U.S. 330 (2007). The Court granted our petition

to decide whether a county's requirement that all waste collected within its borders be disposed of at a county-owned waste management facility violates the dormant commerce clause. By a 6-3 vote, it held that such a law does not violate the commerce clause. Evan Tager (DC) argued the case for the petitioners. Miriam Nemetz (DC) assisted on the briefs.

22. *Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007). In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court held that a plaintiff alleging predatory selling must prove that the defendant (1) sold its end product at a price too low to cover its costs and (2) had a dangerous probability of recouping its losses. The Court granted our petition for certiorari to address whether the objective, two-part *Brooke Group* test also applies to predatory buying claims, or whether, as the Ninth Circuit held, predatory buying may be established simply by persuading a jury that the defendant purchased more inputs "than it needed," or paid higher price for those inputs "than necessary," so as to prevent competitors from "obtaining the [inputs] they needed at a fair price." The Court unanimously agreed with us that the *Brooke Group* test is applicable to predatory buying claims, explaining that a more lenient standard would pose an intolerable risk of chilling legitimate pro-competitive conduct. Andy Pincus (DC) argued the case. Charles Rothfeld (DC) assisted on the briefs.

23. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The Court granted certiorari in this case to review a Second Circuit decision reversing the dismissal of a complaint alleging that the defendant telephone companies conspired not to offer local telephone service outside their traditional territories and to violate their obligations under the Telecommunications Act of 1996. By a 7-2 vote, the Court reversed, holding that, to survive a motion to dismiss, a Section 1 complaint must allege "enough factual matter (taken as true) to suggest that an agreement was made." In particular, a complaint's allegations must go beyond "labels" and "conclusions" that an agreement existed, raising instead "a right to relief above the speculative level." It must provide "plausible grounds to infer an agreement" and create "a reasonable expectation that discovery will reveal evidence of illegal agreement"—not just be "consistent with" agreement. Therefore, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice"; the allegations "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct." The Court's decision has wide-reaching implications for federal antitrust litigation and signals a victory for antitrust defendants in a variety of industries. Steve Shapiro (Chi.), Ken Geller (DC), and Dick Favretto (DC) were counsel for one of the

petitioners, BellSouth Corporation. Counsel for one of the other petitioners argued the case.

24. ***Philip Morris USA v. Williams*, 549 U.S. 346 (2007).** In this case, the Oregon Supreme Court upheld a $79.5 million punitive award in favor of the widow of a smoker. The Court granted our petition for certiorari to address two questions: (i) whether the Oregon Supreme Court erred in holding that a jury in an individual case may punish the defendant for harms suffered by non-parties so long as those harms arose from conduct similar to the conduct that injured the plaintiff; and (ii) whether the Oregon Supreme Court erred in holding that a finding of high reprehensibility can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm. By a 5-4 margin, the Court agreed with us that a jury may not constitutionally punish a defendant for injuries suffered by non-parties. It accordingly did not reach the second issue presented. Andy Frey (NY/DC) argued the case. Ken Geller (DC), Evan Tager (DC), Andy Schapiro (NY), Lauren Goldman (NY), and Daniel Kirschner (NY) assisted on the briefs.

25. ***Fernandez-Vargas v. Gonzales,* 548 U.S. 30 (2006).** Our client in this case, Humberto Fernandez-Vargas, was a Mexican national. Based on his marriage to a U.S. citizen, in 2001, he applied to have his immigration status "adjusted" to that of a legal permanent resident. The government refused, asserting that Section 241(a)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")—which precludes an undocumented alien who had previously been the subject of an order of removal from the United States, and who thereafter re-entered the country illegally from applying for "any relief" under the Immigration and Nationality Act—applied to Mr. Fernandez-Vargas, despite the fact that he had previously been deported from the United States and had re-entered the country long before IIRIRA's effective date. We argued that Section 241(a)(5) of IIRIRA did not apply retroactively to Mr. Fernandez-Vargas. By a vote of 8-1, the Court held that the statute is retroactive. David Gossett (DC) argued the case. Andy Tauber (DC) assisted on the briefs.

26. ***DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006).** In this case, the Court granted our petition for certiorari to review the Sixth Circuit's holding that an Ohio statute providing tax abatements for companies that engage in in-state economic development are unconstitutional under the Commerce Clause. The Court did not reach the merits because it concluded that the plaintiffs lacked standing. Charles Rothfeld (DC), Erika Jones (DC), and Miriam Nemetz (DC) drafted the petition for certiorari and assisted with the merits briefs. Co-counsel argued the case.

27. ***Day v. McDonough*, 547 U.S. 198 (2006).** The Court granted our petition for certiorari on behalf of Patrick Day to decide whether the one-year statute of limitations for filing a habeas petition is an affirmative defense and whether it is error for a court to dismiss a petition as untimely after the defense has been forfeited. The Eleventh Circuit held that the district court could dismiss Day's petition *sua sponte* even though Florida had expressly conceded that it was timely. The Court affirmed by a 6-3 vote. It agreed with our position that the statute is an affirmative defense but declined to apply the forfeiture principles of the Federal Rules of Civil Procedure, holding instead that district courts may dismiss an untimely petition *sua sponte* if doing so would serve the interests of justice. Former partner Brett Busby argued the case. Andy Schapiro (NY) assisted on the briefs.

28. ***Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).** The Court granted our petition in this case to review the Federal Circuit's holding that, in antitrust tying cases involving patent rights, the plaintiff enjoys a rebuttable presumption that the defendant patentee holds market power in the relevant tying-product market solely by virtue of the patent. By an 8-0 margin, the Court agreed with our position, holding that a plaintiff pursuing a tying claim must always prove that the defendant had market power in the tying product. Andy Pincus (DC) argued the case. Dick Favretto (DC), Ken Geller (DC), and Chris Kelly (DC) assisted on the cert. petition and the merits briefs.

29. ***Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303 (2006).** The issue in this case was whether, for purposes of determining diversity jurisdiction, a national bank is a citizen of every state in which it has a branch or, instead, only of the state where it has its principal place of business and/or the state listed on its organization certificate or articles of association as its main office. The Court granted our petition to resolve a circuit split on this issue and held unanimously (8-0) that a national bank is located only in the state of its main office. Andy Frey (NY/DC), Charles Rothfeld (DC), and Evan Tager (DC), in tandem with Wachovia's counsel in the lower courts, drafted the cert. petition and prepared the merits briefs. Andy argued the case.

30. ***American Trucking Associations, Inc. v. Michigan Public Service Commission*, 545 U.S. 429 (2005).** The State of Michigan imposes a flat annual fee of $100 per vehicle on interstate motor carriers for the privilege of transporting property between points within the State. The same tax must be paid both by vehicles that confine their operations to Michigan and by those that engage in a combination of interstate and intrastate operations. The amount due does not vary according to miles traveled or number of trips taken in Michigan, and is not adjusted to reflect the portion of time that a truck devotes to traveling

between states or intrastate in states other than Michigan. After the Michigan courts upheld the tax over constitutional challenges, the Supreme Court granted our petition for certiorari to consider whether the tax violates the dormant Commerce Clause. It proceeded to affirm on the ground that the tax is facially neutral and is imposed only on intrastate transactions. Charles Rothfeld (DC) and Evan Tager (DC) drafted the certiorari papers and merits briefs. ATA's in-house counsel, Bob Digges, argued the case.

31. *Ballard v. IRS*, 544 U.S. 40 (2005). The Court granted our petition for certiorari to determine whether the Tax Court's practice of keeping the findings and opinions of its Special Tax Court judges secret from the parties and the courts of appeals violates taxpayers' due process and statutory rights. The Court held that no statute or rule authorizes this "extraordinary" practice, thereby making it unnecessary to reach the constitutional issue. Steve Shapiro (Chi.) argued the case. Philip Lacovara (NY/DC) and Lauren Goldman (NY) assisted on the briefs.

32. *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004). This is an antitrust case alleging that our client BASF and other defendants conspired to fix vitamin prices. The D.C. Circuit, in a divided opinion, held that U.S. courts may adjudicate Sherman Act antitrust claims arising solely from the impact of anticompetitive conduct on foreign commerce. The Supreme Court granted our cert. petition to decide whether foreign plaintiffs may bring a claim under the Sherman Act that arises solely from injury incurred in foreign commerce. With one Justice recused, the Court unanimously agreed with our arguments, holding that the Sherman Act is inapplicable to claims based on the effects of anticompetitive conduct on foreign plaintiffs that are independent of any adverse domestic effect. Steve Shapiro (Chi.) argued the case. Ken Geller (DC), Ty Fahner (Chi.), Andy Marovitz (Chi.), and Jeff Sarles (Chi.) assisted on the briefs.

33. *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004). Under the terms of their multi-employer pension fund at the time they chose to retire early, our clients, two former union construction workers, were entitled to receive early-retirement benefits so long as they did not accept specified disqualifying employment after their retirements. Although continuing to work as a construction worker would have been disqualifying, working as a supervisor in the construction industry was, under the terms of the Plan, not disqualifying – and both of our clients chose to accept such employment. The pension fund thereafter modified its rules to provide that any employment in the construction industry would disqualify a Plan member from receiving early retirement benefits, and applied this new rule to members who had retired before the change

in policy. Our clients sued, arguing that the application of the new rule to them violated ERISA's "anti-cutback" rule. Although the district court ruled against our clients, the Seventh Circuit ruled in their favor. We were retained to represent them in the Supreme Court, which unanimously affirmed the decision of the Seventh Circuit, holding that the anti-cutback rule precludes multi-employer pension plans from being amended to expand the definition of prohibited post-retirement employment with respect to benefits accrued prior to such amendment. David Gossett (DC) argued the case. Charles Rothfeld (DC) assisted on the brief.

34. *South Florida Water Management District v. Miccosukee Tribe and Friends of the Everglades*, 541 U.S. 95 (2004). The Eleventh Circuit held in this case that the South Florida Water Management District must obtain a National Pollutant Discharge Elimination System permit under the Clean Water Act in order to operate pumps that keep Broward County from flooding because the pumped water is mildly more polluted than the receiving water. The Court granted our petition and, after briefing and argument, vacated and remanded for a factual finding as to whether the canal through which the water flows and the impoundment area are separate bodies of water, an indispensable prerequisite for applicability of the permit requirement. Tim Bishop (Chi.) briefed and argued the case.

35. *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004). The issue in this case was whether the Clean Air Act preempts a local government's rules prohibiting operators of vehicle fleets from purchasing new diesel-fueled vehicles. As counsel for co-petitioner Western States Petroleum Association, former partner John Sullivan was instrumental in drafting the cert. petition. John and Andy Pincus (DC) also had responsibility for drafting the opening brief. Counsel for co-petitioner Engine Manufacturers Association drafted the reply brief and argued the case. By an 8-1 margin, the Court agreed with our position, holding that the local government's fleet rules are preempted.

FEDERAL COURTS OF APPEALS

- **D.C. CIRCUIT**

36. *Grant Thornton, LLP v. Office of the Comptroller of the Currency*, 514 F.3d 1328 (2008). In this case, we secured vacatur of the decision of the Comptroller of the Currency imposing a fine and a cease-and-desist order on Grant Thornton under 12 U.S.C. § 1818. Rejecting the notion that "an external auditor" can be "said to be engaging in a banking practice," the

Court held that Grant Thornton—in conducting an external audit of a bank that the OCC subsequently deemed to have been insolvent—did not "participate in an unsafe or unsound banking practice," as was necessary for liability under the controlling statutory provisions. The Court further suggested that, in order to be held liable under those provisions, an independent contractor must "play[]" a "directive role" in the conduct of the affairs of a covered depository institution, or "proffer[] advice" on those affairs. The Court found that Grant Thornton had done neither and that, in addition, there was no suggestion that Grant Thornton had been "in cahoots" with "fraudulent managers" at the bank. Stan Parzen (Chi.) argued the case. Mark Ryan (DC) and Miriam Nemetz (DC) assisted on the briefs.

37. *Public Citizen, Inc. v. National Highway Traffic Safety Administration*, 513 F.3d 234 (2008) and 489 F.3d 1279 (2007). Tire industry petitioners and Public Citizen challenged a tire pressure monitoring regulation promulgated by the National Highway Traffic Safety Administration ("NHTSA"). Public Citizen based its claim to Article III standing on allegations that NHTSA's failure to adopt more stringent regulations exposed its members to increased risks of injuries from under-inflated tires, and the tire industry petitioners claimed that they faced risks of law suits, warranty claims, and loss of good will as a result of tire failures attributable to under-inflation. We represented the Alliance of Automobile Manufacturers, which intervened in support of the regulation. We challenged petitioners' standing in our merits brief. The court agreed that the tire industry petitioners did not have standing and ordered the remaining parties to file supplemental briefs and declarations on Public Citizen's standing. Subsequently, the court held that Public Citizen failed to establish standing and dismissed the case. Erika Jones (DC) argued the case. Adam Sloane (DC), and Ken Weinstein (DC) assisted on the briefs.

38. *Public Citizen, Inc. v. National Highway Traffic Safety Administration*, 374 F.3d 1251 (2004). This case was a challenge to an advanced air bag regulation promulgated by the National Highway Traffic Safety Administration ("NHTSA"). Petitioners challenged the regulation's provision for unbelted crash testing at twenty-five rather than thirty miles per hour, claiming that this testing protocol violated the applicable statute and was arbitrary and capricious. Our clients, the Alliance of Automobile Manufacturers, Inc., and the Automotive Occupant Restraints Council, intervened in support of the regulation. We filed a brief and participated in oral argument, contending that the regulation conformed to the statutory requirement that NHTSA engage in a rulemaking to "improve occupant protection for occupants of different sizes, belted and unbelted" and was not arbitrary and capricious. Agreeing with our

position, the D.C. Circuit upheld the regulation. Erika Jones (DC) argued the case. Adam Sloane (DC) and David Gossett (DC) assisted on the brief.

- **FIRST CIRCUIT**

39. *Adelson v. Hananel*, 510 F.3d 43 (2007). In this case, we represent casino magnate Sheldon Adelson. Adelson had sought a declaratory judgment against a former partner who claimed a multi-billion-dollar share of Adelson's casino and real estate developments in Macau, China. The District of Massachusetts had dismissed the case on *forum non conveniens* grounds, on the basis of related litigation in Israeli court. The First Circuit reversed, agreeing with our argument that concurrent litigation in a foreign country is irrelevant for purpose of *forum non conveniens* doctrine. The court also rejected the former employee's cross-appeal, affirming the exercise of U.S. jurisdiction. Andy Schapiro (NY) argued the case. Philip Lacovara (NY), Brian Willen (NY), and Chris Houpt (NY) assisted on the briefs.

40. *Galarneau v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 504 F.3d 189 (2007). The plaintiff in this case was a terminated Merrill Lynch broker. She sued Merrill Lynch, alleging claims for, *inter alia*, gender discrimination, breach of contract, and defamation. The jury found for Merrill Lynch on the former two claims, but found for Galarneau on the defamation claim, which was based on Galarneau's allegation that Merrill Lynch's statement in a required filing that she was terminated for "inappropriate bond trading" was maliciously false. The jury awarded $850,000 in compensatory damages and $2.1 million in punitive damages. We were retained to handle the appeal. The First Circuit upheld the compensatory award, but reversed the punitive award in its entirety, concluding that the plaintiff had not met the high standard for imposing punitive damages. Evan Tager (DC) argued the case. Andy Tauber (DC) and academic affiliate Eugene Volokh (UCLA) assisted on the briefs.

41. *Coffin v. Bowater, Inc.*, 501 F.3d 80 (2007). This is a class action seeking medical benefits on behalf of retirees of a former Bowater subsidiary. Plaintiffs claimed that their collective bargaining agreement ("CBA") at Bowater gave guaranteed benefits for life and that Bowater remained liable for their benefits under the Employee Retirement Income Security Act ("ERISA") even after Bowater sold the subsidiary and consolidated the Bowater retiree-benefit plans. In the district court, we successfully moved for summary judgment on plaintiffs' CBA claims under the Labor Management Relations Act, and we also obtained partial summary judgment on plaintiffs' ERISA claims. On appeal, the First Circuit affirmed the district court decision in all respects. The court concluded that the CBA guaranteed benefits only for the duration of the contract

and that the ERISA benefits were terminated when Bowater consolidated its plans. Andy Pincus (DC) argued the case. Reg Goeke (DC) and Andy Tauber (DC) assisted on the briefs.

- **SECOND CIRCUIT**

42. *Lyman v. CSX Transportation, Inc.*, 2010 WL 445613 (Feb. 9, 2010). The plaintiff in this case sued CSX under the Federal Employers Liability Act, alleging that CSX negligently failed to warn him of the presence of a license-plate holder on the front of a vehicle he was unloading from a railcar. The district court granted CSX summary judgment, and we were retained to defend the summary judgment on appeal. Agreeing with our arguments, the Second Circuit affirmed the summary judgment. Dan Himmelfarb (DC) argued the case. Melanie Wilson Rughani (DC) assisted on the brief.

43. *In re Suprema Specialties, Inc.*, 309 F. App'x 526 (2009). The debtor in this bankruptcy case was forced into bankruptcy after the discovery that a number of its officers were engaged in a massive fraud; we represented a bank group that was the debtor's primary secured creditor. This litigation involved a dispute between the bank group and a pair of New York sureties who argued that their claim to approximately $4 million of the debtor's estate was superior to the bank group's claim either because New York surety law trumped bankruptcy law or by virtue of the doctrine of equitable subrogation. We prevailed in the bankruptcy court, on appeal to the Southern District of New York, and on appeal to the Second Circuit. David Gossett (DC) argued the case in the Second Circuit. Tai Tan (Palo Alto) assisted on the briefs.

44. *Hirt v. The Equitable Retirement Plan For Employees, Managers And Agents*, 533 F.3d 102 and 285 F. App'x 802 (2008). In this ERISA case, we represented The Equitable Life Assurance Society of America. Equitable's cash balance plan credits each plan participant with an annual contribution consisting of a fixed percentage of the participant's salary and a guaranteed interest payment. The plaintiffs contended that the cash balance plan violates the applicable age discrimination prohibition of ERISA, because the pay credit of a younger participant has more time prior to retirement to accumulate interest than does the identical pay credit for an older participant, resulting in a larger final retirement benefit for the younger worker. The Second Circuit rejected the plaintiffs' theory, holding that age discrimination under ERISA must be measured by the annual contributions made to participants' accounts and that, accordingly, there is no discrimination when, as with Equitable's plan, the pay and interest credits are applied to the accounts of all participants at the same rate regardless of their ages. The court also held that the plaintiffs' claims that they

received insufficient notice of Equitable's adoption of the cash balance plan were barred by the applicable statute of limitations. Ken Geller (DC) was lead counsel and argued the appeal. Craig Canetti (DC) assisted on the briefs.

45. *In re "Agent Orange" Products Liability Litigation*, 517 F.3d 76 and 517 F.3d 104 (2008). These related appeals involved suits by U.S. veterans and Vietnamese nationals claiming personal injuries due to exposure to Agent Orange during and after the Vietnam War. The plaintiffs claimed that Agent Orange was defective because of the presence of trace amounts of the contaminant dioxin. The Second Circuit affirmed the ruling of the district court granting summary judgment to the defendants on the government contractor defense, holding that the government's consideration and acceptance of a product risk extinguishes contractor liability even where the contract does not expressly require the allegedly defective feature. The court also affirmed the district court's ruling that, under the Federal Officer Removal Statute, the contractors were entitled to remove cases brought in state court, holding that the contractors were under sufficient government control to satisfy the statute. Finally, the court affirmed the dismissal of the Vietnamese plaintiffs' claims under the Alien Tort Statute on the ground that the plaintiffs could not show that the use of Agent Orange had been a violation of international law, let alone one of the few kinds of violations actionable under the ATS. If these decisions stand, they should put an end to the 30-year saga of Agent Orange litigation. Andy Frey (NY/DC) argued the government contractor defense issue, and Charles Rothfeld (DC) argued the removal issue. Lauren Goldman (NY) and Chris Houpt (NY) assisted on the briefs.

46. *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2006). In this case, the Second Circuit reversed class certification in a multi-billion-dollar securities fraud suit challenging conduct of the Nation's leading underwriters in hundreds of initial public offerings. The decision rejects a weak class certification standard in favor of a rule requiring district courts to resolve all legal and factual disputes relevant to the Rule 23 requirements for class certification, even if they overlap with merits issues. The decision also concludes that the plaintiffs cannot prove reliance or lack of knowledge on a class-wide basis, precluding the common-issue predominance necessary for a class action. In so ruling, *Miles* brings Second Circuit class certification law into line with the more restrictive precedents of other circuits and disapproves class certification in what is probably the largest securities fraud litigation ever filed. Steve Shapiro (Chi.), Tim Bishop (Chi.), and Josh Yount (Chi.) represented defendant Merrill Lynch in the case and had a principal role in devising the underwriters' arguments and preparing their briefs in both the district court and

court of appeals. Counsel for one of the other defendants argued the case in the Second Circuit.

47. *TVT Records v. Island Def Jam Music Group*, 412 F.3d 82 (2005). This case arose from a dispute between two record companies, plaintiff TVT Records and defendant Island Def Jam Music Group ("IDJ") to the rights to the services of the recording artist Ja Rule and the music producer Irv Gotti; IDJ's president, Lyor Cohen, was also named as a defendant. A jury found the defendants liable for fraud, breach of contract, and tortious interference with contract. It awarded compensatory damages of approximately $24 million against both defendants, jointly and severally and punitive damages against IDJ in the amount of $52 million and against Cohen in the amount of $56 million. We were then retained to assist Cohen's trial counsel in seeking remittitur of the punitive and compensatory awards. Although the district court rejected the motions for judgment and/or new trial, it granted a substantial remittitur of the punitive award against Cohen, from $56 million to $3 million. Representing Cohen on appeal, we challenged the liability findings on the fraudulent and tortious interference claims. The Second Circuit agreed with our position as to both, leaving standing only the $126,720 in compensatory damages awarded for the unchallenged breach-of-contract count. Andy Frey (NY/DC) argued for Cohen and edited the briefs.

- **THIRD CIRCUIT**

48. *CGB Occupational Therapy v. RHA/Pennsylvania, Inc. Nursing Homes*, 499 F.3d 184 (2007). In this case, our client, Sunrise Senior Living, Inc., was held liable for tortious interference with the at-will relationship between CGB and therapists in its employ. In the first trial of the matter, CGB was awarded $109,000 in compensatory damages for this claim, $576,000 for a second claim, and $1.3 million dollars in punitive damages for both claims. The Third Circuit held that the second claim was not valid and remanded for a new trial on the amount of punitive damages for the one remaining claim. In the retrial, the jury awarded $30 million in punitive damages. We were retained to assist with post-trial motions and any appeal. In response to our post-trial motions, the district court reduced the punitive damages to $2 million. After both parties appealed, the Third Circuit further reduced the punitive damages to $750,000. Evan Tager (DC) argued the second appeal. Lauren Goldman (NY) assisted on the briefs in both the district court and the Third Circuit.

49. *Moyer v. United Dominion Industries*, 473 F.3d 532 (2007). The plaintiffs in this case are five factory workers who alleged that they developed nerve and vascular injuries from using a swaging machine manufactured by a

business unit of United Dominion Industries, Inc. The plaintiffs contended that the swaging machine was defectively designed because it emitted excessive vibration and that the defendant was liable for failing to warn of the vibration risk. The jury awarded them $13.5 million in compensatory damages, to which the district court added "delay damages" of $3.2 million, plus post-judgment interest. We were retained to handle the post-trial motions and then the appeal. The Third Circuit vacated the judgment and remanded for a new trial, holding that the district court had abused its discretion in excluding two categories of relevant evidence proffered by the defense: (i) proof that the plaintiffs' employer had failed to maintain the machine and that it had been used in a manner not intended by the manufacturer, two factors that significantly increased the vibration to which the plaintiffs had been exposed; and (ii) proof that, despite having sold thousands of swaging machines over a period of half a century, the defendant had never received a claim of vibration-related injury. Lauren Goldman (NY) argued the case. Andy Frey (NY/DC) and Evan Creutz (NY) assisted on the briefs.

50. ***S.C. Johnson & Son, Inc. v. DowBrands, Inc.*, 111 F. App'x 100 (2004).** S.C. Johnson purchased most of the assets of DowBrands (a Dow Chemical subsidiary) for more than $1 billion. After the sale, SCJ claimed that DowBrands was obligated to indemnify it for any losses it might incur (as well as the cost of defending) a patent infringement action. SCJ also claimed that DowBrands had defrauded it with respect to a small portion of the business located in Latin America. SCJ ultimately prevailed on the patent infringement action, but the Delaware district court held that DowBrands was obligated to indemnify SCJ for the $7 million it spent to defend the action. After a bench trial, the court also concluded that DowBrands had defrauded SCJ by misrepresenting the nature and extent of its Latin American business and awarded SCJ $23 million in damages. On appeal, the Third Circuit reversed and ordered judgment entered in favor of DowBrands. The court agreed that DowBrands was obligated to indemnify SCJ for litigation costs, but held that the obligation was subject to a $10 million deductible. On the fraud claim, the court concluded that, as a matter of law, SCJ could not have reasonably relied on the alleged misrepresentations made by DowBrands about its Latin American business. Michele Odorizzi (Chi.) was the principal author of the briefs and argued the case. Herb Zarov (Chi.) assisted on the briefs.

51. ***Horn v. Thoratec, Inc.*, 376 F.3d 163 (2004)**. Our client, Thoratec Corp., manufactures a medical device called the HeartMate, which assists in the pumping of blood for patients with serious heart disease. The plaintiff, whose husband died while a HeartMate was implanted in him, alleged that the

HeartMate contained a design defect and that Thoratec failed to warn of its dangers. The Medical Device Amendments of 1976 preempts state-law requirements, including requirements imposed in tort lawsuits, that are different from the requirements imposed by federal law. Third Circuit affirmed summary judgment in Thoratec's favor, holding that the FDA's extensive premarket approval process for the HeartMate was a federal "requirement" and that the plaintiff's tort suit, if successful, would impose different requirements on Thoratec. The case was argued by former Mayer Brown partner Alan Untereiner. Ken Geller (DC) and Gary Winters (DC) assisted on the briefs.

52. *2660 Woodley Road Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732 (2004). Sheraton is in the business of managing hotels. In this case, it was held liable for $12,582,000 in compensatory damages and $17,415,000 in punitive damages (remitted by the trial court from $37,500,000) for alleged breaches of its management agreement, breach of fiduciary duty, and negligent misrepresentation. In addition, it was held liable for $750,000 in antitrust damages, which were trebled for a total antitrust award of $2,250,000. Sheraton retained us to handle the appeal to the Third Circuit, which reversed the antitrust judgment, threw out all except $1,470,000 of the compensatory damages, and reduced the punitive damages to $2,025,000. Andy Frey (NY/DC) argued the case. Evan Tager (DC) and Rob Bronston (DC) assisted on the briefs.

53. *Lum v. Bank of America,* 361 F.3d 217 (2004). In this case, the Third Circuit affirmed dismissal of antitrust and RICO claims against our client, Bank of America, and 11 other of the country's largest banks. Plaintiffs charged that the banks misrepresented that the "prime rate," on which credit card and other variable interest rates are often based, is the lowest rate available to their most creditworthy borrowers, when in fact some borrowers are charged below-prime rates. They also alleged that the banks gave false information about their prime rates to consumers and to financial publications. The court held that plaintiffs failed to plead with the specificity required for fraud-based RICO and antitrust claims. The court also refused to allow plaintiffs to amend their claims, ruling that any such amendment would be futile. Bill Deitrick (Chi.) and Jeff Sarles (Chi.) assisted on the briefs. Counsel for one of the other banks argued the case.

- **FOURTH CIRCUIT**

54. *Volvo Cars of North America, LLC v. United States*, 571 F.3d 373 (2009). In this tax case, Volvo entered into contracts in 1981 and 1983 to sell its obsolete inventory to a warehouser. Volvo then sought to write off the inventory for tax purposes, as is permitted when inventory is sold. But the Internal

Revenue Service disallowed the write-off, taking the position that Volvo maintained control over the inventory transferred to the warehouser under both contracts and that bona fide sales therefore had not been completed. When Volvo disputed the IRS's reading of the contracts and brought suit for a tax refund, the jury ruled for Volvo. The district court upheld the jury's verdict as to sales under the second contract on the theory that the jury could have found that the second contract surrendered Volvo's control over that inventory, but set aside the jury's verdict and granted judgment to the government as a matter of law regarding sales effected under the earlier contract because the judge believed that Volvo retained control over inventory sold under that contract. On appeal, the Fourth Circuit reversed the ruling for the government and ordered that Volvo receive a refund of all taxes in dispute. In reaching this conclusion, the court of appeals adopted our argument that, as the contracting parties intended, inventory initially transferred under the first contract came to be controlled by the terms of the second. Charles Rothfeld (DC) argued the case. Chuck Hurley and Lili Kazemi of our tax controversy practice assisted on the briefs.

55. *Ellis v. Grant Thornton*, 530 F.3d 280 (2008). Following the collapse of the First National Bank of Keystone (in West Virginia), the plaintiff, who had been hired as the President of the bank approximately sixth months before its collapse, sued Grant Thornton for negligent misrepresentation, claiming that in deciding whether to take the position, he relied to his detriment on draft audit reports and oral statements about Keystone's financial statements that Grant Thornton made available to him, at the request of Keystone. Following a bench trial, the district court awarded him nearly $2.5 million in damages. On appeal, the Fourth Circuit reversed the judgment, repudiating the district court's finding that Grant Thornton owed the plaintiff a duty of care as a potential employee. It recognized that a potential employee was not the intended recipient of an audit report, and that no duty existed, in part, because Grant Thornton was not aware at the time of engagement or during the auditing process that potential employees would be reviewing or relying on the report. Stanley Parzen (Chi.) argued the case. Mark Ryan (DC) assisted on the briefs.

56. *Gariety v. Grant Thornton, LLP*, 368 F.3d 356 (2004). In this securities fraud action, the district court certified a class against accounting firm, Grant Thornton. We successfully petitioned for interlocutory review under Fed. R. Civ. P. 23(f), and after full briefing and argument, the Fourth Circuit vacated class certification. The court instructed the district court to reconsider whether the stock at issue (from a bank in West Virginia) traded in an efficient market, and hence whether class members' reliance on Grant Thornton's statements could be presumed. The Fourth Circuit explained that the district court erred in

simply accepting the complaint's allegations about the market for the stock, rather than considering evidence on the issue. The court also vacated class certification on plaintiffs' state law claims, ordering the district court to reevaluate whether those claims, alleged under several states' laws, met the predominance requirement of Fed. R. Civ. P. 23(b)(3). Stanley Parzen (Chi.) argued the case. Jim Schroeder (Chi.), Dan Hildebrand (Chi.), and Mark Ryan (DC) assisted on the briefs.

- **FIFTH CIRCUIT**

57. *Iberia Credit Bureau Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (2004). In this case, the district court refused to compel three class representatives to arbitrate their claims against Cingular, holding, *inter alia*, that a provision in Cingular's wireless service agreement permitting it to change the terms of that agreement rendered the arbitration clause "illusory" and that provisions prohibiting the arbitrator from overseeing a class action and requiring that the arbitration be kept confidential rendered the arbitration clause "unconscionable." The Fifth Circuit reversed on all scores, holding that the arbitration clause was not illusory and that the district court's other rationales conflict with the very purposes of arbitration. Evan Tager (DC) argued the case. David Gossett (DC) assisted on the briefs.

- **SIXTH CIRCUIT**

58. *Borger v. CSX Transportation, Inc.*, 571 F.3d 559 (2009). The plaintiffs in this case sued CSX under the Federal Employers Liability Act, alleging that CSX negligently exposed them to hydrochloric acid fumes from a passing train. Plaintiffs contended that CSX violated various statutes and regulations governing the transportation of hazardous materials. The district court granted CSX summary judgment. We were retained to defend the summary judgment on appeal. Agreeing with our arguments, the Sixth Circuit held that one of the provisions invoked by plaintiffs applied only to the shipper, not the carrier, and that CSX did not violate the remaining ones. The court also agreed with us that the alleged injuries were not foreseeable as a matter of law. Dan Himmelfarb (DC) argued the case. Evan Tager (DC) assisted on the brief.

59. *Nickels v. Grand Trunk Western Railroad, Inc.*, 560 F.3d 426 (2009). The decision in this case resolves two appeals involving the same issue that were consolidated for purposes of argument. The plaintiffs in both cases sued their respective railroad employers under the Federal Employers Liability Act ("FELA"), alleging that they were injured as a result of walking on allegedly oversized ballast (the stone that supports railroad tracks). One district court

granted summary judgment to Grand Trunk and another granted summary judgment to CSX, each concluding that the plaintiff's FELA claim was precluded by the Federal Railway Safety Act ("FRSA"). We were retained by CSX to defend its summary judgment in the Sixth Circuit. A divided panel of that court agreed with our argument that the regulations governing ballast that were promulgated under the FRSA covered the subject and therefore precluded the FELA claim. Andrew Tauber (DC) argued on behalf of both railroads. Evan Tager (DC) assisted on CSX's brief.

60. *Phelps v. UnumProvident Corp.*, 245 F. App'x 482 (2007). The plaintiff in this case was a dentist who suffers from osteoarthritis in his hand. The condition makes it difficult for him to use a "pinch grip." As a result, he is unable to perform many, but not all, of the important duties of his occupation. UnumProvident paid him total-disability benefits for two years, after which it terminated his claim on the ground that he was capable of performing several of the same duties that he had performed before he became disabled. Phelps sued for breach of contract and bad faith. The district court granted Phelps summary judgment on the breach-of-contract claim, and granted UnumProvident summary judgment on the bad-faith claim. Phelps appealed the latter ruling. The Sixth Circuit affirmed, rejecting Phelps' contention that there necessarily is an issue of fact on bad faith whenever liability for breach of contract is so clear as to warrant summary judgment for the insured. Evan Tager (DC) argued the case. UnumProvident's trial counsel prepared the brief with editing assistance from Miriam Nemetz (DC).

61. *Bach v. First Union National Bank*, 149 F. App'x 354 (2005) and 486 F.3d 150 (2007). The plaintiff in this case was an elderly widow whose granddaughter opened a First Union credit card in her name and ran up approximately $25,000 in charges that she never paid. Unable to collect on the account, First Union ultimately charged it off as a bad debt and reported the debt to various credit reporting agencies. Because the plaintiff refused to sign a "fraud affidavit" identifying her granddaughter as the perpetrator and agreeing to cooperate in any prosecution, First Union declined to inform the credit reporting agencies that the charges had been fraudulently incurred. The plaintiff sued, alleging, *inter alia*, that First Union violated the Fair Credit Reporting Act. The jury awarded $400,000 in compensatory damages and $2,628,600 in punitive damages. The Sixth Circuit upheld the compensatory damages, but concluded that the punitive damages were unconstitutionally excessive, finding the 6.6:1 ratio of punitive to compensatory damages "alarming." The court remanded to the district court with instructions to either grant a remittitur or hold a new trial on punitive damages. After the district court ordered a remittitur to $2,228,600,

we again appealed. This time, the Sixth Circuit ordered a remittitur to no more than $400,000. Evan Tager (DC) argued the case both times. Miriam Nemetz (DC) assisted on the briefs.

62. *EEOC v. Ameritech Services, Inc.*, 129 F. App'x 953 (2005). This case was a class action filed by the U.S. Equal Employment Opportunity Commission on behalf of female employees of Ameritech and its predecessors who took maternity leave prior to passage of the Pregnancy Discrimination Act in 1979. Prior to 1979, pregnancy-related leave was treated as personal leave rather than as disability leave for seniority accrual purposes. Since 1979, employees have received full seniority credit for pregnancy-related leave. The EEOC accused Ameritech of discriminating in the application of a 1994 early retirement program because some 7,000 women who had been subject to the pre-1979 policy had less seniority credit—and thus diminished benefits under the early retirement program—than if they had received full seniority credit prior to 1979. We represented Ameritech in the district court, which granted summary judgment to Ameritech. The court ruled that the EEOC's Title VII claim was time-barred and that its Equal Pay Act claim failed because any inequality in pay and benefits resulted from a "bona fide seniority system," which constitutes a complete defense under the Act. The Sixth Circuit affirmed without hearing argument. Jim Holzhauer (Chi.), and Jeff Sarles (Chi.) drafted the appellate brief.

63. *Hendricks v. Comerica Bank*, 122 F. App'x 820 (2004). Our client, Mutual Indemnity of Bermuda, acted as a reinsurer for a commercial insurance program that plaintiffs sold to their clients. Under the parties' agreement, the plaintiffs were required to indemnify Mutual Indemnity for certain losses, and they secured that obligation with irrevocable letters of credit. When program losses mounted, plaintiffs disputed the amounts for which they were responsible and filed suit to enjoin the bank that had issued three of the letters of credit, totaling more than $5 million, from honoring Mutual Indemnity's draws against the letters. The district court granted the injunction, but the Sixth Circuit reversed, finding that the plaintiffs had failed to establish irreparable harm. Jim Schroeder (Chi.) briefed and argued the case in the Sixth Circuit.

64. *Fidel v. Farley*, 392 F.3d 220 (2004). This was a securities fraud case arising out of Ernst & Young's 1998 audit of apparel manufacturer Fruit of the Loom. In the year after E&Y issued its unqualified 1998 audit opinion, Fruit of the Loom took some $220 million in inventory writeoffs and then filed for bankruptcy, but did not restate the 1998 financial statements. After the plaintiff shareholders brought sought in federal district court in Kentucky, we secured

dismissal of the complaint. The Sixth Circuit affirmed, concluding that plaintiffs had failed to allege facts raising an inference that E&Y acted with scienter when issuing its 1998 audit opinion. Among other things, the court rejected plaintiffs' argument that scienter could be inferred from the magnitude of Fruit of the Loom's 1999 writeoffs and their closeness in time to the 1998 audit. The court also rejected plaintiffs' argument that E&Y's alleged consulting work for Fruit of the Loom raised an inference of scienter and dismissed plaintiffs' attempt to infer scienter from the size of E&Y's auditing and consulting fees. Stanley Parzen (Chi.) argued the case and edited the brief.

- **SEVENTH CIRCUIT**

65. *Salmeron v. Enterprise Recovery Systems*, 579 F.3d 787 (2009). In this case, the Seventh Circuit affirmed dismissal of a False Claims Act suit against Sallie Mae and other defendants as a sanction for misconduct by the plaintiff's attorney (leaks of confidential documents to wikileaks.com). The court rejected the appellant's contention that such a "death penalty" sanction is unwarranted simply because no protective order covering the documents had yet been entered. Jeff Sarles (Chi.) argued the case. Kathy Agonis (Chi.) and Linda Boachie-Ansah (Chi.) assisted on the brief.

66. *WellPoint, Inc. v. John Hancock Life Ins. Co.*, 576 F.3d 643 (2009). In this case, the Seventh Circuit affirmed the district court's refusal to vacate an arbitration award favorable to our client WellPoint, Inc. John Hancock Life Insurance Co. sought to vacate the award based on the resignation of WellPoint's party arbitrator mid-way through the arbitration (allegedly coerced by WellPoint) and his allegedly improper replacement. In an opinion by Judge Diane Wood, the Seventh Circuit rejected Hancock's contention that this process violated the parties' contract and held that Hancock should have gone to court at the time, as authorized by Section 5 of the Federal Arbitration Act, instead of waiting until it lost to do so. Jeff Sarles (Chi.) argued the case. Sheila Finnegan (Chi.) and Diana Andsager (Chi.) assisted on the briefs.

67. *Kurz v. Fidelity Management & Research Co.*, 556 F.3d 639 (2009). The plaintiffs in this putative class action alleged that two Fidelity entities breached a supposed contract promising Fidelity customers that the defendants would seek best execution on trades the defendants placed with brokers. The district court dismissed the complaint under the Securities Litigation Uniform Standards Act ("SLUSA"). On appeal, the Seventh Circuit affirmed, agreeing with our argument that the alleged failures to seek best execution amounted to disguised securities fraud claims. Steve Shapiro (Chi.) argued the case. Tim Bishop (Chi.) and Josh Yount (Chi.) assisted on the briefs.

68. ***Andrews v. Chevy Chase Bank*, 545 F.3d 570 (2008).** In this case, the district court certified a class of approximately 7,000 home owners, seeking rescission of their mortgages under the Truth in Lending Act ("TILA"). The Seventh Circuit granted our petition for leave to appeal and, after plenary briefing and argument, reversed. The court held "as a matter of law that a class action for the rescission remedy under TILA may not be maintained." The court's ruling rested on the "individual" character of the rescission remedy, which makes it "procedurally and substantively unsuited to deployment in a class action." In particular, the court explained, "a host of individual proceedings would almost certainly follow in the wake of the certification of a class whose loan transactions are referable to rescission." The court also ruled that the class certified by the district court would not satisfy Rule 23's requirements that common questions predominate over individual questions and that a class action be the superior method of resolving the borrowers' claims. This is a significant win for all mortgage lenders and their assignees. Allowing thousands of class members to rescind their mortgages at one fell swoop for technical violations of TILA without any showing of harm would threaten lenders and their assignees with intolerable liability. The mere risk of such an outcome would inevitably drive up the cost of credit and likely reduce the availability of mortgage loans, an outcome that would harm borrowers as well, particularly at a time when the mortgage markets are already experiencing unprecedented levels of stress. Jeff Sarles (Chi.) argued the case. Michele Odorizzi (Chi.), Luci Nale (Chi.), Scott Anenberg (DC), and Jeff Taft (DC) assisted on the briefs.

69. ***Ameritech Corp. d/b/a SBC Midwest v. International Brotherhood of Electrical Workers, Local 21*, 543 F.3d 414 (2008).** In this case, the Seventh Circuit vacated an arbitration award in favor of the union involving subcontracting while workers are on layoff. While the appeal was pending, the parties agreed via a Rule 33 settlement conference to engage in a new arbitration, which the company won. We then filed a 60(b) motion in the district court based on that win. The district court denied the 60(b) motion, and we then consolidated the two appeals. That enabled the 7th Circuit to rule in our favor on the 60(b) motion and vacate the adverse arbitration award without having to get into the substance of the original appeal. Jeff Sarles (Chi.) argued the case. Steve Shapiro (Chi.) and Tim Bishop (Chi.) assisted on the briefs.

70. ***Fehribach v. Ernst & Young LLP*, 493 F.3d 905 (2007).** In this case brought by the bankruptcy trustee of a failed regional food wholesaler, the Seventh Circuit confirmed that auditors do not serve as management consultants and are not responsible for dispensing business advice to their clients, rejecting

the trustee's claim that Ernst & Young was negligent in failing to warn its client about its poor business prospects by omitting a going concern qualification from its audit opinion. In affirming the district court's grant of summary judgment in favor of E&Y, the Seventh Circuit also held that the trustee's claim was barred by the Indiana accountant's liability statute of limitations because the company's senior financial officer—who embarked on a scheme to defraud the bank's primary lender in an effort to save the company—clearly knew of the dire state of the company's finances well before the company entered bankruptcy and that the applicable limitations period had therefore expired before that time. Stanley Parzen (Chi.) argued the case. Jim Schroeder (Chi.) was the principal author of the appellate briefs, assisted by Jay Tharp (Chi.) who led the litigation effort in the district court.

71. ***Silvernail v. Ameritech Pension Plan*, 439 F.3d 355 (2006).** In this case, the Seventh Circuit unanimously affirmed dismissal of an ERISA suit filed by a former employee who claimed entitlement to a retirement pension from the Ameritech Pension Plan. The terms of the Plan at the relevant time provided for vesting of retirement benefits after ten years' service. The plaintiff had eleven years' service before leaving the company in 1978. However, the Plan excluded years prior to age 22 from the vesting calculation, leaving the plaintiff with less than eight years' service. He contended that the Plan thereby violated ERISA. The court of appeals agreed with our showing that ERISA expressly authorized ten-year vesting plans to disregard service years prior to age 22 and rejected the plaintiff's contention that legislative history and other extrinsic materials undermined the plain meaning of the statute. Jeff Sarles (Chi.) argued the case. Steve Shapiro (Chi.) and Tim Bishop (Chi.) assisted on the brief.

72. ***Knudsen v. Liberty Mutual Insurance Co.*, 435 F.3d 755 (2006).** The plaintiffs in this case filed a consumer class action in Illinois state court against Liberty Mutual, challenging the amounts it pays for medical expense claims on workers' compensation and casualty policies. The suit was filed in March 2000, well before the February 18, 2005 effective date of the Class Action Fairness Act ("CAFA"). After CAFA became effective, the plaintiffs amended their class definition to reference a number of additional policies, subsidiaries, and affiliates of Liberty Mutual, though they added no defendants. The state judge certified the requested nationwide class of plaintiffs and, without trial, entered a default order against Liberty Mutual on liability, leaving only damages to be calculated. Liberty Mutual then removed the case to federal district court under CAFA. The district judge remanded the case to state court, but we successfully petitioned the Seventh Circuit to review and reverse that order. The court accepted our argument that the plaintiffs' pre-CAFA pleadings

failed to provide Liberty with notice of the new claims added by the class certification order. The court thus held that the class certification order amounted to the "commencement" of a new action after CAFA's effective date, making the case properly removable to federal court under CAFA. The Seventh Circuit instructed the district judge, on remand, to give no weight to the state judge's earlier orders on class certification and liability and to consider these and all other issues anew. The case was decided without oral argument. Steve Shapiro (Chi.), Howard Roin (Chi.), John Schmidt (Chi.), and Steve Kane (Chi.) collaborated with co-counsel at Vinson & Elkins on the briefs.

73. ***American National Bank v. Equitable Life Assurance Society of the United States*, 406 F.3d 867 (2005).** During discovery in this breach of contract case, the magistrate judge sanctioned Equitable (which was then represented by other counsel) by striking its privilege log and deeming all of its privileges waived. The magistrate imposed this sanction after a long debate over the sufficiency of the descriptions on the log and a number of in camera reviews of small samples of documents on the log. At the end of this process, the magistrate allowed the opposing party to select 20 documents from the log for in camera inspection and stated that he would strike the entire log if he concluded that four or more of those documents were not privileged. When he concluded that five were not privileged, the magistrate inferred bad faith on Equitable's part and ordered it to produce all of the documents on the log—including documents he himself had concluded were privileged. The district court refused to overturn the decision. As a result, Equitable was forced to turn over the documents. Years later, after the case was dismissed for lack of diversity jurisdiction, we appealed the sanctions order. The Seventh Circuit reversed, concluding that the procedure the magistrate had employed was an abuse of discretion, that Equitable had acted in good faith and done nothing worthy of sanctions, and that consequently the opposing party should be ordered to return the documents. The Seventh Circuit made it clear that the proper course for the magistrate to follow would have been to review all of the documents (which consisted of approximately one-half of a box) in camera. Michele Odorizzi (Chi.) argued the case. Tom Durkin (Chi.), Sheila Finnegan (Chi.), and Steve Kane (Chi.) assisted on the briefs.

74. ***Brown v. Sears, Roebuck & Co.*, 125 F. App'x 44 (2004)**. Until January 2000, Sears, Roebuck & Co. had a licensing agreement with an independent contractor, Diamond Home Services, pursuant to which Diamond sold and installed home improvements such as roofs and garage doors using the Sears brand name. Diamond went out of business, and three Diamond employees brought a purported class action against Sears in state court in

downstate Illinois, arguing that Sears was their de facto employer and was responsible for unpaid compensation and insurance benefits that they had not received. After the case was removed to federal court and then transferred to the Northern District of Illinois, the district court granted summary judgment to Sears. The Seventh Circuit affirmed, holding that the plaintiffs were employees of Diamond only, not Sears, and that Sears therefore was not liable to the plaintiffs. Jim Schroeder (Chi.) argued the case. Howard Roin (Chi.), Kim Leffert (Chi.), and Lauren Frank Noll (Chi.) assisted on the brief.

75. *FDIC v. Ernst & Young LLP*, 374 F.3d 579 (2004). When the FDIC sues an insolvent savings association's directors or outside auditors, it ordinarily does so in its capacity as the failed bank's receiver. In this case, in the hope of evading a contractual arbitration clause that ordinarily would have applied to any claims brought by the receiver, the FDIC took the unprecedented step of suing Ernst & Young (Superior Bank's former outside auditor) in its own name, on the ground that E&Y's alleged negligence or fraud had contributed to the failure of Superior Bank and thus caused the loss of $500 million to the Savings Association Insurance Fund managed by the FDIC. The FDIC sought recovery of that amount, plus $1 billion in punitive damages. The district court dismissed the action on the ground that the FDIC had no right under federal law to sue in its corporate capacity and was required to sue, if at all, in its capacity as receiver. The Seventh Circuit affirmed, holding that no federal statute allowed the FDIC to avoid the arbitration provision by suing directly for harm to the Fund. In dicta, the Seventh Circuit also roundly criticized the FDIC's attempt (as receiver) to repudiate the arbitration clause under 12 U.S.C. § 1821(e), suggesting that it might be sanctionable for the receiver to argue that it could repudiate the arbitration clause in the Bank's engagement letter with E&Y while at the same time seeking damages for E&Y's alleged violation of the duties created by that agreement. After the Seventh Circuit issued its decision, the FDIC agreed to abide by the dispute resolution provisions in the engagement letter, and E&Y eventually settled all of the claims made against it by both the receiver and federal regulators arising out of Superior Bank's failure. Michele Odorizzi (Chi.) was the principal author of E&Y's briefs in the district court and in the Seventh Circuit and argued the case in both courts. Stanley Parzen (Chi.), Jon Medow (Chi.), and Brian Massengill (Chi.) assisted on the briefs.

76. *Menasha Corp. v. News America Marketing In-Store, Inc.*, 354 F.3d 661 (2004). This antitrust case involved at-shelf coupon dispensers, which are attached to shelves in retail stores and dispense coupons for consumers. Menasha Corp. alleged that our client, News America, had committed a variety of anticompetitive acts in its coupon-dispenser business that violated sections 1

and 2 of the Sherman Act, as well as the Illinois Antitrust Act. The district court granted summary judgment to News America on all claims, and the Seventh Circuit affirmed. The court held that the plaintiff had not demonstrated that at-shelf coupon dispensers constituted the relevant market or that News America possessed market power. Lee Abrams (Chi.) argued the case. Jim Schroeder (Chi.) and former partner (now judge) Bob Dow (Chi.) assisted on the brief.

- **EIGHTH CIRCUIT**

77. *Schumacher v. Cargill Meat Solutions Corp.,* 515 F.3d 867 (2008). This case was a class action filed by cattle producers against the nation's four largest meatpackers—Tyson Fresh Meats, Inc., Cargill Meat Solutions Corporation, Swift Beef Company, and National Beef Packing Company. Plaintiffs alleged that each of the packers violated the Packers and Stockyards Act of 1921 ("Act") by purchasing cattle during a six-week period in 2001 while the U.S. Department of Agriculture was misreporting certain market information. Plaintiffs alleged that the USDA's reporting error depressed the market price for cattle and that the defendants' purchase of cattle in those market conditions constituted either an "unfair" practice under the Act or the "manipulation or control" of cattle prices as prohibited by the Act. A jury rejected the "unfair" practice allegation, but found against defendants Tyson, Cargill, and Swift on the "manipulation or control" claim. Nonetheless, the jury returned a total verdict of only $9.25 million, far less than the $38 million that plaintiffs sought from those three defendants. We represented Cargill both at trial and on appeal. The Eighth Circuit held that the district court erred in instructing the jury that the plaintiffs need not show that the defendants acted intentionally to manipulate or control cattle prices. And because the plaintiffs failed to present any evidence that the packers acted intentionally, the court directed the entry of judgment for the packers. Mark Ryan (D.C.) argued the case on behalf of all three defendants-appellants, and along with Mike Lackey (D.C.) collaborated with outside counsel for Tyson and Swift on the packers' joint briefs.

- **NINTH CIRCUIT**

78. *E! Entertainment Television, Inc. v. Entertainment One GP, Ltd.*, 2010 WL 331505 (Jan. 26, 2010). In this case E! Entertainment Television sought an injunction against the use of our client Entertainment One's E1 trademark or any other use of the letter "E" as a mark for any entertainment-related product or service. Our Los Angeles office convinced District Judge Manuel Real to deny a preliminary injunction on the ground, among others, that the marks presented no likelihood of confusion, particularly in light of the differences between the companies' logos and the crowded field of "E" marks

relating to entertainment. The Ninth Circuit affirmed on the same basis. Neil Soltman (LA) argued the case. Don Falk (PA) assisted on the brief.

79. ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Arelma, Inc.*, 587 F.3d 922 (2009)**. This case is part of the subsequent litigation following our victory in the Supreme Court in *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180 (2008), described above. The litigation involves the disposition of approximately $35 million alleged to have been unlawfully acquired by Ferdinand Marcos during his tenure as President of the Republic of the Philippines. Merrill Lynch commenced this interpleader action in 2000 and deposited that money with the clerk of the District of Hawaii. We successfully argued in the Supreme Court that the litigation should be dismissed because the Republic of the Philippines, which had asserted sovereign immunity, was a "necessary" and "indispensable" party under Federal Rule of Civil Procedure 19(a). On remand, we asked the district court (on behalf of our client, the Philippine National Bank) to conduct an accounting to ascertain the correct amount of money to be returned to Merrill Lynch, the interpleader plaintiff. The district court purported to conduct an accounting, but that accounting was largely unintelligible. The district court also refused to return any interest earned on the deposited funds to Merrill Lynch. We appealed to the Ninth Circuit, which reversed, noting that "[w]hen public entities hold private assets, they must do so transparently so that the parties and the public will not be concerned that any of the assets have been lost or mishandled." The court also ordered that all interest accrued on the interpleaded funds be returned to Merrill Lynch, and—at our request—ordered the case reassigned on remand to a different district court judge to conduct an adequate accounting. The accounting on remand, while still underway, appears to have uncovered significant additional funds that will be returned to Merrill Lynch. Charles Rothfeld (DC) argued the case. Ken Geller (DC) and David Gossett (DC) assisted on the briefs.

80. ***Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (2009)**. This case concerns the validity of a California law that extends the statute of limitations by more than 80 years for claims growing out of life insurance policies issued to victims of the "Armenian Genocide" in the Ottoman Empire. The statute is a companion to several other California laws that extended the statute of limitations or created new causes of action for victims of the Nazi Holocaust, World War II-era slave labor regimes, or other events occurring overseas many decades ago, most of which have been held to violate the exclusive federal power over the conduct of foreign affairs. In this case, the district court held the state law enforceable. But on our appeal, the Ninth Circuit reversed and held the law invalid as inconsistent with the federal Executive

Branch's policy, expressed by multiple administrations, rejecting formal recognition of an "Armenian Genocide" as inconsistent with U.S. foreign policy interests. The court rejected the contrary argument that the law was a run-of-the-mill state insurance regulation, explaining that California had created a special rule as a means of means of expressing dissatisfaction with U.S. foreign policy. The Ninth Circuit's holding relied heavily on the Supreme Court's decision in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), which also was argued by Mayer Brown. Neil Soltman (LA) argued the case. Charles Rothfeld (DC) and Chris Murphy (LA) assisted on the briefs.

81. *The Freecycle Network, Inc. v. Oey*, 505 F.3d 898 (2007). Our client in this case was Tim Oey, who had been preliminarily enjoined by an Arizona district court from "tending to disparage" the validity of a trademark claimed by the Freecycle Network and from encouraging others to use the word "freecycle" in its generic sense. The Ninth Circuit vacated the injunction, holding that there is no action for trademark disparagement under the Lanham Act. The court of appeals also provided the most extensive appellate discussion of "genericide" to date in holding that success under a contributory infringement theory was unlikely. Don Falk (Palo Alto) argued the case. Ian Feinberg (Palo Alto) and academic affiliate Eugene Volokh (UCLA School of Law) assisted on the briefs.

82. *Merrick v. UnumProvident Corp.*, 500 F.3d 1007 (2007). The plaintiff is a venture capitalist who, after being forced out of his firm for a record of poor investments, claimed that he was totally disabled by cognitive deficits and fatigue associated with chronic fatigue syndrome ("CFS"). Paul Revere Life Insurance Company (a subsidiary of UnumProvident) paid benefits for over a year while investigating Merrick's claim. Although Paul Revere never challenged Merrick's diagnosis of CFS, it eventually denied his claim because all of the objective testing performed on him by his own doctors and several IME physicians indicated that he was functioning normally. Merrick sued and the jury awarded him $1.15 million in past-due benefits, $500,000 for emotional distress, and $10 million in punitive damages. We appealed to the Ninth Circuit, which ordered a new trial on punitive damages because of the district court's error in refusing to instruct the jury that it could not punish Paul Revere for the impact of its conduct on non-parties. The court also reversed a $500,000 attorneys' fee award. Evan Tager (DC) argued the case. C.J. Summers (DC) assisted on the briefs.

83. *White v. Ford Motor Company*, 312 F.3d 998 (2002) and 500 F.3d 963 (2007). We were retained to assist with post-trial motions and handle the appeal in this products liability case in which a federal jury in Nevada awarded

nearly $151 million in punitive damages against Ford. The case arises out of a tragic accident in which an unattended three-year-old child was run over by his father's Ford truck after the child moved the gear shift into neutral; the truck began to roll, and the child fell out and under the wheels. The plaintiffs alleged that the parking brake was defective and that Ford should have recalled the truck to remedy the defect. The trial court reduced the punitive damages to $69 million. The Ninth Circuit then ordered a new trial on punitive damages, agreeing with our contention that the district court erred in declining to instruct the jury that it had to limit its punishment to conduct affecting Nevada residents. Andy Frey (NY/DC) argued the case. Evan Tager (DC) and Miriam Nemetz (DC) assisted on the briefs. After the remand, Evan Tager (DC) and Adam Sloane (DC) drafted Ford's motions in limine, post-trial motions, and Ninth Circuit briefs. We also drafted supplemental briefs addressing the Supreme Court's decision in *Philip Morris USA v. Williams*. The Ninth Circuit ordered a second new trial on punitive damages because of the district court's error in refusing to instruct the jury that it could not punish Ford for the impact of its conduct on non-parties. Co-counsel argued the second appeal. The case settled before the third trial.

84. *Gerling Global Reinsurance Corp. of America v. Garamendi*, 400 F.3d 803 (2004). In this case, we won a significant attorneys' fee victory for the American Insurance Association. In a prior phase of the suit, after years of litigation, we prevailed before the Supreme Court in our arguments that a California insurance regulation is unconstitutional. On remand, the trial court denied AIA's request for attorneys' fees, reasoning that, although some of the claims we presented could support an award of fees under the civil rights attorneys' fee statute, the claim on which the Supreme Court ultimately ruled for AIA does not. The Ninth Circuit reversed, rejecting the district court's reasoning and holding that a prevailing plaintiff advancing constitutional claims is entitled to a fee award even if the court does not base its decision on the fee-supporting claims. The case was returned to the district court for a calculation of the amount to which our clients are entitled. Charles Rothfeld (DC) argued in the Ninth Circuit. Ken Geller (DC), Steve Shapiro (Chi.), and Neil Soltman (LA) assisted on the briefs.

- **TENTH CIRCUIT**

85. *Rzepiennik v. Archstone Smith, Inc.*, 331 F. App'x 584 (2009). Section 806 of the Sarbanes-Oxley Act ("SOX") prohibits employers from retaliating against their employees who engage in protected activity such as reporting non-compliance with SOX's substantive provisions. Retaliation claims must be filed with the proper administrative agency within 90 days of any

adverse employment action. We represented Archstone in this suit brought by a terminated employee who alleged that his termination and Archstone's offer of a discretionary bonus, contingent on settlement of the plaintiffs' claims, were retaliatory. The claim was untimely as it related to the plaintiff's termination, but the question for the Tenth Circuit was whether the claim also was untimely as it related to plaintiff's argument that the conditional bonus offer—instead of unconditional payment of the bonus—was another retaliatory measure. Disposing of the case without oral argument, the Tenth Circuit agreed with our argument that the plaintiff's 90-day clock began to run when Archstone first made the settlement offer, at which time the plaintiff was on notice that he would not unconditionally receive any bonus. The court rejected the plaintiff's argument that the statute of limitations did not begin to run until the settlement offer expired. Jeff Sarles (Chi.) and Kathy Agonis (Chi.) drafted the brief.

86. *In re. Wal-Mart Stores, Inc., Fair Labor Standards Act Litigation*, 395 F.3d 1177 (2005). We represented Wal-Mart in this Fair Labor Standards Act case, in which the question presented was whether full-time Wal-Mart pharmacists are exempt from the overtime pay requirements of the FLSA. Prior to our involvement in the case, the district court held that *prospective* reductions in salary, if tied to concomitant reductions in hours worked, violate the so-called "salary basis" test under the FLSA, and therefore granted summary judgment to the plaintiffs. After we unsuccessfully sought reconsideration of that ruling with the district court, we appealed to the Tenth Circuit. That court agreed with our argument that prospective reductions in salary, so long as they are not a sham designed to circumvent the salary basis test, do not entitle bona fide professionals to overtime pay under the FLSA. Bob Davis (DC) and David Gossett (DC) drafted the briefs; local counsel argued the case.

- **ELEVENTH CIRCUIT**

87. *Southern Waste Systems, LLC v. City of Delray Beach*, 420 F.3d 1288 (2005). The plaintiff in this case sued the City of Delray Beach and our client Waste Management of Florida, Inc., challenging the constitutionality of the exclusive franchise granted by the city to Waste Management to dispose of construction and demolition ("C&D") waste generated within the city's borders. The federal district court held that the franchise discriminated against interstate commerce in violation of the Dormant Commerce Clause because billing for the disposal of C&D waste was done by Waste Management rather than the city. We appealed on behalf of both Waste Management and the city. The Eleventh Circuit reversed, holding that, because the bidding process was open to all companies regardless of geographic location and the city placed no limitations on where its franchisee could dispose of the waste, the exclusive franchise

arrangement did not discriminate against interstate commerce. Evan Tager (DC) argued the case. Miriam Nemetz (DC) assisted on the briefs.

- **FEDERAL CIRCUIT**

88. *Aristocrat Technologies Australia Pty Ltd. v. International Game Technology*, 521 F.3d 1328 (2008). In this case, the Federal Circuit affirmed summary judgment in favor of our client IGT on patent infringement claims. Aristocrat's patent disclosed a means-plus-function claim directed to a novel type of slot machine. Aristocrat claimed that IGT's slot machines infringed that patent. IGT argued on summary judgment that Aristocrat's patent was too indefinite to be valid because its specification failed to disclose sufficient structure. The district court and now the court of appeals accepted our argument that Aristocrat's failure to disclose an algorithm that would make its disclosed "microprocessor based gaming machine with appropriate programming" more than a general purpose computer was fatal to its claim. Jeff Sarles (Chi.) argued the case for IGT. He was assisted by Intellectual Property associates Melissa Anyetei (Chi.) and Andrea Hutchison (Chi.).

89. *Action Gaming, Inc. v. Alliance Gaming Corp.*, 188 F. App'x 995 (2006). In this case, the Federal Circuit summarily affirmed a $7.3 million jury verdict in favor of our client, International Game Technology ("IGT"), on claims of patent infringement. The court issued its decision without opinion the day after oral argument. The patent claims at issue involve a method of playing multiple hands of video poker virtually simultaneously. IGT commercially embodied these claims into the most successful video poker game ever, inspiring the defendant, Alliance Gaming, to develop and distribute a knock-off. After a two-week trial, a jury in Nevada determined that Alliance's game infringed IGT's patents based on the doctrine of equivalents. The primary issues on appeal involved the propriety of the jury instructions. The court of appeals rejected Alliance's contentions that the jury instructions misconstrued the patent claims and were inconsistent. This appeal was a "joint venture" between Mayer Brown's appellate and intellectual property practice groups. Appellate attorney Jeff Sarles (Chi.) prepared the briefs. Former partner Mike Warnecke (Chi.) argued the case.

STATE COURTS

- **DELAWARE**

90. *Olson v. Halvorsen*, 986 A.2d 1150 (Del. 2009). Our client in this case was the hedge fund, Viking Global. Appellant Brian Olson had been a

Viking co-founder who was fired years later by the majority vote of the other co-founders. Despite being paid millions of dollars in compensation upon his termination, Olson sued for breach of contract, fair value, and a variety of other equitable claims, alleging that he was owed more in connection with a putative "earnout" agreement. This "earnout" was reflected in a draft (but unsigned) operating agreement for one of the hedge fund's operating entities. Before trial, the Court of Chancery granted summary judgment on the contract claim on statute-of-frauds grounds. The parties tried the remaining causes of action in a six-day bench trial. The Court of Chancery wrote an extensive opinion rejecting Olson's claims. Olson appealed, contending that the statute-of-frauds ruling had tainted the trial. The Delaware Supreme Court affirmed on the ground that the Court of Chancery's factual findings, particularly that the parties had never agreed to the alleged compensation scheme, mooted the statute-of-frauds issue. Because the issue was one of first impression and of significance to the business community, however, the Delaware Supreme Court nevertheless took up the question of whether Delaware's expansive LLC statute implicitly repealed the statute-of-frauds with respect to LLC operating agreements. The court agreed with our arguments that the General Assembly intended LLC operating agreements to be treated like any other contract, and that the two statutes could be readily harmonized. Andy Frey (NY/DC) argued the case. Charles Rothfeld (DC), Andy Schapiro (NY), and Hannah Chanoine (NY) assisted on the brief.

- **FLORIDA**

91. *Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124 (Fla. Dist. Ct. App. 2007). In this case, the Florida intermediate court of appeals reversed a jury award of $1.58 billion, including $850 million in punitive damages, to billionaire Ronald Perelman's company, Coleman (Parent) Holdings ("CPH"). CPH had sued Morgan Stanley over the 1998 sale of Coleman Co., in which it was the majority shareholder, to Sunbeam Corp. A jury ruled in CPH's favor in May 2005, after having been told, as a sanction for alleged discovery misconduct by Morgan Stanley, to assume that the investment bank had conspired with Sunbeam to defraud Perelman by paying for the merger in part with substantially overvalued Sunbeam stock. In a 2-1 decision, the district court of appeal held that CPH failed to prove that it was damaged. CPH sought benefit-of-the-bargain damages but presented no evidence of the stock's value absent the fraud—an essential component of benefit-of-the bargain damages. The court thereupon ordered judgment to be entered in Morgan Stanley's favor. Along with several other national and regional appellate firms, Mayer Brown (Andy Frey (NY), Andy Schapiro (NY), and Scott Chesin (NY)) helped to set the appellate strategy and draft the appellate briefs on behalf of

Morgan Stanley. We also took the lead on punitive damages issues. The case was argued by Florida appellate counsel.

- **HAWAII**

92. *Udac v. Takata Corp.*, 214 P.3d 1133 (Haw. Int. Ct. App. 2009). We were retained to handle the appeal in this products liability case involving allegations that Takata's seatbelt buckle was defective and caused severe injuries to the plaintiff when he was ejected during a vehicle rollover. The jury found for the plaintiff and returned a verdict of $17,000,000, including $12,500,000 in punitive damages. The Intermediate Court of Appeals for Hawaii agreed with our contention that the trial court had erroneously excluded expert testimony tending to show that the plaintiff was not wearing his seatbelt, erroneously admitted a patent for an unrelated buckle, and erroneously instructed the jury on a failure-to-warn theory. The court also agreed that the evidence was insufficient to support punitive liability because there was no clear and convincing evidence that Takata knew of a defect in the buckle. The court accordingly vacated the judgment and remanded for a new trial on liability for and amount of compensatory damages (if any). Ken Geller (DC) shared the argument in the Intermediate Court of Appeals with trial counsel. Evan Tager (DC), C.J. Summers (DC), and Tai Tan (Palo Alto) assisted on the briefs.

- **ILLINOIS**

93. *Bemis v. State Farm Fire & Cas. Co.*, 919 N.E.2d 349 (Ill. 2010). Over a ten-year period, a plaintiffs' firm filed a series of similar consumer class actions against State Farm in Madison County. Each time, we persuaded the Illinois Supreme Court to transfer the Madison County case to Cook County, to be consolidated with a similar, previously filed putative class action. Illinois law, however, gives each party a statutory right (akin to a peremptory challenge) to remove one judge assigned to a case. After the Supreme Court began transferring the Madison County cases to Cook County, the plaintiffs twice used the "new" transferred case as a pretext to remove a judge who previously had decided issues against them in Cook County. The Illinois Appellate Court granted Mayer Brown's petition for a permissive interlocutory appeal, but held that the plaintiffs had an absolute statutory right to remove a judge. The Illinois Supreme Court granted leave to appeal, vacated the Appellate Court's decision, and ordered the case to proceed in Cook County before the same judge who has been handling the cases since 2006. Howard Roin (Chi.) argued the case. Jim Schroeder (Chi.) and Josh Yount (Chi.) assisted on the briefs.

94. *Price v. Philip Morris, Inc.*, 848 N.E.2d 1 (Ill. 2005). In this case, a Madison County judge certified a class of more than one million current and former Illinois smokers, held that Philip Morris USA violated the Illinois Consumer Fraud Act ("ICFA") by marketing light cigarettes as being less harmful than its regular-strength offerings, and awarded damages of $10.1 billion. Mayer Brown was retained to assist with the appeal. The Illinois Supreme Court granted our motion to hear the case directly (rather than require Philip Morris first to appeal to the Appellate Court) and then, after briefing and argument, held that the ICFA bars any claims based on conduct that is specifically authorized by a federal agency. The court concluded that "the FTC could, and did, specifically authorize all United States tobacco companies to utilize the words 'low,' 'lower,' 'reduced' or like qualifying terms, such as 'light,' immunizing the use of those terms from claims under the Illinois statute. The court accordingly reversed the judgment and ordered the case dismissed on remand. Michele Odorizzi (Chi.), Andrew Schapiro (NY), Michael Forde (Chi.), and Jay Johnson (DC) assisted on the briefs. Co-counsel argued the case.

95. *Big Sky Excavating Co. v. Illinois Bell Tel. Co.,* 840 N.E.2d 1174 (Ill. 2005). In 2001, the Illinois General Assembly enacted a comprehensive reform of Illinois' telecommunications law. One provision of the new law permanently abated an ongoing investigation by the Illinois Commerce Commission into Illinois Bell's 1998 classification of business services as "competitive"—that is, as services that were reasonably available from another provider and therefore could be the subject of rate changes without prior Commission approval. The General Assembly required Illinois Bell to refund $90 million to its business customers and to pay another $30 million into the State's Digital Divide fund. But it also declared all of Illinois Bell's business services competitive on a going forward basis, subject to a four-year moratorium on any additional increases of the rates charged to small businesses. Plaintiffs challenged the constitutionality of the 2001 telecom rewrite and sought a rollback to 1998 rates and a refund of all post-1998 rate increases to small business customers. The Madison County Circuit Court certified a class and declared the statute unconstitutional, on the ground that it was impermissible special legislation and violated the equal protection and due process rights of small business customers, who supposedly would have received larger refunds had the Commerce Commission proceeding been allowed to run its course. On direct appeal, the Illinois Supreme Court unanimously reversed, holding that the statute did not discriminate in favor of Illinois Bell to the detriment of other similarly situated carriers and that the circuit court erred in concluding that the statute was not reasonably related to a legitimate state purpose. Michele

Odorizzi (Chi.) argued the case. John Muench (Chi.) and former partner (now judge) Bob Dow (Chi.) assisted on the briefs.

96. *Lease Management Equipment Corp. v. DFO Partnership*, 910 N.E.2d 709 (Ill. App. Ct. 2009). In this case, the plaintiff sued our clients, leasing affiliates of Bank of America and Ford Motor Co., claiming a right to $8 million in remarketing fees (plus millions in interest) in connection with a sale of oil tankers to the Navy, which had exercised a purchase option in the contracts under which our clients leased the tankers to the Navy. We argued that, under the terms of the remarketing agreements, no remarketing fee was due upon a purchase option exercise and that, in any event, the sale proceeds were not high enough to allow a remarketing fee. After a bench trial, the trial judge entered judgment in our clients' favor, accepting our reading of the fee formula provisions and finding that the sale proceeds under that reading were too low to result in a fee being due. The appellate court unanimously affirmed the judgment, ruling that the remarketing agreements unambiguously barred a remarketing fee upon a purchase option exercise. Howard Roin (Chi.) argued the case and Josh Yount (Chi.) assisted on the brief.

97. *Marston v. Walgreen Co.*, 907 N.E.2d 851 (Ill. App. Ct. 2009). In this case, the Illinois Appellate Court vacated a $25 million punitive award against Walgreen arising out of a medication error. The elderly plaintiff died shortly after the complaint was filed and his estate pursued the claims under Illinois' Survival Act. The Appellate Court held that Illinois Supreme Court precedents preclude the imposition of punitive damages in Survival Act cases because the Survival Act allows the plaintiff to sue only for compensatory damages. The court rejected other Appellate Court decisions that have recognized a broad "equitable" exception to the general rule, holding that the only exception is for a case in which there would be no recovery absent the implication of a right to punitive damages. That exception did not apply because the plaintiff had obtained a significant award of compensatory damages. Michele Odorizzi (Chi.) briefed and argued the case.

98. *iPCS Wireless, Inc. v. Sprint Corp.*, No. 1-06-2801 (Ill. App. Ct. Mar. 31, 2008). In this case, we represent iPCS, an "Affiliate" of Sprint. iPCS invested hundreds of millions of dollars building a portion of the Sprint wireless network and doing business under the Sprint name in its defined exclusive service area. Sprint then merged with iPCS's competitor Nextel, and sought to compete directly against its Affiliate iPCS in its service area. After a 25-day bench trial, the trial court held in August 2006 that Sprint breached its agreements with iPCS and ordered Sprint to cease owning and operating the portion of the Nextel network that lies in iPCS's service area. The Appellate

Court affirmed the trial court's ruling in all respects. John Muench (Chi.) and Jim Metropoulos (Chi.) were in charge of the appeal and wrote the briefs. Jim Schroeder (Chi.) assisted on the briefs. Co-counsel argued the case.

99. ***MCIMetro Access Transmission Services, Inc. v. Illinois Commerce Comm'n*, No. 3-99-0961 (Ill. App. Ct. Mar. 17, 2005).** In this case, the Illinois Appellate Court, Third District, unanimously affirmed a final order of the Illinois Commerce Commission in favor of our client, SBC Illinois. The decision put a favorable end to more than five years of litigation in the state and federal courts between SBC and MCI concerning the procedures through which MCI may place resale change orders when it uses SBC's facilities to provide telecommunications services to MCI customers. MCI began the litigation in federal court, but that court dismissed MCI's federal claims with prejudice in 2003. MCI then pursued its state court appeal, arguing that it had a right to place change orders electronically under its interconnection agreement with SBC and manually under a state law tariff. SBC convinced the ICC that the interconnection agreement prohibited the use of manual change orders, and the Appellate Court affirmed the ICC's decision. Former partner (now judge) Bob Dow (Chi.) argued the case in the Appellate Court. John Muench (Chi.) assisted on the brief.

- **MARYLAND**

100. ***CSX Transportation, Inc. v. Bickerstaff*, 978 A.2d 760 (Md. Ct. Spec. App. 2009).** In this Federal Employers' Liability Act ("FELA") case, nine CSX railroad workers alleged that they suffered knee injuries as a result of walking on the rocks in CSX's Baltimore rail yards over the course of their careers. The jury found for the plaintiffs and returned verdicts that totaled $19,300,000. After reduction of the awards for comparative fault, the total judgment came to $15,085,000. We were retained to handle the appeal. The Court of Special Appeals agreed with us that the trial court erroneously refused to give an instruction allowing the jury to apportion damages to factors other than CSXT's or the plaintiffs' negligence such as the plaintiffs' age, obesity, or pre-existing medical conditions. The court remanded for a new trial on damages. Evan Tager (DC) argued the case. C.J. Summers (DC) assisted on the briefs.

- **MINNESOTA**

101. ***AT&T Communications of the Midwest v. Minnesota Public Utilities Commission*, 759 N.W.2d 242 (Minn. Ct. App. 2009).** The Minnesota Public Utilities Commission levied a $552,000 penalty against AT&T for allegedly failing to file an off-tariff contract for intercarrier switched access

services. On behalf of AT&T, we appealed the agency's determination, arguing that the MPUC lacked the authority to penalize AT&T because the statute granting it such power expired several months prior to the imposition of penalty. The Court of Appeals agreed, holding that because the relevant provision was not saved by Minnesota's general saving statute, and the penalty provisions had expired, the MPUC did not have the power to impose any penalties against AT&T. Although the Court of Appeals ruled against AT&T on the issue of liability, we have a pending petition for certiorari on file with the Minnesota Supreme Court that challenges this aspect of the decision. Former associate Jeff Berger argued the case. Theodore Livingston (Chi.) and John Muench (Chi.) assisted on the briefs.

- **MISSISSIPPI**

102. *Titan Indemnity Co. v. Hood*, 895 So. 2d 138 (Miss. 2004). In this case, arising out of the decision by St. Paul Fire and Marine Insurance Company to terminate its "representative agreement" with an insurance marketer, St. Paul and two of its subsidiaries were held liable for approximately $2.8 million in compensatory damages and $80 million in punitive damages. The Mississippi Supreme Court reversed the judgment, agreeing with our position that the provision in the agreement specifying that any litigation would be pursued in Bexar County, Texas, was fully enforceable. Evan Tager (DC) collaborated with Mississippi counsel on the briefs. Mississippi counsel argued the case.

- **NEBRASKA**

103. *Budler v. General Motors Corp.*, 689 N.W.2d 847 (Neb. 2004). A 19-year-old boy was injured in an accident while riding in a car manufactured by GM and first sold for use on June 24, 1991. He and his parents filed suit against GM on April 2, 2002, alleging negligence and strict products liability. GM moved to dismiss plaintiffs' complaint on the ground that it was filed after the expiration of Nebraska's ten-year statute of repose, which forbids individuals from filing products liability actions more than ten years after the date the product was first sold. Plaintiffs argued in response that the infancy tolling statute tolled the statute of repose for the two-and-a-half years that Budler was a minor, thus allowing them to file their claims more than ten years after the date of first sale. A federal district court in Nebraska agreed with plaintiffs and denied GM's motion to dismiss. On interlocutory appeal, the Eighth Circuit certified the question to the Nebraska Supreme Court. In a unanimous decision, the Nebraska Supreme Court held that the plain language of the statute trumped any other tolling provision, thus rendering the statute of repose's ten-year

limitation absolute and the Budlers' claims barred. Eileen Penner (DC) prepared the briefs and argued the case.

- **NEW YORK**

104. ***Adamo v. Brown & Williamson Tobacco Corp.*, 900 N.E.2d 966 (N.Y. 2008).** The plaintiff in this case alleged that the regular-strength cigarettes she smoked throughout her life had been "defectively designed" because they contained more than trace amounts of nicotine and tar. According to the plaintiff, the defendants (three cigarette companies including our client, Philip Morris USA) had a duty to manufacture and market only "ultra-light" cigarettes and to remove all regular cigarettes from the market. The undisputed evidence showed, however, that consumers overwhelmingly prefer regular cigarettes to ultra-light versions, and that virtually no consumers choose to purchase ultra-lights when given the option. Plaintiff did not offer any evidence that consumers would accept ultra-light cigarettes as a "feasible alternative" to the defendants' products, contending instead that New York law requires manufacturers to market the safest version of their product that is "technologically feasible," without regard to consumer acceptance. The trial judge allowed the case to go to the jury, which awarded approximately $20 million in compensatory and punitive damages. New York's intermediate appellate court reversed, and New York's highest court, the Court of Appeals, thereafter affirmed the reversal. The court held that to make out a prima facie case of negligent design under New York law, a plaintiff must put on evidence to show that the manufacturer could have produced a safer version of its product that retains the inherent utility and functionality of the original. For products like cigarettes, whose only utility is to satisfy consumer demands, plaintiffs must show that a proposed alternative would be acceptable to consumers. Andy Schapiro (NY/Chi.) argued the case in both courts. Andy Frey (NY/DC), Lauren Goldman (NY), and Scott Chesin (NY) assisted on the briefs.

105. ***White Plains Coat & Apron Co. v. Cintas Corp.*, 867 N.E.2d 381 (N.Y. 2007).** We represent the plaintiff White Plains Coat & Apron Co. ("WPL") in a suit against one of its competitors, Cintas, for tortious interference with contract. Although finding that WPL had presented sufficient proof to create a material question of fact on all the elements of contract interference, the federal district court granted summary judgment to Cintas, holding that Cintas was justified in interfering with the contracts between WPL and its customers because Cintas had an economic interest in soliciting new business. The Second Circuit certified to the New York Court of Appeals the question whether "a generalized economic interest in soliciting business for profit constitutes a defense to a claim of tortious interference with an existing contract for an alleged

tortfeasor with no previous economic relationship with the breaching party." In answering the certified question, the Court of Appeals rejected the district court's analysis, holding that a "defendant who is simply plaintiff's competitor and knowingly solicits its contract customers is not economically justified in procuring the breach of contract." Rather, the economic interest defense is triggered only when the defendant has a "legal or financial stake in the breaching party's business." The Second Circuit thereafter remanded the case to the district court for what we hope will be a trial on the merits of the contract interference claim. Lee Rubin (Palo Alto) argued the case in both the Second Circuit and the New York Court of Appeals.

106. ***Capitol Records, Inc. v. Naxos of America, Inc.*****, 830 N.E.2d 250 (N.Y. 2005).** We were hired to represent Capitol Records on appeal from an adverse summary judgment in its copyright dispute against Naxos of America, Inc. Naxos copied several classical recordings commissioned by Capitol's parent company, EMI Records Ltd., in the early 1930s. Because federal copyright protection was not extended to sound recordings until 1972, the issue was whether and to what extent New York common law protected the performances and the record companies that originally produced them. Capitol sued Naxos under various state common-law theories, including unfair competition and common law copyright infringement. The district court granted summary judgment in favor of Naxos, and on appeal the Second Circuit certified the disputed questions of state law to the New York Court of Appeals. That court in turn held that (1) "New York law provides common-law copyright protection to sound recordings not covered by the federal copyright act, regardless of the public domain status in the country of origin, if the alleged act of infringement occurred in New York"; (2) "fraud or bad faith is not an element of an infringement action in modern New York law"; and (3) "even assuming that Naxos had created a 'new product' due to its remastering efforts that enhance sound quality, that product can be deemed to infringe on Capitol's copyright to the extent that it utilizes the original elements of the protected performances." The decision has broad significance to the recording industry because it firmly establishes state common-law copyright protection for pre-1972 sound recordings, which are not protected by the federal copyright statute. Philip Lacovara (NY) argued the case in the Second Circuit and the New York Court of Appeals.

- **OHIO**

107. ***Maitland v. Ford Motor Co.*****, 816 N.E.2d 1061 (Ohio 2004).** An Ohio resident filed a class action against the Big Three automakers on behalf of state consumers alleging that by depreciating the value of a defective car before

returning the car buyer's money, the automakers violated Ohio's Lemon Law and Consumer Sales and Practices Act. Under the Lemon Law, any dispute between buyers and automakers must first go through an informal dispute-resolution process. During that process, the value of any miles that the buyer had already logged on the automobile—called "offset mileage"—was deducted from the refund of the purchase price received by the aggrieved buyer. Plaintiffs were buyers who had accepted such offset awards in the informal dispute resolution process. Nevertheless, they brought suit, arguing that they were entitled to a full refund of the car's value. The Lemon Law is silent on the subject of offset mileage, but from the time of the Lemon Law's passage until recently, Ohio's Attorneys General have allowed the use of offsets during the informal dispute-resolution process. A state trial court dismissed the action. The court of appeals disagreed and reversed, holding that the Lemon Law did not authorize a setoff and that the Attorney General had no authority to sanction the practice. We were retained to file a petition for review, which the Ohio Supreme Court granted. In a 4-3 decision, the court then held that the practice of offsetting mileage was appropriate in the informal dispute-resolution process because the buyer remained free to file a lawsuit seeking a full refund if he or she was dissatisfied with the arbitration award or the automaker's settlement offer. Charles Rothfeld (DC) and Eileen Penner (DC) drafted the briefs. Ohio counsel argued the case.

- **PENNSYLVANIA**

108. ***Reilly v. Ernst & Young, LLP*, 929 A.2d 1193 (Pa. Super. Ct. 2007) (en banc).** In this case, the Pennsylvania Superior Court, sitting en banc, vacated a nearly $103 million judgment entered against our client, Ernst & Young LLP, on claims of alleged accounting malpractice and fraud. The trial court, which had conducted a bench trial, based its findings of causation and damages exclusively on matters that it deemed Ernst & Young to have admitted as a sanction for Ernst & Young's omission of its own independent verification of the answers and objections to the plaintiffs' requests for admissions that Ernst & Young had filed jointly with its co-defendant. The Superior Court held that the trial court's sanction was "inappropriate and unwarranted" because it "was extremely disproportionate to the noncompliance at issue." Most notably, the Superior Court emphasized that, by deeming Ernst & Young to have admitted matters that the trial court itself had acknowledged would "practically guarantee a finding of negligence on the part of Defendants" and "practically eliminate any presentation of the merits of the case," "the sanction, in effect, relieved the [plaintiffs] of their burden of proof at the time of trial to establish the causation

and damages elements of their claims." Ken Geller (DC) argued the case. Craig Canetti (DC) assisted on the briefs.

109. *Pioneer Commercial Funding Corp. v. American Financial Mortgage Corp.*, 855 A.2d 818 (Pa. 2004). Our client in this case was Wachovia Bank, which is the successor to CoreStates Bank. After discovering that its customer American Financial Mortgage Corporation had been kiting checks, CoreStates froze American Financial's accounts. Subsequent to that action, approximately $1.8 million were wired into one of American Financial's accounts. The funds were supposed to be wired on to another bank as payment for some mortgages that American Financial had purchased and then resold. As warehouse lender for the initial mortgagee, Pioneer claimed to have a security interest in the mortgages and hence an entitlement to the funds in the frozen account. After CoreStates refused to release the funds and instead set them off against American Financial's debt, Pioneer sued. The jury found that Pioneer had a security interest and that CoreStates had committed the tort of conversion. It awarded Pioneer the $1.8 million that had been set off, plus $13.4 million in "consequential" damages, which represented the diminution in value of Pioneer's stock from the day the account was frozen to the day of trial. In addition, the jury awarded $337.5 million in punitive damages. We were retained to take the lead in drafting the post-trial motions and handling the ensuing appeal. In response to the post-trial motions, the trial court ordered a remittitur of the punitive damages to $40.5 million. The Superior Court (Pennsylvania's intermediate appellate court) then upheld the compensatory component of the judgment, but ordered a new trial on punitive damages both on excessiveness grounds and because of improper argument by plaintiff's counsel. We then petitioned the Pennsylvania Supreme Court to review the underlying liability determination. That court granted review and, after plenary briefing and a lengthy oral argument, unanimously reversed the judgment and ordered that judgment be entered in favor of CoreStates on the ground that its setoff had priority over Pioneer's security interest under Pennsylvania law. Andy Frey (NY/DC) argued the case in each court. Evan Tager (DC) and Lauren Goldman (NY) assisted on the briefs.

- **TENNESSEE**

110. *Hensley v. CSX Transportation, Inc.*, 2009 WL 2615849 (Tenn. Ct. App. Aug. 26, 2009). The plaintiff in this FELA case alleged damages from exposure to asbestos and toxic solvents. A jury awarded him $5 million in damages. The Tennessee Court of Appeals affirmed the judgment, rejecting, *inter alia*, CSX's argument that the trial court erred in refusing to instruct the jury that the plaintiff could recover for fear of contracting cancer only if he

proved that his alleged fear was "genuine and serious." We filed a petition for certiorari in the U.S. Supreme Court, which summarily reversed the Tennessee Court of Appeals. The latter 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. Dan Himmelfarb (DC) argued the case. Evan Tager (DC) and Ted Weiman (DC) assisted with the briefs.

111. *BellSouth Telecommunications, Inc. v. City of Memphis*, 160 S.W.3d 901 (Tenn. Ct. App. 2004). For the past several years, the firm has been national outside counsel for BellSouth in various matters involving the rights of counties and municipalities to charge fees for BellSouth's use of public streets and rights-of-way. In 2003, a Memphis trial court held that the City of Memphis could impose a charge on BellSouth equal to 5% of the company's gross revenues from its telecommunications services within the city limits. The Tennessee Court of Appeals issued a unanimous decision reversing the trial court's adverse decision on the ground that Tennessee state law preempted the Memphis ordinance imposing the 5% charge and that the City could recoup only its regulatory costs from BellSouth. We then successfully opposed the City's application for leave to appeal the Court of Appeals' decision to the Tennessee Supreme Court. John Muench (Chi.) and former partner (now judge) Bob Dow (Chi.) briefed the case, which was decided without oral argument.