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# Appellate Group Of The Year: WilmerHale

By **Andrew Karpan**

*Law360 (January 31, 2020, 3:11 PM EST)* -- Lawyers at WilmerHale landed in front of the Supreme Court three times in the past year, where they netted big wins in remaking the limits of bankruptcy protection, sovereign immunity and liability on the high seas, accomplishments that have landed the firm a place, yet again, among Law360's 2019 Appellate Groups of the Year.


This won't be news to followers of the high court or of the firm, whose appellate group has earned the nod more years than not in the past decade. Co-chair Seth P. Waxman, former solicitor general in the Clinton administration, has appeared before the justices no fewer than 51 times on behalf of WilmerHale clients.

Waxman's team at WilmerHale continued the appellate success in the past year.

In an 8-1 ruling, the high court agreed with the firm and put new limits on bankruptcy filers' control over intellectual property. The justices' ruling resolved a circuit split that had allowed some belly-up trademark owners to revoke their licenses in addition to their debts.

The justices ruled that a bankrupt company's decision to "reject" an existing contract does not revoke a trademark licensee's right to continue using the mark.

"We were following the issue and we saw the First Circuit had ruled on the issue," partner Danielle Spinelli said, "and we thought that [decision] was wrong." Spinelli, a vice chair of WilmerHale's appellate group, then took the case on, arguing on behalf of a sportswear wholesaler who the circuit had ruled could no longer use the brand name "Coolcore" after the mark's owner declared bankruptcy and rescinded their license agreement.

The ruling, Spinelli said, cleared up longstanding confusion among intellectual property and bankruptcy lawyers "about what rejection exactly means." She added that it was her fourth bankruptcy case before the high court, where she had also clerked for Justice Stephen Breyer before joining WilmerHale.

In the time since, she's witnessed how the court's slow embrace of textualism has, in turn, lent itself to "a more rigorous way of looking at the [bankruptcy] code."

This rigorous view, Spinelli said, is reflected by a more modest and restrained interpretation of the protections that bankruptcy provides debtors, as the high court has "now switched over to the view that, no bankruptcy ... allows you to throw everybody's rights out the window."

The practice needed similar textual rigor in approaching a tax fight between the California Franchise Tax Board and an inventor named Gilbert Hyatt, who made millions from royalties on a patent claim he owned for an early version of the microprocessor.

Hyatt had been fighting the California Franchise Tax Board since 1993, claiming it committed torts while auditing him for those royalties, and a Nevada court initially awarded Hyatt hundreds of millions of dollars against the state. But a 5-4 decision last May nixed that win in a ruling that barred state institutions from being sued in courts where they couldn't claim sovereign immunity, overturning a high court ruling from 1979 that said otherwise.

Waxman, who argued the case on behalf of the tax board, says that preparing for it required going further back into historical precedent and relying on a Revolutionary-era court's dismissal of a 1781 debt fight between the state of Virginia and a man who had tried to collect the debt in a court in Pennsylvania.

However satisfying an appellate win in state court may be, Waxman added that it's especially satisfying to get cases to the highest court in the land, pointing to how his appellate practice approaches laying out a client's case.

A frequent tactic WilmerHale employs to encourage the high court to take up clients' petitions is encouraging amicus filings by interested third parties. Waxman says the firm approaches amici with a nuanced approach, however.

"An amicus strategy is quite an art form and it's a fun one, actually," he said. Waxman separates his team from some overenthusiastic peers who too often overwhelm the justices with superfluous takes.

"It is not an effective strategy just to run through the list of all the frequent filers and get as many 'me too' amicus briefs as you want," Waxman said, adding, "The court is not in any way influenced by weighing the amicus briefs on one side or another."

Actively soliciting too many amicus briefs, he cautioned, "reduces the likelihood that the one or two most effective briefs are actually going to be read by the justices and taken seriously."

When WilmerHale petitioned the high court on behalf of a shipping company in its appeal of a Ninth Circuit ruling that held that a deckhand could use the Jones Act to net punitive damages in a unseaworthiness claim against a shipowner, what mattered was lining up the disparate business interests that were equally concerned about their bottom line.

"If your case affects an industry and it's going to have practical, on-the-ground implications, many of the justices care about that," Waxman said.

In doing so, he and his team secured a ruling that was widely considered a big win for shipowners and their insurers, nixing a huge bargaining chip that had been widely used by injured seamen and their attorneys in settlement negotiations over the past decade.

Big industry interests faced even starker odds in an IP fight at the federal circuit, according to WilmerHale partner Tom Saunders. He referred to OSI Pharmaceuticals' win last October, in which he and the firm won a neat reversal of a Patent Trial and Appeal Board decision that originally found that part of the patent for the company's cancer treatment drug, Tarceva, had been anticipated by prior art.

On appeal, Saunders' strategy was to point the federal circuit judges toward the broader implications that nixing the pharma giant's patent would have.

"If you are arguing the scientific details, then you will lose," he said.

--Additional reporting by Y. Peter Kang and Bill Donahue. Editing by Adam LoBelia.