

# GIBSON DUNN

## Appellate and Constitutional Law Practice Group: 2010 Year in Review

September 2011

By any measure, 2010 was a remarkable year for the Appellate and Constitutional Law Practice Group at Gibson, Dunn & Crutcher LLP. From landmark wins in appellate courts across the country to unrivalled recognition of our team and individual attorneys, the past year provided further proof that our appellate practice remains in a class by itself.

In 2010, Gibson Dunn attorneys secured stunning results in courts at every level. We took two high-profile cases to the Supreme Court of the United States, winning both, and convinced the Court to hear five more. Our lawyers will argue two of those cases in the coming months on behalf of two of the nation's largest companies, Wal-Mart and Microsoft. We also obtained major victories in federal and state courts nationwide, covering a wide array of cutting-edge legal issues.

Given our stellar track record, it should come as no surprise that our team continues to enjoy an unparalleled position in the most widely respected rankings. In naming Gibson Dunn the "Litigation Department of the Year," *The American Lawyer* heralded the Firm's appellate practice as "perhaps its greatest asset." Dubbing our litigators the "game changers," it explained that "when other firms and conventional strategies come up short, clients in deep trouble turn to Gibson Dunn for fresh, aggressive thinking and innovative rescues." The Firm also was featured in *The National Law Journal's* annual "Appellate Hot List," and *Chambers USA 2010* placed Gibson Dunn in the top tier of appellate practices nationwide.

Our continued success in handling high-stakes appeals involving complex questions depends on the unparalleled skill, experience and expertise that our attorneys bring to the table. Theodore B. Olson was named to the *Time* 100, the magazine's annual list of the most influential individuals in the world. Thomas H. Dupree, Jr., and Matthew D. McGill were featured in Law360's list of the top 10 appellate attorneys under 40. *California Lawyer* recognized Scott A. Edelman and Andrea E. Neuman among its 2010 Attorneys of the Year. *Daily Journal* also included Edelman and Neuman, along with Theodore J. Boutros, Jr., in its annual list of the top 100 California lawyers, and it named Christopher D. Dusseault as one of its Top 20 California Attorneys Under 40. The list of accolades goes on and on.

In addition to the esteem of clients and peers, our attorneys also have earned the respect of public officials and institutions. President Obama recently appointed Theodore B. Olson to serve on the 10-member Council of the Administrative Conference of the United States, a public-private partnership that promotes research and provides nonpartisan recommendations for improving administrative agency operations. The Chief Justice of California appointed Daniel M. Kolkey to the California Judicial Council's Appellate Advisory Committee, which recommends rules and legislation to improve the administration of justice in California appellate proceedings.



Gibson Dunn was named the 2010 Litigation Department of the Year by *American Lawyer*, with the appellate practice described as "perhaps the firm's greatest asset."

To meet the ever-growing demand for our innovative thinking and incisive advocacy, we also have expanded our roster of top-notch appellate attorneys. In 2010, a record six Supreme Court clerks joined Gibson Dunn following their clerkships, along with 10 former clerks from seven federal courts of appeals, as well as the former Solicitor General of Texas—each adding invaluable experience and insight to our team.

As we begin another exciting year, we pause to reflect both on our accomplishments in 2010 and on the new opportunities that lie ahead.

## Supreme Court of the United States

Gibson Dunn just capped a remarkable year of practice before the Supreme Court of the United States, further solidifying our reputation as a powerhouse in Supreme Court litigation. From historic victories to frequent appearances at the podium, our practice group proved again this year that when it comes to advocacy before the nation's highest Court, Gibson Dunn is second to none.

Our most widely heralded win, *Citizens United v. Federal Election Commission*, safeguarded the rights of corporations and other entities to engage in political speech. Gibson Dunn represented Citizens United, a nonprofit advocacy corporation that produces feature-length political films. The case arose out of Citizens United's release of *Hillary: The Movie*, a 90-minute critical documentary about then-Senator Hillary Clinton. Citizens United was prohibited from distributing the movie because federal law made it a felony for corporations to use general treasury funds for political advocacy. Citizens United filed suit challenging those restrictions, but it lost before a three-judge district court. In a decision that the *New York Times* described as a "doctrinal earthquake," the Supreme Court ruled for Citizens United, holding that portions of the McCain-Feingold campaign finance law, and other federal laws banning corporate and union expenditures on political speech, violate the First Amendment.

We also prevailed before the Supreme Court in *Black v. United States*, representing Conrad Black, the former CEO of Hollinger International. Black had been accused of mail and wire fraud stemming from allegations that he and other executives deprived Hollinger of the "intangible right" to his "honest services" through alleged breaches of fiduciary duties. On Black's behalf, Gibson Dunn argued that the government's far-reaching reading of the "honest services" statute was wrong. The Supreme Court agreed, explaining in a related decision the same day that the "honest services" statute must be limited to punishing bribes and kickbacks. The Court also agreed with Gibson Dunn that, contrary to the Seventh Circuit's conclusion, Black properly preserved his challenge to the jury instructions that embodied the invalid interpretation of the "honest services" law. The Court sent the case back to the Seventh Circuit, which threw out two of Black's convictions.

The strength of any Supreme Court practice also is measured by its success in securing coveted certiorari review in high-stakes cases. On that score, too, 2010 was a banner year for the Firm. Still less than halfway through the current Term, Gibson Dunn has persuaded the Court to grant review in five cases that cover a range of critical legal issues, from securities-fraud liability for service providers to the outer limits on class action litigation. The Firm already has argued three of those cases:



The preeminence of Gibson Dunn's Appellate Group is also underscored by its placement on *The National Law Journal's* 2008 through 2010 "Appellate Hot List," a survey of top appellate law practices.

- Most recently, in *Janus Capital Group, Inc. v. First Derivative Traders*, Gibson Dunn argued that the investment adviser to a group of mutual funds should not be liable under the federal securities laws for misstatements in the mutual funds' prospectuses. The statements were made by the funds, not their adviser, the Firm argued, so only the funds can face primary liability in a private federal securities-fraud suit.
- In *Mayo Foundation for Medical Education & Research v. United States*, Gibson Dunn argued for the Mayo Foundation that medical residents fall under an exemption for student employees that shields them from Social Security taxes. The Treasury Department took away that exemption for medical students who work more than 40 hours per week.
- In *CIGNA Corp. v. Amara*, the Firm argued on behalf of CIGNA that certain claims based on alleged inconsistencies in employee-benefit materials it distributed should be rejected. If a plaintiff can recover at all under the relevant provision of the Employee Retirement Income Security Act due to discrepancies between a summary plan description and the terms of the plan itself, the Firm argued, the plaintiff at least must establish that he or she detrimentally relied on the mistaken summary.

## Nationwide Appellate Success

Although our record at the Supreme Court over the past year is truly remarkable, it only begins to describe the depth of our nationwide appellate practice. In 2010, Gibson Dunn attorneys secured victories in bet-the-company cases across the United States on issues from the First Amendment to insurance fraud. Here are just a few of our significant achievements:

- Successfully representing NBC Universal in a Second Circuit challenge to the Federal Communications Commission's "fleeting expletives" policy for live television broadcasts. In a landmark ruling, the court held that the policy violates the First Amendment. *Fox Television Stations v. FCC* (2d Cir. 2010).
- Representing Science Applications International Corp. (SAIC) in a successful False Claims Act appeal in the D.C. Circuit arising from SAIC's contracts with the Nuclear Regulatory Commission. The government claimed that SAIC's alleged noncompliance with conflict-of-interest obligations transformed its facially accurate requests for payment into impliedly false claims. A jury agreed, awarding the government \$6.5 million in damages. But the D.C. Circuit, siding with Gibson Dunn, set the verdict aside because the district court improperly instructed the jury to consider the collective knowledge of SAIC's employees and agents without finding that any one person knew the company's claims were false, and because the district court misdirected the jury regarding damages. *United States v. Science Applications Int'l Corp.* (D.C. Cir. 2010).
- Securing a complete victory in the Fourth Circuit for one of the nation's largest toy manufacturers on trademark infringement and dilution claims. The appeal involved counterclaims that the manufacturer successfully asserted at trial for infringement of its well-known marks.



*Fox Television Stations  
v. FCC*

- Convincing the Ninth Circuit to overturn a multimillion-dollar judgment against the investment bank Bayerische Hypo-und Vereinsbank AG for alleged violations of the Racketeer Influenced and Corrupt Organizations Act and state law stemming from a tax-evasion scheme. The district court awarded summary judgment against the bank, but the Ninth Circuit set that ruling aside, agreeing with Gibson Dunn that the plaintiff could not prove that the bank's involvement in the scheme to avoid federal income tax proximately caused his losses. *Rezner v. Bayerische Hypo-Und Vereinsbank AG* (9th Cir. 2010).
- Persuading the Second Circuit to affirm judgments worth more than \$2 billion in favor of NML Capital, Ltd. and other creditors against the Republic of Argentina for the Republic's failure to honor floating-rate bonds it had issued. Adopting Gibson Dunn's arguments, the court rejected the Republic's assertion that it should be excused from paying even though the floating interest rate had climbed to more than 100% per year. *NML Capital v. Republic of Argentina* (2d Cir. 2010).
- Successfully defending Covidien in the Ninth Circuit in an antitrust suit by purchasers of pulse oximetry products. After securing summary judgment in the district court, Gibson Dunn persuaded the Ninth Circuit to affirm that ruling. In its published decision, the panel rejected the plaintiffs' claims under Sections 1 and 2 of the Sherman Act, holding that Covidien's sole-source and market-share discounts did not foreclose competition in a substantial share of the relevant market and that its product was an improvement over previous designs. *Allied Orthopedic v. Tyco Healthcare Group* (9th Cir. 2010).
- Securing reversal by the California Court of Appeal of a trial-court ruling dismissing Walgreen Co.'s federal and state constitutional challenges to San Francisco's tobacco ordinance. Agreeing with Gibson Dunn, the court concluded that despite the deferential standard applicable to Walgreen's claim, the company's complaint adequately asserted equal-protection violations because there was no rational basis for the distinction San Francisco drew between drug stores and grocery stores. The court also cautioned San Francisco that the appeal precludes any further litigation over whether Walgreen's complaint states valid claims. As a result, the City amended its ordinance. *Walgreen Co. v. City & County of San Francisco* (Cal. Ct. App. 2010).
- Persuading the Federal Circuit, in a patent-law case, to overturn an injunction ordering Novo Nordisk to alter the "use code narrative" it submitted to the Food and Drug Administration. In a decision that should benefit innovator drug companies, the Federal Circuit, adopting Novo Nordisk's argument, held that the counterclaim added to the Hatch-Waxman Act in 2003 is narrowly limited and cannot be used to force changes in a drug maker's use code narrative. *Novo Nordisk A/S v. Caraco Pharmaceutical Laboratories, Ltd.* (Fed. Cir. 2010).
- Convincing the California Supreme Court to order the dismissal of criminal charges brought against members of the Board of Trustees of the San Diego City Employees' Retirement System for alleged conflicts of interest. Our client could not be charged, the Court concluded, because her only financial interest in the contracts at issue was in pension benefits, which applied equally to thousands of employees. *Lexin v. Superior Court of San Diego* (Cal. 2010).

**Walgreens**

Walgreen Co.  
v. City & County of  
San Francisco

- Arguing successfully in the Fifth Circuit that a \$20 million jury verdict against Lexington Insurance Co. arising from Hurricane Katrina rested on an erroneous interpretation of an insurance policy. Agreeing with Gibson Dunn, the court held that the policy did not permit recovery for business-interruption losses where the plaintiff earned sufficient revenue from resuming operations to pay its actual expenses. The Fifth Circuit also set aside the accompanying award of statutory damages, as the jury's finding of bad faith rested on its erroneous understanding of the amount our client failed to pay. *Consolidated Companies v. Lexington Insurance Co.* (5th Cir. 2010).
- Securing dismissal in the Ninth Circuit of a suit alleging that Aetna Life Insurance Co. had conspired to develop and market a fraudulent insurance plan to municipal employees. Agreeing with Gibson Dunn and the district court, the Ninth Circuit held that the plaintiff lacked standing. *Weaver v. Aetna Life Insurance Co.* (9th Cir. 2010).
- Persuading the California Court of Appeal to uphold a special state law allowing counties to continue providing supplemental benefits to state-court judges—benefits representing a substantial portion of judges' compensation. Relying heavily on arguments advanced by Gibson Dunn, which represented the Los Angeles County Superior Court, the Court rejected each of the plaintiff's claims that the law violated the California Constitution. *Sturgeon v. County of Los Angeles* (Cal. Ct. App. 2010).

## New Challenges on the Horizon

As pleased as we are by the results we obtained for our clients in 2010, we are equally excited about the opportunities that lie ahead.

At the Supreme Court, Gibson Dunn attorneys will argue at least two more high-profile cases this spring—bringing to five the number of cases our lawyers will have argued before the Court this Term. In *Wal-Mart Stores, Inc. v. Dukes*, Gibson Dunn represents Wal-Mart in an employment-discrimination suit by millions of would-be class members seeking billions of dollars in damages. The Court granted Gibson Dunn's request for review of the en banc Ninth Circuit's sharply divided ruling, which allowed the largest employment class action in history to proceed. In *Microsoft Corp. v. i4i Limited Partnership*, Gibson Dunn will argue for another of the country's largest companies in a major patent-law appeal. The Federal Circuit upheld a jury finding that Microsoft's Word software infringed a competitor's patent. In November, Gibson Dunn convinced the Supreme Court to review that ruling and to consider whether the courts below applied too stringent a standard to Microsoft's claim that the plaintiff's patent is invalid.

We also are engaged in some of the most significant matters confronting the lower courts. Gibson Dunn represents Chevron Corporation in connection with the Lago Agrio environmental litigation arising in Ecuador, in which the plaintiffs are pursuing fraudulent claims in an effort to recover vast sums of purported damages. Although the case is still ongoing, we already have secured several significant appellate victories. In a highly publicized decision, the Second Circuit substantially affirmed an order requiring a documentary filmmaker to turn over hundreds of hours of outtakes from the film "Crude"—devastating material which further shows the attempted fraud being perpetrated against

**Microsoft®**

Microsoft Corp.  
v. i4i Limited Partnership



Lago Agrio  
Environmental Litigation

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Appeal Against  
Google and YouTube



Gibson Dunn's Theodore Olson speaks to reporters outside the U.S. Supreme Court following oral arguments.

Chevron by the Lago Agrio plaintiffs. We also convinced the Fifth Circuit to uphold Chevron's right to obtain allegedly privileged and confidential communications between the plaintiffs' environmental consultants and the Ecuadorian court's damages expert.

In another major commercial case, Viacom called in Gibson Dunn to handle its highly publicized appeal against Google and YouTube. In the ruling below, a federal district court held that a "safe harbor" provision of the Digital Millennium Copyright Act shields YouTube from liability for certain copyright-infringement claims. Our team is now challenging that ruling in the Second Circuit.

Our attorneys also are leading the charge in a federal constitutional challenge to California's Proposition 8, which denies marriage to gay and lesbian individuals. After a three-week trial, the district court held California's law violates the Constitution's Due Process and Equal Protection Clauses. Proponents of Proposition 8 appealed that ruling to the Ninth Circuit, where Gibson Dunn recently argued in defense of the decision below.

We are proud to share our accomplishments with you, and we are determined to raise the bar once again in the year ahead. We wish you the best in 2011, and we look forward to putting our skill and experience to work for you in the future.

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