

Appellate MVP: Bancroft's Paul Clement

By Matt Fair

Law360, Philadelphia (November 17, 2015, 5:46 PM ET) -- After notching a series of wins before the U.S. Supreme Court, including a ruling that workers weren't owed wages for time spent passing through security screenings at an Amazon.com warehouse, Bancroft PLLC partner and former solicitor general Paul Clement has been named a Law360 Appellate MVP for 2015.

Clement notched his 75th appearance before the Supreme Court last October in a case that ultimately resulted in a victory for Integrity Staffing Solutions Inc. as the justices handed down a unanimous victory finding that workers the company provided at Amazon.com warehouses were not eligible to receive overtime under the Fair Labor Standards Act for time spent undergoing post-shift anti-theft screenings.

And while Clement's name is one you'll frequently find on the Supreme Court's dance card, he told Law360 in an interview that he still gets nervous appearing before the justices.

"If I ever stop getting nervous, I'm going to start doing something else," he said. "Obviously it gets easier as you have more experience and you've been involved in previous high-profile cases, but at the same time if you weren't nervous before a Supreme Court argument, then you wouldn't understand the significance of what you were about to do."

Clement joined Bancroft in 2011 after serving as President George W. Bush's solicitor general from February 2001 through June 2008.

The Integrity Staffing decision resolved a split that erupted after the Ninth Circuit ruled in April 2013 that workers in the putative class action had sufficiently alleged that the security screenings were an integral and indispensable part of their duties.

Clement said the Supreme Court's December 2014 decision in the case helped to firm up case law on the issue while allowing Integrity to avoid facing the prospect of shelling out a significant damage award.

"If the case had come out the other way, they would've been facing some serious liability," he said. "The fact that the court decided it the way that they did suggests that the court is concerned that the FLSA, especially when you have employees who are trying to get compensation for time that historically has not been compensated, really does have the potential to impose an outside liability on employers that may not be what Congress had in mind."

Clement has also scored several big wins in federal courts of appeal throughout the country.

A case Clement handled on behalf of an HSBC Holdings PLC unit resulted in a Seventh Circuit decision in May vacating a record \$2.5 billion jury verdict the company had been saddled with over allegations that executives made misleading statements about the company's lending practices, financial accounting and loan quality.

Clement and his team convinced the court that a plaintiff's expert hadn't properly contextualized



APPELLATE



Paul Clement
Bancroft

testimony about the effect on stock prices of fraudulent statements by company brass.

"The problem in a nutshell was that the evidence the plaintiffs put on did not account for certain other factors that went into the drop in stock price," Clement said.

Given that so few cases of its type end up going to trial, Clement said the ruling would have a significant impact on evidentiary standards in securities class actions.

"I think this will be a very significant precedent on what a plaintiffs has to show and account for in order to prove loss causation in securities class actions," he said. "Those are hugely important issues."

Clement also scored a victory before the Eleventh Circuit in September as it ruled that a Florida federal judge had no right to keep jurisdiction over state-law claims from Texas, California and elsewhere in "extraordinarily complex" litigation accusing Millennium Laboratories Inc. of kickbacks in the form of free drug-test urine cups.

A three-judge panel ruled that the district court had wasted judicial resources and exercised poor judgment by allowing Ameritox Ltd. to pursue "novel and complex" state-law claims in federal court by trying them to the federal Stark Law and Anti-Kickback Statute.

"What we argued to the Eleventh Circuit was that the district court assumed that all of the states involved would adopt the federal statute as the standard of care for state law violation," he said. "We were able to argue that that was actually a very important issue of state law that the federal court shouldn't have been addressing in the first instance."

As his work in the past year has run the gamut from employment and antitrust class actions to securities and gaming cases, Clement said the focus of his work was in singling out key issues and helping to translate sometimes-complex issues to appellate judges.

"In the same way that we're getting involved in a broad variety of cases, they're hearing a broad variety of cases," he said. "What allows us to approach these diverse cases and be in a position to try and be helpful to the court is really the fact that we work collaboratively with people who really know the various areas of the law. What we're provided is almost akin to a translation service where we help to make these sometimes technical areas of the law more understandable and comprehensible."

The coming year looks to be just as busy as the last as Clement prepares to go once again before the Third Circuit on behalf of several professional sports leagues in a fight over New Jersey's effort to legalize sports gambling.

Clement is also slated to go back before the Supreme Court on behalf of the California Franchise Tax Board as it argues that it couldn't face claims in Nevada from an inventor suing the agency for fraud and emotional distress over a massive audit dating back to the early 1990s.

-- Additional reporting by Ben James and Kat Greene. Editing by Patricia K. Cole.
