

# Appellate

## Winstead. Together, One Powerful Voice.

Winstead's Appellate Practice Group's strength and depth are provided by senior, experienced Winstead attorneys.

Acting as a unified, powerful and respected voice, Winstead appellate attorneys represent national and regional clients in state and federal courts. Their experience runs the gamut, from cases involving a single plaintiff and defendant to multiple parties, from real estate and construction, to banking and finance, from insurance and energy, to government enforcement and regulated industries litigation.

## Developing the Law

Winstead's appellate achievements include a number of published opinions that have set precedents, changed legal standards and procedures, and shaped Texas law over the decades to provide more careful balance of industries' concerns with consumer claims. For instance:

- ***In re Weekley Homes***, 295 S.W.3d 309 (Tex. 2009). An important mandamus case concerning the limits of electronic discovery. The Texas Supreme Court ruled for Winstead's client, holding that the trial court had abused its discretion in granting the plaintiffs' forensic experts' access to our client's computer hard drives. The Court also adopted new procedures, in keeping with Winstead's arguments, placing significant limitations on electronic discovery in order to prevent it from becoming unduly intrusive or overly burdensome.
- ***Tony Gullo Motors I, L.P. v. Chapa***, 212 S.W.3d 299 (Tex. 2006). In a one-two punch, the Texas Supreme Court agreed with Winstead's arguments. The Court established factors that must be considered in awarding punitive damages, suggesting any award should be in line with statutory penalties for similar conduct (which in some cases amounts to no more than \$10,000 to \$20,000). The Court also reversed longstanding Texas precedent adverse to Winstead's client's position, holding instead that parties must specifically establish entitlement to attorneys' fees rather than rely on merely showing their work was intertwined between work for which attorneys' fees are authorized and work for which they are not.
- ***McMillin v. State Farm Lloyds***, 180 S.W.3d 183 (Tex. App.—Austin 2005, pet. denied). Monitored closely by the insurance industry because it was one of the first bad faith cases involving a homeowners' mold claim to be tried after the 2001 \$32 million Ballard verdict, resulting from a media-hyped mold scare. Winstead led the trial and appellate defense team. Though plaintiffs claimed millions, the jury found damages to be de minimus. On appeal, Winstead argued for an interpretation of Texas Insurance Code, Article 21.55 (regarding prompt payment of claims) that was consistent with best insurance industry practices.
- ***IDG, Inc. v. Continental Casualty Co.***, 275 F.3d 916 (10th Cir. 2001). An important insurance policy interpretation was required by the plaintiff's novel advertising injury claim. Winstead defended the insurer, persuading the courts to accept the industry's interpretation of standard policy provisions in a commercial general liability policy.

With significant experience in complex financial, insurance, business, government, and land use litigation of national and regional significance, Winstead's Appellate Practice Group adds a level of assurance that our clients' legal position will receive full consideration by the courts.

## Developing the Persuading Argument

At trial, the challenge is persuading the jury about the facts. On appeal, the challenge is persuading the judge about the law. A shift in thinking from the original trial strategy to targeted legal arguments is necessary.

Winstead's appellate attorneys are well-versed in the thought process of appellate judges. They use great care in identifying and structuring the issues within the bigger-picture context. They focus on the readability and understanding of the written word for their briefs. And the goal of their appearance in court is to present succinct, persuasive oral arguments, demonstrating the compelling case. All this Winstead's appellate attorneys do for our clients within an efficient, cost-effective and ethical framework.

## Developing the Strategy

Often appellate counsel can make significant contributions at the earliest stages of litigation, while a matter is still at the trial level.

This preemptive counsel alerts trial litigators to potential problem appellate issues and contributes to a consistent litigation strategy. These early intervention opportunities create savings and efficiencies for clients by avoiding appellate risks.

In addition to handling appeals of complex cases, our Appellate Practice Group regularly handles:

- Interlocutory Appeals (appeals permitted by statute of certain non-dispositive trial court orders)
- Original Proceedings (primarily associated with complaints about a trial court's discovery orders, but our experience includes a variety of matters concerning our clients, including government and regulatory agency inquiries and local option elections)
- Trial Court Motions Challenging Jurisdiction or Requesting Summary Judgment (primarily law-argument related motions resulting in early case disposition)
- Preparing the Jury Charge (assuring that the questions to be asked of a jury after a trial are proper, but if not, that proper objection was made to the court)
- Special Appearances (personal jurisdiction rulings)
- Sealing Records (related to protecting clients' confidential records)

Winstead knows that the reputation of our clients is affected, in part, by the regard in which their attorneys are held. Consequently, we are dedicated to taking the steps necessary to maintain our lead in knowledge, depth and breadth of experience, and professional conduct.

## Developing a Difference

- **Limitations on Electronic Discovery** – An important mandamus case concerning the limits of electronic discovery. The Texas Supreme Court ruled for Winstead's client, holding that the trial court had abused its discretion in granting the plaintiffs' forensic experts' access to our client's computer hard drives. The Court also adopted new procedures, in keeping with Winstead's arguments, placing significant limitations on electronic discovery in order to prevent it from becoming unduly intrusive or overly burdensome. *In re Weekley Homes*, 295 S.W.3d 309 (Tex. 2009).
- **Oil and Gas / Statute of Frauds** – overturning a \$1 million fraud verdict because, in the absence of a written contract, the statute of frauds bars consideration of an alleged royalty interest in an oil and gas lease as a damages measure. *Quigley v. Bennett*, \_\_ S.W.3d \_\_, 50 Tex. Sup. Ct. J. 861 (Tex. 2007).
- **Property Rights** – protecting property owner's rights to just compensation for taken property against government's argument that it need not pay all the damages because property owner did not originally purchase property all at one time. *McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd.*, 222 S.W.3d 878 (Tex. App.—Dallas 2007, pet. pending).
- **Land Annexation** – reversing the trial court's denial of a request for a temporary restraining order to prevent a town from taking any steps toward annexation of property before arbitrating a dispute over the annexation. *In re Spiritas Ranch Enterprises, L.L.P.*, 218 S.W.3d 887 (Tex. App.—Fort Worth 2007, no pet.).
- **Oil and Gas / Easement Rights** – protecting property easement owner's substantial financial interests against adjacent landowners' efforts to take away oil and gas revenues generated over a 70-year period. *Glover v. Union Pacific R.R. Co.*, 187 S.W.3d 201 (Tex. App.—Texarkana 2006, pet. denied).
- **Punitive Damages and Attorneys' Fees** – establishing constitutional limits to punitive damages and further restricting entitlement to attorneys' fees. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006).
- **Insurance** – upholding jury's de minimus damages award in plaintiffs' insurance claim for millions (after insurer had already paid contractual obligations), resulting from a media-hyped mold scare. *McMillin v. State Farm Lloyds*, 180 S.W.3d 183 (Tex. App.—Austin 2005, pet. denied).
- **Home Equity Lending** – establishing that discount points charged to originate home equity loans are interest and not fees limited to 3 percent under the Texas Constitution. *Tarver v. Sebring Capital Credit Corp.*, 69 S.W.3d 708 (Tex. App.—Waco 2002, no pet.).

- **Class Action** – decertifying an improper consumer class because the fraud claim necessarily involved individual reliance questions. *Peltier Enter., Inc. v. Hilton*, 51 S.W.3d 616 (Tex. App.—Tyler 2000, pet. denied).

## Experience

- **Tony Gullo Motors I, L.P. v. Chapa**, 212 S.W.3d 299 (Tex. 2006). In a one-two punch, the Texas Supreme Court agreed with Winstead's arguments. The Court established factors that must be considered in awarding punitive damages, suggesting any award should be in line with statutory penalties for similar conduct (which is some cases amounts to no more than \$10,000 to \$20,000). The Court also reversed longstanding Texas precedent adverse to Winstead's client's position, holding instead that parties must specifically establish entitlement to attorneys' fees rather than rely on merely showing their work was intertwined between work for which attorneys' fees are authorized and work for which they are not.
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