Competition MVP: Latham & Watkins' Margaret Zwisler

By Melissa Lipman

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Latham & Watkins LLP’s Margaret Zwisler convinced a judge that the London Metal Exchange had foreign sovereign immunity from an antitrust class action over aluminum warehousing rates even though the unit is privately owned, earning her a spot on Law360’s list of Competition MVPs.

Zwisler notched several major wins over the last year, helping The Carlyle Group secure a favorable settlement in the leveraged buyout antitrust litigation and helping several cable companies fight a putative class action over their set-top box offerings.

But her biggest victory came in late August when she led a team that convinced a New York federal judge to dismiss LME from the aluminum litigation under the Foreign Sovereign Immunities Act — despite the judge’s own surprise that the exchange was protected as an organ of the U.K. government despite being privately owned.

"It isn't immediately obvious that the FSIA defense would be available to it, but as I got to know the business ... I realized that LME occupied a unique [position]," Zwisler said. "Under jurisprudence in the U.K. it is a market regulator itself, that is the basis for the FSIA defense in the U.S."

The trick, however, was convincing an initially skeptical judge that the FSIA blocked claims against LME that the exchange had conspired with banks and warehousers to inflate storage costs for aluminum.

The situation was also different from the typical motion to dismiss proceedings, where the judge has to take the complaint on its face, because the FSIA argument dealt with subject matter jurisdiction. That allowed LME’s defense team to present a host of evidence about the regulatory regime for the exchange in the U.K. and to make its case before the judge during a half day of oral arguments.

"It was more like a summary judgment proceeding, and I think that was what changed her mind in the sense that just thinking about it legally, it looks squirrelly, maybe that was her reaction, but then when she read the evidence and heard the evidence and legal presentation, that changed her mind," Zwisler said.
Zwisler also represented Carlyle, which became the last private equity firm fighting a class action over a series of leveraged buyouts in the 2000s after the rest of the companies settled with the plaintiffs over the summer.

Even though Carlyle agreed in August to pay $115 million to put an end to the case, Zwisler said that resolution was a favorable one for her client in light of the $12 billion in damages the plaintiffs claimed — which could have been trebled to $36 billion if the plaintiffs won.

"We had a very, very solid opposition to the plaintiffs' class certification motion [and] I think that that case was resolved satisfactorily for the client because of the strength of our opposition," Zwisler said. "Carlyle was the last defendant but it settled for an amount that was acceptable in the range of what other larger defendants had settled for."

Zwisler is also handling two cases in multidistrict litigation accusing several cable companies of illegally tying cable box rentals to premium cable services.

In July, the judge overseeing the case granted summary judgment to Zwisler’s client — Time Warner Inc. subsidiary Insight Communications Co. LP — after concluding that nothing in the cable company’s contracts or practices showed evidence of unlawful tying, as Insight allowed its subscribers to use boxes not rented from the company to access its premium cable services.

Zwisler’s team is also representing Cox Communications Inc. in its appeal of the district court’s order refusing to let the company force the case into arbitration, hiring the Latham team after it twice won similar dismissals for Time Warner.

Zwisler further notched a victory for Highmark Inc. in late 2013, winning the dismissal of a suit accusing the insurer of conspiring with the University of Pittsburgh Medical Center to inflate consumer premiums under the filed rate doctrine.

--Additional reporting by Allissa Wickham, David McAfee, Jonathan Randles and Kaitlyn Kiernan. Editing by Jeremy Barker.

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