

Appellate MVP: Latham & Watkins' Richard Bress

By Kurt Orzeck



Richard Bress
Latham & Watkins LLP

Law360, Los Angeles (November 30, 2013, 4:19 PM ET) -- New York City Mayor Michael Bloomberg's big soda ban was deflated by successful legal challenges raised by Latham & Watkins LLP partner Richard Bress, earning the litigator a place among Law360's Appellate MVPs of 2013.

Bress helped secure multiple New York state court victories over Bloomberg's effort to limit the size of soda beverages available for purchase, largely driving the briefing and strategy on the case on behalf of the American Beverage Association.

In July, the Supreme Court of the State of New York, Appellate Division, held unanimously that in adopting the soda ban, the New York City Board of Health improperly exercised legislative power and exceeded the scope of its executive authority. City officials are still appealing the ruling, and Bress — a member of Latham's executive committee and former assistant to the solicitor general — continues to lead the coalition of plaintiffs.

"To date, the courts have viewed the case as we do, and agreed that, in promulgating the ban, the board exceeded its executive power and arrogated to itself legislative authority that is forbidden to it by the state's separation of powers doctrine," said Bress, who has argued the case before the New York Supreme Court and the Appellate Division of the New York Supreme Court.

Bress told Law360 that his other legal highlights over the past year include his representation of InterDigital Communications in a patent infringement case against Nokia Corp., LG Electronics Inc. and others before the U.S. International Trade Commission and a parallel proceeding before a Delaware federal court.

InterDigital has asserted infringement of seven separate patents relating to mobile phone devices that use

3G wireless technology, including products such as cellphones, mobile hotspots, USB sticks and tablets. The Federal Circuit reversed the ITC's dismissal of LG and remanded the suit for further proceedings.

"This is a significant case as a matter of law because it established that the ITC's termination of investigations for arbitration are reviewable agency actions and made clear that, when addressing a motion to terminate for arbitration the ITC must fulfill its gatekeeper role by refusing the request where, under the plain language of the parties' agreement, the claim of arbitrability is wholly groundless," Bress said.

Bress notched another victory when, in representing Monsanto Co., he successfully persuaded the U.S. Supreme Court to grant certiorari and reverse an injunction that had halted all planting of a genetically engineered type of alfalfa in litigation filed by environmental groups opposed to biotechnology.

In May, the Ninth Circuit affirmed a lower court's dismissal of the suit and agreed with a trial judge that federal regulation of the plant can't continue because it isn't a "plant pest" that will damage or injure other plants.

"This victory eliminates a major threat not just to [Roundup Ready alfalfa], but all genetically engineered crops generally," Bress said.

Among Bress' other highlights over the past year is his work representing intervenors supporting the Federal Communications Commission's "data roaming" rules against a challenge by Verizon Wireless in *Cellco Partnership v. FCC*.

The FCC's rules enable wireless carriers to negotiate agreements so that their subscribers can use another carrier's wireless network to send emails or access the Internet when they travel outside the range of the home carrier's network.

The D.C. Circuit unanimously upheld the data roaming rules and adopted many of Latham's arguments in support of the FCC's actions.

"The D.C. Circuit ruling in this case was critically important for the majority of carriers that don't yet have their own nationwide data networks, because its outcome would determine their ability to serve their customers and compete effectively with the mega carriers," Bress said. "It was a win for the consumer and for competition."

Last but not least, the partner represented Clear Channel Outdoor Inc. on appeal to the Eleventh Circuit in a case involving a multiyear contract to manage all of the billboard advertising throughout Atlanta's Hartsfield-Jackson Airport.

Corey Airport Services, a disappointed bidder, alleged it had been the victim of unconstitutional discrimination based on its status as a politically unconnected "outsider." Corey obtained a jury verdict of \$8.5 million in compensatory damages and \$9 million in punitive damages, but the Eleventh Circuit set aside the verdict and granted a total victory to Clear Channel.

"The appeal was a complete win for our client," he said. "In a nutshell, the suit was an attempt by a disappointed bidder to turn a meritless state-law bid protest into a federal constitutional claim, and the Eleventh Circuit rejected it."

--Editing by Sarah Golin.