Appeals and Critical Motions

Katten believes that written advocacy is a distinct subset of litigation. It covers not only compelling appellate briefs, but also the development and presentation of persuasive arguments before trial courts and administrative agencies.

The attorneys in Katten's Appeals and Critical Motions group have honed the skills necessary to present forceful and convincing arguments on dispositive issues at every level of litigation. Our core team consists exclusively of former federal appellate clerks from circuits across the country and ranges in seniority from partners with decades of appellate experience to associates at the beginning of stellar careers. Our diversity allows us to bring appellate experience to bear on almost any case — regardless of issue, venue or budget. Although we are appellate advocates first and foremost, we regularly collaborate with members of Katten's other litigation-focused practices at trial and even before a case is initiated.

Collaboration at all stages of litigation

When Katten handles a matter from its inception, our Appeals and Critical Motions team frequently gets involved at the pretrial stage to help develop arguments and strategies, and to convince prosecutors and regulators about legal infirmities in the enforcement actions that they are contemplating. Once a case is initiated, we often work with the trial team — not simply to preserve issues for appeal, but to help craft the best possible arguments at the trial stage. On appeal, members of the group continue teaming with members of Katten's other litigation-focused practices, tapping into a wealth of subject matter knowledge. We are also called upon to take over high-stakes appeals from other law firms or to provide strategic advice behind the scenes.

Always ready for an appeal

We have handled several hundred appeals in federal and state appellate courts and in the US Supreme Court, covering a range of legal subjects and industries — many highly technical and all of great consequence to our clients. Through repeated work with our Katten colleagues, members of the Appeals and Critical Motions practice have developed substantial experience in class-action cases, securities litigation, patent and

Key Contacts



Robert T. Smith

Partner and Chair, Appeals and Critical Motions

Washington, DC
+1.202.625.3616
robert.smith1@katten.com

trademark cases, insurance and healthcare fraud, restructuring, and white collar/government investigation matters — just to name a few.

Our Experience

Restructuring

- Represented a major telecommunications company in multiple bankruptcy appeals filed in 2019 and 2020 in the US District Court for the Southern District of New York as part of a fiercely contested adversary action. After our team achieved numerous victories before the bankruptcy court (including partial summary judgment), our opponent filed a series of direct appeals, petitions for interlocutory review, and objections challenging a host of interlocutory decisions. We helped our client respond to each of these matters on an expedited basis, navigating through a thicket of jurisdictional issues in the process. Ultimately, we convinced the district court to deny or dismiss all of the appellate matters filed against our client.
- Helped advise independent managers and board members in multiple mega bankruptcies across the country throughout 2020. Our team provided strategic advice on novel legal issues (often on an expedited basis), conducted investigations, interviewed witnesses, and prepared detailed reports for our clients about claims and exposure faced by the bankrupt entities.

Healthcare

- Successfully represented dozens of pharmacist organizations as *amici curiae* before the US Supreme Court in defending a State law that regulates pharmacy benefit managers (PBMs) from claims of preemption under the Employee Retirement Income Security Act of 1974. Previously represented community pharmacist organizations as *amici curiae* in two appeals before the US Court of Appeals for the Eighth Circuit. *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474 (2020).
- Wrote *amici curiae* brief on behalf of organizations representing independent medical practices, defending a rule by the Centers for Medicare & Medicaid Services (CMS) that brought parity to the reimbursements that Medicare provides to hospital off-campus departments and freestanding physician offices. In upholding this site-neutral payment rule, the US Court of Appeals for the District of Columbia Circuit adopted the logic set forth in our clients' *amici curiae* brief. *Am. Hosp. Ass'n v. Azar*, 964 F.3d 1230 (D.C. Cir. 2020).
- Successfully defended major healthcare system and university before the US Court of Appeals for the Fourth Circuit in multiple lawsuits alleging fraud and retaliation under the False Claims Act and discrimination and retaliation under Title VII of the Civil Rights Act of 1964. Members of the Appellate and Critical Motions group

secured the dismissal of all claims from the district court after proving that the plaintiff had engaged in litigation-related misconduct. The Fourth Circuit affirmed the sanction of dismissal in a unanimous, precedential opinion. *Rangarajan v. Johns Hopkins Univ.*, 917 F.3d 218 (4th Cir. 2019), *aff'g*, 262 F. Supp. 3d 259 (D. Md. 2017).

Patent

- Successfully represented a major generic pharmaceutical company in 2020 in the Federal Circuit, convincing the court to affirm the invalidation of several patents covering a multibillion-dollar drug. Following a complex bench trial, we stepped in on appeal to defend the client's favorable judgment. Despite a sophisticated effort by our adversary to manufacture legal and factual error, we convinced the appellate court to defer to the lower court's fact-finding.
- Represented a multinational electronics manufacturer in defense of patent infringement claims. The two patents at issue covered the scalable display of Internet content on mobile devices. The Patent Trial and Appeal Board held all of the asserted patent claims unpatentable, and the Federal Circuit affirmed the PTAB's decision in favor of our client. *Softview LLC v. Kyocera Corp.*, Nos. 14-1599, 14-1600 (Fed. Cir. Feb. 9, 2015).

Securities litigation and enforcement

- Successfully defended a genetic testing company before the California Court of Appeals in 2019 and 2020 in a putative class action under Section 11 of the Securities Act. Plaintiffs argued that our client was required to publicly disclose financial data on a quarter that closed just days before the company's IPO, despite not being required to do so under SEC regulations. In one of the first state-court Section 11 cases litigated in the wake of the US Supreme Court's decision in *Cyan*, we convinced a California trial court to dismiss plaintiff's claims with prejudice and defended that result on appeal.
- Wrote an *amici curiae* brief on behalf of several market makers challenging the SEC's Transaction Fee Pilot program. In vacating the rule, the US Court of Appeals for the District of Columbia Circuit quoted extensively from our brief—which explained the adverse impact of the Fee Pilot ignored by the Commission. *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541 (DC Cir. 2020).
- Successfully defended a medical device company in 2018 before the US Court of Appeals for the Tenth Circuit against claims of securities fraud involving allegations of channel stuffing. In addition to defending the merits of the district court's decision, we rebuffed the plaintiff's attempt to reshape his case on appeal by injecting a

novel theory of collective scienter. The plaintiff dismissed his appeal on the eve of oral argument.

- Represented biopharmaceutical company Amarin in 2016 and 2017 in an appeal before the US Court of Appeals for the Third Circuit. The company had been pursuing FDA approval to market its signature drug for a new indication. A group of plaintiffs filed a putative class action under the Securities Exchange Act of 1934, alleging that Amarin misled investors about the prospects of FDA approval. The Third Circuit affirmed the dismissal of the plaintiffs' complaint.

Consumer class action

- Represented a federal credit union before the US Court of Appeals for the Fifth Circuit in 2019 in a putative class action alleging fraud and deceptive trade practice arising from the credit union's overdraft policies. Although our client faced complex issues of federal preemption, contractual interpretation, and tort liability, the Fifth Circuit issued a one-word order affirming the district court's ruling in our client's favor.
- Represented Title Lenders in the Supreme Court of Missouri. We obtained a unanimous decision for our client, holding that the presence of a class action waiver is not, in itself, grounds for finding that an arbitration agreement is "unconscionable" under state law that is otherwise governed by the Federal Arbitration Act. *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505 (Mo. 2012).

Copyright and trademark

- Represented Microsoft Corporation in 2013 before the US Court of Appeals for the Third Circuit in a reverse trademark infringement case in which Kinbook LLC alleged that Microsoft's trademarks "Kinect" and "KIN" were confusingly similar to Kinbook's "Kinbox" and "Munchkinbox" trademarks. In a victory for our client, the Third Circuit affirmed the district court's holding that no reasonable jury could find a likelihood of confusion between the parties' marks.
- Represented NBCUniversal and the producers of the series *Heroes* in the US Court of Appeals for the Ninth Circuit in a case filed by Jazan Wild, the graphic novel writer of *Carnival of Souls*, alleging a federal claim for copyright infringement and various state law claims. The Ninth Circuit ruled in favor of our clients, affirming the district court's dismissal, with prejudice, of the copyright claim for lack of substantial similarity. *Wild v. NBCUniversal*, 513 F. App'x 640 (9th Cir. 2013).
- Represented an American media conglomerate in 2013 before the California Court of Appeal in a case granting a rarely issued peremptory writ of mandate directing the trial court to grant summary judgment for our clients. The opinion created important

new precedent in the entertainment industry on the statute of limitations that applies to idea submission claims. The court ruled that plaintiffs' claims accrued and the statute of limitations began to run no later than the date the television series in question was first released to the public and that neither the discovery rule nor the continuous accrual doctrine could extend the accrual date past the initial telecast of the first episode of the series.

Fiduciary and private client litigation

- In 2020, successfully defended a verdict from a multi-week jury trial involving a dispute over the handling of approximately $8 million in estate assets. The Indiana Court of Appeals accepted our analysis of the claims at issue, which ranged from contractual issues to evidentiary and jury challenges, and affirmed the jury's award to our client of the estate assets he had not yet received. We then successfully opposed a petition to the Indiana Supreme Court to review the decision of the appellate court favorable to our client.

Commercial/Real estate

- Represented owner of a shopping mall in Rockville, Maryland, in a case regarding client's ongoing efforts to redevelop the mall into a major mixed-use, town-center-style development. An anchor tenant of the mall sought to enjoin further redevelopment of the mall under a reciprocal easement agreement. In a published decision, the US Court of Appeals for the Fourth Circuit affirmed the denial of the anchor tenant's request for injunctive relief, holding that the proposed injunction would have required the district court to either supervise the restoration of the mall or freeze the mall's ongoing redevelopment efforts, both of which the court of appeals deemed infeasible. *Lord & Taylor, LLC V. White Flint, L.P.*, 780 F.3d 211 (4th Cir. 2015).
- Represented The Retail Property Trust, a wholly owned subsidiary of Simon Property Group, Inc., in the US Court of Appeals for the Ninth Circuit, arguing that the Labor Management Relations Act does not preempt traditional state-law property claims for trespass and private nuisance asserted against a labor union that was arguably engaged in a secondary boycott at the time. The Ninth Circuit agreed in an important, precedential opinion that overturned an adverse decision by the district court. *Retail Property Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938 (9th Cir. 2014).

Tax

- Represented taxpayers in the US Court of Appeals for the Federal Circuit and US Supreme Court in a case in which we obtained a ruling in favor of our clients on the issue of whether an understatement of income resulting from an overstatement of tax basis for sold property can qualify as an omission from gross

income giving rise to an extended six-year (as opposed to three-year) period for tax assessment. The victory against the IRS was a multimillion-dollar win for our clients and was projected to have as much as a billion-dollar impact in tax cases across the country. *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368 (Fed. Cir. 2011), *vacated and remanded by* 132 S. Ct. 2099 (2012).

Criminal/White collar

- Supported a trial team in a two-week federal jury trial in 2020 that resulted in a near-complete victory for our client—an acquittal on seven of eight counts involving healthcare and wire fraud (with the jury unable to reach a verdict on the eighth count). Members of the Appeals and Critical Motions practice provided key trial support, including drafting jury instructions, motions *in limine* and other pre-trial motions, providing input and research support for evidentiary issues that arose during trial, preparing arguments for acquittal made during trial, and drafting post-trial motions.
- Represented a corporate client charged with felony violations of the Outer Continental Shelf Lands Act. Members of the Appeals and Critical Motions practice helped obtain the dismissal of all felony counts of the indictment on the basis that the federal government had failed to promulgate regulations that imposed liability on contractors for failing to comply with substantive regulations enacted under the Act. *United States v. Wood Group Prod. Servs. Network, Inc.*, No. 15-cr-197, 2016 WL 1458925 (E.D. La. Apr. 14, 2016), *appeal dismissed*, No. 16-30561 (5th Cir.).
- Successfully defended a corporate client, following a 2013 federal jury trial, against charges of conspiracy and tampering in violation of Clean Water Act. Members of the Appeals and Critical Motions practice assisted in developing a winning legal strategy, which translated into favorable jury instructions and, ultimately, verdicts of acquittal on all charges.

Pro bono

- Represented indigent criminal defendant pro bono. In a unanimous, published decision, the US Court of Appeals for the Fourth Circuit held that the government must raise at sentencing all predicate offenses that serve as a basis for a career-offender enhancement under the Sentencing Guidelines. If the government fails to do so, it may not rely on a substitute predicate in a collateral proceeding or at resentencing. The decision extends *United States v. Hodge*, 902 F.3d 420 (4th Cir. 2018), which had reached the same result for statutory mandatory minimums under the Armed Career Criminal Act. *United States v. Winbush*, 922 F.3d 227 (4th Cir. 2019).
- Represented transgender ironworker pro bono in an appeal before the US Court of Appeals for the Second Circuit alleging discrimination and retaliation against his union and two of its

officials. In a precedential opinion reinstating the client's lawsuit, the Second Circuit recognized for the first time that allegations of transgender discrimination are sufficient to state a claim for breach of a labor union's duty of fair representation, an implied cause of action under the National Labor Relations Act. The Second Circuit lauded Katten's work during the argument and noted in its opinion that the client was "ably represented" on appeal. *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378 (2d Cir. 2015).