

Boies Schiller Eyes Fla. for Appellate Growth Following Rules Change, Suits Targeting Key Client

by Dan Roe

After adding a formal appellate practice to its broader litigation group in 2021, Boies Schiller Flexner is eyeing Florida as a hotbed for appellate litigation thanks to a recent state court rules change along with a steady stream of litigation against Florida Power & Light, a longtime client of appellate practice leader Stuart Singer.

Florida's state court summary judgment standard, which went into effect in May 2021, removed the burden for appellants to disprove appellees' affirmative defenses in addition to establishing their own case. It's now more closely aligned with the federal standard, which makes it easier for appellants to obtain and uphold an appeal, according to fellow appellate practice leader Jesse Panuccio.

"This is a court that is now very focused on the text of statutes and the text of the constitution and the arguments flowing from that," Panuccio said in an interview. "We're seeing a shift in the type of

arguments that get made up there. Clients are searching for counsel that are skilled at making those arguments, who know how those justices think."

Panuccio has represented Florida-based clients or clients with matters in Florida courts in high-profile appellate litigation over the past year.

Alongside firm co-founder David Boies, Panuccio represented Florida-based telehealth company RemoteICU in the U.S. Court of Appeals for the District of Columbia Circuit as it sought to overturn a decision that held that virtual care providers based outside the U.S. are ineligible for Medicare reimbursement. The court dismissed the appeal in January.

Panuccio also represented Florida Voters in Charge, a committee bolstered by \$73 million in funding from the Las Vegas Sands Corp., as it backed a ballot initiative to expand casino gaming in Northern Florida. The initiative came up against \$40 million in opposition from the Seminole Tribe, which maintains a stronghold on



Photo by Diego M. Radzinski/ALM

Jesse Panuccio, a partner with Boies Schiller Flexner, testifies before the Senate Judiciary Committee during a hearing titled "Rule by District Judge: The Challenges of Universal Injunctions" on Feb. 25, 2020.

casino gaming in the region. After the committee fell short of the signatures required to put the initiative on the 2022 ballot, Panuccio sued the Florida Secretary of State to delay the certification of the count as he argued for the counting of additional signatures that hadn't been processed by the deadline.

Panuccio also worked with co-counsel James McKee, a Foley & Lardner litigator, in a Florida Supreme Court review of the ballot initiative. Earlier this month, McKee wrote to the Florida Division of Elections to withdraw the ballot initiative, citing insurmountable

obstacles to validating the number of signatures in time.

Panuccio and Boies have also teamed up for national appeals, including ongoing cases. “One thing we’re seeing now is we’re being hired for appeals where a case originated outside the firm,” Panuccio said. “There’s a recognition or desire for more specialization in the legal field. Clients want lawyers well-practiced in a particular area. Appeals is our own special creature of litigation.”

The duo recently stepped in to represent former U.S. Secretary of Education Betsy DeVos in her attempt to avoid a deposition in a class action filed by student loan borrowers who were defrauded by for-profit colleges. The plaintiffs claimed DeVos issued blanket denials of claims filed by students who were harmed by predatory colleges after revising the Obama administration’s Borrower Defense to Repayment Program and held up nearly 170,000 borrower claims before the revision.

In February, U.S. Court of Appeals for the Ninth Circuit Judge Milan Smith issued a majority opinion in favor of DeVos, arguing that deposing outgoing cabinet secretaries would discourage future executives from taking office or leaving office during a controversy.

Singer Stays Busy

Stuart Singer, the Fort Lauderdale-based appellate practice leader, has stayed busy representing FPL and parent company NextEra

Energy in a string of recent class actions that involve rate hikes and power outages during Hurricane Irma. Singer won an appeal in Florida’s Fourth District Court of Appeal in May 2020 against residents of a Hollywood, Florida, nursing home that lost power during Hurricane Irma, an outage that led to the death of 12 elderly residents.

He won two other major cases faced by FPL in 2018, including a class action against the company and Duke Energy Florida that sought to recover more than \$1 billion in nuclear facility construction costs that were charged to customers. In another lawsuit, the Florida Supreme Court rejected a Sierra Club argument that FPL couldn’t recover \$600 million in costs for building gas-fired power plants to service peak power demand.

Now, NextEra vice president and chief litigation counsel Robert Sendler says the utility faces two more important appeals, both of which are being defended by Singer.

“I don’t know if he’s lost for us,” Sendler said in an interview. “He’s an excellent advocate on his feet, a quick thinker, extremely well-prepared and knowledgeable.”

The first is a “horrific” case, as Sendler describes it: On New Year’s Eve, a Miami judge certified a class action against FPL for interrupted power service during Hurricane Irma that stemmed from the company’s gross negligence, plain-



Stuart Singer

tiffs argued. Judge David Miller of the Eleventh Circuit ordered the case inactive in late January after Singer appealed the class certification.

The Florida Public Service Commission is also facing an administrative appeal to rate hikes that it approved in the wake of FPL’s merger with Gulf Power in Northwest Florida. On the merger’s completion, area customers complained their electric bills doubled and tripled. Having approved FPL’s requests to raise rates in the next four years, the commission is now facing appeals on the multiyear base rate increase and a rate adjustment for increasing natural gas costs.

“Florida is always a state which has a lot of high-profile litigation,” Singer said in an interview. “I think that’s a reflection of the very large and sophisticated plaintiffs bar. It’s a place where people who have choices of where to bring lawsuits often choose to bring them, which lends itself to a lot of important appellate decisions.”