

Litigator of the Week: Kannon Shanmugam of Williams & Connolly

By **Susan Beck**
December 10, 2015

When Kannon Shanmugam agreed to represent former bond trader Jesse Litvak, the Williams & Connolly partner faced a tough set of facts. His client, a former trader at Jefferies & Co., had already been convicted of criminal securities fraud and sentenced to two years in prison after admitting that he had lied to investors.

Shanmugam's bold argument: Lots of bond traders lie.

On Tuesday, Shanmugam's approach paid off when the U.S. Court of Appeals for the Second Circuit vacated Litvak's conviction for duping bond buyers, and reversed his conviction for defrauding the United States. In a key part of the 84-page ruling, a unanimous panel found that the lower court had improperly refused to let Litvak present expert testimony that bond traders aren't expected to tell the truth when negotiating deals.

The 43-year-old Shanmugam, who heads Williams & Connolly's appellate and U.S. Supreme Court practice, was approached to take the case after Litvak's trial last year. (Shanmugam says he continued to collaborate with Litvak's prior counsel at DLA Piper on the appeal.) Among other challenges in the case, Litvak was the first person convicted of fraud related to the Troubled Asset Relief Program, a government-run program that oversaw the sale of distressed residential mortgage-backed securities after the financial crisis. The government claimed that Litvak committed fraud when he lied to buyers about certain details, including the price that Jeffries paid for the securities.

In his brief and at oral argument in May, Shanmugam argued that the lower court improperly excluded expert testimony about industry practices in the bond market, where sellers have a reputation for not always telling the truth. Sophisticated buyers use their own rigorous process to value bonds, he said, and it doesn't matter what the seller tells them. Litvak's false statements weren't material under securities law, he maintained.

Shanmugam said the Second Circuit panel was "incredibly engaged and well-prepared" at the hearing, which lasted for more than an hour. "That's all you can hope for," he said. And while the court had tough questions for both sides, he said the arguments left him cautiously optimistic. (He singled out for praise the two associates who worked with him: Allison Jones and Masha Hansford.)

In vacating the conviction for defrauding buyers and granting a new trial, the court concluded that Litvak should have been allowed to present expert testimony that a selling trader's statements would be widely considered within the industry as "biased" and "often misleading." The district court also improperly excluded evidence that Jefferies supervisors regularly approved of conduct identical to Litvak's, the court wrote.

While Shanmugam is pleased that his client got a new trial, he had sought a complete reversal on those counts. He did achieve that result on a different aspect of the case, convincing the Second Circuit to reverse

Litvak's conviction for defrauding the federal government. The court held that while the U.S. Treasury Department oversaw the TARP program, it wasn't making decisions to buy and sell these securities, so it wasn't defrauded by the defendant's misstatements.

The government claimed a partial victory, too. The Second Circuit upheld the jury's finding that Litvak's misstatements were material and that he intended to mislead investors.

Shanmugam won a separate appeal for Litvak earlier in the case, when he convinced a different Second Circuit panel to grant his client bail pending the appeal, which Connecticut U.S. District Judge Janet Hall had denied.

Shanmugam joined Williams & Connolly in 2008 from the U.S. Solicitor General's Office, where he was assistant to the solicitor. It was the first time in 22 years that Williams & Connolly brought a new lawyer directly into the firm's partner ranks. Since then, the former clerk for Justice Antonin Scalia has increased the visibility of the firm's appellate practice. As Shanmugam told *The National Law Journal* in a 2013 interview, the firm had been in the Supreme Court just once in the seven years before he joined the firm. Since his arrival, he's had nine appearances. With 17 high court arguments in his career, he has surpassed the firm record previously held by the legendary Edward Bennett Williams.

Shanmugam squeezed in this interview Thursday shortly before he started a moot court practice for his oral argument in another important Second Circuit appeal. On Wednesday he will be representing Bank of America in its challenge of a \$1.25 billion civil judgment imposed last year by Manhattan U.S. District Judge Jed Rakoff. Rakoff found that BofA's subsidiary, Countrywide Financial Corp., violated the Financial Institutions Reform, Recovery and Enforcement Act by selling shoddy mortgages to Fannie Mae and Freddie Mac. It will be Shanmugam's 50th appellate argument since he joined the firm.



Kannon Shanmugam

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