

Down but Not Out—Big Cases With Big Reversals

By Jenna Greene
July 2, 2018

There's a board game for little kids called "Chutes and Ladders" that often left mine in tears—one minute, you're almost at the top and about to win; the next, you've plunged to the bottom.

It's a lot like litigation.

The outcome of the water war between Florida and Georgia was even more unpredictable.

Last year, it seemed like Florida, represented by Latham & Watkins, would be left high and dry.

In 2014, the U.S. Supreme Court agreed to hear Florida's lawsuit against Georgia—a rare original jurisdiction case for the high court—and appointed Ralph Lancaster Jr. of Pierce Atwood to be special master.

He held a six-week "evidentiary hearing"—similar to a bench trial—to consider each state's claim to the use of water in the Apalachicola-Chattahoochee-Flint River Basin.

Florida wanted to cap Georgia's water use, arguing that it needed sufficient downstream flow to support its river ecosystems. Georgia countered that it needed the water for the Atlanta metropolitan region and farmers to the south.

One wrinkle: The Army Corps of Engineers, which through its system of dams ultimately controls the water flow, declined to waive sovereign immunity and get dragged into the case.

In a 137-page report issued on February 14, 2017, the special master sided with Georgia, which was represented by a 20-lawyer team from Kirkland led

by Craig Primis, along with partners K. Winn Allen and Devora Allon.

"Without the ability to bind the Corps, I am not persuaded that the court can assure Florida the relief it seeks," Lancaster wrote—a ruling that Primis at the time said reflected how the team "framed the case from the outset ... We continued to press this issue of the central role of the Army Corps."

But rather than rubber stamp Lancaster's findings, the Supreme Court opted for oral argument.

Latham partner Gregory Garre, a former U.S. solicitor general, argued for Florida, which was also represented by partners Philip Perry, Jamie Wine, Abid Qureshi, Claudia O'Brien, and Paul Singarella.

On June 27, the high court threw Florida a lifeline and remanded the case to the special master. In a 5-4 decision, Justice Stephen Breyer writing for the majority ruled that Lancaster "applied too strict a standard" and "put the cart before the horse" when he determined that the court wouldn't be able to come up with workable decree unless the Army Corps was a party in the case.

If nothing else, the ruling was a refreshing reminder that the justices don't always vote in ideological lockstep. The dissenters were an unlikely quartet: Clarence Thomas, Samuel Alito, Neil Gorsuch—and Elena Kagan.