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Securities Group of the Year: Sullivan & Cromwell

By **Jack Queen**

Law360 (January 21, 2020, 3:36 PM EST) -- Sullivan & Cromwell LLP closed the book on 17 years of Enron-related litigation last year by defeating a $2 billion securities class action against UBS and clinched a decade-long case against Barclays stemming from losses during the financial crisis, landing the firm among Law360's 2020 Securities Groups of the Year.

S&C was also on the cutting edge of state securities class actions unleashed by the Supreme Court's 2018 ruling in Cyan Inc. v. Beaver County Employees Retirement Fund, scoring one of the first ever defense verdicts in the new legal landscape created by the ruling. The firm also notched a precedent-setting win by blocking pre-motion discovery in a New York state securities suit in August 2019.

Sharon Nelles, managing partner of the firm's litigation group, told Law360 that S&C's attorneys pride themselves on being generalists. That means their teams can handle every aspect of a dispute, from the civil case itself down to the enforcement and corporate angles.

"Every single person in this partnership is completely fluent in the securities laws," Nelles said. "We can field the appropriate team for any case that comes in, and we do that in a big-picture way … The same teams are taking care of every aspect of those cases, which leads to flawless execution for the clients."

Nelles said S&C does not rotate attorneys, meaning lawyers who start a case on day one will see it to completion. That pays off for clients who fight to the end in high stakes, decade-long disputes in which others have chosen to settle, she said.

In May 2019, the firm persuaded the Fifth Circuit to uphold dismissal of a $2 billion proposed securities class action against UBS by account holders seeking to recover losses incurred after Enron's collapse. Other banks settled similar claims for more than $7.2 billion, but S&C said it steered UBS through a bold litigation strategy that won outright dismissal after 17 years.

Partner Bob Giuffra said UBS faced particularly aggressive plaintiffs who shifted their legal theories to weather adverse rulings throughout the case. They settled on an argument that bankers on the investment side of UBS should have shared non-public market intelligence with customers on the retail side, challenging the existence of informational walls in financial institutions.

“The court and the Fifth Circuit ultimately rejected that,” Giuffra said. “If that had gone the other way, it would have opened the floodgates for other litigation against full-service banks.”

The firm’s persistence also paid off in a decade-long case against Barclays, which faced a possible $1 billion securities class action over the value of bonds offered by the bank that plummeted amid the financial crisis. Investors claimed Barclays’ offering materials did not adequately disclose their exposure to asset classes that brought the global economy to its knees.

Barclays faced a high bar defending the investors’ negative loss causation claims, which hold that losses in an efficient market can only be explained by missing information. The S&C team defeated the argument on summary judgment, unpacking the complexity of the losses after navigating millions of pages of documents, 25 depositions and 22 expert reports.

“These cases tend to either get through motions to dismiss one way or the other, and if they don’t end well for defendants they tend to settle,” Nelles said. “And here once again we had a client and a team that saw the challenge through for a full decade.”

The Second Circuit affirmed the lower court’s ruling in November 2018, finding the Barclays defendants had “resoundingly met their burden as to the affirmative defense of negative loss causation.”

Giuffra was before the Second Circuit last year in a closely watched case over the breadth of price maintenance theory, or the idea that a company's misstatements can keep an artificially boosted stock price from declining.

In that case, Goldman Sachs is angling to overturn class certification for investors who say the firm misled them about its conflict of interest in underwriting the Abacus CDO transaction before losing $1 billion in securities known as collateralized debt obligations.

Giuffra said the case centers on “puffery” statements, or the routine language used by firms to assure investors they are complying with laws and operating in an above board manner. The case was argued in June.

“Everybody’s waiting for that decision,” Giuffra said. “The question is whether you can certify a class based on puffery statements like that under a so-called price maintenance theory, the theory being that these puffery statements somehow maintained the price of a stock.”

S&C notched big wins in two state court cases last year that tested the application of the Supreme Court’s ruling in Cyan, which broadened state court jurisdiction over securities class actions.

In a proposed class action against underwriters of the online insurance marketplace EverQuote’s IPO, investors sought to take advantage of state court procedural rules to get around the Private Securities Litigation Reform Act’s mandatory stay on pre-motion discovery.

The authority of the law in state courts is now a billion-dollar question, one that judges across the country have come down on both sides of. The New York state court where the investors sued had issued multiple conflicting opinions on the matter, Nelles said.

“The plaintiff tried to come in early, taking advantage of prior decisions in that court, and we challenged that on textualist arguments and really focused on the very specific language of the statute,” Nelles said.

“The judge agreed and issued an extremely well-reasoned opinion staying discovery.”

The Cyan ruling also tossed a spanner in the works of a case S&C had been defending for several years in Michigan state court on behalf of Ally Financial Inc., which was accused of misleading investors about its subprime auto loan business.

The decision limited S&C’s defense tactics, spoiling its effort to remove the case to more favorable ground in federal court. But the firm ultimately scored one of the first post-Cyan victories in January 2019, when a Wayne County judge found that “the actions of a few errant loans in practice doesn’t render the statement in the document false.”

--Editing by Peter Rozovsky.