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Sullivan & Cromwell's Giuffra Seals the Deal on Appeal

By Jenna Greene
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One of the awkward things about Litigator of the Week is that every so often, we pick winners and praise them to the skies, only to see them lose on appeal a year or two down the line.

Whoops.

On the other hand, we never gave the award to Michael Avenatti, so I feel OK about our credibility overall.

But the best outcome is when we pick a winner at the trial court level who goes on to seal the deal on appeal.

That's what Sullivan & Cromwell's Robert Giuffra Jr. did for UBS last week in what is believed to be the last Enron-related case to wend its way through the courts.

"Wend" might actually be too speedy a term to describe the pace. It took 15 years after the putative securities class action was filed in 2002 for U.S. District Judge Melinda Harmon in Houston to grant UBS' motion to dismiss for failure to state a claim in 2017.

"This case started right after my eldest daughter was born, and she's heading to college in a year," said Giuffra, who argued the appeal for UBS.

Sullivan & Cromwell's Brendan Cullen and William Wagener worked with him on the litigation, as did Rodney Acker of Norton Rose Fulbright.

Robert Giuffra Jr. of Sullivan & Cromwell

Then again, from the perspective of UBS, which was facing a $2 billion demand, there was little advantage to hurrying. Because while UBS waited as the complaint was amended and amended again, consolidated into an MDL and then removed, amended a third time and then stayed pending SCOTUS review of a similar case, other banks and financial institutions involved with Enron settled investor lawsuits for more than $7.2 billion.

But not UBS, which was sued by individual retail-brokerage customers who purchased Enron securities and Enron employees who acquired employee stock options.

On appeal, the Fifth Circuit upheld the district court's dismissal, shutting down a pair of novel legal theories by plaintiffs' lawyers from the Spencer Law Firm. David Augustus, who argued the appeal for the plaintiffs, did not respond to a request for comment.

It's one of those decisions that's as notable for what it didn't do as for what it did.

Had the Fifth Circuit gone the other way, Giuffra said, it "would have imposed unprecedented duties on financial services firms and created the risk of massive liability over the grant of employee stock options."

Half of the case involved individual retail-brokerage customers of PaineWebber, which was acquired by UBS in July 2000. The customers bought Enron stock between November 5, 2000 and December 2, 2001, when Enron filed for bankruptcy.

The plaintiffs claimed UBS had knowledge of Enron's "financial chicanery" because of its "long standing banking history with Enron." They argued that UBS as a single, integrated business venture had a duty to disclose that information to its retail-brokerage customers.

Senior Judge Patrick Higginbotham writing for the unanimous panel that also included judges Jerry Smith and James Graves, Jr., said no.

First, the panel found that the plaintiffs didn't establish that the defendants shared joint venture liability.

It wasn't enough to point to a post- PaineWebber acquisition press release, where UBS described itself as an "integrated" bank plus other "vague corporate platitudes about integration as a firm." The panel held that the "plaintiffs' use of the grouping 'UBS' does not cure the fact of those entities' separate legal statuses."

What about the bank's duty to disclose material nonpublic information about Enron to its retail investment customers?

"PaineWebber was the entity that communicated with the retail brokerage customer plaintiffs but plaintiffs fail to allege that PaineWebber had knowledge of Enron's financial misrepresentations," the panel found. "The defendant with the duty was not the defendant with the knowledge. Simply labeling the offending entity 'UBS' does not rescue plaintiffs from this fatal flaw."

The plaintiffs also sued on behalf of Enron employees who got stock options between October 19, 1998 and November 19, 2001. PaineWebber allegedly underwrote the options, acting "the exclusive broker and stock option plan administrator for Enron."

The plaintiffs said that made PaineWebber liable for "materially false statements contained in the Enron prospectuses and registration statements," in violation of Sections 11 and 12 of the Securities Act of 1933.

But as the panel noted, Sections 11 and 12 expressly limit liability to "purchasers or sellers of securities." In this instance, we're talking about stock options.

"The grant of options to employees here was not a sale," Higginbotham wrote for the panel. "The employees did not bargain for the options and they were granted for no cash consideration."

"The fact that plaintiffs would eventually make an affirmative investment decision—whether to exercise the option or let it expire—at some point in the future is of no consequence," he continued. "Plaintiffs' claims are based explicitly on the grant of the option, not the exercise of that option."

Which means there was no sale—and this case is a non-starter.