Sullivan & Cromwell’s Litigation Practice

2015 YEAR IN REVIEW
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Looking Into 2016

A Strong Start to a Year of New and Novel Actions

Following a strong 2015, S&C started 2016 with several significant dismissals for clients, including Goldman Sachs from the In re: Zinc Antitrust Litigation, JPMorgan from an Employee Retirement Income Security Act suit arising from the London Whale actions and JPMorgan from three silver-manipulation suits. At the same time, S&C is preparing for another year of novel and challenging cases. A few of the Firm’s ongoing litigation matters include representing:

- Volkswagen, as lead counsel, in more than 700 cases involved in multidistrict litigation, including consumer and securities litigation, and related regulatory investigations.
- Stryker Corporation, a Fortune 500 medical technologies firm, before the U.S. Supreme Court in a case that will address the standard to be used for awarding enhanced damages in patent infringement actions.
- Cuozzo Speed Technologies LLC, a technology company, before the U.S. Supreme Court, arguing that new procedures render patents challenged through the U.S. Patent and Trademark Office much more vulnerable than those challenged in federal court—an inconsistency that produces confusion and unfairness.
- Valeant, a multinational pharmaceutical company, in a securities fraud class action arising out of alleged relationships with certain pharmacies.
- Four banks in FIFA-related investigations.
- Goldman Sachs, in an antitrust class action related to interest-rate swaps.

Now more than ever, responding to today’s legal disputes requires the kind of generalist lawyering that has always been S&C’s hallmark. Big cases with potentially severe consequences routinely implicate not only multiple areas of the law, but also complex business issues. S&C lawyers’ business acumen complements their broad legal training and experience, making S&C the pre-eminent law firm for companies facing novel and significant actions. The Firm’s relationships—both long-standing and new—with leading business enterprises and financial institutions around the world reflect its ongoing commitment to serving as its clients’ trusted adviser.
Employment Law

Successfully Defeated Class Certification of Closely Watched, High-Profile, Employment-Related Class Action

In a year in which employment-related class actions were marked by a number of high-dollar settlements, S&C blocked a massive employment-related class action for Goldman Sachs. Three former employees filed suit against the investment bank under Title VII of the Civil Rights Act of 1964 and the New York City Human Rights Law. The plaintiffs maintained that Goldman Sachs paid female employees significantly less than male employees and that the rate and significance of promotions for women lagged behind those awarded to men.

Goldman tapped S&C to counter the suit. Prior to the plaintiffs’ motion to certify the class, the U.S. Court of Appeals for the Second Circuit—at S&C’s urging—reversed the lower court’s decision refusing to enforce Goldman’s arbitration agreement for managing directors. The ruling significantly reduced Goldman’s exposure, as higher-level professionals did not qualify to be part of the class. After several years of courtroom wrangling, the plaintiffs’ legal team made a bid in 2014 to certify a class of more than 2,000 current and former female Goldman professionals who were employed in the firm’s Investment Banking, Investment Management and Securities divisions over more than a decade.

In October 2014, Magistrate Judge James C. Francis IV of the U.S. District Court for the Southern District of New York held oral argument and an evidentiary hearing with the parties’ statistics experts.

The plaintiffs’ team argued that the framework employed by Goldman to assess performance had an adverse impact on all the members of the proposed class, but the plaintiffs’ arguments for a class were rejected in March 2015 by the Magistrate Judge, who adopted many of S&C’s arguments. The decision is pending review by the district court.
White-Collar

Negotiating a Settlement With an Understanding of All Possible Implications

Following S&C’s representation of Barclays in the global LIBOR or London interbank offered rate market-manipulation investigations, in which S&C guided Barclays to an outcome considerably more favorable than for other involved banks, S&C represented Barclays in global investigations relating to allegations that at least 15 banks colluded to manipulate the multitrillion-dollar foreign exchange market. The investigations focused on forex traders’ use of online chatrooms to exchange market information. Numerous agencies around the world were involved in the investigations, including the Department of Justice, the Federal Reserve, the Commodity Futures Trading Commission, the New York Department of Financial Services, and the U.K. Financial Conduct Authority.

After intensive investigation Barclays and other banks settled with various agencies in May 2015 by, among other things, pleading guilty to violations of the criminal antitrust laws. However, the DOJ discounted Barclays’ overall fines on the basis of the bank’s extraordinary cooperation, transparency and compliance improvements. As in the LIBOR investigations, other banks had far less favorable outcomes. S&C continues to represent Barclays in the forex civil litigation pending in federal court in New York.
Global Government Settlement

BP Deepwater Horizon

Sullivan & Cromwell represented BP plc in its historic global $18.7 billion settlement with government authorities over the Deepwater Horizon oil spill in the Gulf of Mexico. The settlement establishes the framework for global resolutions of all federal, state and local government environmental and economic damage claims and marks the largest settlement ever involving a single entity. BP relied on S&C lawyers for their judgment, negotiation skills and established credibility with regulators in helping to reach this settlement and move forward with greater certainty. Given the scope and complexity of this matter, there were no prior settlements that could be used as a precedent. Moreover, the negotiations required a delicate balancing of the competing interests of federal and state stakeholders.

S&C was further entrusted by BP to represent the company in shareholder litigations that exposed the company to multibillion-dollar claims. S&C currently represents BP in follow-on securities fraud and derivative class actions arising from the Deepwater Horizon spill. The S&C team secured a dismissal of all of the derivative litigation and persuaded the court in the securities class action to dismiss the class-action claims of non-U.S. shareholders and deny class certification to the longer of two proposed classes—dramatically reducing the potential exposure for BP. The U.S. Court of Appeals for the Fifth Circuit recently affirmed the denial of class certification.
Securities Litigation

Barclays Successfully Battles Dark Pool Allegations

In a ruling that The Financial Times called “a boost for the British bank,” S&C secured a dismissal of five securities class actions that had been brought against Barclays in a multidistrict litigation arising out of high-frequency traders’ (HFTs) actions in its dark pools, or private securities exchanges. The recent wave of multidistrict litigation was triggered by the best-selling Michael Lewis novel Flash Boys: A Wall Street Revolt.

As litigation partner Jeff Scott explained before the court, “the print on that book was barely dry before the lawyers for the city of Providence rushed to court to try to assert a securities fraud claim not only against Barclays but a number of HFTs, a number of exchanges and other broker-dealers.”

The actions involved a putative nationwide class of investors who purchased or sold stock on public exchanges or on LX, an alternative trading system operated by Barclays. The plaintiffs alleged that HFTs used computer algorithms to move quickly in and out of stock positions and benefit from small differences in stock prices and that they employed a number of “aggressive” and “toxic” trading strategies that enabled them to profit at the expense of investors. The plaintiffs claimed that Barclays misled investors regarding (1) the extent of “aggressive” trading in LX by HFTs, (2) Barclays’ treatment of HFTs and (3) the extent to which Barclays protected customers from HFTs.

Judge Jesse M. Furman of the U.S. District Court for the Southern District of New York dismissed the cases in August 2015. Judge Furman’s decision confirmed that financial institutions that operate dark pools will not be held liable for violations of Section 10(b) of the Securities Exchange Act of 1934 unless the plaintiffs can plead and prove that the financial institutions themselves committed a manipulative act or made a misrepresentation upon which the plaintiffs actually relied. Although the plaintiffs had alleged in the putative class actions that HFTs had engaged in abusive trading practices that artificially affected the price of securities traded in dark pools, Judge Furman observed that the plaintiffs had failed to allege that they relied on any manipulative act by Barclays or the exchange defendants. The effect of the ruling is significant to both financial institutions that operate dark pools and exchanges that permit high-frequency trading, limiting their potential liability under securities laws.

Jeff Scott Named Law360 “Securities MVP” for the Barclays’ win.
High-Profile Litigation

S&C Successfully Defends JPMorgan in London Whale Actions

S&C represents JPMorgan Chase, its CEO and other senior officers in securities, shareholder derivative and Employee Retirement Income Security Act (ERISA) litigation arising out of the so-called London Whale trading losses. In early 2012, a small group of London-based traders in JPMorgan’s Chief Investment Office amassed outsized positions in synthetic credit derivatives, earning the principal trader the nickname the London Whale. When the media began reporting on the Whale’s trading in early April 2012, JPMorgan’s then-CFO Douglas Braunstein addressed the trading on a regularly scheduled earnings call, and CEO James Dimon agreed with an analyst’s characterization of the reports as a “tempest in a teapot.” By early May, the trading had resulted in significant losses, which JPMorgan disclosed on May 10.

Securities Actions: Shortly after the disclosure of the losses, putative class actions alleging violations of the federal securities laws were filed in federal court in New York. The plaintiffs contended that the disclosure of the losses caused the price of JPMorgan’s stock to drop by more than 20 percent, resulting in the destruction of more than $31 billion in market capitalization. S&C was able to significantly shorten the putative class period, achieving dismissal of all claims based on statements made during a 26-month period, leaving only claims based on statements made on a single day (April 13, 2012).

Derivatives Actions: S&C secured the dismissal of six shareholder derivative actions and the affirmance of the dismissal of the four actions that were appealed. The derivative appeals involved complex and novel issues relating to evolving areas of shareholder derivative law. For example, in December 2015, the U.S. Court of Appeals for the Second Circuit affirmed the dismissal by the lower court of one of the shareholder derivative actions following guidance on shareholder demands requested of the Delaware Supreme Court through a rare procedural mechanism. The holding provided valuable precedent for company boards responding to shareholder demands. The court explained that boards of directors are not required to provide a detailed response to every issue raised in a shareholder demand letter and that the board may consider a variety of factors in deciding whether to refuse a demand, including the potential impact on other litigation.

ERISA Actions: S&C secured the dismissal of the ERISA action in an opinion that makes clear that the U.S. Supreme Court’s recent decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), was not intended to open the floodgate of “stock drop” cases involving 401(k) plans that offer company stock, but rather imposes significant hurdles on plaintiffs’ ability to proceed to discovery in these cases. The court held that this was still the case even when plaintiffs allege that the price of company stock was artificially inflated and that corporate officers on the 401(k) plan committee knew, or should have known, of fraud or other misconduct within the company.
Financial Services Litigation

Preventing NYC From Unconstitutionally Regulating the Banking Industry

S&C successfully filed a declaratory judgment action on behalf of the New York Bankers Association that prevented a controversial law that would have impeded banking activities.

The New York City Council passed the controversial Responsible Banking Act (RBA) in June 2012, establishing a Community Investment Advisory Board (CIAB) charged with collecting data at the census tract level from the 21 banks eligible to receive New York City’s $150 billion in deposits, including information well beyond that currently requested by federal and state banking regulators. The CIAB was to promulgate best practices and standards for bank performance and then evaluate banks in publicly filed reports. Banks that, in the CIAB’s view, did not comply with the CIAB’s information demands and performance standards would be publicly identified, and New York City could revoke their valuable designation as deposit banks.

Backdrop of the RBA. During the hearings and debates leading to the enactment of the RBA, several New York City Council members explicitly stated that federal and New York State regulations on banks were insufficient to meet those members’ policy and political goals, and that New York City needed to go further in achieving certain bank behavior. The Council then passed the law over Mayor Michael Bloomberg’s veto. However, Mayor Bloomberg delayed implementing the law, expressing firm opposition and calling it a “misguided attempt” to influence banks. Following Mayor Bloomberg’s term, Mayor Bill DeBlasio took steps to implement the RBA.

Pre-empted by State or Federal Law. In building its case to strike down the law, S&C demonstrated to the court that the RBA would impermissibly conflict with the exclusive rights of the federal and state governments to regulate banks by showing, through case law and affidavits, that the RBA would force banks to either (i) incur costs and potentially change their behavior to comply with the CIAB’s information demands and performance standards, or (ii) face public shaming and the loss of business from New York City.

Following oral argument, Judge Katherine Polk Failla of the Southern District of New York permanently enjoined the enforcement of the RBA on the ground that it is “preempted by federal and state law, [i]t’s unconstitutional provisions cannot be severed, . . . [and,] [a]s a result, the RBA is void in its entirety.”

Impact Beyond New York. The judge’s ruling prevents New York City’s unconstitutional attempt to become a bank regulator. The August 7, 2015, decision made headlines and will have ramifications nationwide: In the wake of the financial crisis, other large cities, including Boston, Philadelphia, Pittsburgh, Seattle and Los Angeles, passed similar laws, all of which are now called into legal question.

“A meteor headed straight for the world’s financial center [was] knocked off course” when S&C obtained a federal court order striking down as unconstitutional New York City’s Responsible Banking Act.

For this and other recent wins, partner Bob Giuffra was named Law360 "Banking MVP."
S&C’s victory on behalf of Banco Central de la República Argentina (BCRA) before the U.S. Court of Appeals for the Second Circuit had far-reaching impact on both foreign central banks and the global economy. The case threatened the immunity from suit or attachment enjoyed by central banks and, in the Second Circuit’s own words, could have led “foreign central banks, in particular, to ‘withdraw their reserves from the United States and place them with other countries,’” to the immediate detriment of the U.S. economy and the global financial system.

Establishes Strong Protections for Foreign Central Banks and Other Instrumentalities.

The Second Circuit’s holding reaffirms the test for establishing alter-ego status in cases involving foreign sovereign instrumentalities in the Second Circuit: day-to-day control over the instrumentality by the sovereign. The decision makes for a more predictable legal environment for foreign central banks and other foreign sovereign instrumentalities going forward and sets a relatively high bar for creditors of foreign sovereigns to recover against central banks and other independent instrumentalities.

The decision is also significant because of the Second Circuit’s reliance on public-policy grounds in interpreting the Foreign Sovereign Immunities Act. The Second Circuit demonstrated its continuing concern that the scope of sovereign immunity protections be calibrated in light of New York’s status as a financial center and the significance of the dollar’s role as a reserve currency.

Nine-Year Battle. S&C’s victory on behalf of BCRA was the culmination of nine years of litigation against the backdrop of courts that voiced frustration with Argentina’s failure to pay on bonds which it defaulted in the midst of the economic crisis of 2000-01. However, building on its prior two successes before the Second Circuit in this matter, S&C was able to secure a victory on behalf of BCRA and have the matter dismissed with prejudice.

Plaintiffs NML Capital Ltd. and EM Ltd. hold judgments in excess of $2 billion against the Republic of Argentina on defaulted bonds. (Other similarly situated plaintiffs hold claims or judgments on bonds totaling more than $6 billion.) NML and EM first sought to attach funds of the Central Bank at the Federal Reserve Bank of New York in early 2006. Through decisions in 2007 and 2011 that were themselves path-breaking on the subject of attachments of central bank assets, the Second Circuit dismissed those attempts. In September 2006, the plaintiffs filed an action seeking a declaratory judgment that BCRA is an alter ego of Argentina. The district court denied motions to dismiss the complaint, finding that BCRA had waived its immunity and engaged in commercial activity that fell within an exception to immunity provided by the act.

The Second Circuit reversed the lower court’s decision and, unusually, remanded the case with instructions to dismiss the complaint with prejudice. The court adopted S&C’s argument that, while there were certainly ties between Argentina’s government and BCRA, the plaintiffs fell short of showing that the government controlled the central bank’s day-to-day operations—finding that the firing of bank directors who disagreed with the government and the government’s borrowing from BCRA to pay some creditors and not others, among other things, were insufficient to establish control so as to subject BCRA to Argentina’s waiver of immunity in the underlying bonds.

For this recent win, S&C partner Joe Neuhaus, who was lead counsel on this matter, was named “Litigator of the Week” for the week of September 3, 2015, by The American Lawyer.
M&A Litigation

S&C Sets Exemplary Standard for Special Committees

The Delaware Chancery Court recently highlighted the “expert legal counsel” and “integrity” of S&C’s work in advising the special committee of Dole Food Company Inc. in the high-profile private takeover by CEO and 40 percent stockholder David Murdock. The court’s ruling holds significant implications for how special committees conduct themselves in a merger—under S&C’s counsel, the Dole special committee’s actions created an exemplary model.

After taking Dole public in 2009, Murdock wanted to go private again and made an offer to the company’s board in 2013. A special committee composed of disinterested and independent directors was formed to negotiate the deal. The special committee turned to Alison Ressler and a team of S&C lawyers to advise them through the transaction. The committee negotiated an increase in Murdock’s $12 offer to $13.50, which was approved by Dole’s stockholders.

Even before the deal was finalized, Dole stockholders filed suits claiming that the process was tainted and that Dole’s directors and officers were breaching their fiduciary duties in order to promote Murdock’s interests. Robert Sacks and a team of S&C litigators represented the special committee members in the case.

As the action proceeded to trial, S&C was able to persuade the plaintiffs to drop the four members of the special committee from the case. After a nine-day trial, the court issued a decision that praised the work of the special committee and its advisers but concluded that the deal had been compromised by Murdock, with the aid of Dole President and General Counsel Michael Carter, notwithstanding the “valiant efforts” of the committee and its advisers. The court found that Carter had interfered with the special committee’s work and compromised the process by, among other things, knowingly presenting the committee with false projections, withholding information from the committee that he secretly provided to Murdock’s advisers in disregard of the committee’s instructions, and trying to control and mislead the committee.

In its post-trial opinion, the court outlined the special committee’s “herculean effort” to overcome the conduct of Murdock and Carter. The court cited the “diligence” of the committee and its advisers, which enabled them to overcome “most of Murdock and Carter’s machinations.” It found that the committee in fact acted independently, notwithstanding efforts by Carter and Murdock to keep them in line.

The ruling imposed one of the largest judgments handed out by the Court of Chancery on Murdock and Carter: $148 million. The special committee members—represented by S&C from start to finish—came out of it with their reputations untarnished and with praise for a job well done under trying circumstances.
Financial Crisis Litigation

An Allocation of Billions of Dollars of Liability

The collapse of Washington Mutual in September 2008 was a pivotal moment for the financial markets, marking the largest bank failure in U.S. history. S&C served as adviser to JPMorgan when it won the bid to purchase the failed bank’s assets and deposits from the Federal Deposit Insurance Corporation (FDIC). Years later, S&C continues to advise the bank on litigation matters arising out of the WaMu transaction.

Most recently, the S&C team secured a significant victory on summary judgment, defusing a potentially enormous liability by persuading the court that JPMorgan assumed only a limited amount of WaMu’s massive mortgage repurchase liability under its agreement with the FDIC.

In 2010, Deutsche Bank National Trust, the trustee for nearly 100 WaMu mortgage-backed securitizations, sued the FDIC and JPMorgan, claiming that one or the other must fulfill repurchase obligations associated with those securitizations. The suit sought damages of $6 billion to $10 billion.

The key question was which party—JPMorgan or the FDIC—bears WaMu’s billions of dollars of unbooked liabilities. In June 2014, after extensive fact-finding and expert discovery regarding the negotiation and implementation of the agreement that governed the sale, JPMorgan and the FDIC each moved for summary judgment as to the agreement’s meaning. The FDIC maintained that JPMorgan was responsible for essentially all of WaMu’s liabilities; the bank argued, in turn, that it was only responsible for the amounts shown on WaMu’s accounting records at the time of its failure.

In June 2015, the U.S. District Court for the District of Columbia ruled conclusively in JPMorgan’s favor, holding that any unbooked liabilities remain the responsibility of the FDIC and must be paid out of the WaMu receivership estate. The court also declared that its ruling extends beyond the Deutsche Bank repurchase claims to include all unbooked WaMu liabilities.
**Pro Bono**

**S&C wins a Series of Victories in the Fight for the Humane Treatment of the Mentally Challenged**

Victory includes the first-ever court order to establish a monitor over policies and practices of the Department of Homeland Security

In 2010, S&C, the ACLU and the Public Counsel Law Center sued the U.S. government in a class action on behalf of immigration detainees with mental disabilities in Arizona, California and Washington who were denied free representation and forced to defend themselves before the immigration courts. The team argued that the Rehabilitation Act of 1973 required the government to provide accommodation to detainees denied a legal benefit because of their disability.

In 2013, the court granted partial summary judgment and entered a permanent injunction requiring the government to provide legal representation to detainees denied a legal benefit because of mental disorders.

In October 2014, the court entered a plan implementing the injunction, requiring the three state governments to assess the mental competency of every person detained by immigration, along with procedures about how their claims should be addressed and litigated.

In March 2015, the court entered a monitoring order against the Department of Homeland Security—the first-ever judgment of its kind—to keep tabs on the government’s compliance with the implementation plan.

Recently, S&C secured preliminary approval for an unprecedented settlement agreement, under which individuals who had been class members prior to the suit and were removed from the country will be granted the right to reopen their cases, with the government paying travel expenses back to the United States. The settlement is currently under consideration for final approval.

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S&C was featured as one of Law360’s “Pro Bono Firms of 2015.”