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Q&A With Choate's Michael Gass

Law360, New York (April 11, 2013, 2:38 PM ET) -- Michael T. Gass chairs Choate Hall & Stewart LLP's securities litigation and corporate governance group and co-chairs the major commercial litigation group in the firm's Boston office. He focuses his practice in the areas of complex securities litigation, investigations and proceedings brought by government enforcement agencies, and corporate governance and officer and director liability. He also has substantial experience with major antitrust litigation and in representing media clients in a range of matters. Gass is listed in Best Lawyers in America and Massachusetts Super Lawyers.

Q: What is the most challenging case you have worked on and what made it challenging?

A: I recently represented a major technology company against an international bank that had purchased over $200 million in auction rate securities on behalf of the client. The bank was required to limit the client's portfolio to liquid investments, and when the auction rate securities market froze in February of 2009, the client was stuck with long-term, illiquid bonds. The case was challenging on a number of fronts.

First, the case was substantively challenging. Along with most securities litigators, I didn't know what an "auction rate security" was before this case, so it took some ramp-up time to understand this previously obscure corner of the securities world. Establishing liability was also difficult, as it required developing proof that the defendant had knowledge about the deteriorating state of the auction rate securities market prior to its collapse, an inherently difficult element to prove. Finally, damages are difficult to establish in these cases because the bonds underlying the auction rate securities had not defaulted. Therefore, any damages would have to be tied to the loss of liquidity, requiring us to prove consequential damages stemming from the client's inability to make beneficial investments due to the loss of liquidity of its auction rate securities investments. While damage claims of this nature often fail because they are too speculative, we were able to develop a very compelling argument about a stock buyback at a depressed price that the company wanted to enact but decided not to due to liquidity concerns.

One of the most interesting aspects of this case was being able to put my 25 years on the defense side of securities cases to work on the plaintiff's side. The financial crisis spawned a wide range of disputes between major institutions, which in turn has resulted in a number of historically defense-oriented lawyers taking on the role of plaintiff's counsel. I find that having to think like a plaintiff's lawyer from time to time helps to hone my defense skills.

Q: What aspects of your practice area are in need of reform and why?

A: The flood of shareholder suits filed in response to virtually every material M&A transaction cries out for reform. Plaintiff's firms file these cases reflexively, regardless of the premium received by the acquired company's shareholders or the decision making process engaged in by management. Some of these cases challenge the adequacy of disclosures before the disclosures are even made!

The situation is reminiscent of the "race to the courthouse" that occurred in the pre-PSLRA days whenever the stock price of a company declined materially. As with the stock drop cases, most M&A cases settle because companies are reluctant to jeopardize the transaction or risk a problematic outcome in the litigation, no matter how remote those risks might be.

Of course, not all of these cases lack merit. There are a number of instances in which these suits have exposed flawed processes and conflicts of interest that impaired management's exercise of its duties to maximize shareholder value. But there needs to be a way to discourage suits that do not genuinely advance shareholder interests.

Q: What is an important issue or case relevant to your practice area and why?

A: There are two areas that I keep a close eye on. One is the state of regulatory reform and related enforcement trends, which can significantly impact the types of matters I see. I also track trends within the plaintiff's bar, which is extremely creative and entrepreneurial. In addition to M&A litigation, plaintiff firms have become very active in the executive compensation arena.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Andrew Weissmann, currently general counsel of the FBI, formerly at Jenner & Block and the U.S. Attorney's Office (where he spearheaded the Enron Task Force). Andrew is an extremely smart, energetic and strategic lawyer, who is a tenacious advocate for his clients. I would much rather have him on my side of the table than have to go up against him.

Q: What is a mistake you made early in your career and what did you learn from it?

A: As a young associate, I handled a civil case in which I needed to secure an attachment against the defendant's house. I drafted and filed all of the appropriate papers, successfully argued the motion, obtained the attachment and filed it in the Registry of Deeds for the county in which the property was located. I subsequently learned, to my dismay, that the property was registered land, and thus to be effective the attachment needed to be filed in the Land Court (Massachusetts has dual, mutually exclusive land registration systems). None of the forms or practice guides for obtaining an attachment addressed this issue. On the other hand, I certainly knew there were two systems.

To this day, this experience reminds me to take a step back and think about possible twists or problems that can arise, even (and perhaps especially) in what appear to be the most clear-cut situations.

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