Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Q&A With Choate Hall's Michael Gass

Law360, New York (July 28, 2009) -- Michael T. Gass is chair of Choate Hall & Stewart LLP's securities litigation group. He focuses his practice in complex securities litigation, investigations and proceedings brought by government enforcement agencies, and corporate governance and officer/director liability.

He represents companies against allegations of insider trading, market manipulation, accounting fraud, improper revenue recognition, breaches of fiduciary duty, failure to disclose material information, and false disclosures. He represents boards of directors/committees in conducting internal corporate investigations and providing corporate governance advice. He also has substantial experience with major antitrust litigation, and in representing media clients.

Q: What is the most challenging case you've worked on, and why?

A: Two cases come to mind that were both challenging and interesting. In the first, I represented bondholders who bought bonds issued by Massachusetts counties who defaulted on the required payments. They were general obligation bonds, and nobody (including the courts) understood what would/should happen if a political entity defaulted on them.

This situation arose out of a political standoff — most Massachusetts counties did not generate enough revenue to meet their obligations and relied on the governor and state Legislature to bail them out each year. That year, the governor decided for political reasons to put pressure on the counties by not bailing them out.

For one of the counties, I obtained a judgment and delivered it to the sheriff to execute. The only property he could find to levy on was a courthouse. The situation was short-lived because the Massachusetts Supreme Judicial Court did not find it amusing that my client owned one of the state’s courthouses, and intervened in the case.

For the other county, there was a decades-old Supreme Judicial Court opinion that allowed a creditor of a county to satisfy the debt through a levy on any property located within the county, regardless of who owned it.

The threat of randomly taking private property precipitated a resolution by the Legislature under which the state assumed the counties' obligations (and paid my clients), and took over the counties' operations over a period of time.

The second case was the defense of MIT in a case brought by the Antitrust Division of the Department of Justice challenging MIT's (and other schools') financial aid practices.

This was a high-stakes case that represented a defining moment both in the funding of higher education and the development of antitrust law. The case also illustrated the diametrically opposed views of the nature of higher education and the role of the antitrust laws.

At issue was an open agreement among highly selective schools that they would not use limited financial aid dollars to compete for student applicants who did not need them; i.e., they would provide only need-based aid.

MIT believed that this was an appropriate function for nonprofit, noncommercial institutions of higher education whose purpose was to increase access to education. The DOJ believed that this conduct constituted "garden variety price-fixing," no different than, for example, two car companies fixing prices on cars.

After losing in the district court, we got the Third Circuit to reverse the finding and rule that the conduct at issue was noncommercial in nature and therefore not a per se violation of the antitrust laws.

Q: What accomplishment as an attorney are you most proud of?

A: There is not a specific case or client that I am most proud of. Rather, I get the greatest satisfaction from the relationships I've developed with clients over the years and the trust they put in me to provide advice beyond the legal implications of a given business situation. Most of my clients view me as their counselor and not just a lawyer.

The science in our profession involves the understanding of often-complex legal rules and requirements and applying them to the facts of the case at hand. The art is in really understanding our clients, including their businesses, how they make their money, what their true risk tolerances are, and what, at the end of the day, makes most sense for them.

Mastering the science is important and rewarding, but the art, and the reliance of clients on judgment that goes beyond the case law, is even more compelling.

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

A: The easy answer is that we need to reform those previously unregulated aspects of the securities and credit markets that led to the current economic meltdown, i.e., securitized debt obligations, credit default swaps, etc.

Of course, what specifically should be done is a much more complicated issue. In attempting to strike the balance between allowing the market to function and providing sufficient regulation to protect investors and ensure against fraud, the government erred too much in the direction of trusting the market (and those powerful firms and individuals who control much of it) to understand these complex instruments and to act in the long-term interests of investors.

To correct these issues, it is important that the pendulum is not pushed too far in the opposite direction, unduly tying the hands of entrepreneurs and burdening innovation. Only time will tell what the proper balance should and will look like.

Q: Where do you see the next wave of cases in your practice area coming from?

A: There are two hot areas right now. First, we are seeing an uptick in litigation out of the subprime meltdown, auction rate securities and related areas. Many expected this litigation to occur sooner, as much as a year ago, but it has taken awhile for the issues and claims to get sorted out. I expect this increase to continue for some time.

Second, I expect a continued demand for special committee representation and internal investigations, which has comprised much of my practice over the last several years. This trend reflects a structural change in governance in our post-Enron world, codified in Sarbanes-Oxley, which imposes very real obligations on companies (and in particular their boards) to actively oversee management and redress any misconduct. I do not expect this trend to change anytime soon.

Q: Outside your own firm, name one lawyer who's impressed you, and tell us why.

A: My pick would be Brad Smith, general counsel of Microsoft. He’s incredibly smart, very strategic, has an amazing grasp of the details of a range of highly complex issues, and has done a tremendous job of integrating legal and business strategies.

He has a particularly tough job because Microsoft’s success has made the company a perpetual target of competitors and regulators, yet he handles it all with incredible talent and skill.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: Get a wide range of experience early in your career, including working in both a securities-focused private practice and in government enforcement. Work hard to develop a comprehensive understanding of the securities laws and regulatory schemes that are not limited strictly to litigation.

In order to successfully specialize in this area and effectively advise clients on the range of issues that arise, you need to have a good grounding in the broad arena of securities regulation and enforcement.