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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Securities Group Of The Year: Cleary Gottlieb

By **Dunstan Prial**

Law360, New York (February 2, 2018, 3:56 PM EST) -- Cleary Gottlieb Steen & Hamilton LLP deployed innovative strategies across a range of cases in 2017, including in a U.S. Supreme Court win for a group of banks caught up in Lehman Brothers' historic 2008 bankruptcy and in decertifying an investor class suing Brazilian oil company Petrobras, landing it among Law360's Securities Practice Groups of the Year.

The firm's core securities litigation team is based in New York, but the more than 20 litigation partners and counsel who work in this area are located around the world. In the past year, the group has defended clients in a diverse array of matters, from sprawling, complex class actions to trendier cases such as one involving a suit tied to claims of aiding and abetting breaches of fiduciary responsibility by financial advisers.

"It's a broad and varied practice," Roger Cooper, a partner in Cleary's New York office, said. "We represent financial institutions, but also corporate issuers from a lot of different industries. We also have deep experience representing foreign issuers, and have accumulated substantial experience with the unique issues that can arise in those cases."

"In the sort of run of the mill case, we've had a very high success rate at getting those cases dismissed. But in the more challenging cases, what's distinguished our success has been in developing novel arguments and new law," Cooper added.

For nearly a decade, Cleary represented over 40 banks that underwrote securities issued by Lehman in the 18 months ahead of its bankruptcy filing, including Bank of America, Citigroup, Morgan Stanley and Wells Fargo in multidistrict litigation brought by Lehman investors.

Over time, Cleary attorneys were able to whittle the case down to a narrowed class action that was settled in 2012, while securing numerous dismissals in individual actions brought by investors who opted out of the class action.

One investor appealed its dismissal all the way to the Supreme Court, leading to one of Cleary's most significant wins in 2017. In June, the Supreme Court handed the firm and co-counsel at Kirkland & Ellis LLP a landmark decision that affirmed a lower court's dismissal of a claim brought by California Public

Employees’ Retirement System. The justices ruled 5-4 that CalPERS was too late in filing claims opting out of the class action, while determining suits over securities offerings and sales are subject to a statute of repose that can’t be tolled.

Jared Gerber, also a partner in the New York office, said the Supreme Court’s decision in CalPERS will “significantly impact the scope and timing of opt-out litigation, and provides defendants with certainty about their potential exposure.”

“It also marks the culmination of many years of successful litigating by Cleary,” Gerber added. “We were defense counsel in the first district court decision to adopt the Supreme Court’s holding, won several appeals on the issue before the Second Circuit, represented the securities industry in several amicus briefs on the subject, and ultimately served as co-counsel before the Supreme Court in CalPERS.”

In July, Cleary attorneys convinced the Second Circuit to decertify a class of investors suing Petrobras for securities fraud related to a massive Brazilian corruption scandal. The court, accepting an argument developed by the Cleary team, found that questions concerning the extraterritorial application of federal securities laws raise individualized issues in class actions involving securities that don’t trade on domestic exchanges. Consequently, district courts must consider whether those individualized issues predominate over common issues before certifying such classes.

Lewis Liman led the team on the Petrobras appeal and, according to Cooper, “we’re now seeing the argument that the Second Circuit accepted being made in other similar cases.”

The firm also negotiated Petrobras’ $2.95 billion settlement in that class action announced in January.

A Cleary team led by partner Meredith Kotler in February earned a victory for Goldman Sachs when the Delaware Supreme Court upheld a ruling by the state’s Court of Chancery dismissing investors’ claims that Goldman "aided and abetted" breaches of fiduciary duty by the board of directors of medical device maker Volcano Corp. in its $1.2 billion acquisition by Philips Holding USA Inc. in 2014. Goldman acted as a financial adviser to Volcano.

Kotler said the decision was “significant” not least because it “confirmed the very high pleading standard required for aiding and abetting breach of fiduciary duty on the part of financial advisers advising boards in the sale of a company.”

Cooper said there’s been an increasing push by plaintiffs in Delaware shareholder litigation to try to bring claims against financial advisers on an aiding and abetting theory.

“The ultimate outcome was one that reaffirmed and limited the kinds of claims that plaintiffs can bring in these sorts of actions,” he said. “The court agreed with us with respect to the aiding and abetting liability in ways that were significant and the case is looked at for that purpose now.”

--Editing by Emily Kokoll.