

NEW YORK SECURITIES LITIGATION PRACTICE

Gibson, Dunn & Crutcher's New York Securities Litigation Practice is recognized as one of the preeminent groups in its practice area in the United States. Located at the center of the global financial community, our New York office boasts over 50 outstanding securities litigation attorneys – including 15 partners – with a proven track record of providing a full range of securities litigation services to the world's leading businesses in complex and high-profile matters in state and federal courts.

Our New York Securities Litigation Practice is recognized by *Chambers USA* as one of the best in New York. Our New York attorneys are highly experienced trial lawyers who have successfully represented clients in hundreds of securities litigation matters. Many of our New York securities litigators have been recognized as leaders in their field by *Chambers USA*, *The Legal 500*, *lawdragon.com*, and *The Best Lawyers in America*.

Our securities litigators have been at the forefront of the recent subprime crisis. In fact, *The American Lawyer* recently ranked Gibson Dunn third in the number of subprime lawsuits defended. Gibson Dunn lawyers literally “wrote the book” on securities litigation – we are the exclusive authors of the leading treatise on this subject published by Practising Law Institute, *Securities Litigation: A Practitioner's Guide*.

The New York office includes former high-ranking prosecutors from the United States Attorney's Office for the Southern and Eastern Districts of New York and the Securities and Exchange Commission, including the former Director of the Commission's New York regional office. The New York office is also home to government officials from the state and city level. These diverse backgrounds provide our New York practice with crucial insider knowledge of the process of local government securities prosecutions and investigations and the nuances of the New York political environment.

Our New York Securities Litigation Practice is able to draw on the skills and knowledge of all 140 attorneys of our firmwide Securities Litigation Practice, and, in particular, on the insight and experience provided by the 15 partners in our New York office who specialize in securities litigation. Collectively, these partners represent over 200 years of experience in litigating cases throughout the United States and numerous foreign jurisdictions. Our New York partners work closely with our securities regulatory specialists in our Washington, D.C. office, as well as members of our Crisis Management and Business Crimes practice groups.

Current Matters

Partners in the New York office currently are involved in some of the biggest securities litigation and SEC enforcement matters in the United States, including high-profile actions against clients such as Intel, Hewlett Packard, Marsh & McLennan, Merrill Lynch, PricewaterhouseCoopers, Deloitte, Goldman Sachs and First American. We are actively involved in the representation of companies and firms involved in the current litigation arising out of the "credit crunch," include, clients named in the "subprime" litigation concerning New Century, Countrywide, Washington Mutual, Bear Stearns and Thornburg. We are handling a variety of SEC and DOJ investigative matters, and

proceedings under the Foreign Corrupt Practices Act. Finally, our New York partners regularly represent various industry organizations and others as *amicus curiae* in prominent cases in the appellate courts, including the United States Supreme Court case relating to “scheme” liability, *Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.*, in which we represented 13 former SEC Commissioners and a number of distinguished law professors.

New York Representative Successes

The securities litigation attorneys of our New York office have successfully obtained hundreds of pretrial dismissals, favorable settlements and pleas, and trial victories on behalf of our clients. Some representative successes include:

- ▶ Represented Vivendi, S.A. and Vivendi Games, Inc. in a shareholder class action filed in response to Vivendi, S.A. and Vivendi Games, Inc. entering into a multi-billion dollar Business Combination Agreement (“BCA”) with Activision, Inc. The Activision shareholder’s complaint alleged that Activision and its directors breached fiduciary duties to the shareholders and made material misrepresentations and/or omitted material facts in the preliminary proxy. The complaint also named Vivendi S.A. and Vivendi Games and alleged that they had aided and abetted the Activision directors’ alleged breach of fiduciary duty. After filing multiple motions to dismiss Vivendi, S.A. and Vivendi Games, Inc. were dismissed from the shareholder suit and the BCA was permitted to close.
- ▶ Secured summary judgment on behalf of Marsh & McLennan Companies, Inc., in an Oregon securities action brought by an Oregon state pension fund. Gibson Dunn attorneys convinced Oregon state court judge to find an Oregon state securities statute, drafted in substantial part by the Oregon state pension fund’s counsel, unconstitutional as applied to the facts of the case.
- ▶ Represented Maxim, an investment bank in New York, after Maxim and three of its executives, including its Chairman and Chief Executive Officer, received a Wells notice from the FINRA enforcement staff relating to the bank’s allocation of shares in initial public offerings of special purpose acquisition companies (“SPACs”). The allegations were that Maxim violated Regulation M by manipulating sales of SPAC shares in the immediate IPO aftermarket and failed to have adequate supervisory procedures in place designed to prevent such violations. Gibson Dunn successfully argued that Maxim’s communications with institutional investment customers prior to the IPO were part of a normal book-building process and were outside of Regulation M’s restricted period. The investigation was closed by FINRA without action against the company or its employees.
- ▶ Represented Tyco International Ltd. and two of its subsidiaries in a lawsuit in the Southern District of New York by Bank of New York, as indenture trustee on behalf of Tyco’s bondholders, alleging that a Tyco spin-off of its healthcare and electronics businesses to its shareholders

breached the indentures governing \$3.7 billion of Tyco's public debt. The Bank of New York sought to collect the entire principal of the bonds, accrued interest, and a "make-whole" premium that could amount to several hundred million dollars. Gibson Dunn attorneys successfully defeated Bank of New York's motion for summary judgment in March 2008, and then successfully settled the case for Tyco in April 2008.

- ▶ Represented the Board of Directors of Hewlett-Packard in a hotly contested securities class action brought against the Board following the Company's termination of its former Chief Executive Officer, Carly Fiorina. Several major HP pension fund investors had sued the Board contending that the payments made to Ms. Fiorina when she was terminated as CEO were not authorized under HP's Severance Policy, that the payments were an act of "corporate waste," and that the Company's proxy statement disclosures regarding its severance policies were false and misleading. In March 2008, the U.S. District Court for the Northern District of California dismissed all claims against the Board.
- ▶ Filed an *amicus* brief on behalf of former SEC Commissioners and officials, and law and finance professors, in a case before the U.S. Supreme Court involving the contours of private actions under the key anti-fraud provision of the securities laws. In its January 2008 ruling, the Court adopted the argument advanced in our *amicus* brief, ruling that liability under Section 10(b) of the Securities Exchange Act of 1934 does "not extend to aiders and abettors," and that, to be actionable, "[t]he conduct of a secondary actor must" *itself* "satisfy each of the elements or preconditions for liability" under §10(b) or the SEC's Rule 10b-5.
- ▶ Represented Currenex, Inc., and members of its senior management in a shareholder action challenging stock options granted to Currenex executives in connection with the acquisition of Currenex by State Street Bank & Trust in March 2007. In April 2008 the California Superior Court dismissed all claims against Currenex, finding that the claims were derivative, not direct, and that plaintiffs had lost standing to sue when the merger extinguished their ownership rights in Currenex.
- ▶ Represented Veeco Instruments, Inc. in defense and favorable settlement in 2007 of a securities law class action in the Southern District of New York. Just before trial, after discovery and more than two years of hard fought litigation, we obtained a very favorable ruling on a motion in limine on loss causation and damages. The Court held that class members who either sold their shares after a corrective disclosure at a price higher than their purchase price, or who kept their stock past the point at which the stock price recovered to their purchase price, could prove no economic loss and thus were not entitled to damages. This important ruling substantially reduced the number of damaged class members, as well as the aggregate damages available to the class, and plaintiffs then agreed to settle on terms favorable to defendants.

- ▶ Represented Deloitte & Touche Netherlands in connection with a major international scandal resulting from the revelations of improprieties at Royal Ahold, a Dutch company and the world's third largest supermarket group. Deloitte provided auditing services for Ahold and, as a result, was confronted with a series of class action complaints in the United States seeking billions of dollars in damages and investigations by the SEC and DOJ as well as authorities in the Netherlands. Gibson Dunn attorneys secured a dismissal of the class action complaints against Deloitte with prejudice, and later defeated plaintiff's' efforts to revive their complaint against Deloitte following Ahold's \$1.1 billion settlement with the plaintiffs.
- ▶ Represented Parlux Fragrance in successful defense of consent solicitation by an activist shareholder to replace the entire board. After achieving, in effect, a stay on the consent solicitation following our emergency application for relief on both antitrust and securities grounds in the Southern District of New York, and following pitched discovery, Parlux resolved the battle without giving control to the insurgents.
- ▶ Secured a dismissal with prejudice for A.G. Edwards & Sons, Inc., RBC Capital Markets Corporation and UBS Investment Bank in a securities class action filed by purchasers of Star Gas securities in the United States District Court for the District of Connecticut.
- ▶ Secured a motion to dismiss on behalf of Marsh & McLennan Companies, Inc., in a putative securities class action brought on behalf of purchasers and acquirers of common stock of Axis Capital Holdings Limited in the Southern District of New York. Following the decision, the plaintiffs decided not to amend their complaint and did not appeal the dismissal.
- ▶ Secured an important victory in the Second Circuit for Bjurman, Barry & Associates ("BB&A"), and one of the mutual funds that BB&A advises in a securities case brought by a professional shareholder plaintiff. The plaintiff claimed that BB&A breached its fiduciary duties under 36(b) of the Investment Company Act by causing the fund to incur excessive fees for promotion, marketing and distribution services provided to the fund by third party broker-dealers. BB&A never received any of the fees. The Second Circuit Court of Appeals held that the mere fact that BB&A may have been liable for the fees had the fund not paid them did not make them "recipients" of such fees, and, therefore, BB&A was not liable for violating Section 36(b).
- ▶ Obtained dismissal of a putative class action seeking to prevent our client, the National Association of Securities Dealers, Inc. (NASD) from completing a transaction with the New York Stock Exchange (NYSE) that would make the newly combined entity the single private-sector regulator of U.S. securities markets. That merger has now been consummated.
- ▶ Thwarted the attempt of Laddcap Value Partners LP, a hedge fund, to seize control of Delcath Systems, Inc. United States District Judge Loretta Preska of the Southern District of New York granted Delcath's

- applications for a temporary restraining order and for expedited discovery. In response to our arguments concerning Laddcap's discovery violations, Laddcap, facing a consolidated preliminary injunction hearing and trial as well as Delcath's summary judgment motion and the threat of sanctions for its "discovery malfeasance," gave up its quest for control of Delcath and entered into a settlement agreement with Delcath that left control of the company in the hands of the current board.
- ▶ Represent Bear Stearns in class actions filed against the nation's largest underwriters concerning alleged collusion in IPO allocations (also known as "laddering") of "high tech" "boom and bust" offerings. We serve as litigation counsel in connection with more than 300 class actions seeking billions of dollars of damages pending in the Southern District of New York.
 - ▶ Represented Bear Stearns and its board members in a shareholder derivative action alleging breach of fiduciary duty by members of its board in connection with alleged research analyst conflicts and IPO allocations. We moved to dismiss the action against Bear Stearns and its entire board of directors, and obtained dismissal and then won a unanimous affirmance on appeal.
 - ▶ Obtained dismissal with prejudice of all claims against Merrill Lynch and Morgan Stanley in the Duke Energy Securities Litigation, which dismissal was affirmed by the Second Circuit Court of Appeals. This case set the important precedent that even when the alleged misrepresentations involved an amount exceeding \$1 billion, it could still be found to be "immaterial" to a company's reporting obligations.
 - ▶ Represented Merrill Lynch in a class action filed in the Southern District of New York alleging that brokerage houses had conspired to prevent their retail customers from "flipping" shares purchased in IPOs. Merrill Lynch prevailed.
 - ▶ Represented Merrill Lynch in the defense of a multi-state class action involving the sale of \$2 billion of real estate limited partnerships. While other financial institutions settled similar actions for amounts exceeding \$100 million, we persuaded Judge Mukasey of the Southern District of New York to dismiss the action with prejudice and won an affirmance of the dismissal in the Second Circuit Court of Appeals.
 - ▶ Represented Edison Schools in securities class and shareholder derivative lawsuits in the Southern District of New York and Delaware and New York state courts alleging that Edison misrepresented its revenues. The securities class action was settled as to Edison and its underwriters on favorable terms at the time of argument on Edison's motion to dismiss. The derivative actions were dismissed with prejudice.
 - ▶ Represented the FINOVA Group, Inc., certain of its subsidiaries, and its directors and officers, in securities class and shareholder derivative

actions filed against some or all of these entities in Tennessee, Arizona and Delaware. After filing motions to dismiss, both the securities class actions and the individual claims were settled on terms extremely favorable to FINOVA. The derivative actions were dismissed with prejudice.

- ▶ Obtained a victory in the Second Circuit Court of Appeals for the Nasdaq Stock Market, Inc. against a securities class action challenging Nasdaq's statements to the marketplace and its decisions to cancel trades executed on the Nasdaq. The Court held that Nasdaq was absolutely immune for its activities in operating the Nasdaq Stock Market.
- ▶ Obtained a favorable settlement of ten class action lawsuits, and one individual shareholder suit brought against Cityscape Financial Corp., which had been consolidated in the Eastern District of New York by MDL Panel.
- ▶ Successfully settled a securities fraud action brought by shareholders in the Southern District of Ohio against Cincinnati Bell asserting claims under Sections 10(b) and 29(a) of the Securities Exchange Act of 1934. Plaintiffs claimed that Cincinnati Bell had improperly recognized revenues on indefeasible right of use agreements, network construction contracts, and maintenance contracts and service agreements; made misleading characterizations about the technological advantages of its "all-optical" broadband network; and failed to write down goodwill and long-lived assets in a timely manner.
- ▶ Achieved one of the rarer successes in a securities class action by obtaining the denial of class certification on a Section 10(b) claim brought by noteholders in Livent Inc., a former Canadian-based producer of live theater entertainment. We also obtained the dismissal with prejudice of a Section 11 claim brought by Livent shareholders based on a novel statute of repose argument.
- ▶ Obtained the dismissal of a shareholder derivative action in New York state court against DHB Industries Inc., and its directors alleging breaches of fiduciary duties.
- ▶ Represent Marsh & McLennan Companies Inc. in securities class actions arising from New York Attorney General Eliot Spitzer's allegations of "bid rigging" and "contingent commissions".
- ▶ Represented Deloitte Canada in class action litigation that spanned nine years. This action arose from far-reaching accounting errors that resulted in the restatement of over three years of financial statements and the ultimate bankruptcy of a Deloitte Canada auditing client. The Southern District of New York approved final settlement of this matter in March 2007.

- ▶ Won a summary judgment in favor of Merrill Lynch in an ERISA class action against Merrill Lynch, WorldCom and various of its officers and directors and Arthur Andersen.
- ▶ Won dismissal of securities fraud claims brought in the Southern District of New York against a leading accounting firm arising out of accounting irregularities at a client of the firm. The court dismissed the case because the allegations set forth in the complaint did not sufficiently establish that the accounting firm played any role, let alone a role that was disclosed to investors, in the audits.
- ▶ Won dismissal of a securities fraud action against a leading accounting firm brought against it in connection with its audits of a computer networking company. We successfully argued that the plaintiffs had not satisfied the heightened pleading requirements of Rule 9(b) and the PSLRA.