

Securities Group Of The Year: Gibson Dunn

By **Pete Brush**

Law360, New York (January 04, 2012) -- Facing a deluge of suits that began after New York launched a market timing probe of the mutual fund business, Janus Capital Management LLC opted to fight, turning to Gibson Dunn & Crutcher LLP, which fought off 67 suits over seven years including a signature win before the U.S. Supreme Court in June — victories that earned the firm's securities team a spot on Law360's list of Securities Groups of 2011.

After entering into a \$226 million regulatory settlement with state and federal authorities in 2004 related to the market timing probe, plaintiffs' lawyers began targeting Denver-based Janus with private lawsuits — but Janus decided it had strong defenses, according to Washington-based Gibson Dunn litigation partner Mark A. Perry.

“The civil cases were follow-on litigation,” Perry, who was instrumental over the course of the successful legal marathon, told Law360 in a recent interview. “The company felt it had seen enough and wasn't going to be held hostage by plaintiffs' lawyers.”

In the near-decade long litigation that followed, dozens of lawyers from Gibson Dunn's 170-attorney securities litigation and securities enforcement practice groups, led by Perry, got involved, and the 1,000-lawyer, California-based law firm racked up win after win for Janus.

“They were very committed to the strategy, once they decided on it,” Perry said of Janus. “We have more than 50 lawyers who have worked on the file. We knew these would be big cases for the industry.”

The legal fights culminated in the high court's June 5-4 ruling in *Janus Capital Group Inc. et al. v. First Derivative Traders et al.* that effectively blocked private plaintiffs from bringing aiding-and-abetting suits over misleading prospectuses against the people and companies that may have prepared the statements but did not have ultimate authority over them.

The June ruling was among the last — and highest profile — legal wins for Janus, the only one of more than 20 industry peers that, according to Gibson Dunn, refused to enter into a private settlement related to market timing.

The denouement of the Janus cases wasn't the only instance last year where Gibson Dunn represented a client who chose a winner-take-all stance against an adversary.

The firm also represented Tenet Healthcare Corp. as it went from playing defense to offense against hostile suitor Community Health Systems Inc., accusing its rival of securities fraud in order to fend off what Tenet saw as a low-ball corporate takeover bid by CHS.

Working with two consulting firms, clinicians and industry insiders, Gibson Dunn helped Tenet uncover evidence suggesting CHS had for many years improperly admitted healthy patients to the hospital in order to recover illicit revenue from Medicare. Armed with this information, Gibson Dunn's litigation team filed a 70-page complaint on behalf of Tenet on April 11.

CHS routinely overbilled Medicare to boost earnings to the tune of hundreds of millions of dollars, Tenet's suit claimed — and on the day it was filed CHS' stock plummeted by more than 38 percent.

That stock drop “raised serious concerns about the CHS business model and whether they were a suitable acquirer,” said Robert F. Serio, co-chair of Gibson Dunn's securities litigation practice group.

By the end of May, CHS was also facing questions related to the Tenet allegations from the U.S. Securities and Exchange Commission, not to mention a separate private investor suit, and it then dropped its bid for Tenet.

Gibson Dunn's attorneys noted that the Tenet case was described by Forbes magazine as a legal move that “might rank pretty high in the legal pantheon of aggressive counterpunches.”

Orange County-based Gibson Dunn securities litigation practice group co-chair Meryl L. Young said that the work the firm did for Tenet is indicative of a trend toward more intimate ties between securities and mergers and acquisitions practitioners.

“The number of M&A cases has increased in recent years and the M&A component is becoming a more significant component of our securities practice,” Young said. “Our close relationship with the firm's M&A lawyers shows the strength and breadth of our practice.”

In 2011, Gibson Dunn's securities team also successfully defended UBS AG in a major Bernard Madoff-related action, freeing the Swiss banking giant from the bulk of \$2 billion in damages claims brought by Irving Picard, the trustee for the liquidation of the Ponzi schemer's bankrupt investment company.

Through its role as service provider for two international Madoff feeder funds, UBS was sued by Picard for a variety of common law tort claims, including aiding and abetting fraud, aiding and abetting breach of fiduciary duty, conversion, unjust enrichment and money had and received.

On Nov. 1 a New York federal judge agreed with Gibson Dunn's dismissal motion, which argued that Picard lacked standing to pursue the claims and freed the bank from the bulk of its potential liability.

“Formally, the trustee steps into the shoes of the debtor for the purpose of bringing property into the bankruptcy estate, and as such possesses only the rights of the debtor,” U.S. District Judge Colleen McMahon ruled. “There is no indication in either the Bankruptcy Code or [the Securities Investor Protection Act] that Congress intended to give the trustee power to pursue claims that are not the property of the debtor.”

Serio noted that the case, which Picard has vowed to appeal to the Second Circuit, was challenging because it required UBS and Gibson Dunn's securities team to operate under difficult factual circumstances — namely the Madoff case that still routinely generates sensational headlines — and get the judge to focus on legal theory.

In September, the firm also secured a legal victory for its client TCW Asset Management Co. when a New York federal judge threw out a fraud case over the sale of \$37 million in doomed mortgage-backed securities brought against TCW by German bank Landesbank Baden-Wuerttemberg.

U.S. District Judge William Pauley III found the plaintiff bank had not provided enough specifics to support its fraud claims. Pauley dismissed all of Landesbank's claims against TWC and co-defendant Goldman Sachs & Co.

In addition to fraud the claims included allegations of negligent misrepresentation and unjust enrichment.

But “‘broad reference to raw data’ is not sufficient to plead that defendants knowingly made false statements,” Judge Pauley concluded.

Earlier in 2011, Gibson Dunn had secured TCW's exit from a similar suit brought by China Development Industrial Bank in New York state court.

Methodology: In November, Law360 solicited submissions from over 500 law firms for its practice group of the year series. The more than 550 submissions received were reviewed by a committee of Law360 editors. Winners were selected based on the significance of the litigation wins or deals worked on; the size and complexity of the litigation wins or deals worked on; and the number of significant, large or complex deals the firms worked on or lawsuits the firm had wins in. Only accomplishments from Dec. 1, 2010, to Dec. 1, 2011, were considered.

--Editing by Andrew Park.