KAYE | SCHOLER

Q&A With Kaye Scholer's Terri Mazur

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

A: Representing Ernst & Young in the Cendant securities litigation, the then-largest securities fraud action ever brought. This multibillion dollar action was especially challenging because of the multitude of different proceedings and wide breadth of issues that arose during discovery, and because in such a high-value, high-profile case, every development — no matter how minor — was closely analyzed at the highest levels of all parties.

The Judicial Panel on Multidistrict Litigation quickly consolidated the federal actions in the District of New Jersey. The litigation involved multiple class and derivative actions, opt-out lawsuits, separate state actions, SEC and DOJ proceedings, criminal trials, and securities and professional liability claims. While the federal securities class action settled relatively early in the proceedings, Cendant and E&Y asserted claims against each other and Cendant was very aggressive in pursuing its claims, as were the opt-out plaintiffs. A retired judge was appointed as a special master to oversee discovery. Virtually all of his rulings — regardless of their significance — were appealed to the district court. We also went up to the Third Circuit numerous times during the course of the case, resulting in some widely cited decisions relating to work product issues and pleading standards for securities fraud claims.

The cases were ultimately settled favorably, but only after scores of depositions were taken, which were attended by scores of lawyers and presided over by the special master, whose presence did little to alleviate the high level of acrimony among the lawyers.

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

A: While the SEC Enforcement Division made great strides under the leadership of Robert Khuzami in the last few years, it could still benefit from heightened focus on some basic issues, notably the proof needed for the SEC to actually prevail in SEC enforcement actions. Too often, the SEC Enforcement Division recommends that the SEC bring civil actions when there is insufficient evidence to prove the purported violation. Such actions wreak havoc on the individuals and companies who are the respondents in these actions and result in wasted government resources. The Enforcement Division

About the Author

Terri Mazur is a partner in Kaye Scholer's Complex Commercial Litigation Department in New York. Her practice focuses on securities fraud litigation and regulation, primarily in the financial services industry. She also represents accounting firms in class and individual actions involving securities, professional responsibility, breach of fiduciary duty and insolvency claims. In addition, Mazur represents national and multinational corporations in monopoly, attempted monopoly, price-fixing, market allocation and conspiracy cases. She has successfully tried numerous cases and argued before appellate courts in federal and state courts across the country. She can be reached at ***terri.mazur@kayescholer.com***

This article originally appeared in *Law360* on April 26, 2013.

attorneys responsible for recommending that civil actions be brought would benefit from actually handling trials of some of these actions, as they would better understand the burden of proof requirements to enhance their initial evaluation of whether to bring actions in the first instance.

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

A: Whether the filing of a class action serves to extend the five-year statute of repose on securities claims continues to be an issue. While the Supreme Court squarely held that the filing of a class action tolls the statute of limitations in its 1974 decision in *American Pipe & Construction Co. v. Utah*, there is a split among the district courts as to whether it also tolls the statute of repose. The tolling of the statute of repose could have enormous consequences in securities class action litigation, including MBS securities litigation where courts have generally certified narrow classes, rather than the broad investor classes plaintiffs' counsel originally sought.

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

A: Caryn Jacobs of Winston & Strawn. Aside from her encyclopedic knowledge of securities law, she is an outstanding strategist and trial lawyer — a tremendous and tireless advocate for her clients.

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

A: I quickly learned how to control obstreperous lawyers by refusing to put up with opposing counsel's Wild-West antics during depositions and negotiations. My initial mistake was not to appreciate that many lawyers are showing off for their clients outside the courtroom, and that I could overcome the lawless space of the conference room by going right to the judge, or otherwise moving to compel rather than indulging the boorish behavior of a lawyer who needs the discipline of a court policing his or her conduct.

It is incredibly satisfying — and vindicating — to have a judge rule in your favor when opposing counsel is grandstanding. More importantly, being diligent in seeking a ruling promptly under these circumstances may lead you to secure important evidence for your case that may otherwise have never been brought to light, which is what happened in one of my cases. In the middle of a trial, we had to depose a previously unknown witness whom we suspected had knowledge of facts central to our clients' claims. As the questioning closed in on the particularly damaging area, opposing counsel became increasingly histrionic and began instructing the witness not to answer, asserting baseless privilege objections. Despite our best efforts, opposing counsel flatly refused to reconsider his position, and the witness (also a lawyer) abided by the instructions not to answer.

We decided we had to go to the judge immediately for a ruling, but by this time it was after 6:00pm and no one was answering the judge's phone. We sent an associate racing over to the federal courthouse to

find the judge, only to discover that the building had been locked for the day. Fortunately, a security guard heard the pounding and escorted the associate to the judge, who promptly got on the phone, overruled the objections and read the opposing lawyer the riot act for improperly instructing the witness not to answer. The judge then decided to sit in on the rest of the deposition via phone to make sure these antics were not repeated. Not surprisingly, opposing counsel toned down his conduct. We played the video of the deposition the next day in court and the jury was riveted — they ultimately returned a verdict in favor of our clients and commented that the testimony of this witness was very influential in their deliberations.