

Securities Group Of The Year: Cravath

By **Martin Bricketto**

Law360, New York (January 4, 2011) -- Helping Barnes & Noble Inc. secure a win in a bitter proxy fight, working at the forefront of transnational securities fraud litigation and winning a case with implications for third-party liability were among the successes last year that earned Cravath Swaine & Moore LLP a place among Law360's Securities Groups of 2010.

Those cases included shrinking a class of investors accusing Credit Suisse Group of hiding subprime lending risks and securing further court backing for an affirmative defense shielding PricewaterhouseCoopers LLP from a derivative action brought by American International Group Inc. shareholders.

The firm has about 15 litigation partners who devote a large amount of time to securities actions, though that number fluctuates depending on the volume of cases, a representative said. The practice is based in the firm's New York office.

Richard W. Clary, a partner in Cravath's litigation department, said the firm's securities practice was built on a deep and loyal client base and an ability to cover securities litigation from multiple perspectives.

Clary said Cravath represented not only the issuers of securities but advisers — such as underwriters and financial institutions, who are often sued as accessories — and accounting firms like PwC.

"I'm not sure how many other firms actually cover all three of those aspects of what I would call the core of securities litigation," Clary said.

Clary also highlighted the firm's presence in the courtroom, saying "it's not just a discovery and settlement practice."

"I think clients are looking for firms that are persuasive in court, and that are willing to go to trial if need be," Clary said. "It puts them in a stronger position, even in terms of settlement negotiations, to know that their firm can, in fact, take it all the way to trial."

Cravath helped secure a major win in Barnes & Noble's fight against billionaire Ronald Burkle when Vice Chancellor Leo Strine of Delaware Chancery Court ruled in August that a poison pill adopted by the bookseller was a good faith, reasonable response to a threat to the company and its stockholders.

Along with Potter Anderson & Corroon LLP, Cravath defended Barnes & Noble in the suit filed by Burkle's Yucaipa American Alliance Fund II LP, which accused the family of Chairman Leonard Riggio, the bookseller's largest shareholders, of treating the company as its "personal piggy bank" and adopting the poison pill to ward off Yucaipa's planned proxy challenge.

Yucaipa said that Riggio and other board members breached their fiduciary duty by adopting a poison pill provision triggered when any stockholder other than the Riggio family acquired 20 percent or more of the company's outstanding shares.

The poison pill, which exempts the Riggio family by grandfathering its 30 percent stake, effectively prohibits stockholders from cooperating with one another in connection with any proxy contest, Yucaipa said.

But Vice Chancellor Strine found that, even with the poison pill in place, Yucaipa could still win a proxy contest if it ran a “credible slate of candidates and articulates a sound business platform justifying the slate’s election.”

“Thus, the board’s decision to use the pill to ensure that Yucaipa could not acquire control while bypassing negotiations with the board was reasonable because it addressed that threat while leaving Yucaipa with a fair chance to prevail in a proxy contest,” he said.

According to the firm, the decision reaffirms the standard for reviewing challenges to poison pills, specifically those that include grandfather clauses.

Clary said Cravath's strong mergers and acquisitions practice makes the firm a natural candidate for such securities cases.

Also in 2010, for example, the firm represented Air Products and Chemicals Inc. in litigation in Delaware Chancery Court over its \$6 billion cash bid to buy all outstanding stock of Airgas Inc.

Air Products has accused Airgas' board of directors of breaching its fiduciary duties by rejecting that offer.

Cravath is also among the major firms in transnational securities fraud litigation, and has been at the forefront in applying the U.S. Supreme Court's landmark decision in *Morrison v. National Australia Bank Ltd.*, which banned so-called foreign-cubed securities litigation.

Cravath is representing Credit Suisse in a securities class action in the U.S. District Court for the Southern District of New York, in which the company was accused of making false and misleading statements about its business and financial results.

In 2009, the court threw out foreign shareholders who bought stock in Credit Suisse on foreign exchanges, but it allowed U.S. shareholders who bought stock abroad and any shareholders who bought American Depositary Shares on the New York Stock Exchange to pursue their claims.

Credit Suisse argued that the situation changed in June, when the Supreme Court's landmark *Morrison* decision set forth a new rule for determining extraterritorial application of U.S. securities law.

Investors who bought shares abroad should be dropped from the case in accordance with the new bright-line transactional test introduced in *Morrison*, Credit Suisse said.

In throwing out foreign-cubed plaintiffs — foreign shareholders who purchased their shares on a foreign exchange — the Supreme Court applied a different analysis from the one the U.S. Court of Appeals for the Second Circuit had used in dismissing such plaintiffs, according to Credit Suisse.

Instead of using a conduct and effects test as the Second Circuit had, the Supreme Court in *Morrison* ruled that the only issue was whether a shareholder had purchased a security listed on an American stock exchange or otherwise purchased the security in the U.S., Credit Suisse said.

In July, the court dismissed the securities fraud claims under Section 10(b) of the Securities Exchange Act of 1934 brought by U.S. plaintiffs who purchased stock on the Swiss Stock Exchange, according to the firm, which said the plaintiffs' class had been reduced to about 5 percent of its original size.

Cravath also played a role in the *Morrison* decision itself, having represented the United Kingdom in filing an amicus curiae brief in the case.

In that brief, cited favorably by Justice Antonin Scalia in his opinion for the majority, the U.K. urged the court to set a clear

rule limiting the extraterritorial application of Section 10(b).

The variety of perspectives the firm represents in securities litigation was evident in the derivative action against PricewaterhouseCoopers LLP, in which shareholders suing on behalf of AIG accused the accounting firm of negligence for failing to detect alleged fraud by the insurance giant's officers. The action set the stage for an important ruling on third-party liability.

Represented by Cravath, PwC won dismissal from the case in Delaware Chancery Court in 2009 after the court ruled that, under New York law, the claims against it were barred by the doctrine of in pari delicto, which prevents courts from wading into a legal dispute between two wrongdoers.

The plaintiffs appealed the decision to the Delaware Supreme Court, which certified to the New York court the question of whether in pari delicto would bar a claim in which a corporation sues its outside auditor for failing to detect fraud.

In October, the New York State Court of Appeals upheld the doctrine's application in the AIG case, part of a broader ruling that also addressed a lawsuit in which creditors of Refco Inc. accused the defunct commodities trading firm and several of its outside advisers and underwriters of fraud.

The firm said at the time that the court supported the doctrine as an affirmative defense to claims against auditors in such cases where, as the court stated, "a willful wrongdoer is suing someone who is alleged to be merely negligent" or "where both parties acted willfully."

King & Spalding also represented PwC.

Methodology: In mid-November Law360 solicited submissions from over 300 law firms for its practice group of the year series. The more than 400 submissions received were reviewed by a committee of four editors. Winners were selected based on the number of significant wins the group had in litigation or the size, number and complexity of deals the group worked on in 2010.

--Additional reporting by Megan Stride and Christopher Norton