

Banking Group Of The Year: Cravath

By **Dean Seal**

Law360 (January 23, 2019, 5:15 PM EST) -- Cravath Swaine & Moore LLP hit a heavy stride halfway through 2018 when New York's highest court sided with its argument for a three-year limit for bringing actions under a state anti-fraud law and, two weeks later, the nation's highest court affirmed its win for American Express Co. in a landmark antitrust enforcement case, landing it a spot among Law360's Banking Practice Groups of the Year.

Cravath, which is celebrating its bicentennial this year, saw its 2018 heat up by March when partner Richard Clary told the New York Court of Appeals that one of the most powerful laws in the state's arsenal can only be used against accused financial fraudsters for three years after any wrongdoing.

Clary argued against the state's \$11 billion suit accusing Credit Suisse of violating the Martin Act, a New York statute that provides the state attorney general with broad enforcement powers to combat securities fraud, over its issuance of residential mortgage-backed securities in the lead-up to the 2008 financial crisis.

After failing to get the case tossed in the lower and appellate courts, Credit Suisse was granted a shot at the state's high court to argue that the Martin Act creates new liabilities that didn't exist before the law was passed and thus cannot be viewed as a common law claim, which carries a six-year statute of limitations. It instead fits under the New York Civil Practice Law and Rules' section for causes of action created by statute, which carry a three-year limit, Clary said.

In a defining moment for the New York AG's ability to police the investment industry, the panel sided with Clary and dismissed the Martin Act claim on June 12.

Two weeks later, another high court found favor with Cravath's arguments. On June 25, the U.S. Supreme Court held that American Express did not violate federal antitrust law by preventing merchants from steering customers to other credit cards, marking a complete defense victory for Cravath and a precedent-setting result.

Cravath had represented American Express for more than a decade in the enforcement action first brought by the U.S. Department of Justice and more than a dozen states against AmEx, Visa and MasterCard over their practices of blocking merchants who accept their credit cards from steering



customers toward cheaper payment methods.

While Visa and MasterCard settled soon after the case was filed, Cravath "took the long view" of the antitrust case for AmEx, "understanding that this was an issue that was central to our client's business model," according to partner Kevin J. Orsini.

The firm's ultimately successful strategy was built on the two-sided market theory, Orsini said — that the value of the services AmEx provides to both merchants and cardholders increases along with the number of participants on both sides of a transaction, and any higher merchant fees are ultimately passed on to cardholders.

"We stuck with this approach following a loss at trial, through an appeal to the Supreme Court, and were vindicated with a decision in favor of AmEx that will shape how antitrust law is applied to two-sided markets, which are increasingly prevalent in today's business environment," Orsini said.

Things stayed hot for Cravath into July when a New York bankruptcy judge signed off on a settlement in which Credit Suisse agreed to reduce claims against Lehman Brothers Holdings Inc. over derivatives trades that went into default when Lehman filed the largest bankruptcy in U.S. history at the height of the financial crisis.

As one of the last remaining litigation matters in Lehman's Chapter 11 case, the bankruptcy estate had filed an adversary complaint to recover \$150 million from Credit Suisse for breaching the terms of their trading agreements and expunge or reduce the bank's claims related to losses from the early termination of 30,000 derivative trades.

Each of those complex trades was under the microscope when the case went into discovery, with Cravath defending more than a hundred depositions and staying focused on "putting our best foot forward on every trade" in what was shaping up to be an extensive trial, according to partner Omid Nasab.

"When you talk about 30,000 trades and you're talking about six months of trial, that is absolutely extraordinary and there are high costs for both sides," Nasab said. "Both sides have to factor in the cost of that kind of effort when they think about settlement."

A settlement was in the cards for the nearly decade-old case, with the sides agreeing to reduce Credit Suisse's roughly \$1.2 billion proof of claim against certain Lehman units to an aggregate allowed amount of \$385 million and reduced another claim against parent LBHI by \$789 million to \$363.7 million.

Approving the deal on July 25, U.S. Bankruptcy Judge Shelley C. Chapman called the resolution of the dispute "momentous."

Cravath's victories in 2018 weren't bound to the courtroom. In the same month the settlement for Credit Suisse's claims was approved, Australian plumbing and bathroom products supplier Reece International Pty. Ltd. closed a \$1.44 billion acquisition of a U.S. distributor that was made possible through financing coordinated by Cravath in its representation of JPMorgan Chase Bank.

Arranging \$1.24 billion in financing for the deal was no simple task, according to corporate managing partner Jed Zobitz, as the transaction was cross-border and necessitated both coordination with the National Australia Bank and for capital to be raised in several different currencies and jurisdictions.

Zobitz chose to use a structure he'd used before but that "hadn't really gotten a lot of traction in the U.S.," in which banks were able to hive off pieces of a credit revolver and execute them outside of the deal "while sharing in the collateral that supports this deal."

"It's only been used a few times, as far as I'm aware, in the U.S., so a big part of [the structure] was helping to get the market to understand it," Zobitz said. "The other part was just making sure it was set up in a way that worked for the company and gave them the ability to raise the money they needed and to run the business the way they needed to."

As an asset-based loan, the company's borrowing power was determined by the value of its collateral — a strong financing fit for a retailer with large amounts of accounts receivable and inventory like Reece and a prime example of the creative and customized structuring that Cravath can provide companies contemplating billion-dollar deals.

Whether it's hashing out a transaction on the corporate side or fighting through litigation, tailoring innovative strategies to the client was a cornerstone of Cravath's success last year, be it a pro bono case or one with billions of dollars on the line.

"You don't let the high dollar figures intimidate you and you focus relentlessly on formulating and executing on the best strategy for your client," Nasab said.

"It's the way we approach everything," Zobitz added.

--Additional reporting by Jack Newsham, Alex Wolf and Matthew Perlman. Editing by Marygrace Murphy.

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