

# LAWDRAGON

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## Lawyer Limelight: Richard Clary

By Katrina Dewey

Credit Suisse and Deutsche Bank found themselves in Conroe, Texas, in June.

Nasty time of year in Conroe, population 39,896. June 15, 98 degrees with 90 percent humidity.

And that was outside the courthouse.

Nasty year to be an international bank (let alone two) in front of a jury, accused of backing out of a deal involving syndication of debt.

The plaintiff was a Western chemical company, Huntsman, seeking nearly \$14 billion in damages against the banks for pulling the funding on Huntsman's acquisition by Hexion.

And, of course, here comes the fancy Wall Street lawyer to get all trussed up by the Texas trial bar.

At least that's how the story line was supposed to go.

Problem is, that Wall Street lawyer is actually from midtown and he is numero uno in defending banks in their biggest crises.

The banks chose wisely when they tapped Richard Clary, a Cravath Swaine & Moore partner who's making a career out of getting banks off the hook when they face catastrophe. He's the wizard who defeated \$40 billion in claims against the financial institutions that fueled Enron. While five banks handed over \$6.9 billion to settle claims against them, Clary on behalf of Credit Suisse labored through six years of litigation and 700 depositions, arguing for a narrow interpretation of "scheme liability" that would prevent Enron shareholders from suing.

He won that issue in the 5th Circuit, and helped seal that win authoring an amicus brief on behalf of seven of the country's most prominent transactional lawyers in the Stoneridge case, which constrained the ability of shareholders to sue third parties for a company's fraud.

We caught up with him a few days after he returned from Texas, from what was expected to be a six-week trial. Instead, after one week in court, Deutsche Bank and Credit Suisse agreed to pay Huntsman only \$316 million in cash from each bank and a \$1.1 billion loan to a Huntsman subsidiary, a fraction of the \$14 billion dollars sought by the plaintiffs.

G. Irvin Terrell of Baker & Botts worked with Clary to defend the banks, while Robin Gibbs of Gibbs & Bruns represented Huntsman.

Once home, Clary celebrated by driving to Yale with his wife to surprise their kids, who were attending Squash Camp there.

**Lawdragon:** The banks must be thrilled with this result.

**Richard Clary:** It's a spectacular result for the banks.

**LD:** Can you tell me what significance you think this has for other banks that are contemplating whether to settle lawsuits in this testy time?

**RC:** I think what the banks demonstrated in



Photo by Hugh Williams

the Huntsman/Hexion litigation – and in Enron – was that it is possible for banks to get a fair hearing, from the judiciary and from a jury, and that it is important not to get intimidated or railroaded into an early, expensive settlement. We had good defenses, and by forcefully litigating those defenses we were able to whittle down the case and eventually produce a much cheaper settlement than Huntsman and many analysts were predicting.

**LD:** I read a story questioning whether this really was a big victory for the banks. Can you explain what that missed?

**RC:** The way Huntsman described the settlement focused on the total \$1.7 billion number by adding in the face amount of the two debt facilities. What's missing is that those have to be repaid to the banks, with interest. Really in terms of actual cash paid, the settlement was \$316 million in cash per bank contrasted with \$4.6 billion in damages plus a claim for punitive damages of up to \$9.2 billion, a total of potentially \$14 billion.

There was a good indication of how to view the settlement on a Huntsman shareholder blog. The market reaction to the settlement reflects how we view the settlements as good for the banks, and not what Huntsman had predicted going into the trial.

**LD:** When did you get involved in this case and what were the different pieces of the case?

**RC:** We first got involved July of last year (2008) after Apollo sued Huntsman in Delaware and Huntsman served nonparty discovery on Deutsche Bank and Credit Suisse. The banks got sued by Huntsman on Sept. 30, the day after Huntsman won in Delaware, and it's been nonstop ever since. We had the lead in the Delaware, New York and Texas cases for the banks, with excellent help from Irv Terrell (of Baker Botts) and his team as co lead counsel in Texas.

The Delaware case was essentially over when Chancellor Stephen Lamb ruled in favor of

Huntsman. [He found the declining economy did not fit the definition of a material adverse effect that excused Apollo and Hexion from completing the merger with Huntsman.] The only thing left was the damages case against Apollo, which was on the hook for billions in damages in Delaware and Texas. When Apollo settled for \$1 billion with Huntsman in December, that ended the Delaware and Texas cases against Apollo.

At the end of October, when the banks didn't fund the transaction, Hexion sued the banks in New York. We defeated a temporary restraining order and preliminary injunction in front of Justice Eileen Bransten in New York Supreme Court, Commercial Division. She ruled that Hexion did not have a likelihood of success on the merits that the banks breached the commitment letter by not funding because the banks were likely to show the combined entity to be funded would be insolvent. Justice Bransten ordered an expedited trial on that issue, which would have been decided before the Texas trial. So Huntsman made it a condition of the Apollo settlement that Hexion dismiss the New York case because they were concerned the banks could win in New York on insolvency.

So Hexion dismissed all its claims against the banks with prejudice. As part of the settlement in Texas, Huntsman dismissed all its claims with prejudice. So the only piece of litigation left is that the banks still have a counterclaim against Hexion in New York. Hexion owes the banks all their attorney fees and costs from Delaware, New York and Texas under the indemnity provisions of the original commitment letter.

**LD:** Will you say how much those remaining claims are for?

**RC:** It's in the tens of millions of dollars. Hexion's lawyer said on the record in New York they were going to pay the attorney's fees, but now it appears Hexion will be fighting that counterclaim. One of my younger partners will handle that one.

**LD:** You seem to be the litigator banks should call when they're in trouble.

**RC:** Having done the Enron litigation from 2002-2008 and now this for a year, I think I've done very well for Credit Suisse and other banks who have been repeatedly targeted because they are banks.

**LD:** What was your strategy in containing the banks' exposure in the Huntsman case?

**RC:** There were two major components to the litigation. At the beginning, we had to defeat efforts by Huntsman and Hexion to extend the commitment letter.

The commitment letter by its terms expired November 1, 2008. Huntsman in Texas tried to get the date extended to get more time to change the terms of the merger. We defeated that in a temporary injunction evidentiary hearing in October. Judge Fred Edwards ruled he would not change the terms of the commitment letter because Huntsman wasn't a party to it. Later in October, both Huntsman and Hexion together filed a motion in the Delaware court, after we defeated the Texas motion, asking the Delaware court to make a ruling that would have extended the commitment letter.

As a non party we filed papers, and persuaded the judge he shouldn't be changing the terms of the commitment letter because the New York Court was the exclusive forum. At the end of October, Hexion tried to get the New York Court to extend the commitment letter or order the banks to fund the merger. That's when Justice

Bransten ruled that Hexion had not established a likelihood of success.

**LD:** So did the commitment letter expire then?

**RC:** Exactly. The commitment letter expired, and then it became a fight over damages. At the Texas trial, our big focus was on solvency. We wouldn't have been sued but for the fact we didn't fund. And we didn't fund because of solvency. The banks believed the combined entity would not be solvent.

Our goal at trial and my opening statement heavily emphasized deterioration of Huntsman's and Hexion's businesses. Everything in the economy, in the June to October 2008 timeframe, the country, the world, the chemical industry went into a recession. That change in the economic environment created a solvency issue that had not been there when the world was different. It rendered all the prior projections unrealistic.

Huntsman argued that there were numerous secret assurances and side agreements. So the other part of the defense was to explain to the jury how these deals actually happen – that there's a commitment letter, and as you move to syndication sometimes changes have to be made to the commitment letter to permit syndication. The documents were about all the normal give and take between borrowers and banks that's required to have a successful deal 15 months down the road. Nothing that was sinister or harmful to Huntsman. All were about issues to help syndication if the merger is closed

and financing happens. If it doesn't close, there's no debt to syndicate.

**LD:** What's it like trying to explain that to a jury?

**RC:** It's a tricky task. A tough assignment. We had a good jury in terms of people who were really focused, paying attention, taking a lot of notes, trying to understand all these different aspects. It was a very complicated deal. Even with all MBA's on the jury, it would have been a difficult task for both sides. Lots of education had to go on. Other than the opening statement, the jurors were only hearing our part of the case through cross examination up to the point of settlement.

**LD:** It sounds like you use a teaching style to convey what it is banks do.

**RC:** Very much so. The issue is how to simplify in a way that's still accurate. And how to make jurors comfortable. For instance, if you look at the opening statement, I tried to use examples from home mortgages and termite inspection certificates, things jurors might have more personal experience and familiarity with than a debt financing deal.

**LD:** Do you ever get a break?

**RC:** I haven't had a real vacation since Enron started in 2002. I've tried to squeeze in a week here or there, but they've all been peppered with conference calls and faxes.

**LD:** You could vacation in Texas?

**RC:** I've done very well there over the past seven or eight years. But I think we'll go somewhere else.

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