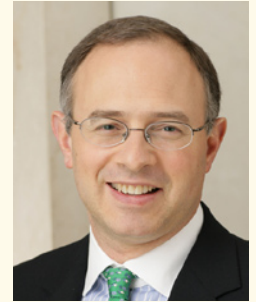


Litigator of the Week: Lawrence Portnoy of Davis Polk & Wardwell

By Susan Beck



Ten years ago, Credit Suisse was hit with 14 class actions in the wake of investigations into the independence of stock analysts. Emails and other evidence had emerged suggesting that analysts at Credit Suisse and other investment firms gave overly rosy reports about companies in the hopes of enhancing their business ties to those companies. Last week, Credit Suisse saw the last of those cases disappear when Boston federal district court judge Nathaniel Gorton granted summary judgment to Credit Suisse and four individuals, wiping out a shareholder fraud suit by investors who lost money on AOL-Time Warner stock.

For Credit Suisse's lead lawyer for all of these cases, Lawrence Portnoy of Davis Polk & Wardwell, it was the end of a long and successful campaign. All but two of the 14 cases were dismissed or won by the company on summary judgment. The remaining two settled for small amounts.

The AOL case proved to be an especially tough battle. Filed in 2002, the suit alleged that shareholders were deceived into buying the company's stock when AOL and Time Warner merged, swayed by Credit Suisse's overly optimistic and intentionally misleading reports. (In 2003 Credit Suisse agreed to pay \$200 million to settle Securities and Exchange Commission charges that it issued misleading research reports on companies.)

Portnoy and his team at the start identified loss causation as their most compelling defense--the plaintiffs would have a hard time showing that any misrepresentation by Credit Suisse caused the plaintiffs' loss, given the wealth of sources of information about the company. "Even if you put aside the content of the emails and reports, we thought we could prove there was no market impact," said Portnoy, who worked closely with counsel Daniel Schwartz and former partner Avi Gesser, who is now at the Department of Justice.

Still, the case law at the time wasn't as clear as the Davis Polk team would have liked. "At the outset of this case there was not a well-developed body of loss causation law," said Davis Polk's Schwartz. "There was no Supreme Court decision on point. That

ruling came down in the middle of the case," he said, referring to the court's 2005 decision in Dura Pharmaceuticals.

But Boston federal district court judge Nancy Gertner, who was then presiding over the case, denied the defendants' motion to dismiss in 2006, and two years later she certified a class. In August 2011 she provisionally denied the defendants' motions for summary judgment. "We did face some headwind," Portnoy acknowledges.

The dynamics of the case shifted last fall when Judge Gertner retired from the bench and Judge Gorton took over. The new judge quickly scheduled a Daubert hearing on Credit Suisse's motion to exclude the testimony of plaintiffs' economics expert, Dr. Scott Hakala. Portnoy argued that Hakala had improperly prepared a study to measure the impact of the defendants' allegedly fraudulent statements on AOL's stock price. "These kinds of reports and analyses are highly technical and specialized," said Portnoy. "A key part of the effort is to dig in and fully understand what the the economic expert is purporting to do and take on the expert at the level of an expert. . . . You really do have to get your hands very dirty digging into the facts and the expert analysis."

Judge Gorton held the Daubert hearing in December, and issued his 29-page ruling within a month. Not only did he exclude Hakala's testimony, but he granted summary judgment to Credit Suisse. Finding that the expert had used the wrong methodology, Judge Gorton concluded that the plaintiffs failed to present triable issues of fact on loss causation. He also granted summary judgment to the four individual defendants, including former Credit Suisse investment banker Frank Quattrone, who is represented by Kenneth Hausman of Arnold & Porter.

Portnoy doesn't believe that their fortunes turned on the appearance of a new judge. "I have no reason to believe Judge Gertner would not have issued the same ruling in a Daubert hearing," he said. Instead, he said, this case shows the power of perseverance. "This case is a good lesson that when you have a good argument, even when you meet initial resistance, if you keep pushing you can often prevail."