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Q&A With McKool Smith's Michael Swartz

Law360, New York (March 26, 2013, 12:42 PM ET) -- Michael Swartz is a principal in McKool Smith PC's Los Angeles office who focuses on complex commercial disputes, particularly securities litigation. In courts across the United States, he has represented various investment funds and institutional investors in pursuing securities fraud claims and in appraisal and valuation actions.

Swartz has also represented individuals and corporations in commercial litigation, including the prosecution and defense of claims for breach of contract and breach of fiduciary duty, as well as prosecution of claims for misappropriation of trade secrets. In addition, he has represented debtors and creditors in an array of bankruptcy litigation matters, including fraudulent transfer disputes and objections to confirmation of plans of reorganization.

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

A: OCM Capital v. CIBC was a particularly challenging securities fraud case that we tried over a four-week period in Los Angeles Superior Court. We represented a group of investment funds that had purchased high yield bonds in the secondary market many months after the alleged misstatements in the initial offering materials.

We had to prove that the offering materials had misrepresented material financial information that remained undisclosed in a stream of negative disclosures about the company's financial condition after the initial offering and before our clients' purchases. We found a spreadsheet that allowed us to argue that the defendants knew the financial projections were inflated. On the witness stand, our clients withstood days of cross-examination and showed themselves to be intelligent and honest victims of a fraud.

After four weeks of deliberations and a lengthy string of perplexing jury questions, the jury saw it our way and awarded our clients the full amount of their losses. Or at least that was our reading of an arguably ambiguous verdict. First, we persuaded the trial court that the verdict meant what we thought. Then, we prevailed on an appeal that confirmed that result and a cross-appeal that added prejudgment interest to the award.

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

A: In securities litigation and almost everyone's practice area, we need more uniform rules for the handling of electronic data. Otherwise, we'll all eventually drown in emails and fights over emails. I applaud the various court systems that are providing more guidance and encouraging more useable productions that include metadata. I just wish the guidance would come sooner and more uniformly.

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

A: Connecticut v. Amgen is an important recent decision in the securities arena. We are co-counsel for the plaintiff class. The trial court certified the class, and the Ninth Circuit affirmed. The U.S. Supreme Court granted the defendant's cert petition, but it too recently affirmed 6 to 3 in an opinion by Justice Ginsburg.

The court decided that a class representative in a 10b-5 case does not have to demonstrate at the certification stage that the alleged misrepresentation was material. This is important because imposing the additional burden of proving materiality at the certification stage would have given a huge edge to defendants.

A contrary ruling would have required a premature mini-trial on the merits at the certification stage of all securities class actions with respect to an issue (materiality) where the defendant would otherwise likely be unable to prevail at summary judgment. The decision had particular importance to me because we are co-counsel for the plaintiff class, and because I had told people that I expected the Supreme Court to affirm.

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

A: I am very impressed by Kathy Patrick of Gibbs & Bruns. I sat through two weeks of depositions taken by Kathy with regard to the operations of a steel-producing mini-mill. In preparation, she had spent endless hours with an expert to build her technical vocabulary and gain understanding of the mill's components, operations and risks. During the depositions, the witnesses were, I believe, more forthcoming and direct in providing critical information because Kathy's questions were asked with proper usage of precise technical terms. She also concluded that one of the witnesses liked military metaphors, and she obtained helpful information by sprinkling Vietnam War references into her questions. I've worked with Kathy on other matters since that time, and she is always smart, well prepared and insightful.

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

A: Early on in my career, I made the mistake of treating my adversary in one matter like my enemy in all contexts. Near the end of a long, hard-fought case, opposing counsel sent us a referral for a contingent representation. The proffered case sounded like an expensive, time-consuming investment in a near-certain loser of a claim. My opponent who was providing the referral, of course, had no idea that the new case would not interest us. And I absurdly acted offended that a few minutes of my time were consumed exploring the opportunity.

My behavior was stupid on many levels, and I have apologized multiple times since then. It taught me a valuable lesson: be careful when deciding that someone is your enemy. They may be your friend. And years later, when you see your former adversary at events for your middle school children, it's best not to be kicking yourself for your poor behavior.

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