

Q&A With McKool Smith's Gayle Klein

Law360, New York (May 23, 2013, 3:49 PM ET) -- Gayle R. Klein is a principal in McKool Smith's New York office. She focuses on business and securities litigation, particularly including disputes involving complex financial transactions, breaches of fiduciary duty, theft of trade secrets, and restrictive covenants contained in employment agreements. She also has extensive experience defending against consumer class actions. Klein regularly litigates against financial institutions and is co-chairman of McKool Smith's mortgage-backed securities task force.

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

A: The year I was up for partner at my former firm, I joined the trial team as the senior associate on behalf of the plaintiff, Excite@Home Bondholders Liquidating Trust, in a case that was on a fast track to trial. The case was factually and legally complex, as it was both a breach of fiduciary duty by board members, as well as a technical trade secret misappropriation case against the company with which they were affiliated.

Excite@Home alleged that certain board members, who were affiliated with an investor, which controlled Excite@Home's board of directors, not only breached its fiduciary duties, but that the investor also misappropriated Excite@Home's trade secrets in connection with the building of a high-speed network to replace Excite@Home's when it filed for bankruptcy in September 2001. Thus, we had to prepare essentially two related but entirely distinct claims for a jury. Moreover, although working on the case and preparing for trial was very rewarding, I also found it personally challenging. In addition to the stress of being up for partner, I ended up spending most of the year in New York, where our lead trial counsel was based, Northern California, where the case was pending and Excite@Home had been based, or on a plane between them or traveling to my home, which at the time was in Texas.

But all is well that ends well; on the eve of trial, the parties settled, Excite@Home received \$400 million, I was elected partner, and I got to enjoy the benefits of being Executive Platinum on American Airlines the next year.

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

A: Electronic discovery has become a bane of the litigator's (and our clients') existence. If you had told me when I started 16 years ago that in the future, I would appreciate all of those days spent looking through dusty boxes of documents in warehouses with mice, I would have told you that you were nuts. However, electronic discovery is too expensive in terms of cost of vendors, attorney collection and review, and client resources. Additionally, it consumes too much of a newer attorney's time, which forces her to spend less time learning and practicing other essential trial skills.

Understanding the facts of a case is essential to preparing, but I would like to see electronic discovery and preservation obligations reformed so that first through third-year lawyers are spending less time looking for needles in haystacks and more time learning about developing strategies and practicing skills to implement them.

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

A: The issue of when the statute of limitations begins to run for an obligor's failure to repurchase loans in mortgage-backed securities for noncompliance with contractual representations and warranties ("put-back claims") is an important and relevant issue to my practice. Because repurchasing a loan when it fails to comply with representations and warranties is an independent contractual obligation, the claims should accrue when an obligor fails to repurchase. However, many obligors have moved to dismiss these claims on the basis that the statute of limitations begins to run on the closing date of the transaction.

Courts have ruled differently on this issue in various jurisdictions across the United States. The issue has now been briefed in two matters pending in the commercial division in New York Supreme Court, which is a jurisdiction where many put-back lawsuits have been filed. McKool Smith has filed a brief as amicus curae on the issue on behalf of the Association of Mortgage Investors in one of them, *Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2005-S4, by HSBC Bank USA, v. Nomura Credit & Capital*, Index No. 653541/2011.

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

A: I have always had considerable respect for Joseph Allerhand at Weil Gotshal & Manges. Joseph was the lead lawyer on the matter described above, and I have looked at him as a mentor since our handling of the case. Joseph is a master of legal theory and strategy and has a gift at zeroing in on the issues that really matter. And, as a mentor, Joseph always pushed me to do my best by asking challenging questions and encouraging me to look at problems from every angle to find the most appropriate solution.

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

A: As a third-year lawyer, the deadline for responding to discovery on a case somehow did not reach my calendar. I realized this for the first time three days beyond the deadline. The first item in the requests for admission was, "Admit all of the allegations contained in the complaint are true and correct," and opposing counsel was Hal "Rattlesnake" Gillespie. My heart sunk. I was convinced that someone who called himself "Rattlesnake" (that was the name on his business card, with a drawing of a rattlesnake for emphasis) would capitalize on my mistake. I still vividly recall the feeling at that moment in time, convinced that my short career in law was over. To my pleasant surprise, Mr. Gillespie was gracious and kind, immediately agreeing to an extension of time. I learned from that mistake that any litigator can unintentionally miss a deadline, and that granting reasonable extensions whenever possible is not only the right thing to do, but is also good litigation karma.

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