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# LAWDRAGON

## The Lawdragon 500 Lawyer Limelight: Brian Pastuszewski



*Photo by Ken Richardson*

Financial institutions caught up in the economic crisis that hit in 2007 have faced an avalanche of legal claims for the past decade. Among the litigators who have stood out on the defense side is [Brian Pastuszewski](#), who secured a number of key victories for client Countrywide Financial Corp., including a win before the Delaware Supreme Court involving post-merger standing to assert shareholder derivative claims and in cases involving mortgage-backed securities. (Bank of America acquired Countrywide in 2008.) His MBS-related cases are virtually all over with, says Pastuszewski, a perennial Lawdragon 500 member who co-chairs [Goodwin](#)'s securities litigation and SEC enforcement group from the firm's New York office.

The veteran litigator, who received his J.D. from [Cornell Law School](#) in 1981, considers himself fortunate to have worked on the historic litigation and is now back to his more diverse mix of securities cases.

**Lawdragon:** How did you first become interested in having a practice focused on financial litigation matters?

**Brian Pastuszewski:** The complexity of the issues appealed to me. Both procedurally and substantively, securities cases challenge a litigator like few others. They require mastery of intellectually difficult concepts, yet at the same time put a premium on simplicity and clarity. A good securities litigator must take these abstruse concepts and explain in plain, simple English why they require the court to rule in your client's favor.

In addition, because of the typically very large financial stakes involved, and the fact that securities complaints routinely name senior management and directors personally, these cases trigger a high level of client engagement. That interaction is very satisfying professionally.

**LD:** What is your practice like now?

**BP:** For roughly nine years my team and I focused on defending securities cases stemming from the credit markets crisis that began in late 2007. These cases have included class actions, individual institutional investor suits, and shareholder derivative litigation. And the vast bulk of them have involved many billions of dollars in mortgage-backed securities issued in the years leading up to the credit crisis.

I consider myself very lucky to have had the opportunity to work on these cases. They have been among the most procedurally and substantively complex cases the courts in this country have seen, involving novel standing, tolling, and statute of repose/limitations issues and the interplay among them. And many of the legal rulings we achieved for our clients in these cases were groundbreaking and helped shape the development of the law nationally in these areas. Virtually all of these cases have been

dismissed or otherwise resolved now, and my case load has become more diverse than it had been over the previous several years. I am now defending a range of matters, including securities class-action cases against syndicates of investment banks that underwrote large public securities offerings; securities class-action cases against publicly traded technology, biotech, and pharmaceutical companies for allegedly making misstatements to investors; and shareholder derivative claims alleging that boards of directors breached their fiduciary duties to shareholders – including one case that challenged how compensation of non-employee directors was determined. A recent decision in that case (*Calma v. Citrix Systems, Inc.*) from the Chancery Court in Delaware is likely to have implications for all Delaware corporations in the years ahead.

**LD:** Are there trends you are seeing in the securities litigation practice?

**BP:** I expect that we will continue to see large numbers of securities class-action cases that target biotech, pharmaceutical, and healthcare companies – in the case of the biotechs, unless and until the public market for new securities offerings by these companies shuts down again. I also expect an increasing number of suits against foreign issuers of securities, including but not limited to Chinese issuers.

We also have observed an uptick in the number of cases concerning securities offerings that name underwriters (in addition to the issuers themselves). And we are seeing an increase in cases alleging violations of Item 303 of SEC Regulation S-K, which requires disclosure in periodic reports filed with the SEC and in securities offering

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documents of known trends that can reasonably be expected to have a material impact on revenues or earnings.

And recent developments in Delaware suggest that in the future a greater number of suits challenging merger and acquisition transactions may get filed in federal court as opposed to the primary court historically for such matters, the Delaware Court of Chancery. Rulings recently from that court, including in particular one earlier this year from Chancellor Andre Bouchard in the Trulia-Zillow merger case, appear to have significantly limited the availability in Delaware of a much-used vehicle for settling M&A suits: the “disclosure-only” settlement, in which the target agrees to enhanced shareholder disclosure in exchange for dismissal of the suit and a release of claims without alteration of the substantive deal terms. In the wake of these rulings, the number of M&A suits filed in federal court has spiked recently. Whether this is a long-term trend or a temporary blip remains to be seen.

One thing is for sure – in my more than 30 years defending securities litigation, it has

never been very long before “the next big thing” becomes the focus of securities class action suits.

**LD:** Can you go into detail on a recent case?

**BP:** I represent a syndicate of investment banks that underwrote a several hundred million-dollar secondary offering for a leading pharmaceutical company. The FDA temporarily suspended the marketing of this company’s flagship drug product when additional clinical trial data sent to the FDA after the offering raised questions about the drug’s safety. The company’s stock price dropped more than 90% from its class-period high on this news, and investors sued, alleging that the secondary offering materials failed to disclose the supposed upward trend in the incidence of serious adverse health events. The underwriters were sued under the Securities Act of 1933, which imposes liability for material misstatements or misleading omissions in public offering documents and does not require a class action plaintiff to plead or prove intent to defraud.

We successfully argued to the federal district court that all claims against the

underwriters should be dismissed with prejudice. The court agreed with us that even though a plaintiff-friendly pleading standard applied to the plaintiff's claims, the complaint failed to allege a sufficient factual basis for the court plausibly to infer that the clinical trial data that ultimately led the FDA to suspend marketing of the drug showed a material increase in serious adverse health events as of the date of the secondary offering (as opposed to events that occurred later in the trial period, after the offering).

**LD:** What were the key challenges of litigating the case for your clients?

**BP:** Whenever an issuer's stock price drops more than 90%, that makes for a challenging securities class action case to defend.

**LD:** What do you expect the impact of the case to be?

**BP:** In addition to the argument on which we won in the district court, we also argued that the case should be dismissed because the plaintiffs lacked statutory standing to bring their claims, having failed to allege facts sufficient to support an inference that the shares they bought had been issued in the secondary offering they were challenging as opposed to any of the several prior securities offerings this issuer had done. The 1933 Act requires that a plaintiff suing for violation of the Act have bought securities issued pursuant to the same offering materials being challenged as false or misleading. One part of our argument was grounded in the stricter pleading requirements for plaintiffs that the U.S. Supreme Court adopted a few years ago in the *Twombly* and *Iqbal* cases – an argument that is still evolving as applied to allegations of statutory standing under the 1933 Act. We are waiting now for a ruling from the appellate court in this

matter – an affirmance of the dismissal based on lack of statutory standing could be a very positive development for the financial industry.

**LD:** As co-chair of your practice, are there challenges you face in your current leadership role?

**BP:** Practicing law has become intensely competitive. There are many fine firms in New York, Boston and other major cities that defend securities litigation suits and SEC enforcement matters. Clients have their pick. Our job at Goodwin is to deliver best-in-class results and be absolutely responsive to our clients' needs on a 24/7 basis, but also deliver that level of service at a cost the client considers a good value. Clients increasingly are unwilling to pay standard hourly rates and have pushed the legal industry to use alternative billing arrangements.

At Goodwin, we have worked hard to get ahead of this with our clients by taking a "client risk perspective" in our pricing. We have a group dedicated solely to helping us propose and manage alternative fee arrangements, which in part involves maintaining a comprehensive database of what matters and phases of matters typically cost. And we have hired senior operations personnel who have worked in the client world and who now work side-by-side with our partners on creating pricing that is predictable and transparent and creates a partnership with our clients through shared risk.

In our experience, many clients favor fixed-fee arrangements through which the cost of a phase of a case is agreed on in advance. Clients like the financial predictability of such arrangements, and our firm has become a leader in the industry in the use of such arrangements.