LAWDRAGON

Securities Litigation Leader Brian Pastuszenski Discusses The Current Practice Horizon

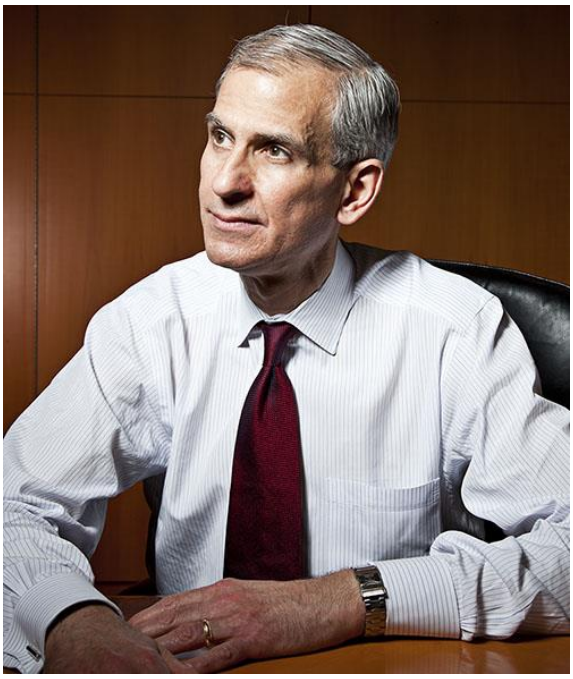

Photo by Ken Richardson.

If you had to pick one lawyer who epitomizes elite securities litigation defense, you could do no better than Goodwin's Brian Pastuszenski. He's led the defense of billions of dollars in claims for more than 30 years. His practice went supernova with the financial crisis, when he was tapped to lead Countrywide's defense in residential mortgage-backed securities litigation. He also excels at a broader range of financial institution counseling and internal investigations.

An astute thinker and appellate lawyer in his area, we talked to him about the claims he's seeing these days, including the rise in securities litigation in the pharmaceutical and life sciences industry. He also shares the lessons he's learned, starting with his Rhode Island clerkship through cases lost and largely won.

Lawdragon: Brian, you had such an influential role in the resolution of the mortgage-backed securities litigation wave of the past 10 years, and all the cases in this area that came before. What's keeping you busy these days? Are there new trends in your practice?

Brian Pastuszenski: My current case load is a mix of matters for large financial institutions and publicly-traded operating companies in the technology and pharmaceutical industries. For example, I am currently defending numerous cases in which syndicates of investment banks have been sued over alleged misstatements and omissions in offering documents for initial or secondary public offerings that these banks underwrote. These suits allege violations of the Securities Act of 1933; some were filed in state court and some in federal court.

Recently, we succeeded in obtaining affirmance on appeal of the dismissal with prejudice of one of these cases (involving a more-than-$300-million secondary public offering). The federal Court of Appeals adopted a novel statutory standing argument that we made on behalf of the underwriting syndicate, ruling that the standard boilerplate words that appear in virtually every '33 Act complaint (*i.e.*, that the securities were bought "pursuant or traceable to" the challenged offering) are no longer sufficient to plead standing in the wake of the U.S. Supreme Court's *Twombly* and *Iqbal* decisions a few years ago, which require plaintiffs to plead at least some facts showing a plausible claim for relief.
The cases I am defending for underwriting syndicates have been filed in various courts around the country, from California to New Jersey to Delaware.

I also have been representing companies accused of securities law violations stemming from the discovery of payments made to government officials in foreign countries that are potentially improper under the Foreign Corrupt Practices Act. The plaintiffs' securities bar has been filing an increasing number of

cases with this profile, alleging among other things that company disclosures about the adequacy of internal financial and disclosure controls were knowingly false when made. In one of my cases recently, we filed a motion to strike allegations in the complaint attributed to a so-called "confidential witness" – a former employee of my client – after that person had disavowed the statements allegedly attributed to him. Securities class action complaints are routinely supported these days by statements allegedly attributed to one or more former employees of the defendant company. And courts have been eyeing this type of allegation with greater skepticism and caution due to several high-profile cases in which such allegations have been repudiated by these "confidential witnesses" after being included in a complaint.

LD: What other trends are you seeing?

BP: The number of securities class action cases filed against biotech and pharmaceutical companies continues to grow. According to Cornerstone Research, suits against companies in the life sciences space represented nearly percent of all first-half 2017 federal court securities class action filings, and more than twice as many such suits were filed in that period than in the first half of 2016. Because of the uncertainties and delays these companies routinely experience when going through the FDA approval process for new drugs, therapies or devices, these issuers are an attractive target for suits.

Over the past few years the percentage of securities class action suits challenging public offerings in which the underwriting syndicates are named as defendants in addition to the issuer has gone up materially as well. Whether this will continue remains to be seen. And there has been an increase in recent years in the number of securities class actions following issuers' announcement of the commencement or resolution of a regulatory investigation or government enforcement action.

LD: What was your path to leadership in the securities litigation practice?

BP: Before joining Goodwin, I had chaired the securities litigation practice at a large firm that focused on representing clients in the technology, biotechnology, and private equity spaces (a firm whose doors we closed more than a decade ago). I did quite a bit of work at that firm for one of the country's leading mutual fund organizations, but at the time the percentage of litigation work I did for financial industry clients was not nearly as significant as it is today.

I moved to Goodwin when my previous firm ceased operations. Goodwin has one of the largest practices of any law firm in the country in the technology, biotechnology and pharmaceutical, and venture capital/private equity industries (thus mirroring my previous firm in that respect). But Goodwin is also a leader in representing the needs of the financial industry. And with our growing international footprint (with offices in the major money centers in the U.S. as well as in the UK, France, Germany and Hong Kong), we are able to meet the needs of our clients globally.

LD: Are there lessons you would offer from victory and defeat from your remarkable record defending securities class actions?

BP: Develop a healthy sense of humility. One should never, ever underestimate one's opponent. Even if the briefs filed by your opponent leading up to an argument may be lackluster, your opponent's oral presentation in the courtroom may be much better, pulling the threads together and capturing the court's attention. Entering an argument with an arrogant feeling of superiority about one's own briefs and the arguments in them may lead to a very unpleasant outcome.

Avoid arrogance in the courtroom. The Court makes the decision, not the lawyers. No matter how good you may be (or think your arguments may be), the outcome will be dictated by whether you persuade the court, not how impressed you may be with yourself.

Listen and observe. The difference between winning and losing an argument may turn less on how well you wrote your briefs and more on answering a question posed by the Court during the hearing that reflects it did not understand or is troubled by something in your briefs. An advocate who directly addresses the questions the Court poses and provides compelling responses has an advantage. Similarly, observe the "body language" of the judge or panel you are addressing. That may clue you in to a point that requires elaboration or explanation.

LD: Those are all important lessons, from which almost all lawyers could benefit. Any others?

BP: Learn from your mistakes. When you lose an argument, ask yourself why. It could simply be that the judge was predisposed to a particular outcome, perhaps deciding at the outset who the "white hats" and the "black hats" are. That does happen, though I think rarely. But it also could be your own written or oral advocacy, including overall strategy. Your failures may help you identify decisions you made or

things you did that you should strive to avoid or improve the next time.

There are many, many excellent lawyers who practice in the same areas you do and who are vying for the same client work that you are trying to get. In this competitive business, one must strive fresh every day to be one's very best. Past victories demonstrate what you were capable of then, but each day you need to prove yourself anew.

LD: Do you have any special routines before or during a trial or appellate argument?

BP: It may sound trite, but yes – prepare, prepare, prepare. For example, when I get ready to argue an appeal, I start by re-reading all the briefs in the trial Court as well as on appeal. I re-read all the significant cases and other authorities cited in those briefs. And I re-read all the key passages in the exhibits. I want to know the record cold – better than the clerks who prepare the bench memoranda for the judges on the panel, and better than my opponent.

I once argued an appeal in a federal Court of Appeals where my opponent was a legend in the bar. My opponent commanded the respect of the panel. But after mis-citing the record in one instance and not knowing where an issue was addressed in the record in another instance, my opponent lost whatever benefit of the doubt the panel was prepared to afford this lawyer coming into that courtroom. Lack of preparation can be fatal. Although perhaps not due to those missteps, we did win that appeal too.

Once I have done my foundational reading, I step back – and think. I try to anticipate all the arguments that my opponent is likely to make, as well as all the tough questions that the panel conceivably might ask me. I then try to develop the most persuasive responses to those arguments and to those questions. If I do my job well, there should be no surprises once I enter the courtroom and the argument begins.

I then draft – and redraft – a "roadmap." This roadmap is a set of increasingly refined and increasingly compressed "talking points" that are intended to identify for the Court at the very outset of the argument the core points I intend to address and, more important, the bottom line reasons – in the law, the facts, or both – why the panel should rule in my client's favor. Appellate arguments are typically not long, and one needs immediately to focus the Court on the points critical to the affirmance or reversal that one is seeking.

LD: Was your judicial clerkship helpful in building early awareness of courtroom tactics?

BP: I clerked for the chief judge of the Federal District Court in Rhode Island, Raymond Pettine. Judge Pettine was a phenomenal teacher and mentor who cared deeply about his clerks. He called all us clerks "his family." He also was a legendary jurist. He often found himself in the spotlight because of decisions that were viewed as controversial, including one ruling shutting down the Rhode Island prison system and his later decision holding that the use of public funds to sponsor a municipal nativity scene at Christmas was an unconstitutional endorsement of religion.

Unlike some clerkships, working for Judge Pettine involved much more than finding case law citations to support the opinions and rulings the Court intended to issue. Although we clerks spent much time in the law library, we also accompanied the Judge in the courtroom during bench trials and then prepared draft bench decisions for the Judge's review; we also did the initial drafts of decisions on motions to dismiss and motions for summary judgment after conferring with the Judge about the merits of the litigants' arguments. I learned much about good legal writing during the year I spent working with this thoughtful man (a humbling experience as I witnessed the process by which initial drafts – after heavy editing! – became published decisions).

Of all the lessons learned from that special year, the one that stands out in my mind as potentially most valuable for younger lawyers is that the law is not a collection of sterile rules, statutes and case law precedents. Judge Pettine respected precedent deeply – he often issued rulings that were in tension with his own personal beliefs (*viz* his nativity scene decision that I mentioned – he was a devout Catholic). But he also taught me that the correct result in a particular case may not be the one that a first reading of the statutory language or prior judicial interpretations of that language might suggest.

This helped shape me as an advocate – formulating arguments that can persuade courts requires a "holistic" approach, one that certainly draws upon the literal words of the rule or statute at issue or the existing case law decisions, but is also informed by the equities of the specific factual context, the policy considerations that underlie the wording of the rule or statute, and the implications for future cases that can be brought to the Court's attention should the Court rule one way or the other on the argument one is making.

