

Litigators of the Week: Stamina Pays for David Boies and Carl Goldfarb in 14-year fight

By Celia Ampel

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When Boies, Schiller & Flexner took over a securities fraud case against Halliburton Co., chairman David Boies believed it might never get off the ground.

Instead, after 14 years, repeat visits to the U.S. Court of Appeals for the Fifth Circuit and two seminal decisions from the U.S. Supreme Court, the case ended in a \$100 million settlement announced last week.

Boies said the result is a credit to his daughter, Caryl, who brought the case to the firm, and Boies Schiller partner Carl Goldfarb in Fort Lauderdale, who took over the litigation after Caryl's death in 2010.

"When she first brought it in, the Fifth Circuit was the place that class actions went to die," Boies said. "They had a history of very restrictive decisions with respect to class actions, particularly securities class actions. I was, at the time, a little reluctant to take it on for that reason. But Caryl thought it was an important case, and she thought it was important that a law firm that was prepared to devote the necessary resources to the case and see it all the way through be prepared to take it on."

The lead plaintiff, the Erica P. John Fund, alleged in a 2002 lawsuit that Halliburton falsified financial results related to long-term construction projects.



David Boies and Carl E. Goldfarb, Boies Schiller & Flexner

The investors also claimed the Houston-based oilfield services giant misled the public about its liability for asbestos claims.

Boies, whose firm worked with co-counsel at Kahn Swick & Foti, was right about one prediction: The Fifth Circuit rejected plaintiffs' arguments for class certification, ruling they needed to prove by a preponderance of the evidence that their losses were caused by Halliburton's alleged wrongdoing.

The opinion was based on an earlier Fifth Circuit decision in *Oscar v. Allegiance*, one Boies said kept almost all securities class actions from achieving class certification.

He and his daughter also believed *Oscar* was inconsistent with the U.S. Supreme Court's 1988 ruling in *Basic v. Levinson*, which established the right to bring a class action based on the fraud-on-the-market theory.

Investors arguing they relied on misrepresentations from the company can refer to that theory, which says share prices reflects all publicly available information, including any misrepresentations.

Goldfarb's briefs and Boies' oral argument persuaded the U.S. Supreme Court to unanimously reverse the Fifth Circuit in 2011.

The case got an extra kick from an amicus brief filed by the U.S. solicitor general, who said the Fifth Circuit erred by requiring plaintiffs "to prove a significant element of their case at the class-certification stage, without the benefit of full discovery and without consideration of their claims by a jury."

When Halliburton's legal team from Baker Botts challenged *Basic* itself at the Supreme Court, Boies Schiller once again won a unanimous victory. Boies said the decisions were key to the future of securities class actions.

"If the *Oscar* decision had been upheld by the Supreme Court, it would have had the effect of radically reducing the number of securities class actions," he said. "We then had a fundamental argument over

whether or not securities class actions, as a practical matter, [should] be permitted. Each of these two Supreme Court decisions, while they obviously paved the way for the settlement that we've just achieved, in a larger sense were critical to the fate of class actions going forward."

Boies declined to comment on what drove the case to settle after 14 years. (When the agreement was reached, the case was once again before the Fifth Circuit on a class certification issue.) However, he said the two Supreme Court decisions were key to settlement negotiations.

While Boies argued the cases to the high court, he insisted the justices' rulings turned on Goldfarb's work.

Goldfarb "had the laboring oar," Boies said, doing the analytical work, the preparation of experts and the bulk of the brief writing.

"At the federal court of appeals level or the Supreme Court level, the judges are extremely well-prepared when they come on the bench, and the views they've formed from the briefs may sometimes change, but generally don't," Boies said. "So I've always believed that the preparation of the briefs was more important to the success of the appeals than the oral arguments, and the briefing was really what Carl was responsible for. I think he deserves an enormous amount of credit."

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