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Litigator of the Week: In Decade-Long Fannie/Freddie Shareholder Fight, an Appellate Win Upholding an $812M Judgment

By Ross Todd

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For more than a decade, shareholders challenging the federal government's controversial "Net Worth Sweep" of Fannie Mae and Freddie Mac profits have been battling their way through courts. Last week—after multiple appeals, an initial hung jury and a verdict of more than $600 million in 2023—a D.C. Circuit panel affirmed an $812 million judgment against the Federal Housing Finance Agency arising from claims that the agency breached the implied covenant of good faith and fair dealing owed to holders of Fannie and Freddie's pre-conservatorship preferred stock.

At oral argument, our Litigator of the Week, **Boies Schiller Flexner** partner **Hamish Hume**, faced questions about the interplay between the Supreme Court's decision in *Collins v. Yellen* and the shareholders' theory of damages. But, in a notable departure from the rapid-fire exchanges that often characterize appellate arguments, the panel, at several points, appeared content to let Hume fully develop his answers before moving on to the next issue. The decision marks the latest chapter in one of the longest-running and most consequential shareholder disputes to emerge from the 2008 financial crisis.

Photo: Eli Meir Kaplan

Hamish Hume of Boies Schiller Flexner.

Litigation Daily: Who were your clients and what was at stake?

Hamish Hume: The principal class representatives were Joseph Cacciappalle, Michelle Miller and Timothy Cassell. While there were others, those three gave testimony presented at trial. Their perseverance–and that of other long-holding shareholders–throughout this long ordeal has been nothing short of extraordinary.

What was at stake was whether the government could take for itself, for no good reason, the residual value of the private shareholder rights that the FHFA said would be respected when the conservatorship was imposed; those rights reflected private investment of over $33 billion into Fannie and Freddie, much of which was invested at the beginning of the financial crisis at the behest of the government regulator who was seeking to enhance the capitalization of Fannie and Freddie. While those private rights had suffered a huge loss in value from the conservatorship, they were still significant given the massive profits Fannie and Freddie were expected to generate once the housing market recovered and their arguably excessive write-downs were reversed. Then, in August 2012, right as those record profits were starting to occur, two government agencies decided to give the U.S. Treasury 100% of all future profits, and to eliminate any possibility that private shareholders could get anything, no matter how much profit the enterprises made.

How did this matter come to you, your firm and your co-counsel?

Back in early 2013, right after the Net Worth Sweep first took effect, the **Kessler Topaz** firm, and in particular **Lee Rudy** and **Eric Zaga**r, had a client that wanted to file the initial case, and they wanted co-counsel with experience suing the government. They initially approached my old firm of **Cooper & Kirk**, but they were already retained by Fairholme Funds, so they referred Kessler to me. I'm extremely grateful to my friends at Cooper Kirk for doing so, in particular **Chuck Cooper** and **David Thompson**.

Who all was on the team and how did you divide the work–that goes for at trial, on post-trial motions and in this appeal?

Early on in the case, our Kessler and BSF team merged forces with **Bernstein Litowitz** and **Grant & Eisenhofer**, who had filed a similar case in the DDC. So, all four firms were appointed co-lead class counsel. And lawyers from all four firms worked on this. It's hard to mention everyone who did so over the years. But the principal players were Rudy and Zagar from Kessler, as well as their partner **Grant Goodhart** and their associate **Lauren Lummus**; **Adam Wierzbowski** and **Robert Kravetz** from Bernstein; **Michael Barry** from G&E; and from BSF, my partners **Sam Kaplan** and **Kenya Davis**, as well as our associate **Jessica Mugler**. Many others contributed too, including my partner **David Lehn** on the appeal, as well as a team of BSF appellate lawyers who helped with the mooting. I also want to acknowledge the amazing trial support we received—in both trials—from my legal assistant **Lisa Chauncey** and our paralegal **Dale Pedrick**.

This case has been litigated for more than a decade and survived multiple rounds of motions, appeals and even a hung jury before the successful retrial. How did you keep yourself and the court focused the handful of issues that actually mattered after 13 years of litigation?

The basic story of what the Net Worth Sweep did stayed the same: It converted a dividend equal to 10% of the Treasury investment into a dividend equal to 100% of all future profits and net worth, forever. That should be pretty startling. Plus, while the FHFA said this was done because Fannie and Freddie were not making profits sufficient to pay the 10% dividend, there was overwhelming evidence that was not true. For example, in the first year the Sweep took effect, the companies paid a dividend of $131 billion to Treasury, which was $113 billion more than it would have been under the 10% regime. Yet not a single FHFA email or document remarked on how dramatically different that was from what the Sweep was supposedly all about. These facts were so startling, the difficult thing was dealing with over a decade of courts around the country generally deferring to the government that all of this was just fine and no big deal. Sometimes in litigation, you just have to remember not to give up when your cause is just, and to persevere.

The panel ultimately adopted much of your position that *Collins v. Yellen*—which FHFA's counsel argued foreclosed the claims here—addressed statutory authority and injunctive relief, while the shareholders' claim sought contract damages. When did you become confident that distinction was resonating with the court?

I don't know that one can ever become fully confident on a result from an appellate argument in front of very smart judges who may or may not be saying everything they think about the case. But certainly, by the time I sat down, I felt that the *Collins* argument by defendants was not likely getting any traction. It was a potentially dangerous argument for us because it had some superficial appeal based on how Justice Alito wrote two sentences in his opinion, but we were always convinced that Judge Lamberth (and now the appellate panel) correctly analyzed why the Supreme Court's APA decision had no bearing at all on our breach-of-contract case.

Appellate lawyers often measure success by how quickly judges start interrupting. In this argument, there were stretches where the court appeared content to let you develop your answers at length—about seven minutes uninterrupted at one point. Did that strike you as unusual in real time, and how did it affect your presentation?

That stretch of the argument was actually answering a question from Judge Ginsburg about what made the Net Worth Sweep so unprecedented and unreasonable. I was very grateful to be given the time to give a fulsome answer. While I always prepare to give an uninterrupted argument just in case there are no questions, that's obviously not the way it normally works. Here, I'm especially grateful to my partner Sam Kaplan, who suggested during the prep sessions that I have at the ready some quick points to make about what made the Sweep so outrageous. While we all knew those points by heart, having the record cites ready and the basic sequence of how best to make the points organized in my head in advance really helped.

The opinion repeatedly references evidence that the Net Worth Sweep was "unprecedented." How important was that concept to establishing shareholder expectations necessary to support

the legal claim for breach of the implied covenant of good faith and fair dealing?

It was important, but not sufficient on its own. As the defendants will tell you, the HERA statute authorized the FHFA to act in the best interests of the public, even if doing so might not be in the best interests of the enterprises. So, the key point from our perspective was to explain that even though the statute—and by extension the shareholder contract—gave the FHFA that discretion, the whole point of the implied covenant of good faith is that it does not allow a party to a contract to exercise its discretion in a way that arbitrarily or unreasonably interferes with reasonable contractual expectations. Here, a number of things showed that the Sweep violated that standard. It was not only that no such thing had ever been done before. It was the combination of that with both (a) the staggering scale of the Sweep—which predictably transferred over $150 billion of excess value to Treasury over and above its already very generous 10% dividend plus (b) the incredibly slap-dash and one-sided way in which it got decided: not a single memo analyzing whether or why it was necessary, no effort to negotiate provisions that would protect both the public and the enterprises if the enterprises started generating massive record profits (as was predicted would happen and as actually happened), and then also (c) the very strong evidence that the ulterior motive driving the whole thing was the opposite of what FHFA was saying in court–meaning, the Sweep was driven not by a fear that Fannie and Freddie could not pay the 10% dividend, but instead Treasury's desire to capture the upcoming record profits that were far in excess of the 10% dividend, so as to ensure Fannie and Freddie would never rebuild their capital base. That combination of facts showed this was not something any reasonable shareholder could ever have expected, and could not be justified or made foreseeable simply by invoking the public interest provision in the statute.

The opinion ultimately affirmed your win below on every major issue raised by FHFA. Looking back, which issue worried you most going into argument?

I would prefer to answer that after all of the defendants' rehearing and cert petitions have been denied, as I believe they will and should be if pursued! But I will say that the defendants' appeal had some challenging issues, mostly because they had arguments with superficial appeal that required careful, clear and relatively deep analysis to show why they were wrong—plus the fact that a government agency often gets the benefit of the doubt. So, we are very grateful for both a fair and a careful review by the appellate panel.

Many appellate lawyers inherit a trial record. You had to defend a jury verdict built after years of factual development in a case you had worked on yourself. How much did that matter, do you think?

We gave some thought to hiring an appellate specialist for this appeal. I remember discussing that with **David Boies**, who has always argued his own appeals. His advice helped confirm my view that it would be too risky hiring an appellate lawyer and expecting them to master a record we knew virtually by heart. So, I think it mattered a lot for us to be ready with someone who really knew the record—not just on points we were prepared to emphasize, but also for anything else the panel might ask about. That would have been very hard for an appellate lawyer new to the case to do.

What can other litigators take from what you and the team achieved here?

Never give up when your cause is just. And sometimes it is hard to predict at the beginning which specific claim will end up being the best fit for the basic facts and gravamen of your case. Here, at the start, I would have predicted this would be found to be a Taking. I still think it was, but the Federal Circuit disagreed. And the Supreme Court rejected the APA claim. Few would have predicted that a breach of the implied covenant in the shareholder contracts would be the sole successful claim.

What will you remember most about this matter?

Too many things to mention, but I'll give two. First is arguing the original appeal of the initial dismissal of the case. That was in 2017, and I argued it alongside the late-great **Ted Olson**, who argued the appeal of the dismissed APA claim. That argument had a jam-packed courtroom plus an overflow room downstairs listening on closed-circuit audio. Way more of an audience than the recent appeal. The panel ended up denying Ted's APA appeal and granting our appeal of the dismissed contract claims, which set the stage for our eventual trial success. Second is from the first trial, which ended in a hung jury: During my rebuttal closing, I got a little emotional. Something the other side did in closing upset me, and I allowed my emotions to get the better of me. I got some negative feedback on that after the hung jury, which discouraged and depressed me quite a bit. I think I'm normally relatively understated in how I present, but I do get emotional sometimes—and normally it's counter-productive. I remember discussing the whole episode with David Boies, who was very reassuring. He said emotion is an intensifier—it makes those who are with you more with you, and makes those against you more against you. So. maybe no surprise we got a hung jury there. The whole episode made me appreciate how our profession, as frustrating and exhausting as it can so often be, is also a great teacher. Hopefully it is gradually making me at least a little bit better at things I need to be better at.