Trends in Litigation: Crisis Management

By Karen Dunn, Michael Gottlieb, Heather King, and Lee Wolosky

One of the biggest challenges that can confront any twenty-first century company is the sudden emergence of a crisis. This can take many forms, including an allegation of wrongdoing from inside or outside the company; a breach of security, such as when private customer data is compromised; or a shift in the geopolitical landscape. Whatever the cause, these crises often have two things in common: they arise unexpectedly and, if not managed properly from the outset, they can quickly spiral out of control, threatening the business itself.

When a company is engulfed by such an event, its problems are rarely confined to a single courtroom or the offices of a single regulator. Most often, events that pose the greatest risk involve actual or threatened litigation, intense media scrutiny, and overlapping inquiries by state, federal, or foreign regulators. Failing to coordinate responses on all of these fronts, from the moment the crisis emerges, risks prolonging investigations, invites unnecessary litigation, and ultimately increases the threat to the company's reputation and profitability.

And wherever the company's headquarters are located, it is hard to imagine a major controversy these days that does not involve some corner of Washington, whether it is a civil enforcement action, a criminal investigation, or a congressional inquiry. Since the financial crisis of 2008, regulatory oversight of financial institutions and public companies has intensified. Meanwhile, U.S. antitrust enforcement has deepened, and Congress has ramped up its investigations of businesses accused of wrongdoing.

In this environment, among the most important factors determining success or failure during a crisis is the company's choice of legal counsel. Outside counsel must investigate swiftly and thoroughly, and they must ensure that positions taken before regulators or in litigation are consistent both with arguments made publicly and with the company's long-term strategic interests. Outside counsel must also make sure that deliberations and communications forged in crisis are protected to the maximum permissible extent by applicable legal privileges.

Companies will also have a significant advantage if they choose lawyers who have experience in different branches of government, including the White House, Congress, and executive agencies such as the Department of Justice, the Federal Trade Commission, and the Securities and Exchange Commission. These days, no intelligent response to a multi-dimensional business crisis can ignore Washington.

One of us, Heather King, recently participated in a two-year global public policy and legal defense of Bank of New York Mellon in a $22.5 billion claim filed by the Russian government in Russian court. The work involved meeting with various branches of the U.S. and Russian governments to explain how the lawsuit was damaging to business interests in both countries and to their respective economies. Ms. King worked with members of the U.S. Congress and with the State, Treasury, and Commerce departments to raise policy arguments for bilateral discussions with the Russian government, and to explore a face-saving exit for the Russian government. Our strategy contributed to a settlement for $14 million, less than 1 percent of claimed damages.

Currently, we serve as global lead counsel for Burisma, the leading private gas producer in Ukraine. Our work for the company includes leading the public policy and media strategy related to U.S.-Ukraine energy security issues. We also counsel a large global company contending with the trifecta of litigation, regulatory investigation, and media scrutiny. Typically in this type of engagement, we work closely with in-house lawyers and government relations and communications professionals, as well as with a company's outside consultants.

INSIDE THIS ISSUE

Companies facing enterprise-threatening crises benefit when they hire outside counsel who, in addition to knowing their way around a courtroom, are savvy crisis managers skilled in navigating the corridors of Washington. For years, Boies, Schiller & Flexner has excelled in handling the most complex and high-profile public-facing matters, and our lawyers have sharpened the skills needed to defend our clients both in the courtroom and in the broader public arena. We've learned that only an integrated approach can ensure that strategy remains the same across all aspects of a major controversy. And we have an established track record of counseling clients through crises, helping them emerge stronger and more profitable on the other side.

Karen Dunn (kdunn@bsfllp.com) is a partner in the Washington, D.C., office of Boies, Schiller & Flexner. She is a former federal prosecutor and former associate counsel at the White House under President Obama.

Michael Gottlieb (mgottlieb@bsfllp.com), a partner in Washington, is also a former federal prosecutor and former associate counsel at the White House under President Obama.

(continued on page 7)

Boies, Schiller & Flexner in London

Questions for Natasha Harrison, the managing partner of the Firm's first overseas office.

What was the thinking on opening an office in London?

It was client-led. Most of our core clients have an international presence, and London is one of the world's most important financial and legal centers. Litigation is increasingly international, and an office in London helps us to better serve our clients, to deepen our existing relationships, and to create new opportunities for the Firm.

What is the benefit for clients and future clients?

We provide a seamless service on cross-border litigation and investigations by providing best-in-class lawyers in London, New York, and Washington. The opportunities and issues facing our clients are rarely confined to one jurisdiction, and a closely knit cross-border team can deliver not just in the U.S. but also beyond. London is the gateway to Europe and to Asia, and we have extensive experience building the legal strategy and coordinating complex international litigation with local law firms across the globe.

How are we positioning ourselves?

We are building an office founded on the key principles developed in the U.S.: litigation-focused and staffed with the most creative and talented lawyers; maintaining the core client strategy by both extending existing client relationships to Europe and building new key relationships; and, of course, winning our cases.

What is the biggest case you worked on in your career?

There are a number, but two really stand out. The first is Elektrim, a Polish telecommunications company, where I acted for holders of €525 million bonds. The company started breaching covenants and this triggered eight years of litigation: first against the Trustee for refusing to declare an event of default and then for refusing to accelerate without the benefit of a €1 billion indemnity (we took that to the Supreme Court and won, clarifying the law), then against the Issuer and its parent for the amounts due under the bonds. We litigated all over Europe (Poland, Germany – wherever we could find an asset) as well as in the U.S. and ultimately recovered the full amount due under the bonds together with significant default interest. We then went for the equity kicker and obtained a further nine-figure judgment – paid to our clients as part of a final settlement.

And the second one?

Iceland. As part of its response to the financial crisis, the Icelandic government retroactively prioritized depositors over bondholders. I ran a group of 90 bondholders of the three largest banks, holding bonds with a total face value of €20 billion. It involved issues of human rights – do hedge funds have them? – and the steps a state can legitimately take when faced with a financial crisis to expropriate property without compensation.

What is your take-away from that case?

Iceland is just one example post 2008 of state intervention into the banking sector and the "bailing in" of subordinated debt holders. We have seen similar steps being taken across Europe (e.g., Britain, Ireland, Greece) in response to the financial crisis, and more recently being threatened in Austria and Portugal. Any expropriation of property must be compensated and any change in the law to give effect to the expropriation must be proportionate. The Iceland case took place against a highly politicized backdrop, with the British and Dutch governments also being closely involved. It reminded me that you never litigate in a vacuum and it is important to have a deep understanding of the culture, economics, and politics of the country in which you are litigating.

How do you see the outlook for financial litigation?

Busy, but the emphasis will shift as the key cases following the 2008 crisis become statute-barred. The significant increase of regulation of financial institutions following the financial crisis, combined with active co-operation between and among regulators in various jurisdictions, means that this will be an important focus for our clients, and litigation will undoubtedly flow from the increase in regulatory activity.

For investment funds, we will continue to see inter-creditor disputes as opportunities are exploited in finance documents; an increase in the use of schemes of arrangement as the English court continues to extend its long-arm jurisdiction and associated litigation over defined classes of creditors; challenges to the "white list" concept in debt trades, where sponsors/borrowers are trying to block secondary hedge fund investors from elevating and becoming lenders of record; and continued litigation in the sovereign debt markets. We are also likely to see challenges to steps taken by states intervening in the banking sector and bailing in subordinated debt holders.

How big is the London office?

We're fully operational with a core group of lawyers, and by the end of the year we expect to hit double figures.

What attracted you to Boies, Schiller & Flexner?

Shared values, brilliant lawyers, and the opportunity to build something with one of the best in the business.

Litigation Update

HALLIBURTON

In *Halliburton v. Erica P. John Fund*, one of the most widely watched securities cases in years, the U.S. Supreme Court in June reaffirmed the "fraud-on-the-market theory" established in *Basic v. Levinson* a quarter of a century ago. The theory serves as the foundation for most securities class actions, which Congress, the SEC, and the Supreme Court have all recognized are important to the integrity of securities markets. Under the theory, rather than establish reliance separately for each class member, plaintiffs can presumptively establish reliance for all class members based on the twin premises that material misrepresentations are impounded into the stock price and that investors rely on the integrity of the stock price. Halliburton argued that the efficient market hypothesis, which underpins the fraud-on-the-market theory, had been discredited by economists, and that securities class actions did little to deter fraud or compensate investors. Boies, Schiller & Flexner Chairman David Boies argued for the plaintiffs before the Supreme Court in March, maintaining that most economists still believe that material information affects stock prices, and that under the *stare decisis* principle, the court should defer to Congress, which could overrule *Basic* if it wanted to and which has repeatedly legislated in the securities class action arena without doing so.

Chief Justice John Roberts, writing for six members of the court, held that Halliburton had failed to justify overturning *Basic*. The Supreme Court did hold that the lower court had erred in refusing to afford defendants an opportunity at class certification to seek to rebut the presumption by establishing that the alleged misrepresentations did not impact the stock price. The other three justices would have overturned *Basic*.

After the decision, Law360 put *Halliburton* at the top of its list of the biggest securities cases of 2014, and Litigation Daily named Mr. Boies its Litigator of the Week. Partners Carl Goldfarb, Sigrid McCawley, Robert Silver, and Stuart Singer worked on the matter, assisted by co-counsel. Our legal team also included counsel Hampton Dellinger, Eli Glasser, David Nelson, and Eric Posner, along with associates Andrew Adler and Aaron Marcus.

COLLEGE ATHLETICS

In 1995, Ed O'Bannon led UCLA to the NCAA basketball championship. Years later, O'Bannon, who now works as a car salesman in Nevada, noticed his image in a video game and questioned why he had received no compensation. In June, 19 years after O'Bannon's college championship season, a federal judge in California presided over an antitrust trial that could reform National Collegiate Athletic Association rules that prevent college players from sharing in revenues from broadcasts and licensing such as video games. Boies, Schiller & Flexner partner Bill Isaacson, the only lawyer in the United States who has tried three previous antitrust class actions to verdict in recent memory, was co-lead trial counsel for O'Bannon and the other plaintiffs.

In a three-week trial, Isaacson systematically and effectively undermined the NCAA witnesses, including Neal Pilson, the former president of CBS Sports, and Mark Emmert, the current president of the NCAA. A journalist sending live updates from court via Twitter described Isaacson as a "bull dog," and another characterized Isaacson's cross-examination of University of Texas Athletic Director Christine Plonsky as "one of the more entertaining moments" of the trial. ESPN wrote that Isaacson "distinguished himself . . . as a formidable advocate." By the end of the trial, a *Wall Street Journal* reporter wrote that Isaacson and his co-counsel had laid bare the "deeply embedded contradictions and occasional bits of outright absurdity" in the NCAA's case. Judge Claudia Wilken is expected to rule this summer. Isaacson was supported at the trial by associate Martha Goodman.

BARCLAYS

Boies, Schiller & Flexner continues to take a leading role representing Barclays, with more than fifty individual and class actions involving the London Interbank Offered Rate (Libor) that have generated several significant decisions from both district and appellate courts. Boies, Schiller & Flexner is on Barclays' list of preferred law firms.

This litigation has been brought against Barclays and other banks arising from their submissions to the bodies that set interbank offered rates in various currencies. Most cases are consolidated into a multidistrict litigation involving the U.S. Dollar Libor before Judge Naomi Reice Buchwald of the Southern District of New York (*In re Libor-Based Financial Instruments Antitrust Litigation*, No. 11-md-02262). Other significant actions include *Laydon v. Mizuho Bank, Ltd.*, No. 12-cv-3419; a case before Judge George B. Daniels involving the Yen Libor, *Sullivan v. Barclays Bank PLC*, No. 13-cv-2811; a case before Judge P. Kevin Castel involving the Euro Interbank Offered Rate (Euribor); and a securities fraud action pending before Judge Shira A. Scheindlin, *Gusinsky v. Barclays PLC*, No. 12-cv-5329, all in the Southern District of New York. Since the cases were filed, judges Buchwald and Daniels have issued rulings dismissing significant claims asserting billions of dollars of damages.

Led by Managing Partner Jonathan Schiller, the attorneys working on Libor-related matters for Barclays include partners David Boyd, Mike Brille, Bill Isaacson, Jonathan Shaw, Jim Denvir, Todd Thomas, Mike Gottlieb, Melissa Felder Zappala, and David Zifkin; counsel Hampton Dellinger; and associates Leigh Nathanson, Amos Friedland, Mike Mitchell, Abby Dennis, Wells Harrell, Karen Paik, and Nishanth Chari.

GOLDMAN SACHS

Boies, Schiller & Flexner successfully defended Goldman, Sachs & Co. against claims of fraud, breach of fiduciary duty, and breach of contract brought by two of its brokerage clients, who alleged that they were subject to improper margin calls and who sought damages in excess of $300 million. Jonathan Schiller, David Boyd, and David Zifkin represented Goldman, Sachs & Co. at a FINRA arbitration in January. The panel decided in favor of Goldman Sachs in March.

THERANOS

Boies, Schiller & Flexner successfully represented Silicon Valley consumer healthcare company Theranos in a patent dispute over blood test technology. That technology, which was the brainchild of Theranos founder Elizabeth Holmes, permits laboratories to conduct tests that are quicker, more affordable, and less painful to patients. Theranos alleged that Fuisz Pharma and its principals, Dr. Richard Fuisz and Joseph Fuisz, misappropriated Theranos's confidential information – including information in Theranos's unpublished patent applications – and patented the same technology. Specifically, Theranos alleged that a family member of the defendants, who was a partner at Theranos's former law firm, passed the information to the defendants. After two days of trial in federal court in San Jose, California, and during David Boies's questioning of Richard Fuisz, the defendants agreed to invalidate all claims of their own patent. As part of the settlement, the defendants also agreed to a broad release and covenant not to sue, which precludes Fuisz Pharma from asserting any legal claims against Theranos for five years. Partners Michael Underhill, William Marsillo, and Michael Jay worked on the case, as did associates Joseph Lasher, Michael McCarthy, and Meredith Dearborn.

ARIZONA

A New York State judge held a six-week bench trial that ended on July 2 to value the AriZona Iced Tea company and break a long-standing deadlock between the company's two 50 percent owners. Boies, Schiller & Flexner's client, John Ferolito, had been seeking for years to sell his family's half of the company, but had been prevented from doing so by a 1998 agreement with co-owner Domenick Vultaggio that restricted sales to outsiders absent Mr. Vultaggio's approval. During a hard-fought trial, Boies, Schiller & Flexner partner Nick Gravante presented evidence that the company was worth in excess of $4 billion as of the October 2010 valuation date, far more than the $200 million valuation placed on the company by Mr. Vultaggio and his counsel. Although the court will determine how much the company must pay Mr. Ferolito to buy out his 50 percent interest, mid-trial Mr. Gravante presented an irrevocable, binding $2 billion offer from Mr. Ferolito to buy out Mr. Vultaggio's half of the company. Notwithstanding his testimony that AriZona is worth between $200 and $260 million, Mr. Vultaggio rejected the $2 billion offer during cross-examination. Mr. Gravante and partner Helen Maher tried the case, assisted by partners George Carpinello, Karen Dyer, Michael Merley, William Ohlemeyer, Jeremy Vest, and Richard Weill. Attorney consultant Stephanie Reger, and counsel Rosanne Baxter and James Grippando also worked on the case throughout trial, as did associates Brooke Alexander, Paul Fattaruso, Matthew Cushing, Ievgenia Vatrenko, Dan Boyle, Sebastian Swett, Amy Donehower, and Miguel Lopez. Justice Timothy Driscoll of the Commercial Division of the Nassau County Supreme Court has said that he will rule as soon as October.

ZURICH

In April, the Firm won dismissal of a lawsuit challenging two subsidiaries of long-time client Zurich Insurance over changes they had made to an investment fund's guaranteed minimum growth rate and surrender terms. One change capped the fund's guaranteed 8 percent growth rate because the divergence between the market performance of the fund's underlying investments and the guaranteed growth rate threatened to violate federal tax laws relating to insurance products. Another change clarified that, if the policyholder elected to surrender the policies, liquidation and distribution of proceeds would be delayed until the market value of the underlying investments caught up with the guaranteed value. Plaintiff Aviva Life, which invested $180 million in the fund in 2001 through two Company-Owned Life Insurance (COLI) policies issued by AIG's American General Life, challenged the modifications in Delaware's Court of Chancery. A team led by partner Alan Vickery brought a motion for judgment on the pleadings, reasoning that the case was not ripe and that, in any event, the contracts permitted the changes. The motion was briefed principally by partner Jennifer Altman and associates Matt Kaden and David Siffert, with tax arguments formulated by tax partner Michael Kosnitzky. Mr. Vickery argued the case for Zurich and American General at a hearing in April, after which Vice Chancellor Sam Glasscock observed that he gets to hear arguments "from the best of the bar around the country, and this was a privilege to hear . . . it is unusual, in my experience, that an oral argument is as helpful to the Court as this one has been." In dismissing the case, Vice Chancellor Glasscock wrote that it presented a question of first impression under federal tax law, but that the objections raised by Aviva were not ripe for decision.

STRAUSS

In November, the Firm was engaged by the Strauss company, a family-owned Israeli food company largely known in the United States for its Sabra product line. The Strauss company retained a team led by Jonathan Schiller and assisted by Josh Schiller and Benjamin Margulis to provide counsel in an Enterprise Chambers proceeding in Amsterdam. The proceeding was brought against the company by private equity firm TPG relating to a contested IPO arising out of a joint venture in the Strauss international coffee business that the parties entered into in 2008. After prevailing in the Enterprise Chambers proceeding, Strauss also retained the Firm's corporate group, including George Liu, Thomas Fritsch, Lidia Frenkel, and Daniel Grossman to, in addition to ongoing litigation advice, advise the Strauss Group through the contested IPO discussions, which are ongoing.

Trends in Corporate Law: Rep and Warranty Insurance

By Stefan dePozsgay

Sellers and buyers in private control transactions negotiate a host of issues when documenting the change in ownership of a target business. While the general economics of private company merger and acquisition deals tend to make their way into the news media, risk allocation issues are often left to the fine print of transaction documentation, despite their importance to both sellers and buyers.

Understandably, sellers usually have substantially more familiarity with a target business than potential acquirers, resulting in an information disparity that is difficult to overcome through due diligence alone. Realizing the impracticality and costliness of a prolonged and invasive due diligence process, sellers and buyers historically have addressed this "information gap" by supplementing due diligence efforts with a package of representations and warranties about the target company made by sellers for the benefit of buyers. Representations and warranties in acquisition agreements are usually accompanied by indemnification mechanics to ensure that buyers are protected against losses arising from inaccuracies. Indemnification provisions can be complicated: sellers and buyers must negotiate whether known and unknown risks will be covered, whether indemnification will be "capped" at some percentage of the transaction consideration, whether there is some threshold or deductible of losses that a buyer must sustain before a seller becomes liable, and whether a buyer's prior knowledge of breaches will absolve sellers of liability, among other things.

Unfortunately, no matter how heavily negotiated or well designed they are, representations, warranties, and indemnification provisions are only valuable to a buyer if they can be enforced against the seller. Without a creditworthy seller providing indemnification (and often even with such a seller), buyers will typically demand that a portion of the transaction consideration be deposited with a third-party escrow agent (or held back by the buyer) for the potential satisfaction of future indemnification claims. The customary requirement for a "backstop" of indemnification obligations transforms a "legal issue" into a "money issue," since buyers and sellers are forced to quantify risk. Over the past several years, the insurance industry has emerged to address risk allocation and quantification in private company M&A transactions through a new product, representation and warranty insurance.

Rep and warranty insurance protects the insured (buyer or seller) from certain losses it may incur as a result of a breach of covered representations and warranties, or other matters that may be insured under the policy. Insurance can be structured to cover specific representations and warranties or to cover the entire package of representations and warranties given by the sellers under the acquisition documents. A standard rep and warranty insurance policy can act as either security (backstopping or extending the coverage of a seller's indemnification obligations for breaches of representations and warranties) or as the primary source of coverage (replacing the indemnity entirely).

More and more frequently, our clients are considering the use of rep and warranty insurance policies to bridge the gap on risk allocation between sellers and buyers. For sellers, these policies can maximize their closing date payouts by reducing or eliminating the need for escrows or holdbacks. This is particularly advantageous for private investment funds that are trying to maximize their internal rates of return or other performance metrics to improve their track records. If the sellers are a consortium, an insurance policy can alleviate complications associated with joint and several liability for breach, which is often required by buyers but may be onerous for sellers with varying levels of knowledge of the target business's operations and contingent liabilities.

There are also benefits to buyers. Because these policies may be attractive to sellers, a buyer's willingness to use insurance may be enough to distinguish its bid in a competitive sale process. In our experience, sellers are also often willing to provide a more comprehensive representation and warranty package when a policy is in place, since much of the risk has been transferred to the insurer. Furthermore, the coverage period for rep and warranty insurance typically exceeds the survival period for representations and warranties set forth in the acquisition agreement, thereby providing additional protection for the buyer.

However, using a rep and warranty insurance policy does raise some additional issues for the parties to consider. First, they must decide who pays for the policy. Premiums usually fall within the range of 1 to 6 percent of the amount of coverage. Insurers also typically require that one or more parties (customarily the seller) retain some risk on representations and warranties in the form of a deductible, which is often set at 2 percent to 3 percent of the total transaction value but may vary from deal to deal. The party paying the premium does not necessarily have to be the insured. However, the insured's actual knowledge of a breach is typically excluded from the coverage, and since sellers usually have more knowledge about the target business than buyers, buy-side insurance (where the buyer is the insured) is generally considered to be more comprehensive and is, accordingly, more expensive. The treatment of seller fraud is another significant distinction between sell-side and buy-side policies. Sell-side policies exclude fraudulent misstatements by the sellers from the coverage, whereas buy-side policies typically do not. This is largely because buyers are not in a position to know which of the sellers' statements are fraudulent.

The parties must also decide the breadth and scope of insurance coverage. The specifics of a particular deal are material in determining the scope of the coverage. Rep and warranty insurance usually covers breaches of reps and warranties but customarily does not cover breach of post-signing covenants, since compliance with covenants is generally under the control of the sellers. However, rep and warranty insurance can cover specific contingent liabilities (for example, outstanding litigation) and other general indemnities (for example, indemnification for pre-closing taxes). On the other hand, circumstances may dictate that certain representations be excluded from the coverage, typically when the potential exposure is high. An example of this would be coverage of a representation on environmental matters where such issues are a disproportionately material risk of the target business.

The benefits of rep and warranty insurance have been documented extensively by practitioners, and the market has moved dramatically in recent times toward widespread adoption. We would strongly recommend that our clients, whether on the buy side or the sell side, consider the use of rep and warranty insurance in their acquisition strategies.

Stefan dePozsgay is a partner in the corporate group at Boies, Schiller & Flexner in New York.

Corporate Update

MONGOLIA

After a 5-month competitive procurement process involving 12 top-tier international law firms, Boies, Schiller & Flexner, in a representation led by Managing Partner Jonathan Schiller, was selected as international counsel for the Mongolian state-owned coal company Erdenes Tavan Tolgoi. The company holds the rights to develop the Tsankhi portion of the Tavan Tolgoi strategic coal deposit, near the Gobi Desert, one of the world's largest untapped reserves with an estimated 6.4 billion tonnes of coal. With this selection, Boies, Schiller & Flexner becomes one of a select few foreign law firms to undertake substantial representation of Mongolian interests in the country's burgeoning natural resources sector.

The project will establish and operate a best-in-class coal mine with modern integrated mining and processing technology, in accordance with national laws and international health, safety, and environmental best practices. Development will take several years and will require new infrastructure for coal extraction and processing, power generation and transmission, water supply, and rail transportation. The project is expected to result in the construction or improvement of public roads, schools, hospitals, housing, local government buildings, and community centers.

Boies, Schiller & Flexner's work has three separate phases. The first will involve negotiation with foreign investors seeking to become joint venture partners in the project. The second will involve negotiation with the Mongolian government on behalf of the joint venture. The investors will agree to certain minimum investment commitments, environmental standards, and local employment and social investment, and will agree to pay certain taxes, royalties, and other fees to the government. In return, the government will ensure a stable and predictable legal structure. The third phase will involve advising the joint venture on international project financing to fund the project. Boies, Schiller & Flexner is also representing Erdenes Tavan Tolgoi on certain matters associated with its current mining contractors and offtakers.

The team of lawyers is headed by Mr. Schiller, with assistance from partners Robert Leung, Mike Huang, and Jonathan Sherman and associates Michael Anastasio, Lidia Frenkel, Joseph Eno, and Gloria Ho.

NUSTAR

When NuStar Energy disposed of its 50 percent stake in its asphalt joint venture earlier this year, it turned to Boies, Schiller & Flexner's corporate group to handle the transactions. NuStar, which sought to continue its focus on its core oil pipeline and terminal businesses, completed the transfer of its equity interest in the business to its joint venture partner, an affiliate of the investment firm Lindsay Goldberg, in February. In connection with the transfer of the equity interest, the Firm assisted NuStar with amendments to its debt facilities, terminal leases, and oil supply contract with the joint venture, which was renamed Axeon Specialty Products. NuStar, which has been a client of the Firm since 2009, sold an initial 50 percent stake in the asphalt business to an affiliated fund of Lindsay Goldberg in 2012. The asphalt business originally was purchased by NuStar in 2008. Partner Jason Hill, along with associates Michael Anastasio and Joseph Eno, worked on the transactions, with assistance from partner Robert Lia and counsel Ivan Mitev.

YES

Earlier this year, Boies, Schiller & Flexner represented Yankees Entertainment and Sports Network in connection with the sale of a 31 percent equity stake to 21st Century Fox. The YES Network televises New York Yankees baseball and Brooklyn Nets basketball, as well as other leading local and national sports-related programming. The transaction raised 21st Century Fox's ownership in the YES Network to 80 percent from the 49 percent it had acquired in 2012. The Firm also represented the YES Network in connection with the 2012 transaction. Associates Russell Franklin, Lidia Frenkel, and Elaine Tapp worked on the most recent transaction.

CAITHNESS

In late April, the Firm assisted longstanding client Caithness Energy with the sale of development assets relating to a proposed 569 MW nominally rated combined-cycle power facility to be located in Riverside County, California, to an affiliate of Canadian power company AltaGas. Partner Jason Hill and associate Joseph Eno worked on the transaction.

In Partnership

Boies, Schiller & Flexner partner **Tanya Chutkan** won confirmation from a unanimous Senate to become a judge on the U.S. District Court for the District of Columbia. She joined the Firm in 2002, after 11 years as a public defender. During her time here she helped bring three antitrust class actions to successful jury verdicts for plaintiffs and brought a civil case to a positive settlement mid-trial.

Richard Feinstein rejoined the Firm in Washington, D.C., after four years as the Federal Trade Commission's top antitrust enforcer. His main practice areas include antitrust litigation and advice.

Karen Dunn joined the Firm in February to focus on high-profile litigation and crisis management. She previously served as an associate White House counsel, an assistant U.S. Attorney in the Eastern District of Virginia, and the communications director and a senior advisor to then senator Hillary Clinton.

Michael Gottlieb joined the Firm in October to focus on government litigation, white collar criminal investigations, enforcement, securities litigation, data privacy, cyber security, and constitutional litigation. He previously served as a special assistant to President Obama and an associate White House counsel.

Parker Bagley will move to Oakland, California, this summer to boost the Firm's IP practice there. **Heather King, Michael Merley, Luke Nikas**, and **Ansgar Simon** were promoted to partner.

Honors & Recognition

Chairman **David Boies** and his wife, **Mary Boies**, were honored by the Wilson International Center with the Woodrow Wilson Award for Public Service.

Managing Partner **Jonathan Schiller** became Chairman of the Board of Trustees of Columbia University. Mr. Schiller graduated from both Columbia College and Columbia Law School.

Stephen Zack, the administrative partner of the Miami office, became a member of the Council on Foreign Relations. Last year he served as an alternate U.S. representative to the United Nations General Assembly.

Anne Hinds, counsel in the Fort Lauderdale office, received the Juvenile Law Award from the Legal Aid Society of Palm Beach County and a commendation from the Florida Supreme Court for her work advocating for children in foster care.

Melissa Felder Zappala, on behalf of the Firm, was awarded an Outstanding Achievement award by the Washington Lawyers' Committee for Civil Rights and Urban Affairs for her pro bono work for disability rights.

Nick Gravante, the administrative partner in New York, was awarded the Attorney of the Year Award by the Brooklyn Independent Democrats for his legal advocacy and support for the Brooklyn Public Library.

Litigation Trends

(continued from page 1)

Heather King (hking@bsfllp.com), a partner in Washington, was special assistant and policy advisor to the Senate office of former senator Hillary Rodham Clinton.

Lee Wolosky (lwolosky@bsfllp.com), a partner in New York, served at the White House as the director for transnational threats on the National Security Council under presidents Clinton and George W. Bush.

Why I Took the Case

Boies, Schiller & Flexner's chairman writes about his reasons for joining former rival Ted Olson in the lawsuit that led to a court decision ending California's ban on same-sex marriage, a decision that the Supreme Court upheld in June 2013.
By David Boies

The case Ted proposed was an opportunity to confront, and hopefully eliminate, the core of antigay bias. In a sense it was not a proposal I was free to immediately accept. The case would, I knew, require a great deal of my time and my firm's resources – time and resources for which I was aware our plaintiffs could not begin to pay. I also knew that the nature of the case would arouse fierce and passionate opposition, and that there would be a fringe that would direct their anger at my family as well as myself. (During *Bush v. Gore* death threats against my youngest son, Alexander, had been called in to his elementary school, and many were made against me.)

Fortunately, when I discussed the case with my wife Mary, my children, and my partners at Boies, Schiller & Flexner, later that day, I found that they were as determined as I was that this was a case we should accept. Although the American Foundation for Equal Rights, which was sponsoring the litigation, had offered a partial payment, Jonathan Schiller, Donald Flexner, and my other partners agreed that we would take the case entirely without a fee.

I soon discovered that many in the gay community, including most of those who had long led the fight for equality, were adamantly opposed to our proposed lawsuit to challenge Proposition 8. They did not, of course, oppose our objective, but believed that the time was too soon, that the federal courts were too conservative, that we would lose, and that in losing we risked setting back the movement.

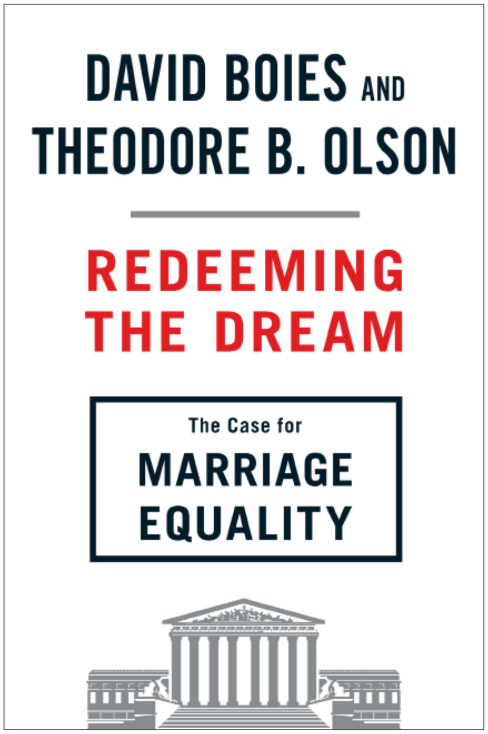
Coming as they did from people who had worked much longer and risked much more in the battle for equal rights than I had, those concerns were entitled to respect. I nevertheless decided it was right to proceed for four reasons.

First, I believed we would win. This was not a case where we were asking the courts to recognize a new right, merely to hold that an established right could not be withheld based on sexual orientation. The combination of *Loving* and *Lawrence*, together with numerous Supreme Court decisions holding unconstitutional state laws barring marriages by imprisoned felons and people who had abused a prior marriage, were compelling. Even as staunch an opponent as Justice Scalia seemed to recognize the inevitability.

Second, both our individual plaintiffs and tens of thousands of couples like them in California wanted to exercise what they and we believed to be their constitutional right to marry. I did not know how to tell them this was not their time, that only future generations could enjoy that right.

Third, I believed that simply bringing this case, and the national discussion it would engender, would advance the cause of equality and public support for it. The opposition to marriage equality did not have arguments that could withstand scrutiny. They had a tautological bumper sticker (MARRIAGE IS BETWEEN A MAN AND A WOMAN) and a religious belief ("God forbids gay marriage") that, however sincerely held, was barred by the First Amendment as a basis for legal decisions. In part because of our reputations (and our "odd couple" relationship that I knew would make good copy), I felt that Ted and I could bring this issue to mainstream America, and I believed that when we did, the common sense and fairness of the American people would do the rest.

Fourth, we believed there was no way that a federal constitutional challenge could be avoided. If we didn't bring this case for these plaintiffs, someone else would do so for other plaintiffs. It was essential that the case that was decided first be prepared, tried, and presented on appeal as perfectly as possible. With our experience, and with the unparalleled resources our two firms offered, we were confident that we could prepare, try, and appeal the case as well as, and probably better than, any alternative team.



A few times, I asked myself whether my desire to accept this case, and to do so with Ted, was causing me to too quickly dismiss the arguments of those who counseled caution. Each time I concluded this was the right case, in the right place, at the right time, and that Ted and I and our team were the right lawyers to bring it.

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