

Banking Group Of The Year: Mayer Brown

By Jon Hill

Law360 (December 9, 2020, 5:57 PM EST) -- Mayer Brown LLP's banking practice freed Citi from litigation over fees it earned in a federal coronavirus relief loan program, extricated a big Swiss bank from a \$350 million bribery case, and helped Goldman Sachs raise \$6.8 billion for United Airlines by monetizing its reward program, earning it a spot as one of Law360's 2020 Banking Practice Groups of the Year.

Banks and other financial services companies have long relied on the services of Mayer Brown, where the banking group was a founding practice and has since grown into a global powerhouse. The firm has more than 300 banking and finance attorneys spread across major financial hubs on four continents, serving more than half of the world's biggest banks.

But the outbreak of the coronavirus pandemic this past year has put those relationships in especially sharp focus for the firm, which found itself fielding a flood of inquiries from clients grappling with debt workouts, unanticipated transactional issues and fast-moving government relief efforts.

"The pandemic has really proven to us the depth and trust that we have with our clients, because they've come back to us with their biggest problems and most sensitive issues in a greater volume than I think we would have seen in a regular environment," said Mayer Brown partner Mark Hanchet, who is one of the firm's group leaders for international banking and financial services litigation.

A case in point has been the firm's deft representation of Citigroup in class action litigation from accountants, consultants and other third parties that helped small businesses apply for the Paycheck Protection Program, an initiative created by the Coronavirus Aid, Relief, and Economic Security Act to channel hundreds of billions of dollars in forgivable loans to small businesses affected by the pandemic.

Lenders that participated in the program earned fees from the government for each PPP loan they processed, but lawsuits have been filed against banks like Citi and others over claims that they're required to split those fees with the "agents" who assisted borrowers in applying.

In September, however, Mayer Brown's banking attorneys defeated such claims against Citi in a case consolidated with others in New York federal court, where U.S. District Judge Jed Rakoff held when



granting the bank's motion to dismiss that the CARES Act doesn't mandate payment of PPP agent fees unless a lender agreed to do so in advance.

"That was a particularly important outcome for the industry," said Chris Houpt, a Mayer Brown partner and co-chair of its banking and finance litigation group. "Judge Rakoff ran that case very quickly and ... [the decision] was one of the first to rule on the question of CARES Act liability of banks for agent fees."

Indeed, the Rakoff decision would be cited by a California federal court in November when it dismissed another set of PPP agent fee claims in *American Video Duplicating v. Citigroup*, marking another key win secured by the firm.

But pandemic-related cases were just one part of Mayer Brown's banking litigation portfolio this past year, which also saw the firm emerge victorious on behalf of the Bank of New York Mellon in a residential mortgage-backed securities trustee suit stemming from the last financial crisis.

The 2011 suit was brought by a corporate investor that sought to pin blame on BNY Mellon for millions of dollars in losses suffered on RMBS overseen by the bank as trustee. But in July, the Tenth Circuit affirmed the case's dismissal in a rare federal appellate-level decision interpreting an RMBS trustee's duties under the contractual agreements governing an RMBS trust.

The appeals court concluded that BNY Mellon hadn't been shown to have received the formal notice required under those agreements to trigger the heightened duties it was alleged to have breached. The bank also couldn't be held liable for allegedly failing to perform duties required by the Trust Indenture Act because that law didn't apply to the RMBS at issue, according to the decision.

"It essentially adopted the argument that we and other [RMBS] trustees have been making all along, which is that before the trustee has these heightened duties ... it has to receive notice of an event of default and the event of default has to occur in a formal way," Houpt said. "An event of default doesn't just sneak up on you, and then you only find out about it 10 years later in litigation."

Although New York state courts, where many of these trustee cases have played out, have come to agree that showing formal notice is a prerequisite for these breach-of-duty-type claims to be viable, Houpt said federal district courts have "often explicitly declined to follow that rule."

"So what was helpful about the [Tenth Circuit] decision is not only that it completely eliminated that case ... it was also a federal court of appeals fully adopting the trustee's view of how events of default work," he said. "Hopefully that will have some influence on other remaining trustee cases."

Mayer Brown's banking attorneys also achieved significant victories for foreign financial institutions facing litigation in U.S. courts.

In late March and August, for example, the firm obtained dismissals for Societe Generale in two New York federal court antitrust class actions alleging manipulation of interest-rate benchmarks by big banks.

The firm also rescued Swiss-based Banque Pictet from a \$350 million case brought by Saudi plaintiffs in New York state court, claiming it was involved in facilitating a Saudi corporate bribery scheme.

After New York's highest court ruled in 2016 that the bank's alleged use of the state's correspondent bank accounts was enough to provide jurisdiction for the case to proceed, the bank called in Mayer

Brown to fight back with a different strategy. The firm carried the day by pushing instead for dismissal on forum grounds, ultimately persuading a New York state appeals court in February that the case was too tenuous for a U.S. court to hear.

The result was a major win not only for Banque Pictet, but also arguably for the larger international banking community, which could otherwise have been looking at new potential litigation risks if a New York correspondent bank relationship was enough to let a foreign bank be sued in U.S. courts by foreign plaintiffs alleging foreign misconduct.

"What the plaintiffs here were doing was saying because there are sufficient contacts to justify personal jurisdiction, that's also enough to justify a forum here in the United States," Hanchet said. "They were basically conflating these two concepts, and we had to separate them."

Litigation isn't the only area where Mayer Brown's banking attorneys blazed trails in 2020, however. When United Airlines needed to raise cash to help it ride out the pandemic this summer, the firm was instrumental as counsel to Goldman Sachs in helping to design a first-of-its-kind \$6.8 billion debt offering where the carrier essentially mortgaged its frequent flier loyalty program.

"We were able to structure a deal using our expertise on the structured finance side that would essentially monetize the cash flows and assets in their loyalty program," said Gabriela Sakamoto, a Mayer Brown banking and finance partner who worked on the financing. "This is the first major U.S. airline that has done that."

In the process, the deal may have set a trend. Sakamoto said there's "been a lot of interest" in adapting the idea for loyalty programs outside of the airline sector.

"That structure has been somewhat replicated in a number of recent airline financings, as well," she added.

--Editing by Adam LoBelia.