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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With Morgan Lewis' Marc Sonnenfeld

Law360, New York (March 06, 2013, 2:27 PM ET) -- Marc J. Sonnenfeld is a partner in Morgan Lewis & Bockius LLP's litigation practice and head of the securities litigation group in Philadelphia. His practice focuses on defending securities and shareholder litigation and related regulatory and enforcement proceedings, as well as counseling directors and officers on corporate governance issues. Sonnenfeld has defended shareholder class and derivative actions against public and private corporations, controlling shareholders, directors and officers and underwriters arising under federal and state law.

Q: What is the most challenging case you have worked on and what made it challenging?

A: The most challenging case I encountered over the course of my legal career involved the representation of a foreign client, who did not speak English, in complex litigations in the courts of a distant state. The language barrier, time differences and the client's lack of familiarity with the U.S. legal system, compounded by the actions of a well-connected and well-funded adversary and tactical decisions made by predecessor counsel made for a notably challenging case.

Representing foreign clients whose language, cultures and legal systems differ from ours is a growing challenge as our practice becomes more international. These representations require great patience and attention to subtle points and nuances.

Q: What aspects of your practice area are in need of reform and why?

A: Ninety-five percent of public company acquisitions are challenged by shareholder actions concurrently brought in multiple jurisdictions alleging unfair price and process and inadequate disclosure, regardless of the facts. These cases seldom confer benefit on anyone other than the lawyers bringing them and impose a burdensome "tax" on transactions.

One possible reform is an exclusive venue provision in certificates of incorporation as suggested by a footnote in a recent Delaware Chancery Court decision or legislation compelling coordination of multistate litigation. Another corrective measure may be to adopt the British system for fee shifting. Since these actions generally are brought under state corporate law, rather than federal securities law, and usually in state courts rather than in federal courts, finding a legislative or procedural device to compel coordination of concurrent actions in multiple jurisdictions is not easy.

In these cases as well, the court should be able to act as a "gatekeeper" at the pleading stage to determine which actions should proceed through discovery and hearing. Otherwise, the defendants are faced with potentially overwhelming pressures to settle.

Q: What is an important issue or case relevant to your practice area and why?

A: An issue of key importance to my practice area is the question of whether the "safe harbor" for forward-looking statements under the Private Securities Litigation Reform Act of 1995 is defeated by actual knowledge. While the statute seems clear on its face, the circuits are divided. In particular, the statute provides protection for forward-looking statements that are identified as such and accompanied by meaningful cautionary statements; or immaterial; or made without actual knowledge that the statement was false or misleading.

The statute is phrased disjunctively, yet there is a circuit split as to whether the safe harbor applies to knowing misrepresentations. The Sixth, Ninth, and Eleventh Circuits have held that so long as a forward-looking statement is accompanied by meaningful cautionary language, the safe harbor applies regardless of the defendant's state of mind.

By contrast, the Fifth Circuit has addressed the issue, but its ultimate position is unclear. The Second Circuit has examined but expressly declined to resolve this issue but invited Congress to "give further direction." The First, Third, Fourth, Seventh, Eighth, and Tenth Circuits have not directly considered the issue.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: I have always had deep admiration and respect for Steven Schatz, partner with Wilson Sonsini Goodrich & Rosati. He is careful and thoughtful, knowledgeable, has always exercised sound judgment and is extremely courteous. Steve and I have worked as co-counsel in the defense of several derivative actions against a common client. We have worked seamlessly as though we were partners in a single firm. I have great respect for his judgment and regularly call upon him for advice even in matters where we are not working together.

Q: What is a mistake you made early in your career and what did you learn from it?

A: Early on in my career, I made the mistake of working in a "silo" and trying to do everything myself. I soon learned the importance of building a team and attribute much of my success today to the team that I have helped to assemble around me at Morgan Lewis & Bockius. I work with lawyers in our domestic and overseas offices, and staff my cases on the basis of expertise and without regard to the location of the office in which the lawyer is resident. The global footprint of our firm enables me to handle matters efficiently throughout the United States and abroad.

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