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BANK v. BANK LITIGATION: NEW CHALLENGES, CONFLICTS EMERGE FOR LAW FIRMS

by
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Conventionally, law firms have refrained from suing banks in exchange for transactional business; however, the global credit crisis has prompted a wave of bank-on-bank litigation, and caused several major law firms to reassess their long-standing policies of not suing financial institutions. Despite the possibility of alienating clients, a growing number of law firms have indicated a willingness to sue banks. This point is highlighted in three major cases, which involve the alleged misrepresentation in the sale of securities: *Barclays Bank PLC v. Bear Stearns Asset Management Inc., et al.*, *HSH Nordbank v. UBS AG*, and *M&T v. Gemstone CDO VII*.

Barclays Bank PLC v. Bear Stearns Asset Management Inc., et al., No. 07-CV-1140 (S.D.N.Y.), arises from the subprime losses of a failed Bear Stearns hedge fund. Barclays, PLC, represented by Linklaters, filed suit against Bear Stearns alleging that the defendant intentionally concealed losses to overstate the value of subprime mortgage securities being held within a fund. Linklaters formerly acted as outside counsel to J.P. Morgan Chase. This relationship was severed as J.P. Morgan assumed all of Bear Stearns' legal liabilities upon consummation of the acquisition in April.

Similarly, in *HSH Nordbank v. UBS AG and UBS Securities LLC, 600562/2008*, HSH sued to recover on subprime-related losses. HSH alleged that UBS "created a compromised structure" for the collateralized debt obligations (CDO) backed by substituting subprime mortgage loans as the underlying assets for the CDO, in lieu of lower risk debt. Quinn Emanuel Urquhart Oliver & Hedges, a business litigation firm, represents HSH.

In *M&T v. Gemstone CDO VII*, M&T sued Gemstone CDO VII, a Deutsche Bank AG trust, for accrued losses on subprime mortgage-backed securities. M&T, represented by Hodgson Russ, alleges that Deutsche fraudulently stated the securities to be a sound and virtually risk-free investment. M&T further alleges that Deutsche was aware of the deterioration in its underwriting standards, and withheld material information from credit ratings firms, such as S&P and Moody's.

Going forward, it will be critical for law firms to carefully address the resolution of potential conflicts and consider all factors while examining opportunities to work with clients that intend sue banks. Bank-on-bank litigation may result in more corporate law firm clients being asked

to sign advance blanket waivers, which allow firms to represent a client's rivals or adversaries. In certain cases firms may also negotiate narrower waivers that allow them to finish litigation that could be considered adverse to interests of their new clients.

In light of current market conditions and liquidity concerns, it is foreseeable that bank-on-bank litigation will continue into the near future. Minor skirmishes and misunderstandings that would typically be resolved out of court may result in all-out wars; and the formerly unified interests of banks, hedge funds and private equity funds, may come into conflict with one another to further complicate this new wave of litigation.

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