

## LITIGATION BOUTIQUES

A Special Report

Some of the small firms profiled thrive by identifying strong niche practices. Grais & Ellsworth represents purchasers of toxic assets suing financial institutions to recoup their investments. Getnick & Getnick represents whistleblowers in False Claims Act cases. Another, Bickel & Brewer, does well with a mix of cases and a consistent litigation strategy. One firm, Liner Grode, discovered that smaller is better; now half its former size, it is flourishing in a practice heavy on entertainment litigation. And the Gregory P. Joseph Law Offices has attracted big-name clients such as Citigroup by delivering big-firm levels of quality.

### Suing banks on behalf of purchasers of toxic assets

Grais & Ellsworth, only four years old, has found a niche in the wake of the subprime-mortgage crisis.

BY NATE RAYMOND

Before 2007, asking David Grais and Kathryn Ellsworth about collateralized debt obligations and mortgage-backed securities would have probably resulted in a decent amount of head-scratching between the pair.

But for the founders of four-year-old Grais & Ellsworth, those toxic assets have come to give their firm a sense of purpose. The firm's name graces complaints that companies including The Charles Schwab Corp. filed against Wall Street banks over billions of dollars in lost investments in mortgage-backed securities. Even the Federal Deposit Insurance Corp. is now a client.

The 14-lawyer New York firm is now so overrun with work that partners are laying the groundwork for expansion. Should the suits survive motions to dismiss, partners say they will need more hands on deck. And in the meantime, the boutique is confronting the challenges its size poses, thanks to competition from big firms such as Quinn Emanuel Urquhart & Sullivan, which has beaten it out for some cases. "We want to be only as big as we have to be to persuade clients we can do what we do," Grais said.



Most major banks face some sort of litigation stemming from the mortgage crisis. From 2004 to 2008, about \$5.3 trillion in loans were bought up by Wall Street only to be sliced and diced into mortgage-backed securities that were sold to investors, according to a February report by Standard & Poor's. When defaults and fore-

closures began to rise, the value of those securities plunged.

Many of the investors—ranging from pension funds to insurance companies—have in the wake of the crash turned to the courts. In lawsuit after lawsuit, the investors have sought to hold the banks accountable and recoup their losses.

While several of the suits are class actions, a number of individual corporate investors have also gone to court. And in that area, Grais & Ellsworth was one of the earliest.

Not that Grais nor Ellsworth knew much about mortgage-backed securities when they launched their firm in March 2007. Until then, they had been partners at Dewey Ballantine (now Dewey & LeBoeuf), which Grais joined in 2003 from Gibson, Dunn & Crutcher and where Ellsworth had practiced in the insurance practice since her days as an associate.

"He came into the firm with a large reinsurance practice, so our two practices melded well and we ended up heading the firm's insurance-reinsurance practice," Ellsworth said. But conflicts were a problem in chasing for new work and clients, Ellsworth said. Dewey also began "going in a direction we didn't want to go in," she said, namely a possible merger with Orrick, Herrington & Sutcliffe. The merger talks broke down in January 2007, "but the fact was, by then we had decided to go out on our own," Ellsworth said.

They brought their open cases with them. But Grais said many of his settled early on, leaving him looking for something new.

In spring 2007, Grais went out to lunch with a friend, James Grant, the editor of finance journal *Grant's Interest Rate Observer*. Grais said he was looking for a complicated financial instrument that he could study and that might present litigation possibilities. "And without skipping a beat he said 'subprime CDOs,'" Grais said.

The firm immediately bought itself textbooks on structured finance—"duller than dull," Ellsworth said—and the lawyers (including a few associates) each took a chapter to read up and then teach the others. Ellsworth said doing so helped them get a working vocabulary so they could begin talking to bankers and others in the industry. In March 2008, Grais chaired a conference after writing an article related to claims against rating agencies stemming from CDO losses.

The big break came in October 2009, Grais said. That's when the Federal Home Loan Bank of Seattle hired the firm. Two months later, Grais & Ellsworth filed 11 separate suits in King County, Wash., Superior Court against financial institutions. The suits involved 43 securities that the Federal Home Loan Bank had spent \$4 billion on before the crash. Targeted by the suits are

financial firms including Bear Stearns, Bank of America and UBS. If Grais & Ellsworth is successful, the Federal Home Loan Bank will be entitled to return the securities and the money it has received on them and get its original investment back, Grais said.

The firm followed the Seattle lawsuits with another set in March 2010 for the Federal Home Loan Bank of San Francisco, which had sunk \$19 billion into 48 troubled securities. Those suits caught the attention of Charles Schwab, which had similar holdings and had been exploring its own options, said Lowell Haky, associate general counsel at the company. Schwab has since sued several banks over 48 securities in which it invested about \$2 billion.

In particular, Haky said he was taken with the level of data contained in the firm's complaints. An early suit over mortgage-backed securities had been dismissed due to a lack of specificity, Grais said. But the firm has been able to convince clients to hire a company called CoreLogic to analyze their holdings and estimate to what extent the mortgages in their securities have defaulted. Grais attributes the idea to the Seattle bank.

"[The firm] was able to provide much greater detail and substantiation of potential claims that made a complaint much more likely to survive a motion to dismiss," Haky said.

Grais declined to discuss his firm's revenue, but said many of the suits the firm has brought have involved a mix of contingent and hourly fees. No recoveries have occurred yet, he said, as many cases remain in the early stages.

Whether the complaints do survive those motions is the coming test. For months, the firm has been busy successfully convincing federal judges to remand their suits back to state court, where Grais prefers to litigate them since they largely are based on state "blue sky laws" that do not require a proving of intent. "All we have to prove is the offering documents were materially inaccurate," Grais said.

Defeating dismissal motions is the next test. A judge in King County has already heard three days of arguments in the Seattle bank's cases; a decision is pending.

If they survive dismissal, both Grais and Ellsworth said they will need to staff up. Grais said he already wants the firm to add another 10 lawyers because "clients perceive, with some justice, that because of our size we're overstretched."

Still, the firm continues to file new suits. In February, the firm sued Bank of America in New York state court, representing a group of investors who have pooled their more than \$1 billion troubled investments into a Delaware-incorporated company, Walnut Place LLC. The creation of the company specifically for the suit is intended to preserve confidentiality, Grais said.

Eventually, Grais said the firm will need to find a new trick. While these surges of litigation typically "go on for quite a while," he recognizes they will end and he will need a new subject area. Lately, problems in pension funds and the hedging of retirement income have come to fascinate him. "It's going to be the subject of a lot of financial stress," he said. "And where there's financial stress, there's often litigation."

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