

Litigator of the Week: This One's For You, Vince

"To the extent we won this case, it's really not my victory. It's much more a victory for Vince [DiBlasi], and all the other partners at the firm that were trained by Vince."

By Colby Hamilton

January 18, 2018

Sullivan & Cromwell partner Robert Giuffra, Jr. doesn't want to take the credit for his latest litigation win.

It was a big one, too. The veteran corporate litigator saw the U.S. Court of Appeals for the Second Circuit undo class certification against his client, Goldman Sachs, in a case born out of the now-infamous trades popularized in the book and eponymous film, "The Big Short."

Giuffra has been leading the suit through both the district court and appellate proceedings, but he says the win was really for his former mentor and securities bar legend, Gandolfo "Vince" DiBlasi. Only two days after the Jan. 12 appellate win, DiBlasi passed away at the age of 64.

"This is sort of like winning one for Vince. He really was the star of our securities litigation practice for 20 years," Giuffra said. "So to the extent we won this case, it's really not my victory. It's much more a victory for Vince, and all the other partners at the firm that were trained by Vince."

Giuffra spoke by phone from Europe, where he was traveling for work. He noted that DiBlasi was still at the firm when this most recent Goldman Sachs suit came through the door back in 2010. DiBlasi was Goldman's principal litigation partner at the time, so was all but certain to have handled it initially.

"Had he not gotten sick, he very well could have argued this case," Giuffra said.



Robert Giuffra, partner at Sullivan & Cromwell

If the results at the appellate level were any indication, DiBlasi's inspired mentoring paid off for Goldman Sachs.

To Giuffra, the suit by the Arkansas Teachers Retirement System and other investors represents a distillation of the issues behind critical areas of development in this area of the law. Plaintiffs allege that Goldman made material misrepresentations about avoiding conflicts of interest after the burst housing bubble kicked off the financial crisis.

Goldman failed to disclose short positions in funds packed with mortgage-backed assets. Most notable among them was the Abacus, from which investor

John Paulson, who was involved in determining the fund's assets, walked away with \$1 billion post-crisis, thanks to his short position.

The appellate court's decision in favor of Goldman was, in the end, mostly a semantic one: Judge Paul Crotty dismissed key evidence Goldman wanted reviewed in its quest to defeat class certification as inconclusive.

The problem, as the appellate court stated, was that the evidence standard to defeat the presumption of investor reliance on stock price integrity as established in *Basic v. Levinson* was preponderance. Since it was unclear if inconclusiveness was the same as preponderance, the appellate court remanded the case back to Crotty to take another look.

This wasn't exactly the victory Giuffra was looking for.

"The Second Circuit did not address—and it specifically declined to address—the issue of whether the statements themselves were actionable as a matter of law, and basically look at the motion to dismiss issue," Giuffra said. "I pressed that at oral argument, and I could see that the court didn't want to go down the road allowing defendants to get essentially a second bite at the motion-to-dismiss-apple on class certification."

Giuffra believes his clients had a good case for doing just that however, noting there are a number of other circuit decisions that he believes show similar public statements by other financial companies aren't actionable.

Preparation and experience, however, led Giuffra and his pro litigation team which included partner Richard Klapper, on to pursue a multi-pronged

approach on appeal. The first strategy was, let's get the entire case dismissed. Failing that, then get the court to adopt the correct standard—preponderance—and get Crotty to review the evidence he dismissed more closely.

That strategy, ultimately, won the day for Goldman Sachs. While the appellate decision turned on a phrase, the panel spent a considerable amount of time mulling over Goldman's evidence purporting to show 34 instance ahead of the class period where the firm's stock price didn't move, despite public reports that it may likely have conflicts of interest in the funds at issue. Crotty was encouraged to go back and take another look through an evidentiary hearing or oral argument ahead of any further class certification decision.

"Whenever you argue an appeal you always have to think, ok: what's the complete victory argument, and what are the other arguments you can make to prevail? Obviously the goal was to try and have the class decertified, which we were able to do," Giuffra said. "I'm a big believer that you have to have multiple lines of argument in order to prevail, because you never know what arguments are going to resonate with a particular panel of judges."

While he tipped his hat to his former mentor for providing the foundation for wins like this, Giuffra's appellate win continues Sullivan & Cromwell's track record of victory on behalf of Goldman Sachs—something DiBlasi surely would have appreciated.

B. Colby Hamilton is a litigation reporter for the *New York Law Journal* and *Law.com*.