

Banking Group Of The Year: Covington

By Jon Hill

Law360 (December 4, 2020, 3:41 PM EST) -- Covington & Burling LLP's banking practice dealt a blow to multibillion-dollar litigation over fees earned by lenders in a federal coronavirus relief loan program, helped thwart class certification sought by aluminum buyers suing JPMorgan for collusion, and guided one of the biggest European bank mergers in years, earning it a spot as one of Law360's 2020 Banking Practice Groups of the Year.

With more than 100 attorneys stationed in major financial centers across the country and globe, Covington's financial services group battled high-stakes cases for some of the world's biggest banks and steered transactions for financial services clients large and small this past year, persevering through the often challenging disruptions and dislocations of the coronavirus pandemic.

"With the pandemic and the passage of stimulus legislation, banks were critical intermediaries in getting relief funds out," said Covington partner Michael Nonaka, who co-chairs the practice group. "We were able to provide advice in a multidimensional way, both on the regulatory issues in terms of making sure banks understood what was passed and helping them put together corporate documents for funds as they were made available, and also on the potential litigation and white-collar investigation issues."

The Paycheck Protection Program, for example, was created by the Coronavirus Aid, Relief, and Economic Security Act this past spring and relied on banks to help channel more than \$525 billion in forgivable loans to small businesses struggling to survive after the pandemic hit.

In return for their services, the government agreed to pay banks and other lenders a small fee for each loan they processed, but whether lenders must share a portion of those fees with accountants and other "agents" who assisted PPP borrowers in applying has become a key focus of litigation.

These agents have filed dozens of lawsuits nationwide collectively seeking as much as \$3 billion in fees from an array of PPP lenders, including six that turned to Covington for representation in this litigation. In September, the efforts of the firm's banking attorneys paid off when U.S. District Judge Jed Rakoff of New York's Southern District agreed with their arguments that the CARES Act doesn't mandate payment of PPP agent fees unless a lender agreed to do so in advance.



That conclusion led Judge Rakoff to grant the dismissal of several sets of agent fee claims against Covington client MUFG Union Bank and other lenders, and it has since been followed by other federal courts hearing similar cases.

"We had a lead role in drafting and arguing the portion of the motion to dismiss that related to the statutory interpretation of the CARES Act that ultimately the judge ruled on," said Covington partner Henry Liu. "It was a significant victory."

Covington's banking practice has also continued to deliver for financial institution clients facing high-stakes litigation from before the pandemic, such as a proposed class action in New York federal court accusing subsidiaries of JPMorgan Chase & Co., Goldman Sachs and others of colluding with metals warehousemen to inflate aluminum prices.

Brought by aluminum buyers, the case sought billions in damages and was given new life in 2019 by the Second Circuit, which reversed an earlier dismissal from 2016 when a federal judge ruled the buyers hadn't adequately alleged antitrust injury.

But back in district court and with a new federal judge assigned to the case, Covington attorneys appearing for JPMorgan argued this summer that class certification should be withheld because the buyers couldn't back up this alleged antitrust injury with sufficient class-wide proof. The judge agreed and declined to certify their proposed class in July, effectively slashing billions in potential liability from the case for JPMorgan and the other defendants.

"The plaintiffs in this case alleged an antitrust violation based on a supply restraint, but they sought to prove that through econometric analyses and a very complicated multi-step analysis," Liu said. "We were able to emphasize that judges are really supposed to take a close look at the plaintiffs' expert evidence and make a determination as to whether that's reliable and enough to satisfy the plaintiffs' burden at class certification."

Covington's banking attorneys stayed equally busy on the transactions side this past year. While the initial shock of the pandemic led to market volatility and surging uncertainty that put a dampener on mergers and acquisitions activity, Covington partner Rusty Conner said it wasn't long before deals picked back up again.

"That's in large measure because of the fundamental factors that the banking industry faces and has faced historically in generating an increasing level of earnings," he said. "The easiest way to resolve those challenges is to do acquisitions to make yourself larger and more efficient."

In July, for example, Intesa Sanpaolo, an Italian banking group, executed a rare hostile takeover of UBI Banca, a smaller Italian rival, for €4.2 billion. Covington attorneys advised Intesa on all the U.S. securities, tax and banking law issues involved and also provided U.K. securities law counsel for the transaction, which marked the biggest European banking acquisition of the last decade.

Days later, Legg Mason Inc. completed a \$4.5 billion merger with Franklin Templeton Inc. in a deal advised by Covington that created one of the world's largest asset managers with a combined \$1.5 trillion.

The firm has followed that feat up by helping to guide the creation of the largest Black-led U.S. minority depository institution, the product of a historic merger-of-equals between the parent companies of City

First Bank of D.C. and Broadway Federal Bank. Covington has represented City First on a pro bono basis for the corporate work in the deal, which was announced in August and will turn Broadway into a bank with more than \$1 billion in combined assets under management.

"One of the things that was very different with this is that you have two institutions that are very much focused on investing in inner-city development," Conner said. "While all financial institutions have legal obligations to do that, these institutions were specifically set up under statutory and regulatory guidance to do that very thing."

City First and Broadway are both community development financial institutions, or CDFIs, a special regulatory category of financial institution that focus on serving lower- to middle-income areas. Their merger was the first for Covington that had involved CDFIs, and Broadway will maintain that status, according to Conner.

"It was an interesting transaction from the standpoint of making sure that we could continue those designations," he said. "We feel very fortunate and privileged to be a part of it."

And in a financial services landscape undergoing rapid change from new technologies, Covington has demonstrated its capabilities as a trusted adviser to both banks seeking to harness innovation and the fintech firms helping to deliver it.

When banks and other financial institutions started signing up for the Paycheck Protection Program this spring, for example, Covington's regulatory counsel aided several nonbank fintech companies in getting admitted to the program as participating lenders.

Around the same time, the firm advised startup BanQu on a major deal to license its blockchain-based software platform for the Islamic Development Bank to use in tracking the delivery of COVID-19 aid to its member nations in Africa and the Middle East.

Covington also provided guidance to the U.K. challenger bank Monzo when it began applying with U.S. federal regulators in April for a banking license to further its stateside expansion plans. The firm had previously advised the London-based startup on a partnership with an Ohio bank that allowed Monzo to start trialing its services in the U.S. last year.

"That's showcased a lot of our depth in different areas that are relevant to bank-fintech partnerships," Nonaka said of Covington's ongoing counsel to Monzo. "It's not just regulatory work. There's a lot of interesting work on technology transactions that goes into that, as well as on privacy and consumer disclosures."

"Then when it comes time to take the next step of actually forming a bank, [it also involves] making sure there's a coherent way of rolling out products that makes sense to regulators and will appeal to consumers," he added. "We're really happy with that work."

--Editing by Adam LoBelia.