

## Q&A With Gibbons' Scott Garley

Law360, New York (April 12, 2013, 3:39 PM ET) -- [R. Scott Garley](#) is the co-director in charge of [Gibbons PC](#)'s New York office, leader of the firm's securities litigation team, and co-chairman of its private equity and hedge fund team. He focuses his practice on litigation, arbitration, investigations, and counseling in connection with securities transactions and regulatory matters; directors and officers liability and corporate governance matters; executive compensation and employment matters; business tort claims; and complex commercial disputes.

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

A: The most challenging case I have ever worked on involved parallel state court actions and [FINRA](#) arbitration proceedings in connection with the offering and sale of variable annuity policies and their underlying portfolio investments. The policies offered policy owners the option to allocate their premium payments to underlying investment funds. In this case, the plaintiff policy owners invested in two hedge funds that traded primarily in naked option strangles and other risky derivatives, as disclosed in the funds' offering documents.

As a result of the extreme volatility in the markets during the period from late 2008 through early 2010, the options trading strategy performed poorly, and the funds sustained substantial losses and ultimately closed in mid-2010.

In the months that followed, 50 plaintiffs from nine different states — each asserting individual fraud claims (these were not class actions) under the laws of his or her home state — brought state court cases in Tennessee, North Carolina and Texas against the insurance company, the fund manager, the investment adviser and a wholesaler, alleging that the defendants had misled them about the nature and risks of investments in the funds. In addition, the plaintiff policy owners brought eight parallel FINRA arbitration proceedings against their financial advisers alleging that the advisers failed to investigate and recommend suitable investments and misrepresented the nature and risks of investments in the funds.

The case was particularly challenging because of the number of parties and jurisdictions involved; the coordination of proceedings and conduct of discovery among the three court actions and eight arbitration proceedings; and the application of the laws of nine different states. Fortunately, we were able to extricate our clients from the case through a favorable settlement, but the litigation continues on several fronts.

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

A: As the case I just described illustrates, the securities laws should be reformed to ensure that individual investors are sufficiently informed and qualified to make investments, particularly in alternative investments like hedge funds and derivative products. Although the policies and funds in that case were intended only for and offered only to accredited investors and qualified purchasers who are generally presumed by law to be wealthy and sophisticated investors, neither the policy owners nor their financial advisers read the offering documents or understood the nature and risks of the investments.

The current definitions of accredited investor and qualified purchaser under the securities laws are based primarily on the net worth or income level of the individual investor, which in many instances does not indicate or equate to the level of investment experience and sophistication necessary to understand and evaluate complex and risky investments. In addition to the required net worth or income level, investors should be required to demonstrate that they have sufficient knowledge and experience in investment and financial matters, and are capable of evaluating the merits and risks of the investment.

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

A: In keeping with the theme of ensuring that investors are qualified and sufficiently informed to make certain investments, an important issue to address is what should be the role and responsibility of financial advisers? The financial adviser must be the gatekeeper in determining whether the investor is qualified to invest and is capable of understanding and evaluating the investment. In addition, the financial adviser is responsible for investigating, understanding and recommending investments that are suitable for the investor's objectives, needs and risk tolerances.

As the population in this country ages, there likely will be increased pressure on individual investors — and on their financial advisers — to find investments that will provide sufficient returns to meet the investors' medical and retirement needs. That pressure may cause both investors and financial advisers to cut corners in evaluating investment opportunities. The [SEC](#) is expected to consider imposing a fiduciary obligation on financial advisers to act in the best interests of their clients. That may not be necessary or appropriate for a number of reasons. At a minimum, however, improved training and supervision of financial advisers is required to ensure that the advisers are effectively reviewing the qualifications and capabilities of individual investors before making investment recommendations.

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

A: An attorney outside my firm who has impressed me in the area of securities litigation is Mark J. Hyland of [Seward & Kissel](#). I have known and worked with and against Mark for many years and have always been impressed by his ability to reduce a complex case to its simplest terms and then pursue practical and effective solutions for his clients.

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

A: One mistake I made early in my career was a tendency to deny or overlook the bad facts or other weaknesses in my cases. Experience has since taught me that an attorney cannot afford to ignore the unhelpful or inconvenient facts and law in any case. A critical part of the lawyer's job is to identify the weaknesses in his or her case and develop and execute a strategy to deal with and overcome those shortcomings.

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