

### Litigators of the Week: The Milbank Team That Made a Bench Trial Nearly a Decade in the Making a ‘Not Close’ Call for the Judge

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By Ross Todd  
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I think more than a few of us became somewhat conversant in that nightmarish alphabet soup of complex securities in the aftermath of the Great Recession. If you, like me, had cleared your memory banks of exactly what’s what in that world, this 211-page decision that U.S. District Judge Lewis Liman of the Southern District of New York issued on August 27 could be a good refresher.

But it was more than a refresher for this week’s litigators of the week at **Milbank, Thomas Arena, Sean Murphy, and Robert Hora**. Liman’s opus was a knockout win for them and their client, The Putnam Advisory Company LLC, which served as the collateral manager of a complex financial product named Pyxis ABS CDO 2006-1, or Pyxis. After a virtual bench trial before Liman, the judge found that plaintiff Financial Guaranty Insurance Company hadn’t made the case that Putnam made false and misleading statements to defraud it into participating in Pyxis. Liman concluded “the evidence was not close.”

Arena, Murphy, and Hora took turns answering the Lit Daily’s questions about the mechanics of the 11-day bench trial and how they made such a convincing case to Liman over Zoom.

**Lit Daily: Who was your client and what was at stake?**

Thomas Arena: Milbank’s client was The Putnam Advisory Company, LLC (“Putnam”). Putnam was the



Courtesy Photos

(l-r) Thomas Arena, Sean Murphy, and Robert Hora, of Milbank.

collateral manager of a 2006 CDO backed principally by subprime residential mortgage-backed securities called “Pyxis.” FGIC insured the \$900 million senior secured tranche of Pyxis. FGIC claimed that it was exposed to hundreds of millions in damages when Pyxis failed, as almost all CDOs did, in the wake of the 2007 financial crisis.

**How far into your trial preparations were you when the plug got pulled on your initial April in-person trial date?**

Arena and Sean Murphy: We were reasonably far along in our trial preparations, but an explanation is needed. As Judge Liman’s decision recounts, the case was first assigned to the Honorable Robert J. Sweet, who heard argument on the parties’ summary judgment motions but sadly passed away before deciding

those motions. The case was then assigned to the Honorable Analisa Torres, who decided the summary judgment motions and later set the case down for trial for April 27, 2020.

At that point in time, we were operating under the expectation that we would have a jury trial. Milbank and Putnam performed substantial jury research, and many of our preparations were focused on how to best present the case to a jury. After the Court decided the parties' Daubert motions and struck large portions of the expert testimony that FGIC sought to introduce, Putnam consented to a bench trial and recalibrated the manner in which it was prepared to try the case.

In March 2020, when the court adjourned the April 27, 2020 trial date to July 6, 2020, the Milbank team had started the process of outlining witness examinations and organizing its anticipated presentation of evidence. To be sure, there was a lot of work left to be done, but at the time the court adjourned the trial date, Milbank had worked through most of the conceptual issues regarding our case.

**What different steps did you have to take to prepare after getting word that the trial would proceed over Zoom?**

Robert Hora: As the COVID issues worsened, the Milbank team recognized the strong possibility that any trial in this matter would need to be conducted remotely. On June 2, 2020, the case was reassigned to Judge Liman, and on June 5, 2020, Judge Liman held a telephonic court conference in which he made clear that he intended to proceed with a virtual trial in one month's time on July 6. Judge Liman directed the parties' counsel to meet and confer about how to get that done. Thereafter, Milbank and FGIC's counsel agreed to use the Trial Graphics platform for the virtual trial. Trial Graphics trained counsel and the court on how to use the platform, and the court required the parties' counsel to make the necessary arrangements with witnesses so that they had the equipment and ability to interface with the Trial Graphics platform.

For Putnam, our principal witnesses were located in Boston, Chicago and Washington, D.C. Each of our witnesses testified from his residence; they were not in our offices during the trial, and in any event, Judge

Liman ruled that counsel could not be seated next to any witnesses during testimony since, at a live trial, a lawyer would not be able to sit alongside a witness in the witness box.

One complication was how to make sure that witnesses had hard copies of documents that opposing counsel might want to use during cross-examination. Judge Liman solved this issue by requiring counsel to arrange to send to any witnesses it sought to cross-examine, approximately one week before the anticipated testimony, sealed boxes containing all possible exhibits that might be used during a cross-examination. The witnesses were under instruction not to open these sealed boxes until the commencement of their cross-examination, in full view of the Court and all counsel.

This process did put a burden on counsel to figure out the specific documents they might use during cross-examination earlier than they otherwise would have. What we found was that most of the trial witnesses did not refer to the hard copies of their cross-examination exhibits. Rather, like the court, most witnesses tended to review documents on their computer monitors.

**How did you divvy up the work at trial?**

Arena: It was truly a team effort. I handled the opening and summation for Putnam, as well the cross-examination of FGIC's principal witness, Elizabeth Menhenett. Sean Murphy prepared and defended the testimony of Putnam's principal witness, Carl Bell, who was the centerpiece of Putnam's affirmative presentation of evidence. Sean also handled the cross-examination of two important FGIC witnesses, one of whom the court found to have lacked credibility and the other of whom had important testimony struck by the court after Sean conducted a lengthy voir dire. Rob Hora was responsible for Putnam's expert witnesses and also handled many of the letter briefs and motions that Putnam filed in the weeks leading up to and during the trial. Rob is an incredibly talented writer—he's an assassin with a pen. Among the pleadings he authored under tight deadlines were a critical letter brief on loss causation and a successful motion to strike a loss analysis that FGIC sought to introduce just two weeks before trial.

The three of us were assisted by a team of Milbank associates—**Samantha Lovin, Kingdar Prussien, Allison Markowitz, Lacey Reimer and Brendan Walden**—who were all tremendous. A more dedicated and engaging group of young attorneys you could not find.

**According to Judge Liman’s ruling, you were able to undermine the credibility of a number FGIC’s witnesses on cross-examination. What was conducting cross-examination remotely like? Were there any advantages to it?**

Arena and Murphy: There were both advantages and disadvantages to cross-examination via a virtual set-up. At times it was more difficult to control a witness during a remote cross-examination. Think of talking heads on a TV news show, where the moderator poses a question and then has difficulty breaking in to cut off a guest who embarks on a lengthy, self-serving monologue. A certain amount of immediacy is lost when the examiner is not in the same physical space as the judge and the witness.

On the other hand, one advantage is that a remote trial tends to highlight documentary evidence, especially where, as here, direct testimony is in the form of witness declaration. We used a Trial Graphics Zoom platform for our trial, and Trial Graphics and our hot seat operator from **Dubin Research & Consulting** was able to present a split screen that showed a document on one side of the monitor and the testifying witness on the other side. It was reasonably easy during cross-examination to focus attention on the specific portion of a document you wanted to emphasize. In a case where a party wants to embrace specific documents as part of its core presentation of evidence, a remote cross-examination allows the advocate to zero in on those documents in a compelling way.

**Explain what the “Peach-Colored Spreadsheet” was and the role it played at trial?**

Arena and Hora: Judge Torres’s summary judgment decision dismissed all of FGIC’s theories of fraud and negligence except to the extent they were based on a document that FGIC labeled the “Peach-Colored Spreadsheet” or the “PCS.” The PCS contained a list

of targeted assets for approximately one-fourth of the Pyxis collateral pool that had not yet been acquired. The Putnam team did not love the name “Peach-Colored Spreadsheet,” but the acronym PCS was easier to say than “the Calyon August 2006 Detailed Target Portfolio,” and the shorter appellation caught on.

FGIC received the PCS about two months before Pyxis closed. FGIC argued that the PCS contained an affirmative misrepresentation because Putnam selected different assets for the final portfolio than the targeted assets listed in the PCS. The Court rejected FGIC’s claims based on the PCS in virtually every respect; the Court found the PCS could not be attributed to Putnam, that the PCS did not contain a misrepresentation, that FGIC did not rely on the PCS, and that FGIC could not establish transaction causation or loss causation based on the PCS. It was as close to a complete victory as you could have.

**Judge Liman’s decision is a 221-page monster for the uninitiated, but he clearly concluded that the evidence “was not close” and decided all the issues in Putnam’s favor. What’s important here for your client or the securitization industry?**

Arena and Hora: Putnam richly deserved its vindication. FGIC publicly accused Putnam of fraud and negligence in connection with FGIC’s decision to insure a \$900 million tranche of a CDO. The evidence overwhelmingly showed that the Putnam employees who worked on Pyxis were incredibly conscientious and that, far from having defrauded FGIC or acted negligently, Putnam performed its job as collateral manager as it was supposed to. Pyxis failed in the wake of a financial crisis that wiped out almost every CDO issued in the second half of 2006, not for any other reason.

Putnam needed to persevere through eight years of dogged litigation to get to this result. Psychologically, it is incredibly satisfying to have a federal judge find, after an exhaustive trial, not just that Putnam prevailed on all counts, but that the evidence “was not close,” that Putnam’s witnesses were credible, and that FGIC’s principal witnesses were incredible.

Murphy: One important point to make. Pyxis was a CDO backed principally by subprime RMBS. At trial,

several FGIC witnesses suggested that Putnam should have selected a larger portion of prime RMBS for the Pyxis CDO. It's easy to get lost in the intuition that of course a prime mortgage loan is less risky than a subprime mortgage loan. Here's the thing, though. Even FGIC's expert witness agreed that increasing the amount of prime RMBS would have caused Pyxis to perform worse, not better. The basic reason why is that if you have a prime RMBS bond and a subprime RMBS bond of the same credit rating, the prime bond will have fewer mortgage loans supporting it, and in a market downturn like the one we experienced in 2007, the prime RMBS bond would default more quickly.

**Did it ever occur to you all that here you were coping with New York's latest public health crisis while focusing on the elements underlying its last major crisis: the economic crash?**

Arena, Murphy and Hora: We were obviously knee-deep in the two crises—one was the subject of the trial and the other dramatically impacted the conduct of the trial—but we can't say that we connected them beyond that in any conscious way.

**The underlying events of this litigation took place 14 years before trial. What challenges did that present?**

Arena and Murphy: That had a big impact on our strategy for direct and cross examinations, because we knew the ability of witnesses to recall these events was obviously going to be important to the judge's assessment of credibility. We certainly exploited the fact that a witness could not possibly recall the specific details of events that long ago, or that witnesses had greater recall at trial than they did at the time of their depositions.

**What will you remember most about this trial?**

Arena: There were many memorable moments. But if I had to pick one, it would be the camaraderie of the Milbank trial team, which in an odd way was facilitated

by the virtual trial format. At a live trial, counsel have to sit stoically in the courtroom, with their eyes glued straight-ahead. You are taught to never show any emotion. Your witness is getting beaten up? Sit there quietly and betray no anxiety. In contrast, in a virtual trial, only one lawyer for each side is captured on video at a time. That means the rest of the trial team can be engaged in a blizzard of activity and, because they are not on camera, they are relieved of any need to sit like a wooden statue in response to testimony. The Milbank trial team was set up at Milbank's offices in a large conference room around a large rectangular set of tables. At any point during the trial, one lawyer might be working on a brief, another chasing down a document, and a third literally slapping her forehead in disbelief or mock horror at something an opposing witness said. It will be good to get back to live trials in the courthouse, but I will miss some of the informalities permitted by the virtual setting.

Hora: I echo Tom's comments about the camaraderie of the trial team. After months of lockdown due to the pandemic, it was incredibly refreshing to be in the office with Milbank colleagues, even in a socially distanced way. As different as this trial was, there was also a tremendous sense of normalcy in being back in the trenches with colleagues. Those personal interactions are important, and we look forward to having more of them again.

Murphy: Whether virtual trials become the norm or not, it will be hard to forget all of the nuances we were struggling with because there was not much precedent for virtual trials. Just picking the technology platform and then learning how to cross examine a witness effectively using that technology was a whole new phase of the trial preparation process.

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