

Litigator of the Week: When a \$2.38B Payout Is a Win

Willkie Farr & Gallagher partner Todd Cosenza steered a legacy multibillion dollar Lehman Brothers case through years of litigation, coming out on top after a grueling bench trial.

By Andrew Denney

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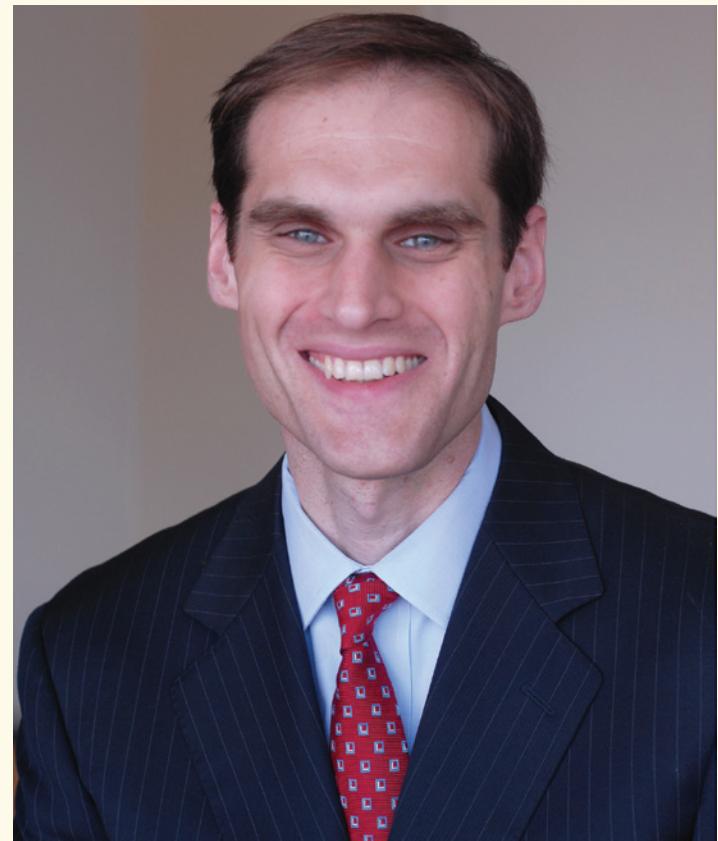
When the nearly decade-long proceedings in the Lehman Brothers bankruptcy finally went to trial last year, investors who said they were hurt by the bank's collapse wanted to pick \$11.4 billion off the bones of its estate.

But a team led by Willkie Farr & Gallagher partner Todd Cosenza representing the plan administrators for Lehman lowballed the trustees by \$9 billion, arguing that the fair and reasonable payout for all creditors was \$2.38 billion.

And after slogging through a grueling, 23-day estimation **trial** spread over three months, in which the parties pored over thousands of loan files underlying residential mortgage-backed securities—an experience that U.S. Bankruptcy Judge Shelley Chapman of the Southern District of New York said was “one of the most difficult, if not the most difficult, thing I have ever done”—the judge **sided with Cosenza and his team**.

Once the fourth-largest investment bank, Lehman Brothers made the biggest Chapter 11 filing in history in September 2008. Bankruptcy proceedings for Lehman have paid out roughly \$122 billion for creditors, *The Wall Street Journal* reports.

During the case, a rift developed between the trustees, which were comprised of hedge funds and institutional investors. Fourteen institutional investors—making up about 24 percent of the unpaid balance on Lehman's RMBS—ended up opting out of the effort and last year took a \$2.4 billion **settlement**.



Todd Cosenza, partner with Willkie Farr & Gallagher.

The attorneys for the remaining trustees, a sprawling team from Holwell Shuster & Goldberg, forged ahead to trial, and they came to play. They sought damages for a gargantuan 193,148 breach of contract claims on more than 94,500 loans, and the case law thus far was “not entirely positive” for the plan administrators, Cosenza said.

"They had the winds to their back," Cosenza said. The trustees representing the securities holders are Deutsche Bank National Trust Co., Law Debenture Trust Co. of New York, U.S. Bank National Association and Wilmington Trust Co., court papers state.

Characterizing the trustees' attorneys as taking a "blunderbuss" approach, Cosenza's team fired back, arguing that the trustees would not be able to meet their burden of proof because they used a flawed review process for the loans.

Cosenza was able to cut a deal in the trial that he saw as crucial to his team's ultimate victory: he would agree to an expedited schedule for discovery if he would be allowed to submit expert economic testimony on the value of other settlements. That included the settlement reached with the trustees who opted out, which Cosenza said was persuasive for Chapman.

In the middle of discovery, the trustees—for reasons cloaked in privilege—decided not to pursue 40 percent of their claims, reducing the number of loans in dispute to less than 72,000.

On March 8, ruling from the bench, Chapman found for Lehman. The judge concluded that the "industry standard" the trustees were trying to apply in the case had flaws; notably, she said, no representatives from the trustees' loan review firms testified at trial.

Among other issues, Chapman said, the trustees' loan reviewers made mistakes in determining borrowers' income levels based on income tax returns. In one example, the judge cited a loan to a registered nurse who said her annual income was more than \$165,000. But the trustees had tried to argue that she lied about her income based on Bureau of Labor Statistics data that the vast majority of nurses in her area made something closer to \$95,000.

"This is a real testament to someone doing the leg-work in a neutral way," Cosenza said of Chapman.

Cosenza also credited his team's win to the fact that, almost 10 years since the financial crisis, courts are taking a more nuanced view of these cases and not always deferring to trustees.

"I think that judges looked at banks as having a real role in the financial crisis," Cosenza said.

The team from Willkie Farr representing the Lehman plan administrators also included Joseph Davis, Benjamin McCallen and Paul Shalhoub.

The Willkie team was joined by Greenwood Village, Colorado-based Rollin Braswell Fisher attorneys Michael Rollin and Maritza Dominguez Braswell, who served as local counsel for the plan administrators; and Matthew Cantor and William Olshan of the Lehman Brothers Holdings in-house legal team. Holwell Shuster partner Michael Shuster, who led the team representing the trustees, declined to comment on Chapman's ruling, but commended his adversary for remaining steadfast in his strategy.

"Todd is a smart lawyer who's good at devising a strategy to get his client to its objective and then executing on and sticking to that strategy through the twists and turns of a case," Shuster said of Cosenza.

Shuster's team included Holwell Shuster attorneys Dan Goldberg, Dwight Healy, Dorit Black, Neil Lieberman, Lani Perlman, Eileen Delucia, Karen Sebaski, Tim Grinsell, Wendy Green, Laura Aronson, Brendon Demay, Ben Heidlage and Sarah Sternleib.

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