

MVP: Willkie's Todd G. Cosenza

By Dean Seal

Law360 (September 13, 2021, 4:42 PM EDT) -- Willkie Farr & Gallagher LLP partner Todd G. Cosenza achieved a watershed ruling for underwriter defendants fighting state court securities suits and scored a series of full dismissals and strong settlements for his clients in several litigations concerning initial public offerings, landing him a spot as one of Law360's 2021 Securities MVPs.

ONE OF HIS BIGGEST CASES THIS YEAR:

Representing approximately 30 underwriters of Uber Technologies Inc.'s tumultuous 2019 IPO, Cosenza got his clients dismissed from state court litigation last November after a California judge agreed that the federal forum selection provision in the ride-hailing giant's charter could apply to nonsignatories.

The suit had been filed in parallel with a federal action, with each alleging that Uber's offering documents misled investors about its business prospects and downplayed rampant mismanagement, a toxic work culture and other illicit dealings.

Federal forum selection provisions have proliferated in the wake of the U.S. Supreme Court's 2018 decision in *Cyan* to allow IPO-related securities claims to play out in state court, as they stipulate that those claims can only be asserted in federal court and help companies avoid facing similar claims on two different fronts.

But their application to nonsignatories of a company's corporate charter, such as IPO underwriters, was still a matter of first impression when Cosenza and his team fought to keep Uber's underwriters out of California state court.

Cosenza's team was ultimately successful in persuading the state court judge that both the terms of the provision in Uber's charter and California contract law warranted a dismissal as to all the defendants in the case, including underwriters.

"It was a really strong opinion, and I think it gives a lot of clarity for companies to put these exclusive



federal forum provisions for securities law claims in their charters going forward," Cosenza said. "It ensures that most of these cases will proceed now in federal court instead of having this really awkward state court-federal court dilemma, where you're dealing with two parallel cases that are very similar in terms of their factual allegations and legal claims."

OTHER NOTABLE CASES THIS YEAR:

In May, Cosenza helped Morgan Stanley and other underwriters for Casper Sleep Inc.'s 2020 IPO escape a New York state securities suit claiming Casper's registration statement failed to disclose that its relationships with certain logistics partners would come to an end around the time the company was set to go public.

The underwriters and their fellow defendants argued that the lawsuit itself was misleading, having relied heavily on allegations in another complaint FedEx had brought against Casper that, according to the defendants, showed the changes in Casper's relationships with its logistics providers occurred after the IPO. The plaintiffs in the investor action dropped their case soon after.

Cosenza also helped secure a total victory for the underwriters of Blue Apron's 2017 IPO, who were facing securities litigation in New York federal court over the offering.

After a motion to dismiss prompted the investor plaintiffs to drop the underwriters from the complaint, the case moved toward a settlement that, as Cosenza's team noticed, did not include a release for the underwriters and thus left them exposed to further litigation. Cosenza was able to get the settlement amended to include a full release for the underwriters without them having to make any contribution to the settlement fund.

He was also instrumental in warding off parallel sets of securities claims for underwriters of GreenSky Inc.'s \$1 billion IPO from 2018, first by successfully getting the state court claims dismissed and then negotiating a settlement of the federal action that won't cost the underwriters any money.

Cosenza said his year of big victories couldn't have happened without the strong bench of Willkie senior associates and junior partners he's had the fortune to work with, in addition to the firm's culture of collaboration and collegiality.

"No MVP stands alone," he said. "We have a great team here."

ON THE CHALLENGES OF REPRESENTING UNDERWRITERS:

Cosenza said he never set out to become "the underwriters' lawyer," but it has become a significant aspect of his practice after years of getting strong results for major banks and developing an expertise on particular legal issues connected to problematic IPOs.

One of the main challenges of representing underwriters in IPO-related suits, he said, is harmonizing a litigation strategy with that of the IPO issuer, which fortunately has been seamless in his collaboration with Uber's defense counsel from Shearman & Sterling LLP and can make all the difference in achieving strong results.

And when representing multiple underwriters in a single case — Cosenza represents nearly 30 in the federal court investor action against Uber — it is also essential to "keep everyone moving in the same direction," Cosenza said.

But securities law, particularly around IPOs, is constantly changing and requires "a ton of scholarship and a willingness to read a lot of cases and keep up with trends" in order to be successful, he said.

"You really have to be constantly engaged," according to Cosenza. "You just can't go by what happened in court last time — every case is very different, and the actual body of case law continues to change over time, so you really have to stay up to speed on current developments."

HIS ADVICE TO JUNIOR ATTORNEYS:

Securities litigation, whether connected to an IPO or not, can be a grind, Cosenza said, so the best advantage a younger attorney can attain when tackling an investor action is to "dig in [and] understand the business."

"Ask what the risk factors are and how the stock price declined ... really look at the case both with the foundation of its legal arguments but also with an understanding of the business and the economics and market forces [at play]," he said.

That's the kind of approach Cosenza said he's seen from Willkie's more junior attorneys, who have "really helped me build out the practice and are willing to contribute at a moment's notice," he said.

"Charles Cording is excellent, Sarah Wastler is excellent, Zeh Ekono is excellent," he said. "We have a lot of really strong junior partners who are making a mark, and over the next 10 years, those are the people to watch out for."

— *As told to Dean Seal*

Law360's MVPs are attorneys who have distinguished themselves from their peers over the past year through high-stakes litigation, record-breaking deals and complex global matters. A team of Law360 editors selected the 2021 MVP winners after reviewing nearly 900 submissions.