

Litigator of the Week: Justin Nelson of Susman Godfrey

By Alison Frankel

We're not sure what the endgame will be for shareholders of Washington Mutual Inc., the bankrupt parent of Washington Mutual Bank. Right now, they stand to recover nothing under a proposed plan of reorganization that distributes about \$7 billion to WMI creditors. But we do know that since a young Susman Godfrey partner named Justin Nelson began appearing in court for the official equity committee in May, Delaware federal bankruptcy court judge Mary Walrath has granted Nelson almost everything he has asked for. In the two months since Susman Godfrey took over representation of the WMI shareholders from Dewey & LeBoeuf, Nelson has managed to throw the WMI Chapter 11 into chaos. And creating chaos is probably the only way that shareholders are going to eke out any recovery from the bankruptcy.

On Wednesday Judge Walrath granted Nelson's motion for an expedited hearing on the appointment of a bankruptcy examiner. That alone is a remarkable turnaround: Only a month ago, Walrath refused the equity committee's previous request for an examiner, finding that WaMu's collapse—which culminated in the bank's receivership and subsequent \$1.9 billion sale to JPMorgan Chase in 2008—had been "investigated to death."

But after that ruling, Nelson and the rest of the Susman Godfrey team returned to Walrath to argue that WMI's lawyers from Weil, Gotshal & Manges and Quinn Emanuel Urquhart & Sullivan hadn't done an adequate investigation of WMI's claims against JPMorgan and the Federal Deposit Insurance Corporation before reaching a \$7 billion settlement with them. As we reported Monday, Judge Walrath listened hard to what Nelson had to say at a June 3 hearing about the "shockingly little" discovery conducted in WMI's \$20 billion suit against JPMorgan. She refused to grant Susman Godfrey's request for Quinn Emanuel work product, including its analysis of the debtor's case, but said she'd reconsider the appointment of an examiner.

Nelson can take a hint. After the hearing Susman filed a second motion asking for an examiner. (The firm said it would drop its appeal of Judge Walrath's earlier order refusing to appoint one.) Contrary to Walrath's belief, the new Susman brief says, WMI's lawyers didn't investigate the sale of WaMu Bank to JPMorgan "to death," and if any government agency conducted such an investigation, Weil and Quinn Emanuel never obtained the results. (Whether any real investigation took place is a big

question: JPMorgan informed Susman Godfrey that it was never contacted by a government agency in connection with its WaMu Bank acquisition.)

Judge Walrath, Susman's brief argues, simply doesn't have enough information to approve a reorganization plan that surrenders WMI's claims against JPMorgan and the FDIC without a lot more information about the value of those claims.

For good measure, Susman Godfrey also filed a request for an expedited hearing on its motion, asserting that the quick appointment of an examiner would cut short expensive and time-consuming wrangling over discovery materials between WMI's lawyers and the equity committee. Weil Gotshal objected to the expedited hearing, arguing that the hurry-up was overly burdensome and the examiner remained unnecessary. Judge Walrath rejected Weil's reasoning and ordered a hearing for June 17.

"We are gratified by the judge's rulings so far," Nelson told us Thursday. "We think this case still has a long way to go. We are hopeful that with the discovery she's granted, and with the examiner, we will get to the bottom of what's happening here."

A onetime clerk to U.S. Supreme Court Justice Sandra Day O'Connor, Nelson acknowledges in briefs that the examiner's findings—assuming Judge Walrath appoints one—may not benefit the shareholders. But the shareholders, after all, have nothing to lose.

"At the end of the day, what we want is a resolution that's fair to all parties," Nelson said. "The first step is to try to get a handle on what's there."

The shareholders will have a shot at improving their leverage even before the June 17 hearing on the appointment of an examiner. On Friday, Judge Walrath will hear arguments about a shareholder suit seeking to force WMI to hold an annual meeting and elect a board. (The case was filed in state court in Tacoma, Wash., but was removed to bankruptcy court.) There's a chance that shareholders could gain control of WMI—which would really throw the Chapter 11 into a tizzy.

Buckle up. This ride is only going to get bumpier.