

Rising Star: Covington's Ashley Simonsen

By Jon Hill

Law360 (July 10, 2020, 5:38 PM EDT) -- Covington & Burling LLP's Ashley Simonsen has defended financial services firms like Celtic Bank, Navient and Chase against borrower litigation with often millions of dollars on the line, securing a spot as one of the banking law practitioners under age 40 honored by Law360 as Rising Stars.

HER PROUDEST ACCOMPLISHMENT:

Simonsen has established herself as a top expert on hot-button "true lender" issues.

Some of the biggest names in online lending are powered by partnerships between banks and nonbank financial technology companies, where loans are made by the former to borrowers recruited and underwritten by the latter. But as this form of lending has grown in prominence, there has been a rise in litigation challenging these partnerships as shams designed to facilitate predatory lending.

According to these suits, the true lender in these partnerships is really the fintech firm, but by having the bank put its name on the loans, the fintech firm can harness the bank's federal preemption powers to evade state usury laws and charge often much higher rates of interest than it otherwise legally could.

This true lender theory is one of the most contested issues in banking law, and Simonsen made her mark on the field last year when she scored a first-of-its-kind victory as lead counsel for Celtic Bank, which was sued over its lending partnership with Kabbage Inc. by a small business borrower in Massachusetts.

Starting in Boston federal court, Simonsen and her Covington colleagues were able to enforce arbitration agreements in the borrower's loan documents and take the matter before an arbitrator. Then, after a five-day evidentiary hearing, Celtic walked away with a complete win.



Ashley Simonsen
Covington & Burling

Age: 38
Home base: Los Angeles
Position: Partner
Law school: Stanford Law School
First job after law school: Judicial clerkship in the Southern District of New York

"It was really the proudest moment for me, because as a result of that defense victory, Celtic Bank went from facing a \$14 million claim to an award directing the plaintiffs to repay all of their unpaid debt, plus the bank's attorney's fees," Simonsen said. "That victory is the first time we know of that a bank has ever defeated these types of true lender claims following an evidentiary hearing."

OTHER NOTABLE MATTERS:

Simonsen has also defended Celtic Bank against a number of other true lender challenges to its lending partnership with Kabbage, including a 2018 suit brought by a Los Angeles-area clothing retailer. After getting it removed from California state court, Simonsen and her Covington colleagues again were able to steer the case to arbitration.

"In true lender cases, you sometimes have to delve into economic policy and macroeconomics when developing arguments on the defense side," Simonsen said. "I studied economics in college and love the discipline, so it's fascinating and really satisfying to be able to draw on those ideas."

From an economics perspective, Simonsen said the problem with the true lender theory is the risk it poses to liquidity. Banks rely on being able to sell loans freely so they can make room on their balance sheets for more lending, but if a bank loan can lose its legal status as a bank loan once sold to a third party, that uncertainty "threatens to undermine access to credit and the critical liquidity that drives it," Simonsen said.

Although not a fintech company, Navient Solutions LLC has also faced true lender challenges to the interest and fees charged on bank-originated student loans that it has serviced. Simonsen has represented Navient in battling three such consumer class actions in California, bringing one of the cases to a settlement in 2018 after fending off certification of a state-law usury class and writing the dismissal motions that helped shut down the other two cases.

"Those cases were complex for all of the reasons that true lender cases more generally are complex," Simonsen said. "Not only do they require a deep understanding of a complicated regulatory regime, federal banking statutes and all of the case law that has come out of interpreting them, but they also require applying economic principles in order to [show] the fundamental problems with the true lender theory."

Simonsen's representation of Navient has extended outside of the true lender realm as well. After the servicer was hit in 2018 with an American Federation of Teachers-backed suit accusing it of misleading borrowers about their eligibility for the Public Service Loan Forgiveness program, Simonsen persuaded a New York federal judge to throw out all but one of the class action case's 15 claims. The litigation is now poised to conclude in a settlement that received preliminary court approval last month.

Her deft handling of consumer class actions was also on display in a California federal court case against JPMorgan Chase, which was accused of violating a California fair credit reporting law by continuing to report information about accounts discharged in bankruptcy.

Although dismissal bids in consumer credit reporting litigation often face long odds, Simonsen and her Covington colleagues built on prior casework to pull out a win in 2019, successfully arguing to a judge that the bank's reporting wasn't misleading because the bankruptcy status and resulting zero balance were also disclosed. When the plaintiff's spouse subsequently filed a similar suit against the bank that went before a different judge, Simonsen and her colleagues got it transferred to the earlier judge and

again secured dismissal.

"It's especially a privilege to be at a firm like Covington, where there's a long tradition of approaching the practice of law like a craft to be honed and refined," Simonsen said. "There's a real dedication to achieving excellence in everything we do for our clients."

HOW SHE BECAME A BANKING ATTORNEY:

Simonsen's skill as a financial services litigator comes in part from her passion for economics, one of the two subjects she majored in at Amherst College. The other was women's and gender studies.

After college, Simonsen made her way to New York and spent three years at Lehman Brothers, where she advised smaller banks on balance sheet management strategies before moving to the investment house's fixed-income research desk and finally its interest-rate derivatives sales and trading desk.

"My experience there is what ultimately led me to land in financial services litigation," Simonsen said. "I have a fluency and familiarity with the industry and its products and services that has allowed me to feel more comfortable practicing financial services litigation."

Simonsen entered law school the year before Wall Street succumbed to the financial crisis, but the litigation resulting from the crisis — particularly around mortgage-backed securities — subsequently became a major focus of her work after graduation, when she clerked for the now-retired U.S. District Judge Shira Scheindlin of New York's Southern District and then U.S. Circuit Judge Barrington Parker Jr. of the Second Circuit.

"Almost all of the cases I worked on were cases involving financial institutions," Simonsen said of her district court clerkship. "I just loved digging into the complexities when working on those, and I think that further led me to this area of the law."

WHAT MOTIVATES HER:

Growing up with an identical twin sister helped foster a competitive drive in Simonsen that she has harnessed not only academically and athletically — she was captain of her college swim team — but also professionally as a commercial litigator.

"I've basically always had this other person to compare myself to and live up to," Simonsen said of her sister, who is also a commercial litigator. "I think we both pushed each other very hard. Being a litigator allows me to channel my competitive spirit in a productive way. I don't shy from a fight, and really nothing thrills me more than winning a great result for my clients."

— *As told to Jon Hill*

Law360's Rising Stars are attorneys under 40 whose legal accomplishments belie their age. A team of Law360 editors selected the 2020 Rising Stars winners after reviewing more than 1,300 submissions. Attorneys had to be under 40 as of April 30, 2020, to be eligible for this year's award. This interview has been edited and condensed.