

Labaton Row A Reality Check On Lawyer Donations

By **Gavin Broady**

Law360, New York (April 01, 2015, 3:25 PM ET) -- CVS Caremark Corp.'s recent bid to derail a securities class action over claims the municipalities leading the suit were influenced by campaign contributions from plaintiffs' firm Labaton Sucharow LLP offers a timely reminder that lawyers must think twice before making political donations, experts say.

The pharmacy giant levied the allegations in a bid to stop certification of a class headed by the retirement funds of the Massachusetts city of Brockton and counties of Plymouth and Norfolk, arguing that the leaders of those municipalities have received generous campaign donations from Labaton attorneys, according to the brief.

The timing and volume of those contributions, CVS argues, suggest that Labaton and the municipal leaders engaged in an improper quid pro quo in which the firm traded political funding for lucrative work as counsel in securities class litigation — in this case, a suit over stocks that dropped following allegedly misleading statements from Caremark and negatively impacted the municipal retirement funds.

The accusations, while difficult to prove, shine a light on the delicate balance lawyers must strike between their ethical obligation to avoid conflicts and their right to participate in the political process, experts say.

"It's a tough thing to prove that someone gave a donation with the promise that they're then going to get business," said Montgomery McCracken Walker & Rhoads LLP partner Michael Hayes. "But as a lawyer, do you really want to expose yourself to that kind of investigation?"

"At the same time, you don't want to impair an individual's ability to engage in political speech by making contributions," he added. "So there's a balance to be struck. CVS is simply saying this is on the wrong side of that balance."

A Labaton representative told Law360 on Tuesday that the firm is currently preparing a brief responding to CVS' claims, and defended Labaton's political funding activities as aboveboard and entirely legal.

"Campaign contributions are a matter of public record, and we support our right, as well as the rights of defense lawyers and defendants themselves, to support candidates we believe in," firm spokeswoman Angelica Crisi said in an emailed statement.

Hayes notes that while CVS cites provisions in the American Bar Association's Model Rules of Professional Conduct, the issue at hand is not really whether the lawyers at Labaton should face sanctions, but rather whether the recipients of the political donations are too conflicted to function as class representatives.

Attorney ethics rules would only come into play in the event that the political contributions are determined to be a bribe, which would typically require an undisclosed relationship and would depend on the nature and amount of the gifts, according to Hinshaw & Culbertson LLP partner Ron Mallen.

Mallen notes that, in light of the elevated standards of class action proceedings, the political contributions here will nonetheless be scrutinized for the appearance of impropriety.

"Class actions are special," Mallen said. "Both counsel and the chosen class representative are held to high standards of impartiality. [Political contributions] can raise concerns about the fitness of both counsel and the lead representative. At a minimum, there can be an appearance of impropriety and in the extreme, there can be actual impropriety."

Experts say the so-called "pay for play" improprieties alleged here are of special concern in class litigation given how lucrative that work can be for the firms in charge.

"One of the biggest complaints about the class action process is that lawyers profit far more than the individual class members they're representing," said Fox Rothschild LLP partner Robert Tintner. "The class itself may recover a lot of money, but often individual members don't see much of that, while lawyers often do."

The determination of whether Labaton's donations were proper is now in the hands of U.S. District Judge Joseph Laplante, who will engage in a thorough, fact-based inquiry into the timing of the contributions, communication between the parties and anything else that might suggest Labaton would not have been named plaintiff's counsel absent their donations, according to experts.

"The test is 'but for' causation of a quid pro quo, and ultimately it is a question of mental intent," said Gregory Sisk, a professor at the University of St. Thomas School of Law. "Of course, the facts may give rise to a powerful inference that such an arrangement was contemplated."

Among the facts alleged by CVS are that New York-based Labaton lawyers have made 153 campaign donations to the chairmen of Norfolk and Plymouth, including 11 donations made to the chairman of Plymouth just two days before the filing of the instant litigation — and three years ahead of his next election, according to the brief.

Should CVS' allegations sway Judge Laplante into a finding that Labaton and the municipal leaders engaged in an improper relationship, the most likely outcome would be the ouster of the lead plaintiffs and the rejection of class certification, according to experts.

Such a decision would likely be cause for significant concern in the plaintiffs bar over the extent to which defendants would be empowered to dredge up entirely proper political contributions as a weapon against class certification, according to Tintner.

"You don't want lawyers being in a position where they can use the fact that a law firm made even small contributions in an even-handed way to suggest they can't get a fair day in court," he said. "It could

become ridiculous."

Tintner says such a decision could have a chilling effect given that lawyers are traditionally big political contributors, in part because they have an actual and vested interest in ensuring that smart, appropriate candidates are elected to public office.

"Fortunately, we also have rules of professional conduct that govern what we say about public officials and the judiciary, meaning we can't go around making accusations that are unfounded," Tintner added. "The motion filed by CVS doesn't appear to be unfounded. I don't know if it has merit, but it certainly raises questions."

Hayes says that firms should be proactive in avoiding potential questions of impropriety by having a strong and clear policy governing all firm donations that takes into account both professional rules of conduct as well as state and federal ethics laws.

"Over the past 10 years or so, as the practice of law has become more and more businesslike, return on investment is a concept that's more at the forefront," Hayes said. "Firms are asking harder questions: Why are we making this contribution? What's the purpose? In the realm of political contributions, you can't ignore ethical or legal implications of those gifts."

The Norfolk County Retirement System and Plymouth County Retirement System are represented by Christine M. Fox, Serena P. Hallowell and Jonathan Gardner of Labaton Sucharow LLP and Barry J. Kusinitz. The City of Brockton Retirement System is also represented by Jonah H. Goldstein of Robbins Geller Rudman & Dowd LLP.

CVS is represented by William R. Grimm and Mitchell R. Edwards of Hinckley Allen & Snyder LLP, Dennis E. Carley of Roberts Carroll Feldstein & Peirce Inc., and Williams & Connolly LLP.

The suit is Richard Medoff v. CVS Caremark Corp. et al., case number 1:09-cv-00554, in the U.S. District Court for the District of Rhode Island.

--Additional reporting by Michael Mello. Editing by Katherine Rautenberg and Kelly Duncan.