

How This Haynes and Boone Lawyer Wiped Out a \$98M Judgment Against BBVA Compass

Anne Johnson and her team persuaded a Texas appellate court to take the extraordinary step of tossing a jury verdict after the court found that the borrower plaintiff couldn't establish the basic elements of his fraud claim.

By Ross Todd
December 18, 2020

With the end of 2020 in sight, I think we could all use a good reversal-of-fortune story as we gear up for next year.

Thankfully, **Anne Johnson** of **Haynes and Boone** dialed up just such a turnaround for her client BBVA Compass this week. The lender was hit with a \$98 million judgment including \$50.5 million in actual damages and \$40 million in exemplary damages after a 2017 trial in a case brought by David Bagwell, a residential land developer in Texas.

Bagwell's lawyers had convinced a state court jury to hold the bank liable for fraud after loan officer Sam Meade told Bagwell that the bank wasn't seeking to sell his past-due loans. The jury found that Bagwell had justifiably relied on Meade's representations before the bank sold his loans to a national homebuilder, which foreclosed on the property underlying them.

Johnson, who was brought in post-trial, this week convinced the Fifth District Court of Appeals in Dallas to **toss the fraud verdict**, wiping away the judgment that had grown to more than \$110 million with interest.

Litigation Daily: Who was your client and what was at stake?

Anne Johnson: Our client is BBVA USA (formerly BBVA Compass), a bank headquartered in Birmingham, Alabama.

This case arises from an \$11 million loan in 2006 to finance the development of luxury homes. The borrower (David Bagwell) was unable to sell home lots and repay his loans, and the fallout from the 2008 financial crisis dealt the fatal blow

to his venture. In 2009, Bagwell defaulted. BBVA sold Bagwell's matured and defaulted loans in 2010 to a third party, as the loan documents permitted, and took a \$3.7 million loss.

Bagwell waited until 2014 to sue BBVA, and claimed fraud, alleging that a BBVA loan officer told him in 2010 that his defaulted loans were not being offered for sale. The trial court granted summary judgment for BBVA on the statute of frauds, and that ruling was affirmed in part and reversed in part by the Dallas Court of Appeals in 2016. The court of appeals remanded a "limited fraud claim" for trial in which only "out-of-pocket damages" were recoverable. The remanded fraud claim went to trial in 2017, and resulted in a verdict of \$50 million in actual damages and \$40 million in



Anne Johnson of Haynes and Boone.
Courtesy photo

punitive damages. With interest, the judgment had grown to more than \$110 million by the time the second appellate opinion came out this week.

At what point were you hired and what were your first steps when you were brought onto the case?

Our appellate team was hired soon after the jury verdict in December 2017. Coming into a case in the aftermath of a verdict is much like being an emergency room doctor who is called upon to quickly analyze the situation, prioritize the tasks ahead, and take swift action. Close collaboration with trial counsel (**Mike Logan** and **Ken Riney** at **Kane Russell**) and with our client was critical. This case had a long history and a multi-week jury trial, so our first task was to get our arms around a huge record and begin to identify key legal issues and possible grounds for appeal. We also had to move quickly on issues like judgment formation, supersedeas, and preservation of error in post-trial motions.

Who all was on your team for the appeal and how did you divvy up the work?

Our appellate group typically works in teams. We have a deep bench—a large appellate practice with decades of experience, both in the trial and appellate courts. We have found that the team approach produces the best results for our clients, and it helps that we really enjoy working together! **Kent Rutter** and I had primary responsibility for the post-trial motions and appellate briefs, with substantial assistance from our associate **Chris Knight**. We also had the benefit of considerable guidance from **Nina Cortell** and **Mike Hatchell**, two of the most recognized appellate practitioners in Texas. Every single person on our team played a critical role—from the post-trial strategy to the appellate briefs to preparing for oral argument.

Under Texas law, judgment contrary to a jury verdict is proper “only when the law does not

allow reasonable jurors to decide otherwise.” How did you go about getting over that considerable hump here?

We had a number of strong legal arguments, as well as compelling, undisputed facts that conclusively negated a fraud claim. We had at least three solid legal buckets: statute of frauds, limitations and failure to meet the elements of a fraud claim. Obviously, the last argument won the day. It had the advantage of drawing on three recent Texas Supreme Court cases confirming that reliance is negated as a matter of law when sophisticated parties sue for fraud on a representation that contradicts the parties’ contracts, often in the midst of red flags warning against reliance. That binding precedent gave us a straightforward roadmap to reversal.

Can you briefly discuss what the “red flags” were that you used to undermine the notion that Bagwell was justified in relying on the loan officer’s misrepresentations? How did you decide to focus your argument against the plaintiff’s fraud claim on those red flags?

The red flags included:

- **The loan agreements.** Bagwell signed loan agreements that gave BBVA the right to sell his loans at any time, without permission, and provided that any modification of that right had to be in writing. Bagwell knew very well that he could not rely on any oral statement about his loans that was not in writing.
- **Borrower’s admission that he could not rely on the bank employee in another context.** Bagwell knew that a prior representation by the bank employee was inconsistent with the loan agreements, and so he didn’t rely on it.
- **Statements by outsiders that the loans were being sold.** Two of Bagwell’s colleagues independently told him that the bank was indeed acting on its rights by offering his notes for sale.

Bagwell admitted that he was “very concerned” that the bank was trying to sell his loans.

- **Bagwell’s sophistication.** Sophisticated parties in arm’s-length transactions can’t blindly rely on representations when there are “red flags”—considering the parties’ experience, knowledge, and background—suggesting they shouldn’t. Bagwell’s loans were previously extended on two occasions pursuant to signed extensions. At the time of the claimed fraud, Bagwell was in default and there were no written, signed agreements providing for an extension at that point. There is no question that Bagwell was fully aware of where he stood, and the bank’s rights.

We focused our justifiable reliance argument on these red flags based on longstanding Texas law. And a trio of recent Texas Supreme Court opinions confirmed that any of these red flags, standing alone, would render Bagwell’s claimed reliance unjustifiable. Together, they certainly do.

Did you get any indication when the case was argued back in January that the court was leaning toward this outcome?

We had an active and well-prepared panel at oral argument. The plaintiffs and intervenors were represented by very talented appellate lawyers—**Jeff Levinger** of **Levinger P.C.** and **David Coale** of **Lynn Pinker Hurst & Schwegmann**. The panel had questions for all of us on a variety of issues. Our team felt good about the argument, but we had no indication as to how the Court would rule.

How did you and your clients react to the news of the decision?

Obviously, we were all extremely happy to receive this opinion!

What can other defendants facing big jury verdict awards take away from this decision?

First lesson: Understand that there will be another day. Often in these situations, the plaintiff’s best day is the day of the verdict. The defendant needs to stay calm and prepare for the long haul. There are often a number of pressing issues that require immediate attention, like securing a bond to ensure the ability to appeal, examining insurance coverage, and dealing with negative press.

And on the law front, the losing defendant needs to begin immediately identifying and formulating its appellate strategy, which often takes initial form in post-trial motions in the trial court. We leave no stone unturned in reviewing the record, the law, and all aspects of the trial—all intended to unearth any and all arguments that might be available to reverse the judgment, either in the trial court or on appeal. (We did not have success in the trial court here, but often do.)

What will you remember most about handling this matter?

This was one of the most complicated verdict forms I’ve ever seen, with 16 actual damage awards totaling more than \$50 million. The hours we spent untangling that verdict are indelibly stamped upon my mind! But, notwithstanding all the late nights, what I will remember most is the great teamwork with Kent, Chris, Nina and Mike. They are terrific lawyers and wonderful people, and I’m grateful every day for the opportunity to work with them.

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