

# Daily Journal

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## TOP PLAINTIFF LAWYERS IN CALIFORNIA FOR 2017

Joseph J.  
Tabacco, Jr.

**Berman DeValerio**

San Francisco

**Practice:**

Business antitrust, securities fraud,  
intellectual property



Tabacco for the first time successfully took on credit rating agencies with a win in a bellwether action on behalf of California Public Employees' Retirement System. He alleged that several credit rating agencies made negligent misrepresentations when giving their highest credit rating to credit vehicles. The case settled against Moody's and Standard & Poor's for a total of \$255 million weeks before a 2016 trial was set to begin.

"Most such cases have been unsuccessful," Tabacco said. "Courts have allowed the agencies immunity on First Amendment grounds." An initial success came when Tabacco and colleagues fought off defense efforts to move the case from California to New York. "We argued that CalPERS was an arm of the state, so the diversity rule did not apply," he added. "California law has a broader test for foreseeability than New York's narrower test, so that was key."

The settlements rank as the largest known

recoveries from Moody's and S&P in a private lawsuit for civil damages. More important, they resulted in a published appellate court opinion — which Tabacco argued — overcoming decades of First Amendment precedent by holding that credit rating agencies can, in some circumstances, be liable for negligent misrepresentations under California law for their ratings of privately placed securities.

"We had to fight our way through an anti-SLAPP motion, and that led to a three-year detour in the case," Tabacco said. "Finally, the court let us proceed on the merits. S&P was under a Department of Justice investigation that led them to settle, but Moody's fought on. Most of the bad acts were done in their London offices, which led to complicated international discovery. There were trips to London, but we didn't get to too many shows."

Moody's motion for summary judgment was pending when Moody's settled. "They

saw that a San Francisco jury trial on the record presented would raise very serious questions about how they could have rated AAA these [structured investment vehicles] in which CalPERS invested \$1 billion-plus only to have them be downgraded to junk shortly after the financial crisis hit," he said. *California Public Employees' Retirement System v. Moody's Corp.*, CGC-09-490241 (S.F. Super. Ct., filed July 9, 2009).

"It was a good win," Tabacco said. "It's good when you do a lot of contingent litigation. You win some, you lose some, but our client was steadfast and willing to take the case all the way through trial."

Beyond the individual outcome, Tabacco added, "It was important to send a message to the rating agencies that they have to do a better job. The good news is that there has been no new meltdown since '08, but this case is on the books should one occur."

— John Roemer