Law360

2014 Practice Group of the Year

Securities

Kirkland & Ellis LLP's securities litigation star continued to climb in 2014 as it beat a derivative suit against Wyndham Worldwide Corp. directors over the hotelier's cybersecurity and crushed a shareholder claim over General Motors LLC's landmark 2010 stock offering, earning the firm a spot among *Law360*'s Securities Groups of the Year.

In the past year, Kirkland has represented notable clients, including Bill Ackman's Pershing Square Capital Management in his and Valeant Pharmaceuticals International Inc.'s hostile $54 billion bid for Allergan Inc. It also delivered critical victories to others, including the Securities Investor Protection Corp., in its battle to avoid covering potential claims of victims of Robert Allen Stanford's $7 billion Ponzi scheme.

And in other matters, Kirkland is continuing to lead the defense of Facebook Inc. in ongoing shareholder litigation around its troubled 2012 initial public offering while representing PricewaterhouseCoopers in litigation brought by former employees over its pension plan.

For Mark Filip, a Kirkland partner and a former federal judge in Illinois' northern district, the defeat of the Wyndham derivative suit was especially significant over what it says about the duties of boards and cybersecurity.

"It clearly established that boards are not going to be insurers with respect to cybersecurity and that's a reasonable conclusion for the courts to have reached," said Filip, who also served as deputy attorney general under President George W. Bush.

"Boards are going to be accountable to be diligent, in the usual way, but they're not going to be insurers."

The suit, filed Feb. 25, 2014, had accused Wyndham's board and top executives of putting the company in financial harm by failing to adequately protect sensitive customer data during a spate of cyberattacks on the hotel chain. Hackers believed to be from Russia were able to pilfer data on more than 619,000 customers during three breaches between 2008 and 2010, which in turn led to a watershed suit against Wyndham by the U.S. Federal Trade Commission accusing the company of misrepresenting its security practices.

But U.S. District Judge Stanley Chesler tossed the derivative suit in its entirety in October, saying the shareholder plaintiffs, among other things, did not show proof the Wyndham board had failed to seriously investigate the company's security protocols. On the contrary,

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the judge found the board had done a credible inquiry into the cyberattacks and the follow-on demands of the shareholder plaintiffs.

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"That really is a case that people are going to be talking about for a long time in terms of boards and cyber," he said.

Separately, and important for Kirkland and other practitioners, Judge Chesler also said Kirkland's representation of Wyndham in both shareholder litigation and the FTC claim was not conflicted because its "obligations in the FTC and shareholder matters were identical: It had to act in [Wyndham's] best interest."

Kirkland enjoyed another victory in the GM shareholder litigation, when a New York federal judge last year axed a claim that the automaker had puffed up its share price after its 2010 IPO by continuing to engage in "channel stuffing," in which it allegedly ramped up dealership inventory to inflate revenue figures by accelerating revenue recognition not tied to actual sales.

The judge, Laura Taylor Swain, ruled in September that the plaintiff's allegation was not just unsupported by fact, it was also critically flawed in that the litigants undermined their omission claim by acknowledging in their amended complaint the existence of press reports and GM disclosures around the company's increased inventory at dealerships.

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Another victory for Kirkland that has major implications going forward came when the D.C. Circuit refused a U.S. Securities and Exchange Commission attempt to force SIPC, the industry-funded safety net for customers of insolvent broker-dealers, to face claims from shareholders who lost billions of dollars investing in certificates of deposit issued by an entity controlled by the now-convicted Ponzi schemer Stanford.

The appellate court agreed with a lower court and found that because the entity that issued the certificates was not an SIPC member, even though a related Stanford-controlled firm was, the SEC could not force the SIPC to launch a liquidation to recoup assets that could be returned to victims of the scheme. Months after the D.C. Circuit ruled, the SEC said it would not attempt any further appeal, sealing the victory for the corporation.

While many of Kirkland's major representations in the past year have been in the area of shareholder litigation, the law firm is taking steps to beef up its securities enforcement chops, said Filip, who is the head of the firm's government enforcement defense and internal investigations group. It took a major step toward this goal in July 2013, when it hired Robert Khuzami, the SEC's former head of enforcement and Deutsche Bank AG's former general counsel for the Americas, as a partner in its Washington, D.C., office.

"Rob really is a transformational hire for us," Filip said. "He's one of the top securities defense lawyers nationally. He's at the peak of his career." And joining Khuzami at Kirkland at the same time was Kenneth Lench, a longtime SEC enforcement attorney who most recently headed up its structured products enforcement unit.

So far, Khuzami is making his mark at the firm. Among other matters, he is currently representing Deutsche Bank in an antitrust suit brought against major banks over their alleged manipulation of foreign currency exchange rates, according to court records.

"For us, this is an area where we feel like we're on the rise and the best days are ahead of us," Filip said. "As good as we felt about the last 10 years, we feel the next 10 years are looking even better."

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