

Securities MVP: Gibson Dunn's Mark Kirsch

By **Jody Godoy**

Law360, New York (December 7, 2016, 5:15 PM EST) -- Gibson Dunn's Mark Kirsch scored victories in securities litigation for UBS, Coty and Merck, along with a rare win against a collateral trustee for private equity magnate Lynn Tilton, showing the versatility of his practice and making him one of Law360's 2016 Securities MVPs.

The case that decisively pushed Kirsch into securities law years ago was one in which he successfully defended Alliance Capital Management LP in a \$1 billion proposed class action filed by Enron Corp.'s shareholders — and made the other side's lawyers pay for it. Some 10 years later, Kirsch says talented colleagues on the securities bar keep him on his toes.

"One of the pleasures of being in this end of the business is that the level of advocacy is very high, and you have to run very fast just to stay even with all of the good lawyers out there," Kirsch said.

This year, Kirsch himself proved a formidable opponent. Last December, he convinced a New Jersey state court judge to toss a derivative suit against Merck & Co. A shareholder had seized on a New York Times article questioning whether large corporations like Merck were fulfilling legal obligations to report the tax they would pay if they brought foreign earnings back into the U.S.

Kirsch argued Merck could not readily disentangle all the assets that had been permanently reinvested in dozens of countries and guess how they would be taxed.

"As we pointed out to the trial court, there are a thousand reasons why one could not reasonably ascertain what the tax would be if that money were being brought onshore today," Kirsch said.

In February, Kirsch convinced the Second Circuit to uphold a ruling dismissing a shareholder suit that blamed UBS and its executives for a \$2.3 billion loss by a rogue trader. The panel found that the plaintiffs "offered no plausible explanation as to why defendants would turn a blind eye" to the possibility of losses.



In another success, Kirsch and company knocked out a shareholder suit against beauty products company Coty Inc. The investors had argued that executives had failed to disclose that two of Coty's key brands were struggling ahead of the company's \$1 billion initial public offering.

Kirsch says the central question of the case was when a set of events — such as dips in sales or the end of a tie-up with retail chain Sephora — can be considered a negative material trend for disclosure purposes, an area of securities law that is not well-defined.

In a March ruling, U.S. District Judge Richard J. Sullivan dismissed the case, calling it "a classic example of Monday morning quarterbacking."

More recently, the Gibson Dunn attorney has been going to bat for Tilton in the cases resulting from her firm Patriarch Partners defaulting on certain collateralized loan obligations.

Kirsch and his team got a New York federal judge to halt an impending sale of distressed assets tied to a CLO known as Zohar I. Insurance company MBIA held \$150 million in Zohar notes and had the right to sell the collateral and recover its losses, after which Tilton would recover on the \$400 million in notes she held.

But the way the insurer carried out the sale, by grouping the distressed assets together as one and limiting the bidding time, kept buyers at bay and allowed MBIA to buy them itself at a discount, Kirsch said.

After a nine-hour evidentiary hearing in October, U.S. District Judge Jed Rakoff allowed the sale to go forward under conditions including a longer window for bidders to come forward. MBIA also allowed the assets to be sold separately, according to Kirsch.

A graduate of Yale Law School, Kirsch began his career as a clerk to U.S. District Judge John Walker Jr. and then spent four years as a Brooklyn federal prosecutor. He then went on to practice for 14 years at Clifford Chance LLP, where he led the firm's global litigation practice, before joining his current firm.

Along with co-managing Gibson Dunn's New York office, Kirsch currently represents UBS in suits over precious metals and currency exchange transactions as well as alleged manipulation of the London Interbank Offered Rate. He is also handling other matters for financial institutions including Macquarie Capital (USA) Inc. and the Royal Bank of Canada.

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