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Q&A With Dechert's David Kistenbroker

Law360, New York (March 22, 2013, 6:15 PM ET) -- David H. Kistenbroker is the managing partner of Dechert LLP's Chicago office and co-chairman of the firm's white collar and securities litigation practice. He represents publicly traded companies and their directors and officers in securities class actions, U.S. Securities and Exchange Commission investigations, internal investigations and corporate governance disputes. Kistenbroker frequently writes and lectures on the topics of securities litigation, directors' and officers' insurance matters and corporate governance. He served as co-chairman of the Practising Law Institute Securities Litigation & Enforcement Institute for 2011.

Q: What is the most challenging case you have worked on and what made it challenging?

A. One of the more challenging cases I have been involved with is the representation of a leading global financial institution simultaneously in a putative shareholder class action, a receivership action and an SEC investigation arising out of the client's alleged involvement in the fraudulent sale of unregistered securities in the U.S. and South America by bank customers.

We were able to use our quarterbacking skills to simultaneously represent various witnesses for testimony before the SEC, produce documents and brief highly contested issues and participate in evidentiary hearings in the receivership action, and brief motions to dismiss in the securities class action. After we successfully moved pursuant to SLUSA to dismiss the original class action complaint, the plaintiff amended to assert claims under the Exchange Act and the Securities Act. While our motion to dismiss the amended complaint was pending, we successfully negotiated favorable settlements of all remaining claims in all three proceedings. What made this case particularly challenging was not only the interesting legal issues, but the need to strategically position the three cases for an ultimately successful resolution.

Q: What aspects of your practice area are in need of reform and why?

A: I really believe that the "no fault" clawback provisions of Dodd Frank need to be repealed. We do not yet know what the final regulatory rules will look like but the prospect of such potentially punitive clawbacks from corporate executives, without fault, seems too harsh. Such clawbacks can be economically devastating to many corporate executives and such a damaging penalty applied without fault seems frankly contrary to the concept of fundamental fairness.

Q: What is an important issue or case relevant to your practice area and why?

A: The U.S. Supreme Court decision in Morrison v. National Australia Bank Ltd. is clearly one of the most important cases rendered recently in the field of securities litigation. It has had a profound impact on the ability of shareholders to bring securities class actions in the United States on behalf of truly global classes and has carved back jurisdiction in the U.S. over foreign corporations, eliminating the F-cubed cases.

The Morrison decision represented the final straw for the plaintiff's bar to truly globalize the field of securities litigation by taking advantage of the evolving laws in non-U.S. jurisdictions that provide for global collective actions and settlements such as the Dutch collective action structure. This trend of global collective actions and settlements will continue to develop as the need for jurisdictions capable of accepting global collective actions grows.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: I have been privileged to know a number of attorneys in the field of securities litigation and regulation that have impressed me on a consistent basis. I have worked alongside many of these lawyers in a large number of securities class actions and related matters. For example, I have had the privilege on a number of occasions of working with Jeff Rudman of Wilmer Cutler Pickering Hale and Dorr, Mike Young of Willkie Farr & Gallagher and Scott Schreiber of Arnold and Porter. Each of them embodies the expertise and judgment of truly great lawyers in this space.

Q: What is a mistake you made early in your career and what did you learn from it?

A: Early in my career, I was practicing at a law firm first as an associate and then as a partner. Although I was having a successful early career, I was deeply dissatisfied with my practice area. I became more unhappy with the practice of law until such time as I found the courage to make a change and leave that law firm for the possibility of more fulfilling work at a different firm. My mistake was in being reluctant to embrace change earlier and suffering in my prior firm much longer that I should have tolerated. That mistake taught me a very valuable lesson. Although I believe people are very reluctant to change, the earlier you embrace the possibility of change and pursue it, the sooner your professional life can flourish if you have found yourself in unfulfilling circumstances.

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