



2012 Practice Group of the Year

Appellate

Kirkland & Ellis LLP's appellate attorneys convinced the U.S. Supreme Court to reverse Ninth Circuit law regarding derivative claim limits and to rule that consumers aren't guaranteed a right to sue credit-repair companies, landing the firm a spot among *Law360's* Appellate Groups of the Year.

Kirkland's two Supreme Court wins came in a banner year that witnessed several other appeals court victories including one involving judicial salary adjustments for federal judges and others involving clients such as Dow Chemical Co., Rockwell International Inc., Siemens Medical Solutions, Raytheon Co. and PricewaterhouseCoopers Canada, cementing the firm's reputation as a go-to for appellate representation.

"The art of our job is to make it look easy," group chair Chris Landau told *Law360*. "You want to make anyone who picks up your brief ask why you are being paid to do what you do, because your position makes so much sense."

And the firm's position in *Credit Suisse v. Simmonds* made sense to the high court, which in March ruled that the two-year clock on certain insider trading claims begins to run as soon as the fraud is discovered or

should have been discovered — not after corporate insiders disclose potentially illicit trades, as the Ninth Circuit previously held.

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The circuit court had held that the two-year statute of limitations is tolled until company insiders disclose their trades to the U.S. Securities and Exchange Commission. But the Supreme Court dismissed that finding, saying it flies in the face of the controlling law and congressional intent.

"*Credit Suisse* was a tricky case in the sense that there were disagreements among the lower courts on the mechanics of tolling — disagreements that gave us a good basis for asking for Supreme Court review. But our fundamental problem was deeper than that — whether or not there should be tolling at all," said Landau, who argued the case before the high court.

The court wound up splitting on the question of whether tolling should exist, but Landau praised the decision, saying it has reverberations for the entire underwriting industry.

Kirkland also won a Supreme Court victory just days into 2012, when the high court ruled in *CompuCredit Corp. v. Greenwood* in January that the Credit Repair Organizations Act doesn't guarantee consumers the right to sue credit-repair companies in court.

CompuCredit sought to compel individual arbitration in a proposed consumer class action alleging the company misled consumers into believing its cards would help them rebuild their poor credit, and in an 8-1 vote, the justices ruled that the CROA does not override arbitration agreements like those signed by CompuCredit's consumers, overturning a Ninth Circuit decision that said the CROA's use of the term "sue" doesn't include arbitration.

The majority found that if Congress had intended to bar the enforcement of arbitration agreements in the CROA, it would have explicitly done so, as it has in other statutes. But because the CROA is silent on arbitration, the Federal Arbitration Act, which maintains "a liberal federal policy favoring arbitration agreements" requires the CompuCredit agreement to be enforced to its terms, the high court said.

"This was one in a series of cases affirming arbitration as a legitimate means of settling disputes," said of counsel Michael W. McConnell, who argued the case. "Congress has adopted a policy favoring arbitration for very good reasons that by and large benefit everyone by reducing the costs of dispute settlement. The Supreme Court simply read what the statute says, and that's the way it should be, since Congress is the lawmaker."

Members of the judiciary have also taken note of Kirkland's success, asking the firm to represent them in litigation concerning judicial cost of living adjustments. In October,

Kirkland persuaded the Federal Circuit, sitting en banc, that Congress' efforts to withhold judicial salary adjustments violates the Compensation Clause of the U.S. Constitution in *Beer v. United States*.

"The challenge was that the Federal Circuit had decided this very issue 10 years ago and had decided against us in *Williams v. United States*," Landau said. "How do you overturn that? Our initial strategy was to get to the Supreme Court as quickly as possible."

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Beer landed in the high court within a year, but was punted back to the lower court to determine if *Williams* even applied to the plaintiffs, whom Landau said were absent class members in that case. After the Federal Circuit determined the plaintiffs weren't bound by the *Williams* decision, it overruled its compensation clause precedent in a 10-2 decision.

The case is ongoing, and on Jan. 3, the government filed a certiorari petition seeking review of the Federal Circuit's decision.

Landau credits his group's success to its intimate size of about a dozen appeals attorneys and its structure. Kirkland doesn't maintain a distinct appellate group. Rather, the lawyers, who are concentrated in Washington with a few in New York and Chicago, are part of the firm's broader litigation practice, he said.

"Appellate people are involved from the beginning," Landau said. "We don't just parachute at the appellate level, and we're thinking hard about the legal issues from the beginning of the case. Some appellate practices are more of a boutique within a firm, but that tends to make your arguments more academic and ivory tower and less practical," he said. "It's a healthy practice for us to be integrated, and that's reflected in our work."

And business is booming, as Kirkland recently picked up four former Supreme Court clerks to join its ranks, Landau said.

That booming business translates to two cases that have already been scheduled for oral arguments in front of the Supreme Court this year and will be argued respectively by McConnell and partner Jay Lefkowitz, Landau said.

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