

Litigator of the Week: David Tulchin of Sullivan & Cromwell

By Alison Frankel

If we had to pick the single most important hurdle for securities class action plaintiffs, we'd say it's the motion to dismiss. Particularly in the last five years, thanks to the heightened pleading standards the U.S. Supreme Court has established in its *Tellabs*, *Dura*, *Twombly*, and *Iqbal* opinions, plaintiffs lawyers have to work hard to come up with adequate allegations of loss causation and fraudulent intent. If they do—if their cases survive defense motions to dismiss and they win the right to begin discovery—the balance of power in the litigation shifts significantly in their direction.

Last August, in an opinion read from the bench, Chicago federal district court judge Suzanne Conlon denied Kirkland & Ellis's motion to dismiss a securities class action against Boeing and two of its executives. It was a hugely important ruling. Plaintiffs lawyers at Robbins Geller Rudman & Dowd alleged that Boeing officials hid discouraging 2009 test results on the company's 787 Dreamliner jets for several months. When Boeing eventually announced a delay in the Dreamliner rollout, the company's stock dropped by 12 percent, or \$4 billion. Judge Conlon had dismissed Robbins Geller's first complaint, but when the plaintiffs amended the complaint to include assertions from an unnamed Boeing chief engineer who said the Boeing execs knowingly hid Dreamliner test results, she said the case could proceed.

The confidential informant almost singlehandedly saved the plaintiffs' case. Robbins Geller pushed ahead with discovery and a class certification motion.

That triumph is now a distant memory. On Monday, Judge Conlon dismissed the class action against Boeing with prejudice after Boeing's new lawyers from Sullivan & Cromwell exposed the Robbins Geller confidential informant. He wasn't a Boeing chief engineer with firsthand knowledge of the Dreamliner test results. He was a line engineer who once worked for a Boeing contractor and, by his own admission, had no knowledge of the Dreamliner test results. Even worse than Robbins Geller's inaccurate description of the informant, Judge Conlon found, was the failure of Robbins Geller lawyers to interview the informant themselves, rather than drafting crucial paragraphs of the second amended complaint based only on an investigator's notes.

"The reality is that the informational basis for [key parts of the second amended complaint] is at best unreliable and at worst fraudulent," the judge wrote. "More significantly, this unseemly conflict between plaintiffs' confidential source and plaintiffs' investigators could have been avoided by reasonable inquiry on the part of plaintiffs' counsel before filing the second amended complaint, and, later, by making flawed representations directly to the court about the confidential source's position and firsthand knowledge of Boeing's internal testing documents."

Judge Conlon's ruling was a long time coming, according to lead

Boeing counsel David Tulchin of S&C. S&C came into the case in mid-September, about two weeks after Robbins Geller first disclosed the confidential informant's name to Kirkland & Ellis in the hallway outside of Judge Conlon's courtroom. Within a month after replacing Kirkland, S&C had discovered that the informant wasn't a chief engineer, wasn't employed by Boeing, and wasn't part of the Dreamliner project until months after the allegedly undisclosed tests were conducted.

Those discoveries confirmed Boeing's doubts about the plaintiffs' description of the informant. "It seemed unlikely that someone like that would be providing information to the plaintiffs lawyers, especially because we didn't think [the informant's allegations] were true," Tulchin said.

But convincing Judge Conlon wasn't easy. Based on the information that the informant was a low-level contract engineer—and not a Boeing chief engineer—S&C filed another motion to dismiss the class action, arguing that Robbins Geller's supposed evidence of scienter was based on false information. In a one-sentence ruling from the bench in October, Judge Conlon denied the motion.

Tulchin was disappointed but undaunted. "I wasn't stunned," Tulchin said. "Nothing stuns me anymore."

The S&C lawyer renewed Boeing's arguments in a motion opposing class certification, asserting that Robbins Geller was not qualified to represent the class because it had misrepresented facts about the purported confidential informant. Meanwhile, S&C and Boeing's local counsel from Perkins Coie continued to investigate the informant. He ultimately showed up at Perkins Coie's Seattle offices, where he told Boeing lawyers that Robbins Geller's investigator pressured him to say he'd seen documents that, in fact, he never saw.

After the informant repeated that assertion at a Nov. 17, 2010 deposition—at which he met Robbins Geller lawyers for the first time—S&C filed a motion asking Judge Conlon to reconsider her October motion to dismiss ruling. Tulchin told us the firm was heartened when, in January, the judge put a hold on class certification as she evaluated the reconsideration motion. "It appeared as if we'd gotten the judge's attention on this issue," he said.

Then came Monday's dismissal of the case. Tulchin told us Judge Conlon's ruling was so gratifying because it was the right outcome. The plaintiffs had only survived Boeing's motion to dismiss because of allegations the complaint ascribed to a confidential informant, and those allegations were based on false information.

"It does appear in this case that corners were cut," Tulchin said. "It does make you wonder."

