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BRACED FOR BATTLE

Activist investors—and their lawyers—
have their eyes on Europe.

By Susan Hansen

David Rosewater: Bringing
Schulte Roth's shareholder
rights practice to London

By Susan Hansen

Taking the Fight to Europe

New York's Schulte Roth sees opportunity advising activist investors as they cross the Atlantic. But lawyers on the defense side are gearing up too.

WHEN NEW YORK'S SCHULTE ROTH & Zabel announced in April that it would expand its gadfly shareholder activism practice to London, it wasn't good news for Europe's boardrooms. The business press had already begun to warn of a coming siege by cash-rich American activist funds, which typically use their stake in a troubled or undervalued company to try to replace top management or make other major changes. "Big beasts are circling around the City," as the Times of London put it in a March 22 article. Schulte Roth's announcement was one more sign the invasion was at hand.

Among the recent high-profile activist campaigns, Paul Singer of New York-based Elliott Management Corp. has been pushing for a major shake-up at British grocery chain Wm Morrison Supermarkets plc, while Thomas Sandell, the founder of Sandell Asset Management, also based in New York, has been campaigning for a break-up of U.K. transport operator FirstGroup plc. To hear Sandell tell it, he and other U.S. hedge fund activists are just getting started. "We're seeing a lot more opportunity in Europe right now," says the Swedish-

born Sandell, who contends that compared to the sky-high U.S. stock market, valuations for European companies are looking much more attractive. Plus, he adds, more shareholder-friendly corporate governance rules in Europe—particularly in the U.K.—tend to make it more hospitable terrain than the U.S. for activist investors.

For corporate lawyers, especially corporate governance specialists, the recent rise in shareholder activism in Europe is opening up new opportunities in advising activists and the companies they target.

"Our clients were calling, so we're gearing up," declares Marc Weingarten, cohead of Schulte Roth's shareholder activist practice, although he declines to supply client names. (Its clients in the U.S. have included TPG-Axon Capital Management, Clinton Group Inc. and First Manhattan Co. ["Acting Up," *The American Lawyer*, April 2014].) The new London group will start out with three lawyers, according to Weingarten, including U.K. partner James McNally, who joined Schulte Roth from Dewey & LeBoeuf in 2012, and two associates.



DAVID ROSEWATER
OF SCHULTE ROTH

CLIFFORD CHANCE'S STEPHEN FOX: AGGRESSIVE, U.S.-STYLE CAMPAIGNS WON'T WORK IN EUROPE.

Other firms are also getting in on the action. Jeffery Roberts, a London-based partner with Gibson, Dunn & Crutcher, says he and other U.K. lawyers are representing a handful of U.S. and U.K. hedge funds that have launched or are considering launching activist campaigns in Europe. Likewise, Kirkland & Ellis has been helping some of its hedge fund clients explore potential targets in Europe, according to senior corporate partner Stephen Fraidin.

Fraidin cautions that it's still too early to tell whether activism in Europe will really take off. And indeed some local corporate lawyers are dubious, in spite of the recent media hype. "I don't think the increase has been as great as the number of articles that have been written about it," says Nigel Boardman, who heads Slaughter and May's corporate group. Even so, Slaughters—along with Freshfields Bruckhaus Derringer, Clifford Chance and other Magic Circle firms—says it has recently seen more defense-side work stemming from activist campaigns.

IN THE U.S., ACTIVISTS WAGED 414 shareholder campaigns in 2013, including 90 proxy fights, according to shareholder activism data compiled by Gibson Dunn. Europe, by contrast, saw just 60 such campaigns in 2013. Still, that number is climbing, up some 50 percent from 2011. And as U.S. hedge funds continue to seek out new targets abroad, Schulte Roth's Weingarten predicts the number of activist campaigns in Europe will continue to grow. "There's a feeling that the U.S. market has gotten saturated," says Weingarten. "In Europe, you've got less competition for targets."

With cash inflows to activist funds at all-time highs—and total assets under management approaching \$75 billion, according to hedge fund research firm



eVestment—American activists have plenty of money to spend in Europe. Spotting an opportunity, Elliott Management, Sandell Asset Management, SpringOwl Asset Management and other U.S. hedge funds have begun zeroing in on European targets over the past year. They face some competition from local activist funds, including Stockholm-based Cevian Capital; London-based Children's Investment Fund (TCI); and Knight-Vinke Asset Management, which has offices in Monaco, Zurich and London. TCI, in particular, has recently shown an appetite for U.S. activist-style hardball, judging from its campaign against EADS, now known as Airbus Group: Although its efforts to force EADS to sell its 4 billion euro stake in jet maker Dassault Aviation stalled, TCI has stepped up demands for major cost cuts at the French aerospace giant.

Those targets in turn are hiring outside counsel to help them ward off at-

tacks. Freshfields, for instance, is helping U.K. online gambling company bwin.party digital entertainment plc fend off an aggressive proxy fight by New York-based SpringOwl. The fund, headed by former Bear Stearns gambling industry analyst Jason Ader, owns a 5 percent-plus stake in bwin.party, making it the company's second largest shareholder. Citing steep declines in bwin's revenues and profits, Ader has blasted company management for incompetence. He also launched a new website (savebwinparty.com) to build support for his campaign to install four SpringOwl-named directors to bwin's board as part of a management shakeup. Bwin initially rejected all of SpringOwl's proposed candidates. But in late May, on the eve of the company's annual shareholder meeting, it agreed to consider one of SpringOwl's nominees—internet entrepreneur Michael Fertik, founder of Reputation.com—for a slot on the board, thus

averting a showdown. (Freshfields partner Piers Prichard Jones declined to comment on the bwin proxy fight.)

Freshfields lawyers also recently advised German pharmaceutical wholesaler Celesio AG in connection with Elliott

Some companies are turning to a firm that, although it has no European offices, boasts one of the world's most powerful brands for corporate defense. New York's Wachtell, Lipton, Rosen & Katz recently teamed up with MacFarlanes on

part of the broader investment in the client relationship," he says.

Still, he and other lawyers who do activist defense work note that, because of the stakes involved, they're typically dealing with CEOs and board members. So

"IN EUROPE, YOU'VE GOT LESS COMPETITION FOR TARGETS," SAYS SCHULTE ROTH'S WEINGARTEN.

Management's challenge to a takeover bid by U.S. drug distributor McKesson Corp. McKesson made its initial play for Celesio last October, but that effort stalled after Elliott, Celesio's second largest shareholder, challenged the deal, claiming that McKesson's original 23 euro a share offer price was too low. McKesson ultimately upped its offer to 23.5 euros per share, while also reportedly agreeing to pay a "significant premium" for Elliott's large holding of Celesio convertible bonds. Elliott dropped its objections in late January, thus clearing McKesson's way for a full takeover.

Along with those matters, Jones says Freshfields also has been retained by company boards on two other activist campaigns that haven't gone public. Indeed, he and other local lawyers contend the surge in European activism is more dramatic than some of the tracking data suggest, given that many activists choose to engage with company management privately, so as not to unnecessarily alienate boards or institutional shareholders.

one activist defense case in Europe, according to one partner. Plus, this lawyer says, he and other Wachtell takeover defense specialists are regularly consulted by European companies facing potential activist campaigns.

Likewise, Armand Grundberg, head of European M&A at Skadden, Arps, Slate, Meagher & Flom, says his group's activism defense workload, including a handful of matters tied to ongoing campaigns, continues to pick up. "Over the past six months, there's clearly been an acceleration in calls from CEOs," says Grundberg. While some of those callers are just experiencing general anxiety about the rise in activism, he says others are actually facing serious threats. "They're people who have a reason to be scared," he says.

Some defense-side lawyers doubt that activist-related work will ever be a big revenue-generator. "It's not a hugely lucrative area for us," says one Magic Circle lawyer who did not want to be named. This attorney notes that, unlike the U.S., the U.K. does not permit the

the potential payoff in terms of future work opportunities can be huge. "You're cementing your role as an important advisor," says Gavin Davies, a corporate partner at Herbert Smith Freehills. "For any lawyer worth his salt, that's where you want to be."

WHILE ACTIVISTS HAVE BEEN PURSUING targets across the continent, the epicenter for European activism has clearly been the U.K. Over the past two years, roughly half of activist campaigns in Europe have been directed at U.K. companies. In part, that's due to the U.K.'s liquid capital markets, along with a more diffuse shareholder base than in Germany and other countries on the continent, where tightly controlled family interests still tend to dominate major corporations and corporate boards are much more entrenched.

What's more, compared to Germany and France, which both permit the use of poison pills to fend off takeovers, the U.K.'s takeover code and corporate governance laws generally give companies

THE U.K.'S NEW INVESTOR FORUM MAY ENCOURAGE SHAREHOLDER ACTIVISM, SAYS GIBSON DUNN'S ROBERTS.

"What you see is the tip of the iceberg," says Clifford Chance partner Steven Fox, who believes that aggressive U.S.-style public campaigns won't sit well in Europe. "There's an awful lot of engagement behind the scenes."

use of poison pills, and activist-related litigation is basically unheard of there, so activism matters tend to be far simpler. Therefore, he views the activism-related advice that he gives to clients mainly as a relationship sweetener. "It's

much more limited defenses and activists freer rein. "We've probably got one of the most activist-friendly regimes in the world," says Taylor & Wessing partner William Belcher, who's one of the few U.K. lawyers who regularly repre-

sents activist investors, including U.S. hedge funds. (He declined to name his hedge fund clients.) Unlike in the U.S. and many other countries, notes Belcher, directors of companies listed on the U.K.'s FTSE index are required to stand for election every year. Moreover, activists need only line up support from 5 percent of shareholders to circulate resolutions or call a special general shareholder meeting.

U.K. activism is likely to get an additional boost this summer, with the widely anticipated launch of the so-called Investor Forum. The creation of the forum was among the key reforms recommended by a U.K. commission set up in 2011 by Vince Cable, Britain's secretary for business, innovation and skills, to improve the operation of British capital markets. As part of its goal of promoting greater engagement between companies and investors, the forum will feature company-specific action groups, where investors will be able to share information and get better organized.

"It's a way of encouraging shareholders to be more involved," says Gibson

Dunn partner Roberts, who believes the forum could lead to more activist campaigns. "Companies will need to sit up and take notice."

Sandell has definitely caught the notice of Europe's business community with his recent pressuring of Aberdeen-based transport operator FirstGroup. Though not exactly a bellwether, that campaign is being closely watched as a test of U.S. activism in Europe. So far the results have been mixed.

Sandell, who holds a 3.1 percent stake in FirstGroup, had initially lobbied company management privately. But that effort failed, and in December Sandell went public, calling on the company's management to spin off its North American Greyhound bus service and Laidlaw school bus line to pay down debt and concentrate on its core U.K. rail and bus operations. FirstGroup countered with its own public statement, which claimed Sandell's proposals were "not compelling," in addition to containing "numerous inaccuracies and structural flaws." The battle continued in January, when Sandell publicly lambasted management's "premature" rejection of

his proposals. He also circulated a white paper laying out his proposed fixes for the company in greater detail in order to build greater shareholder support.

In the months since there's been little evidence that Sandell's efforts have gained any real traction. Sandell, however, insists he's making headway. Among other things, he points out that, thanks in part to his efforts, FirstGroup's board recently installed a new chairman—John MacFarlanes—who is much more sympathetic to his concerns. "We're very happy with our progress," says Sandell.

However that campaign turns out, lawyers at Schulte Roth insist they're confident their new shareholder activism team in London will be busy. Since announcing the move in April, David Rosewater, cohead of the firm's shareholder activist practice, says the firm has been getting a steady stream of calls from U.S. hedge funds who are looking at potential British targets. "In the U.K., there are plenty of companies, and plenty that are underperforming. That's our bread and butter," says Rosewater. ■

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