

Securities Group Of The Year: King & Spalding

By **Mike Cherney**

Law360, New York (January 6, 2011) -- In a practice area where trials are rare, the willingness of King & Spalding LLP's securities group to take cases to a jury has netted the firm big wins in 2010 — including one for former Vivendi CEO Jean-Marie Messier — and earned it a place among Law360's Securities Groups of 2010.

Messier was found not liable for allegedly fraudulent financial statements and disclosures issued by the French media conglomerate, even though the jury held the company itself responsible. The approximately three-month trial has been called the largest securities class action ever tried.

“It came down to a man presenting himself to the jury, being on the witness stand for a week and persuading the jury that he made mistakes, that he failed in some ways in what was his life's work, but he never intended to defraud anyone,” said Mike Malone, a King & Spalding partner and the lead trial lawyer for Messier. “After all the Ph.D. experts and technical wizardry, that's the way jury trials are decided.”

The firm holds this trial savvy as one of the greatest strengths of its securities group, a skill that aids its lawyers in reaching favorable pre-trial settlements for its clients. And its experience representing a wide variety of clients — investment banks, accounting firms, investment advisers and others — gives the firm an edge in understanding small technical details that can swing a securities case.

“We tell the client that we think you can get a better result if you dig your heels in and fight, and when we tell the client that and we can back that up with a track record of success in litigation either through appeals or through trial, it resonates with the client and it is believable to the plaintiffs' lawyers,” said Mike Smith, the head of the firm's securities practice.

The firm has about 85 securities lawyers in seven offices nationwide — New York, Atlanta, Houston, Silicon Valley, Washington, Charlotte, N.C., and Austin, Texas. The group has been growing recently, adding the Charlotte, Austin and Silicon Valley offices within the last five years and bringing on a six-lawyer securities team from Orrick Herrington & Sutcliffe LLP more recently, according to Smith.

King & Spalding adopted a set of strategic initiatives in 2007, setting the firm up for growth in areas where it had already established success and market strength. The firm decided to further increase its expertise in those areas, one of which was securities litigation, Smith said.

In the Vivendi case, the company — which owns Universal Music Group and video game giant Activision Blizzard Inc. — was accused of misleading investors about its liquidity after embarking on a series of acquisitions. Between 2000 and 2002, the company allegedly painted a rosy picture of its finances when, the plaintiffs alleged, the company was actually heavily burdened with debt.

The plaintiffs launched two claims at Messier, including control person liability, in which an officer of the company was in a position of authority but did not actually make allegedly false statements, and primary liability, in which the defendant is accused of making the false statements directly. Messier was acquitted on both allegations.

The key to Messier's defense was his testimony, which was designed to allow the former executive to connect with the jury on a personal level. He testified not only about his successes at Vivendi, but also admitted that he made mistakes and that he failed as CEO.

"When he admitted that to the jury in an emotional moment, that really enabled them to bond with him, because at some point we've all made mistakes and we've all failed in something that we cared deeply about," Malone said.

King & Spalding also stressed evidence that Messier continued to buy company stock even though its price started to tumble.

"That was profound proof that this was a man who believed in the company, and that he believed in it enough to commit a great deal of his own money," Malone said. "I think that helped the jury conclude that he also believed what he said about the company."

Meanwhile, Vivendi itself — which was not represented by King & Spalding — was found liable for 57 alleged misstatements. Judge Richard J. Holwell, who presided over the trial, had warm words for all counsel involved at the end of the proceeding.

"I can only say that this is by far the best tried case that I have had in my time on the bench," he said, according to the transcript. "I don't think either side could have tried the case better than these counsel have."

King & Spalding's securities group also had some significant wins in 2010 that did not come via trial. In a class action involving the collapse of laser skin treatment company Cutera Inc.'s stock, King & Spalding won an important ruling regarding the safe harbor provisions of the Private Securities Litigation Reform Act.

Prior to the case, which went to the U.S. Court of Appeals for the Ninth Circuit, it was an open question in that circuit whether the safe harbor provisions of the PSLRA — which frees companies of liability regarding any forward-looking statements, such as earnings projections — applied to forward-looking statements the company knew were false when they were made.

The plaintiffs' case hinged on a 2007 conference call, in which Cutera allegedly did not adequately disclose the poor performance of its junior sales force in selling a lower-priced laser. During the call, a company executive made robust revenue projections, but said only that the firm was "looking to improve upon the sales productivity" of the junior sales team.

Two months later, the budget laser sales effort was essentially abandoned and the company's revenue projections were later revised downward, eventually leading to a drop in the company's stock price. The plaintiffs alleged Cutera knew the call's optimistic revenue projections were false.

The Ninth Circuit decided, however, that the call's projections fell under the safe harbor provisions of the PSLRA, which the court ruled applied to forward-looking statements even if they were known to be false. The decision was in line with other circuit court decisions and upheld the lower court's dismissal of the case.

The case was handled in the district court by Tim Scott, who has 25 years of securities experience and is the former head of the litigation department at Wilson Sonsini Goodrich & Rosati, and in the appellate court by Paul Clement, a former U.S. solicitor general who argued about 50 cases before the U.S. Supreme Court.

"It's just a dynamite combination," Smith said. "It was a combination of our deep familiarity with this area of the law — the securities litigation area — plus the appellate expertise. That's what really won us that particular matter in the Ninth Circuit."

Another important win came in Georgia state court, where shareholders of Eclipsys Corp. were challenging the proposed \$1.35 billion stock-for-stock merger between the company and Allscripts-Misys Healthcare Solutions Inc. The firm defeated

the challenges, and the merger closed in August.

A Georgia state business court applied the “business judgment rule,” an established rule in Delaware state court that had not been applied in that Georgia court previously, said Warren Pope, co-lead counsel for King & Spalding. The rule provides that if company executives have no personal stake in a stock merger, their decisions are presumed to be in good faith unless the plaintiffs can definitively prove otherwise.

Eclipsys was incorporated in Delaware, but based in Georgia, allowing the plaintiffs to challenge the merger under Delaware law but in Georgia state court. It is part of a trend of plaintiffs seeking to get more favorable judgments under Delaware law by bringing suits elsewhere, where they might get a judge less familiar with Delaware law who could yield a better result, Pope explained.

“The plaintiffs are arguably trying to go outside of Delaware and avoid what would have been a pretty obvious result under Delaware law in Delaware,” said Pope, adding that the Georgia court's decision provides a useful precedent for the defense bar.

Other high-profile cases remain on tap in 2011 for King & Spalding's securities group. The firm is still defending SunTrust Banks Inc. in multiple civil actions alleging fraud and breach of fiduciary duty in connection with auction rate securities. It is also defending now-defunct NetBank Inc. in a securities class action over misleading statements on the bank's subprime mortgage exposures.

Smith said he also hopes to continue the group's expansion, specifically in the area where white collar suits intersect with securities litigation. The U.S. Department of Justice is ramping up enforcement of Medicare fraud and bribery violations under the Foreign Corrupt Practices Act, and plaintiffs firms are now filing civil shareholder derivative suits against companies targeted by the DOJ.

“We've got an increasingly aggressive plaintiffs' bar and they are going to take more and more of these cases to trial,” Smith said. “The plaintiffs' bar is stocking up on former [U.S. Securities and Exchange Commission] lawyers, former DOJ attorneys and a lot of them are bringing in former U.S. assistant attorneys. I think we're well positioned with our litigation history and culture and strength in trial practice to meet the upcoming challenge.”

Methodology: In mid-November Law360 solicited submissions from over 300 law firms for its practice group of the year series. The more than 400 submissions received were reviewed by a committee of four editors. Winners were selected based on the number of significant wins the group had in litigation or the size, number and complexity of deals the group worked on in 2010.

Correction: A previously published version of this article misstated the application of the Delaware business judgment rule in Georgia. The error has been corrected.