

## Product Liability Group Of The Year: King & Spalding

By **Sindhu Sundar**

*Law360, New York (January 13, 2012, 8:40 PM ET)* -- King & Spalding LLP's defense verdicts in a bellwether case in the New York multidistrict litigation over Merck & Co. osteoporosis drug Fosamax and in a Florida Engle progeny suit against Big Tobacco clients were among some of the against-all-odds victories that vaulted the firm into a spot among Law360's Product Liability Groups of 2011.

The firm's October victory for Merck came after a four-week trial involving claims brought in April 2006 by Linda Secrest, an American Airlines air hostess in her sixties, who had sought millions in damages for her claims that using Fosamax caused her to develop osteonecrosis of the jaw, a virulent infection that affects jawbone tissue.

The case, one of seven bellwether cases in the MDL, was a tough win for King & Spalding, which served as lead trial counsel in the defense, in part because it was selected by the plaintiffs' steering company, according to King & Spalding partner Chilton Varner, who led the defense team in the trial.

Varner observed that plaintiffs typically select suits that they believe they have a strong case in.

"Each of these cases has its own peculiarities, but I do think it's important to note that this was a case that the plaintiffs had elected for trial," Varner told Law360. "The plaintiff herself was a sympathetic woman in her sixties, who had gone through considerable pain."

The jury was persuaded by Varner's arguments that Ms. Secrest's condition was not caused by Fosamax, but by her history of difficult procedures in her mouth, including dental replacements and implants, which had culminated in the condition, Varner said.

Bellwether cases have become a common strategy in recent years among judges who manage mass tort litigation, Varner noted, adding that they have found it helpful to try an early group of cases to determine the relative strength of the parties' positions and proof.

In the Fosamax MDL in New York federal court, U.S. District Judge John F. Keenan allowed both the plaintiffs' steering committees and Merck to select certain cases for early trial to see what sort of verdict they might produce, Varner said.

The specific facts of the cases differed in terms of when and how the plaintiff suffered the alleged injury and differences in the labeling mandated by the U.S. Food and Drug Administration about the drug's side effects, according to Varner.

The defense also had to contend with a situation common in product liability cases, in which a plaintiff is suffering from health conditions that have arisen through no distinct fault of hers.

"Product liability cases in general typically pit large corporations against plaintiffs who are quite sympathetic and who may not have contributed to their own injuries," Varner said. "That generally requires top-flight lawyering on behalf of the defendant, since it takes convincing juries who may have preconceptions about large corporations."

Another such victory for the group came in September, when a Florida jury returned a defense verdict for King & Spalding client R.J. Reynolds Tobacco Co. in Miami-Dade County Circuit Court.

The suit was among thousands of the so-called Engle progeny cases in the suits, which involve claims for tobacco-related injuries, with plaintiffs accusing the companies of conspiring to conceal the harmful side effects of cigarette smoking.

A Dade County Circuit Court had granted a \$145 billion verdict to the Engle class in 2000, which the Florida Supreme Court reversed in 2006 and refused to revive the class action status of the lawsuit.

But the difficulty in defending the Engle cases lies in the fact that the high court allowed plaintiffs who could have won judgments under the original verdict to use findings from the jury trial for any individual suits they chose to pursue, King & Spalding attorneys said.

"The biggest challenge in the suit was dealing with the Engle findings, which was that, once class membership is established, the findings apply to any plaintiff who is a member of the class," said Ray Persons, the King & Spalding partner who led the six-lawyer team in the defense, along with King & Spalding partner Ursula Henninger.

"Essentially, [plaintiffs] are relieved of proving general causation and certain elements of their claims including strict liability, negligence, fraud by concealment and conspiracy," Persons said.

In the three-week trial, the plaintiff, whose father had developed lung cancer and died after a longtime habit of smoking Camel cigarettes, sought unspecified damages within \$50 million, claiming that his father's death was caused by the cancer and emphysema from cigarette smoking.

King & Spalding enlisted a historian from the University of Central Florida to argue that the plaintiff's father, an immigrant from Cuba who settled in Florida in 1969 and spoke only Spanish, had access to information in Spanish in his community in Miami-Dade County about the health risks of smoking.

Persons said that the judge did not allow the defense to use any evidence of information that the plaintiff's father might have learned about the health risks of smoking while in Cuba, despite the fact that there was a widespread anti-smoking campaign in Cuba at the time, because of the lack of witnesses with first-hand knowledge to testify on his exposure to such information there.

Given that impediment, the historian's testimony was powerful evidence for the jury to consider, Persons said, because it demonstrated that the plaintiff's father would have been aware of the hazards of smoking at least after coming to the U.S., and knowingly accepted those risks.

"There is definitely a lot of sympathy in a case like this where someone has lost a loved one," Persons said. "But jurors can also be persuaded to take the view that personal responsibility has to come into play. It's difficult to say that just because someone is addicted, they have lost their free will to make choices about their habits."

King & Spalding's arguments were also bolstered by a pathology expert, who testified that the plaintiff's father's lung tumor was not a result of smoking-related lung cancer but of colon cancer that had metastasized to his lung, Persons said.

In two other Engle progeny trials for Reynolds, the plaintiffs had asked for multimillion-dollar awards, but the juries awarded only a fraction of what the plaintiffs had asked for because of the strength of the defense, the firm said.

Tobacco litigation, which the firm has taken on since the late 1970s, is among the pillars of the work of the firm's product litigation team, which has 300 attorneys across five U.S. offices, according to Andy Bayman, a partner in the firm's Atlanta office, who heads the tort litigation and environmental practice group.

The lawyers are spread across offices in Atlanta; Washington; Houston; Charlotte, N.C., which is looking to grow in tobacco litigation; and San Francisco, which has plans to grow in handling toxic tort and big pharma litigation, Bayman said.

"Our firm overall is fairly evenly split between litigation and transactional lawyers, and product liability is the largest litigation practice in the firm," Bayman said.

The firm also has an off-site discovery center in Atlanta that was created in 1995 for tobacco litigation work but has grown to some 200 lawyers who also work on discovery in other areas, including pharma litigation, according to Bayman.

The lawyers working at the discovery center are not in the partner track, so their billing rates tend to be lower, Bayman said.

"For large companies with a lot of litigation, this offers certainty, predictability in terms of costs," Bayman said, noting also that the team is highly specialized and works exclusively on discovery.

"Ultimately, product liability is an area where you're constantly learning new things," Bayman said. "We've worked with experts in a range of deeply technical areas like epidemiology and cardiology. And it's very interesting to work with some of the leading academics in the country."

*In November, Law360 solicited submissions from over 500 law firms for its practice group of the year series. The more than 550 submissions received were reviewed by a committee of Law360 editors. Winners were selected based on the significance of the litigation wins or deals worked on; the size and complexity of the litigation wins or deals worked on; and the number of significant, large or complex deals the firms worked on or lawsuits the firm had wins in. Only accomplishments from Dec. 1, 2010, to Dec. 1, 2011, were considered.*

--Editing by Cara Salvatore.