

Employment Group Of The Year: Orrick

By **Maria Chutchian**

Law360, New York (January 05, 2012, 10:02 PM ET) -- In the face of Morgan Stanley Smith Barney LLC employees claiming compelled patronage, Orrick Herrington & Sutcliffe LLP's employment attorneys successfully fought back with a unique application of federal securities law, just one feat that landed them among Law360's Employment Groups of 2011.

"We decided it was possible the plaintiff's claims were preempted by federal securities laws. Ultimately, that's what we came up with — a defense of preemption," Orrick labor attorney Lynne Hermle said. "It was new and innovative, but actually very solid."

The Morgan Stanley case involved the combined forces of the firm's labor attorneys and its securities team, as the brokerage's employees claimed they were improperly forced to maintain their personal brokerage accounts with their employer.

Orrick attorneys argued that federal securities laws grant brokerages the discretion to design employee trading policies to best prevent insider trading and other securities abuses. That discretion, they successfully argued, includes the ability to require that employee accounts be maintained within the company through which they are employed.

The Central District of California agreed, granting summary judgment to Morgan Stanley and dismissing the claims in May.

Other defendants battling the same compelled patronage claims copied Orrick's argument for their individual cases, Hermle said.

Orrick's global employment law practice chair, Mike Delikat, called the victory an example of the group's creative thinking in such situations. He said its preference for the most complex labor disputes makes it stand out from the pack of employment practices.

"There's an emphasis on shooting for the top of market in terms of not only the complexity of the matter, but also the quality of the client," he said.

In San Francisco, Orrick attorneys defeated Hewlett-Packard Co. in its case against former executive Adrian Jones, who was accused in April of stealing trade secrets by downloading the entire contents of his HP laptop before leaving the company and taking the information to Oracle Corp.

Attorney Rob Shwartz called this particular win one of the most challenging he worked on in 2011, one in which forensic evidence was used to demonstrate a flaw in their time frame of the alleged download to shoot down HP's claims.

"We were able to show when that device [that contained the alleged download] was installed, it was installed by HP, not by Mr. Jones," Shwartz said. "The entire basis of their claim was totally flawed. We also showed that [the company] knew it ... that HP was aware of the fact that the device that they were claiming contained HP trade secrets was in their possession."

HP voluntarily dismissed its misappropriation claims, though allegations relating to expense reports remain, Shwartz said. The litigation is ongoing as Jones seeks attorneys' fees.

Orrick labor attorneys worked on a number of wage-and-hour class actions in 2011, including one for Apple Inc.

Apple retail employees contending they were denied rest breaks lost their bid for class certification in June when Orrick convinced a San Francisco Superior Court judge that there was no common issue among the many Apple stores that were included in the class. It was the second wage-and-hour action Orrick handled for Apple, and a "huge win," Hermle said.

Two months later, Orrick used an unusual method to successfully get wage-and-hour claims against Sears Roebuck & Co. dismissed. After learning the lead plaintiff had filed for bankruptcy and failed to disclose the class action in his proceeding, the company purchased the plaintiff's claims for "a nominal sum," then returned to district court to dismiss the claims.

Orrick also represented Sears against a class of over 5,000 mechanics bringing more than \$25 million in claims and attorneys' fees. The California Court of Appeal affirmed an earlier denial of class certification in May.

In October, Orrick represented the city of Oakland in a gender discrimination and whistleblowing suit brought by the former city administrator, Deborah Edgerly, claiming a former congressman and mayor, Ron Dellums, did not promote women to high-level positions.

Orrick won a summary judgment for the whistleblowing claims, and later convinced a jury to dismiss all of the discrimination claims.

"The evidence that came out was that women were promoted to a certain number of high-level positions so her claim that women were not promoted or get positions in the city of Oakland under [Dellums'] administration just proved not to have any merit," Delikat said.

He added that the Oakland case is an example of how the lawyers in Orrick's employment practice don't always rely on motions to do their work, but are eager to take on trials as well.

"We tend to pride ourselves on being a go-to practice for employers that do want to go to trial," he said.

Orrick labor lawyers went out with a bang in 2011, scoring an affirmation of a dismissal in a high profile defamation suit brought by the former general counsel of McAfee Inc., Kent Roberts, in November.

Roberts, who was indicted in 2008 by the U.S. Department of Justice on charges of stock option backdating, hit McAfee with two malicious prosecution claims and one defamation claim. The suit was eventually dismissed.

After McAfee filed an anti-SLAPP motion, a California federal judge dismissed Roberts' claims for defamation and invasion of privacy, but kept the remaining two claims for malicious prosecution alive.

In November, the Ninth Circuit affirmed the district judge's dismissal of the defamation and invasion of privacy claims, and reversed its ruling on the malicious prosecution claims. Orrick's victory saved McAfee \$40 million in potential damages, the firm said.

In 2012, Orrick will continue to represent PricewaterhouseCoopers LLP in the leading case of a series of suits brought against the accounting industry challenging the exempt status of accountants under the Fair Labor Standards Act and California state law.

The Central District of California initially granted summary judgment to the plaintiffs, finding unlicensed associates were eligible for overtime, but the Ninth Circuit later reversed that decision, finding PwC had established adequate "material fact questions."

The case was sent back to district court, where it is pending. Delikat said the suit is significant not only because of the hundreds of millions of dollars in potential liability, but because of its complexity and lengthy proceeding.

The firm will also continue its representation in 2012 of Facebook Inc., UBS Investment Bank, AllianceBernstein LP and Lawrence Livermore National Laboratory in various labor disputes.

Orrick's employment practice, made up of 62 attorneys worldwide, has increased its global footprint over the years, with a third of the group working outside the U.S., according to Delikat. The practice has offices in New York, three in California, two in Germany, and one each in London, Paris, Moscow, Tokyo, Hong Kong and Shanghai.

While Orrick's labor practice does a large portion of its work in the technology and retail industries, it also has a niche law firm representation practice as well, representing law firms in internal employment matters.

"It's not our goal to be the largest employment practice. We handle high value, complex engagements where a strategic approach and the quality of the work will make a difference in the outcome, so that does price us out of the market for more commodity type of work that some of the boutique firms are able to do," Delikat said. "As a result, we're not going to be the biggest, but we hope to be recognized as one of the best employment practices for complex matters."

Methodology: 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 Andrew Park.