

Litigation Powerhouse: Arnold & Porter

By Melissa Maleske

Law360, Chicago (August 23, 2016, 10:11 PM ET) -- Arnold & Porter's litigation team has racked up wins in a slew of cases that not only have made waves in the legal world but also have entered the mainstream consciousness, including lawsuits stemming from the Deepwater Horizon oil spill, the Costa Concordia cruise ship disaster and so-called light cigarettes, which earns the firm a place among Law360's Litigation Powerhouses.

More than half of Arnold & Porter's attorneys are litigators, with 438 litigation partners, counsel and associates spread across nine offices and working in constant contact and coordination.

The firm's litigation capabilities have expanded dramatically in recent years. Arnold & Porter's 2011 merger with Howard Rice Nemerovski Canady Falk & Rabkin PC made it a West Coast powerhouse that now counts among its clients Adobe, Google, McDonald's, PepsiCo, Wells Fargo, Charles Schwab, Wells Fargo, the Oakland Raiders and the Golden State Warriors. In 2014, it established a Houston office, bringing in some top-tier mass tort attorneys to represent clients



Arnold & Porter

Litigation Attorneys: 438
 Litigation Partners: 136

Big Wins:

Philip Morris Inc. v. Price – The litigation over Philip Morris' "light" cigarette labeling raged on for 15 years until a decisive November 2015 win at the Illinois Supreme Court, which tossed a \$10 billion judgment against Arnold & Porter's longtime client for second time. In June, the U.S. Supreme Court denied cert. to the plaintiffs, closing the book on the extended dispute.

Abeid-Saba et al. v. Carnival Corp. – Arnold & Porter scored the dismissal of all claims of the hundreds of passengers onboard the Costa Concordia cruise ship on jurisdictional grounds in a Florida state appellate court decision backing the firm's argument that U.S. courts were the wrong forum for a case centering on an overseas incident.

Hoskin Hogan v. BP West Coast Products LLC – In the test case for nine mass actions brought by more than 500 ARCO franchisees seeking over \$1 billion in damages, Arnold & Porter prevailed at trial, with the jury rejecting plaintiffs' claims that BP's wholesale gasoline prices were set in bad faith and were commercially unreasonable.

Deepwater Horizon Oil Spill global resolution – Arnold & Porter was co-counsel on BP's legal team that helped to orchestrate a global settlement of Clean Water Act, natural resource damages and all economic claims with the U.S. Department of Justice, five Gulf states and around 300 local government entities. The estimated \$18.7 billion global resolution was the DOJ's largest ever with a single entity.

MM Steel LP v. Reliance Steel & Aluminum Co. – The firm's antitrust group put its skills on display in a successful Fifth Circuit appeal of a \$156 million jury verdict against client Nucor. In a case that rocked the Gulf Coast steel industry, the team convinced the appeals panel that an area conspiracy to boycott a distributor had no bearing on Nucor's business dealings.

Trial Tip: "When a case comes in the door, we take the long-term view of how it is going to look at trial and on appeal, and from day one we have trial and appellate lawyers involved so we can position the case well. By the time we get to trial, it doesn't feel like a big shift because we have been preparing from the outset." — Kenneth Chernof, head of Arnold & Porter's litigation group

like Carnival Cruise Lines and Airbus Americas Inc. and its European parent Airbus SAS. And in April, the firm's commercial litigation practice in London expanded with the addition of prominent litigator Hilton Mervis.

Arnold & Porter's bench is not just deep; it's also strong, backed by a large contingent of attorneys who have developed substantive and industry expertise over the years, including more than 75 who have served as federal, state and international prosecutors; government officials; and U.S. Supreme Court clerks. In June, for example, the firm recruited Sara Shudofsky, the former chief of the Civil Division in the U.S. Attorney's Office for the Southern District of New York. She joined a number of other SDNY alumni at the firm.

"That's been very important to us because the firm is really positioned at the intersection of industry and policy in many respects," said Kenneth Chernof, who heads the firm's litigation practice and is a veteran of the U.S. Department of Justice. "So many of our matters are not just pure, sterile disputes but in fact often involve significant public policy issues or industry issues that require substantive expertise and the ability to operate in a complicated regulatory environment."

Prevailing in such cases often requires approaching them from fresh viewpoints, and Arnold & Porter looks for the unique and sometimes precedent-setting arguments that can reframe its cases as well as entire categories of lawsuits.

Consider, for example, the theory of "removal before service," which the firm pioneered to remove cases to federal court even when they are filed in the forum defendant's home state. Before Arnold & Porter devised the strategy, it was common knowledge that the removal statute didn't allow this; the firm has used the theory to turn the statute on its head, arguing that because it provides that home state defendants that are properly enjoined and served cannot remove, defendants who have not yet been served can win a removal.

Currently Arnold & Porter's product liability litigation practice is at the forefront of personal jurisdiction arguments. In litigation over the blood thinner Plavix, the firm argued on behalf of Bristol-Myers Squibb Co. and Sanofi before the California Supreme Court that the U.S. Supreme Court has called into question the common practice of plaintiff-side attorneys pooling plaintiffs from across the country and filing a class action in a plaintiff-friendly jurisdiction.

The firm has already succeeded in moving Plavix litigation out of Cook County, Illinois, and California is the next battleground. A decision is imminent, and win or lose, the outcome will be a major development for the life sciences arena and product liability law in general, said Anand Agneshwar, chair of Arnold & Porter's product liability litigation practice, who argued the case in June.

"I think what makes our group so strong is that we have a reputation for thinking outside the box and coming up with new angles and new strategies. ... A lot of firms will follow the playbook, and we try very hard to look at every case differently and try to come up with new angles to get an advantage," Agneshwar said.

Agneshwar's group has stayed busy in the life sciences arena. In another case involving Plavix, the product liability team in August 2015 won a key motion to dismiss a ruling in U.S. District Court for the District of New Jersey that pared back most of the claims in a qui tam case alleging improper sales and marketing of the drug. Arnold & Porter is also representing Bristol-Myers in litigation involving the drug Abilify, and in October, in a New York case in which out-of-state plaintiffs alleged the drug caused them to develop diabetes, the firm won a motion to dismiss on forum non conveniens grounds.

The doctrine of forum non conveniens, which lets courts dismiss cases when they are filed in inappropriate forums, has been a powerful arrow in the firm's quiver, a tool it has developed over the years and on which it has essentially made the law in the Ninth and Eleventh Circuits.

The last year has seen the firm's transportation and aviation litigation practice — led by Houston office head Thad Dameris — invoke the forum non conveniens argument to prevail on behalf of Carnival in the widely publicized lawsuit over the 2012 Costa Concordia shipwreck. Arnold & Porter was lead counsel, securing the dismissal by a Florida state appellate court of all claims of several hundred of the U.S.-based passengers on the ship.

The transportation and aviation practice chalked up another big dismissal in December on personal jurisdiction grounds, representing Airbus in a suit brought by family members of victims of the 2014 Air Asia crash. They sued in the Northern District of Illinois under the Multiparty, Multiforum Trial Jurisdiction Act of 2002, a federal statute authorizing federal jurisdiction in claims arising from a single accident that results in more than 75 deaths.

The statute is unique in that it permits the determination on a nationwide, rather than state-by-state, basis. In the Air Asia case, Arnold & Porter won the first decision of any U.S. court addressing personal jurisdiction under the MMTJA, succeeding in its argument that Airbus wasn't subject to jurisdiction based on the totality of its contacts with the U.S. as a whole.

"It's an important, precedent-setting decision, and it's particularly notable because the plaintiffs had argued that essentially there were no due process protections available under the statute: that personal jurisdiction existed as long as there was a venue," said David Weiner, a Washington partner and another DOJ alum. "The court followed our opposition and rejected that argument, eventually agreeing that there was no personal jurisdiction for Airbus anywhere in the U.S."

Arnold & Porter is also trailblazing in the emerging field of data breach lawsuits, racking up a number of dismissals in data breach class actions that are establishing it as a go-to firm. Most recently, Arnold & Porter was co-counsel for Horizon Healthcare Services Inc., obtaining the March 2015 dismissal of class actions before the U.S. District Court for the District of New Jersey and currently representing the company in the plaintiffs' Third Circuit appeal.

The firm's antitrust litigation group has also seen some significant rulings in the past year, perhaps most notably in its Fifth Circuit appeal of a \$156 million jury verdict against client Nucor Corp. In a case that rocked the Gulf Coast steel industry, partner Lisa Blatt successfully argued before the appeals panel that an area conspiracy to boycott a distributor had no bearing on Nucor's business dealings. The Fifth Circuit reversed the verdict in November, "a tremendous outcome" both for Nucor and Blatt, Chernof says.

Blatt additionally won the dismissal of a \$10 billion verdict for longtime client Philip Morris in litigation over "light cigarette" labeling, which raged on for 15 years until November, when the Illinois Supreme Court tossed the verdict for the second time, finding that lower state courts lacked the authority to vacate its prior judgment. The firm also continues representing Philip Morris in the so-called Engle progeny litigation: personal injury claims by smokers who made up a class that was decertified in 2006 in *Engle v. Liggett Group Inc.* Two of Arnold & Porter's most recent appellate successes in that line of cases were a judgment in Philip Morris' favor that affirmed an award of zero damages, and the vacating of a \$17.4 million punitive damages award against the tobacco giant.

Another repeat client of Arnold & Porter's is BP. In October, Arnold & Porter helped orchestrate a record settlement. BP Exploration & Production Inc. entered into a consent decree with the DOJ to resolve claims by the federal government, five Gulf states and around 300 local government entities stemming

from the 2010 Deepwater Horizon oil spill. Approved in April, the estimated \$18.7 billion global resolution is the DOJ's largest ever with a single entity.

The firm also prevailed at trial on behalf of the company in the bellwether case for nine mass actions brought by more than 550 Atlantic-Richfield Co. gas station franchisees seeking over \$1 billion in damages. The jury rejected four plaintiffs' claims that the BP West Coast Products' wholesale gasoline prices were set in bad faith and were commercially unreasonable.

And Arnold & Porter's most recent major trial win came Tuesday from the U.S. District Court for the Eastern District of Virginia, which dismissed a Freddie Mac shareholder's case against the Federal Housing Finance Agency, the conservator of Fannie Mae and Freddie Mac, for which the firm obtained 21 appellate and district court victories in 2015 alone. The shareholder was suing for access to its books and records, and Arnold & Porter's Howard Cayne obtained a dismissal that further stymies shareholders' attempts to roll back bailout agreements requiring net worth sweeps, which essentially require companies to hand over their entire net income to the government.

Chernof attributed much of the firm's trial and appellate success to preparedness. When a case comes in, the litigators are mindful of the fact that although trials in the U.S. are increasingly rare and motions practice now tends to be the primary focus in litigation, they need to begin with the assumption that the case will end up at trial and will be followed by appeals. When a case does end up going to trial, the groundwork has already been laid for success, and the firm's expert litigators are ready and enthusiastic advocates for their clients. Positioning a case for trial success and looping in the trial and appellate lawyers from day one makes the transition to trial seamless, he said.

"What does feel different [at trial] is the pace. You drop everything you're working on and you focus like a laser, 24 hours a day, on what you're portraying to the judge or the jury," Chernof says. "And frankly, it's thrilling. If anything, our litigators can't get enough stand-up courtroom work. We all relish the chance to be in court and lament only that courtroom opportunities are not as common as they used to be."

--Editing by Sarah Golin and Mark Lebetkin.

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