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## Top Defense Verdicts of 2005

# Nobody Blinked in Securities Case

It wasn't that they didn't try to settle.

In fact, Orrick, Herrington & Sutcliffe partners Daniel Tyukody and Michael Tu spent a significant amount of time discussing the case — and possible conclusions — with opposing counsel.

But the parties couldn't reach consensus.

"Nobody blinked," Tyukody said.

So the Los Angeles attorneys ended up at the center of a legal rarity — a securities class action tried to verdict.

Tyukody and Tu were defending Thane International, a Southern California company that specializes in infomercial and other product marketing.

After a weeklong bench trial last year, Santa Ana-based U.S. District Judge James Selna sided with Thane in a written verdict.

The result was a significant win for the Orrick partners.

Securities class actions typically end in million-dollar settlements or, occasionally, summary judgment. When they do reach trial, they usually are settled before a verdict is reached.

Since the passage of the Private Securities Litigation Reform Act of 1995, only six securities class actions have been tried to verdict, according to the attorneys.

"Here, we had a client and insurance company who believed they didn't do anything wrong and were willing to take it through to trial," Tyukody said.

The lawsuit stemmed from Thane's acquisition of Reliant Interactive Media Corp., a Florida-based marketing company, in a 2002 stock-for-stock deal valued at \$236 million.

A group of Reliant shareholders said that Thane backed away from a promise to list the newly merged company on Nasdaq's national trading network. Instead, the shares ended up trading on the less-prestigious over-the-counter bulletin board, where stocks are lower-priced and considered riskier.

At the time of the deal, Reliant was trading on the over-the-counter board, and Thane was privately held. The former Reliant shareholders blamed Thane's failure to list on the major trading network as the cause of the stock's decline in value, from \$7 a share to less than \$2. The class sought \$8 million in damages.

The judge concluded that Thane never explicitly stated it would list on Nasdaq's national trading network and ruled that the plaintiffs failed to prove that the alleged misrep-



Robert Levins

Orrick, Herrington & Sutcliffe partners Daniel Tyukody and Michael Tu achieved a legal rarity — a securities class action tried to verdict.

resentation was "material" and had a negative effect on Thane's stock price.

Lead plaintiffs' attorney Joel Feffer of New York's Wechsler Harwood did not return a phone call requesting comment.

Defense attorneys Tu and Tyukody, who were assisted in the trial by associate Jason Krajcer, said the case is also significant because it was based on an obscure area of the law: Section 12 of the 1933 Securities Act.

Less than 5 percent of securities class actions focus on this section and related provisions of the 1933 act, estimated

Laura Simmons, who performs securities-litigation studies for Cornerstone Research, a civil-litigation research firm.

Aside from being rare, the statute gives plaintiffs an easier burden, holding the company strictly liable for even innocent misrepresentations — eliminating the principal defense used in most securities cases, according to Orrick.

"Even though it was a 33 Act complaint, which has a much lower burden in terms of what they have to prove for the plaintiffs, we prevailed," Tyukody said.

— Anna Oberthur