

Litigators of the Week: Teamwork Makes the Dream Work in Knocking Out Kasowitz FCA Case

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By **Cogan Schneier**

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When lawyers from five mega-firms came together to fight a \$90 billion reverse False Claims Act lawsuit, their mission was clear from the start: stop Kasowitz.

The firm of Kasowitz Benson Torres, acting as a relator, filed the FCA lawsuit last year alleging four chemical companies—The Dow Chemical Co., BASF Corp., Huntsman International and Covestro—failed to report risk information about certain chemicals to the U.S. Environmental Protection Agency and owed the government money for the failure. It was a novel theory that could have had dire consequences for the chemical companies, but the defendants' lawyers attacked the challenge head on, working as one giant team with no single lead attorney.

The group—our collective litigators of the week— included Christopher Landau of Kirkland & Ellis and Alice Fisher of Latham & Watkins for Dow Chemical, Reed Smith's Raymond Cardozo for Huntsman, Seth Rosenthal of Venable for BASF and Bradley Arant Boult Cummings' William Goodman for Covestro.

Fisher said the group came together early on and soon realized they all had similar arguments. So, they decided that instead of filing four



Left to right: Alice Fisher (Latham), Seth Rosenthal (Venable), Raymond Cardozo (Reed Smith), and William Goodman (Bradley Arant Boult Cummings).

separate briefs, they would collaborate on one joint brief in response to Kasowitz's nearly 200-page complaint.

"I think it was more efficient for the court, but it was also a strategic way to handle a big case like this," she said.

The so-called "reverse" FCA claim by Kasowitz alleged that the companies violated the Toxic Substances Control Act's reporting requirements, and needed to pay the government for the fines they would have incurred, if the government had imposed them. If Kasowitz had won, it could have set a nightmare precedent for companies of all stripes.

"The ramifications would be truly stunning," Kirkland's Landau said. "Basically, that you could

use the False Claims Act to pass to the private sector the ability to enforce laws.”

The group hunkered down, focusing and refining their arguments. With so many prominent lawyers from across the country working on one team, it would have been easy for schedules, time zone differences, technical difficulties and egos to get in the way.

But that wasn’t the case with this crew, Rosenthal of Venable said.

“Even when you have several lawyers within your own firm working on one brief, it’s a difficult process,” he said. “Here, you had multiple lawyers from multiple firms working on a single document, which made it that much more cumbersome and that much more remarkable that things worked so seamlessly.”

The group divvied up the work, with each defendant focusing on a different portion of the argument and diving into their area of expertise. But they didn’t shy away from editing one another and providing feedback. Landau said it was the most effective joint defense team he’s worked on in 25 years.

“I think we clicked, not only personally, but substantively,” he said. “We all had similar views about what were our strongest arguments and what were our weakest ... If we ever had a difference, we would talk it through, and everything was done by consensus. We never had anybody say, ‘I won’t agree to that.’”

After bouncing through three different judges in the Northern District of California, the team

was able to move the case to Washington, D.C. That was important, Fisher said, because the judges in D.C. have significant expertise in government and FCA cases.

The government itself also stepped in, filing a rare statement of interest in the case on the side of the defendants. The government agreed with the companies that the FCA should not permit private parties to take on the enforcement role of the executive branch. Additionally, a ruling out of the Fifth Circuit in a notably similar case put another hole in the Kasowitz theory.

“That is a point that we hammered on relentlessly in our briefs,” Rosenthal said. “That Congress never could have intended the radical result that Kasowitz’s theory contemplated.”

Luckily, U.S. District Judge Rosemary Collyer agreed, writing in her opinion Tuesday that the “TSCA creates a duty to obey the law, but the duty to pay penalties is not established until penalties are assessed and final.”

In the end, Cardozo of Reed Smith said the team’s success came down to the basics.

“The key to success is that the statute defeats this case,” he said. “That was where it begins and where it ends. The statute does not permit this kind of case, and all of these lawyers understood how a solid statutory argument is put together. The text of the statute, the legislative history and common sense all squarely supported our view of the case.”