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Litigators of the Week: The Latham & Watkins Duo Who Paved the Path for Mallinckrodt to Exit Bankruptcy

Despite objections from the U.S. Trustee, the SEC, the state of Rhode Island and others, Latham's Chris Harris and Betsy Marks were able to get judicial sign-off on the pharma company's reorganization plan, including a $1.7 billion settlement of opioid-related litigation.

By Ross Todd
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This week's Am Law Litigation Daily Litigators of the Week are **Latham & Watkins** partner **Chris Harris** and counsel **Betsy Marks**. The duo helped Mallinckrodt Pharmaceuticals navigate a Chapter 11 confirmation hearing held over 16 days between November and January where the company's reorganization plan was facing objections from everyone from the U.S. Trustee to the U.S. Securities and Exchange Commission to individual company shareholders.

Despite the objections, U.S. Bankruptcy Judge John Dorsey in Wilmington, Delaware, last week signed off on the company's reorganization plan, including its deal to settle opioid-related liabilities for roughly $1.7 billion.

Courtesy photos

(L-R) Christopher Harris, partner and Elizabeth Marks, Counsel of Latham & Watkins.

Lit Daily: Who is your client and what was at stake?

Chris Harris: We represent Mallinckrodt Pharmaceuticals in connection with its Chapter 11 restructuring. Mallinckrodt is a 150-year old global pharmaceutical company, headquartered in Ireland with its principal operations in the United States. Mallinckrodt manufactures and sells a number of life-saving and critical products, which include generic opioid products. Mallinckrodt filed for Chapter 11 in October 2020, after it was swept up in the wave of litigation facing opioid manufacturers in this country, and also investigations and lawsuits about other products and issues, despite having strong defenses to each claim. Our trial was about whether Mallinckrodt could emerge from bankruptcy under a plan of reorganization that would let it continue selling life-saving products, preserve the jobs of its employees, and provide billions of dollars of support to people suffering from opioid addiction.

Who all was on your team and how did you divide the work?

Harris: This is the most complex Chapter 11 trial I have been involved in. It was so complex because, in addition to being a large, international company with multiple businesses and significant debt, Mallinckrodt faced massive potential litigation liability on a wide variety of issues, and all of these litigation adversaries became potential creditors with divergent interests. We are lucky at Latham to have skilled litigators on

all these topics, who we pulled in to assist on each discrete aspect of the matter. For example, in addition to our core bankruptcy litigation team, led by Betsy and myself, and with assistance from an invaluable associate team, we also brought in health care litigators **Stuart Kurlander** and **Eric Greig** to advise on False Claim Act claims, an antitrust team led by **Maggy Sullivan** to focus on antitrust claims, a civil commercial litigation team led by **Gwyn Williams** to assist on tort issues, white collar partner **BJ Trach** to run an independent investigation, and insurance litigator **Drew Gardiner** to advise on insurance issues. Of course, Latham's stellar restructuring team, led by **George Davis**, made confirmation of the plan of reorganization a reality.

Walk me through how you handled this logistically. This confirmation hearing essentially functioned as a 16-day Zoom trial, right?

Betsy Marks: That is right. Often in bankruptcy matters, objections to a debtor's plan of reorganization are limited to a few contested issues, involving a few witness over a few days. Here, although Mallinckrodt was able to generate an enormous amount of consensus in support of the plan among the vast majority of the creditors, there were still dozens of creditors who objected. The confirmation hearing became a two-phase multi-week contested trial, beginning in November and concluding in early January, with dozens of witnesses, including experts. Given the hundreds of parties who would want to attend the hearing, we did not believe there was any way to hold a COVID-safe, live trial. The court agreed and held the hearing over Zoom, however, our team gathered in our New York office to be together in person for the trial. We sat in a large conference room, and whichever litigator was at the virtual podium would sit in a designated spot in front of the camera at the middle of the conference table. Many of our witnesses took the stand over Zoom from wherever they were located, but our witnesses in the New York area came into our office as well, and would testify from a separate sequestered conference room down the hall from our war room. It was nice to all be together in person, at least for part of the trial.

How did your set-up change when the Omicron wave hit?

Marks: Unfortunately, about half-way through the trial in mid-December, several members of our trial team came down with COVID. As you'll recall, this was when Omicron was first emerging, and New York City was hit early on. Luckily most of us did not get infected and stayed healthy for the rest of the trial. This changed our ability to gather in person, however, as we did not want anyone else on our team to get sick or expose their families, especially so close to the holidays. So mid-way through the trial, we all went fully remote and worked from home. In order to coordinate with one another during the trial, we would have large groups of our litigators and restructuring colleagues on our internal IM system, chatting real time throughout the trial each day about case strategy.

Walk me through the cast of objectors that you were facing. How did you alter your tone between times you were arguing against a single pro se shareholder versus counsel for a litigation funder who purchased a creditor's claims?

Harris: The plan objectors ran the gamut from individual creditors represented by other large law firms, to litigation funders who had purchased creditors' claims, to plaintiff class action litigation firms, to government entities from state AGs to the US Trustee to the SEC, and also several active pro se shareholders and creditors. All of the objectors were adversarial to us (the debtors), but many of them were also adversarial to one another, as bankruptcy is in some sense a zero sum game — there is a single pie being divided amongst all of the creditors. So we had instances where one creditor would cross-examine our witness to try to establish a point, and the next creditor would cross-examine that witness to try to establish the opposite point, both of which we had to disprove. As the debtors, we had to be the honest broker in the middle, proposing how the estate should be divided up fairly. We had to be respectful but adversarial to all. And although this matter was very contentious at times, I think we succeeded. I definitely give credit to our pro se objectors, who crossed-examined witnesses, and made legal arguments, and did an admirable job given the lack of counsel. We tried not to use procedural or evidentiary rules they might be unfamiliar with to shut down discussion of a legitimate issue they wanted to raise.

Tell me about the mini-trial that your co-counsel at Arnold & Porter handled between the two phases of the confirmation hearing.

Marks: As I mentioned earlier, the plan confirmation hearing was split into a two-phase trial. Because Mallinckrodt would like to emerge from bankruptcy as soon as possible, we began the plan confirmation hearing at the first chance we got, in early November. At that time, only certain issues were ready to be litigated, and the bankruptcy court agreed that we could carve off the remaining issues and objections for a second phase of trial to be held at a later date. But there actually was a third phase of confirmation, because the debtors had to have a separate trial against one Acthar creditor on a predicate issue about administrative expenses. A loss on that issue could have prevented the plan from being confirmed. Our co-counsel at **Arnold & Porter — Matt Wolf**, **Laura Shores**, **Sonia Pfaffenroth** and **Eric Shapland** — handled this trial, which occurred over the course of a week and a half in mid-November between phase 1 and phase 2 of the plan confirmation hearing. Arnold & Porter had represented Mallinckrodt in a handful of pre-petition lawsuits related to Acthar. Arnold & Porter did a fabulous job, securing a complete victory for Mallinckrodt, which paved the way for confirmation of the plan.

While your confirmation hearing was ongoing a federal judge nixed the $4.5 billion settlement coming out of the Purdue Pharma bankruptcy that shielded members of the Sackler family from liability. How did you take that into account when making the case for the releases included in the Mallinckrodt plan, especially those relating to directors and officers?

Harris: It wouldn't be a trial without some surprises. On December 16, in the middle of our case-in-chief, the district court in the SDNY overturned the confirmation of Purdue Pharma's chapter 11 plan of reorganization, based on releases that were granted to the Sackler family. Although we have different factual and legal issues in Mallinckrodt's restructuring, this was a significant ruling, as Mallinckrodt's plan also contains third party releases for liability. Although this ruling did not change our overall strategy or thinking, it did cause us to double-down on building and emphasizing the evidentiary record in support of the releases in Mallinckrodt's plan, particularly in our closing argument.

What's important here for other companies considering entering Chapter 11 with significant litigation liabilities?

Marks: Bring in litigation support early to help build a restructuring strategy. When a company files for bankruptcy, litigation pending against the company outside the bankruptcy is automatically stayed. However, the debtor's litigation adversary may now become a creditor, and there could be significant issues to litigate or resolve with that adversary inside the bankruptcy. In other words, that adversary does not just go away. If an adversary is particularly litigious during a lawsuit, a debtor should count on them continuing to be litigious during the bankruptcy as well. This can cause significant cost and disruption during the bankruptcy and depending on the issues, could even potentially derail a plan from getting confirmed altogether. Also, keep a close eye on indemnification and related types of claims, which otherwise might reimpose liability that you've tried to address through a restructuring.

What will you remember most about this matter?

Harris: What I will remember most are our great team and great client. Latham's restructuring attorneys are brilliant and genuinely nice people, and Betsy and I have loved working, strategizing, and collaborating with them throughout this chapter 11 case. And a huge thank you to the incredible litigation subject matter experts who joined the team; I remember at my first Latham partners' meeting being told that if another partner calls for help, to put your brief down and your email aside and return that call, and our partners all did that in spades with a smile. Our local Delaware counsel, litigator **Bob Stearn** at **Richards, Layton & Finger**, provided indispensable advice as well. In addition, Mallinckrodt was a pleasure to work for. No one is ever happy to be in bankruptcy, but all of the executives, directors, and employees we worked with were so helpful and made our job a lot easier, and the trial strategy was crafted with a very sophisticated and driven in-house legal team. We're thrilled to see the company on the path to emergence so it can continue doing good work with its important pharmaceutical products.