

## Court Rips 'Legal Artifice' in Kasowitz Firm's Megabillions Whistleblower Case

By Dan Packel

New York-based litigation powerhouse Kasowitz Benson Torres can't revive a whistleblower lawsuit that alleged a quartet of chemical manufacturers cheated the Environmental Protection Agency out of billions in fines, a federal appeals court ruled Friday.

The ruling from the U.S. Court of Appeals for the D.C. Circuit suggested that the firm had thrown a Hail Mary with its *qui tam* complaint against Dow Chemical Co., Bayer MaterialScience, BASF Corp. and Huntsman International, motivated by the prospect of multibillion-dollar whistleblower award.

"*Pecunia non satiat avaritiam, sed iritat*" translates from Latin to English as 'money doesn't satisfy greed; it stimulates it,'" wrote U.S. Circuit Judge Karen LeCraft Henderson. "This case teaches that money also stimulates legal artifice."

Kasowitz said in a 2016 complaint that the chemical manufacturers failed to hand over information to the U.S. Environmental Protection Agency about the substantial risk of injuries posed by isocyanate, a common chemical used in a variety of consumer products. While representing coal miners in a prior lawsuit, Kasowitz lawyers uncovered company documents that showed that just touching or inhaling a small amount of isocyanate could cause permanent pulmonary injury in humans.

The Kasowitz firm contended that the four companies were consequently on the hook for \$90 billion in fines and



U.S. Circuit Judge Karen LeCraft Henderson.

Diego M. Radzinski/NLJ

penalties, a figure that could net the firm \$27 billion, or 30% of the recovery.

Senior Judge Rosemary Collyer of the U.S. District Court for the District of Columbia dismissed Kasowitz's complaint in 2017, finding that, since the EPA had not handed out any penalties, the companies did not have an "obligation" to pay the government.

Following oral argument in May, the appeals court came to the same conclusion. The panel rejected the firm's argument that the Toxic Substances Control Act compelled the companies to pay a penalty as soon as they violated the statute, pointing to the EPA's discretion over whether to pardon or forgive civil penalties.

"We are disappointed that the courts have not held these chemical

companies to account for their egregious refusal for many decades to adhere to their obligations to protect public health and safety," the firm said in a statement.

Latham & Watkins' Gregory Garre, who argued the appeal for the defendants, did not immediately respond to a request for comment Monday.

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