

Litigator of the Week: Hector Torres of Kasowitz Benson Torres & Friedman

By Jan Wolfe
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Hector Torres

A prosecutor once called the rise of the beverage company Le-Nature's Inc. "a financial mirage the likes of which I had never even dreamt could have been created."

Le-Nature's CEO Gregory Podlucky was sentenced to a 20-year prison term last October for his part in an elaborate fraud that cost investors and banks \$800 million between 2000 and 2006. When details of the scheme emerged, a target went up on the back of K&L Gates, which was hired to do an internal investigation of Le-Nature's in 2003 and found no evidence of fraud. A massive malpractice suit against the firm sputtered out in 2010, but now it's back on track, thanks to Hector Torres of Kasowitz Benson Torres & Friedman.

As our sister publication *The Legal Intelligencer* reported, on Monday the Pennsylvania Superior Court reinstated a \$500 million malpractice suit that Le-Nature's liquidation trustee, represented by Torres, brought against K&L Gates in 2009. The court rejected every argument that a judge in the Allegheny County Court of Common Pleas gave for tossing the trustee's claims back in 2010.

Trouble began brewing at Le-Nature's headquarters outside Pittsburgh in 2003, when a high-level financial officer resigned because of what he called "astonishing and extremely improper" secrecy on Podlucky's part. Minority shareholders appointed a special committee to investigate the allegations. That committee tapped K&L Gates, which concluded in 2003 that it "found no evidence of fraud or malfeasance" by the CEO. The report helped Podlucky hold onto his job for three more years.

The liquidation trustee sued K&L Gates for malpractice in 2009, claiming \$500 million in damages. The lower court judge dismissed the malpractice suit in December 2010, siding with K&L Gates' lawyers at Williams & Connolly on seemingly every issue. Perhaps most significantly, the lower court found that, because Le-Nature's was already insolvent when K&L Gates' launched its investigation, investors didn't suffer any harm from the firm's alleged failure to uncover management abuses. The judge concluded that the trustee was effectively claiming that K&L Gates deepened Le-Nature's insolvency, a legal theory that the Delaware Chancery Court had

rejected as a cause of action in a 2006 opinion. "I find [that opinion] to be very persuasive and believe that the Pennsylvania appellate courts will also," the trial judge wrote at the time.

That prediction turned out very wrong. At oral argument, Torres laid out a straightforward but compelling argument: "Deepening insolvency" harms shareholders. Since for every harm there must be a remedy, deepening insolvency can, and should, be used to gauge damages in traditional tort claims, Torres asserted. Whether or not deepening insolvency can be a stand-alone cause of action is beside the point.

That argument carried the day. "Our review of the Amended Complaint discloses that the Trustee has not claimed 'deepening insolvency' either as a separate cause of action or a separate cause of damages," the three-judge panel ruled Monday. "The fact of Le-Nature's insolvency does not negate the harm allegedly resulting from K&L Gates's professional negligence."

Torres also fended off a slew of other arguments on appeal. K&L Gates maintained, for instance, that the case should be dismissed based on the doctrine of *in pari delicto*, which holds that a plaintiff that participated in wrongdoing may not recover damages from the wrongdoing. Based on this doctrine, the fraud perpetuated by upper management should be imputed to the company itself and bar recovery, K&L Gates's lawyers argued. Torres shot that argument down by pointing to a case holding that an agent's bad acts should not be imputed to the company if the company received no benefit from the bad acts. "We cannot conclude that a material misstatement of corporate financial information, so as to hide Podlucky's looting of the company, provided any benefit to Le-Nature's," the appeals court held.

Given the dramatic allegations, we suspect K&L Gates would very much like to avoid a jury trial. The odds of that happening just got a lot slimmer. Torres, for his part, is sounding confident. "Reinstatement of the suit, including each of the claims we asserted, permits us now to bring the Defendants to trial," Torres said in a statement. "We expect to hold the Defendants fully accountable for their role in causing more than half a billion dollars in damages."