

## Litigator of the Week: Marc Kasowitz of Kasowitz, Benson, Torres & Friedman

By David Bario

Winning an outright reversal of a lower court decision is never easy. And when you're litigating against a score of the largest banks in the world, backed by a half-dozen of the country's top law firms, that makes the victory all the more sweet.

Marc Kasowitz of Kasowitz, Benson, Torres & Friedman this week persuaded a New York state appeals court to toss the fraud case 18 global banks brought against his client, the monoline insurer MBIA. The state appellate division, first department ruled 3-to-2 against the banks and their lead counsel at Sullivan & Cromwell, reversing a February 2010 decision by Manhattan state supreme court judge James Yates that had allowed the banks' fraudulent conveyance suit against MBIA to move forward.

The appellate panel's 20-page ruling ordered the dismissal of the May 2009 suit, in which the banks claimed that MBIA's \$5 billion restructuring in February 2009 jeopardized the chances that policyholders would be able to collect on structured finance policies. The court held, as Kasowitz had argued from the beginning of the litigation, that the "appropriate vehicle" for the banks to challenge MBIA's restructuring is an Article 78 suit against the New York Insurance Department, which approved the plan.

Kasowitz told us Thursday that even though squaring off against major financial institutions is par for the course for his firm, Tuesday's appellate decision was particularly gratifying. "It's always a challenge going up against really talented counsel in a case like this, but it's what makes the job exciting, especially when you're able to get successful results for a client," Kasowitz said.

Still, MBIA isn't remotely in the clear for its controversial restructuring. The bank coalition's Article 78 suit against the insurance department is headed toward a trial in Manhattan state supreme court, possibly as soon as this summer. If the banks prevail in that case, which seeks to undo MBIA's restructuring by overturning the department's

approval, Kasowitz's victory in the fraudulent conveyance case won't amount to much. (In November the banks' lawyers, led by Robert Giuffra Jr. of S&C, persuaded Judge Yates to order the insurance department to release internal e-mails, which they contend will help prove that its approval of the MBIA restructuring was illegal.) Moreover, Giuffra has already announced that the banks will appeal the dismissal of their fraudulent conveyance case to New York's highest court.



In addition, MBIA is facing a parallel class action suit over its restructuring in Manhattan federal district court. Judge Richard Sullivan denied MBIA's motion to dismiss the suit last February, ruling that the hedge fund plaintiffs leading the class (who are represented by Simpson Thacher & Bartlett) could sue despite the N.Y. insurance department's approval of MBIA's restructuring plan.

Kasowitz, who represents MBIA in the federal district court case along with Dewey & LeBoeuf, is hoping to turn his state appellate win into ammunition in federal court. He told us MBIA filed a letter with Judge Sullivan Wednesday, informing him of the state appellate court decision and asking for permission to renew the insurer's motion to dismiss. "The claims [in the state and federal cases] really are identical," Kasowitz said, noting that the federal district court case had been effectively stayed pending the state court appeal.

Meanwhile, Kasowitz is savoring the dismissal of what he called the banks' best chance to challenge MBIA's restructuring. The bar the plaintiffs must meet in their Article 78 proceeding is much higher than in the fraudulent conveyance case, he told us. "You have to show that the insurance department acted arbitrarily and capriciously," Kasowitz said. "That's a tough standard to meet."