



## Micah E. Marcus

Member

Chicago

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### Practice Focus

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- Litigation
- Business litigation
- Business restructuring
- Creditors committees
- Creditors rights
- Products liability and mass tort
- Appeals
- Directors and officers litigation
- Class action defense

Formerly a partner at Kirkland & Ellis, Micah is now a member in our firm's Litigation and Business Restructuring Services Departments. He focuses his practice on all aspects of complex commercial litigation, from case development and discovery through trial and appeal. He has more than 18 years of experience in general commercial litigation handling an array of matters including contractual disputes, ERISA and pension matters, labor disputes, asset and business valuation disputes, securities actions and all forms of commercial torts, such as fraudulent transfer, fiduciary duty and negligence claims. Micah also routinely advises clients regarding corporate liability relating to potential litigation, as well as corporate public disclosure requirements, risk management and general fiduciary obligations concerning corporate restructuring matters.

In addition to litigation, Micah has extensive experience in corporate restructuring matters in a wide range of industries, including working with clients on issues relating to business operations under chapter 11, auctioning and negotiating the sale of estate assets, negotiations of contracts and settlement agreements with clients' creditors and business partners, structuring out-of-court work-outs, and drafting and implementing chapter 11 plans of reorganization.

Micah earned a J.D., with honors, from DePaul University College of Law in 1999. He received a B.A. from the University of Arizona in 1995.

### Representative Cases/Matters

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#### RECENT SIGNIFICANT TRIAL EXPERIENCE

**Lead trial counsel:** Kelly Stapleton, Trustee of the SGK Ventures, LLC Liquidating Trust v. NewKey Group, LLC et al. (Adv. No. 13 A 01411, Adv. No. 14 A 00114). Represented the Liquidating Trustee of SGK Ventures (f/k/a as Keywell). I served as lead counsel and first chair at trial for various claims against Keywell's former insiders seeking equitable subordination of in excess of \$15 million in claims against the Liquidating Trust as well as: (i) potential recharacterization of the underlying secured claims as equity; and

(ii) recovery of various transfers made from Keywell to the former insiders as fraudulent and/or preferential transfers. At trial, we successfully argued that the former insiders' claims should be equitably subordinated to unsecured creditors, providing those creditors with an increase in available assets of somewhere north of \$15 million based upon the former insiders' calculation of outstanding principal and interest owed. Similarly, the court granted judgment in the Liquidating Trustee's favor in a separate action brought by the former insiders (through two shell corporations set up to act as purported lenders) seeking enforcement of their secured claims and turnover of the Liquidating Trust's assets, which we tried contemporaneously with the Liquidating Trustee's affirmative claims. A copy of the opinion is available at Kelly Stapleton, Trustee of the SGK Ventures, LLC Liquidating Trust v. NewKey Group, LLC et al., Adv. No. 13 A 01411, Adv. No. 14 A 00114, 2015 WL 7755525 (Bankr. N.D. Ill., Nov. 30, 2015).

**Lead trial counsel:** The Liquidating Trust of TMP Directional Marketing, LLC v. General Yellow Pages Consultants, Inc. D/B/A Marquette Group (Arb. No. 51 147 Y 00826 12) (Jan. 28-31, 2013): Represented Deloitte/CRG as trustee for The Liquidating Trust of TMP Directional Marketing, LLC. I served as lead counsel and first chair at trial for claims of breach of contract, fraud and reformation arising out of a counter-party's improper interpretation of its earn-out obligation relating to an asset purchase agreement. At trial, we successfully argued that, though the contract was ambiguous with respect to the inclusion of a specific type of revenue in the calculation of the defendant's ongoing earn-out obligation, parol evidence supported TMP's interpretation. An Interim Award was issued in our favor on February 26, 2013, awarding TMP past damages, future injunctive relief, and similarly finding TMP the prevailing party entitled to the recovery of its costs and fees (the total recovery exceeded \$3 million based upon the ultimate collections and true-up calculations).

**Second chair:** In re Hawker Beechcraft, Inc., (Case No. 12-11873). Represented Hawker Beechcraft. I served as second chair at a one-day trial on a contested matter against one of Hawker Beechcraft's significant suppliers, NORDAM. In this matter I had significant roles in discovery, pre- and post-trial briefing, as well as handling a number of witnesses at trial, including the cross-examination of NORDAM's key witness, Ronald Richman, the former president of NORDAM who negotiated the underlying supply contracts at issue before the court. The case revolved around the proper interpretation of two Master Purchase and Support Agreements. In particular, whether the Master Agreements provided Hawker Beechcraft with the ability to reject particular purchase orders in the context of its bankruptcy (thereby assuming responsibility for only favorable contracts it wanted to retain) or whether assumption of the overarching Master Agreements required Hawker Beechcraft to assume all of the related purchase orders without the ability to pick and choose. At trial, we successfully argued that the Master Agreements were not requirement or installment contracts (as argued by NORDAM) and that Hawker Beechcraft had the ability to reject individual purchase orders, as divisible executory contracts, despite assumption of the Master Agreements. A copy of the opinion is available at In re Hawker Beechcraft, Inc., Case No. 12-11873, 2013 WL 2663193 (Bankr. S.D.N.Y., June 13, 2013).

**Second chair:** Black Flag Brands, LLC v. Bridgeview Aerosol, LLC (Arb. No. 61 181 Y 00257 08) (Sept. 2009): Represented Black Flag Brands. I served as the lead attorney in pre-trial motion practice between the parties and discovery and was the second chair, handling multiple witnesses, at a weeklong hearing before a three-arbitrator panel. In this matter, Black Flag prevailed on its claims for breach of contract relating to the defendant's defective production/filling of an insecticide product marketed by Black Flag. In

particular, Black Flack obtained an award of approximately \$4.6 million for past damages as well as the denial of Bridgeview Aerosol's counterclaim for approximately \$15 million. Following obtaining the award, Bridgeview Aerosol filed for bankruptcy, where I continued to represent Black Flag as lead counsel in connection with various contested matters in the bankruptcy and in connection with its role on the official committee of unsecured creditors.

**Second chair:** *United Air Lines, Inc. v. UMB Bank, N.A., as Successor Trustee and the Regional Airports Improvement Corporation*, (Adv. No. 03-A-977, Adv. No. 05-A-1884) (April 2007). Represented United Air Lines, Inc. I served as the second chair at trial, including the handling of multiple witnesses, valuing UMB's security interest in portions of United's leasehold in facilities at Los Angeles International Airport ("LAX") for purposes of liquidating UMB's allowed secured claim against United pursuant to 11 U.S.C. § 506(a). The trial revolved around analysis of the various complex indenture agreements forming the basis of UMB's security interest as well as technical expert opinions regarding the valuation of the underlying collateral and appropriate discount rates. The Bankruptcy Court found in favor of United's valuation analysis, finding, consistent with our approach, that UMB's collateral was valued at \$33,455,055.00. A copy of the opinion is available at *In re UAL Corp.*, 374 B.R. 625 (Bankr. N.D. Ill. 2007).

**Second chair:** *UAL Corporation v. The City of Los Angeles and Los Angeles World Airports* (Adv. No. 05-A-2806) (May 2008). Represented UAL Corporation. I served as the second chair at trial seeking injunctive relief against the City of Los Angeles to preserve United Air Line's right to continue flying "turbo-props" out of its leased facilities at LAX. The Bankruptcy Court found in UAL's favor, ruling that LA's attempted prohibition of United's use of turbo-props from its leased facilities constituted a breach of contract. A copy of the opinion is available at *In re UAL Corp.*, 391 B.R. 791 (Bankr. N.D. Ill. 2008).

**Second chair:** *In re Chemtura Corporation*, No. 09-11233 (contested confirmation hearing). Represented Chemtura Corporation and its debtor affiliates. I served as lead counsel in pre-trial discovery, overseeing approximately 110 attorneys review in excess of 2 million pages of documents over a 6 week period, resolving numerous discovery disputes and taking depositions of numerous fact witnesses. At trial, I oversaw the exchange, review and argument regarding evidence offered by submission without supporting testimony and oversaw the drafting of the pre-trial and post-trial memorandums. The trial revolved primarily around the valuation of Chemtura upon its emergence from bankruptcy. The Bankruptcy Court ruled in Chemtura's favor. A copy of the opinion is available at *In re Chemtura*, 439 B.R. 561 (Bankr. S.D.N.Y. 2010).

### RECENT APPELLATE EXPERIENCE

**Lead counsel:** *O'Halleran v. Harder*, No. 1-15-1990. Represented Sean O'Halleran on appeal to Illinois Appellate Court, First Judicial District (trial handled by prior counsel). The case related to a state judge imposing restrictions on a father's visitation rights with his minor daughter. Following obtaining leave for an expedited appeal of the trial court's order, we successfully argued to the Illinois Appellate Court that the lower court's action in restricting the father's visitation rights: (i) exceeded the trial court's jurisdiction when he entered the order sua sponte without a pending request for relief; and (ii) erroneously deprived Mr. O'Halleran of his parental rights without a finding of "serious endangerment", as required under prevailing Illinois law. The court reversed the trial court without oral argument and ordered the immediate restoration of the parties' respective custody and visitation rights in place prior to the lower court's erroneous actions. A copy of the opinion is available at *O'Halleran v. Harder*, Case No. 1-15-1990, 2016 WL 283651 (Ill. App. Ct.

1st Cir., January 15, 2016).

**Lead counsel:** *Barron v. BP America Production Company*, No. 14-60066. Represented BP America Production Company on appeal to the Fifth Circuit. Following obtaining summary judgment in favor of BP before the District Court for the Southern District of Mississippi, I served as lead counsel in drafting BP's appellate briefs in support of the underlying judgment. The Fifth Circuit affirmed the District Court without oral argument. The case related to a personal injury action brought by an individual performing clean-up in response to the April 2010 Deepwater Horizon incident. In particular, the individual claimed he was significantly injured while being transported back to land on a vessel chartered to BP under what was commonly referred to as the Vessel of Opportunity program (a program that entered into charters with local residents to utilize their personal vessels to assist in the Gulf Coast clean-up efforts). We successfully argued to the Fifth Circuit that BP was not liable to Mr. Barron under applicable maritime law because the underlying vessel lease was "non-demise", meaning the charterer, BP, could not be liable for the negligence of the vessel captain under prevailing 5th Circuit precedent. We likewise successfully argued that BP was not liable under general negligence theories, because the plaintiff failed to present admissible evidence supporting his basic premise that the vessel utilized by BP for the particular task at hand-transportation in the gulf-was unfit for its intended purpose. A copy of the opinion is available at *Barron v. BP America Production Co.*, 590 Fed.Appx. 294 (5th Cir. 2014).

**Lead counsel:** *Chapman Kelley v. Chicago Park District*. Nos. 08-3701, 08-3712. Represented Chapman Kelley on appeal to the 7th Circuit and Supreme Court (trial handled by prior counsel). I served as lead counsel in the drafting and argument regarding the District Court's erroneous interpretation of copyright law and the Visual Artists Right Act, 17 U.S.C. § 106A ("VARA"). In particular, we argued that the District Court: (i) erroneously interpreted the concept of "originality" required under the Supreme Court's seminal opinion in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); and (ii) mistakenly adopted the First Circuit's erroneous analysis from *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006)-holding that so-called "site-specific art," like Chapman Kelley's *Wildflower Works*, was not entitled to protection under VARA. Following oral argument, the Seventh Circuit took a year and a half to rule, ultimately issuing the landmark opinion of *Chapman Kelley v. Chicago Park District*, 635 F.3d 290 (7th Cir. 2011). In that decision, the Seventh Circuit held in our favor with respect to our challenges to the District Court's opinion, including rejecting the First Circuit's analysis in *Phillips*. However, the court found against Chapman on other grounds. In particular, the court ruled, as a matter of first impression, that *Wildflower Works* (a garden), lacked the kind of authorship and stable fixation normally required to support copyright protection (a necessary pre-condition to protection under VARA). Following that decision, I acted as lead counsel in Chapman's appeal to the United States Supreme Court, where, despite garnering five amicus supporters, the Supreme Court denied cert. A copy of the opinion is available at *Chapman Kelley v. Chicago Park District*, 635 F.3d 290 (7th Cir. 2011).

**Lead counsel:** *Bridgeview Aerosol, LLC v. Black Flag Brands, LLC*, No. 09-3370. Represented Black Flag Brands. This appeal related to representation of Black Flag Brands in its successful litigation with Bridgeview Aerosol, in which I served as second chair at trial. In particular, at the outset of the parties' litigation, Black Flag engaged in certain self-help measures by attempting to set-off certain undisputed obligations owed to Bridgeview under a separate contract relating to Bridgeview's filling of other Black Flag products. Bridgeview filed an unopposed claim for recovery of that obligation, which was approved by the

arbitration panel on an interim basis. Bridgeview sought to immediately execute upon the debt prior to the trial on the remaining claims between the parties. We filed an appeal based upon the impropriety of enforcement of an interim award where additional claims remained to be resolved between the parties and obtained a stay of enforcement upon posting a bond for the value of Bridgeview's undisputed claim. Upon confirmation of the ultimate arbitration award in favor of Black Flag, I negotiated the set-off of the parties' competing claims (thereby elevating Black Flag's claim to the status of secured creditor in Bridgeview's bankruptcy case) as well as an agreed entry of satisfaction of the underlying judgment, thereby mooting the appeal and resulting in the release of Black Flag's liability on the bond securing the judgment.

**Second chair:** In re UAL Corp. (Regen Capital I, Inc. v. UAL Corporation, et. al), No. 10-1524. Represented UAL Corp. I served as second chair throughout litigation process, including the successful defense of the Bankruptcy Court's opinion in the initial appeal to the District Court. In that role, I argued the original motions before the Bankruptcy Court and principally handled the research and drafting of the various pleadings filed with the Bankruptcy Court, the District Court and the Seventh Circuit, including the appellate briefs to both the District Court and Seventh Circuit, as well as the response to the motion to reconsider before the Seventh Circuit. I similarly was heavily involved in our preparation for oral argument before the Seventh Circuit. In Regen, the appellant argued that it was entitled to a \$4 million "cure claim" from UAL because: (i) Regen had purchased ATT's pre-petition claims against UAL; and UAL's confirmed plan of reorganization had sought to assume the pre-petition executory contracts to which those claims related. The Seventh Circuit held in UAL's favor, ruling that, despite several years passing from the date of its emergence from bankruptcy: (i) UAL never actually assumed the respective AT&T contracts; and (ii) pursuant to a provision in UAL's confirmed plan, it retained the right to reject those agreements post-emergence in the case of a dispute regarding cure-a provision which the court found UAL rightfully invoked in the present case. A copy of the opinion is available at In re UAL Corp. (Regen Capital I, Inc. v. UAL Corporation, et. al), 635 F.3d 312.

**Second chair:** United Air Lines, Inc. v. Regional Airports Improvement Corporation et al., Nos. 08-2736, 08-2751, 08-2752, 08-2824, 08-2905. Represented United Air Lines. Following our success at trial, I served as second chair throughout the appellate process, including the successful defense of the Bankruptcy Court's opinion in the initial appeal to the District Court. In that role I was principally responsible for the drafting of the various pleadings and appellate briefs and assisted in our preparation for oral argument.

### RECENT NOTABLE NON-TRIAL LITIGATION WORK

Lead litigation counsel

- BP plc and affiliates: For the past several years I served as national lead counsel with respect to all tort actions asserted by post-incident responders alleging non-MDL based personal injuries stemming from clean-up efforts in the Gulf Coast following the April 2010 incident involving the Deepwater Horizon. In connection with this position, I have successfully defended BP in matters throughout the Gulf Coast, including, Texas, Louisiana, Alabama, Mississippi and Florida at the state, federal and appellate levels.
- TMP Directional Marketing, LLC (Del.): I served as lead litigation counsel, handling all aspects of litigation leading up to the filing of TMP's chapter 11 petition, including handling the defense of numerous claims and collection actions brought around the county on account of delinquent account receivables. I also handled all litigation matters relating to the bankruptcy case, including the preparation and presentation of witnesses in connection with the first day hearing, various contested motions, and in support of confirmation of TMP's confirmed bankruptcy plan.

- Insight Imaging (Del.): I served as lead litigation counsel, handling all litigation matters relating to the bankruptcy case, including the preparation and presentation of witnesses in connection with the first day hearing, various contested motions, and in support of confirmation of TMP' s confirmed bankruptcy plan. In particular, I was the lead trial counsel in a contested confirmation of Insight's plan of reorganization when certain key votes sought to amend their votes previously placed in favor of the plan at the eleventh hour. The objection was withdrawn on the eve of trial following my obtaining dispositive admissions at the objecting parties' depositions the day before the hearing on confirmation.

Litigation counsel

- Hawker Beechcraft Corporation, et al. (S.D.N.Y.): I served as part of the litigation team covering all aspects of litigation relating to HBC' s bankruptcy proceedings. In that role I prepared numerous witnesses in support of the first day hearing as well as various contested matters throughout the proceedings. I also handled the research and drafting of a potential complaint against HBC's pre-petition lenders resulting in significant portions of HBC's assets being declared unencumbered by pre-petition debt and available for distribution to HBC's general unsecured creditors.
- The Great Atlantic & Pacific Tea Company, et al. (S.D.N.Y.): I served as part of the litigation team responsible for covering all aspects of litigation relating to A&P's bankruptcy filings. I prepared and defended numerous witnesses at depositions in connection with various contested matters throughout the proceedings as well as prepared witnesses for testimony on those matters. Additionally, I drafted and filed various adversary complaints relating to enforcement of the automatic stay and assisted in A&P's obtaining of extensive union concessions in connection with potential litigation under § 1113 of the Bankruptcy Code. My work on § 1113 matters included participation in union negotiations as well as extensive work with experts developing the economic analysis requiring concessions and the relevant market conditions for A&P's business.
- Global Aviation (S.D.N.Y.): In this matter, I assisted in Global Aviation's obtaining of extensive union concessions in connection with potential litigation under § 1113 of the Bankruptcy Code. My responsibilities in this matter primarily included extensive work developing and drafting Global' s expert report regarding the financial necessity of such relief.
- Lauth Investment Properties, LLC, et al. (S.D. Ind.): I served as part of the litigation team responsible for covering all aspects of litigation relating to Lauth's bankruptcy proceedings, including the preparation of numerous witnesses in support of various contested matters throughout the proceedings. In particular, I served as second chair for a trial regarding the principal creditor's attempted appointment of a chapter 11 trustee, in which I was responsible for cross examination of numerous of the movant's key witnesses. The matter was settled in chambers at the outset of the trial, with the movant's request being withdrawn with prejudice. In addition, I presented Lauth's evidentiary case in support of the approval of a global settlement allowing for Lauth's successful emergence from bankruptcy.
- Corus Bankshares, Inc. (N.D. Ill.): I served as part of the litigation team covering all aspects of litigation relating to Corus Bankshares' bankruptcy proceedings. In addition to arguing several motions before the Bankruptcy Court, I prepared numerous witnesses in support of the first day hearing as well as various contested matters throughout the proceedings. Similarly, I was on the trial team for potential litigation with the FDIC where we were litigating on behalf of Corus' bankruptcy estate over the ownership interests in approximately \$260 million of tax refunds owed under Corus' consolidated tax filings with its subsidiary bank (the bank was seized and placed in receivership by the FDIC shortly before Corus Bankshares' bankruptcy petition).

- Lear Corporation (S.D.N.Y): I served as part of the litigation team responsible for covering all aspects of litigation relating to Lear's bankruptcy proceedings. In particular, I handled various litigation matters relating to contract and lease counterpart

### Admissions - Court

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- Eighth Circuit Court of Appeals
- Fifth Circuit Court of Appeals
- Illinois Supreme Court
- Seventh Circuit Court of Appeals
- U.S. District Court for the Eastern District of Michigan
- U.S. District Court for the Northern District of Illinois
- U.S. District Court for the Central District of Illinois
- U.S. Supreme Court

### Admissions - State

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- Illinois

### Education

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- DePaul University College of Law
- University of Arizona

### Honors and Awards

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- Selected for inclusion in *Illinois Rising Stars* (2012, 2013)
- Benchmark Litigation, Future Star (2009)

### Blog Posts

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- QuadrigaCX and the dangers of cold storage
- Cryptocurrency: A new frontier (and trap) for employee incentives
- NY court rules cryptocurrencies can constitute securities
- What are smart contracts?
- Blockchain technology: It's not just about cryptocurrency
- Not all cryptocurrencies are securities: SEC starts providing guidance

### External Publications

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- You're Right, But Can You Prove It: Reliance on a Debtor's Business Records in Litigation, NABTalk, Fall 2013, Volume 29, Issue 3, pgs. 40-43
- "Privacy Concerns and Safeguards in the Governmental Dissemination of Bankruptcy Data on the Internet," *American Bankruptcy Institute Journal*, May 2000