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With high-profile successes, Podhurst Orseck law firm fights above its weight class

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DEFENDING JIM MORRISON, SUING THE NFL, REPRESENTING PLANE-CRASH VICTIMS: From left, Podhurst Orseck lawyers Robert Josefsberg, Aaron Podhurst, Steve Marks and Peter Prieto brandish memorabilia from some of their best-known cases.

When Capital One asks, “What’s in Your Wallet?” the Podhurst Orseck firm can confidently answer: Your banker’s hand.

Capital One is one of nearly two dozen banks sued by the Miami firm for allegedly overcharging millions of customers in overdraft fees. To date, 19 of those banks have settled, agreeing to pay a staggering \$1.071 billion, says Peter Prieto, a partner who oversees the firm’s commercial class action cases. Prieto expects the cases involving the remaining three banks — Capital One, Wachovia/Wells Fargo and Bancorp South — to be resolved either this year or next. Firm president Aaron Podhurst is co-lead counsel, along with Nova Southeastern University law professor Bruce Rogow, on those bank overdraft cases.

Once known primarily for its work on behalf of the victims of airplane crashes — including the 1996 ValuJet crash in the

Everglades and the 1998 terror bombing of PanAm 103 over Lockerbie — Podhurst Orseck has branched out into complex commercial litigation and massive class actions, an area of law that now makes up half of the firm’s business. While it continues to handle aviation cases — representing victims in more than 125 crashes since Aaron Podhurst was lead counsel for the victims of Eastern Airlines Flight 401 that crashed in the Everglades in 1972 — the portfolio also includes a variety of multidistrict litigation cases.

Of note is the mass class action against the NFL for injuries relating to concussions occurring in practice and on the playing field, some of which have resulted in early dementia, Parkinson’s disease, or amyotrophic lateral sclerosis, the wasting disease often referred to as Lou Gehrig’s disease. Steve Marks, who oversees the firm’s personal injury and mass class action caseload, served on the settlement committee with three other firms seeking compensation on behalf of more than 4,000 former professional football players and their wives. Among the former NFL players Podhurst Orseck represents: Joe Theismann, Kevin Turner, Clinton Portis and Shawn Wooden.

Last August, the league agreed to pay \$765 million, plus legal fees. A court-appointed master is currently reviewing the settlement, after a federal judge rejected the settlement last January because she feared it was not enough to cover the medical expenses of the injured players. Marks tried to allay those fears.

“We worked with some of the brightest and most capable economists in the U.S. who have modeled these type of funds on a routine basis and have a great reputation in doing so,” Marks said in defense of the \$765 million figure. “We worked with these experts for many months to ensure that there would be

sufficient funds to satisfy the obligation contemplated by the settlement. We are more than confident with the results.”

Marks also said that the case had far-reaching ramifications and literally changed how the game is played, from Pop Warner to pro ball: “It has had a most dramatic effect on the conduct for coaches and players. We were successful in educating the public.”

The firm currently is involved in four class action cases with an expected payout of at least \$1 billion.

The overdraft case is not the only example of bad banking that is likely to result in a \$1 billion-plus settlement. Another lawsuit involves “force-placed insurance,” where the firm is defending homeowners who get stuck having to buy flood, hazard and wind insurance from companies affiliated with the banks that hold their mortgage — sometimes at six times the going rate. Last October, JP Morgan Chase agreed to settle for \$300 million, concluding the first of several similar cases nationwide pending in Miami’s federal court.

Other cases in the billion-dollar arena include an antitrust lawsuit against Blue Cross/Blue Shield for allegedly restricting competition in certain states and a consumer protection lawsuit against the manufacturers of defective drywall from China that corroded electrical wiring and copper piping in homes nationwide, especially in hurricane-prone Florida and Louisiana. Cases like these take a lot of patience and man hours. The firm has spent more than four years on the drywall case and has yet to see a dime. Partner Robert “Bob” Josefsberg serves on the Plaintiff’s Steering Committee, and fellow partners Prieto and John Gravante worked with him on the case.

For a firm with only 10 living partners and two associates, Podhurst Orseck has an impressive amount of firepower. Combined, the firm represents 300 years of legal experience. Karen Podhurst Dern, the firm president’s daughter, is of counsel, adding another 27 years of legal experience to the mix. Given the type of cases the firm pursues, the lawyers often take on the role of David versus Goliath-size firms, frequently appearing in court with one partner, an associate and a paralegal against a phalanx of opposing counsel.

“We’re able to fight above our weight class against bigger firms because of technology and the many co-counsel relationships that we have,” Prieto said, explaining that the boutique law firm often teams up with attorneys from other firms, both when they are called into a case and when they seek help with their caseload. “We can compete with the national firms because technology is the great equalizer, and we can search through millions of documents without the need of many attorneys searching through documents and billing their clients.”

For nearly 50 years, Podhurst has treated his firm like family, deliberately keeping it small and tight-knit. He continues to pay homage to those who helped mold him as an attorney and remain a guiding force. Robert Orseck has a hallowed place both in the firm’s name and on its roster of partners, even though he died more than a quarter of a century ago, drowning while swimming in Israel. Walter Beckham, another founder of the firm who was of counsel when he died in 2011, is similarly recognized.

Podhurst, who is known as much for his pro bono work — such as trying to negotiate a resolution to the Elián González custody battle and helping pave the way for building the Pérez Art Museum Miami — takes a pragmatic approach when it comes to case selection.

“You can only handle a certain number of cases well — not withstanding Perry Mason and Law & Order on TV,” he said. “It’s 90 percent perspiration and 10 percent inspiration. You’ve got to know the case. You’ve got to go through the documents. You’ve got to speak to the witnesses. You’ve got to research the law. And you’ve got to prepare all the witnesses. And that takes time.”

Prieto boils that down to: “We look for two things: cases that make a difference and cases that we can prosecute successfully.”

The overdraft case is one such case.

“We very much enjoy representing the little guy,” said Josefsberg, a former federal prosecutor who has represented clients of all stripes, including Jim Morrison after he was arrested for lewd and lascivious behavior when The Doors played at the Dinner Key Auditorium in 1969. “Shame on a corporation for overcharging and being a big bully by taking advantage of the little guy,” Josefsberg said of the way in which big banks have treated their least-affluent customers.

Court documents in the case against Union Bank show exactly what the banks planned for their customers. The scheme worked like this: The banks installed special computer software that would flag when a customer spent more than he had in his account. Rather than simply prohibit the purchase, the banks covered the shortfall — for a price. The banks typically charged \$25 to \$35 each time the customer went over his or her limit. Once the overdraft protection went into effect, the bank’s computers would automatically rearrange the purchase order so that the most expensive purchases were listed first and all the other purchases that month would each incur the fee for nonsufficient funds. Often what should have been a one-time fee ended up costing the customer hundreds of dollars.

They called this process “resequencing,” a term that sounds more apt for DNA testing than bank matters. They also tried to hide what they were doing.

“By design, the details of what happens inside the bank when an overdraft occurs were never intended to be communicated to the public,” Union Bank is quoted in the civil complaint filed in Miami’s federal court. One bank executive went so far as to state in an email, “stick with ‘under the radar’ type communications (inserts)’ when disclosing fee increases.” Yet another bank communication stated, “We should also burn all our documentation that is just posting sequence = more fees.”

The potential for problems with this overdraft policy so unnerved Union Bank’s executive vice president for item processing that he advised against implementing it.

“Well, as a UBOC shareholder (and a consumer) I would STRONGLY disagree with the high to low approach,” said VP William Christianson. “I don’t believe that UBOC has ever done this before and we have seen Wells and BOA (Security) sued for this. I don’t think the bank ought to do anything that encourages a lawsuit right now!”

If only they had listened.

Union Bank, which had projected additional earnings of \$17 million a year based on the overdraft scheme, ultimately ended up agreeing to a \$35 million settlement, not to mention the fees they paid their attorneys and the consultant who advised them on how to implement the scheme.

Podhurst Orseck also ended up with millions of dollars as the settlements from various banks came pouring in. They gambled that taking the case on a contingency basis would succeed. Their money spent up front on experts and man hours paid off.

The biggest haul came from Bank of America, which settled for \$410 million, \$123 million of which was divvied among some 30 law firms — including the Miami-based Alters Law Firm — with the three lead firms — Podhurst Orseck, Grossman Roth of Coral Gables and Leiff Cabraser Heimann & Bernstein of San Francisco — getting the lion’s share, reportedly more than \$20 million each.

Professor Stuart R. Cohn, who teaches business law at the Levin College of Law at the University of

Florida, maintains the legal fees may seem high, but they are standard for the industry. On cases like these the law firms usually work on a contingency basis, meaning they don't get paid unless they win or the cases settle.

"It's a large figure, yes," Cohn said, "but relative to the size of the award and the amount of the work, it is not unusual at all."

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