The multiple claims came to light when one of Kananian's lawyers, Christopher Andreas, from the firm of Brayton Purcell, filed a lawsuit against Lorillard Tobacco, claiming Kananian's exposure was from his smoking Kent cigarettes, whose filters contained asbestos for several years in the 1950s. Lorillard suspected that Kananian had already filed claims with various trusts arguing that his exposure occurred on the site of several jobs he held during his life. Lorillard urged Cuyahoga Common Pleas Judge Harry A. Hanna to permit any original claim forms filed with the various trusts on behalf of Kananian to be admitted into evidence for the jury to consider. In response, Andreas claimed that there was no evidence that any claim forms were actually submitted to the bankruptcy trusts. Judge Hanna ruled that the claim forms were only admissible if Lorillard could prove they were actually submitted.[6]

Andreas said he would "welcome" any documentation showing that claim forms were submitted to any trusts, and that his firm would not put up any roadblocks to their discovery.[7] During discovery, Andreas produced an unsigned copy of the original claim form filed with the Johns-Manville Trust, and, on February 23, 2006, contended that the form should be excluded from evidence because "[i]t's an unsigned document" that "wasn't even executed by an attorney at my office." He argued that he did not even know "whether that claim form was ever actually submitted or not."[8]

Andreas tried to create enough ambiguity over the Johns-Manville claim form to keep it from being admitted into evidence. After investigation, however, Lorillard verified that the Brayton Purcell firm had submitted the original Johns-Manville claim form in April 2000; that Alan Brayton, one of Andreas' partners, had signed the claim form; and that Johns-Manville had paid money on the claim. Judge Hanna concluded in his recently issued opinion that "Andreas represented to this Court that the original Johns-Manville claim form was unsigned when he knew that it was signed and submitted, and that his firm had collected money from the Johns-Manville Trust."[9] Once it was clear that the Johns-Manville Trust claim form was going to be admitted into evidence, Andreas acknowledged its existence and on March 23, 2006, told Judge Hanna that the claim form was "entirely accurate"

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The Milberg Weiss Indictment

by Margaret A. Little

Milberg Weiss Bershad Hynes & Lerach, one of the nation's largest class action firms, before it split in two in 2004, has been the subject of a long-running federal investigation. Over the years, the firm and its successors have secured billions of dollars in contingency and other legal fees by suing some of the nations largest corporations for defrauding investors and customers.

The Allegations of the Prosecution

News reports indicate that the firm's troubles began nearly seven years ago, when Steven G. Cooperman, one of the firm's frequent lead plaintiffs, was convicted on art fraud charges, and offered to provide evidence to prosecutors against Milberg Weiss in exchange for a reduced sentence. In 1999, federal prosecutors in Los Angeles launched an investigation into whether the firm paid clients to file securities fraud suits. In 2004, when William Lerach left to form his own San Diego law firm (Lerach Coughlin, Stoia Geller Rudman & Robbins LLP), he was the subject of federal interest that did not result in charges.[1] Then, in the summer of 2005, Seymour M. Lazar was indicted for fraud and conspiracy and accused of receiving more than $2.4 million in payments for appearing as the lead plaintiff in more than fifty Milberg Weiss cases over twenty-five years. That indictment alleged that it was illegal for a plaintiff to receive a portion of the legal fees, because lead plaintiffs in class actions cannot have incentives that are not in the best interests of the class as a whole. In early 2006, another former Milberg Weiss serial client, Howard J. Vogel, admitted that he or members of his family were paid more than $2.4 million by lawyers at Milberg Weiss from 1991 through 2005 to act as plaintiffs in more than forty class actions securities lawsuits, according to a plea agreement filed in April of 2006.[2] The government asserted that partners at Milberg Weiss assisted Mr. Vogel in receiving over a million dollars in kickbacks for initiating securities fraud actions against Oxford Health Plans, Inc. and Baan Co.[3]

In May of 2006, with an indictment of the Milberg Weiss firm looming, David J. Bershad and Steven G. Schulman, two of the firm's most senior attorneys, and members of its executive committee, agreed to take leaves of absence. Both men were expected to face individual criminal charges for their roles in the kickback schemes. In addition the firm hired a former Manhattan U.S. Attorney to monitor its procedures for paying referral fees. Despite these efforts, on May 18, 2006, Milberg

The Milberg Weiss Indictment

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member served as a lead plaintiff. He is charged with receiving more than $2.4 million in secret and illegal kickbacks from Milberg Weiss. Mr. Lazar has been confined to his home in Palm Springs. The government alleges that these secret and illegal payments are in contravention of law, which bars such payments in order to avoid conflicts of interest between the lead plaintiffs and other class members. Mr. Lazar is not arguing the facts of the indictment, but asserts that they are legal referral fees. Milberg Weiss and Lerach Coughlin in San Diego also say that Mr. Lazar was not paid to be a plaintiff, and that referral fees are perfectly legal.[5]

The law is clear that named plaintiffs may not have interests in conflict with other class members and, further, that both counsel and lead plaintiffs are under duties not to deceive or act unethically towards the court or absent class members, *and both attorney and client are charged not to withhold such information and repeatedly swear to the absence of such financial and other conflicts throughout the course of the litigation.* The purpose of lead plaintiff is to serve as a watchdog against self-dealing conduct by the lawyers. If the allegations of the indictment are correct, Milberg Weiss not only allegedly threw huge kickbacks to carefully selected lead plaintiffs, but their payoffs were a percentage of Milberg Weiss's own legal fees, thus allying the lead plaintiff's interests with counsel's, not fellow, class members. Finally, ironically, Milberg Weiss has been in the forefront of defining broadly, and aggressively policing, kickbacks of any form in the mortgage, securities, IPO and mutual funds, insurance brokerage commissions and pharmaceuticals industries.

The Oxford Class Action and Milberg Weiss' Representation of the Vogel Group

Milberg Weiss' troubles came into sharper focus with the 2006 guilty plea of Howard Vogel. The indictment states that Mr. Vogel has plead guilty to receiving $1.2 million in kickbacks in cases brought by Milberg against Oxford Health Plans, Inc. and Baan Co.

Milberg Weiss's practices came under scrutiny, as these things often do, during an extended courtroom brawl over which group would serve as lead plaintiff in the Oxford litigation. The Oxford litigation postdated the Class Action Reform Act of 1995, and the jockeying for lead counsel was a pitched battle among the state of Colorado pension fund, the PBHG mutual fund company, and the Vogel Plaintiff group of thirty-five individual investors represented by Milberg Weiss, three of whom (not Vogel) were represented to the court to have sustained losses of $2 to $3.4 million each. The Colorado pension group claimed losses of $20 million; the PBHG group contended that six of its mutual funds had lost $4.3 million. (PBHG later dropped all but one of its mutual funds from the litigation; the remaining fund's losses were $65,000.00.) Milberg Weiss aggregated a group of 35 investors with a claimed aggregate loss of $10 million with Mr. Vogel as the initial named plaintiff.[6]

News reports indicate "what was unknown at the time was that Mr. Vogel had acquired shares of the [Oxford] stock on the belief that it was on the verge of collapse."[7] Indeed, the indictment asserts "the Paid Plaintiffs purchased the securities at issue anticipating that the securities would decline in value, in order to position themselves to be named plaintiffs in securities fraud actions and to obtain kickback payments. . . ." Mr. Vogel alleges that Robert Sugarman, a former Milberg Weiss lawyer who had discussed the potential Oxford class action with Mr. Vogel, informed him that his payment would be less than his usual percentage because the suit was so large and "Milberg Weiss would have other payment obligations in the case," according to the indictment. Mr. Sugarman is said to be cooperating with federal prosecutors.[8]

Scrutiny into these claimed losses ensued after lawyers representing Oxford examined the trading records of the Milberg Weiss plaintiffs. Milberg itself made some adjustments to the claimed losses, but further accounting showed that one of the lead plaintiffs had actually made over $700,000 in profits and that another's losses came to $315,000, a far cry from the $2 million originally alleged. Yet, another of the Vogel group plaintiffs withdrew from the case weeks after he was deposed, and a court document revealed allegations of perjured testimony in that proceeding. The judge overseeing the case rejected Oxford's challenges and ruled that the Vogel group could continue as lead plaintiffs. And so, despite these disappearing plaintiffs and diminished claims, Weiss and the other law firms reached a $300 million settlement in June of 2003, with Milberg Weiss's share of the fees totaling around $40 million. It was a few months later that Mr. Vogel contacted Steven Schulman about his payments for Oxford and other cases.

Fallout from the Indictment

Ohio's Attorney General, who had hired Milberg Weiss to represent Ohio's public college savings fund in class action mutual fund litigation, fired the firm because he felt its indictment "severely compromised" its representation of clients. A Delaware Court of Chancery chancellor expressed concern about Milberg's fitness to serve as lead counsel in a shareholder class action against the largest Russian oil producer's takeover of a Kazakhstan subsidiary.[9] Lawyers have suggested that U.S. District Court Judge Shira Scheindlin, presiding over a massive class action alleging that investment banks conspired with hundreds of technology companies to artificially inflate stock prices in the 1990s and 2000, will have to determine Milberg's fitness to serve as class counsel, especially given that hundreds of individual plaintiffs have sent letters objecting to lawyers being the lavish beneficiaries of the suit at the expense of plaintiffs' share of the benefits. One such shareholder declared "this entire suit is about making money for lawyers at the expense of those who are truly productive in our economy."[10] Reportedly, nearly half of Milberg Weiss's lawyers have left the firm. In March of 2007, J. Douglas Richards and Michael M. Buchman, two top antitrust lawyers at Milberg Weiss are slated to join another class action firm based in New York.[11]

Additional Matters

Ethics Claims

Shortly after the indictment was issued, it was reported that one of the individual partners named in the indictment, Steven Schulman, was facing claims of breach of ethics in two pending civil cases. In the first, a client alleged that Mr. Schulman named him as a plaintiff in a class action lawsuit without his consent, and, in the second, a former client has sued for damages he contends he suffered when Mr. Schulman sued his former employer without his consent. Schulman's attorney vigorously maintains that these are unrelated matters.[12] However, claims that Milberg Weis sues on behalf of unconsenting plaintiffs have been alleged for years. William Lerach is famous for boasting, "I have the greatest practice in the world because I have no clients. I bring the case. I hire the client. I do not have some client telling me what to do. I decide what to do."[13]

The criminal indictment notes that Mr. Schulman was head of Milberg Weiss's "case starting" department, in charge of identifying companies in distress and clients willing to sue them. The speed with which such a company is identified and sued is critical to securing the role of lead counsel in what can be a sharp contest, because the law firm that controls a class action case earns most of the fees.

Payments for Expert Fees

Indictment of the Milberg Weiss firm in May of 2006 was soon followed by reports of a federal investigation into whether Milberg Weiss improperly used money it recovered in legal cases to pay its expert witness, John B. Torkelson, for expert analysis he provided in earlier class action suits. Milberg Weiss reportedly paid tens of millions of dollars to Mr. Torkelson, a former financial analyst in Princeton, New Jersey, who frequently testified as an expert in Milberg Weiss cases in the 1980s and 1990s. Both Mr. Torkelson and his ex-wife have been convicted of theft or wrongful conversion of funds and accounting irregularities in connection with the Acorn Technology Fund, a former venture capital partnership. Papers filed in Mrs. Torkelson's criminal matter reveal that in connection with her guilty plea on theft and interstate transportation of $1.9 million in stolen or fraudulently obtained property, she is cooperating with an investigation being conducted by the US Attorney's office in Los Angeles. Legal trade publications have linked delays in her sentencing to her cooperation in the Milberg Weiss probe. It is not clear whether Mr. Torkelson, who has been sentenced to seventy months in prison for wrongful conversion of at least $5 million lent to Acorn by the Small Business Administration, is also cooperating. Finally news reports suggest that the Torkelsons could provide a link to the Lerach San Diego class action firm because Mr. Torkelson also acted as an expert witness in cases personally handled by both Mr. Weiss and Mr. Lerach. Neither Mr. Weiss nor Mr. Lerach has been charged to date.[14]

Lerach Firm Ordered to Pay Defendant's Legal Fees and Expenses

Another development of interest is a landmark decision by a federal judge in Houston ordering the Lerach firm, the 2004 San Diego Milberg Weiss spin-off class action firm, to pay the legal fees and costs of a company it sued in the aftermath of the Enron collapse. Lerach had sued Alliance Capital, a money management firm, arguing that Alliance should be held responsible for fraud at Enron because an Alliance official was also a director there. Judge Melinda Harmon issued summary judgment dismissing the case, ordering Lerach to pay Alliance's legal fees and costs because the case had been pursued after it became clear that it was without merit. The case is believed to be the first in which a law firm, and not the client, was ordered to recompense the defendant wrongfully sued under Section 11(e) of the Securities Act of 1933. Judge Harmon ruled that, even though one circuit court of appeals had previously ruled that the section "was not intended to authorize an award against the parties' attorney," it was more appropriate that such fees and costs be borne by licensed counsel who are in a better position to determine at what point it becomes evident that an action becomes legally frivolous.[15] The plaintiffs in the action against Alliance were led by the University of California Board of Regents. U.S. District Judge Harmon's observations about control of and decisions to pursue the litigation are consistent with Mr. Lerach's own description of his control and management of securities and other class actions quoted above.

Policy Implications

The indictment of Milberg Weiss implicates a number of legal and public policy matters. Given that Congress passed comprehensive class action reform in 1995 aimed to eradicate professional plaintiffs, members of the class action bar have expressed surprise that Mr. Vogel or his family members, lead plaintiffs in at least forty Milberg Weiss cases, are alleged to have received kickbacks as recently as 2005.[16]

Some reports suggest that the indictment could also subject decades-old settlements to scrutiny by shareholders who contend that they were not treated fairly, or by law firms muscled out of representing a lead plaintiff by Milberg Weiss.[17] Paying clients to act as lead plaintiffs allegedly gives Milberg Weiss an edge in the scramble to be named lead law firm, because the firm had a ready stable of paid professional plaintiffs.[18] Judges in their pending cases may be forced to consider whether Milberg Weiss can provide "adequate representation"—the standard for lead counsel in cases that are in litigation or in connection with proposed settlements.[19]

Critics of class action lawsuits have long alleged that these suits need reform and close judicial scrutiny. Claims that such suits benefit class counsel disproportionately have been vigorously asserted, with contingency fees to class counsel running from 19% to 45% of the multimillion dollar settlements.[20] Lead counsel in a class action case typically has considerable influence over how the fees will be awarded to itself and the other law firms, according to plaintiff's lawyers; and so, the scramble to file copycat lawsuits and jockey for lead counsel position may often be the most financially critical battle of the litigation. One can raise legitimate questions about why the class action model permits lead counsel to engage in such self-interested fee-dealing without judicial review or public scrutiny.

Indictment of the law firm also raises the ongoing question over indicting firms for individual executive's criminal activities that led, in the case of Arthur Anderson, to the demise of the firm; (although the U.S. Supreme Court later reversed its conviction). Milberg Weiss refused to sign a deferred prosecution agreement--as have accounting firms KPMG and Bristol-Meyers--because it refused to waive attorney-client privileges. Even the *Wall Street Journal*, long a critic of Milberg Weiss, took exception to the indictment of the entire firm and the implications such precedents hold for future prosecutions.[21]

A very interesting perspective on this aspect of the prosecution was raised by a *Business Week* article noting that some corporate defense attorneys, usually Milberg Weiss's foes in court, are rooting for the firm in its battles with the Justice Department.[22] Two self-interested factors are given for this unlikely support. As part of its investigation into whether the firm paid kickbacks to lead plaintiffs, the Government ordered Milberg Weiss to turn over confidential communications among its staff and their outside criminal defense attorneys. Milberg's refusal, as noted above, was followed shortly by its indictment. This arguably presents an important test case for the scope of the attorney client privilege and it is no surprise that defense firms hope that privilege is broadly defined and protected. Indeed, the business community is rightly concerned with the controversial Thompson memorandum's requirement that a firm waive attorney client privileges if it wants a favorable plea deal. Many critics, including the *Journal* editorial board, the business community, the ACLU and white collar defense counsel have assailed a practice pursuant to which the Justice Department arm-twists corporations into waiving their employee's rights. On the other hand, notwithstanding these concerns, legitimate distinctions can be made between accounting firms extinguished by the isolated wrongful activity of a few partners, and a decades long conspiracy by a law firm and pattern of recruiting, setting up straw plaintiffs, paying kickbacks to those same serial plaintiffs and experts that represent a significant portion of and pattern for the business done by the firm as a whole.[23] Another question goes to the scope of the privilege. Fee payments between law firms and their clients are not covered by the privilege under existing law, and surely kickbacks of such fees to clients that are themselves illegal are not conceivably protected by any privilege.

The second reason noted by the *Business Week* article is that firms like Milberg Weiss keep defense lawyers own fees rolling in by their relentless and lucrative activity. One partner at a major New York firm put it this way: "If they weren't suing our clients, we'd be selling pencils."[24] This latter, somewhat cynical observation brings to mind the important scholarly work done by two Emory University professors who have studied such agency problems between attorneys and their clients.[25] They note that empirical studies in the market for lawyers show that "[t]he increased demand for lawyers has occurred because law has been changing in ways favorable to lawyers. The stock of lawyers did not reach equilibrium because the law was continually changing (and indeed is continuing to change) in a way that increases demand."[26] Rubin and Bailey describe the substantive implications of these developments as follows:

> It is generally agreed that a stable legal system is a prerequisite to economic development and growth….Rent seeking by lawyers seems to take the form of undermining those legal institutions that provide stability and clear rights for citizens….Litigation is profitable to lawyers, and most especially to plaintiffs' attorneys. Defense attorneys…also benefit from an increased demand for their services when there is increased litigation….[27]

The cultural forces of increased payment of damages and uncertainty and unpredictability in the law are identified as two principal factors leading these economists to "predict that the law…will come to favor the interests of attorneys: Where attorneys have a financial interest in the outcome of litigation (as through a contingent fee), then their interests. . .determine the shape of the law…. the major actors with an interest in the law are tort lawyers (on both plaintiffs' and defendants' sides)."[28]

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