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Forum

Class Action Fraud Takes the 'Class' Out of the Legal Profession

By Timothy D. Reuben

Class actions were designed as procedural vehicles of social justice — they protect the rights of the little guy or gal from being taken advantage of by what Bill Lerach called “the dishonorable and despicable greed” of corporate America. Of course, Lerach is in jail now, serving two years on a massive conspiracy violation involving kickbacks to plaintiffs in class actions. Sadly, large corporations are not the only ones that suffer from dishonorable and despicable greed. Lerach said at his sentencing: “My conduct was completely and absolutely unacceptable from anyone, and especially a lawyer.” At least he finally recognized that lawyers are expected to be ethical leaders and set examples. I just wish he had not set another bad example.

So I was both glad and sad when I read that this continuing embarrassment to all lawyers was essentially at an end with Mel Weiss going to jail and Milberg Weiss (now just Milberg) paying \$75 million in fines. According to reports, from 1979 to 2005 — the time of the alleged kickback scheme — the firm paid named plaintiffs in more than 165 cases and earned fees in those cases of about \$239 million. That puts that \$75 million in fine perspective. It's all just so much money, and yet based on the fine alone, the illegal practice was still profitable. Not that I question the prosecutors' judgment — to the contrary, they are to be commended by showing us lawyers and the world that we don't get away with such stuff.

So who was harmed? Presumably, the class actions that were filed had merit in and of themselves. Therefore, assuming these lawyers litigated effectively, the suits filed based on illegal kickbacks must have still accomplished the same social justice. One newspaper commented that the victims were the shareholders of corporate America (which is most of us) since the settlements “came from the pockets of the unsuspecting shareholders ... payouts that cut dividends.” But that's not right. If the companies were doing wrong, class actions were designed to do something about that. Remember, Lerach purportedly obtained \$7.2 billion in settlements from Enron on behalf of investors and employees. He did good, right? And if it hadn't been him, someone else among us lawyers would have carried that

ball. No, the defendants were not really the victims at all.

Was the plaintiff class harmed? Possibly, but the class had good law firms and apparently adequate plaintiff representatives to carry the case forward. The kickbacks to the named plaintiffs perhaps should have gone to the class as a whole, but when divided amongst all class members, that loss likely doesn't amount to much.

I was foolish enough to file a securities class action in New York federal court a number of years ago. I represented a little old lady — not from Pasadena but from Westwood — who had lost what to her was a lot of money because of a misleading stock offering. She was hopping mad and wanted to sue and wanted to be a class representative. She would have been a good one — but of course there was never any chance of that. I filed her suit and flew to New York to appear at the hearing where the court was to decide which law firm was to lead the plaintiffs' suits, since of course I wasn't the only one who filed. You see, in these big class action securities cases, a whole bunch of firms sue. Then, while the defense watches, the plaintiffs' lawyers argue to the judge who should handle the consolidated matter. I had even called a number of the plaintiffs' firms to discuss the case — including the Milberg firm. They routed me to a young lawyer there — obviously the junior guy on the case, who was nice enough but spoke to me like they already had been selected to run the case. When I got to court, Weiss was there with another senior lawyer from his firm, as well as about a dozen other plaintiffs' lawyers, but it seemed that it was obvious to everyone that Weiss would get the case. Weiss had submitted papers showing he had a named plaintiff who had suffered the biggest individual loss — which was pretty much determinative of who the judge would have to pick for lead counsel. Weiss got the case. I have no idea if there was a kickback or not — I do know that there were a lot of other qualified law firms able and willing to take that case. They all pretty much lost out, and Weiss made the fee.

So lawyers were harmed — competitively, that is — if Weiss got the case by not playing by the rules. Other law firms deserve to have a chance. It's downright anticompetitive to break the rules and thereby get all the high-paying class actions. Adam Smith competition

is healthy for the legal profession — but it doesn't work if a law firm cheats. So the victims were other lawyers who lost opportunities to be as professionally successful as Weiss and Lerach.

And when this mess came out, we lawyers were all harmed again — in our public image. We look dishonorable and despicably greedy to the public. The L.A. Times just stated in an article picturing Lerach and Weiss: “The very phrase ‘trial lawyer’ has become associated with unadulterated greed.” And do not think that none of that negative image falls on you because you are a defense lawyer or you work in some totally unconnected area of practice. Weiss and Lerach make all lawyers look bad — they bring dishonor to our profession. I saw Weiss's picture in the paper - he looked unhappy and guilty but I don't recall any words of apology. He is waiting to serve 30 months in prison.

Our process was also harmed. All this money was involved and our own rules were broken by lawyers who knew better. And that undermines our system.

None of the indicted attorneys are still at Milberg, and on the Milberg Web site, the firm management “reiterated the firm's apology, based on the former partners' misconduct, to ‘all judges, lawyers, clients and class members who deserve full and complete adherence to all legal and ethical norms.’” Those are nice and carefully chosen words, but they really don't undo the harm. Firms like Milberg that have so profited from our system and profession need to be leaders of the bar in the area of professionalism. There are lots of ways to do just that. I will be watching to see if Messrs Weiss and Lerach and the Milberg firm try to make a genuine positive effort for our profession. They certainly owe it to us. But it falls on the rest of us to work hard to improve our marred public image, to be leaders in society for justice, ethics and public service. Milberg and Lerach just have made our job that much harder.

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