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Class Action Counsel Evaluate Impact of Milberg Weiss Indictment

By Garth T. Yearick, Litigation News Associate Editor

Minimal effects expected on class action litigation

Milberg Weiss Bershad & Schulman LLP—one of the leading class action litigation firms in the United States—and two of its named partners were recently indicted by a grand jury for alleged criminal offenses that included paying $11.3 million in illegal kickbacks to certain clients for serving as lead plaintiffs in class actions. Since the indictment was made public, practitioners have been gauging its impact on not only Milberg Weiss but also class action practice in general.

Michael D. Donovan, Philadelphia, a member of the Section of Litigation's Class Actions and Derivative Suits Committee, contends that the problems highlighted by the indictment are not unique to class actions, even if the amount in controversy is greater in such cases. "The allegations highlight the problem of a lawyer agreeing to split his or her fee with the client," Donovan says. "That has long been an ethical prohibition." Although he acknowledges that "guilt by association is always possible," Donovan believes the indictments will not adversely affect the plaintiff's class action bar as a whole.

Donovan also believes it is very unlikely that the indictment will cause defense counsel to seek to revisit settlements in earlier Milberg Weiss class actions. "The focus of the charges appears to be that the Milberg Weiss lawyers were able to beat out other plaintiffs' lawyers in obtaining leadership positions in cases," Donovan says. "It does not appear that the allegations of the indictment have anything to do with the fairness or adequacy of any of the settlements." Donovan notes, however, that as a result of increased scrutiny, "the indictments themselves appear to have increased the risks and costs associated with moving for lead plaintiff status."

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Defendants would have no reason to revisit settlements in earlier Milberg Weiss cases, says Lynda J. Grant, New York City, a member of the Section's Class Actions and Derivative Suits Committee. "Courts, after notice to the class members, found that these settlements were fair and reasonable to the classes, and defendants determined that they were in

the best interests of their clients."

Grant notes that many of the allegations of the indictment focus on the actions purportedly taken by Milberg Weiss to secure lead counsel status during the "race to the courthouse days when the first case filed generally dictated which law firm and which client would control the action." According to Grant, this race was largely ameliorated, in securities class actions, by the Private Securities Litigation Reform Act of 1995, which established a presumption that the plaintiff with the greatest financial interest would be appointed as lead plaintiff and, generally, his or her attorney as lead counsel.

Pamela S. Palmer, Los Angeles, former Co-Chair of the Section's Class Actions and Derivative Suits Committee, agrees that, even from a defense perspective, "There is little incentive for most defendants to seek to undo the peace they bought through a class action settlement. It is difficult to imagine a scenario where defendants would want to reopen litigation, especially since other members of the class and other class action firms would be standing in the wings to step in if a settlement with the lead firm unraveled."

Palmer notes, however, that "separately represented class members and potential opt-out groups may have an incentive to attempt to seize control of litigation currently controlled by Milberg Weiss—for example, by challenging settlements as deficient or challenging the lead class-counsel appointment as not in the best interests of class members."

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