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Double Exposure

by Peter R. Taffae

For more than three decades, the law firm of Milberg Weiss Bershad Hynes & Lerach (Milberg Weiss hereafter) has brought thousands of class actions against corporate America with aggregate settlements exceeding $50 billion.

Milberg Weiss is credited with introducing securities class action litigation and perfecting it to a science. In the early days of professional securities class actions, the rules were very different than they are today. Milberg Weiss had the infrastructure and technology to choose its target and react quickly. Today, software has been developed and is utilized in the pre-screening process to determine the likelihood of successful litigation. Over the years, the "template" proceeding has been drafted and redrafted to incorporate the changes in the securities law landscape (i.e., Private Securities Reform Litigation Act of 1995 (PSRLA) and Sarbanes-Oxley). When evaluating the history of securities class actions, one must look at pre- and post-PSRLA. Many believe the sole motivating factor behind the PSRLA was to stop Milberg Weiss; corporate America in general and the technology industry specifically sought Congress' help to stop the massive amount of securities class-action litigation.

The landscape changed after a Congressional override of President Clinton's veto of the PSRLA. No longer was the first to the courthouse guaranteed to be lead plaintiff. Milberg Weiss' experience and advanced infrastructure gave it an advantage under the "first to file" approach. It was also very inexpensive to file litigation. The allegations were often the same and the pleading standards did not exist as they do today. Today the pleading has raised to a "fraud plus" standard. Under the old system, discovery could begin immediately after the filing with the hope of finding a smoking gun. With much higher post-1995 pleading standards in place, additional investment had to be made to avoid a motion to dismiss. This new standard requires a more personal approach to filing, including hiring in-house forensic accountants, trained investigators and damage analysts.

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Under the post-1995 rules, lead plaintiff status goes to the investor who suffered the greatest loss, usually the institutional investor. At first, this change did not do much because of the large pension plans' reluctance to get involved. As pressure intensified on pension plan managers, this new plaintiff emerged and dramatically changed the landscape. The cost associated with more sophisticated clients presented some problems for Milberg Weiss, which in the past had never dealt with an institutional investor as a plaintiff. Marketing, producing newsletters, holding conferences, entertaining and political contributions all became necessary to gain the acceptance and favor of these clients and be chosen as their lead counsel. But Milberg Weiss adapted well.

In May 2004, the grand-daddy of plaintiff lawsuits split into two fierce competitors: Milberg Weiss Bershad & Schulman, LLP and Lerach Coughlin Storia & Robbins, LLP. Milberg Weiss, with headquarters in New York, has over 100 attorneys in five offices nationwide. Lerach Coughlin has close to 125 attorneys with five offices nationwide and is based in San Diego.

These two highly specialized and proficient plaintiff firms will certainly bring new challenges to D&O underwriters, directors and officers, especially as these firms scramble to raise fresh operating capital. Each will need to strengthen its own infrastructure by acquiring internal forensic accountants, investigators and damage analysts. Substantial amounts will also be required to solicit institutional investors as clients.

The quickest and easiest capital-raising activity a plaintiff firm can do is bringing lots of high-speed litigation that yields settlements. These are small cases in today's world of $10 to $25 million awards, and will normally involve companies in a healthy cash position regardless of how much D&O coverage they may carry. Such "hit and run" legislation will also be a prime strategy for quickly building a successful track record, to be used for drumming up more work.

With two premier firms now competing against each other for superiority, the stakes have officially been raised. Each will have its unique internal farm system to recruit fresh talent from the best law schools, and the doubling of top-tier partnership tracks will make joining the ranks of the professional class action attorney that much more attractive and lucrative.