

# THE PLAINTIFFS'

# HOT LIST

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# Milberg lives long after all—and prospers

The partnership regrouped following scandal, expanded its practice areas and racked up wins.

BY JEFF JEFFREY

When the federal government indicted Milberg Weiss Bershad & Schulman in May 2006, the odds that the venerable plaintiffs' firm would avoid utter collapse looked slim to none.

A mere three years later, the New York-based firm has scored a \$750 million settlement against Xerox Corp. in a long-running case involving the company's accounting manipulations. It ranked among the largest recoveries in securities litigation history and one of eight settlements the firm won this year of more than \$10 million.

Milberg is in a much different place than it was in 2006. Since the indictment, four name partners—including co-founder Melvin I. Weiss—have pleaded guilty to participating in a decades-long scheme in which individual plaintiffs were paid millions of dollars in kickbacks to be on call when shareholder cases were ready to file. Last year, the firm agreed to pay \$75 million in exchange for criminal charges against it being dropped. The indictment caused almost 50 lawyers to ditch the firm; many expected it to disintegrate within a few months. Several client pension funds fired Milberg and a number of courts fired it from lead counsel roles. In short, the firm looked like a goner.



**SANFORD DUMAINE:** Saving Milberg was "one of the most challenging and now satisfying things I have ever done in my life," the managing partner said.

But Milberg is back.

The firm has shortened its name to simply Milberg LLP and has redoubled its commitment to what it was known for before its legal troubles: scoring high-profile—and high-dollar—victories for plaintiffs. Eight new lawyers joined the roster this year. Even in a down economy, Milberg continues to beef up its client offerings, adding a bankruptcy practice and bringing in laterals to han-

dle antitrust and Employee Retirement Income Security Act litigation. "The Xerox case was a real shot in the arm," said Milberg partner Brad Friedman, who led the work on the case. "The clients stuck with us throughout the indictment period and we maintained our position as co-lead counsel. It was a big win for us."

Milberg Chairman Sanford Dumain would not disclose its fee for the case

other than to say it was in the “tens of millions of dollars.”

### A \$6.3 BILLION CASE

The case came to Milberg in 2000, when Xerox was under investigation by the U.S. Securities and Exchange Commission for misleading the market about the falling demand for its products and services. Among other allegations, the company was accused of reporting copy machine leases as outright purchases and adding revenue that should have been spread across several years to a single quarter's report. At the time, it represented the largest corporate restatement in history, some \$6.3 billion. (That amount was eclipsed later by Enron.)

“The discovery documents were some of the most complex ones I have ever seen. It was possible to look at a highly incriminating report and not know you had gold in your hand without some pretty sophisticated knowledge of accounting principles and practices,” Friedman said.

To navigate the complexity, Friedman assembled a team of more than two dozen Milberg partners and specialized contract lawyers to wade through hundreds of boxes of files. Skill in accounting was mandatory, and if someone wasn't pulling his weight or made mistakes, “they were removed immediately,” he said. “We were terrified of the concept that someone might not know what they were looking at.”

Xerox and its auditor KPMG LLP were represented by Cravath, Swaine & Moore and Shearman & Sterling, respectively. When the defense moved in 2002 to dismiss, the case stalled for almost three years, until Connecticut U.S. District Judge Alvin Thompson issued a ruling. “In the end, he decided it 100% in our favor, so I can't really complain,” Friedman said.

The case settled in September 2008. Xerox agreed to pay \$670 million and KPMG contributed \$80 million. The settlement was approved in January.

With that much money on the line, it's hard to believe that Milberg's clients would be willing to ride out the storm of the indictment and its fallout. According to Dumain, that loyalty was typical of the firm's clients and was the reason Milberg could keep it together through its troubles.

“We really lost only a handful of clients,” Dumain said. “For the most part, they trusted us and knew that whatever a small group of our partners may have done, it didn't affect the quality of the work done by the firm as a whole.”

The government's case against Milberg resulted in guilty pleas from co-founder Weiss and former partners Steven Schulman and David Bershak. William Lerach, who left the firm in 2004 when it split into New York- and San Diego-based firms, also pleaded guilty. The roughly 75 lawyers who remained at Milberg banded together and assumed what Dumain called an “us against them” mindset.

“I was going to be good and damned if the government was going to chase me out of my firm and away from the people I liked working with,” Friedman said.

Dumain went on tour, assuring clients that they would continue to be represented well and fielding any questions. In the office, Dumain laid out the firm's position as clearly as he could. “I couldn't make guarantees, but I told everyone that I was living my life as though the firm would have a future, and I made a commitment to be as open as possible,” he said.

As for the name, Dumain said, the firm's partners considered changing it completely but concluded that it remained the proper flag to fly. “When people think of the name Milberg, they think of a lot of things, not all of them good,” he said. “But that name still means over 40 years of high-quality representation of plaintiffs.”

Cash flow remained steady as payments continued from Milberg's pre-indictment cases, such as the tens of

millions of dollars it earned from its 2007 Tyco International Ltd. securities litigation win. It also could look forward to collecting interest in fees from cases litigated by Lerach that began before he left the firm, including work on behalf of Enron Corp. investors

“For every big case that we were receiving payments on, there were several smaller cases with payments coming in. We knew that as long as a huge number of our clients didn't dump us, we were going to make payroll,” Dumain said. Dumain acknowledged that Milberg managers suffered many sleepless nights during settlement negotiations, which ended when the government cleared the firm itself and all remaining partners of wrongdoing.

Meanwhile, he said, Milberg was hiring. In 2006, it launched a bankruptcy practice with the addition of Matthew Gluck from New York's Fried, Frank, Harris, Shriver & Jacobson. The firm hired Herman Cahn, who had served more than three decades as a trial judge, and brought on Arthur Miller, a professor at New York University School of Law, to lead its appellate practice.

The turnaround even brought back into the fold a lawyer who had left following the indictment. In November, Andrei Rado left New York-based Labaton Sucharow to return to Milberg as a partner.

Opposing lawyers conceded that, whatever the recent unpleasantness, Milberg attorneys remain worthy adversaries. “Milberg was always a first-tier plaintiffs' firm, and they are still one today,” said Alan Kraus, a litigation partner in Latham & Watkins' Newark, N.J., office.

The firm's survival gives its partners a sense of pride, Dumain said. “I wouldn't ever want to do it again,” he said. “But thinking back, it's one of the most challenging and now satisfying things I have ever done in my life.”

Contact Jeff Jeffrey at [jjeffrey@alm.com](mailto:jjeffrey@alm.com).

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### MILBERG

Milberg returns to this list for the first time since its indictment in 2006 for kicking back fees to lead plaintiffs. Since then, the reorganized firm has jettisoned the offending partners, reached a nonprosecution agreement with the government and persevered. In fact, it's growing, having added eight attorneys this year. Milberg has launched a new bankruptcy practice and bolstered practices in antitrust litigation, litigation support and discovery. New York-based Milberg opened offices in Tampa, Fla., and Detroit to complement its Los Angeles and New York locations. It has 76 attorneys.

### NOTEWORTHY CASES

- *In re Initial Public Offering Sec. Litig.*, No. 21, MC 92 (SAS) (S.D.N.Y.). Co-lead counsel Ariana J. Tadler, Robert A. Wallner and Peter Safirstein. Milberg, a member of the court-appointed plaintiffs' executive committee, helped obtain preliminary approval for a \$586 million settlement in this consolidated class action. Complaints against underwriters of technology company stocks during the dot-com boom, implicating 55 investment banks and 300 corporate issuers, were largely sustained.
- *Carlson v. Xerox*, No. 3:00-CV-1621 (D. Conn.). Lead counsel Brad N. Friedman. This securities class action resulted in a \$750 million cash settlement (\$670 million paid by Xerox Corp., \$80 million by auditor KPMG). It was the 11th-largest recovery in the annals of securities litigation. Xerox's alleged massive and global accounting improprieties led to the suit.
- *In re General Electric Co. ERISA Litig.*, No. 1:06-cv-00315 (N.D.N.Y.). Lead attorney Lori G. Feldman. As lead settlement counsel, Milberg obtained a \$40 million award for former General Electric Co. employees who claimed the company imprudently sank more than two-thirds of their 401(k) assets in G.E. stock.