

Milberg Weiss: Dying of Shame
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I. Introduction – Make it clear that some of the difficulties of analysis inhere in confusion of feelings about:

- A. Securities class action litigation
- B. Entity liability
- C. Professional ethics issues and what we expect of partners in law firms
- D. Perception of political agendas
- E. Perception that criminal liability is somehow different than civil liability, while in context of entity liability it very arguably is not.

II. Factual Background

- A. Since 1981, market position of Milberg Weiss
- B. The investigation
- C. The indictment
- D. The inquiry into the indictment
 - 1. General
 - 2. Rangel et al
 - 3. Frank

III. The Alleged Crimes

A. No brainer category: i.e., lying to judge, falsifying tax returns, destroying documents, money laundering. Sort of Martha Stewartish – there’s nothing so bad that lying about it can’t make it worse.

B. Peripherals: conspiracy, aiding and abetting, using wires and mail to do the things described in A or C, forfeiture counts

C. The basic bad acts (that is, what the conspiracy was about and what was being hidden) (Note that there is a great deal of overlap between the illegal and the unethical):

1. Illegal

- a. Commercial bribery
- b. Breach of fiduciary duty
- c. Paying witnesses
- d. Excess payments to lead plaintiff

2. Unethical

- a. Stirring up
 - i. Solicitation generally
 - ii. “Standing” purchases
- b. Sharing fees with non-lawyers
- c. Paying witnesses
- d. Conflicts of interest (non-typical plaintiff, interest of Milberg)

IV. Who did wrong? Who should have known? This is a different question than who could, under the current state of the law, be criminally charged.

A. Individuals indicted

B. Others in firm

- 1. What did they know and when did they know it?
- 2. Standard rules of imputation:
 - a. Agents
 - b. Partners
 - c. The requirements of the Model Rules.
 - i. Arguably, there are no innocent partners.

ii. But is it economic to check in a large firm?

iii. Does this simply mean that some firms have gotten too big? Are there really social advantages to mega-firms? This obviously is closely related to the question of entity liability.

3. Should the other partners in fact have been named? Presumably the statutory elements were not present

C. The Entity

1. Whether fictional entities can “do wrong” is interesting, but too metaphysical to be useful.

2. The crime of being too big?

3. The crime of “corporate indifference”?

4. How were the statutory elements arguably satisfied? (One gives the prosecutors the benefit of the doubt as far as the non-frivolity of the charging.)

V. The promise and perils of entity punishment

A. The possible justifications:

1. Presumably not retribution against fictional entity

2. Punishing persons (such as the unindicted Milberg Weiss partners) who can't be individually reached?

3. Deterrent effect on other entities/firms?

4. The deterrence effect might be articulated in terms of forcing restructuring as a method of imposing gatekeepers on gatekeepers. (This characterizes Milberg Weiss lawyers as gatekeepers of class action litigation.)

B. The counterclaims:

1. Injury to employees, creditors, other clients, innocent partners

2. “Political” manipulation to punish and thus chill bringing of securities class action. This is a point related to VA3, which also should be recognized in connection with the analysis in Part VI.

3. Not manifest in the Milberg Weiss scenario, but widely claimed that entities are pursued to force waiver of attorney-client privilege to detriment of constituents.

VI. Integrating entity liability and social goals. This can involve the re-definition of wrongdoing, consideration of possible new defenses, and tailoring specific punishments. These clearly are different parts of the elephant, but all belong to the same animal.

A. Overtly recognize the possible use of entity liability as a tool. As intimated above, it obviously is a way of requiring monitoring by partners (or others) in entities, chilling disfavored activities.

B. Parallel analysis of integrating laws of general applicability and rules of professional conduct.

1. Steps

- a. Determine the goals of the generally applicable law in question
- b. Examine whether the relevant rule of professional conduct is a matter of inherent morality or merely a matter of prophylaxis or convention
- c. Evaluate the fit of the rule with the achievement of the goals of the generally applicable law

2. Using the example of solicitation:

- a. Section 16(b) litigation
- b. Other derivative litigation
- c. Securities class action litigation

3. Obviously, this approach would require changes in the rules

4. Recognize the federal issue/federal standards point

5. Note the possible analysis of “up the ladder” in these terms. (In other words, perhaps this is more-or-less what has happened.)

C. Entity liability analysis:

1. Steps

- a. Determine the goals of the law or laws with which you are concerned
 - b. Can we bypass the issue of inherent morality?
 - c. Evaluate the fit of entity liability with the achievement of the goals of the law(s) in question
2. Application (becoming progressively more complicated)
- a. “Typical” corporate wrongdoing
 - i. Think about securities fraud
 - ii. Compare Section 11 liability and note the penalty
 - b. Arthur Andersen-type situation: arguably, a deliberate failure as market gatekeeper
 - c. Milberg Weiss
3. Obviously would require changes
4. Again, consider federal issues aspect

D. Unpacking and tweaking

- 1. Definition of offense: i.e., when X occurs, the entity may be charged with . . . what? X itself? The crime of corporate indifference to X?
- 2. Defenses – There’s no reason something novel couldn’t be devised (and this might even be folded into the definition of the offense). Fictional human being, traditional imagery need not drive the analysis and simply gets in the way.
 - a. Percentage of innocent owners, etc.? (Sort of a Sodom and Gomorrah defense.)
 - b. Defense of adequate consideration or adequate safeguards?
- 3. Punishment
 - a. Obviously, no incarceration
 - b. Fines: Penalty of excess profit only? Points to consider:

- i. Protects employees, other creditors, and clients
 - ii. What compensation for owner/workers? Quantum meruit?
 - iii. Public corporations: reasonable return on investment. This would tend to contain speculation, absent credible signaling that no misdeeds would occur.
 - iv. Private entities: allowance would have to be made for services and return on capital invested
 - v. Is this adequate deterrence? Stupid to think it's going to be perfect.
- c. Shaming, or who killed Arthur Andersen?
- i. Was it the shame or the threatened liability?
 - ii. In the entity context, shame simply seems to mean market reaction
 - iii. Consider various scenarios involving criminal charges and/or civil liability:
 - Firestone
 - Exxon
 - Martha Stewart: The market cared a little, but not much
 - Enron. Its demise arguably was exacerbated by market reaction, made possible by irrational overvaluing
 - iv. Is there a difference between charging constituents or whole entity? In other words, the shaming aspects may not be a lot different than what happens when partners individually are named
 - v. Are there different considerations for those trading, in large part, on integrity? (This would include Andersen and other gatekeeper professionals.) If so, which way does it cut?
 - vi. What might we predict about Milberg Weiss? Is it a provider of actual services? A gatekeeper? A streetfighter whose image won't be tarnished?

d. Consider specific legal consequences of conviction, such as licensing, official business or other concerns.

e. In general, are there any reasons for distinction between primary actors, market gatekeepers and plaintiffs' attorneys, who might be regarded as the court's gatekeepers?

VI. Conclusion