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Corporate Fraud Is Not Constructed By Plaintiffs' Bar

Monday, Oct 15, 2007 --- In their recent article, "State Attorney General Class Actions Raise Concerns," Brian Anderson and Amber Taylor of O'Melveny & Myers ("the authors") launch a wide-ranging attack on the role of private counsel in government enforcement actions.

In so doing, they strain to link these actions, and indeed class actions in general, to the recent guilty plea of Bill Lerach. In a futile attempt to support this flawed attack, they conflate parens patrie actions with class actions to conclude that private counsel side-step otherwise insurmountable legal hurdles when partnered with state attorneys general.

Thus, they implicitly conclude that class actions defy, rather than promote, the public interest. An actual examination of recent class actions and the latest scandals in Corporate America exposes their reasoning as unfair and fundamentally wrong.

By way of background, state attorneys general do not bring class actions. Instead, they use their authority as parens patrie to recover on behalf of their state's citizens. However, when citizens sue in their own capacity on behalf of a putative class, they are required to demonstrate compliance with Rule 23, the class action device.

Rule 23 is not meant to deter private suits. In fact, at least with regard to the antitrust laws, class actions have been encouraged by Congress, which created a bounty in order to persuade plaintiffs to act as private attorneys general to bring enforcement actions by allowing them to recover treble damages and attorneys' fees under the Sherman and Clayton acts.

Notwithstanding the differences between parens patrie and class action suits, state attorneys general have a long history of working side-by-side with private counsel to obtain significant recoveries for the benefit of the public.

For instance, in In re Lorazepam and Clorazepate Antitrust Litigation, MDL No. 1290; C.A. No. 1:99-cv-01082 (TFH) (D.D.C.), private counsel worked hand-in-glove with state attorneys general and the Federal Trade Commission — a collaboration resulting in over $135.4 million in settlements on behalf of consumers and third-party payors (e.g., union health and welfare funds and private insurers) nationwide for claims that Mylan Laboratories Inc. implemented unlawful and anti-competitive price increases for generic versions of two of its prescription anti-anxiety drugs.

Similarly, certain state attorneys general worked with private counsel on behalf of consumers and third-party payors nationwide to prosecute claims

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that Bristol-Myers Squibb engaged in monopolistic and anti-competitive conduct in marketing BuSpar, another anti-anxiety drug. In re Buspirone Antitrust Litigation, MDL No. 1413; C.A. No. 1:01-md-01413 (JGK) (S.D.N.Y.).

In stark contrast to the disparaging portrayal of private-government collaboration in the article, the top-notch lawyering in the case prompted United District Court Judge John Koeltl to comment: "Let me say that the lawyers in this case have done a stupendous job. They really have."

Importantly, while decrying the ostensible abuses of private counsel-public enforcer collaboration, the authors fail to support their derogatory comments.

What they do not disclose is that the typical collaboration between government and private litigants does not absolve private counsel of the need to meet the requirements of Rule 23 to obtain class certification. This is particularly true in the context of securities class actions, under the Private Securities Litigation Reform Act, where private counsel often represent state pension or retirement funds. The record reflects that such cases have recovered billions of dollars for investors. Indeed, the current options backdating scandals starkly reinforce the need for the continued prosecution of these types of class actions.

The authors offer purported examples of private counsel-public enforcer collaboration gone bad to support their pro-defense counsel diatribe. But these examples are unavailing.

For instance, they cite the cases filed by Eliot Spitzer, New York's former attorney general and current governor, against brokerage and insurance firms to demonstrate how plaintiffs' firms are "borrowing" the prestige of state attorneys general. This example ignores the reality that the state of New York's prosecution was brought and settled completely apart from that of the private class litigants, who are still litigating their claims years after the government suit concluded.

The only other example offered on this point is the tobacco litigation, where again, they fail to identify any negative consequence of the record-setting settlements, other than to point out that the lawyers who prosecuted the cases obtained attorneys' fees. It would be very difficult, indeed, for them to claim that the nationwide settlements, which are estimated to cost the tobacco companies $246 billion over the first 25 years, were merely "token relief" extorted from innocent corporations that were left to hang merely because of the "prestige" afforded by government counsel.

On a more basic level, the authors attempt to use the crimes of one lawyer in a patently unfair attempt to smear the entire plaintiffs' bar, as well as state government enforcers. At the same time, the authors are entirely silent as to the economic crimes routinely committed in Corporate America.

While it is clear that not all (or even most) corporations and their executives

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are dishonest, there is strong objective evidence that fraud is still endemic in Corporate America. According to the Department of Justice, in the last five years alone, over 53 ex-CFOs have been convicted in connection with the president's Corporate Fraud Task Force.

In the same announcement, the DOJ said that it also counted 214 chief executives, 23 corporate counsel or attorneys and 128 vice presidents as having been convicted since July 2002. If anything, it appears that it is Corporate America, not plaintiffs' lawyers, who are most adept at developing new tactics to evade attempts to limit fraud.

Thus, the assertion that corporate fraud is a fiction constructed by the plaintiffs' bar borders on the offensive. Indeed the SEC, the government agency responsible for protecting investors, has consistently emphasized over the last 40 years that private civil lawsuits are an important and necessary supplement to its actions.

If and when corporations cease to commit illegal acts, private attorneys general will gladly put down their badges. Until then, private litigants can and should continue to take corporations to task for their wrongful conduct.

--By Bernard Persky of Labaton Sucharow LLP.

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