

## A Decade After the Milberg Weiss Scandal: Does History Repeat Itself?

By **Joan Meyer** and **Norman Bloch** / March 26, 2021, Thompson Hine LLP



**New York Law Journal** - With the government again focusing on the behavior of the plaintiffs' bar, its scrutiny could signal the emergence of a new prosecutorial priority with which plaintiffs' firms, and the legal profession, will have to contend.



More than a decade after the Milberg Weiss scandal, plaintiffs' firms are facing myriad challenges to maintain their revenue streams. In 2007, Milberg Weiss was investigated for giving individuals kickbacks, typically 10% of the fees earned by the firm in the action, so

the firm could use them as named plaintiffs in its class actions. This scheme allowed Milberg to be first in the door to receive the largest share of the legal fees received in any case. After a seven-year investigation by federal prosecutors, four partners pled guilty to criminal charges and the firm entered into a non-prosecution agreement. At the time, the prosecutions appeared to be a bellwether of change for the legal profession. Yet years later, the plaintiffs' bar is experiencing another growing threat. The recent proliferation of civil actions and criminal prosecutions involving alleged misconduct of plaintiffs' counsel, ranging from the diversion of client funds to extortion in connection with settlement negotiations, is making the news. With the government again focusing on the behavior of the plaintiffs' bar, its scrutiny could signal the emergence

of a new prosecutorial priority with which plaintiffs' firms, and the legal profession, will have to contend.

### **Diversion of Client Funds**

In the last two years, prosecutors have been actively pursuing cases involving high profile plaintiffs' attorneys who have misappropriated client funds. The most public example of these is the spectacular demise of the law firm Girardi Keese and its founder and sole equity partner, Tom Girardi, a well-respected California plaintiffs' lawyer who was the subject of the movie Erin Brockovich. The movie, and Girardi's successful result in obtaining a \$460 million settlement for residents of a community who were sickened by contaminated drinking water, launched his career in mass torts litigation in the 1990s. On Dec. 2, 2020, the Chicago law firm of Edelson, PC sued Girardi Keese, Tom Girardi and others, to recover settlement proceeds for the families of the victims in the Lion Air Flight 610 crash who had pursued Boeing for the airplane's malfunction. Complaint, ECF No. 1, Edelson PC v. Thomas Girardi, et al., No. 1:20-cv-07115 (N.D. Ill. Dec. 2, 2020). As primary counsel, Girardi Keese controlled the client relationships and hired Edelson PC to act as local counsel. In its complaint, Edelson alleged that Girardi and his partners deceived clients and local counsel when the firm received millions in settlement money from Boeing, but never sent the clients their share. Edelson further alleged that Girardi diverted funds to support his lavish lifestyle and to pay off pressing debts owed to litigation funders. The district court found the firm and Girardi

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in contempt, froze their assets, and issued a judgment for \$2 million dollars to protect the interests of the clients from other creditors. Defense attorneys at the contempt hearing acknowledged that there was only \$15,000 in the firm's operating account and Girardi was suffering short-term memory loss and could not assist in his own defense. The case was referred by the district court to the U.S. Attorney's Office in Chicago for criminal investigation.

In more recent news, it was disclosed that Girardi and his firm had been sued in at least 45 actions over the years alleging malpractice or misappropriation of client funds. On March 9, 2021, the State Bar of California reported that his license was "ordered inactive." A few days later, the State Bar took the unusual step of challenging his family's efforts to establish a permanent conservatorship over Girardi in probate court, arguing that Girardi's claims of dementia were raised only after he was publicly accused of embezzling client funds in the Air Flight 610 crash and that imposition of a conservatorship over him would impair the bar's ability to move forward with a disbarment proceeding.

This case should not be viewed in isolation. Michael Avenatti is currently awaiting trial on a federal indictment in California alleging that he embezzled the settlement funds of multiple clients, including a paraplegic, lulling them into believing that settlement funds were delayed. Criminal Complaint, ECF No. 1, United States v. Avenatti, No. 8:19-cr-00061-JVS-1 (C.D. Cal. March 22, 2019). In 2019, federal prosecutors in Oregon indicted attorney Lori Deveny on fraud, identity theft and charges for misappropriating \$2.6 million in settlement pay-outs to her clients from 2011 to 2019. Deveny was a sole practitioner who represented clients who suffered serious injuries "as a result of automobile accidents and other traumatizing events." Indictment, ECF No.

1, United States v. Deveny, No. 3:19-cr-00183-MO-1 (D. Or. May 7, 2019). She was alleged to have received insurance proceeds, forged client signatures, deposited them and converted them to her own use. When clients complained about the delay, Deveny allegedly offered excuses, including claiming to clients that the delay was caused by the insurance companies even though she was already in receipt of the funds. The case is currently awaiting trial in 2021. And in September 2020, a felony information was filed against Gustavo Vila, a disbarred attorney representing a former New York police officer who received compensation for his disabilities from the Department of Justice's 9/11 Victim Compensation Fund. Vila received the \$1 million award for his client in 2016, converted it and manufactured a multi-year delay an excuse for non-payment. He pled guilty in October 2020 and is currently awaiting sentencing. Information, ECF No. 11, United States v. Vila, No. 7:20-cr-00495-VB (S.D.N.Y. Sept. 18, 2020).

### **Attorney Extortion Attempts**

Along with diverting client funds, plaintiff attorneys have attempted to extort funds from companies and other institutions with threats of unwanted publicity and reputational damage if their demands are not met. Avenatti was charged in New York for a scheme to extort Nike. The federal indictment alleged that Avenatti threatened Nike with substantial reputational harm if his client was not immediately paid \$1.5 million. Avenatti also demanded that Nike hire him to perform an internal investigation, which Nike had not requested, and for which Avenatti demanded payment of \$20 million. Avenatti was convicted at trial and is awaiting sentencing. Indictment, ECF No. 8, United States v. Avenatti, No. 1:19-cr-00373-PGG (S.D.N.Y. May 22, 2019). In late December 2019, mass tort lawyer Timothy Litzenburg and his associate were charged

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with attempted extortion when they attempted to set up a sham consulting agreement for \$200 million by threatening one of the chemical companies providing chemicals used in Monsanto's Roundup. Criminal Complaint, ECF No. 3, United States V. Litzenburg, No. 3:19-mj-00069 (W.D. Va. Dec. 16, 2019). After pleas of guilty, Litzenburg was sentenced to two years in prison (Amended Judgment, ECF No. 68, United States v. Litzenburg, No. 3:20-ccr-00013-NKM-JCH (W.D. Va. Oct. 19, 2020)) and his law partner, Daniel Kincheloe, to one year (Judgment, ECF No. 27, United States V. Kincheloe, No. 3:20-cr-00014-NKM-JCH (W.D. Va. Sept. 28, 2020)) for their roles in the extortion attempt. In October 2020, one of the top medical malpractice attorneys in Maryland, Stephen Snyder, was indicted for attempted extortion of the University of Maryland Medical Systems by demanding \$25 million in consulting fees in exchange for not publicizing alleged misconduct in the institution's organ transplant program. Snyder threatened a campaign that would include front-page articles in the local newspaper, national news stories, a press conference, the airing of two self-made videos and notices appearing on the internet every time anyone accessed the university's transplant site. Snyder is alleged to have demanded a sham consultancy to keep quiet. Indictment, ECF No. 1, United States v. Snyder, No. 1:20-cr-00337-GLR (D. Md. Oct. 5, 2020).

### Conclusion

Although the legal profession is facing higher obstacles to generate revenue these days, many of the cases recently prosecuted in both federal and state court allege a multi-year pattern of attorney misconduct that was deliberate and brazen. The most egregious circumstances typically arise in the mass tort/personal injury context where receipt of multi-million-dollar settlements creates an

opportunity for theft. When one person, usually a named partner, has unilateral control over a trust account, the ability to determine what costs and fees are subtracted from settlement proceeds deposited into that account, and conceals when settlement funds are actually received with false assurances, vulnerable and unsophisticated clients can be easily misled. Moreover, the potential dollar figures in these cases, especially when a company faces the specter of multi-district litigation, can incentivize lawyers to cross the line.

The government's increasing focus on these cases should prompt the plaintiffs' bar, as well as the legal profession generally, to undertake certain reforms that would curtail these abuses. Bar disciplinary authorities are admittedly overburdened and under-resourced, but procedures could be created to: (1) monitor suspended attorneys who have been charged and are pending hearing, as well as those who have been disbarred, to ensure that they are not holding themselves out as practitioners; (2) encourage personal injury and mass tort/class action clients to contact the state bar for assistance in determining if the payment of claims has been excessively delayed; and (3) require mandatory disclosure to the state bar when lawsuits alleging professional malpractice, especially the failure to pay settlement proceeds or to provide clients an accounting of their funds, are filed against practitioners. Moreover, state bar authorities should not wait for a criminal or civil resolution to begin to seek a license suspension or revocation. In some of these cases, attorneys continued to practice long after serious allegations against them surfaced. Finally, in individual tort cases, companies should consider requiring a notarized signature of the client on forms memorializing when the funds are released for deposit into an attorney's trust account. The alternative to reform is the spectacle of more

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attorneys being arrested, prosecuted and convicted for theft, fraud and extortion.

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