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CORPORATE CRIME REPORTER

INTERVIEW WITH WILLIAM LERACH, LA JOLLA, CALIFORNIA

William Lerach was called the knee-capper of corporate America.

He sued the big names in corporate America – and few were immune from his class action securities litigation.

Over three decades of practice, he and his partners at the law firm Milberg Weiss recovered more than $40 billion in fraud judgments for shareholders.

Then in 1995, corporate America organized to get Bill Lerach. They drafted and passed a bill through Congress called the Private Securities Litigation Reform Act (PSLRA). The insiders in Congress knew it as The Get Lerach Act.

We interviewed Lerach on January 22, 2024.

CCR: Give us William Lerach in a nutshell – where you grew up, went to school and your professional life.

LERACH: I went to public school in Pittsburgh, Pennsylvania. I grew up in an ordinary family. I was lucky to go to the University of Pittsburgh at a time where you didn't have to borrow money for college. I didn't do very well at the University of Pittsburgh, but I got into the law school. The law school let me in more as an act of grace. They gave me a scholarship and I did very well in law school. It is what I apparently wanted to do.

I then worked for five years at Reed Smith Shaw and McClay, a fantastic white shoe defense firm in Pittsburgh. I learned the craft and the trade. I did both corporate finance and litigation. And I was very well mentored.

But I did not like that environment and ultimately I met Mel Weiss, who was developing a new, aggressive and successful class action practice in New York City.

I was the youngest partner ever made at Reed Smith. And then I had the duty to go and tell them I was going to leave.

I went with Mel Weiss. Mel wanted me to go to New York. I wanted to go to California. I went to California. Nature took its course. Timing was everything. We were there when the high tech thing and modern securities litigation exploded. And we obviously had a long and successful adventure with that.

Along the way, because we became high profile and were Democrats, the Republicans insisted upon trying to constantly tort reform and cripple us, we became very active in politics. We gave a lot of money and did a lot of work to support progressive candidates. And frankly, we were just destroyed in that political fight. We did not have the money or the power to resist the combined forces of the accounting industry, the high tech executives, the banks and the Chamber of Commerce. And they ultimately, in my humble opinion, brought sufficient political power in Washington to cripple private litigation. That's the nutshell.

CCR: Literally minutes before I picked up the phone to interviewed you, I reached up to my bookshelf and pulled down this book titled – *Circle of Greed: the Spectacular Rise and Fall of the Lawyer Who Brought Corporate America to Its Knees by* Patrick Dillon and Carl Cannon (Broadway Books, 2010).

"He was the knee-capper of corporate America," they write. "For three decades, a fearless, abrasive and brilliant attorney named William S. Lerach sued the Who's Who of the Fortune 500 list. No one was immune – not Disney, Citibank, Hewlett-Packard, Apple Computer, R.J. Reynolds, Arthur Andersen, WorldCom or Enron – not Michael Milken, Charles Keating, Roy Disney, Al Dunlap, Michael Ovitz, Ken Lay, or, by way of implication, Dick Cheney. During his reign of terror, Bill Lerach and the firm Milberg Weiss Bershad Hynes & Lerach, returned more than $45 billion in fraud judgments or settlements to millions of shareholders, small and large."

You weren't just an ordinary trial lawyer. You were the cream of the crop, the person who when you asked, who is fighting corporate crime in America, people might say Ralph Nader, or they might say Bill Lerach.

LERACH: And I would add Mel Weiss. The success of our firm and my own success was in

large part due to his mentorship and training. We had a fantastic nationwide partnership. We built a law firm from a dozen people up to, I don't know, we must have had 350 lawyers at some point.

In a sense, the way the business evolved, was the epitome of the way the private attorney general model was supposed to operate. You are entrepreneurial, you take your risks, and when you win, you get a reward. Clients are passive beneficiaries. And the fees and the behaviors are controlled by the federal and state judiciaries. I don't see what's wrong with that model. But I guess if you were on the receiving end, it didn't look as attractive.

CCR: The corporate counterattack was vicious. They in fact passed a federal law. It was called the Private Securities Litigation Reform Act (PSLRA). And they passed it to slow you down – would you agree that was its purpose?

LERACH: Yes. In fact, it was dubbed – The Get Lerach Act. I remember having dinner with a lobbyist from the accounting industry in Washington, D.C. It was the middle of that fight. I don't recall his name. But he was effective. He looked me right in the eye and said – Bill, you are too prominent and we are going to get you.

CCR: And they did get you. How did you end up being prosecuted and sent to prison?

LERACH: The private securities bar, like many businesses, had a certain number of warts and blemishes. No business is perfect. A practice developed in splitting fees with referring attorneys. And it turned out that the referring attorneys shared that money in many instances with the plaintiffs in the cases. It's an inducement and reward for them to undergo the strain and the service and the attacks they get from the defense bar.

Everybody knew it was going on, but nobody would talk about it for obvious reasons. As sometimes happens, somebody within a web got in trouble for conduct that none of us had anything to do with or knew about.

And he got in big trouble. And when the prosecutors got him in a box, he did what people do. And he told on us. It generated a six year, $35 million criminal investigation from the Department of Justice. And it was a tough go, because we had to prosecute our cases and run our business while we were defending ourselves.

CCR: The PSLRA law was known as The Get Lerach Act. Was it your sense that the criminal prosecution against you and Weiss was part of the corporate campaign to get you?

LERACH: There is simply no question about it. And remember, a prosecution of lawyers, especially lawyers of our status and notoriety, had to be approved by the Attorney General himself. All of our files were seized. Prosecutors literally went through millions and millions of documents.

We simply were not able to survive that degree of scrutiny in that political climate. I'm not resentful about it. I'm okay. It's just simply part of the process.

CCR: What did this PSLRA do? And what impact did it have on the practice?

LERACH: I was there. I spoke with our adversaries. And I know what they were up to. They created a heightened pleading standard so rigorous as to give any district court judge unlimited license to throw the case out on the grounds that it was insufficiently particular or failed to allege a strong enough inference of scienter or knowledge.

It was a terrible rule and took predictability out of the situation because the judge could do whatever they wanted. As part of that, they created the ability for a class certification order to be appealed immediately to delay the case for years and allow hostile appellate courts to get their hands on a trial court ruling in contravention of the final judgment rule. It also limited damages.

And of course, it created a safe harbor, which is a license to lie in forward looking statements. It has completely debased corporate disclosures.

You look at a press release today, the disclaimers are longer than the press release, which some wizard from Harvard Law School thinks up to try and think of every imaginable event. So, it has crippled enforcement.

Yes, the cases still get brought. Yes, the good cases get settled because they are so good that even the law and the judges can't stop them. But you are not getting appropriate recoveries for the victims.

That's what that law did.

It also created the lead plaintiff provision, the largest loser, as we call it. That was meant to take the cases away from us, the private bar, and allow institutional investors to intervene and stop the lawsuits.

That was Stanford Law Professor Joseph Grundfest's little gem and it completely backfired. In 1995, a law review article was published titled – *Let the Money Do the Monitoring.* It raised the

prospect of how institutional investors could control large class action lawsuits so as to get rid of what the corporations viewed as frivolous lawsuits.

The idea was picked up, adopted and advanced by Professor Grundfest, who saw it as a way for institutional investors to come forward and use the lead plaintiff mechanism to seize control of cases that the corporate community viewed as frivolous and have them dismissed.

Grundfest brought together a group of institutional investors at a conference at Stanford Law School to try and rile up the community, to use the PSLRA to take control of these cases which we were bringing against tech companies, and get what they viewed as these horrible, frivolous cases dismissed. We showed up at the conference and made our case in and one such case – we laid out the facts. And we effectively won over the institutional investors based on our arguments.

So in short, they wanted to use the lead plaintiff provision to destroy the ability of the traditional plaintiffs' bar to bring these cases, and that completely failed. In fact, over time it has led to a greatly increased litigation presence and activity by institutional investors that in many instances has led to larger recoveries.

I used to say – you know, they told everybody we had horns and a tail. But when these institutional investors actually met us and looked at what was being done to them, they were furious. And today, who are the plaintiffs in the cases? The institutional investors who were supposed to come in and stop these cases. It is the ultimate example of the law of unintended consequences. And it's probably why private securities litigation survives today.

CCR: When you were practicing, did you have a sense that the law was actually working in controlling and deterring corporate wrongdoing?

LERACH: One simple way would be to compare the amount of corporate and accounting wrongdoing today to the way it was twenty-five years ago. I don't think it's materially less.

But I never bought the idea that private litigation was an effective deterrent. It was more of a punishment, an exposure and a penalty. The system is set up to defeat deterrence. The corporations indemnify the corporations. The wrongdoers use corporate money to buy huge insurance policies. You can't get their insider trading proceeds.

So, yes, there's a big lawsuit. It's inconvenient. And they bellyache about it. But at the end of the day, it doesn't cost them any money. And you certainly can't say the accounting industry has been deterred by what happened to them – even the destruction of Arthur Andersen. The media today is filled with articles about how horrible corporate accounting is all over the world, despite what we went through.

I'm in favor of private enforcement. It's good for the lawyers who bring the cases. It gets some money back to the victims. And it calls wrongdoers to account. But I don't think you can deter corporate wrongdoing. The incentives are too strong. All you can do is try to tap it back.

CCR: How does the class action bar today compare to back when you were practicing?

LERACH: It's more of an oligopoly. More concentrated. Fewer firms. The lawyers who do it are smart and experienced. But remember – they are operating in an incredibly hostile environment.

CCR: The defense lawyers are better equipped, better paid and there are more of them?

LERACH: They have it great except that they have to live with themselves for what they do for a living.

CCR: Let's talk about mass tort law. It seems as if very few cases go to trial. It's a settlement practice where plaintiffs' lawyers and defense lawyers are, if not on the same page, working together to get to settlement.

LERACH: I'm obviously devoted to plaintiff actions and helping victims. But I must say that the industrial strength mass tort litigation leaves me a bit unsatisfied. I know the lawyers work very hard and the defendants have a lot of money and power. But these cases become formulaic. Big problem, big disaster nationwide, and somehow a devoted group of lawyers assemble those cases, they hire the contract lawyers, they gin up the hours, they run the machine, and at the end of the day inevitably there has to be a settlement.

People watch television. And what do they see? Ads from trial lawyers for lead paint, Camp LeJeune, asbestos. And it reinforces a negative image of plaintiffs' lawyers. I just wonder who benefits from those cases. Defendants get worldwide permanent relief on day one. The lawyers get paid for all of that time. I'm not sure that is all that effective.

CCR: Let's look at the Boeing case where 347 people died in two plane crashes. Even in an egregious case like that, all of the Boeing cases have

been settled. Not one of the Boeing cases has gone to trial – and the two-thirds of them have been settled already. You would think that a trial would deter future corporate crime – there would be depositions of the CEOs, there would be public attention to the trial. Instead, the imperative is to settle, settle, settle.

Doesn't that undermine justice?

LERACH: It would depend on the amount of settlement. What happens there is that it is a highly specialized aviation bar. They know all of the defense lawyers. It's what you were alluding to. It's not collusive and it's not wrong. But there is a protocol almost. The event has occurred. The plaintiffs lawyers assemble the case. And ultimately, you know there is going to be several billions of dollars changing hands. And it's going to change hands because no one is ever going to get to depose the CEO of Boeing or show those horrible documents. They won't permit it.

You want to talk about something that's wrong in litigation? It's secrecy – secrecy of pre-trial documents. It's outrageous. It's terrible. And the plaintiffs' lawyers are to blame for that too. When I was practicing, we would fight that. We fought it in Enron. And the judge ruled in our favor. There is no reason for this kind of evidence to be kept secret. That undermines the real worth of litigation. The real worth of litigation is exposure. And it undermines deterrence.

CCR: What is stopping a judge from lifting these gag orders or secrecy orders on pre-trial documents?

LERACH: It's discretionary. Most judges want lawyers to be compliant and agreeable and not create big fights in front of them. Most judges figure – okay, it's a big litigation. The plaintiffs are going to win someday. They'll get paid. We don't need to have a big controversy here about these documents. The defendants are insisting that they be sealed. In many cases, there is almost a presumption in favor of secrecy. I just really hope the plaintiffs' lawyers will fight harder on that. The law is mixed. It's not as good as you would want it to be.

CCR: The plaintiffs lawyers are reluctant to anger a judge. If a judge wants to accelerate the case toward settlement, and the plaintiff lawyer says – I want to make this information public and go to trial – that's going to anger the judge.

Why are judges biased toward settlement and not toward transparency and openness?

LERACH: Because transparency and openness require hard work – running trials, allowing for contested arguments by skillful lawyers. Your life as a judge is just easier if you go along.

And look, there are a lot of wonderful judges. Please don't misconstrue my remarks. But judges are human beings.

And where do federal judges mostly come from? They are former assistant U.S. Attorneys who are politically benign. And as prosecutors, they can get confirmed. Where else do they come from? Out of big law firms, where people have been seasoned as partners. They may not be the best partners. And they may not want to work six or seven days a week as people do in big firms. And they get placed onto the federal bench.

When that becomes the core of the federal judiciary, that's not necessarily a favorable situation for plaintiff lawyers.

CCR: Then let's look at the plaintiffs' bar. Clearly, in the vast majority of these cases, the plaintiffs' lawyers are also biased toward settlement for the same reason. They don't want to go to trial because their payday is secured with these settlements. To prepare for trial and offend the judge and move the judge off the ball –

LERACH: You have put your finger on the essential economic dynamic that drives this litigation. And it's not necessarily bad. You can't try every case. If you did, the judiciary would collapse. There has to be settlements. There has to be processing.

When we were active, we had 300 to 400 cases. Some of those cases are going to simply be – process, settle, pay the bills. The skill for you as a manager is – can you identify within that universe the eight, nine, ten, twelve, fifteen cases that have the right mix of merit, judge, venue where you invest your effort, your time and risk to try and do good for that case, but also to benefit the practice and the overall litigation? You simply can't prosecute every single case without restraint.

CCR: The corporate criminal practice is moving toward a settlement practice also. When we started this publication 38 years ago, federal prosecutors would investigate a case, and if there was sufficient evidence, bring it to a plea agreement or to trial. If they didn't have sufficient evidence, they wouldn't bring the case. Now, almost all major cases are settled with deferred and non prosecution agreements.

It's a question of power. I can tell the size of

the defendant based on the settlement. If it's a plea agreement and the defendant is not being represented by a major law firm, then it's a smaller company.

If it's a deferred or non prosecution agreement with a major corporate law firm, it's a major United States company or a major foreign multinational.

LERACH: The Democratic administration – because politically they are dependent on corporate money, Wall Street money, the accounting firm money, corporate community money – they have become soft on prosecuting big corporate cases.

On the other hand, these cases are hard to prosecute. These corporate executives are smart. They are surrounded by lawyers and experts. They get opinions. They insulate themselves. To us, we might say – the conduct there is so bad they ought to be prosecuted. But when you get into it, proving criminal intent can be difficult.

So what are the results? A system whereby deferred prosecution agreements and big fines paid with corporate shareholder money, not the individual wrongdoers money, create headlines, create statistics for the prosecutors and a perfectly acceptable world for the corporate criminals where they can just go on with their conduct paying for it with the shareholders' money. Now that's not a good system.

CCR: It's been doom and gloom up until this point. Give us a ray of hope.

LERACH: I got into trouble many years ago when I said plaintiffs' lawyers are sort of like snakes – you cut them in half and they continue to wiggle. Despite 30 years of unremitting hostility – from the judiciary and the Congress – plaintiffs' securities litigation at least continues to go on. It's a tribute to two things – the persistence of corporate wrongdoing and the persistence of a relatively small group of lawyers who have the skill to bring these complicated cases against very powerful and skillful defense law firms.

I'm hopeful that the litigation will continue. I think the plaintiffs bar turned the lead plaintiff thing back on the corporate community. Securities litigation will survive. The darn problem is that – oh my, there's an $80 million settlement that will produce a $20 million fee. That's there. But what were the damages? What really was recoverable?

Part of the problem is because stock prices have become so grotesquely inflated – Dow 38,000 – that almost any case will develop a huge damage model. The damages are a function of volume and price decline. And both volume and extended declines are higher. These cases bring with them a big damage component. So you have an $80 million settlement. But what if it was $800 million? That's hard to penetrate.

CCR: If Congress were to act to control corporate wrongdoing in this field, what would you propose that they do?

LERACH: I would re-establish aiding and abetting liability for professionals. I'd get rid of the strong inference subjective test in the PSLRA. I would get rid of the ability to appeal interlocutory and class certification orders.

I would get rid of the Morrison decision so that the poor class action cases don't lose half their damages when they are filed because many investors are foreign or are buying on foreign exchanges. You do those things, you will see bigger recoveries, more lawsuits and more justice.

CCR: Those are technical fixes in your field of expertise. But overall, the trial bar is wealthy. It's educated. It's organized. And yet, it continues to lose the public relations battle in the United States?

LERACH: Because they see trial lawyers who just scored some big victory in a tobacco case hitting golf balls into the ocean on television. The plaintiffs lawyers can be their own worst enemies in their behavior.

Mel and I decided we were going to be legitimate in the way we litigated these cases and we were going to fight for what we believed in as a public policy matter. Of course, we paid an enormous price for that. Many of the trial lawyers, including many who are very close friends of mine whom I admire deeply, are quiet and work under the radar and try to protect themselves and survive. And you cannot blame them.

If they speak out, the machine will be turned against them and they will get squashed. And the companies will go out and get more tort reform legislation. They are in survival mode.

CCR: In attacking you, in naming PSLRA the Get Lerach Act – were the corporations sending a message to the bar generally – don't mess with us?

LERACH: I wasn't the only one. There were some lawyers down in Texas who had been particularly aggressive in asbestos litigation and in political contributions ended up getting prosecuted. They went after some people.

Of course it sends a message.

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