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From Academia to the Private Sector: A Discussion With Professor Elliott Weiss

An interview by Bruce Carton
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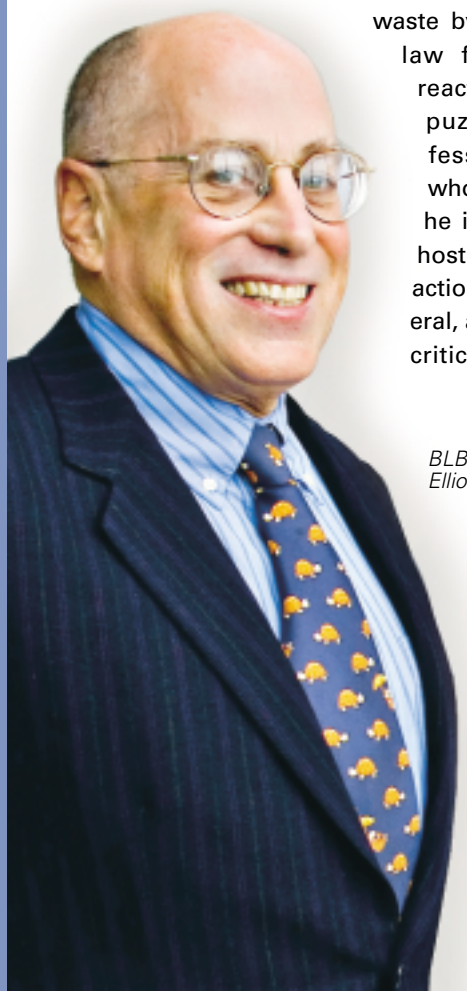
In late December, leading plaintiffs' securities class action law firm Bernstein Litowitz Berger & Grossmann LLP announced that Elliott Weiss, a prominent professor and securities law expert, had left academia to join BLB&G. This announcement intrigued and somewhat puzzled many lawyers and others in the industry, who viewed Professor Weiss as a harsh, long-time critic of class action abuse and waste by plaintiffs' law firms. This reaction in turn puzzled Professor Weiss, who states that he is not at all hostile to class actions in general, and that his criticisms have been "directed at suits that have no merit and lawyers who exploit the process, neither of which advance investors' interests."



BLB&G's Elliott Weiss

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I interviewed Professor Weiss about his move from academia to private practice, as well as several other subjects.

Carton: Your 1995 article, "Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions" {104 Yale L.J. 2053 (1995)}, proposed reforms for the organization of securities class actions, and was the basis of the lead plaintiff provisions of the Private Securities Litigation Reform Act (PSLRA) of 1995. You have been a long-time critic of class action abuse and certain practices of the plaintiffs' bar. What led you to join a plaintiffs' law firm and, specifically, BLB&G?

Weiss: After I retired from the faculty of the Rogers College of Law at the University of Arizona, I decided that I would like to remain active professionally. I also was interested in developing an ongoing relationship with a law firm. I had had several good experiences working with BLB&G in the past, including, most recently, working on the brief on defendants' Rule 23(f) appeal to the Fifth Circuit of the class certification decision in the EDS litigation. The BLB&G lawyers impressed me

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with their professionalism and their commitment to effectively representing their clients. I also was impressed by the results they had achieved in cases such as *Baptist Foundation, Cendant and WorldCom,* among others. We began discussing a possible relationship and things worked out.

Carton: Have the PSLRA's lead plaintiff provisions worked the way you envisioned?

Weiss: Not exactly. When we wrote our article, the Internet was in its infancy. We anticipated that most communications between law firms and investors would be face-to-face. The explosive growth of the Internet created a very different dynamic. However, especially in big cases where major institutional investors have served as lead plaintiffs, they have worked pretty much as we hoped they would. Recoveries are in a whole different league than was the case before the PSLRA was adopted and are much more reflective of the merits of the claims being litigated. Attorneys' fees are a much lower percentage of recoveries and reflect real bargaining between institutions and their lawyers. And, in at least a few cases, institutional investors have pushed for and obtained recoveries payable out of the pockets of corporate officers and directors, which has a potential major deterrent effect, but was not anything plaintiffs' lawyers were inclined to seek before institutional investors entered the picture.

Carton: What role will you serve with BLB&G? Do you expect to actively litigate cases? To serve as an expert behind the scenes? Something else?

Weiss: My role at BLB&G is still evolving. The relationship is very much a part-time one. I expect to be — and already have been — involved in cases that the firm is actively litigating, but I do not anticipate assuming a lead counsel role. My guess is that I'll be more like an in-house consultant.

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Carton: In May 2000, you filed a declaration in the *Cendant* case opposing the BLB&G fee request to the extent it short-cut the "Lead Plaintiff's rightful participation in the process of formulating a request for attorneys' fees." What were the circumstances that led you to do so, and what are the lessons that can be taken from the *Cendant* case with respect to attorneys' fees?

Weiss: In *Cendant,* I filed a declaration as an expert retained by the New York City Pension Funds, which were one of three lead plaintiffs. The thrust of my declaration was that the district court should have deferred to the fee arrangement negotiated by lead plaintiffs, rather than taking over the fee-setting process. The fee agreement required lead counsel to obtain the approval of lead plaintiffs before submitting their fee request. I argued that the district court should require them to seek that approval before passing on counsel's fee request. That's almost exactly how the Third Circuit eventually ordered the district court to proceed. The lessons from that case seem self-evident.

Carton: What changes, reforms, or other shifts do you foresee in the securities class action process in the next five years? Ten years?

Weiss: I'm not sure my crystal ball is any better than that of anyone else. My impression is that courts have gotten more comfortable and more sophisticated when dealing with the lead plaintiff appointment process. For example, they're no longer appointing large "groups" of unrelated investors to serve as lead plaintiffs, which was a process that pretty much left control of the case in the hands of the lawyers who assembled those groups. I think we will see a steady evolution in that area. I also think courts will get better at using the pleading provisions of the PSLRA to winnow out those complaints that should be dismissed and to sustain those that address real instances of fraud.

Carton: What are you most excited about with respect to your new position in private practice?

Weiss: The opportunity to work with a group of smart, committed lawyers and the opportunity to seek meaningful remedies for investors who have been injured by fraud. I have always believed that the plaintiffs' bar can, and often does, play a very important, constructive role in our capital markets. In fact, in our article proposing the lead plaintiff process, we pointed out the flaws in work by Janet Cooper Alexander and others who suggested that the merits never matter in securities class action litigation. My goal as an academic was always to suggest ways to improve the manner in which the plaintiffs' bar can protect investors' interests. I'm excited to have the opportunity to become a more direct part of that process. ■

The preceding interview appeared in the February 2006 SCAS Alert.