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A CONVERSATION WITH NLJ LIFETIME ACHIEVEMENT AWARD WINNER MAX BERGER

Ever since he was a kid, lawyer Max Berger has kept close to him a quote from British philosopher Edmund Burke, one that's still on display in his home office. It reads, "The only thing necessary for the triumph of evil is for good men to do nothing."

Berger knew quickly after entering Columbia Law School that he wanted to defend victims of wrongdoing who couldn't advocate for themselves. He has since spent decades working to secure settlements for defrauded investors, negotiating nine that were in excess of \$1 billion.

"I just felt from the outset that I didn't want to use my legal education and my training to work defending large corporations and large entities. I basically needed to feel good about the work that I was doing,"



Max Berger, with Bernstein Litowitz Berger & Grossmann, stands next to his photography. Berger has held two photography shows in New York with proceeds going toward charities.

said Berger, a founding partner of the securities class action law firm Bernstein Litowitz Berger & Grossmann.

Berger is a recipient of this year's Lifetime Achievement Award from the National Law Journal.

The following interview has been edited for length and clarity.

Can you tell us more about what led you to representing plaintiffs in securities cases?

There was only one law firm that interviewed at Columbia that had just started a department prosecuting plaintiff securities cases, and that was Kreindler & Kreindler, with Paul Bernstein as a partner. I was pretty desperate to get that job, even though it paid a lot less than the big firms that I had offers from. I managed to be able to get that job, and pretty much have had one job since I graduated Columbia in 1971.

From the day I started working, I loved the work that I was doing. I felt like I was on the right side. I was defending victims of wrongdoing, who couldn't advocate for themselves. Then six years later, I became a partner at Kreindler & Kreindler. And six years after that, in 1983, the four of us—Paul Bernstein, Ron Litowitz, Edward Grossmann and I—left and formed our own firm. I think they would readily acknowledge the fact that it was my idea, and not because we were unhappy with Kreindler & Kreindler. It was a very fine firm, but our work was so different from the work that the rest of the firm was doing that I felt it was time for us to branch out. I was a very young lawyer with no means to speak of, and it was a terrifying experience, but we did it. I feel very fortunate that even now, 54 years later, I'm still doing what I love to do.

What differences have you seen in how these securities fraud cases are resolved over your years practicing law?

Until the Private Securities Litigation Reform Act was passed in 1995, it was like the Wild West in terms of bringing securities class action cases. Someone could own one share of stock and be running a securities class action case. It was a free-for-all in terms of a race to the courthouse, and the quality of lawyering wasn't that good because it was easy to bring one of those cases without too much effort.

We never prosecuted our cases that way. We always represented institutions, not just individual shareholders, and we took our time. So the competition was fierce, and it was difficult for us to get leadership positions in cases because by the time we filed them, the cases were already organized. But the Private Securities Litigation Reform Act encouraged and provided a vehicle through which large institutional investors can take a leadership role in those cases, because it was presumed that the investor with the largest loss would

be able to run the case provided that investor was willing to be the lead counsel.

We were probably the only plaintiffs securities firm that welcomed that provision. After that law was passed, we represented some of the largest public pension funds in America. We prosecuted the *Cendant Securities Litigation* [brought in 1998], which was a monumental recovery [of \$3.3 billion]. I think that made these large institutions more comfortable in prosecuting these cases. That began the era when these cases are managed by mostly large institutional investors that have a major stake in the case, and are no longer lawyer driven.

You've handled a number of cases where the settlement didn't just mean money changing hands, and rather, resulted in monitors being put in place. One that comes to mind is the high-profile Texaco discrimination settlement. Can you tell us more about that case and its significance?

That case is one of my proudest accomplishments and interestingly, it's not a securities case. It was a Civil Rights Act class action where we represented African American white collar employees at Texaco, which was then the 13th largest industrial company in the world. That was extraordinarily hard fought. One of the C-suite executives was, fortunately for us, secretly taping meetings of the senior executives of Texaco who used very disparaging remarks to talk about minority employees at the company, as well as doing improper things with destroying documents that were supposed to be produced in our litigation. Those tapes were provided to us. They were then published in the New York Times, and Texaco imploded.

The CEO resigned, and that led us to not only the largest recovery monetarily for employees in a civil rights class action, but also the establishment of what we call the Equality and Tolerance Task Force, which had a minimum five-year life. That task force was run by Deval Patrick, who was head of the civil rights division of the Justice Department prior to his appointment and later Massachusetts governor. Texaco got to appoint half of the task force, and we got to appoint the other half. That task force formed a template for public companies going forward in terms of good practices in connection with diversity, promotion and equality of treatment. It was a seminal case and provided a guidepost for large companies to follow, and

we actually employed a similar task force by a different name in our sexual harassment derivative case against 21st Century Fox involving their well-known sexual harassment claims by employees against the senior executives of the company. I'm particularly proud of both of those cases.

Speaking of the 21st Century Fox case, something stood out to me from the description of the case on your firm's website. It says that the plaintiffs explored the possibility of initially not filing claims against the board publicly "while investigating the facts and exploring whether Fox was serious about making changes to how it policed workplace misconduct. This allowed for a constructive dialog with the companies, inside and outside counsel." Could you kind of explain that mindset at the start of the case a bit more.

This was a derivative case brought on behalf of the current shareholders against the officers and directors, or some subset of the officers and directors. So it's different than a class action... and the threshold that you have to meet in order to be able to prosecute a case like that is very high.

We had a relationship with the principal law firm representing 21st Century Fox on the other side.... I said, you know, this could be a win-win situation for everyone, for shareholders [and] for what's right. What happened at this company was awful. The board, in our view, was complicit, at the very least, in allowing this kind of untoward behavior to continue unabated at the company.... They ought to recognize that they ought to be at the forefront of trying to right this wrong and also help insulate the company from future litigation. I made it very clear to them that this was good business for them to do because they could not only be a representative for good corporate governance, but also be able to focus on their core business instead of being distracted by this kind of litigation.

Ultimately, I said, "Because you paid out so much to settle these sexual harassment cases, you're going to have to pay significant amount of dollars to the company—because it was a derivative case—to reimburse the company for the amounts that were paid. In addition, similar to *Texaco*, you should agree to put in place a commission that had transparency

and oversight over the kind of conduct that got you in trouble in the first place."

Before the cases got very far along, the company bought what we were saying. It made the decision to try to negotiate this settlement, and I think it proved to be a win-win for both. I haven't heard much about anything since the #MeToo movement and the publicity that Fox got for the sexual harassment charges brought by former employees of the company way back when. And I think that's as a result of our lawsuit.

What are you watching for going forward in the area of securities law?

Greed and fraud are growth industries. They've been around since the beginning of time, or certainly modern time. It's not going to change. It's just going to take different forms. So it could be crypto, it could be stocks, there's lots of different areas where those in a position of corporate power who ... don't have the moral compass they should have, basically try to take advantage of unsuspecting investors.

The thing that I'm most worried about right now is that our current administration, the president and his appointees, seem to want to gut the safeguards that exist to preserve the private rights of action by those kinds of victims, whether they are consumers or investors or small businesses or whoever. That worries me.

We talked about your career in law spanning decades. What do you like to do in your free time, outside of work?

Photography is a hobby of mine. I've had two very successful photography shows of my work in New York over the years. The shows sold hundreds of works, and all the proceeds went to two charities that were important to me. One was City Year New York, which is a part of AmeriCorps where 17 to 25 year olds dedicate themselves to at least a year of full-time public service working in the public school system for underprivileged kids. And the other charity was Her Justice, which provides free legal services to at-risk women. Through the sale of my photographs, we raised hundreds of thousands of dollars. Talk about win-win situations: I was very gratified to see that there was recognition of my work as an artist [and] at the same time, providing these significant contributions to these two organizations.