

Walk-Off Home Run

Roseland lawyer strikes a winning deal for securities claimants in the WorldCom Chapter 11 litigation

By Lisa Brennan

In the three years since his appointment as bankruptcy liaison counsel for securities claimants against WorldCom, Mickey Etkin has been swinging for the fences.

Not the easiest of feats, even for a lawyer born in the shadow of Yankee Stadium in the Bronx, considering the size and complexity of the WorldCom Chapter 11 settlement and the fact that, in bankruptcy litigation, securities claimants are at the bottom of the food chain.

So it was no small victory for Etkin when, last Tuesday, a judge conditionally approved a settlement by which former WorldCom CEO Bernard Ebbers will turn over nearly all of his assets (valued at more than \$40 million) to a liquidating trust fund. The money will principally benefit the 800,000 shareholders and bondholders who lost billions of dollars when the telecom giant collapsed in 2002.

The trust will allocate 75 percent of the cash proceeds to the class and 25 percent to WorldCom (now MCI), which seeks to collect on a \$408 million personal loan Ebbers failed to repay. In exchange, the lead plaintiff — New York State Comptroller Alan Hevesi, who oversees that state's Common Retirement Fund — has agreed to withdraw its bankruptcy claims.

As solid a result as it was, Etkin, of Roseland's Lowenstein Sandler,

hastened to point out that it is but a piece of a total recovery, including settlements in a securities class-action suit, that is expected to surpass \$7 billion.

"The settlement today is solely the settlement between the class, Bernie Ebbers and WorldCom," said Etkin Tuesday afternoon after leaving bankruptcy court in Manhattan.

After three years of litigation and four weeks of trial, the class has recovered more than \$6 billion in settlements from a multitude of defendants not in bankruptcy, including individual former directors and officers of WorldCom, accountant Arthur Anderson and investment banks, such as Citigroup and J.P. Morgan Chase, which the class claimed helped WorldCom sell bonds in 2000 and 2001 when they should have known its books were cooked.

Including the \$750 million payment WorldCom made last year to end a separate suit by the Securities and Exchange Commission, the settlement pool should contain at least \$7 billion for shareholders and debtholders.

A final fairness hearing on the Ebbers settlement and all nonbankruptcy-related WorldCom settlements is scheduled for Sept. 9 before U.S. District Judge Denise Cote in Manhattan, who has been presiding over the securities class action.

U.S. Bankruptcy Judge Arthur Gonzalez will not enter a final order



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until he hears from all the plaintiff pension funds with pending issues, including plaintiffs in Kentucky, Iowa and Illinois.

Byproduct of Criminal Case

The Chapter 11 settlement was suddenly on the table last month when Ebbers, 63, convicted in March of helping to mastermind an \$11 billion accounting fraud at WorldCom, was sent to prison for 25 years — a virtual life sentence.

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The U.S. attorney's office in Manhattan "facilitated ... intense, arms-length" settlement discussions, according to the proposed settlement order filed by debtor's counsel Adam Stochak of Weil Gotshal & Manges in Washington, D.C., and his partner, Alfredo Perez.

Stochak says the settlement resolved a dispute between debtor MCI and the class over whether claims arising from purchases of securities should be subordinated to those of other creditors. "Our view was no class members should get compensated," he says.

Etkin says that dealing with the subordination issues in the context of WorldCom's complex capital structure was one of his biggest challenges.

Although there was no getting around the statutory relegation of claims connected with buying and selling stock to the bottom of the ladder, Etkin focused on one group of debtors — holders of MCI senior notes with fraud claims — and argued that the statutory language on debt securities and bonds allows for recovery despite subordination.

Although Etkin's argument did not lead to new case law, it injected enough uncertainty into the process that MCI embraced the idea of the Ebbers settlement as a way to resolve the legal impasse. "The withdrawal of the N.Y. Fund Claims resolves proofs of claim in an aggregate amount that exceeds \$77 billion, and avoids all litigation risk to MCI on the subordination issue," Perez and Stochak stated in their filing.

The co-lead counsel for the plaintiff class, Jeffrey Golan of Philadelphia's Barrack, Rodos & Bacine, says there were other factors at work as well. "It's fair to say that through the discussions we had with MCI, the U.S. attorney's office, the SEC, and state Attorney General Eliot Spitzer, everybody saw a benefit to

settlement with Ebbers, and sharing his assets between the class and MCI."

Adds Stochak: "There are often extenuating factors in these cases. At the confirmation there was a fear that it could go on for years and the patient, so to speak, could die on the operating table. Mickey, to his credit, realized that a big part of this is conciliation; that this is something you can settle."

Etkin, who was brought into the case by co-lead counsel Bernstein Litowitz Berger & Grossman of New York, says the three-year road toward last week's settlement was littered with numerous other obstacles. Among them, he faced opposition from the debtor and nonbankruptcy defendants in his attempt to modify the automatic stay to get access to documents. He had to battle for preservation of the directors' and officers' liability insurance in the face of challenges by the insurance carriers. And he had to win bankruptcy court approval of the SEC settlement to ensure the recovery would go to the benefit of defrauded investors.

"It created a very complex set of circumstances," Etkin says. "It required a significant level of cooperation between WorldCom and lead counsel in terms of access to documents and information."

Once the court approves the settlements, as expected, the lawyers for the class, including Etkin, stand to collect about 5.5 percent of the total recovery, a fraction of the 25 percent that is the norm in securities class-action settlements but, at \$385 million, still enormous.

Niche Practice

Etkin began representing defrauded investors in bankruptcies in 1990, beginning with the Drexel Burnham Chapter 11, which he says

"was in large measure, litigation-driven and significantly securities-litigation-driven."

He currently represents shareholder and investor interests in the Reliance Acceptance Group, FPA Medical Management, PHP Healthcare, Bennett Funding, Sun Healthcare and K-Mart Chapter 11 proceedings, to name a few.

"WorldCom happens to be in New York, but I'm involved with bankruptcy cases all over the country with plaintiff's firms all over the country. It's a unique niche," he says.

Etkin says he often has 20 or more cases pending at one time in places like San Francisco; San Diego; Orange County, Calif.; Reno; Sioux Falls; Richmond; Chicago; Boston; Phoenix and Pittsburgh. Most of his work, though, is in the New York-to-Wilmington corridor. Ira Levee of Lowenstein works closely with Etkin.

And Etkin is currently working with Todd Collins of Philadelphia's Berger & Montague, which is representing defrauded investors in a Chapter 11 proceeding in Delaware involving American Business Financial Services. Collins says he brings Etkin into his cases because he's knowledgeable about bankruptcy and securities class actions. "Mickey is savvy, trustworthy, the best in the business," says Collins. "We're both trying to help people who've lost money because of fraud and misrepresentation."

Etkin says his biggest recurring obstacles in such cases are attempts by the bankrupt corporation to shut down the securities litigation against the company and its officers and directors, even though the officers and directors are not in bankruptcy. Another problem involves issues relating to the directors' and officers' liability insurance and to what extent the bankrupt company or others want to exercise control over that insurance.

Etkin joined Lowenstein in 2000, one of a group of defectors from Roseland's now-defunct Ravin Sarasohn Cook Baumgarten Fisch & Rosen. ■