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MATT COLLINS

Despots, Deposits, & Directors

Fulbright & Jaworski's chairman serves on the Riggs Bank board. So why didn't he stop the transfer of millions in frozen assets to former Chilean dictator Augusto Pinochet?

By Paul Braverman

IN JANUARY 2003, STEVEN Pfeiffer was elected chairman of Fulbright & Jaworski. Pfeiffer, a partner in the firm's Washington, D.C., office, became the first person outside Houston to hold the position. The firm's press release also noted his position on the board of Riggs National Corporation, the parent company of Riggs Bank.

A few blocks down Pennsylvania Avenue from Pfeiffer's office, U.S. Senate investigators were already looking hard at Riggs because of reports that money deposited in the bank had been used by the 9/11 terrorists. The probe would soon include charges that the bank had evaded an international freeze when it sent millions to client Augusto Pinochet, the former Chilean dictator.

Last summer, the Senate issued a report on the Riggs/Pinochet connection, which noted the role Pfeiffer played in the payments. One eager reader was Baltasar Garzon, Spain's crusading magistrate-judge, who has pursued Pinochet for years. In September, Garzon issued a criminal complaint against Pfeiffer and others for money laundering. Garzon asked the U.S. Department of Justice to freeze Pfeiffer's assets until he posts a bond and answers questions about the payments. (By mid-October Justice had not responded to the request.) In addition, the U.S. attorney's office in Washington, D.C., has opened a criminal inquiry into the Riggs matter, and Pfeiffer has been named in a shareholder derivative suit.

The relationship between Pinochet and the soon-to-be-defunct Riggs dates to the 1970s, when Riggs made "vast sums" by financing Pinochet's arms deals, says Peter Kornbluh, author of *The Pinochet File*. The Senate report, by its subcommittee on investigations, details how Riggs's leadership "accepted millions of dollars in deposits from him with no serious inquiry into the source of his wealth . . . set up offshore shell corporations . . . altered the names of his personal account to disguise his ownership . . . [and] concealed the existence of the Pinochet accounts" from federal regulators. The report lays out a chronology:

- In 1998 Garzon indicted Pinochet for genocide and torture, and froze his bank accounts throughout the world. At the time, Pinochet had as much as $8 million on deposit at Riggs.
- In May 2001, acting on that order, a Bermuda bank froze its Pinochet accounts. That same day, Riggs withdrew $500,000 of Pinochet's money, and sent him ten cashier's checks for $50,000 each by overnight delivery.
- A few days later a Riggs executive asked Pfeiffer, an international finance specialist, to look into the bank's obligations regarding the Pinochet accounts. Andres Rigo, a senior adviser with Fulbright, wrote a memo that discussed Pinochet's legal troubles throughout the world.
- Pfeiffer forwarded Rigo's memo to the bank's general counsel with a letter describing it as an overview of "attempts to freeze and/or seize General Pinochet's assets," as well as efforts by Garzon to locate Pinochet's assets in the U.S. Pfeiffer told Senate investigators that he didn't tell the other directors, and didn't raise any concerns with bank officials because he assumed that due diligence had been performed when the accounts were opened. But the bank had already been cited by the OCC because high risk accounts "were not being appropriately identified, documented, and monitored."
- Several months later, Riggs again sent Pinochet ten cashier's checks for $50,000 each, and again in April 2002.
- In March 2002 the Office of the Comptroller of the Currency (OCC), the Treasury Department agency charged with enforcing money laundering and bank secrecy laws, learned about the Pinochet accounts. It began to investigate and pressured Riggs to close the accounts. In June the bank again queried Pfeiffer: If we close the accounts, can we send the money to Pinochet, or does it have to be turned over to a court?

Pfeiffer's answer is unknown. He refused to answer questions from Senate investigators, and he declined to speak to *The American Lawyer*, both times citing attorney-client privilege. But a month later, according to the Senate report, Riggs closed Pinochet's accounts and sent him the balance—more than $5 million. "If he knew that the bank had violated an international asset freeze, he had, at the very least, an obligation to both resign from the board and withdraw from the legal representation," says Deborah Rhode, professor of legal ethics at Stanford Law School. Pfeiffer is still on the Riggs board, and the bank still uses Fulbright for IP work.

That dilemma is only one facet of the ethical quagmire in which Pfeiffer is now mired, much of it caused by the ambiguous position he occupies—as both a lawyer for Riggs and as a member of its board. (He now heads the corporate governance committee and chairs Riggs Bank Europe Limited.) In an e-mail declining an interview with *The American Lawyer*, Pfeiffer wrote that lawyers "regularly" hold both positions. But while once common, the practice has become much less so. Today most firms either ban or strongly discourage the practice.

Consider the potential conflicts that confronted Pfeiffer. Riggs had spent years accommodating Pinochet, and refusing to return his money after it closed his accounts would harm the relationship. "If I'm on the board of directors, it's harder to give objective advice," says Susan Koniak, professor of legal ethics at Boston University School of Law. "I've got another interest to worry about, namely my own."

If Pfeiffer put the bank's interests aside and decided the assets were frozen, was he obliged to ensure the bank complied with the freeze? "As a lawyer, no. As a director, maybe," says Charles Elson, professor of corporate governance at the University of Delaware. "A director is a monitor of management and has a fiduciary duty to follow up on things that could have a material effect on the company."

To Coin a Phase

JUDICIAL HELLHOLES—THE PHRASE USED BY THE American Tort Reform Association (ATRA) to identify pro-plaintiffs jurisdictions—naturally graces the cover of the pro-defense group's annual reports. But now the association has slapped the slogan on coffee mugs and highlighters. Those looking to jump on the bandwagon, however, should think twice. As of May, the association had trademarked the phrase.

Victor Schwartz (a.k.a. "Schwartz on Torts"), a partner in the Washington, D.C., office of Kansas City, Missouri's Shook, Hardy & Bacon, is the association's general counsel. He says the group won't be running around with a buggy whip suing everybody who uses the term. But he does want to protect it from misuse by potential competitors. He's also considering an expansion of the organization's trademarked phrases.

Next up, he says, could be "litigation tourist."

—Elizabeth Amon

Monday Morning Piggyback

Hausfeld and Chesley chase Microsoft fees. Hard.

PLAINTIFFS LAWYERS ARE not known for being shy. But Michael Hausfeld's efforts to extract hefty fees from the Microsoft Corporation antitrust litigation have reached new heights of audacity. In 1999 Hausfeld was appointed colead counsel, along with Stanley Chesley, for a potentially massive federal class action that attempted to sue Microsoft on behalf of consumers who used the company's software. Damages could have reached $7 billion.

But the case foundered when Baltimore federal district judge J. Frederick Motz limited the class to the relatively small group who had bought software directly from Microsoft. (Most buy a computer with software already loaded by the manufacturer.) In September 2003 the parties settled the claims for a mere $10.5 million. Microsoft agreed to pay Hausfeld, Chesley, and their 50–law firm plaintiffs team nearly as much—$10.1 million in fees.

For Hausfeld this wasn't enough. The name partner in Washington, D.C.'s Cohen, Milstein, Hausfeld & Toll has gone around the country and attempted to intervene in other state court actions against Microsoft to get fees—even though his team wasn't counsel of record in these cases. The lawyers in the state cases have had much more success bringing claims for consumers. This is largely because, unlike federal law, these states' laws allow claims by "indirect" purchasers. A Florida suit, for example, reached a settlement valued at $200 million. There, Hausfeld sought fees and expenses upwards of $30 million.

Hausfeld admits his intervention is unprecedented but says his team should share in the wealth because others benefited from discovery in the federal case. "These settlements could not have been achieved but for the ef-

JOHN NEITZEL

Elson adds that the potential for compromise cuts both ways. Fulfilling the director's role of vigorously challenging management could cost the lawyer his client.

As a bank, Riggs had a duty to make a complete disclosure to regulators, says Charles Intriago, publisher of moneylaundering.com. But the Senate report concluded that, "Riggs appeared to take affirmative steps to hide the relationship," a relationship Pfeiffer knew about since at least 2001.

As for Pfeiffer, if the OCC decides he violated money laundering rules, it could start proceedings to ban him from the banking industry. Federal criminal charges are a possibility if the violation was "knowing or through willful blindness," says Intriago. Pfeiffer is represented by Howard Shapiro and Russell Bruemmer of Wilmer Cutler Pickering Hale and Dorr, in the various investigations, and by Sullivan & Cromwell in the civil suit. Sullivan & Cromwell didn't return phone calls seeking comment, and Wilmer declined to do so.

The director-lawyer conflict is reflected in the American Bar Associations Model Rules of Professional Conflict, which say that a lawyer must resign from a board if there's a "material risk" to his independence. The ABA has even weighed banning the practice.

Malpractice insurers particularly don't like lawyers serving on client boards.

Malpractice insurers don't like the dual role because it increases a law firm's liability exposure, particularly at a time when firms are sometimes named as codefendants along with their clients. "It's a higher hazard area because there's no clear line to define what function the lawyer is performing," says Anne Marie Davine, who works with law firms at Marsh Inc., an insurance brokerage subsidiary of Marsh & McClennan Companies, Inc. She adds that some carriers insist on language excluding coverage for clients that have members of the law firm on their board.

Garzon's case against Pfeiffer seems to be lost somewhere over the Atlantic. As for the complaint, a copy of which was obtained by *The American Lawyer*, a Justice spokesman wouldn't comment on whether it was received, saying only that the department would respond "as it considers appropriate," if and when it does.

Garzon might not like the response. His complaint against Pfeiffer, like his complaint against Pinochet, is based on "universal jurisdiction," the principle that some crimes are so heinous that perpetrators are subject to prosecution anytime, anywhere. It's doubtful that Justice subscribes to the doctrine, say experts on international law, and any acceptance of it would likely be limited to crimes such as genocide and torture, not money laundering.

But that doesn't clear Pfeiffer. Senate and U.S. attorney investigations continue. In April, Pfeiffer was named in a shareholder suit brought by Milberg Weiss Bershad Hynes & Lerach (now Milberg Weiss Bershad & Schulman). The suit alleges the bank's reputation (and market value) suffered because Pfeiffer and other directors ignored warnings that some Riggs clients were connected to Al Qaeda, as well as warnings about Riggs's shoddy money laundering controls. Milberg wants Pfeiffer and the other directors to return the compensation they received while they were allegedly in breach of their fiduciary duties.

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forts done under the umbrella of federal discovery," he says.

"The avarice involved has been quite stunning," remarks David Tulchin, the Sullivan & Cromwell partner who is Microsoft's lead counsel for these cases. He notes that the $30 million that Hausfeld asked for in Florida exceeded the fee request from the lawyers of record. (They received $15.5 million.) The state court lawyers haven't appreciated Hausfeld's attempts to intervene either. "This was one of the most bizarre requests I've ever seen, and I've been practicing 40 years," remarks Robert Parks, a Coral Gables lawyer who is on the Florida team. Judges have tended to agree. They rejected Hausfeld's requests in Florida, Tennessee, North Carolina, and the District of Columbia. In a September opinion, Washington, D.C., superior court judge Cheryl Long called Hausfeld's request "strange and dubious."

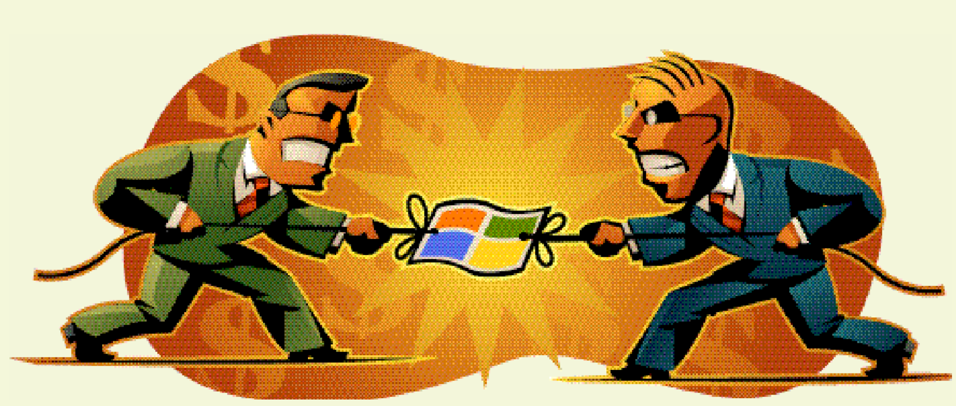
Hausfeld did not attempt to intervene for fees in California, where the largest recovery was achieved. In July a San Francisco state judge approved a settlement valued at $1.1 billion for state consumers. He awarded $101 million in fees for the team lead by Eugene Crew of San Francisco's Townsend and Townsend and Crew. (This amount, to be paid by Microsoft on top of the class's recovery, was less than half of the amount Crew's team had requested.) Unlike the other state cases, the California case was filed before the federal case. Crew fought efforts by Hausfeld's team to have his case folded into the federal multidistrict litigation ["1 Live Crew," March 2002].

Crew had also sparred with Robert Lieff, of San Francisco's Lieff, Cabraser, Heimann & Bernstein, who was a member of both the California and federal teams, and who had tried to get the California case joined with the federal action. Judge Alvarado awarded Lieff's firm the same 2.0 "multiplier" (effectively doubling its hourly rates) as Townsend and the other firms in the California case, even though Townsend had recommended it get much less. (Lieff, Cabraser received $2.6 million; Townsend got $32 million.)

Hausfeld is undaunted. Next, he says, he plans to ask Judge Motz in Baltimore to order the state court lawyers to contribute part of their fees to the federal plaintiffs team. He claims it's the other lawyers who are being greedy and ungrateful, he says. "It's just a matter of some people trying to aggrandize their position to the exclusion of others."

Of course, aggrandizement is in the eye of the beholder.

—SUSAN BECK



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