LAWDRAGON

The Bright Cluster of Lawdragon Legends at Cohen Milstein

Joe Sellers, Agnieszka Fryszman and Steve Toll have all made their mark on the law in expansive and impactful careers.

By Matthew Heller

The Lawdragon Legends are our most prestigious group of lawyers, having been honored in our flagship Lawdragon 500 Leading Lawyers in America over 10 times. So, we always take notice when there's a concentration of several Legends in one firm, especially a small or mid-sized one.

That's the case with the four Legends at Washington, D.C.-based Cohen Milstein. With practices ranging from human rights and employee discrimination to securities litigation and investor protection, these Legends form a bright constellation of justice-seeking advocacy of the highest order.

Over a career spanning more than four decades, **Joseph Sellers**, founder and co-chair of Cohen Milstein's Civil Rights & Employment practice, has helped draft legislation such as the

Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, and the Lily Ledbetter Fair Pay Restoration Act of 2009. He has litigated more than 75 class and collective actions, challenging, for example, gender discrimination at the largest chain of jewelry stores in the country and the largest U.S. law enforcement agency, race discrimination in staffing agencies, the denial of access to credit to Native Americans by the USDA, and the failure to pay for all time worked by large chicken processing companies and large restaurant chains. He became a Lawdragon Legend in 2016.

Agnieszka Fryszman joined Cohen Milstein in 1998 after serving as a U.S. House of Representatives committee counsel. As chair and founder of Cohen Milstein's Human Rights practice, she has represented victims of torture, human trafficking, forced and slave labor, and other violations of international law. She has taken on corporate giants such as Exxon over alleged human rights violations in Indonesia and Chiquita Brands over alleged violations in Colombia. She became a Lawdragon Legend in 2019.

Steven Toll, the former managing partner of Cohen Milstein for 26 years and current co-chair of the Securities Litigation & Investor Protection practice, joined the firm in 1979. He has led or co-led some of the nation's highest-profile stock fraud lawsuits in the past 30 years. Recent wins include a landmark $1B settlement against Wells Fargo and an appeals court ruling limiting safe harbor protections for forward-looking statements in a lawsuit against electronics maker Harman International Industries. He became a Legend in 2019 as well.

Julie Reiser, co-chair of Cohen Milstein's Securities Litigation & Investor Protection practice, was inducted as a Lawdragon Legend this year, after these interviews were conducted. Reiser is a highly accomplished securities litigator, perhaps best known for her landmark $310M settlement against Alphabet in a shareholder derivative action that held the corporate board accountable for claims of sexual harassment, discrimination and retaliation.

The common thread between these very accomplished Legends is a devotion to advocacy and their consistent ability to garner positive, impactful results for their clients and bring about corporate reforms. We were fortunate to chat with Fryszman, Toll, and Sellers about their stand-out practices and some of their most memorable cases.

Lawdragon: Can each of you start by talking about how you got into the area of law that you now practice?

Joseph Sellers: I saw race discrimination firsthand when I was in high school. I ran track and was a member of the relay team, where three of our four-member team were African American.

We would often go out to get dinner or get a snack after practice. Once we went to a restaurant and I said to my friends, "Why don't you guys get a table? I'm just going to the bathroom." When I came back, they were still standing there. I said, "I thought you asked for a table." And they said, "We did. Now you ask for a table." So, I did, and we were immediately seated. My friends said, "Now you see the difference." That's when I started to see the world through their eyes and recognize the daily obstacles they faced.

My interest in civil rights took me to law school. After a short stint at a corporate law firm where I paid off my student loans, I joined the Washington Lawyers Committee for Civil Rights in 1982. Then in 1997, I was invited by Cohen Milstein to start a civil rights practice. At the time, it was one of the first civil rights class action private practices in the country.

Agnieszka Fryszman: I joined Cohen Milstein from the Hill because the lawyers were working on Holocaust-era forced and slave labor cases. A lot of my family had perished in the Holocaust, so the issue was near and dear to my heart. I was able to work on these cases at every step and saw them to conclusion, which was an amazing experience. Afterward, I was able to convince the firm's leadership to continue their work in human rights. That was more than 20 years ago. Our Human Rights practice was formalized in 2010, where upon I became the practice chair.

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Steve Toll: After law school, I was a government lawyer at one of the banking agencies, where I did enforcement and litigation. But I was itching to do something different and more fulfilling. So, I decided to go into private practice. Cohen Milstein grabbed my attention. The firm focused on plaintiff-side securities fraud. I had a background in business, having graduated from the Wharton Business School at the University of Pennsylvania. So, holding corporations accountable for lying to investors sounded exciting and rewarding to me.

LD: Joe, was employment law always a focus for your practice?

JS: At the Washington Lawyers Committee, I led the Equal Employment Project. So that was the initial focus of the Civil Rights & Employment practice I created at Cohen Milstein. Over time, we've expanded our practice to include representing people in cases involving housing discrimination, equal access to credit, and wage and hour violations.

LD: Which of those cases particularly stand out for you?

JS: Probably the Keepseagle case, in which I represented Native American farmers and ranchers in a class action that began in 1999 against the U.S. Department of Agriculture. The USDA was the lender of last resort for socially disadvantaged farmers and ranchers, which included Native Americans. Loan collateral requirements and stereotypes and bigotry led to Native Americans frequently being denied credit. After extensive interviews with farmers and ranchers across the country, we brought a class action against the USDA under the Equal Credit Opportunity Act. Twelve years later, we reached a settlement that provided for major changes to the farm loan program, as well as payment of $680M to the class and $80M in debt forgiveness, which was roughly 95 percent of the recovery we could have achieved had we prevailed at trial.

LD: That sounds like an incredible victory.

JS: Yes. It really was. Life changing in many ways. In addition to distributing long-needed monetary relief to thousands of farmers and ranchers, we created the Native American Agriculture Fund, in which was deposited unclaimed *cy pres* funds to support Native American farmers and ranchers over the next 20 years. So, this case was a triple victory: it caused major changes to the farm loan system, it paid nearly $700M in damages to Native American farmers and ranchers, and it has allowed unclaimed funds to be used to support farming and ranching in Indian Country for 20 years. It also provided our clients a sense of agency in their pursuit of justice against the federal government.

> ***“ What's even more special about this verdict is it's the first time an American jury held a U.S. corporation liable for its complicity in human rights abuses in another country.***

LD: Can you tell us about other recent case where you helped make an impact?

JS: Yes. Much of our litigation results in reforms to employment policies and practices by private and governmental employers, as well as the recovery of financial damages. Recently, we settled sex discrimination claims regarding pay and promotions against Sterling Jewelers, the largest chain of jewelers in the country. This class action, which was litigated for 13 years, proceeded in arbitration, rather than in court, embroiling us in many unsettled legal questions before it was resolved by changes to the pay and promotion practices at Sterling and a payment to the plaintiffs of $175M.

Even more recently, we settled very shortly before trial, a class action brought on behalf of over 1,000 officers and agents of U.S. Customs and Border Protection, the largest law enforcement agency within the U.S. Department of Homeland Security.

Our interviews of dozens of female employees revealed that their pregnancy was treated as an obstacle to continued performance in their jobs by managers at the agency. When these employees informed their managers of their pregnancy, even in the first trimester, they were placed on temporary light duty without any assessment of whether they could continue to perform their regular job duties with or without an accommodation.

This harmed them in several ways. First, most pregnant employees were found ineligible for overtime. They were also limited in the work assignments and the training they could receive. For some, it also delayed opportunities for promotion. And, as they were regarded as no longer fit to perform duties of jobs in which they took great pride, it caused various forms of emotional harm to many members of the class. Some reported that they were even told, "Pregnancy is a liability and pregnancy is a problem."

Shortly before trial was scheduled to begin last September, we reached a settlement. It provided for significant reforms to the agency's policy on pregnancy, among other things by creating a presumption that pregnancy does not affect a woman's ability to perform her regular job duties, unless shown otherwise. Other major reforms are being developed, drawing upon best practices from other law enforcement agencies around the country. In addition, the settlement provided a payment of $45M. In the end we hope the policies developed at this agency will be a model for other federal law enforcement agencies.

LD: Agnieszka, can you tell us about one of your recent human rights cases that has made an impact?

AF: Two cases that recently resolved illustrate how survivors of human rights abuses can enforce their rights against the U.S. corporations responsible for their injuries even when the abuses take place overseas, despite legal developments that many analysists thought would close the door on human rights claims.

The first was against ExxonMobil. After 22 years of litigation, two trips to the D.C. Circuit Court of Appeals and one cert petition to the U.S. Supreme Court, the case settled one week before a jury trial was to begin. The other, against Chiquita Brands International, went to trial after 17 years of litigation. After a six-week trial, the jury returned a verdict of $38M in damages. What's even more special about this verdict is it's the first time an American jury held a U.S. corporation liable for its complicity in human rights abuses in another country.

Both were part of an early wave of cases filed under the Alien Tort Statute (ATS), which was initially interpreted to provide a cause of action for gross violations of human rights norms. However, mid-litigation – in both cases – the Supreme Court narrowed the remedies available to plaintiffs against corporate defendants under the ATS. So, we had to re-frame the legal strategy for each case and apply, instead, foreign tort law to ensure that justice could be served, and U.S. corporations could be held to account in U.S. courts.

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LD: That sounds impactful. Can you please tell us more about the Exxon case?

AF: Yes. The case against ExxonMobil was brought in 2001 by eleven Indonesian villagers who claimed that the Indonesian soldiers Exxon contracted to guard its sprawling operations in the rural peninsula of Aceh, had inflicted horrific abuses on the villagers and their families. This included murder, torture and sexual violence.

When we started the litigation, cell phones, Wi-Fi, and the internet were nascent technologies. So, the villagers were very isolated with few resources or avenues for justice. Then there was

dengue, malaria, a tsunami and Covid-19. So, managing the case was logistically challenging. The case itself also presented many complex novel legal issues – of jurisdiction, justiciability and political questions, comity, extraterritoriality – the list goes on. Then the case had to be re-tooled after the Supreme Court drastically limited the scope of the ATS.

When we realized we could use foreign law to bring the same claims that we could bring under the ATS, that was a big breakthrough. We reconfigured the whole case to fit the claims under the rubric of Indonesian law. It was the first time this had been done.

After we'd done years of discovery and developed the case facts, it turns out they fit very well under Indonesian law. I don't know why we were surprised. Indonesian law was probably always a better fit for our claims of negligence and agency. We argued that Exxon had retained these Indonesian military units pursuant to a contract to guard its facilities, and the company provided negligent supervision, training, and retention policies, which resulted in these guards allegedly shooting people walking in the road, for example. So, you can say that's extrajudicial killing and an international law violation, but it is also standard negligent supervision, negligent hiring and assault, battery and wrongful death.

LD: And the trial against Chiquita? What were some of the challenges?

AF: Similar challenges to Exxon. Except, one challenge in the Chiquita case was that even though the case was tried under Colombian law, Colombia is a civil law country and doesn't have pattern jury instructions. So, at the outset both sides had to work with the court to develop jury instructions reflecting Colombian law. For background, our case, which was the first bellwether in a large MDL against Chiquita, was brought on behalf of nine families whose sons, husbands, and brothers were murdered by the Autodefensas Unidas de Colombia (AUC), a designated terrorist organization that was funded by Chiquita, we alleged, to protect its farms and quell any civil unrest.

After the Supreme Court scaled back the ATS and the Trafficking Victims Protection Reauthorization Act, the court in our case dismissed the ATS claims. So, we retooled the case under the transitory tort doctrine and stayed the torture cases against the individual Chiquita executives so that we could try just the case against Chiquita under Colombian law. The claims we brought fell under two provisions of Colombian tort law. One was, did you act as a good businessperson? And the other was, is this a hazardous activity? Our main argument was that Chiquita didn't act as a good businessperson when providing nearly $2M in financial funding and other support to the AUC. In the end, the jury agreed.

LD: From a procedural standpoint, it sounds fascinating.

AF: Yes. It really was. And then the trial itself was also fascinating. The jury heard about the history of U.S. involvement in Colombia, the history of the right-wing paramilitary in Colombia, why they grew in prominence, how Chiquita supported them, and how much money was involved. We had 60 witnesses overall and 84 exhibits. It was a highly engaging trial. I felt like I grew an enormous amount as a lawyer. The other counsel were excellent trial lawyers, and I

learned a lot from them. The jury was thoughtful and careful in its evaluation and came out with the verdict that it did.

LD: Steve, what about you? Any big impact cases you have worked on?

ST: Yes, a few cases stand out. For establishing important case law and precedent, there's my case against Harman International because there aren't that many plaintiff victories at the court of appeals in securities cases. That one was important as it resulted in needed clarity on limiting the use of a safe harbor for forward-looking statements, which is an often-used defense in securities fraud cases. It's also a defense that's tough to overcome. Our case against Harman was dismissed on that ground at first, and then we won in the D.C. Circuit in a detailed opinion which established good law for the plaintiffs' bar.

LD: What's special about overcoming forward-looking statements?

ST: Forward-looking statements is an essential provision in the Private Securities Litigation Reform Act of 1995, which dictates how private securities class actions are to be litigated. Basically, a plaintiff can't sue someone who speaks about what they think is going to happen in the future unless they can show that the CEO of the company knew what he or she said was not true at the time. The lower court held that the statements were immunized under the forward-looking statement doctrine, but the D.C. Circuit reversed the dismissal and in so doing limited the scope of protection under the "safe harbor" for forward-looking statements.

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LD: You mentioned your background in banking. Any impactful cases?

ST: Yes, there were a dozen securities class actions we brought against financial institutions such as Countrywide, Bear Stearns, etc. that were involved in the mortgage-backed securities that precipitated the global financial crisis in 2008. These were not traditional securities fraud cases and took a lot of creative lawyering to be successful. Ultimately, the $2.5B we recouped for our clients had a big impact on their bottom line as well as for the members of the various union pension funds on whose behalf we sued.

LD: That's a big recovery. Can you tell us a little about your recent $1B settlement with Wells Fargo?

ST: Wells Fargo was a really interesting case and an important settlement for our investor clients who owned Wells Fargo stock. First, for background, back in 2018 federal regulators like the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau all imposed consent orders on Wells Fargo to stop its decades-long, fraudulent banking practices like opening bank accounts for customers without permission.

During this time, Wells Fargo had told investors, the public, and members of Congress that it was complying with the consent orders, when it was not.

An interesting hurdle with this case was Covid-19. News was starting to leak out about the bank not complying with the consent orders. But the real news that broke the case was on March 10, 2020, when Wells Fargo's CEO testified before the House Financial Services Committee. He basically told the committee that it hadn't done what was necessary to address the consent orders or any of the other shortcomings. And boom, just like that, the stock tanked. Since the timing of the stock drop occurred during one of the first weeks that the country was shutting down because of Covid-19, Wells Fargo argued the stock drop was caused by pandemic-related market turbulence, not the revelation of the bank's fraud or misstatements.

Fortunately, the court agreed with our arguments, and in its ruling basically said that the bank had not even submitted an acceptable plan for compliance with the consent orders to regulators at the time it made these misstatements.

LD: And the settlement? What was the impact of that?

ST: The $1B settlement we recovered represented an unusually high percentage of investors' losses – more than 25 percent. So, it was a huge victory for our clients. But keep in mind who are clients are. They aren't ordinary investors. We represent some of the largest public pension plans in the country who thoughtfully invest the retirement funds of teachers, nurses, firefighters, police officers and other first responders into presumably safe companies. It's really their money we were able to get back. So, that's something.

I think the settlement underscores the critical role investors play in redressing consumer harm and holding companies – or banks – accountable and to ensure that our financial markets are fair, honest and safe. I also think it serves as a huge deterrent to other banks and companies. At least, I hope it does. I hope it encourages them to be honest and forthright with their investors and, frankly, comply with the law.

LD: Each of you is a practice leader. What's a key ingredient that defines your practice?

ST: I'd say it's talent. I feel privileged to be surrounded by so many talented lawyers. Joe and Agnieszka included. Looking at our securities practice, it has dramatically evolved over the past 10 years because of the talented attorneys we've hired and cultivated.

For instance, Julie Reiser, my practice co-chair, has literally transformed the practice of shareholder derivative litigation to address systemic workplace issues like discrimination and harassment that went all the way up to the corporate board level.

Not long ago, Julie had a series of successes involving these issues at Wynn Entertainment, Victoria's Secret and L Brands, Pinterest, and a very large and precedent-setting case against Alphabet, the parent company of Google. The common thread in all these cases was that the board of directors of each company breached its fiduciary duties by either ignoring, or being

complicit in, systemic workplace issues that harmed the company and brand. Coincidently, these cases took place at the same time as the #MeToo movement. So, they captured a lot of attention.

Other members of our team are making an impact for our institutional investor clients by addressing cutting-edge issues like manipulation schemes involving electronic trading and the financial markets.

What drives me – and I think the team – is ensuring corporate accountability, protecting the marketplace and protecting investors, the people who are being defrauded.

AF: I'd say it's tenacity. I feel really lucky to do what I do. The firm's support has meant my small team has been able to be tenacious and stick to our guns in some really worthwhile but difficult cases. And we're getting great results for clients who really deserve it.

JS: For me it would be persistence. Like Agnieszka's human rights work, civil rights litigation takes years, even decades to attain justice. But justice is worth pursuing no matter how long it takes. And if we can make some good law along the way, that is a reward in itself.

I'm also inspired by my clients. These are real people. I'm inspired by their courage, tenacity, and their commitment to challenge practices they think are unlawful, sticking with it for sometimes a decade or more.

Also, I think I speak for the team when I say I'm inspired and excited about the chance to make a difference in the industries and the places where illegal practices may have occurred, and to make change happen. Tangible, real results.

And once in a while, we help change the law. As a lawyer, this is an incredibly rewarding part of what we do. So, each of the cases we've discussed, in its own way, has had a positive impact on the development of the law for justice and the common good.

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