

## Q&A: Weil's Jonathan Polkes on Marsh's Showdown with Former Execs

By Scott Flaherty  
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Believe it or not, until very recently New York's federal courts hadn't ruled squarely on a big issue for employers: Can a company being probed for potential wrongdoing legally fire employees because they refuse to cooperate with an internal investigation?

A judge in Manhattan concluded late last month that the answer is yes, at least in the case of a pair of former Marsh & McLennan Companies Inc. executives who were implicated in a criminal bid-rigging investigation. As we reported, Weil, Gotshal & Manges deflected the ex-employees lawsuit on Jan. 26, persuading U.S. District Judge J. Paul Oetken that Marsh was in the clear to fire William Gilman and Edward McNenney Jr. in 2004.

The former execs, who were later criminally charged for their actions at Marsh, had refused to cooperate with internal investigators amid a sprawling investigation into the insurance market by then-New York Attorney General Eliot Spitzer. They argued that Marsh fired them to appease Spitzer and avoid prosecution, and that the company breached their employment contracts. Oetken tossed the case, ruling that Marsh had cause to fire the men.

Jonathan Polkes, who defended Marsh in the case, took a break from his duties as co-chair of Weil's litigation department to chat with the *Litigation Daily* about the decision and its potential impact for other employers. Our conversation was edited for length and clarity.

**Litigation Daily:** *Gilman and McNenney's case related to Spitzer's investigation and their own subsequent criminal trial. [Their convictions were ultimately thrown out in 2010.] When did Weil begin representing Marsh & McLennan?*

**Polkes:** I got involved after the investigations, after Spitzer was gone from office. We did not have history with the prior goings-on in the investigation.

**Lit Daily:** *How important was the history of Spitzer's probe to your efforts to defeat the executives' case?*

**Polkes:** This is the last chapter in what was a very long journey for Marsh. The suit referred back to and challenged actions that Marsh took during the original investigation phase. So in order to address that properly, we did have to go in extensive detail into the very lengthy background, and dive into the facts taking place back in 2004-2005.

**Lit Daily:** *Can you walk us through some of the challenges in building the company's defense?*

**Polkes:** We had to build this factual record, and basically put ourselves



**Jonathan Polkes**

back in the position that this particular business found itself in, in 2004. There were investigations swirling, events were developing rapidly, and the company did what essentially any company does when it's presented with those sorts of circumstances: It asked for cooperation.

We think the law is clear that companies have fiduciary obligations to their shareholders to seek these kinds of interviews [from employees] and learn whatever information they can learn. So one area we looked at was the area of fiduciary duties. Another was a line of authority in the Second Circuit that makes clear that companies are looked to as a first line in ensuring compliance with various rules imposed by regulators, and that it is a public good for them to be seeking this kind of information.

**Lit Daily:** *What, in your view, are some of the broader implications of the ruling?*

**Polkes:** This decision provides clear guidance to companies in a context where they need clear guidance. It's important to remember that companies dealing with very active government investigations may find themselves under a lot of stress. Regulators sometimes make public statements, stock price can be under assault, civil lawsuits can be brought—there are lots of different considerations. Management, guided by their legal advisers, have to be making real-time decisions about how they're going to proceed, and obviously they can't do that without getting material information.

What happened here, in 2004, was that Eliot Spitzer took one guilty plea of someone in open court who said, under oath, that these particular employees engaged in certain activity that gave rise to a criminal complaint. The next day, Spitzer publicly charged the company, and within days there were public class action lawsuits filed. Obviously, the first thing you would want to do is go to the people who are alleged to be in the middle, and just find out what the facts are.

**Lit Daily:** *What about the implications for your client?*

**Polkes:** Having finality over that and knowing that they're not going to have to further revisit all these issues is something that any company would welcome.