

COURT RULING SETS PRECEDENT IN FIGHT AGAINST LAWSUIT ABUSE

by
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Recently a jury in the United States District Court for the Northern District of Illinois rendered a verdict for \$36 million (\$8.3 in compensatory damages and \$27.7 million in punitive damages) against the law firm of Ness, Motley, Loadholt, Richardson & Poole. The firm was found liable for violating its fiduciary duty to, and breaching its retainer agreement with, a client who had hired the firm to prosecute a class action on behalf of persons who had been fraudulently induced by a telemarketing firm to purchase shares in lottery tickets. The Ness Motley firm, which has earned hundreds of millions of dollars in fees over the past two decades from representing plaintiffs in asbestos, tobacco and lead paint personal injury litigation, was found to have violated its fiduciary duty by (1) unilaterally withdrawing from representing one client while continuing to represent the class members who were also its clients, and then (2) settling the class action lawsuit without the one client's authorization and on terms detrimental to that client (the proposed settlement provided for no payment to the client and effectively little for the class members, but specified payment of \$2 million in attorneys fees for Ness Motley).

This verdict, in the case entitled *Interclaim Holdings, et al. v. Ness Motley*, Civil Action No. 00-CV-7620 (U.S.D.C., N.D. Illinois, July 3, 2003), highlights the abuses that can occur in class action settlements and demonstrates how plaintiffs' class counsel may violate their ethical responsibilities by favoring its own financial interests over those of its clients. Indeed, a lawyer who represented victims of the telemarketing scheme, and who objected to the proposed settlement, described the verdict as "a fabulous exposé of the corruption that went on in this case." See *Big Litigation Firm Found to Have Acted Unethically*, N.Y. TIMES, July 4, 2003 at A15.

The factual allegations underpinning the claims against Ness Motley are detailed in the original and amended complaints, as discussed in a Memorandum Opinion and Order denying Ness Motley's earlier motion to dismiss those claims. See *Interclaim Holding Ltd. v. Ness, Motley, Loadholt, Richardson and Poole*, 2001 U.S. Dist. LEXIS 17945 (N.D. Ill., Oct. 29, 2001). Specifically, in late 1999 and early 2000 Interclaim Holdings Limited, a company which purchases and enforces multi-jurisdictional liquidated claims, hired Ness Motley as its counsel to bring class action proceedings on behalf of victims of a criminal network operating out of Canada known as the Down Group. Throughout the 1990s the Down Group had engaged in an illegal use of mass mail solicitations and telemarketing to sell to elderly and other persons in declining health shares or other interests in large pools of foreign and domestic lottery tickets and other contests, for which the Down

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Group reaped some \$200 million and then laundered and invested throughout the world. In 1998, after being contacted by the Federal Bureau of Investigation, Interclaim agreed to help recover the monies lost by thousands of United States citizens to the Down Group, and then entered into power of attorney agreements with 29 of those victims. Those agreements gave Interclaim the power to prosecute and file legal actions to recover the funds obtained illegally by the Down Group.

One effort taken by Interclaim to prosecute the claims was to file involuntary bankruptcy petitions against the Down Group in several courts in Canada where the debtor was based. In the course of these bankruptcy proceedings the Canadian court approved an agreement between Interclaim and the court-appointed receiver whereby Interclaim was to be paid up to a maximum of 50% of the proven claims of creditors. As part of its cost recovery strategy, Interclaim entered into an agreement with Ness Motley whereby it retained Ness Motley “as its counsel, in both its capacity as (a) owner of certain trade indebtedness owed by [the Down Group] and (b) as a representative of [29] nominated victims of [the Down Group] (by and through certain Powers of Attorney) in respect of pursuit of recovery of loss and damages occasioned to such persons...by reason of the operation of the [Down Group].” The Agreement also provided that Ness Motley would receive 25% of the net compensation paid to Interclaim out of the British Columbia bankruptcy estate, plus whatever Ness Motley would have been awarded in the U.S. class action proceedings. After consulting an ethics expert regarding the proposed arrangement, Ness Motley proposed, and Interclaim agreed, that before any compensation was paid to Interclaim for services it rendered on behalf of the class, “the U.S. class shall, at its own cost, retain special independent outside counsel to represent the U.S. class of Down victims for the express purpose of evaluating the reasonableness of Interclaim’s compensation.”

Several months after filing the class action, Ness Motley told Interclaim that it had, without notice to or consent from Interclaim, initiated settlement talks with the Down Group and that the Down Group was insisting that Interclaim be excluded from receiving any of the settlement funds. At that time Ness Motley did not disclose to Interclaim that it intended to agree to Interclaim’s exclusion from the settlement agreement. While Ness Motley was secretly negotiating a settlement with the Down Group, it apparently continued to have attorney-client communications with Interclaim during which Interclaim provided Ness Motley with confidential information regarding the location and movement of the Down Group’s assets. Eventually, Ness Motley informed Interclaim about the terms of the proposed settlement with the Down Group (providing for a fund of \$10 million to pay for claims which class members were able to substantiate through documentation, and for Ness Motley’s \$2 million in fees, but not specifying any payment to Interclaim). Under the proposed deal, Ness Motley’s attorneys’ fees were to be based on the total value of the fund rather than the amount actually paid to class members (money not paid out to claimants was to revert to the Down Group). Interclaim objected to the proposed settlement, primarily because the high level of proof required from class claimants would ensure, as Ness Motley reported was the Down Group’s expectation, that few claimants would ever qualify for payment (resulting in reversion of the funds to the Down Group).

A few weeks after informing Interclaim of the Down Group’s interest in settlement, Ness Motley told Interclaim that it was withdrawing from representing Interclaim. Ness Motley first asserted that the proposed settlement, which excluded Interclaim from any settlement discussions and from any recovery, created a conflict of interest between Interclaim and the class and, therefore, Ness Motley would not continue to represent Interclaim. Ness Motley then contended that, due to the conflict between Interclaim and the class, it was obligated to continue to represent and protect the class members’ interests, *even at Interclaim’s expense*. At no time did Ness Motley seek to have an independent counsel for the class evaluate what compensation should be paid to Interclaim from the settlement funds, the procedure contemplated in the retainer agreement.

Ness Motley repeated these arguments when it moved to dismiss Interclaim’s claims for breach of fiduciary duty and breach of contract. However, in denying that motion, the trial court expressly held that the parties’ retainer agreement did not require Ness Motley “to sacrifice the interests of Interclaim” if a conflict of interest arose. The court noted that Ness Motley represented both Interclaim and the class and should have either rejected the Down Group’s demand that Interclaim be excluded from the settlement, or obtained Interclaim’s consent before proceeding with settlement negotiations. The court concluded that Ness Motley’s failure to take either such action arguably violated the Rules of Professional Conduct established by Illinois and South Carolina (where Ness Motley’s main offices are located). As for Interclaim’s breach of contract claim, the court found that under the retainer agreement Interclaim had the right “to play a role in the class action proceedings” and, therefore, could bring suit against Ness Motley for depriving it of such a role.