Legal Backgrounder

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FEDERAL APPEALS COURT SCRUTINIZES LAWYERS' CONDUCT IN ASBESTOS LAWSUIT

by

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Numerous litigation abuses have surfaced in the wake of the "elephantine mass" of asbestos-related suits that have beset the federal and state courts over the past several decades. Such abuses can be explained in large measure by the fact that the overwhelming majority of the asbestos suits filed involve claimants who have no present impairment or injury and may never become sick from asbestos exposure. *See Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 821 (1999); *In Re Asbestos Prod. Liab. Litig.* (No. VI), 1996 WL 539589, at *1 (stating that "only a small percentage of the [asbestos] cases filed have serious asbestos-related afflictions"); James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S. C. L. REV. 815, 823 (2002).

Some of the most abusive practices associated with the mass filings for non-sick claimants—litigation-driven mass medical screenings and "manufactured for money" medical diagnoses—were methodically exposed by Judge Janis Jack in her 2005 decision regarding silicosis claims in *In Re Silica Products Liability Litig.*, 2005 WL 1593936 (S.D. Tex.). Medical audits conducted over the past few years by various asbestos bankruptcy trusts have also revealed rampant erroneous, and possibly fraudulent, diagnoses generated in mass medical screenings and used in asbestos claim submissions to those trusts. *See* Roger Parloff, *Mass Tort Medicine Men*, AMERICAN LAWYER, Jan. 2003 at 98; *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 297, 309 (referring to the audits conducted on behalf of the Manville Asbestos Trust and explaining that "[c]laimants today are diagnosed largely through plaintiff-lawyer arranged mass screening programs targeting possibly asbestos-exposed workers and attraction of potential claimants through the mass media," that the screening "programs rely almost solely on chest x-rays and pro-plaintiff readers to identify the injured," and that "[a] number of studies have shown that some plaintiffs' doctors consistently overdiagnose asbestos-related conditions").

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Unscrupulous litigation conduct has also been evident in the use of aggregate "inventory" settlements to resolve thousands of asbestos claims, as illustrated in two class actions filed by asbestos plaintiffs against their counsel. In January 2006 a class action complaint filed with respect to some 4,000 putative plaintiffs alleged that Miami plaintiff lawyer Louis Robles brought asbestos lawsuits on plaintiffs' behalf, had received some $13.5 million in settlement payments from defendants on those claims, but then never paid plaintiffs any of the settlement proceeds before he filed for bankruptcy and was disbarred for misappropriating the clients' settlement funds. *See Alexander v. The Florida Bar*, No. 06-20046 (U.S.D.C., S.D. Fla., filed Jan. 10, 2006). That case remains pending as the District Court considers defendant's motion to dismiss the complaint.

Most recently, the United States Court of Appeals for the Third Circuit in *Huber v. Taylor*, 2006 U.S. App. LEXIS 27088 (3d Cir., Oct. 31, 2006), had occasion to scrutinize the fee and co-counsel arrangements made among several plaintiff counsel who jointly represented thousands of asbestos claimants residing in Texas, Mississippi, Ohio, Pennsylvania and Indiana, and for whom asbestos lawsuits were filed in Mississippi and then consolidated as one action in *Rankin v. A-Bex Corp.*, No. 99000086 (Miss. Cir. Ct. Jefferson Cty.). In *Huber*, eight of the plaintiffs from the *Rankin* action asserted claims, as part of a putative class action on behalf of 2,600 plaintiffs, against both attorney Robert G. Taylor ("Taylor"), the counsel who filed *Rankin,* and other counsel in Texas and Mississippi whom Taylor had hired, in "upstream co-counsel" arrangements, to negotiate inventory and aggregate settlements for the *Rankin* plaintiffs. In particular, the plaintiffs in *Huber* alleged that Taylor and the upstream co-counsel breached their fiduciary duty of undivided loyalty and candor to their clients; engaged in an undisclosed multiple representation; and never disclosed that the aggregate settlements they negotiated, in total amount of at least $400 million, specified that those *Rankin* plaintiffs who resided in Texas in Mississippi (the "Southerners") were to be paid amounts some 2.5 to 18 times greater than the payouts allocated for the *Rankin* plaintiffs who resided in Ohio, Pennsylvania and Indiana, including the eight named plaintiffs in *Huber* (the "Northerners").

The plaintiffs in *Huber*, the Northerners, also claimed that higher settlement payouts were purposefully allocated for the Southerners to maximize the amount of fees payable to Taylor and the upstream counsel. In fact, pursuant to the fee agreements between Taylor and the local attorneys from Ohio, Pennsylvania and Indiana ("local counsel") who had referred the Northerners to Taylor, Taylor and upstream counsel were entitled to receive only a portion of the contingency fees due for the Northerners' claims, whereas they were entitled to all of the contingency fees associated with settlement payments made to Southerners, for whom they were the only counsel of record. As noted by the Third Circuit in its decision, Taylor and the upstream counsel had a substantial financial incentive to maximize settlement payments for the Southerners at the expense of the Northerners because they "stood to gain up to $10 million…[in fees] at the expense of Northerners (and Local Counsel), depending on how the settlements were allocated between Northerners and Southerners." *Id.* at 9.

In the proceedings below, the District Court entered summary judgment in favor of Taylor and upstream counsel and denied plaintiffs' motion for class certification, holding that plaintiffs had failed to show actual harm from defendants' conduct, which the District Court concluded was required under Pennsylvania, Ohio and Indiana law. The District Court also held that Texas law, which did not require a showing of actual harm, was not applicable to the breach of fiduciary duty claims under Pennsylvania choice of law rules. On appeal, the Third Circuit vacated the District Court's entry of summary judgment, as well its denial of the class certification motion, and remanded the case for further proceedings with respect to plaintiffs' claim for disgorgement of fees from Taylor

and the upstream counsel.

In reversing the District Court, the Third Circuit expressed exasperation with the positions taken by defendants Taylor and upstream counsel in this litigation. First, the court deemed as "specious" defendants' choice of law argument that Pennsylvania, Ohio and Indiana substantive law applied to plaintiff's breach of fiduciary duty claim. Instead, the Third Circuit found that Texas law applied because "the alleged conduct causing the non-disclosures occurred (or rather failed to occur) in the Defendants' law offices…" *Id.* at 30. The court also labeled as "preposterous" defendants' assertion that they did not owe any fiduciary duty whatsoever to their Northern clients. The court ruled that even though the Northerners had also retained their own local counsel in the states where they resided, Taylor and the upstream counsel "held themselves out as the Northerners' attorneys, they entered into agreements regarding representation of the Northerners, they signed and filed pleadings on the Northerners' behalf, negotiated settlements for the Northerners' claims and collected attorneys' fees from the Northerners." *Id.* at 31.

The court further held that defendants' fiduciary duty includes the duty of undivided loyalty, candor, and provision of information material to the representation and that, "[e]ven if the duty of disclosure is itself delegable, the duty of loyalty is inherently not, and in this case disclosure was necessary to fulfill the duty of loyalty." Most important, the court ruled that "because the fiduciary duty of co-counsel is a joint obligation…. , Local Counsel's alleged failure to fulfill the fiduciary duty of disclosure could hardly excuse the Defendants." *Id.* at 33. Indeed, the court emphatically explained that "in the case of the duty of loyalty, its non-delegability is so patent as to be axiomatic."

In this same vein, the Third Circuit admonished defendants that "[t]he fiduciary duty that an attorney owes clients is not a matter to be taken lightly….and may not be dispensed with or modified simply for the convenience and economies of class actions." *Id.* at 33. The court further emphasized that "[e]ven when clients are viewed as mere 'inventory,' they are still owed the renowned 'puncilio of an honor most sensitive.'" *Id.* at 33 (*citing Meinhard v. Salmon*, 249 N.Y. 458, 464 (N.Y. 1928) (Cardozo, J.)). Fulfillment of such duties, the court noted, "is the cost of doing business as an attorney at law, and we will not countenance shortcuts." *Id.* at 34. The court similarly rejected the suggestion by Taylor and upstream counsel that the Northerners had somehow preauthorized the settlement terms when they agreed to allow counsel to negotiate aggregate settlements: "We note that, even if Plaintiffs authorized settlement negotiations of their claims in the aggregate, that alone does not constitute consent to the settlement nor waiver of disclosure of the complete settlement terms." *Id.* To underscore its disapproval of the settlement "shortcuts" taken by Taylor and the upstream counsel, the court bluntly stated that "…we are embarrassed to have to explain a matter so elementary to the legal profession that it speaks for itself: all attorneys in a co-counsel relationship individually owe each and every client the duty of loyalty. For it to be otherwise is inconceivable." *Id.*

The *Huber* court's scrutiny of inventory aggregate settlements and the intricate co-counsel arrangements among asbestos plaintiff attorneys is a welcome development in mass asbestos litigation. Such judicial scrutiny may deter, at least to some consequential degree, the plaintiff bar from filing claims for those who allege asbestos exposure but who have no present injury, sickness or physical impairment. Hopefully, as the courts demonstrate a greater willingness to examine such litigation practices, those claimants who are actually sick or impaired from asbestos exposure will have a better chance of getting to the "front of the line" to litigate their claims without undue delay. *See* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J. L. & PUB. POL'Y. 541, 542 (1992).

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