COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

CASE No. 2021-J-0206

APPEAL No. 2021-P-0485

CHARLES KINGARA,

Plaintiff-Appellant,

v.

SECURE HOME HEALTH CARE INCORPORATED, SIDDHARTH PARMAR, and ANKUR RUSTGI

Defendants-Appellee

Appeal from the Superior Court of Suffolk County

BRIEF OF APPELLANT CHARLES KINGARA

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Date: July 13, 2021

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

a. Whether a deceased plaintiff's attorney has the authority to act on the deceased plaintiff's behalf prior to class certification, and before any motion to certify a class had been filed, and without any motion by the plaintiff's legal representative to substitute as a party to the putative class action; and

b. If the deceased plaintiff's attorney lacked such authority, whether the Superior Court had the power to order, *sua sponte*, notice to the putative class members under Mass. R. Civ. P. 23 (d).

II. STATEMENT OF THE CASE

In September 2019, Plaintiff-Appellant Charles Kingara commenced a putative class action against Defendant-Appellee Secure Home Health Care Incorporated ("Secure Home Health"), seeking relief for unpaid wages and expenses under the Massachusetts Wage Act, M.G.L. c. 149, § 148, Massachusetts Minimum Fair Wage Law, M.G.L. c. 151, § 1, and Massachusetts Overtime Law, M.G.L. c. 151, § 1A. *See* Record Appendix("R."), 3-15. Mr. Kingara and the putative class worked as nurses and home health care aides for the company, providing in-home health care services to patients. (R.6). As part of their jobs, these health care workers travel between patient appointments each day in their personal vehicles. Despite Massachusetts law explicitly requiring Secure Home Health to do so, the company does not pay these employees for the travel time between patient

appointments, reimburse them for their related travel expenses, or pay them overtime wages for their overtime hours. (R.7).

In late July 2020, Mr. Kingara unexpectedly passed away. (R.16). After learning of his death, Plaintiff's counsel served and filed a motion to authorize notice to the putative class pursuant to MASS. R. CIV. P. 23(d), asking that the Court allow counsel to send notice to the class informing them of Mr. Kingara's death and the potential impact on their legal rights flowing therefrom, and inviting them to come forward to protect those rights. (R.18-30). On April 5, 2021, the trial court allowed the motion. (R.57).

Secure Home Health followed by filing a petition for interlocutory relief. (R.58-213). On June 2, 2021, the single justice reported the two foregoing questions of law to this Court. (R.222-223).

III. STATEMENT OF FACTS

All relevant facts are included in the Statement Of The Case.

IV. STANDARD OF REVIEW

An interlocutory appeal that resolves a pure question of law is reviewed *de novo*. *Abuzahra v. City of Cambridge*, 162 N.E.3d 653, 657, 486 Mass. 818, 821 (2021). Therefore, the Court should review the foregoing two questions *de novo*.

V. ARGUMENT

A. PUTATIVE CLASS COUNSEL HAS LIMITED AUTHORITY TO ACT TO PROTECT THE INTEREST OF PUTATIVE CLASS MEMBERS, INCLUDING REQUESTING THE ISSUANCE OF NOTICE

i. Putative Class Counsel Has A Duty To Act In Furtherance Of Putative Class Members' Interests

"[E]ven prior to class certification, attorneys for the putative class have fiduciary and ethical obligations to all putative class members." *Arkansas Teacher Retirement System v. State Street Bank and Trust Company*, C.A. No. 11-10230-MLW, C.A. No. 11-12049-MLW, C.A. No. 12-11698-MLW, 2020 WL 949885, at *42 (D.Mass. Feb. 27, 2020), citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed"); Federal Judicial Center, Manual For Complex Litigation, § 30 at 24 (3d ed.1995) ("Although no formal attorney-client relationship exists between class counsel and the putative members of the class prior to class certification, there is at least an incipient fiduciary relationship between class counsel and the class he or she is seeking to represent"). Indeed, "counsel for a class has a continuing obligation to each class member." *Spence v. Reeder*, 382 Mass. 398, 409 (1981).

These duties require "protecting the substantive legal rights of putative class members that form the basis of the class action suit from prejudice in an action against the class defendant resulting from the actions of class counsel." *Schick v. Berg*, Nos. 00-CV-5332, 00-CV-4632, 99-CV-1988, 00-CV-2340, 2004 WL 856298, at *6 (S.D.N.Y. Feb. 6, 2006). In fact, "[w]here the actions of class counsel put those rights at risk, class counsel must at a minimum put absent class members on notice and provide them with an opportunity to object" and if "they fail to do so, class counsel exposes itself to potential liability for breach of its fiduciary duties." *Id*.

"Not the least important of the fiduciary duties shared by counsel and the court is their duty to ensure that absentee class members have knowledge of proceedings in which a final judgment may directly affect their interests." *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973);*see also In re Williams-Sonoma, Inc.*, 947 F.3d 535, 542–43 (9th Cir. 2020)("[C]lass actions are a form of representative litigation, and, before certification, counsel may wish to advise potential plaintiffs of their rights and encourage their involvement in a class suit, to seek helpful evidence from them, or simply to inform them of the status of the litigation. The ability to communicate with members of the class is acutely important given the fiduciary duties that class counsel owes unnamed class

members."), citing 6 Newberg on Class Actions § 19:2 (5th ed.) (internal quotations omitted).

ii. Putative Class Counsel Has Limited Authority To Act In Furtherance Of Putative Class Members' Interests – That Should Include Requesting The Issuance Of Notice

The scope of putative class counsel's duties and authority to act is an issue of first impression in the Commonwealth. As this Court has remarked, "it is far from clear that the normal attorney-client rules appl[y] even [where] […] no class ha[s] been certified." *Ehrlich v. Stern*, 908 N.E.2d 797, 804, 74 Mass.App.Ct. 531, 540 n. 12 (2009) (abrogated on other grounds), citing *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1110 (5th Cir.1978), aff'd sub nom. *Deposit Guar. Natl. Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) (even before certification of class, representatives have responsibilities to class and a "cease-fire may not be pressed upon them by paying their claims"); *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir.1995) (when a conflict arises between named plaintiffs and class, class attorney cannot allow interests of named plaintiffs to subvert those of class); *In re M & F Worldwide Corp.*, 799 A.2d 1164, 1174 (Del.Ch.2002) (before a class is certified, counsel and the putative class representative have fiduciary obligations to the class and the attorneys do not represent the class representatives alone).

If a fully formed attorney-client relationship existed between putative class counsel and putative class members, there would be no question that counsel could act to request notice issue to putative class members. A minority of courts have found such a relationship exists. *See, e.g., Dondore v. NKG Metals Corp.*, 152 F.Supp.2d 662 (E.D.Pa.2001); *Impervious Paint Industries v. Ashland Corp.*, 508 F.Supp., 720 (W.D.Ky.1981) (addressing relationship between counsel and putative class before expiration of opt-out period).

Conversely, a majority of courts have found that a fiduciary duty and something short of a full-blown attorney-client relationship exists between putative class counsel and putative class members. As one judge put it: "putative class members prior to certification hold a hybrid status." *Gutierrez v. Johnson & Johnson, No.* Civ. 01–5302 WHW, 2003 WL 26477887, at *3 (D.N.J.,Apr. 3, 2003) (determining whether attorney-client relationship existed between putative class counsel and employee putative class in context of defendant-employer interviewing employees), citing Federal Judicial Center, Manual For Complex Litigation, § 30 at 24 (3d ed.1995). "Because of this status, the putative class members have certain rights stemming from their potential interest in the litigation. Common sense dictates that in order to protect these rights, the putative members be informed of the existence of the law suit and the

identity of the attorneys for the plaintiffs, as well as the fact that it is a class action, and that they may be a part of the class." *Id*.

In turn, courts have recognized instances in which putative class counsel, pursuant to their fiduciary duty, can act on behalf of putative class members, independent of their obligations to named plaintiffs. For example, in *In re M & F Worldwide Corp.*, Delaware's Court of Chancery recognized that, pre-certification, class counsel can affirmatively act in direct contravention of a named plaintiff's settlement position in order to protect putative class members' interests. 799 A.2d 1164 (Del.Ch.2002). That is because, by asserting class claims, "named plaintiffs g[i]ve up the right to dictate the outcome of the action unilaterally" and, instead, "any resolution of the action […] depend[s], to some extent, on whether their counsel agree[s] (and ultimately, on the court's approval)." *Id*. Indeed, "named plaintiffs [are] operating in a context in which it [i]s possible that their counsel might take a different view of the advisability of settlement, and act on that view in the face of their objections […]because counsel owe[s] a duty to act in good faith on behalf of all intended beneficiaries of the representative action, and not simply at the direction of the named plaintiffs." *Id*. Further, "precedent makes clear that counsel in a derivative and/or class action may present a

proposed settlement over the objections of the named plaintiffs." *Id.*

In a similar vein, putative class counsel can even settle named plaintiffs' claims without their consent. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978) ("Appellants' argument that the settlement cannot be applied to them because they did not authorize their attorney, Walker, to settle the case or otherwise consent to the settlement is also easily disposed of. Because the 'client' in a class action consists of numerous unnamed class members as well as the class representatives, and because (t)he class itself often speaks in several voices ..., it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole […] Because of the unique nature of the attorney-client relationship in a class action, the cases cited by appellants holding that an attorney cannot settle his individual client's case without the authorization of the client are simply inapplicable").

And, of course, putative class counsel can contend that a settlement is in the best interests of putative class members and request that the court bind the named plaintiff and absent members to settlements that include releases of legal claims, thereby benefitting or prejudicing hundreds or thousands of individuals. *See* MASS. R. CIV. P. 23(c); *Schick*, 2004 WL 856298,

at *6 ("…class counsel acquires certain limited abilities to prejudice the substantive legal interests of putative class members even prior to class certification").

The foregoing authority reflects that putative class counsel has both the duty and authority to act in furtherance of the interests of putative class members. And that authority to act is significant – putative class counsel can *disregard* a named plaintiff's wishes and act to settle his claims without approval and ask that a trial court bind the named plaintiff and putative class members to a release of claims. If putative class counsel can engage in actions that may alter individuals' legal rights, then surely counsel has some limited authority to apprise the court of a named plaintiff's death and ask that court to exercise its broad authority to issue notice to putative class members in order to protect them from prejudice. *Juris v. Inamed Corp.*, 685 F.3d 1294, 1317 (11th Cir. 2012) ("[t]he notice provisions of Rule 23 [] are meant to protect the due process rights of absent class members…").

Therefore, this Court should find that, consistent with putative class counsel's fiduciary duty to protect the interests of absent class members, counsel have limited authority to request that a trial court issue notice to putative class members when their interests are in jeopardy, such as when a putative class representative passes away.

VI. TRIAL COURTS HAVE THE AUTHORITY TO ISSUE NOTICE TO A PUTATIVE CLASS SUA SPONTE

The plain language of Massachusetts Rule of Civil Procedure 23(d) grants a trial court authority to issue notice to a putative class sua sponte to locate a substitute class representative in order to protect the putative class's interests. In fact, consistent with its duty as guardians of absent class members' rights, in some circumstances, the trial court may have an affirmative duty to order the issuance of notice.

A. MASS. R. CIV. P. 23(D) UNAMBIGUOUSLY GRANTS MASSACHUSETTS COURTS THE AUTHORITY TO ORDER, SUA SPONTE, NOTICE TO PUTATIVE CLASS MEMBERS AT ANY POINT IN THE LITIGATION

When interpreting rules of civil procedure, courts apply traditional principles and tools of statutory interpretation. *See United States v. All Assets Held at Bank Julius, Baer & Co., Ltd.*, 228 F. Supp. 3d 118, 123 (D.D.C. 2017) ("Courts apply the traditional tools of statutory interpretation when resolving ambiguity in the Federal Rules of Civil Procedure[.]" (citing *Yousuf v. Samantar*, 451 F.3d 248, 255 (D.C. Cir. 2006))); *Smith-Dandridge v. Geanolous*, No. 5:19-CV-05184, 2020 WL 4253306, at *4 (W.D. Ark. July 24, 2020) (applying principle of statutory absurdity to Arkansas Rules of Civil Procedure).

The first step is to look to "the plain meaning of the statutory language." *Com. v. Mogelinski*, 466 Mass. 627, 633, 1

N.E.3d 237, 243 (2013). Where the language is clear and unambiguous, it is to be given its ordinary meaning so long as that meaning is "reasonable and supported by the purpose and history of the statute." *Id.* (internal quotations omitted).

Massachusetts Rule of Civil Procedure 23(d), "Orders to insure adequate representation," provides, in relevant part:

> **The court** at any stage of an action under this rule **may** require such security and impose such terms as shall fairly and adequately protect the interests of the class in whose behalf the action is brought or defended. **It may** order that notice be given, in such manner as **it may** direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or **of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire.** (emphasis added).

The subject of every verb in Rule 23(d) is "[t]he court," not the parties or counsel. This syntax indicates that every verb in Rule 23(d) is an action that the court can take sua sponte.

Because Rule 23(d)'s plain language indicates that trial courts may take the actions prescribed therein sua sponte, it is not necessary for this Court to look any further. *Com. v. Millican*, 449 Mass. 298, 300–01, 867 N.E.2d 725, 728 (2007) ("Ordinarily, we do not look to extrinsic sources to vary the plain meaning of a clear, unambiguous statute unless a literal construction would yield an absurd or unworkable result."). However, if this Court were to do so, it would come to the same conclusion.

"A general principle of statutory interpretation is that every word in a statute should be given meaning, and no word is considered superfluous." *Boone v. Com. Ins. Co.*, 451 Mass. 192, 196 (2008)(internal citation and quotation marks omitted). The Supreme Judicial Court of Massachusetts "interpret[s] statutes so as to avoid rendering any part of the legislation meaningless." *Bos. Police Patrolmen's Ass'n, Inc. v. City of Bos.*, 435 Mass. 718, 721 (2002). Accordingly, the SJC instructs courts to "look to the language of the entire statute, not just a single sentence, and attempt to interpret all of its terms harmoniously to effectuate the intent of the Legislature." *Com. v. Mogelinski*, 466 Mass. 627, 641 (2013).

The Massachusetts Rules of Civil Procedure are akin to a single statutory scheme. It follows that the language within a particular Rule should be interpreted harmoniously with the language in other Rules.

Throughout the Rules, there are numerous judicial actions that necessitate a "motion of a party" or "stipulation of the parties." *See, e.g.,* MASS. R. CIV. P. 12(f)("**Upon motion made by a party** before responding to a pleading . . . the court may after hearing order stricken from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter."), MASS. R. CIV. P. 15(b)("Such amendment of the pleadings . . . may be made **upon motion of any party** at any

time[.]"), MASS. R. CIV. P. 15(d)("**Upon motion of a party** the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth . . ."), MASS. R. CIV. P. 52(b): "**Upon motion of a party** made not later than 10 days after entry of judgment . . ."), MASS. R. CIV. P. 6(b)(3)("permit the act to be done **by stipulation of the parties**").

As is clear from these examples, where the court has the authority to take an action only upon the motion of one or both parties, the Rules of Civil Procedure expressly specify as much by qualifying the action with language such as "upon motion of a party." Where there are no such limiting words, it follows that the court can take the action sua sponte.

Any other conclusion would require finding that the phrases "upon motion of a party" or "by stipulation of the parties" throughout the Rules are superfluous. Such a reading of any statute or rule does not comport with basic tenets of statutory construction. *Commonwealth v. Woods Hole, Martha's Vineyard and Nantucket S.S. Auth.*, 352 Mass. 617, 618, 227 N.E.2d 357 (1967) ("None of the words of a statute is to be regarded as superfluous").

This interpretation is also in accordance with the purpose of MASS. R. CIV. P. 23(d), which is "designed to afford protection to absent members of the class." Reporter's Notes to MASS. R. CIV.

P. 23(d). As the SJC has made clear, a trial "judge […] has a role as the guardian of the absent parties' interests." *Spence*, at 409. Construing Rule 23(d) to require the court to wait for a party's motion to act would constrict its ability to protect putative class members' interests.

Rule 23(d) further provides that the court can take such actions "at any stage of an action under [Rule 23.]" MASS. R. CIV. P. 23(d). The plain meaning of this text is that the court can take the actions listed in Rule 23(d) at any stage of class litigation, from the filing of the complaint to the entry of final judgment—whether before or after class certification. *See Clark v. Legal Sea Foods*, LLC, No. SUCV20141026G, 2014 WL 6875613, at *5 (Mass. Super. Nov. 6, 2014)("This rule [MASS. R. CIV. P. 23(d)] expressly authorizes the court to act . . . at any time during the case, not just after the class is certified."); *see also Frost v. Malden/Dockside, Inc.*, No. 1784CV02204, 2018 WL 4418271, at *3 (Mass. Super. July 25, 2018) (exercising authority over precertification communications pursuant to MASS. R. CIV. P. 23(d) to enjoin Defendants from coercive settlement communications with putative class members).

In short, the trial court may, on its own accord, authorize issuance of notice of the putative class at any stage of the litigation. The trial court did not err doing so in this case.

B. THE TRIAL COURT MAY EVEN HAVE HAD AN AFFIRMATIVE DUTY TO ISSUE NOTICE IN ORDER TO FIND A SUBSTITUTE CLASS REPRESENTATIVE

"Ordinarily courts properly remain inactive unless and until judicial action is required by some party in accordance with recognized practice. But courts have a wide inherent power to do justice and to adopt procedure to that end." *Quincy Tr. Co. v. Taylor*, 317 Mass. 195, 198 (1944). "Where a court has once taken jurisdiction and has become responsible to the public for the exercise of its judicial power so as to do justice, it is sometimes the right and even the duty of the court to act in some particular sua sponte." *Id.* at 198.[1] "Especially appropriate for the exercise of judicial power *sua sponte* is a case in which an appointee of the court to a position of trust is found to be unworthy or unsuitable." *Id.* at 575-76.

Class representatives are akin to an "appointee of the court to a position of trust," (*see id.)*, as they have fiduciary duties to the class they represent (*In re M & F Worldwide Corp.*, 799 A.2d 1164, 1174, n. 34 (Del. Ch. 2002)), and their ability to adequately represent the class is subject to court approval. *See* MASS. R. CIV. P. 23. Moreover, the fiduciary duties of class

[1] Amongst the sweeping powers a trial court judge can exercise, sua sponte, are the powers to assign a case for trial, require a child to appear for examination, call and question witnesses even over the objections of the parties, take a case from the jury, set aside verdicts, refer a case to an auditor and read those findings into evidence against the will of the parties, join cases together, and correct her own records. *Id.* at 198 (citations omitted).

representatives manifest "even before the class has been certified."[2] *In re M & F Worldwide Corp.*, 799 A.2d 1164, 1174, n. 34 (Del. Ch. 2002). *See also Roper v. Consurve, Inc.*, 578 F.2d 1106, 1110 (5th Cir. 1978), aff'd sub nom. *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980) ("By the very act of filing a class action, the class representatives assume responsibilities to members of the class").

In other words, putative class representatives are in a position of trust as soon as the class action complaint is filed. It follows that the court's concomitant duty to ensure the adequacy of the class representative arises simultaneously and continues through the conclusion of the litigation. And where the class representative becomes unable to fulfill his fiduciary duties to the class before certification, the court may need to act sua sponte to carry out its duty to protect absent class members' interests.

Here, Mr. Kingara – the sole putative class representative – passed away during the pendency of the case. Without a named plaintiff, the putative class is left vulnerable, as they lack

[2] "Once class allegations are made, various otherwise routine decisions such as whether to compromise the action or abandon the class claims – are no longer wholly within the litigants' control. The attorneys and parties seeking to represent the class assume fiduciary responsibilities, and the court bears a residual responsibility to protect the interests of class members, for which Rule 23(d) gives the Court broad administrative powers." Federal Judicial Center, Manual For Complex Litigation § 30 at 31–32 (3d ed.1995).

the representation necessary to effectively pursue their claims. And, if the case is ultimately dismissed because (as here) a personal representative of the decedent's estate is not substituted into the action, the putative class risks significant prejudice due to the running of the statute of limitations. Courts are duty-bound to act to prevent such harm from befalling putative class members. *See, e.g., Culver v. City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002) (it is "[t]he judge's duty is to order notice unless the risk of prejudice to absent class members is nil and to review for adequacy the form of notice proposed by class counsel in response to the order") (emphasis added); *Sanft v. Winnebago Industries, Inc.*, 216 F.R.D. 453, 460 (N.D.Iowa 2003) (authorizing notice pursuant to Rule 23(d), reasoning that "the circumstances of this case pose a significant risk of prejudice to putative class members who do not receive notice of this order. This suit has been pending for almost two years. If the putative class members do not receive notice of this order they may permit the statute of limitation to run on their claims. The court is therefore of the opinion that notice of this order should be given to putative class members").[3]

[3] *See also Griffith v. Javitch, Block & Rathbone, LLP,* 358 B.R. 338, 342 (S.D.Ohio 2007) ("While the Court does not suggest that Defendants have acted improperly in settling the claims brought against them, Defendants did reach individual settlements with both of the individual plaintiffs prior to any class certification motion being filed. Under all of the circumstances of

Therefore, not only was it permissible for the trial court to act to order the issuance of notice to putative class members in this action, it was the right thing to do given the potential prejudice flowing to the putative class if the trial court sat on its hands and did nothing.

VII. CONCLUSION

For the foregoing reasons, this Court should find that putative class counsel has limited authority to request, pursuant to MASS. R. CIV. P. 23, that the trial court issue notice to the putative class to protect their interests when those interests are jeopardy, such as when the sole putative class representative passes away during the pendency of the action.

Alternatively, the Court should find that a trial court has the authority under MASS. R. CIV. P. 23(d) to, sua sponte, order the issuance of notice to the putative class.

In either circumstance, this Court should find that the trial court did not err is ordering the issuance of notice to the putative class.

this case, the Court concludes that issuing notice [to the putative class] is the most fair and equitable resolution").

Respectfully submitted,

/s/ Raven Moeslinger

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Counsel For Putative Class

Dated: July 12, 2021

CERTIFICATE OF RULE 16(k) COMPLIANCE

Pursuant to M.R.A.P. 16(k), Plaintiff-Appellant, through his counsel, hereby certify that he has complied with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs, including, but not limited to, M.R.A.P. 16(a)(6), 16(e), 16(f), 16(h), 18, and 20.

/s/ Raven Moeslinger

_____

Raven Moeslinger, Esq.

CERTIFICATE OF SERVICE

I, Raven Moeslinger, hereby certify that today I served the within document on counsel for the appellants/defendants by electronic mail at the following addresses:

Daniel S. Field, Esq.
Alexandra Pichette, Esq.
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/s/ Raven Moeslinger

_____

Raven Moeslinger

ADDENDUM

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notify 04/05

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF
THE TRIAL COURT

Notice sent
4/07/2021
R. M.
LAW OFFS. OF
N. F. O.,P.C.
D. S. F.
M.,B. & J.,LLP
A. P.
N. F. O.
LAW OFFS. OF
N. F. O.,PC.

CHARLES KINGARA,
individually and on behalf of others
similarly situated,

Plaintiff,

v.

SECURE HOME HEALTH CARE
INCORPORATED, SIDDHARTH
PARMAR, and ANKUR RUSTGI,

Defendants.

C. A. No. 1984CV03059E

E-Filed 03/25/2021 (NJ)

(sc)

PLAINTIFF'S MOTION TO AUTHORIZE NOTICE TO THE PUTATIVE CLASS AND EXTEND TRACKING ORDER DEADLINES

Plaintiff Charles Kingara, through counsel, respectfully moves the Court pursuant to Mass. R. Civ. P. 23(d) to authorize issuance of notice to the putative class in order to apprise the putative class of the status of the case, including the death of the named plaintiff, and to allow time for a suitable class representative to join the case after notice issues, and to extend the tracking order deadlines by 120 days to allow the parties to complete discovery.

WHEREFORE, Plaintiff respectfully requests that this Court issue an order:

1. Authorizing notice to the putative class pursuant to Mass. R. Civ. P. 23(d) substantially in the form attached as Exhibit A, ordering the defendants to identify putative class members' names and addresses, and allowing counsel 60 days from the date of issuance to substitute in a suitable class representative;

Allowed. [signature]
5 April 2021

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Massachusetts General Laws Annotated
Massachusetts Rules of Civil Procedure
IV. Parties (Refs & Annos)

Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), Rule 23

Rule 23. Class Actions

Currentness

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. The court may require notice of such proposed dismissal or compromise to be given in such manner as the court directs. The court shall require notice to the Massachusetts IOLTA Committee for the purpose set forth in subdivision (e)(3) of this rule.

(d) Orders to Insure Adequate Representation. The court at any stage of an action under this rule may require such security and impose such terms as shall fairly and adequately protect the interests of the class in whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. Whenever the representation appears to the court inadequate fairly to protect the interests of absent parties who may be bound by the judgment, the court may at any time prior to judgment order an amendment of the pleadings, eliminating therefrom all reference to representation of absent persons, and the court shall order entry of judgment in such form as to affect only the parties to the action and those adequately represented.

(e) Disposition of Residual Funds.

(1) “Residual Funds” are funds that remain after the payment of all approved class member claims expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order, judgment or approved compromise in a class action certified under this rule that establishes a process for identifying and compensating members of the class may provide for the disbursement of residual funds. In matters where the

claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, or to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts.

(3) Where residual funds may remain, no judgment may enter or compromise be approved unless the plaintiff has given notice to the Massachusetts IOLTA Committee for the limited purpose of allowing the committee to be heard on whether it ought to be a recipient of any or all residual funds.

Credits

Amended November 25, 2008, effective January 1, 2009; April 24, 2015, effective July 1, 2015.

Editors' Notes

REPORTER'S NOTES--1973

Prior Massachusetts practice in the area of class suits was governed entirely by case law. The requirements for maintaining a class suit in Massachusetts were set out as follows:

"Class bills may be maintained where a few individuals are fairly representative of the legal and equitable rights of a *large number* who cannot readily be joined as parties. The persons suing as representatives of a class must show by the allegations of their bill that all the persons whom they profess to represent have a common interest in the subject matter of the suit *and a right and interest to ask for the same relief against the defendants.* It is not essential that the interest of each member of the class be identical in all aspects with that of the plaintiffs. The interest must arise out of a common relationship to a definite wrong. There must be a joint prejudice to all the class whom the plaintiff seeks to represent. The wrong suffered must be subject to redress by some common relief beneficial to all. The plaintiffs must be fairly representative in all essential particulars of the class for which they seek to act.... Mere community of interest in the questions of law or of fact at issue in a controversy or in the kind of relief to be afforded does not go far enough to warrant a class suit. Avoidance of multiplicity of suits is not enough." Spear v. H.V. Greene Co., 246 Mass. 259, 266-267, 140 N.E. 795, 797-798 (1923). (emphasis supplied)

This rule likewise applies where the action was brought *against* a class. Thus in Thorn v. Foy, 328 Mass. 337, 338, 103 N.E.2d 416, 417 (1952) a suit was held properly brought against the officers of a labor union, individually and as representatives of the members of the union, because it was found that the members were too numerous to be sued individually and the named defendants adequately represented the entire membership.

Rule 23(a) sets out four prerequisites to a class action. These prerequisites, which are also contained in Federal Rule 23(a) as amended in 1966, closely parallel prior Massachusetts practice as stated in Spear v. H.V. Greene Co., supra.

"(1) the class is so numerous that joinder of all members is impracticable."

Federal courts have drawn very few lines with respect to how large a class must be in order to allow the class action. Most courts would agree that mere numbers should not be the sole test of practicability of joinder.

"But courts should not be so rigid as to depend upon mere numbers as a guideline on the practicability of joinder; a determination of practicability should depend upon all the circumstances surrounding a case." Demarco v. Edens, 390 F.2d 836, 845 (2d Cir.1968).

The Supreme Judicial Court has never attempted to set any minimum number which would be necessary for a class suit. The opinions use such language as "large number who cannot readily be joined as parties," Spear v. H.V. Greene Co., 246 Mass. at 266, 140 N.E. at 797; "When the parties interested are very numerous, so that it would be difficult and expensive to bring them all before the court ... the court will not require a strict adherence to the [general] rule [that all interested persons be made parties]." Stevenson v. Austin, 44 Mass. (3 Metc.) 474, 480 (1842).

Rule 23(a)(1) will have little effect on prior Massachusetts practice.

"(2) there are questions of law or fact common to all."

The requirement of common questions of law or fact is the same as that established for joinder under Rule 20 and intervention under Rule 24. It should, however, be noted that Rule 23(a)(2), unlike Rules 20 and 24, does not also require a single transaction or series of transactions or a single occurrence or series of occurrences. However, the language of Rule 23(b) concerning the predominance of the questions of law or fact over questions affecting individual members would imply the need for a single transaction or occurrence or a series of transactions or occurrences.

Rule 23(a)(2) should have little effect on prior Massachusetts law. "The persons suing as representatives of a class must show by the allegations of their bill that all the persons whom they profess to represent have a common interest in the subject matter of the suit and a right and interest to ask for the same relief against the defendants." Spear v. H.V. Greene Co., 246 Mass. at 266, 140 N.E. at 797.

"(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will adequately protect the interests of the class."

Prerequisite (3) was written into Federal Rule 23 when it was amended in 1966. It should be read with prerequisite (4). Both requirements state the need for the ability of the representatives of the class to protect its interests. The word "typical" does not require that all members of the class be identically situated. Siegel v. Chicken Delight, Inc., 271 F.Supp. 722, 726-727 (N.D.Cal.1967). This is similar to the language of the Supreme Judicial Court in the *Spear* case: "It is not essential that the interest of each member of the class be identical in all respects with that of the plaintiffs. The interest must arise out of a common relationship to a definite wrong." Spear v. H.V. Greene Co., 246 Mass. at 266, 140 N.E. at 797.

Rule 23(a)(3) and (4) should have little effect on prior Massachusetts law.

Rule 23(b) deletes substantial portions of Federal Rule 23(b) which are unnecessary to state practice. Beyond the four requirements set out in Rule 23(a) for maintaining a class action the only further requirements set out in Rule 23(b) are findings by the Court: (1) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Rule 23(c) and (d) are designed to afford protection to absent members of the class.

Unlike Federal Rule 23, the Massachusetts class action rule does not *require* the giving of notice to members of the class; nor does it provide to members of the class the opportunity to exclude themselves. Instead Rule 23(d) provides that the court may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. No doubt the trial judge will order the giving of appropriate notice to members of the class, of the commencement of the action where fairness and justice so require, particularly where the failure to give notice may raise subsequent problems of res judicata.

REPORTER'S NOTES--1996

With the merger of the District Court civil rules into the Mass.R.Civ.P., Rule 23 of the Mass.R.Civ.P. governing class actions is made applicable to District Court proceedings.

REPORTER'S NOTES--2008

The 2008 amendment, effective January 1, 2009, added Rule 23(e) concerning residual funds in class action proceedings. This amendment was recommended to the Supreme Judicial Court by the Massachusetts IOLTA Committee.

Notes of Decisions (114)

Rules Civ. Proc., Rule 23, MA ST RCP Rule 23
Current with amendments received through May 15, 2021.

End of Document

2003 WL 26477887
Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

GUTIERREZ & Morgan

v.

JOHNSON & JOHNSON.

No. Civ. 01–5302 WHW.
|
April 3, 2003.

Attorneys and Law Firms

Scott A. George, Seeger Weiss, LLP, Bennet Dann Zurofsky, Newark, NJ, for Gutierrez & Morgan.

Hon. NICHOLAS H. POLITAN, Special Master.

Dear Counsel:

***1** This matter comes before the Special Master on the joint submission of plaintiffs Guiterrez. Morgan, and Jenkins ("plaintiffs") and defendants Johnson & Johnson ("defendants" or "Johnson & Johnson") for aid in resolving a dispute. The issue before the Special Master is what language defendant is required by the New Jersey Rules of Professional Conduct ("Rules" or "RPC's") to include in an Advisory to its own employees, who are also putative class members in plaintiffs' as-yet uncertified class, before interviewing the employees in preparation for its defense in the suit. This question implicates the interrelationship between RPC's 1.13, 4.2 and 4.3. Although these Rules have been thoroughly analyzed in exploring attorneys' ethical obligations when initiating certain *ex parte* contacts, *see Andrews v. Goodvear Tire & Rubber Co., Inc.,* 191 F.R.D. 59 (D.N.J.2000), the majority of those cases have dealt with a plaintiff seeking to obtain information from the employees of defendant corporation, rather than the & corporation seeking to obtain information from its own employees. *See e.g., In re Complaint of PMD Enterprises, Inc.,* 215 F.Supp, 2d 519 (D.N.J.2002); *Andrews,* 191 F.R.D. at 76; *Michaels v. Woodland,* 988 F.Supp. 468 (D.N.J.1997)[1]

In the majority case, and as explained in-depth in *Andrews,* the Rules require the following. RPC 4.2 allows an attorney to conduct an *ex parte* interview with any individual in order to determine if the individual is either (1) represented as an individual by counsel, or (2) is represented by corporate counsel by being in the "litigation control group." *Andrews,* 191 F.R.D. at 78; *New Jersey Rule of Professional Conduct Rule 4.2* West (2003). An attorney must exercise reasonable diligence in determining whether that person is represented. *Id.* Under RPC 1.13, the "litigation control group" is a narrowly defined group of people that is significantly involved in determining the employer's legal position. *New Jersey Rules of Professional Conduct Rule 1.13(e)* (West 2003). *Andrews* held that after determining that an individual is not represented, the attorney's ethical obligations are not over. *Andrews,* 191 F.R.D. at 79. Instead, the attorney must abide by RPC 4.3 relating to communications with an "unrepresented person" and "employees of an organization". Once an attorney determines that a person is neither represented by counsel nor in a litigation control group, the attorney must "first and foremost, not appear 'disinterested'." *Andrews,* 191 F.R.D. at 79; *New Jersey Rules of Professional Conduct Rule 4.3* (West 2003). If the attorney "knows or reasonably should know" that the person has misunderstood their role in the case, the attorney is obligated under RPC 4.3 to correct the misunderstanding. *Id.* In addition, if the interviewee is an employee of an organization (but not a member of the litigation control group), "the attorney must again exercise reasonable diligence in determining whether the person is actually represented by the organization's attorney pursuant to 1.13(e) or has a right to such representation." *Id.* If. however, the attorney establishes that the individual is neither actually represented by the organization's attorney nor has a right to such representation, the attorney is obligated to "make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney." *Id.* Only after adhering to both RPCs 4.2 and 4.3 may an attorney discuss the substantive case with an individual.

***2** Thus, plaintiff's attorney's ethical obligations when conducting *ex parte* interviews with the employees of defendant corporation are fairly clear. However, the issue now before the Special Master is factually distinct from the above, and is one which the RPCs were not drafted to address. *See Andrews,* 191 F.R.D. at 69–77 (detailing the long history of the drafting of the RPCs). When dealing with its own employees who may be putative class members of an as-yet uncertified class, what are defense counsel's ethical obligations? This question is complicated by the injection of another issue—an employer's right to formulate a defense by interviewing its own employees. It is a truism that in the investigation of a complaint against a company, the company

has the right to gather information from its employees. In fact, it would be virtually impossible for a corporation to mount a defense without such an investigation.

Plaintiffs in this case ask the Special Master to simply apply the present RPC's to this reverse situation, but the scenario does not fit within the Rules as easily as plaintiff suggests. Rather, in order to determine the obligations of defense counsel in this case, we must look to the purpose of the RPC's, the rights of the putative class members, and the rights of the employer.

The purpose of RPC's 4.2 and 4.3 is to "preserve [ ] the integrity of the attorney client relationship and the posture of the parties within the adversarial system ... [and] to protect the lay person who may be prone to manipulation by counsel." *Andrews,* 191 F.R.D. at 76 (citing *Michaels v. Woodland,* 988 F.Supp. 458, 470 (D.N.J.1997)). Thus, the Rules have three goals: preserving the attorney-client relationship, preserving the posture of the parties, and protecting the lay person from manipulation by counsel.

In order to accomplish these goals, and in molding these rules to fit the current situation, the first issue to be addressed is the classification of the putative class members as unrepresented or represented parties, or as some type of hybrid. This is necessary in order to determine whether the attorneys' ethical obligations in this case stem from Rule 4.2, 4.3 or some combination of the two. Both parties agree that it is the minority view that a fully developed attorney-client relationship exists between putative class members and class counsel.[2] The majority view holds that before certification as a class, no fully developed attorney-client relationship exists between putative class members and class counsel *See e.g., Van Gemert v. Beoing Co.,* 590 F.2d 433, 440 n. 15 (2d Cir.1978); *Fulco v. Continental Cablevision, Inc.* 789 F.Supp. 45, 47 (D.Mass.1992); *Bower v. Bunker Hill Company,* 689 F.Supp. 1032, 1033 (E.D.Wash.1985); *Resnick v. American Dental Ass'n.,* 95 F.R.D. 372, 377 (N.D.Ill.1982); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) Section 99 cmt.1.

The Special Master does not accept the minority view that putative class members are considered "represented persons" for purposes of these rules. These individuals may or may not meet the qualifications of class members, and even if they do, they may or may not opt out of the class. Viewing them as represented parties at this juncture is premature. However, the majority view—that no attorney-client relationship exists between class counsel and putative members—appears overly harsh. While these individuals do not currently have a fully developed attorney-client relationship, they very well may have a stake in the litigation, and class counsel are ready and willing to represent them. Thus, they cannot be treated as unrepresented parties.

***3** Instead, putative class members prior to certification hold a hybrid status. *See* MANUAL FOR COMPLEX LITIGATION (3D) Section 30.24 ("Although no formal attorney-client relationship exists between class counsel and the putative members of the class prior to class certification, there is at least an incipient fiduciary relationship between class counsel and the class he or she is seeking to represent."). Because of this status, the putative class members have certain rights stemming from their potential interest in the litigation. Common sense dictates that in order to protect these rights, the putative members be informed of the existence of the law suit and the identity of the attorneys for the plaintiffs, as well as the fact that it is a class action, and that they may be a part of the class. This is necessary in order to protect the lay person from manipulation by counsel as intended by the Rules.

However, balanced against this need to fully inform the employee of his or her rights prior to the interview is the employer's right to formulate a defense by interviewing its own employees. Johnson & Johnson has a right to communicate with its employees in their capacity as representatives and agents of the corporation in order to gather information about the corporation's actions. As discussed above, the ethical rules were formulated with a very different situation in mind, and must be interpreted in this setting to protect the rights of the employer as well as the employee.

Thus, in analyzing defense counsel's ethical obligations toward putative class members who are also employees, the Special Master must analyze Rules 4.2 and 4.3 in the context of the hybrid individual and the employer. In that context, it is clear to the Special Master that the following statements should be included in the Advisory. *See* Exhibit A for the Advisory drafted by the Special Master.

The first of plaintiffs' proposed changes to the advisory is the addition of the term "company-wide" before the word "discrimination" in the sentence: "In this case, three plaintiffs allege company-wide discrimination in compensation and promotions on the basis of race and Hispanic national origin." The defendant has stated that although the phrase

is somewhat inaccurate, since the plaintiffs actually allege that the discrimination exists within John & Johnson and 35 subsidiaries, it does not object to the addition of the language. *See* Defendant's Letter Brief of March 5,2003, p. 3. The Special Master finds this language useful in making clear to the lay person that he or she may be part of this class even if he or she did not work in proximity with the named plaintiffs and did not experience identical working conditions. This clarifies for minority employees at Johnson & Johnson who feel they have experienced discrimination that the suit may represent their interests as well. Thus, this language will be included in the advisory.

The second proposed addition is the identification of class counsel. Defendant argues that its obligations under the rules do not encompass identifying attorneys for the plaintiff class, and that such a requirement is tantamount to forcing Johnson & Johnson to advertise for the plaintiffs. The Special Master agrees that it would be improper to require the corporation to submit a publicity item for plaintiffs' attorneys. However, simply identifying class counsel does not have that effect.

***4** Moreover, identifying class counsel is an important facet in a complete disclosure to putative class members. Without such a disclosure, employees who wish to retain an attorney prior to or rather than participating in interviews with Johnson & Johnson may not know where to turn. RPC 4.3 requires, and *Andrews* held, that when a person is an employee of an organization, the attorney must:

> exercise reasonable diligence in determining whether the person is actually represented by the organization's attorney pursuant to 1.13(e) or has a right to such representation. If the approaching attorney ascertains that the person is neither actually represented by the organization's attorney nor has a right to such representation, the attorney has an obligation to 'make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.'

Andrews, 191 F.R.D. at 79.

Although the identification of counsel is not specifically required by the Rules cited above, it is also unnecessary in the reverse situation—where a plaintiff's attorney ascertains that a defendant's employee is interested in representation. In that instance, the employee simply has to go to its own employer for representation. In this case, an employee may have no idea how to proceed if it chooses to exercise its right to join the class.[3] Thus, the Special Master finds that in order to follow the intent of the Rules and give the individual a meaningful and informed choice whether to participate in the interview, the Advisory must include the identification of class counsel.

The third addition proposed by plaintiffs is the following specific statement detailing the possible conflicts of interest between the employee and Johnson & Johnson. "If Plaintiffs and the class are successful, it is possible you will receive monetary relief and may benefit from new Company employment policies and practices." This statement is redundant and not required by the RPC's. The Advisory, as worded by the defendant, includes several statements detailing the conflict of interest Johnson & Johnson's attorneys face. These statements include: that the attorneys represent Johnson & Johnson, that they are defending a suit in which plaintiffs allege discrimination, that Johnson & Johnson denies the allegations, that the party being interviewed may or may not be a member of the potential class, that Johnson & Johnson takes the position that the lawsuit should not proceed as a class action, and that Johnson & Johnson does not represent the interviewee.

This litany of warnings to the employee is certainly sufficient to advise him or her that the attorney's interests may be adverse to their own. In addition, the Rules require only that counsel make clear the *attorney's* conflict of interest, not the individual's, *see* RPC 4.3, and that has been clearly stated. Once again, it is important to emphasize that Johnson & Johnson, as the interviewee's employer, has certain rights to defend itself in this case by conducting a factual investigation. This investigation must, by its nature, include interviews with its employees. Undercutting this right by requiring the employer to state plaintiffs' case so strongly that it virtually ensures that the interviewee will not talk to its employer is improper under the Rules. Thus, this statement does not need to be included within the Advisory.

***5** Plaintiffs' next proposed addition is the following:

> The plaintiffs attorneys have advised us, however, that they are prepared to represent any member of the proposed class who wishes to be represented by them in connection with this particular case and discussions related to this particular case. Plaintiffs' counsel can be reached through Nicole Austin–Hillery at 202–822–5100.

As discussed previously, requiring Johnson & Johnson to advertise for class counsel is improper. It is quite clear from the wording of the Advisory, including the specific identification of plaintiffs' counsel, who an employee should

contact if interested in joining the class. Instead of simply supplying the employee with enough information to make an informed decision, the promotion of plaintiffs' counsel tips the scales toward plaintiffs and sends the message that it is not in the employees' interest to cooperate with the defendant. Thus, Johnson & Johnson need not include this wording in the Advisory.

Plaintiffs also request that Johnson & Johnson put in the Advisory the following: "This interview is voluntary. Whether you participate or not, J & J cannot and will not retaliate against you in any way." Defendant counsel argues that this statement should not be included because their obligations to the employees are much more complicated than this statement encompasses. Counsel argues that employers may have the right to remove an employee from a position in reaction to a lawsuit in certain limited circumstances, *citing Jones v. Flagship,* 793 F.2d 714, 726 (5th Cir.1986); *Smith v. Singer,* 650 F.2d 214, 216 (9th Cir.1981). Whatever the Special Master's views on an employer's obligation not to retaliate against an employee for participating in an employment discrimination action, the Special Master finds that the RPC's do not require this voluntariness warning. This warning is beyond the scope of the Rules, The information Johnson & Johnson has already given the employees—the nature of the action, the fact that they may be part of the class, the identity of plaintiffs' counsel—is sufficient to meeting its obligation under the RPC's. Although plaintiffs argue eloquently that more information should be given the individual, the Special Master is reminded that protection of the lay person is balanced against the employer's rights in this instance, and that the voluntariness language goes beyond the scope of the Rules. Thus, it need not be included.

Finally, the Advisory asks the employee—"Have you retained an attorney to represent you in this case?" This language is necessary to fulfill the obligations of RPC 4.2 which provides that the lawyer should exercise reasonable diligence in determining whether the person is actually represented, including a specific inquiry of the person as to whether that person has retained counsel.

If the employee's answer is "yes", the Advisory must contain language stating that the interview is immediately terminated, because at that point the employee has moved from hybrid status to that of a represented person, and Rule 4.2 requires that the attorney is precluded form communicating with that person about the substance of the action. Thus, if the answer if "yes", the defense attorney must say: "Thank you for your time. Please have your attorney contact me."

***6** If the answer is "no", the attorney must ask the employee if they wish to retain an attorney in connection with the interview. This question satisfies the obligations of the Rules for the same reasons that defense counsel's identification of class counsel is required, If the employee does wish to retain an attorney, the Advisory should say:

> Okay, then we will reschedule this interview for a mutually convenient time within the next two weeks. Please retain an attorney and then have your attorney contact me as quickly as possible in order to make the necessary arrangements.

The Special Master finds that these changes to the Advjsory track the intent of the RPC's by both protecting the putative class member and preserving the employer's rights to information from its current employees. An important point to keep in mind is that under the Rules, plaintiffs' counsel has the right to interview these same individuals, provided they are not members of the litigation control group. If plaintiffs feel that more information should be provided to Johnson & Johnson employees, they are free to provide it, as long as they too act within the confines of the RPC's.

As appears from the history of the Rules of Professional Conduct in question, the drawing of lines is not an easy task and the balancing delicate, yet required. The Special Master is satisfied that the proposed dialogue set forth in Appendix A is appropriate in this case.

EXHIBIT A

We are attorneys for Johnson & Johnson and would like to speak with you to obtain information for the company's defense in the lawsuit Gutierrez, et al. v. Johnson & Johnson, Civil Action No. 02–5302 (D.N.J.). In this case, three plaintiffs allege company-wide* discrimination in compensation and promotions on the basis of race and Hispanic national origin, Johnson & Johnson denies these allegations.

Also, the plaintiffs are bringing this case as a class action in which they seek to represent persons of African and/or Hispanic descent employed by J & J companies in permanent salaried positions (exempt and non-exempt) in the United States at any time since November 15, 1999. Based on this

description, you may or may not be a member of this potential class. However, J & J takes the position that the lawsuit should not proceed as a class action. The Court will decide in the future whether a class action is appropriate. At this point, we obviously do not know what the Court will decide.

We believe that we should explain a few things before we interview you. As stated above, we are attorneys for Johnson & Johnson in this case. We're garnering information for the purpose of preparing Johnson & Johnson's defense to this lawsuit We do not represent you personally in this case.

The plaintiffs have obtained their own attorneys to represent them in this case. We do not know the extent to which others may be represented in this case by an attorney. Plaintiffs are represented by Johnnie L. Cochran, Jr. of The Cochran Firm of New York City, New York, Cyrus Mehri of Mehri & Skalet of Washington, D.C., Bennet Zurofsky of Reitman Parsonnet of Newark, New Jersey and Bruce Ludwig of Shelter, Ludwig & Badey of Philadelphia, Pennsylvania. We also advise you that you have a right to retain an attorney of your own choice to represent you m connection with this particular case. If you have retained an attorney for purposes of this case, we cannot speak with you without the attorney's consent. So, that's why we have to ask you whether or not you are represented by any attorney in connection with this lawsuit before we speak with you.

***7** Have you retained an attorney to represent you in this case?

If the answer is Yes; "Thank you for your time. Please have your attorney contact me."

If the answer is No; "Would you like to retain an attorney in connection with this Interview?"

If the answer is Yes: "Okay, then we will reschedule this interview for a mutually convenient time within the next two weeks. Please retain an attorney and then have your attorney contact me as quickly as possible in order to make the necessary arrangements."

If the answer is No: "Fine, then let's continue."

If the answer is I Don't Know: "Okay, why don't we take a break and call me tomorrow to let me know what you have decided."

All Citations

Not Reported in F.Supp.2d, 2003 WL 26477887

Footnotes

1 Although there is a decision within the Third Circuit dealing with a defendant corporation's ethical obligations 10 its own employees in a similar situation, *see* *Dondore v. NGK Metals Corp.,* 2001 WL 516635 (E.D.Pa. May 16, 2001), the Special Master finds that case distinguishable for several reasons. First, Judge Bartle in *Dondore* relied upon the Pennsylvania Rules of Professional Conduct, which differ from the New Jersey RPC's. Second, in an opinion one month earlier, *see* *Dondore v. NGK Metals Corp.,* 152 F.Supp.2d 662 (E.D.Pa.2001), Judge Bartle held that counsel was prohibited from interviewing *ex parte* putative class members in a related action. The second opinion, upon which plaintiffs rely heavily in this case, is founded upon the radical view of the RPC's which the Special Master does not choose to adopt.

2 For this minority view, *see* *Dondore v. NKG Metals Corp.,* 152 F.Supp.2d 662 (E.D.Pa.2001); *Impervious Paint Industries v. Ashland Corp.,* 508 F.Supp., 720 (W.D.Ky.1981). However, note that in *Impervious Paint,* the issue is the relationship between class counsel and potential class members between the institution of the class-action and the end of the opt-out period. *Impervious Paint,* 508 F.Supp. at 722. In this case, although a suit has been instituted, it has not been certified as a class action, so the relationship between class counsel and putative members is even more amorphous.

3 Defendants suggest that because there is a web site containing information about the action and identifying class counsel, there is no need to give the party being interviewed specific information about the case. However defendant assumes that every employee of defendant corporation has access to the internet and is proficient at searching the world wide web. Because this is simply not true, the existence of the web site does not lessen defendant's ethical obligation to identify class counsel.

* The bold typeface indicates the Court's additions to Defendant's proposed Advisory.

End of Document

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Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Marvin SCHICK, Plaintiff,
v.
David BERG and Moriarity, Leyendecker, P.C. Defendant.

No. 03 Civ. 5513(LBS).
|
April 20, 2004.

MEMORANDUM AND ORDER

SAND, J.

***1** Plaintiff Marvin Schick ("Schick") filed a complaint against Defendants David Berg and Moriarty, Leyendecker, P.C. ("Berg" and "Moriarty Firm" or "Firm"). Berg and the Moriarty Firm were lead attorneys in a class action suit against the Marriott Corporation filed in Texas (the "Marriott Litigation"). Plaintiff Schick was a class member in that suit. During the course of the Marriott litigation, Defendant Berg urged Les Fuchs to consider suing Schick to whom he had sold his interests in a Marriott limited partnership at a price below the ultimate settlement price. The Moriarty Firm filed a motion on behalf of Mr. Fuchs in the Marriott Litigation, and initially sought to represent Mr. Fuchs before this Court. The Plaintiff asserts that this action breached certain duties that Defendants owed him. For the reasons given below, Defendant Berg's motion for summary judgment is granted. The Moriarty Firm's motion is also granted. Plaintiff's cross-motion for partial summary judgment is accordingly denied.

I. Background

In the mid-1980s, Marriott offered for sale limited partnership units in a number of investment entities including one known as Courtyard By Marriott LP ("the CBM 1 Units" or "Units"). Plaintiff Schick purchased 2.5 Units. Les Fuchs, another investor, purchased 3 Units. These Units did not provide purchasers with the rate of return that had been represented by Marriott. Numerous Unitholders began organizing to advocate for better treatment from Marriott. On August 16, 1999, Mr. Fuchs agreed to sell his three Units to Schick.

Defendants Berg and the Moriarty Firm had brought a putative class action suit on behalf of Unit purchasers (the Marriott Litigation) in mid-1998. In February 2000, they reached an agreement with Marriott to settle the class action litigation, and this agreement was signed on March 9, 2000. As a part of that settlement, Marriott agreed to buy out the Unit holders. Plaintiff Schick, unhappy with the terms of the agreement, intervened in the Marriott litigation on or about May 8, 2000, and moved to amend the terms of the agreement. He retained Lawrence Kolker, an attorney, to make this motion.

However, just prior to the Plaintiff's intervention in May 2000, Defendant Berg communicated by telephone with Mr. Fuchs.[1] After learning of the transaction between Plaintiff Schick and Mr. Fuchs in which Mr. Fuchs sold to Plaintiff Schick his three units at a price significantly below the price paid by Marriott under the settlement agreement, Defendant Berg told Mr. Fuchs that he "had been screwed" and "mistreated" by the Plaintiff and should consider a lawsuit against him. He urged Mr. Fuchs to obtain counsel. Though he declined to represent Mr. Fuchs in a suit against Mr. Schick himself, documents from his office concerning Defendant Schick eventually made their way into Mr. Fuchs's possession. Mr. Fuchs then contacted the Moriarty Firm in August 2000. That firm agreed to represent him in his suit against Plaintiff Schick.

***2** The class was certified on August 3, 2000, according to the Notice of Pendency signed by the Texas court. *Quinn Affidavit,* Exhibit I, p. 5 ("On August 3, 2000, the Court under Texas Rules of Civil Procedure 42(a) and (b) certified a settlement class of CBM I LP limited partners."). As a result of Plaintiff's earlier intervention, the parties amended the settlement agreement that had been signed previously by class counsel. The Texas court found Schick's amendment fair, reasonable and adequate, and approved the new settlement agreement in its October 24, 2000 Judgment Order.

Schedule "A" of that order listed all and only those who had removed themselves from the Settlement Class. "Any Member of the CBM I LP Settlement Class whose name does not appear on the list annexed hereto as Schedule 'A' failed to file a valid request for exclusion from the CBM I LP Settlement Class or be otherwise excluded, and is hereby forever barred from asserting otherwise." *Quinn Affirmation,* Exhibit H, p. 4. Marvin Schick is not listed on Schedule "A," and so he ultimately became a class member. As such, he

received an award from Marriott for his Units based upon the amended settlement agreement.

On August 31, 2000, Les Fuchs sent a demand letter to Plaintiff Schick. In it, he demanded payment for the difference between the settlement amount and the price Schick had paid Mr. Fuchs for the three Units purchased from him in August 1999. *Blander Affidavit,* 10/17/03 Exhibit D. Mr. Fuchs threatened to sue if not paid. As noted above, the Texas court approved the final Marriott Litigation settlement agreement on October 24, 2000.

On December 11, 2000, Paul H. Doyle of the Moriarty Firm wrote an additional demand letter to Plaintiff Schick. In it, he claimed to represent Les Fuchs, and demanded payment within ten days. *Blander Affidavit,* 10/17/03 Exhibit E. Three months later, on March 14, 2001, the Moriarty Firm filed a "Petition in Intervention" on Mr. Fuchs's behalf against Plaintiff Schick. *Blander Affidavit,* 10/17/03 Exhibit A. That Petition was dismissed on jurisdictional grounds, at which point the Moriarty Firm filed a lawsuit against Plaintiff Schick on Mr. Fuchs's behalf in this Court, alleging fraud and breach of fiduciary duty. *Plaintiff's Rule 56.1 Statement,* ¶ 22. By decision dated April 10, 2002, this Court granted Mr. Schick's application not to allow the Moriarty Firm to appear *pro hac vice* to represent Mr. Fuchs because the Moriarty Firm had previously represented Plaintiff Schick in the Marriott Litigation.[2] That lawsuit continued with other counsel, but this Court ultimately dismissed it on June 4, 2003, granting Defendant's motion for summary judgment.

II. Analysis

In his complaint, Plaintiff Schick alleges two causes of action. The first claims that the conduct of Defendants, in encouraging Fuchs to sue Schick, constituted "maintenance and champerty, which is proscribed by applicable law and rules." *Complaint,* p. 10. In his briefs, he expands this to include barratry. In his second cause of action, Plaintiff asserts that as a member of the class action for which Defendants were class counsel, he was their client. Consequently, he insists that Defendants "owed Schick, as their client, a duty of undivided loyalty." *Complaint,* p. 11. The Plaintiff alleges that Defendants violated this duty of loyalty by inducing Mr. Fuchs to commence a lawsuit against Mr. Schick, and by representing Mr. Fuchs against Schick.

A. The Law of Texas Applies

***3** Defendants argue that Texas law controls. *Transcript,* p. 3. This is in essence conceded by counsel for the Plaintiff. In response to this Court's inquiry as to whether Texas law is controlling, counsel replied, "It probably is, Your Honor, and I would be less than candid if I said that I have a better argument that New York applies than Texas law....I respectfully submit it really doesn't matter that much because I think the law in New York and the law in Texas is identical, with respect to ... whether [Defendants] separately breached their fiduciary duty of loyalty and fidelity that they owed to Dr. Schick." *Transcript,* p. 12. In light of this concession, we will deem Texas law to control.

B. No Cause of Action Lies in Champerty and Barratry in Texas

Under Texas law, the common law claims under champerty have not existed for a very long time. "It has been definitely held that the common-law rules with reference to champerty and maintenance are not in force in this state." *Yellow Cab Co., Inc. v. McCloskey,* 82 S.W.2d 1042, 1043 (Tex.App.1935).

In contrast, Texas has retained the offense of barratry. However, the facts alleged by the Plaintiff do not meet the requirements under any of the prongs of the current barratry statute. The statute states:

> (a) A person commits an offense if, with intent to obtain an economic benefit the person: (1) knowingly institutes a suit or claim that the person has not been authorized to pursue; (2) solicits employment, either in person or by telephone, for himself or for another; (3) pays, gives, or advances or offers to pay, give, or advance to a prospective client money or anything of value to obtain employment as a professional from the prospective client; (4) pays or gives or offers to pay or give a person money or anything of value to solicit employment; (5) pays or gives or offers to pay or give a family member of a prospective client money or anything of value to solicit employment; or (6) accepts or agrees to accept money or anything of value to solicit employment.

Tex. Penal Code § 38.12 (2004). Here, the Plaintiff has accused Defendant Berg of encouraging Mr. Fuchs to sue him. This by itself does not meet any of the above requirements. Likewise, the Plaintiff has accused the Moriarty Firm of taking on the case against Schick, despite having "represented" him in the class action against Marriott. That, however, does not violate the Texas barratry duty. While it was perhaps inappropriate for the Moriarty Firm to represent

Mr. Fuchs in a suit against Plaintiff Schick (as a class member of a class the Moriarty Firm represented), the appropriate remedy was to object to the Moriarty Firm's appearing as counsel for Mr. Fuchs in that litigation. The Plaintiff did object, and this Court refused the Firm's application to represent Mr. Fuchs *pro hac vice.*

C. Defendant Burg's Motion for Summary Judgment on Breach of Fiduciary Duty

The Plaintiff's complaint against Defendant Berg is that he encouraged Mr. Fuchs to sue Schick at a time when Schick was a putative class member of a class that Defendant Berg sought to represent. The issue is whether Berg at that time had a duty not to make such a statement to Mr. Fuchs concerning Schick. Plaintiff Schick insists he had such a duty, and that by his actions he breached it. He contends that Defendant Berg represented him as class counsel. Attorneys, the Plaintiff continues, owe their clients fiduciary duties, including the duty of loyalty. Schick insists that urging a third-party to sue one's own client surely violates this duty. Thus, when Defendant Berg opined to Mr. Fuchs that Schick had "screwed" him (Mr. Fuchs), and urged him to look to his legal rights, Defendant Berg breached an existing duty to Schick. This Court cannot agree.

***4** Two preliminary points. First, the relationship between class members and counsel in a class action differs in many ways from the relationship between an individual client and his or her attorney. Courts must exercise caution when generalizing from one to the other. Second, while the distinction between pre- and post-certification is a useful shorthand for understanding the scope of the duties owed by class counsel to class members, it is an overly simplistic bright-line rule. Ultimately, the duties owed by counsel to a client must reflect the capacity for that counsel to affect the substantive rights of the client. To the extent that this capacity is limited, the duties owed are likewise limited. Since pre-certification class counsel has only a limited capacity to affect the substantive legal rights of the putative class, their fiduciary duties to putative class members prior to certification are similarly limited. As discussed below, however, some such duties do exist.

The Plaintiff's argument above relies upon the assumption that Berg represented him as class counsel at the time of the allegedly inappropriate conduct. In Texas, a plaintiff pursuing a legal malpractice action must first demonstrate a duty owed him by the defendant. But "[b]efore any duty can arise, however, there must be an attorney-client relationship." *SMWNPF Holdings, Inc. v. Devore,* 165 F.3d 360, 364 (5th Cir.1999). "An attorney-client relationship arises when an attorney agrees to render professional services for a client." *Id.* "Once the attorney-client relationship is established, numerous duties are owed the client by the lawyer, which, among others, are to use utmost good faith in dealings with the client, to maintain the confidences of the client, and to use reasonable care in rendering professional services to the client." *Yaklin v. Glusing, Sharpe & Krueger,* 875 S.W.2d 380, 383 (Tex.App.1994).

In the instant case, the undisputed facts make clear that under Texas law the Plaintiff was not the Defendant Berg's client at the time the latter spoke to Mr. Fuchs. So long as Plaintiff retained the right to opt-out of the class, Berg's actions were not preclusive as to Schick's substantive legal rights in the Marriott Litigation. Defendant Berg gained the capacity to render such services for class members (services that, for good or for ill, would control their substantive legal rights in that Litigation) only after their option to exit the class lapsed. Only at that point did the fiduciary duties ordinarily associated with the attorney/client relationship attach. When Berg encouraged Mr. Fuchs to sue Schick, the class had not yet been certified.

This, however, does not end our inquiry. To the extent that they have considered the issue, Texas courts have not recognized any fiduciary duties owed to putative class members by class counsel prior to class certification. In *Gillespie v. Scherr,* 987 S.W.2d 129, 131 (Tex.App.1998), appellants contended that by purporting to file a class action, there was "established an implied attorney-client relationship with all potential class members." The court rejected the notion of a pre-class certification attorney-client relationship. "Appellants have cited and we have found no case finding an implied attorney-client relationship to exist before class certification between an attorney who files the class action and any unnamed class members." *Id.* The court did acknowledge that several federal decisions had, "in the context of class certification, recognize[d] the general existence of a fiduciary duty to unnamed class members once a class action suit is filed." *Id.* However, the court "found no decision which has defined the scope of such a duty or addressed it with regard to an actual claim for recovery against an attorney for its breach." *Id* . Consequently, the court declined to hold that named plaintiffs' attorneys owed any duties to unnamed class members prior to certification. *Id.* at 132.

***5** In response, the Plaintiff cites In re *General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, 801 (3d Cir.1995), where the court held that "[b]eyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed." That is, at least some fiduciary duties attach prior to class certification, at the time the class action is filed. The difficulty, as the *Gillespie* court observed, is in defining the scope of those pre-certification duties. The *In re General Motors* court supported its assertion with two citations.

First, it cites Newberg & Conte, *Newberg on Class Actions* § 11.65, at 11-183 (4th ed.2003). That subsection focuses entirely upon the voluntary dismissal of class actions, and the protections afforded putative class members under Fed.R.Civ.Pro. 23(e). Rule 23(e)(1)(A) states "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." Court approval is necessary to protect putative class members against private settlements that favor named plaintiffs, or prejudice resulting from discontinuance of litigation. "The general rule is that the named plaintiff and counsel bringing the action stand as fiduciaries for the entire class, commencing with the filing of a class complaint. The tendency of putative class members to rely on class representatives as fiduciaries to advocate the class interests has been observed and noted by the courts." Newberg & Conte, § 11: 65.

For example, in *Rothman v. Gould,* 52 F.R.D. 494 (S.D.N.Y.1971), the named plaintiff received a settlement offer from the defendant two years after filing a complaint on behalf of a similarly situated class that had not been certified. The plaintiff made an unopposed motion to determine that the action would not be maintained as a class action, in order to consummate the settlement. The court refused, on the grounds that doing so may have prejudiced the legal rights of other putative class members. "The very bringing of a class action ... may deter the institution of suits by members of the ostensible class. The passage of time may impair or defeat the rights of others thus deflected from acting for themselves." *Id.* at 496. The court went on to note that merely filing a class action complaint creates certain duties for class counsel: "having nominated themselves as class representatives, both plaintiff and his counsel have undertaken responsibilities, and triggered possible consequences, that may not now be erased by routine acceptance of the resignation they now tender." *Id.* At a minimum, the court required that putative class members be given notice and opportunity to oppose the motion.

The second supporting citation refers to the responsibility, shared by the court and class counsel, to insure that the due process rights of absent class members are upheld:

> ***6** Responsibility for compliance is placed primarily upon the active participants in the lawsuit, especially upon counsel for the class, for, in addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court....Not the least important of the fiduciary duties shared by counsel and the court is their duty to ensure that absentee class members have knowledge of proceedings in which a final judgment may directly affect their interests.

Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 (3d Cir.1973). In other words, pre-certification class counsel owe a fiduciary duty not to prejudice the interests that putative class members have in their class action litigation. These duties arise because class counsel acquires certain limited abilities to prejudice the substantive legal interests of putative class members even prior to class certification. In electing to put themselves forward as class counsel, they assume the duty of not harming those rights. After certification, class members have the opportunity to formally state whether they want to be represented by that counsel. Prior to certification, class members have no control over who may come forward as a named plaintiff and class counsel, and so their interests at that stage require protection. Requiring court approval (under Rule 23(e)) is one means of ensuring this protection. Imposing limited fiduciary duties upon pre-certification class counsel is yet another.

Under this analysis, we may venture a few statements about the scope of the fiduciary duty owed by class counsel to putative class members prior to class certification. In short, the scope of those duties is limited to protecting the substantive legal rights of putative class members that form the basis of the class action suit from prejudice in an action against the class defendant resulting from the actions of class counsel. Where the actions of class counsel put those rights at risk, class counsel must at a minimum put absent class members on notice and provide them with an opportunity to object. Where they fail to do so, class counsel exposes itself to potential liability for breach of its fiduciary duties. Applied to the facts here, the Court first notes that the action complained of (Defendant Berg's urging Mr. Fuchs to sue Plaintiff Schick) had nothing to do with Schick's substantive legal rights in

the Marriott class action. The resulting suit began after the settlement agreement had been reached, and in any event did not impact Schick's rights against Marriott. While Berg owed Plaintiff a duty not to act in a manner that would prejudice his rights in that action, urging Mr. Fuchs to sue Schick in no way prejudiced the Plaintiff's rights vis-à-vis Marriott. Consequently, Berg did not breach any fiduciary duty owed Schick by virtue of his being class counsel for the putative class.

***7** The issue of whether or not Defendant's owed and breached a fiduciary duty to Mr. Schick is one of law. "The existence of a duty is generally a question of law for the court to determine from the facts surrounding the occurrence in question." *Smith v. McCleskey, Harriger, Brazill & Graf,* 15 S.W.3d 644, 647 (Tex.App.2000). Summary judgment is therefore appropriate. Here, Plaintiff Schick cannot as a matter of law recover for a breach of fiduciary duty owed him as a client because Defendant Berg was not his attorney at the time of the allegedly inappropriate conduct. Moreover, though Defendant Berg did owe him some fiduciary duties as class counsel of a class of which Schick was a putative member, the action complained of was beyond the scope of those fiduciary duties. Consequently, Defendant's motion for summary judgment is granted, and the Plaintiff's second cause of action against Defendant Berg is dismissed in its entirety.

D. The Moriarty Firm's Motion for Summary Judgment on Breach of Fiduciary Duty

The Plaintiff's complaint against the Moriarty Firm is that it represented Mr. Fuchs against him, having already represented Schick as class counsel.[3] Plaintiff Schick alleges the Moriarty Firm's representation of Mr. Fuchs against Schick while Schick remained a current client (in filing the Petition to Intervene with the Texas court handling the Marriott litigation) and its resumption of that representation of Mr. Fuchs against Schick once Schick became a former client (in conducting Mr. Fuchs's suit against Schick in this Court until its motion for admission *pro hac vice* was denied) constituted a breach of the Moriarty Firm's fiduciary duties to Schick.

The Plaintiff first insists that the Moriarty Firm represented Mr. Fuchs and Schick at the same time. In support, they cite the fact that the Moriarty Firm intervened on behalf of Mr. Fuchs pursuant to Rule 60 of the Texas Rules of Civil Procedure. Rule 60 interventions, Plaintiff notes, must be made prior to final judgment or else they will be dismissed out of hand as untimely. In fact, both parties agree that the Moriarty Firm's motion to intervene was quickly dismissed. However, neither party has provided any documentation to this Court concerning the reasons for that dismissal, making it impossible to determine the cause. Based upon the evidence the parties did provide, we conclude that the Moriarty Firm did not represent Mr. Fuchs and Mr. Schick simultaneously. The final settlement was approved by the Texas court on October 24, 2000. This final approval terminated the Moriarty Firm's status as class counsel in the Marriott Litigation. *Stephenson v. LeBoeuf,* 16 S.W.3d 829, 836 (Tex.App.2000) ("In the absence of an agreement to the contrary, an attorney-client relationship generally terminates upon the completion of the purpose of the employment."); *see also Simpson v. James,* 903 F.2d 372, 376 (5th Cir.1990). Paul H. Doyle of the Moriarty Firm did not write the Plaintiff on behalf of Mr. Fuchs until December 11, 2000. *Blander Affidavit,* 10/17/03 Exhibit E. The Moriarty Firm did not file its "Petition in Intervention" against Plaintiff Schick until March 14, 2001. *Blander Affidavit,* 10/17/03 Exhibit A. As Plaintiff himself notes, the "Moriarty Firm intentionally delayed the filing of the Petition in Intervention against Schick until the final approval of the Class Action settlement by the Texas Court." *Plaintiff's Rule 56.1 Statement,* ¶ 20.

***8** As for fiduciary duties owed to previous clients, claims arising from alleged breaches are governed by the "substantial relationship" test in the Fifth Circuit. This test is comprised of two elements. First, there must have been an actual attorney-client relationship between the parties. Second, there must be a substantial relationship between the subject matter of the former and present representations.

1. The Moriarty Firm Represented Schick as Class Counsel

At the outset, we reject as without merit the Moriarty Firm's contention that it did not represent the Plaintiff in the Marriott litigation. Mr. Schick was a prominent member of the class, and the Moriarty Firm represented the class. The fact that Mr. Schick had advice of other counsel when he intervened against the settlement agreement is irrelevant. Mr. Schick, having successfully altered the settlement agreement, elected not to opt out of the class. He was therefore represented by the Moriarty Firm.

2. Fiduciary Duty to Avoid Conflicts Owed by Class Counsel to Class Members

As discussed above, attorneys owe their clients fiduciary duties. Among the fiduciary duties owed by lawyers to

their clients is the duty to avoid conflicts of interest. "[A]n attorney's duty of care includes the duty to avoid conflicts of interest that may impair the attorney's ability to exercise independent professional judgment on behalf of the client....And the duty to avoid conflicts of interest is a key aspect of the fiduciary duty that an attorney owes to his client generally. *Two Thirty Nine Joint Venture v. Joe,* 60 S.W.3d 896, 905 (Tex.App.2001) (citing *Restatement (Third) Of The Law Governing Lawyers* § 16(3) and 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law Of Lawyering* § 4.4 (2001)).

Moreover, "when a lawyer continues representation with the possibility of a conflict without obtaining properly informed consent from the affected client, there is a breach of the duty of loyalty." *Id.* at 905 (*see also SMWNPF Holdings v. Devore,* 165 F.3d 360, 365 (5th Cir.1999) ("A conflict of interest among clients may give rise to an attorney's duty to withdraw from a representation. Absent consent, an attorney must discontinue employment if he is required to represent one or more clients who may have differing interests.") Failure to avoid such conflicts may subject a lawyer to civil liability. "Because avoiding conflicts of interest and thereby observing the fiduciary duty of loyalty is an action that a reasonably prudent lawyer would observe in relation to the client, a lawyer can be civilly liable to a client if the lawyer breaches a fiduciary duty to a client by not avoiding impermissible conflicts of interest, and the breach is a legal cause of injury." *Id.* at 905-906 (citing *Arce v. Burrow,* 958 S.W.2d 239, 245-46 (Tex.App.1997), aff'd in part & rev'd in part on other grounds, 997 S.W.2d 229 (Tex.1999)).

This fiduciary duty of avoiding conflicts also exists between class counsel and members of a class action. Of course, the attorney-client relationship in an individual representation context differs from that in a class action context. "The duty owed to the client sharply distinguishes litigation on behalf of one or more individuals and litigation on behalf of a class." *Parker v. Anderson,* 667 F.2d 1204, 1211 (5th Cir.1982). Class counsel, for example, owe a duty to the entire class, not merely to the named plaintiffs. One result of this difference is that class counsel need not gain the approval of named class members in a settlement. However, a lawyer's duty to avoid conflicts of interest is not altered in the class action context. "We measure class counsel's performance of the duty to represent class fairly and adequately as we gauge the fairness and adequacy of the settlement. It will follow generally that an attorney who secures and submits a fair and adequate settlement has represented the client class fairly and adequately." *Id.* In the class counsel context, a lawyer retains his duty to represent the class fairly and adequately. This duty is inconsistent with representing parties with conflicting interests. *See also Quigley v. Braniff Airways, Inc.,* 85 F.R.D. 74, 84 (N.D.Tex.1979) ("A lack of congruence among the interests of the class representative and the class members may, however, render the attorney, despite his qualifications, unable to fully and fairly counsel the plaintiff and class members, to each of whom he owes a duty.").

***9** If a conflict existed between the Moriarty Firm's representation of Schick against Marriott and its representation of Mr. Fuchs against Schick, the Moriarty Firm could be held liable to Schick.[4] The issue is thus whether representation of both Schick and Mr. Fuchs resulted in a conflict. Under Texas law, a conflict of interest arises where the matters are substantially related or there exists a genuine threat of disclosure of client confidences. A client may thus claim liability resulting from a breached this fiduciary duty "either by establishing that the present and previous representations are substantially related or by pointing to specific instances where [the client] revealed relevant confidential information regarding [his or her] practices and procedures." *Duncan v. Merrill Lynch, Pierce, Fenner & Smith,* 646 F.2d 1020, 1032 (5th Cir.1981). Consequently, on motion for summary judgment, the Moriarty Firm bears the burden of demonstrating as a matter of law that Schick cannot prove a conflict existed under either of these theories.

(a) The Fuchs Litigation and the Marriott Litigation Were Not "Substantially Related"

"When contemplating whether disqualification of counsel is proper, the court must determine whether the matters embraced within the pending suit are *substantially related* to the factual matters involved in the previous suit." *N.C.N.B. Texas Nat'l Bank v. Coker,* 765 S.W.2d 398, 400 (Tex.1989). Texas courts have interpreted the substantial relation test to require a precise recitation of the way in which the two cases are related.

> The vagueness of the court's order indicates that the substantial relation test was not used; had it been the court should have been able to state without difficulty the precise factors establishing a substantial relationship between the two representations. To hold that the two representations were 'similar enough' to give an 'appearance' that confidences which could be disclosed 'might be relevant' to the representations falls short of the requisites of the established substantial relation standard.

N.C.N.B. Texas Nat'l Bank v. Coker, 765 S.W.2d 398, 400 (Tex.1989). Moreover, "a substantial relationship may be found only after the moving party delineates with specificity the subject matters, issues and causes of action common to prior and current representation and the court engages in a painstaking analysis of the facts and precise application of precedent." *See In re American Airlines,* 972 F.2d 605, 614 (5th Cir.1992).

In his brief, the Plaintiff suggests a somewhat weaker standard by citing to a dissenting opinion in *Ghidoni v. Stone Oak, Inc.,* 966 S.W.2d 573, 602 (Tex.App.1998): "So that if parts of the present action and the past representation concern the very same subject matter, reasonable minds must agree that they are substantially related." However, the majority opinion of that same case required a more rigorous showing to demonstrate a substantial relationship:

> ***10** In order to prove a substantial relationship between two matters, the [party with the burden] must produce evidence of specific similarities capable of being recited in the disqualification order....Mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice under this standard....Furthermore, the [party with the burden] may not rely upon conclusory statements but must provide the trial court with sufficient information so that it can engage in a painstaking analysis of the facts.

Ghidoni v. Stone Oak, Inc., 966 S.W.2d 573, 579 (Tex.App.1998) (internal citations omitted).

On the basis of the affidavits and briefs submitted and statements made at oral argument, this Court holds that the litigation undertaken by the Moriarty Firm on behalf of Mr. Schick was not "substantially related" to that undertaken on behalf of Mr. Fuchs. Admittedly, the two matters involved some of the same Units. But while the issue in the Marriott Litigation was whether Marriott had misrepresented the rate of return to those investing in the Units, the issue in Mr. Fuchs's litigation was whether Schick had inside information concerning what the Units' value would be under the Settlement Agreement with Marriott.

On a motion for summary judgment, the Moriarty Firm carries the burden of demonstrating that the two matters were not "substantially related." At trial, however, Mr. Schick would bear the burden of demonstrating that a "substantial relationship" in fact existed. Thus, the "moving party bears the burden of pointing to an absence of evidence to support the nonmoving party's case, and summary judgment will be granted where the nonmovant is unable to point to any evidence in the record that would sustain a finding in the nonmovant's favor on any issue on which he bears the burden of proof at trial." *Armstrong v. American Home Shield Corp.,* 333 F .3d 566, 568 (5th Cir.2003) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-24 (1986); *see also Nebraska v. Wyoming,* 507 U.S. 584, 590 (1993) ("When the nonmoving party bears the burden of proof at trial, summary judgment is warranted if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to [its] case.") (internal citations omitted). Naturally, "all facts and inferences must be viewed in the light most favorable to the nonmoving party." *Id.* (citing Perez v. United States, 312 F.3d 191, 194 (5th Cir.2002)).

In defending against a motion for summary judgment on an issue where he bears the ultimate burden, however, the Plaintiff must come forward with more than conclusory rebuttals. "The nonmoving party ... cannot satisfy his summary judgment burden with conclusional allegations, unsubstantiated assertions, or only a scintilla of evidence." *Dickerson v. Bailey,* 336 F.3d 388, 395 (5th Cir.2003). Here, however, the Plaintiff asserts that the issue of whether these matters bear a substantial relationship to one another "requires little discussion." *Plaintiff's Memo,* p. 24. Instead, relying on an incorrect understanding of the "substantial relationship" test, Plaintiff concludes: "This test of 'substantial relationship' is easily met here, where both cases concern the CBM-1 Units and their value....Indeed, the *only* reason Fuchs contacted Berg and Moriarty and ultimately retained Moriarty was because they had represented the Class of CBM-1 Unit Holders." *Plaintiff's Memo,* p. 25. Such conclusory statements are insufficient to overcome his summary judgment burden. We find that as a matter of law, the litigation matters were not substantially related.

(b) Schick Has Conceded that No Breach of Confidentiality Existed

***11** Above, we held that the suit against Schick and the class action against Marriott were not substantially related. Under Texas law, Schick could have also argued that the Moriarty Firm created a conflict of interest because their representation of Mr. Fuchs threatened disclosure of confidential information revealed in the course of the Moriarty Firm's representation of Schick. "Rule 1.09 thus on its face forbids a lawyer to appear against a former client if the current representation in reasonable probability will involve the use of confidential information *or* if the current matter

is substantially related to the matters in which the lawyer has represented the former client." *In re American Airlines,* 972 F.2d 605, 615 (5th Cir.1992). Initially, there appeared to be a potential threat of revealed confidences concerning the extent of Schick's knowledge about the likely settlement value of the Units at the time he purchased Mr. Fuchs's Units. Indeed, when we rejected the Moriarty Firm's application for admission *pro hac vice,* we did so in part out of a concern that "the suit in which the Moriarty Firm seeks to represent a seller of these partnership units in a suit against the buyer turns to a large extent on what information he obtained in connection with the negotiations with Marriott, negotiation in which [Schick] participated along with members of the Moriarty Firm with whom he discussed 'strategy' and values." *Les Fuchs v. Marvin Schick,* 2002 U.S. Dist. LEXIS 6212, *7 (April 10, 2002 S.D.N.Y.).

However, after the conclusion of discovery, Plaintiff has not suggested potential breach of confidences as a basis for his breach of fiduciary duty claims. Rather, his subsequent briefs have made clear that his claims rested entirely upon an alleged substantial relationship between the issues of the cases, and not upon any danger of revealed confidences. *See Plaintiff's Memo,* p. 15-16. More significantly, counsel expressly disavowed at oral argument that Plaintiff's claims relied upon the misuse of confidential information theory. "The Court: You agree that for purposes of this motion for summary judgment, there is no evidence of a use of confidential information? Mr. Blander: Yes, your Honor. That's not what my case is about." *Transcript,* p. 12-13.

The undisputed facts are sufficient as a matter of law to establish that the two matters were not "substantially related." Because they are not substantially related and there is no issue with respect to confidential information, the Moriarty Firm did not create an actionable conflict of interest in representing Mr. Fuchs against Schick. There was thus no breach of a fiduciary duty to Schick. Therefore, the Moriarty Firm's motion for summary judgment as to Plaintiff's second cause of action is granted.

III. Conclusion

For the reasons given above, the Defendants Berg's motion for summary judgment is hereby granted in its entirety. The Moriarty Firm's motion is also hereby granted. Plaintiff's cross-motion for partial summary judgment is accordingly denied.

***12** SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2004 WL 856298

Footnotes

1 Plaintiff's admission that this conversation between Mr. Fuchs and Defendant Berg occurred prior to his (Schick's) intervention in the Marriott litigation undermines his insistence that the Defendants were motivated by a desire to retaliate for his intervening in the settlement agreement. *See Plaintiff's Memo,* Feb. 23, 2004, p. 10 ("In or about April 2000 ... and before Schick intervened in the Texas Action, Berg and Fuchs spoke on the telephone.") and p. 12 ("Both Berg and the Moriarty Firm ... had substantial animus towards Schick because Schick intervened in the Texas Action and challenged the settlement they had negotiated with Marriott.")

2 At the time, this Court explicitly characterized its decision as a denial to grant admission *pro hac vice.* "Although defendant refers to his position as a 'motion to disqualify,' we believe it is more properly characterized as opposition to the motion for admission *pro hac vice.* Because on the facts before the Court, we would reach the same conclusion regardless of how the issues are labeled, we do not regard this distinction as critical." *Les Fuchs v. Marvin Schick,* 2002 U.S. Dist. LEXIS 6212, *2 n. 1 (April 10, 2002 S.D.N.Y.). As we noted then, both the decision to admit an attorney to practice *pro hac vice* and to disqualify counsel rest with the discretion of the Court in the Southern District of New York. *Id.*

3 Here, there is no issue of fiduciary duties that arise between class counsel and class members prior to certification, because the Moriarty Firm did not begin to represent Fuchs until several months after the class was certified.

4 Under Texas law, such a conflict would exist even if individual lawyers at the Moriarty Firm worked exclusively on one case or the other. *See Two Thirty Nine Joint Venture v. Joe,* 60 S.W.3d 896, 906 (Tex.App.2001) ("Finally, the liability would extend to the firm and any member of the firm that engaged in the prohibited conduct.") (citing *Cook v. Brundidge, Fountain, Elliott & Churchill,* 533 S.W.2d 751, 758 (Tex.1976); *Metroplex Glass Ctr., Inc. v. Vantage Props., Inc.,* 646 S.W.2d 263, 266 (Tex.App.1983); *DeWitt v. Harris County,* 904 S.W.2d 650, 654 (Tex.1995); Restatement (Second) of Agency § 219 (1958); and Tex. Disciplinary R. Prof'l Conduct 1.06(f)).

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