

PROFESSIONAL LIABILITY UPDATE

ATTORNEYS FEES

By Jennifer A. Becker

Mark v. Spencer (2008) 166 Cal.App.4th 219

The Fourth District refuses to enforce a fee-splitting contract between counsel in a class action lawsuit when the contract was not disclosed to the class action court.

Matt Capelouto contacted Ronald Mark to discuss a potential action against Capelouto's former employer, General Nutrition Corporation (GNC). After determining Capelouto was a proper class action representative, Mark approached Jeffrey Spencer about co-counseling the case. Mark and Spencer entered into a written agreement to split fees equally even if fee applications were submitted individually.

After settlement Spencer submitted a fee application and each attorney submitted separate declarations in support. There was no mention of the fee-splitting agreement in the papers or at the hearing, and Mark did not appear at the hearing. The trial court entered an order approving attorney fees to Spencer in an amount significantly higher than to Mark. Spencer refused to honor the fee splitting agreement and Mark filed suit. The trial court sustained a demurrer without leave to amend reasoning that the claim was precluded by *res judicata* issue preclusion.

On appeal the Court noted that fee-splitting agreements create a potential conflict of interest between the client and the attorneys. For example, a fee-splitting agreement that contemplates the attorneys will perform their

reasonable share of the joint representation and share equal duties and responsibilities might prompt the attorney who performed less work on the case to exaggerate and create the appearance he or she had performed the requisite share of the work. Another potential conflict concerns the attorney's tactical decisions. One attorney spending far more time on the case than co-counsel may push for an early settlement to stem the losses. An attorney spending less time may try to drag the litigation out to earn a larger fee.

Thus, Rules of Professional Conduct, Rule 2-200(A) provides that an attorney must obtain informed, written consent for any fee division. This protects the client by giving the client information to assure that he or she will not be charged unwarranted fees so that the attorney who actually provides services has sufficient compensation to be able to share fees with the referring attorney. The Supreme Court has held that denial of contractual fees is a proper consequence of an attorney's failure to follow Rule 2-200.

Although Mark did comply with Rule 2-200, the class action settlement increased the potential for a conflict of interest between the objectives

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of the attorney and those of the class. In addition, full disclosure to the class is frequently impractical to obtain. Thus, oversight is the responsibility of both the class representative and the court. To exercise this oversight function, fee-sharing agreements must be disclosed to the court. The Court summarily rejected Mark's argument that the contract between he and Spencer was nonetheless enforceable, even if it harms the absent class members. Ignoring the requirement to notify the class action judge of the fee splitting would provide little incentive to disclose the agreement if it could be enforced in a separate action. The Court held that failure to fully disclose the fee-splitting agreement to the class action court is a bar to later enforcement of the agreement.

Although Spencer would benefit from his own violation of the disclosure rule, the Court would not protect Mark from his failure as he was equally responsible to the class.

As a separate and independent basis for affirming the trial court, the Court held that Mark's claims are barred by the doctrine of *res judicata*. *Res judicata* rests upon the ground that the party to be affected has litigated, or had an opportunity to litigate the same matter in a former action. Although the fee-splitting agreement was not considered by the class action court, Mark had a fair opportunity to bring the fee-splitting agreement to the court's attention. The fee-splitting agreement was not an issue separate from the matters considered by the class action court. A class action court cannot rely on a fee distribution agreement to allocate fees between class counsel but must award fees tied to counsel's actual efforts to benefit the class. This entitlement was considered and determined by the class action court.

Comment: This case furthers the policy enunciated by the Supreme Court to show little tolerance for attorneys who do not abide by all ethical rules in fee arrangements with clients.