

## PROFESSIONAL LIABILITY UPDATE

### ATTORNEYS' FEES

By Jennifer A. Becker

#### ***Rodriguez v. Disner* 688 F.3d 645 (9<sup>th</sup> Cir. 2012)**

*The Ninth Circuit holds that class counsel representing conflicting interests is not entitled to attorneys' fees.*

Van Etten Suzumoto & Becket LLP (which later merged with McGuire-Woods LLC) entered into "incentive agreements" with five clients in connection with a potential antitrust class action against West Publishing. Each client authorized Van Etten to request a fee award based on any recovery against West, and Van Etten agreed to seek incentive compensation for each client based on the value of a potential settlement. The class was certified, the clients were named class representatives, and McGuire-Woods was appointed class counsel. There were also two class representatives who were represented by separate counsel and who did not have incentive agreements. Upon settlement, McGuire-Woods filed motions seeking incentive awards and attorneys' fees.

Multiple non-named class members challenged the fairness, reasonableness, and adequacy of the settlement, and objected to the incentive awards and fee request. One set of objectors argued that the court should reduce the fee award because the incentive agreements created a conflict of interest between McGuire-Woods and their clients on the one hand, and the remaining members of the class, on the other. The district court approved the settlement despite the conflict of interest and awarded fees,

but declined to approve incentive awards finding they created an appearance of impropriety, violated the ethics rule against fee-sharing with non-lawyers, and created conflicts of interest between the class representatives and unnamed class members.

In a prior appeal the Ninth Circuit agreed that the incentive agreements created an unacceptable disconnect between the interests of the class representatives and class counsel, on the one hand, and members of the class on the other. The attorneys' agreement to seek incentive awards put class counsel and the class representatives into a conflict with the putative class members, because the class representatives would favor settlement over trial due to the incentive agreements. The Ninth Circuit nonetheless affirmed the district court's approval of the settlement because two class representatives did not have incentive agreements and were represented by separate counsel. The case was remanded for the district court to determine a proper fee award in light of the conflict.

On remand the district court concluded that the incentive agreements gave rise to a conflict that tainted the representation. Under California law

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this ethics violation results in fee forfeiture. McGuire-Woods was awarded costs and a *quantum meruit* award for services provided after the court's rejection of the incentive awards, which eliminated the conflict.

Rule 3-310(C) of the California Rules of Professional Conduct generally prohibits the representation of clients with actual or potential conflicts of interest absent an express written waiver. An actual conflict arises whenever a lawyer's representation of one of two clients is rendered less effective because of his representation of the other. The primary value at stake in cases of simultaneous representation is the attorney's duty and the client's legitimate expectation of loyalty. A potential conflict exists whenever a lawyer's representation of one client might, in the future, become less effective by reason of his representation of the other.

In determining reasonable class action attorneys' fees a court may consider a lawyer's misconduct, which affects the value of the services. Guided, but not constrained by California law, a federal court has broad equitable power to evaluate attorney services and deny attorneys' fees or order disgorgement when an attorney represents clients with conflicting interests. There is no value to services where a serious ethical violation pervades the relationship.

California law does permit some leniency where an ethical violation is less severe. For example, where an attorney represents clients with only a potential conflict of interest, California courts may award some fees depending on the equities. A trial court may consider the gravity and timing of the violation; its willfulness; its effect on the value of the lawyer's work for the client; other threatened or actual harm to the client; and the adequacy of other remedies. The egregiousness of the violation is often the critical factor.

The equitable principles are applied assiduously in common fund class action cases, because the court has a special duty to protect the interests of the class and must act with a "jealous regard" for the rights of class members. The court must consider whether class counsel has properly discharged its duty of loyalty to absent class members, and cannot permit even the appearance of divided loyalties of counsel.

There are exceptions, and a court may tolerate certain technical conflicts in order to permit attorneys who are familiar with the litigation to continue to represent the class. However, where the conflict was not one that developed beyond the control or perception of class counsel, and was never disclosed to the district court, it is within the discretion of the court to deny all fees.

The Court rejected McGuire-Woods' argument that it was entitled to fees despite the ethical violation because the client suffered no injury and the lawyers did not knowingly or willfully violate an ethical rule. Although there is authority under California law to temper the consequences when an ethical violation is not egregious, the district court's ruling was within its discretion. The district court could reasonably determine that the conflict created by the incentive agreements precluded the attorneys from discharging their duty of loyalty to absent class members.

Moreover, the conflict did not develop during the course of the litigation or was beyond the control or perception of class counsel. It was a conflict created by the retainer agreement and would be considered knowing, willful, and egregious under California law. Objectors, not McGuire-Woods, brought the conflict to the attention of the district court, a further violation of counsel's fiduciary duties to the class and duty of candor to the court.

Despite the admittedly excellent result in the litigation, the district court was entitled to weigh

any benefits McGuire-Woods conferred on the class against the pervasive conflict of interest caused by the incentive agreements with class representatives.

*Comment:* This was a steep price to pay for an incentive likely offered to secure the opportunity to represent the class. Attorneys must be mindful that ethical violations may deprive them of the fruits of their labor.