IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (PHENTERMINE / FENFLURAMNE/DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 2 :15 MD1203
SHEILA BROWN, ET AL. v. AMERICAN HOME PRODUCTS CORPORATION	:	CIVIL ACTION 99-20593
Appellant:	:	
Claimant:	:	
Arbitration No.:	:	REPORT AND AWARD
Claim No.: 183/00	:	OF ARBITRATOR

FINDINGS OF FACT

1. On , the AHP Settlement Trust ("Trust") issued a Final Determination in the matter of (sometimes hereinafter "Claimant"), awarding Attorneys' Fees in the amount of $ to Lawyer 2 and awarding to Lawyer 1 ("Appellant") $ in costs but nothing in fees.

2. On , Lawyer 1 filed an appeal from the decision of the Trust awarding attorneys' fees in the amount of $ to Lawyer 2, and requested that the United States District Court ("Court") refer this matter to Arbitration. The appeal was assigned docket number .

3. On , the Appeal of Lawyer 1 was referred by the Court to Arbitration pursuant to VI. C. 4 (h) & (I) of the Nationwide Class Action Settlement Agreement with American Home Products Corporation.

4. On , an Arbitration Hearing was held concerning the Appeal of Lawyer 1.

ANALYSIS

1. Claimant, ingested Pondimin (Fenfluramine) in excess of sixty days and ultimately required . By letter dated , the Trust offered Matrix A, Level III compensation in the gross amount of and in the net amount of $. The difference between the two amounts represented Class Counsel's Fee, Attorneys' expenses, and Attorneys' Fees in the amount of $. By letter dated accepted the Trust's net offer of $. This Arbitration involves a fee dispute between two attorneys for claimant: Lawyer 1, who represented claimant from , and Lawyer 2 who has represented her since Lawyer 1 asserts that he is entitled to the $ based on his contingent fee contract with claimant or, alternatively, that he is entitled to a fee based on the principles of *quantum meruit*. On his own behalf, Lawyer 2 asserts that he is entitled to the $ based on his contingent fee contract with the claimant. On behalf, Lawyer 2 argues that Lawyer 1 is not entitled to be compensated pursuant to the principles of *quantum meruit* because, *inter alia,* his discharge was for cause.

2. On or about , claimant executed a one-page retainer and fee agreement with Lawyer 1, then of the law firm of , (now known as). The agreement engaged Lawyer 1 to represent claimant in connection with a claim against American Home Products, arising out of claimant's ingestion of Pondimin (Fenfluramine). On Laywer 1 filed suit on claimant's behalf in State Court. That case was discontinued on , 2001, when claimant agreed to participate in the class action settlement. Laywer 1 submitted claimant's completed BLUE and GREEN Forms to the Trust in , respectively. On Judge Bartle

signed Pretrial Order 2663, which stayed the processing of all matrix claims. On , Judge Bartle signed Pretrial Order 2811, which extended the stay until November 1, 2003. In , claimant underwent . Thereafter, Lawyer 1 began preparation of a supplemental GREEN Form to enable claimant to seek surgical benefits. On , before Lawyer 1 submitted claimant's supplemental GREEN Form to the Trust, claimant discharged Lawyer 1. On that same date, claimant entered into a contingent fee agreement with Lawyer 2.

3. Lawyer 1 claims that the Trust erred in awarding the disputed fees to Lawyer 2 instead of to him. His claim raises two issues: whether Lawyer 1 is entitled to the money and whether Lawyer 2 is entitled to the money. Resolving the issue of whether Lawyer 1 is entitled to the money requires first identifying the applicable law. Federal law requires that the district court apply the forum state's choice of law rules. *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941). Therefore, Pennsylvania's choice of law rules apply. Pennsylvania's choice of law rules follow the "flexible conflicts methodology," which combines the interest analysis theory with the significant contacts theory of the Restatement (Second) of Conflict of Laws. *In re Adoption of Baby Boy Y*, 29 Pa. D&C 4th 212 (Pa Com.Pl. 1995). Lawyer 1's claim involves a fee agreement entered into by a member of the Bar, making the state with the superior interest in Lawyer 1's fee agreement. In addition, although claimant resides in , Lawyer 1's legal work was performed in , giving more significant contacts with the disputed agreement. Therefore, law governs the question of whether Lawyer 1 is entitled to a contingency fee, a proposition with which both Lawyers 1 and 2 agreed during the Arbitration Hearing.

Lawyer 1 claims a right to one third of the settlement proceeds on the ground the

contingency in the fee agreement was triggered in when agreed to enter into the class settlement by filing her BLUE and GREEN Forms with supporting medical documentation. Claimant's BLUE Form was received by the Trust on , and her GREEN Form was received by the Trust on , both during the period that Lawyer 1 represented claimant. In his written submission, Lawyer 1 relied on *Kelner v. 610 Lincoln Road*, 328 So.2d 193 (Fla. 1976) for the proposition that attorneys' fees ripen when the contract contingency occurs, even if the payment must await actual recovery of the settlement proceeds.

In its response, the Trust concluded that Lawyer 1 was not entitled to recover on the contract for two reasons. The first pertains to the meaning of the word "recovery". The second pertains to when the contingency that triggers the right to recovery is concluded. With respect to the first issue, the Trust pointed to a provision in Lawyer 1's fee agreement, "If no recovery is made, the client will not owe an attorneys' fee whatsoever." The Trust concluded that "recovery" means the actual receipt of funds and that claimant's receipt of funds did not occur during the period of representation. Thus, the Trust determined that the language in Lawyer 1's agreement presented a potential bar to Lawyer 1's recovery. The Trust did not resolve this question, however, because the Trust concluded that even if the receipt of proceeds could come after the representation had ended, the contingency triggering the recovery had to have occurred during the representation and recovery was not triggered during Lawyer 1's representation. Since the extent of injury and the amount, if any, she would receive in compensation could not be known until her claim was processed and adjudicated by the Trust, the Trust concluded that her right of recovery was uncertain until those events had occurred. Those events were not concluded, and right of recovery did not come

into existence, until Since right of recovery did not occur during the period of Lawyer 1's representation, the Trust concluded that Lawyer 1 was not entitled to be paid on the contract.

During the Arbitration Hearing, Lawyer 1 conceded that because was not entitled to receive payment at the point her BLUE and GREEN Forms were submitted neither would he then have been entitled to receive his fee. By the same reasoning, he acknowledged that he would have been entitled to receive payment only when claimant received the proceeds of the settlement. He asserted, however, that there was no remaining contingency to prevent claimant's eventual receipt of the proceeds, in essence bringing this case within *Kelner*.

I find *Kelner* distinguishable from the present case and Lawyer 1's reliance on it unavailing. In *Kelner*, the client rejected an offer that was not contingent on any factors, required no action by client and was not subject to any independent evaluation or audit. If the client in *Kelner* had said "I accept", the case would have been settled. In contrast, I do not find that the fee-triggering contingency had occurred at the point that Lawyer 1 was discharged. Although the BLUE and GREEN Forms were a necessary predicate to receipt of funds, submission of those forms did not conclusively settle the matter of Matrix compensation nor require the Trust to settle the claim at the levels sought in the BLUE and GREEN Forms. The Settlement Agreement resolved the class action litigation, but it did not create a right of certain recovery in any claimant. Rather, the Settlement Agreement provided a process by which class members could seek a remedy based on the extent of their illness. When Lawyer 1 was discharged in , there was no outstanding offer for claimant to accept. Moreover, in addition to the fact that Lawyer 1 was discharged in and the Trust did not make its settlement offer to until claim was evaluated, audited and her

recovery was ultimately based on a different GREEN Form than that prepared by Lawyer 1. These factors compel me to conclude that claimant's entitlement to settlement proceeds did not ripen until the Trust sent its Post-Audit Determination Letter on , long after Lawyer 1's services had been terminated. There being no recovery of proceeds, nor an entitlement to recovery of proceeds, during Lawyer 1'spresentation of claimant, Lawyer 1 is not entitled to a fee based on his contingent fee contract.

4. The second issue is whether Lawyer 2 is entitled to the fees based on the terms of his contingent fee contract. The Trust concluded that he was. Lawyer 2 was retained by on and that representation continues. In his pre-Arbitration submissions, Lawyer 2 argued that he was entitled to the retained fees because even if discharged attorneys are entitled to a *quantum meruit* recovery for their services, successor attorneys are entitled to the full contingent fee provided for in the contract. In support, he relied on *Lubell v. Martinez*, 901 So. 2d 951 (Fla.App. 2005). During the Arbitration Hearing, Lawyer 1 asserted that Lawyer 2's contract was governed not by law but by law, and thus the rule that a successor lawyer gets the entire fee was inapplicable to Lawyer 2's claim. Based on this assertion and the fact that claimant lives and Lawyer 2 practices law in , I requested that the parties address by "letter brief" the question of whether law governed Lawyer 2's claim and, if so, what effect law would have on the dispute. In response, the Trust asserted that like , provides that the successor attorney is entitled to the full contingency fee. *Phillips v. Smith*, 768 P.2d 449 (Ut. 1989). Thus, whether Pennsylvania's choice of law rules would look to or to to resolve Lawyer 2's claim, on the issue of the right of a successor lawyer to be paid according to the terms of the fee agreement I am satisfied that the outcome is the same under both and law.

Lawyer 1 argued in both his pre- and post-Arbitration submissions that Lawyer 2's representation of claimant violated the ethics standards in that insufficient risk remained at the time Lawyer 2 assumed the representation to justify a contingent fee recovery. The Trust was unpersuaded by this claim and concluded that Lawyer 2 performed sufficient services to entitle him to a contingent recovery under law. More importantly, ethics opinions do not provide authority for resolving contract claims. For all these reasons, I do not find the Trust's determination that Lawyer 2 was entitled to his contingent fee to be clearly erroneous.

5. The final issue is whether Lawyer 1 is entitled to be compensated in accordance with the principles of *quantum meruit* and whether that issue is properly cognizable in the Arbitration forum.

According to law, a *quantum meruit* claim must take into account "all relevant factors surrounding the professional relationship", including the actual value of services to the client. *Searcy, Denney, Scarola, Barnhart & Shipley v. Poletz*, 652 So. 2d 366, 369 (Fla. 1995). Those factors include, but are not limited by, the factors set forth in Rule Regulating The Bar 4-1.5(b):

> (1) the time and labor required, the novelty, complexity and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee, or rate of fee, customarily charged in the locality for the legal services of a comparable or similar nature;
>
> (4) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

(5) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client.

It is apparent from the material submitted that Lawyer 1 rendered valuable service to including but not limited to securing her participation in the Class Action settlement by the filing of her BLUE Form prior to the registration deadline. In support of his *quantum meruit* claim, Lawyer 1 submitted a detailed statement of services rendered, along with affidavits from two expert witnesses, both of whom offered an opinion about the value of the services rendered by Lawyer 1. Both in writing and during the Arbitration Hearing, Lawyer 1 described in detail the strategy and actions he undertook during his representation of claimant. He also cited as evidence of his good faith the fact that even after he was discharged he completed the preparation of and submitted to claimant a supplemental GREEN Form, by which she could seek surgical benefits.[1] And on the issue of whether the discharge was justifiably for cause, Lawyer 1 pointed out that a portion of the delay in claimant's receipt of settlement proceeds was the result of Judge Bartle's Orders staying the processing of claims[2]. In response, both in writing and during the Arbitration Hearing, claimant stated that she believed Lawyer 1 was delinquent in processing her claim and it was for that reason that she terminated their relationship.

Prior to the Arbitration, the Trust did not address Lawyer 1's *quantum meruit* claim and confined its analysis to the proper disposition of the retained funds. In its post-Arbitration

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[1] The GREEN Form, completed by Board-Certified cardiologist, , was received by the Trust on .

[2] Within three days of Judge Bartle's Pre-Trial Order 2663, imposing a stay on the processing of claims, Lawyer 1 notified of the stay and provided her with a copy.

submission, the Trust characterized the pending question as the extent of Lawyer 1's rights, if any, to recover against the contingent fee held by the Trust, and concluded that neither the Trust nor the arbitrator had jurisdiction to adjudicate a *quantum meruit* claim in the circumstance presented here. I find nothing in the Settlement Agreement that prevents the Trust from deciding a *quantum meruit* claim. The Settlement Agreement provides that the Trust shall determine "the amount of counsel fees to which the attorney representing the Class Member is entitled, making the appropriate deduction of nine percent to account for the fees paid to Class Counsel." Settlement Agreement, Section VI.C.4.e.(2) and VI.C.4.g.(2). By letter dated (which the Trust concluded was misdated and should have been dated), Lawyer 2 notified the Trust as follows: "Please be advised that both Lawyer 1 and I have mutually agreed and stipulated that one third of monetary claim should be held by the Trust." The issue is whether the retained one-third of the proceeds was required to be considered as contingency funds. During the Arbitration Hearing, Lawyer 2 and Lawyer 1 disagreed about the purpose for which the $ was retained. Lawyer 1 and the Trust's lawyer, , both stated that they believed the funds were retained to allow satisfaction of any attorneys' fee claims, not just those based on a contract contingency claim. Lawyer 2 disagreed, and stated that he consented to the retention of the funds solely on the belief that the dispute was limited to whether Lawyer 1 should recover on his contingency contract or whether Lawyer 2 should recover on his.

It is not necessary for me to resolve this dispute, however, because the decision to retain only $ effectively set that sum as the limit of the Trust's ability to resolve the competing claims. Once the Trust concluded that Lawyer 2 was entitled to a contingent fee of $, a conclusion with which I agree, the Trust had no more funds to disburse. The

Trust cannot be responsible for distributing more funds than it possesses even if the Trust, and I, were to view Lawyer 1's *quantum meruit* claim as having merit. Nor does the Trust have any authority by which to compel claimant to pay *quantum meruit* fees to Lawyer 1. To the extent Lawyer 1 is entitled to a *quantum meruit* recovery, his claim lies against outside of this Arbitration process. *Lubell v. Martinez*, 901 S.2d at 952-953; *accord, Phillips v. Smith*, 768 P.2d at 452.

CONCLUSIONS

1. The findings of the Trust are not clearly erroneous, as set forth in Rule 5 of the Rules Governing Arbitration Process.

2. Based upon the findings above, the appellant, Lawyer 1, is not currently entitled to any portion of the $ currently held by the Trust because his claim on the contract did not ripen during his representation of claimant, , and the agreement to retain $ provided an insufficient amount to permit resolution of a *quantum meruit* claim .

Accordingly, based on all of the above, I find that Lawyer 1 is entitled to be paid by the Trust $ in costs but nothing in attorneys' fees.

_____ _____

DATE

Arbitrator