

Summary of Complaint:

William Buckwalter, Beverly Barker and Christine Dickey v. Napoli, Kaiser & Bern, LLP, Paul. J. Napoli and Gerald Kaiser

On December 4, 2001, Hagens Berman filed suit on behalf of former diet drug litigations represented by the law firm Napoli, Kaiser & Bern LLP (“NKB”) and the individual defendants Paul J. Napoli (“Napoli”), Gerald Kaiser (“Kaiser”) and Marc J. Bern (“Bern”) (Defendants Napoli, Kaiser and Bern are collectively referred to herein as the “Individual Defendants”; NKB and the Individual Defendants are collectively referred to herein as “NKB”). Plaintiffs and the members of the Class were clients of NKB in connection with claims for personal injury arising from their use of so-called “diet drugs.”

The following is a summary of the complaint.

NKB is a law firm that holds itself out as focusing primarily on representing injured persons. The Individual Defendants are the founders and partners of the law firm. In the nationwide diet drug litigation, NKB represented thousands of injured individuals and, according to its website, was “appointed as Liaison Counsel to the Steering Committee for the New York Plaintiff’s mass tort Fen-Phen litigation.” NKB also sponsored a website devoted to diet drug litigation which purported to offer information regarding the drugs, related medical conditions and the litigation. In these ways, NKB held itself out to its own clients and others as experienced diet drug counsel.

The nationwide diet drug litigation had arisen out of the popular and widely-used weight loss drugs Pondimin and/or Redux. They were part of the diet drug family known as Fen-Phen. Several manufacturers, including American Home products (“AHP”), had marketed and profited from the sales of the drugs for years before scientific and medical studies revealed that the drugs were unreasonably dangerous to users and consumers in that they posed a serious risk of valvular heart disease, primary pulmonary hypertension (“PPH”), brain serotonin neurotoxicity and other health problems. The FDA ordered a recall of the drugs in September 1997, but it was too late. Many of the 18 million Americans who had relied on the drugs to lose weight had been permanently and even fatally harmed. The nationwide diet drug litigation arose out of these injuries. Cases were filed across the country and eventually combined through Multi-District Litigation proceedings.

In late 1999, the MDL case was settled with the only solvent defendant, AHP. The settlement included matrices for determining individual damages. Certain factions of plaintiff’s personal injury lawyers criticized the settlement as undervaluing individual claims and under-compensating certain lawyers. The national Settlement capped attorney fees at 9%, as opposed to the 25 to 33% contingent fees many lawyers proceeding on a non-class action basis had negotiated with their clients.

NKB, and particularly individual defendants Napoli, Kaiser and Bern, were among the most vocal critics of the National Settlement. They were openly critical of the settlements. In reaction to the settlement, NKB developed, agreed to and executed a scheme for extracting more fees out of the diet drug litigation (“The NKB Fen-Phen Aggregate Settlement Scheme”) to the benefit of the Individual Defendants and at the expense of their unsuspecting clients.

The scheme was predicated on AHP’s position. The drug giant was desperate to put the diet drug chapter of its corporate history behind it, both to improve its financial bottom line and the image of

individuals opted out. If NKB's inventory of opt-out cases from the National Settlement was large enough, it would pose a credible threat and AHP would be forced to deal with NKB independently.

As part of the scheme, NKB began a massive campaign to obtain "opt out" plaintiffs. The firm, either on its own, or through law firms with which it had secret referral arrangements, conducted an advertising campaign soliciting plaintiffs and opt outs. As part of the scheme, the firm's lawyers aggressively criticized the National Settlement, claiming that the settlement amounts were so low that the lawyers representing the class should be investigated. The firm promised it would do better. Its campaign was successful, and the firm, according to its own proclamation, was retained by over 5800 clients.

The roughly one dozen lawyers at NKB could not handle the 5800 individual cases they were committing to prosecute. Those individual cases would have required separate filings, depositions, expert testimony and costs. The stage was thus set for the unlawful scheme and enterprise from which this lawsuit derives. Contrary to what their clients were led to believe, NKB and the Individual Defendants did not intend to take the cases to trial or even to prosecute the cases individually. With the threat of 5800 cases in its control, NKB approached AHP and initiated the scheme outlined below.

The Fen-Phen Aggregate Settlement Scheme was multi-faceted and had at its core the following agreed terms:

- The Individual Defendants agreed to form and jointly conduct the affairs of the NKB Fen-Phen Aggregate Settlement Enterprise which consisted of NKB and a network of referring lawyers;
- NKB and the Individual Defendants agreed to aggressively recruit and otherwise assemble a large inventory of individual opt-outs from the National Settlement on the pretense that their claims would be prosecuted against AHP individually and that as a result they would recover far more than under the National Settlement;
- NKB and the Individual Defendants agreed among themselves not to prosecute or try the claims of the thousands of Fen-Phen clients they signed up as individual cases;
- Instead, NKB and the Individual Defendants agreed in advance instead to settle the individual cases with American Home Products en masse without any meaningful consideration of the circumstances of the individual cases and without disclosing this fact to the affected clients;
- The purpose of this scheme was to minimize the cost and effort on behalf of NKB and the Individual Defendants and to maximize the profits to them;
- As part of the en masse settlement on behalf of individual clients, NKB would secretly retain sole discretion over determination of individual settlement amounts;
- NKB and the Individual Defendants agreed to do this with the understanding that this would mean that individual cases would likely be settled for less than

- Internally, NKB agreed to settle the claims of clients it originated for higher amounts than the claims of individuals who were referred by other lawyers. In the latter cases, NKB would have to share a fee with the referring lawyers; in the former cases NKB would keep the entire fee;
- NKB and the Individual Defendants agreed in advance on a method to compel individual plaintiffs to acquiesce in the settlements it recommended;
- NKB and the Individual Defendants agreed to conceal the Fen-Phen Aggregate Settlement Scheme from their clients and in the future to jointly take any steps necessary to conceal the scheme. NKB and the Individual Defendants agreed to do this in derogation of their fiduciary duties to their individual clients and their duties under the Rules of Professional Conduct.

Thus, as part of the scheme, NKB reached an aggregate settlement with AHP which was apparently negotiated in part by a lawyer from Texas that the plaintiffs and the class did not hire. The amount of the aggregate settlement, and the terms and the identity of the participants in the process have never been revealed to plaintiffs and the Class. What has been discovered is that NKB reached a lump sum settlement with AHP for all of its cases that exceeded in total several hundred million dollars. NKB did so without receiving client approval. NKB then went back to each of its diet drug clients and pretended that it had negotiated a specific offer with AHP for each plaintiff's case. In fact, there had been no negotiation of individual cases with AHP. After reaching a global settlement with AHP, the settlement numbers offered individual plaintiffs had been determined solely by NKB. If the client rejected the amount, NKB would come back with another amount until the client accepted. The clients thought that NKB was negotiating on their behalf with AHP. The clients never were aware that they were, in effect, negotiating with the lawyers they trusted, not the defendant in the lawsuit. In essence, individual NKB clients would unknowingly negotiate with NKB lawyers, against each other, for a share of the finite fund NKB had secretly created.

Defendants' settlement negotiations with individuals followed a common modus operandi. Individuals would be presented with settlement offers which NKB lawyers claimed were AHP's best offer, as negotiated by NKB lawyers. Clients were told that the amount was recommended by NKB lawyers based on their assessment of the individual's injuries. The settlements were presented by mail, hand delivery, or even in person in hotel rooms – always with a release and a sense of urgency if not an implied or actual attempt to coerce a settlement. The message was that this was AHP's final offer and that the release had to be signed immediately or the offer would be lost. No time was given to review the terms of the release. These initial offers were notable for the shocking difference between the amount offered and the amounts that NKB and the Individual Defendants had promised their Fen-Phen clients they would likely receive if they opted out and pursued their cases on an individual basis. If the clients resisted or even questioned accepting the settlement offered by the NKB lawyer, or asked to see a medical doctor, the NKB lawyers or staff unleashed the intimidation tactics they had agreed to in advance. The lawyer or staff person would bully the NKB client by insisting that they should be grateful, they were not really injured and that the offer was the maximum offer they would ever get. Often a "nurse" was brought in to give Fen-Phen clients her expert opinion that they could do no better. The nurse was actually a J.D./RN on the NKB payroll.

Typically, NKB opened up these individual settlement negotiations with their own clients by "recommending" a \$10,000 settlement. By comparison, NKB knew that individuals with similar

The NKB Diet Drug litigants were not sophisticated litigants. In the interest of slimming, their bodies had been harmed by a drug unfit for human consumption. The National Settlement had given them no relief and now their own lawyers, once so aggressively optimistic about their claims, were insisting that they were not really injured after all. It was a predictable part of the Fen-Phen Aggregate Settlement Scheme that many NKB Fen-Phen litigants acquiesced to the bullying and sign the release presented by NKB without reading it. Those with the fortitude to resist further, or to threaten bar complaints over the tactics used by NKB, were often “rewarded” by having the NKB lawyers magically multiply what was said to be American Home Products’ “best offer” right before their eyes.

The Fen-Phen Aggregate Settlement Scheme was hugely successful from the perspective of NKB and the Individual Defendants. Virtually all of the claims of its clients settled by NKB and the Individual Defendants pursuant to the Scheme, and NKB and the Individual Defendants made tens of millions in fees for little effort and no risk.

In violation of their fiduciary obligations to plaintiffs and the Class, defendants (1) failed to fully investigate and assess individual claims, (2) failed to obtain client approval to negotiate a lump sum for all clients with AHP, (3) entered into an aggregate settlement with AHP of all claims without authority, approval or disclosure, (4) concealed all of the above from plaintiffs and the Class, (5) acted in a position of disabling conflict as they were secretly having their own clients compete for a limited fund that they had created, and (6) intimidated and coerced their clients into accepting settlements.

The Fen-Phen Aggregate Settlement Scheme conducted by NKB and the Individual Defendants was in violation of the RICO statutes and was also carried out via hundreds, if not thousands, of acts of mail and wire fraud in violation of federal and state law.

###