

ETHICS OPINION

RO-96-03

QUESTION:

"This letter constitutes a request for an expedited opinion with respect to the question of whether or not I and other lawyers have a conflict of interest arising out of our participation in two separate lawsuits. In the Circuit Court of Greene County, Alabama, in a case styled D. [redacted] v. U. [redacted] Company, et al., civil action number CV-[redacted], we represent a class of pharmacy owners in a lawsuit filed pursuant to Alabama's antitrust statute, §6-5-60 Alabama Code 1975, against numerous pharmaceutical manufacturers. In D. [redacted] we allege that the pharmaceutical manufacturers have conspired in a price discrimination scheme to charge favored purchasers of pharmaceuticals lower than market rates while the same defendants charge the owners of independent pharmacies artificially and agreed upon high rates.

Other lawyers and I have also recently filed a petition to intervene and a complaint in intervention in H. [redacted] v. A. [redacted] L. [redacted], et al., civil action number CV-[redacted] pending in the Circuit Court of C. [redacted] County, Alabama. In the H. [redacted] case a class of indirect purchasers or consumers has been certified as a class composed of Alabama residents as well as residents of the District of Columbia and the States of Kansas, Maine, Michigan, Minnesota, Mississippi, New Mexico and Wisconsin. In D. [redacted] no class certification has yet been entered.

In the H. [redacted] case the lawyers for the original plaintiff and plaintiff class oppose our intervention on the grounds that we have a conflict of interest. We believe that no conflict exists for the following reasons:

1. The defendants are the largest pharmaceutical manufacturers in the world. Between them they have more assets and a greater wealth than most of the countries of Europe combined. This is not a situation where there is a limited fund for recovery. The two classes may be competing for the same funds but the funds are unlimited. As you can see from the attached complaint and motion for class certification and order in the H. [redacted] case, individual claims of \$50,000 or more are excluded by definition from the class. There is simply no possibility that these two classes, that is the class in D. [redacted] and H. [redacted], will ever be competing for a limited pool of money.
2. Under Alabama's antitrust statutory scheme the damages sought in both cases are statutory and therefore are defined or fixed by statute. It is not a situation where unlimited damages would be sought by competing classes.
3. The wrongful conduct complained of in both actions is the concerted effort by the defendants to fix the prices of drugs charged to retail pharmacies and to the customers of those pharmacies. There is no allegation in either case that the retail pharmacies have violated Alabama law. The wrongful conduct complained of in both cases is that of the defendants. This wrongful conduct has affected both classes of plaintiffs. The fact that the pharmacies may in some instances have passed on the artificially inflated prices to the indirect purchasers or the consumers is not a violation of Alabama law and is not the subject of either complaint. With respect to the liability of the defendants, then, the necessary proof is identical in these cases. Accordingly we could have no conflict if that is the complaint of the plaintiffs' lawyers in H. [redacted].

Any claim by the plaintiffs' lawyers in the H█████ case that we have a conflict of interest due to our representation of the plaintiffs' class in D█████ could only be raised after there had been a certification of the plaintiffs' class in D█████. No certification has been made by Judge H█████. Even if we admitted the possibility of such a conflict, it could not conceivably arise until there was a certification in D█████.

* * *

We do not believe that we have a conflict of interest between these two plaintiff classes. Judge C█████, the judge in the H█████ case, will be deciding sometime in the near future whether we have a conflict or not. We would like as prompt a ruling as we possibly can get from your office as to whether or not any conflict exists."

* * *

ANSWER:

You do not presently have a conflict of interest under the circumstances described in your letter.

DISCUSSION:

This situation is covered by Rule 1.7(b), which states:

"Rule 1.7 Conflict of Interest:
General Rule

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(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

Ordinarily a lawyer may not represent two plaintiffs in separate actions against the same defendant if the lawyer knows or has reason to believe there will be insufficient insurance or assets to satisfy both potential claims. However, if both plaintiffs consent to the representation after full disclosure then the conflict is obviated.

In the circumstances you have described, there do not appear to be any issue conflicts between the two plaintiff classes you seek to represent. In D█████, you represent Alabama pharmacy owners and in H█████, you will be representing consumers who have purchased drugs in the past. Both groups

contend that the defendant took illegal steps and measures to inflate the prices of their products to those in the distribution and end-user positions. As for whether both plaintiff classes will be competing for the same assets to satisfy their claims, there is no indication, at this point, that the defendants' resources are so limited as to generate that type of conflict for you. If future discovery reveals that situation, then the conflict issue would have to be addressed again. Rule 1.7(b), of course, gives you the option of seeking consent from your class clients. In that case the risk of any adverse effect created by the multiple representation is eliminated.

MLM/vf

3/13/96