STATE OF MINNESOTA
DISTRICT COURT
COUNTY OF RAMSEY

THE STATE OF MINNESOTA, BY HUBERT H. HUMPHREY, III, ITS ATTORNEY GENERAL,

and

BLUE CROSS AND BLUE SHIELD OF MINNESOTA,
Plaintiffs,

v.

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES P.L.C., LORILLARD TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY, LIGGETT GROUP, INC., THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC., and THE TOBACCO INSTITUTE, INC.,
Defendants.

File #C1-94-8565

November 29, 1994

ORDER

The above entitled matter came on November 4, 1994, before the Honorable Kenneth J. Fitzpatrick based on (1) defendants' motion to disqualify the law firm of Robins, Kaplan, Miller & Ciresi ("Robins") due to their past representation of Liggett Group, Inc.; (2) defendants' motion to prohibit Robins from prosecuting this action based on the contingent fee agreement with the State of Minnesota; and (3) plaintiff's motion to disqualify the law firms of Gray, Plant, Mooty, Mooty & Bennett, Dorsey & Whitney, Leonard, Street & Deinhard, Faegre & Benson, and Lindquist & Vennum based on their concurrent representation of the State of Minnesota and defendants.

Based upon review of the file and the arguments of counsel,

IT IS HEREBY ORDERED:

1. That defendants' motion to prohibit prosecution by Robins based on the contingent fee agreement is denied.

2. That defendants' motion to disqualify Robins based on their past representation of Liggett Group Inc., is denied on the condition that every Robins' attorney and investigator, involved in this action, currently and in the future, file an affidavit as to their knowledge of the prior Liggett representation and the existence of the ethical wall.

3. That plaintiff's motion to disqualify Gray, Plant, Mooty, Mooty & Bennett is denied based on the representation that they no longer represent the Department of Employee Relations.

4. That plaintiff's motion to disqualify the firms of Dorsey & Whitney, Leonard, Street & Deinhard, Faegre & Benson, and Lindquist & Vennum is denied.

5. That the attached memorandum is included herein.

Kenneth J. Fitzpatrick
Chief Judge

MEMORANDUM

This lawsuit was commenced by the Attorney General, on behalf of the State of Minnesota, based on statutory claims of Unlawful Trade Practices, (Minn. Stat. §§ 8.01, 8.31, 325D.09-15), Deceptive Trade Practices, (§ 325D.43-45), Minnesota Antitrust Law, (§ 325D), False Statement in Advertising Act (§ 325F.67), and Prevention of Consumer Fraud Act (§ 325F.69), and common law claims for unjust enrichment, restitution, and breach of undertaking of a special duty. Robins, Kaplan, Miller & Ciresi, ("Robins") were retained by the Attorney General to prosecute this action under a Special Attorney Appointment.

Soon after the complaint was filed, defendants filed motions to remove Robins pursuant to their Contingent Fee Arrangement or, in the alternative, to disqualify Robins based on their past representation of defendant Liggett Group, Inc. The State also filed motions to disqualify Gray, Plant, Mooty, Mooty & Bennett, Dorsey & Whitney, Leonard, Street & Deinhard, Faegre & Benson, and Lindquist & Vennum based on their concurrent representation of the State of Minnesota and their respective defendant clients.

I.

Contingent Fee Agreement

Copyright © 1994 by TPLR, Inc.

Defendants argue that Robins should be prohibited from representing the State pursuant to the Contingent Fee Arrangement for it allegedly violates Minnesota Law and public policy and deprives defendants of their rights under the United States and Minnesota Constitutions.

The Attorney General has a broad grant of statutory authority as provided in Minn. Stat. § 8.02:

> The Attorney General shall have the power to employ such assistance, whether lay, legal, or expert, as the attorney general deems necessary for the protection of the interests of the state through the proper conduct of its legal business.

There exists a long history in Minnesota of Special Attorney Appointments utilizing percentage-based retainers. In many situations this is the only way the Attorney General may prosecute certain matters under its fixed budget. This procedure avoids the fiscal commitment of hiring new employees while providing the flexibility required to commence actions in a timely manner. Defendants have failed to cite any statutes or case law which explicitly states that the attorney general is prohibited from utilizing contingent fee arrangements in the prosecution of civil matters. Defendants' motion is denied.

II.

Disqualification of Robins

Disqualification of a firm due to its prior representation of an adverse party is controlled by Rule 1.9 of the Minnesota Rules of Professional Conduct. Rule 1.9 states:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Here, defendants argue that Robins should be disqualified because their prior representation of Liggett Group Inc., ("Liggett") in *Keating v. Philip Morris et al*., is "substantially related," Minn. R. Prof. Conduct 1.9(a), to the present action. This argument is applied in conjunction with Rule 1.10(a) which prohibits all lawyers associated with a firm from representing a client when any member of the firm would be prohibited.

To determine disqualification, the court must apply the three step analysis stated in *Jenson v. Touche Ross & Co*., 335 N.W.2d 720, 731-732 (Minn. 1983):

> a) The court must first consider the facts and the issues involved in determining whether there is a substantial relevant relationship or overlap between the subject matters of the two representations;
>
> b) If such a relationship or overlap exists, the court will apply certain presumptions. The court will presume irrebuttably, that the attorney received confidences from the former client, thus creating a conflict of interest in the current subject matter. The court will also presume, subject to rebuttal, that these confidences were shared with the attorney's affiliates (*e.g,*. other members of the law firm), thus implicating the rule regarding imputed disqualification (now Rule 1.10); and
>
> c) Finally, the court must balance the equities associated with granting or denying the disqualification motion.

First, the court must examine the two actions. In 1979, Liggett retained Robins to represent them from the complaint of James Keating, a gasoline station operator who sold cigarettes. Mr. Keating alleged that various cigarette manufacturers violated the Minnesota Antitrust Law by fixing the retail price of cigarettes. The monopoly profits were then allegedly used to engage in deceptive advertising. By court order, all discovery was limited to questions of class certification, only one deposition was taken, and no discovery was permitted on the merits. *Keating v. Philip Morris Inc.*, 417 N.W.2d 132, 134 (Minn. Ct. App. 1987).

The present action alleges a wide scope of illegal practices committed by defendants. While the

Copyright © 1994 by TPLR, Inc.

litany of counts includes antitrust violations the focus is different. Besides the fact that *Keating* never reached discovery on the merits, plaintiff argued that the defendants fixed the price. Here the focus is on the defendants alleged knowledge and cover-up of the unhealthy aspects of their product. Based on the different focus of the two actions, the reported lack of discovery completed in *Keating*, and the affidavits submitted by the members of Robins that worked on the Keating case, this court finds no substantial relationship.

Based on *Jenson*, the court need not look at the remaining two steps after its finding that no substantial relationship exists. However, this court will require all Robins' attorneys and investigators who actively participate in this litigation to submit an affidavit as to their knowledge of the *Keating* case, and their agreement to establish/maintain the ethical wall to avoid the appearance of any impropriety.

III.

State's Motion to Disqualify

Plaintiff State of Minnesota moves to disqualify the law firms of Gray, Plant, Mooty, Mooty & Bennett, Dorsey & Whitney, Leonard, Street & Deinhard, Faegre & Benson, and Lindquist & Vennum based on their concurrent representation of the State and defendants. Rule 1.7(a) of the Minnesota Rules of Professional Conduct provides:

> A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.

The five defendants respond that the State of Minnesota is not a current or former client. The defendants argue that their representation of a variety of state agencies does not mean that the State of Minnesota is their client. Therefore, Rule 1.7(a) does not apply. The court agrees with this general proposition, however, the question remains as to whether the represented agency would be adversely affected by the concurrent representation.

Of the five defense firms involved, only Gray, Plant, Mooty, Mooty & Bennett's relationship with the Department of Employee Relations ("DOER") is of concern to the court based on their health care contract negotiations. However, this firm has represented to the court that it no longer provides services to DOER nor will it do so in the future. As for the remaining four firms, the court finds that the representation of their respective state agencies does not adversely affect plaintiff. The motion to disqualify the law firms of Gray, Plant, Mooty, Mooty & Bennett, Dorsey & Whitney, Leonard, Street & Deinhard, Faegre & Benson, and Lindquist & Vennum is denied.

Kenneth J. Fitzpatrick

Copyright © 1994 by TPLR, Inc.