MondayMonday

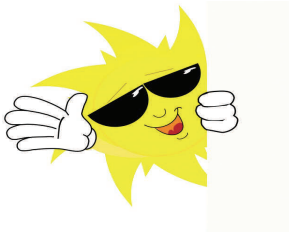
Sunlight Leads the Way to Truth

February 9, 2015

The contingency fee is the great equalizer in American jurisprudence. With it, the lowliest day worker can secure the loftiest counsel, allowing him to do battle on equal footing with wealthiest tortfeasor. In England, there is no such mechanism, and the mother country's "loser pays" idiom ensures that those who have, keep.

Yet, those of us who make daily use of the contingency fee arrangement know full-well that there is an internal conflict at large within it. Sometimes, what is good for us and Client #1 is bad for a colleague and his client. We speak of the almost knee-jerk execution of discovery protective orders and confidential settlement agreements. Simply, show me yours and I won't share your private parts with anyone else. Better yet, pay me and I won't tell a soul what happened. Any problem?

We were in the 9th Circuit last week arguing two statute of limitations cases involving misfirings of Remington rifles that involved no trigger pull. That means, for you city



folks, the rifle fired without anyone pulling the trigger. Take if from us, it's not supposed to do that. The problem was that Remington, who had known about the problem since 1947, had undertaken a concerted program to hide the defect from American gun owners since then. One of the ways it did so was to secure protective orders and confidential settlements for similar cases. So good was Remington's concealment of the defect that no one in their right mind would ever suspect that the iconic Remington rifle would ever fire with no one pulling the trigger. And when the rifle did fire and injure someone, no one would bring an action against Remington. After all, children, accidents happen, don't they? The fault is in ourselves, isn't it, not our tools? In a perfect, corporate world, the statute of limitations then expired.

The 9th Circuit will now deal with appellants' claims of fraudulent concealment tolling the SOL under Montana law, but the problem exists everywhere. Take, for example, last week's *Zimmerman v. Kohn*, 2015 NY Slip Op 00804 (1st Dep't 2/3/15). Plaintiffs' counsel settled a federal negligence action. The settlement was confidential.

Plaintiffs' attorneys, paid by contingency, now claim that an intentional misrepresentations in the federal action caused them to expend "unnecessary hours" developing an estoppel argument to oppose a motion to dismiss on statute of limitations grounds and seek to hold defendant's counsel responsible. But since the number of hours spent by plaintiffs' counsel in securing relief was not the basis for its fee, the court holds that no action taken by defendant's counsel decreased that fee in any manner.

However, think about the next plaintiff's lawyer to come up against this defendant. What if the SOL claim is made once again? What if the only saving grace is that very estoppel argument advanced in this case? Confidentiality may well spell disaster for a colleague and an innocent victim. Uncomfortable, eh?

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