

Lott v. Morgan Stanley Dean Witter & Co. Long-Term Disability Plan
S.D.N.Y., 2004.

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United States District Court, S.D. New York.

Mary LOTT Plaintiff

v.

MORGAN STANLEY DEAN WITTER & CO.
LONG-TERM DISABILITY PLAN, Welfare Plan
Administration Committee of Morgan Stanley Dean
Witter & Co. as plan administrator, and First Unum Life
Insurance Company of America Defendant.

No. 03 Civ.9235 HB.

Dec. 23, 2004.

OPINION & ORDER

BAER, J.

*1 On November 24, 2004, Defendant, First Unum Life Insurance Company ("First Unum"), by its attorneys, **Begos & Hogan, LLP**, moved to disqualify Peter J. Heck ("Heck") and Binder & Binder P.C. ("Binder") from representing Plaintiff, Mary Lott ("Lott"), because of Heck's representation of UnumProvident Corporation and its subsidiaries ("UnumProvident") and, in particular, First Unum, in substantially related matters. For the following reasons, Defendants motion is GRANTED.

I. Discussion

The New York Code of Professional Responsibility provides that "a lawyer who has represented a client in a matter *shall not*, without the consent of the former client after full disclosure: (1) Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client," [DR 5-108\(a\)\(1\)](#), [22 NYCRR 1200.27\(a\)\(1\)](#) (emphasis added). To ensure compliance

with the rule, an attorney may be disqualified from representing a client when:

(1) The moving party is a former client of the adverse party's counsel; (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and, (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client.

[Guerrilla Girls, Inc. v. Kaz](#), No. 03 Civ. 4619, 2004 WL 2238510, at *2 (S.D.N.Y. Oct. 04, 2004) (citations omitted). The adjudication of such matters, the Second Circuit has held, requires the district court to resolve "any doubt [s] ... in favor of disqualification." See [Kara Holding Corp. v. Getty Petroleum Mktg, Inc.](#), No. 99 Civ. 0275, 2002 WL 1684365 at *3 (S.D.N.Y. Jul 24, 2002); [Crudele v. N.Y. City Police Dep't](#), No. 97 Civ. 6687, 2001 WL 1033539, at *2 (S.D.N.Y. Sept. 7, 2001); [Felix v. Balkin](#), 49 F.Supp.2d 260, 267 (S.D.N.Y.1999).

1. Former Client

The movant seeking disqualification must demonstrate that counsel for the adverse party had a prior attorney-client relationship with the movant's client. See [Evans v. Artek Sys's Corp.](#), 715 F.2d 788 (2d Cir.1983).

Before recently joining Binder, between 1998 and August 16, 2004, Heck was an associate and, later, a named partner at the law firm of Del Mauro, DiGiaino, Knepper & Heck ("DDKH"). DDKH is a litigation boutique that "exclusively" represented "life and disability insurance companies in direct actions brought against them by policyholders seeking life and/or disability benefits." (Del Mauro Decl. ¶ 7). While at DDKH, Heck represented UnumProvident in over 350 actions and billed more than 9,600 hours of time on "UnumProvident matters ...

including over 500 hours of work on *Kortland v. First Unum Life Ins. Co.*,” in which First Unum was the primary client and Heck “was lead counsel.” (Del Mauro Decl. ¶¶ 4, 12, 13). Heck does not dispute his “prior representation of UnumProvident,” his work on *Kortlander v. First Unum Life Ins. Co.*, or that he:

*2 [P]repared UnumProvident witnesses for depositions and defended their depositions; engaged in settlement conferences with his client, UnumProvident, and settlement discussions with plaintiff; and he worked closely with UnumProvident on trial strategy and preparation.

(Del Mauro Decl. ¶ 13).

Accordingly, Heck, First Unum, and UnumProvident maintained an attorney-client relationship.

2. Substantial Relationship

Having satisfied the attorney-client relationship prong, the movant must next demonstrate that “the relationship between issues in the prior and present cases is patently clear ... identical or essentially the same.” *Gov't of India*, 569 F.2d at 739-40 (citations omitted),^{FN1} or, put another way, the facts surrounding Heck's former representation of First Unum or UnumProvident “necessary to the present litigation.” [U.S. Football League v. Nat'l Football League](#), 605 F.Supp. 1448, 1449 (S.D.N.Y. 1985).

^{FN1}. The Second Circuit has embraced the “substantial relationship” standard elucidated by Judge Weinfeld in [T.C. Theatre Corp. v. Warner Bros. Pictures](#), 113 F.Supp. 265 (S.D.N.Y.1953):

I hold that the former client need show no more than that the matters embraced within the

pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

[Emle Indus., Inc. v. Patentex, Inc.](#), 478 F.2d 562, 570 (2d Cir.1973).

The focus of the instant case is the group disability policy issued by First Unum to Lott's employer, Morgan Stanley Dean Witter and the subsequent denial of Lott's claim for long-term disability benefits. (Compl.¶ 4). Lott has brought this action under ERISA seeking disability benefits from First Unum. However, Lott's claim is not narrowly tailored around the specific question regarding the medical and vocational evidence that she provided in support of her disability benefit claim and its denial.^{FN2} Rather, the Complaint alleges a broad pattern of First Unum's illicit conduct calculated to inhibit, if not deny, claims, regardless of their merit. (Compl.¶ 60) (“[F]ailed ... to monitor, and correct, First Unum's bad faith handling of this claim”) (Compl.¶ 73) (“[A] consequence of the Defendants' knowing and intentional breach of their respective fiduciary duties”). In particular, the relief sought demonstrates the breadth of Lott's claim:

^{FN2}. This is where Heck's reliance upon [Goodlett v. The Paul Revere Life Ins. Corp.](#), No. 97 Civ. 0089, 2000 WL 34027916 (N.D.Iowa Jan. 15, 2000), is misguided. In *Goodlett*, the district court, in part, based its decision not to disqualify plaintiff's counsel upon the fact that “the defendant offer[ed] no evidence to show that

this particular ERISA claim ha [d] a substantial relationship to previous ERISA claims litigated for UNUM.”*Id.*, 2000 WL 34027916, at *7. Alternatively, here, Heck's strategic decision to draft a broad legal claim, which included allegations of First Unum's systematic “bad faith,” and the substantial evidence presented in support of Defendant's motion to disqualify, including affidavits of attorneys who previously worked with Heck on First Unum matters, sufficiently demonstrated that Heck's prior representation of First Unum was substantial as it related to the instant action against Defendants.

Plaintiff respectfully requests ... that the Court ... grant ... a permanent injunction prohibiting the Defendants from repeating the bad faith conduct which has led to the wrongful denial of Plaintiff's claim in the handling of future claims.
(Compl. ¶ (d)).

It should be noted, that the record lacks any indication of Marry Lott's specific position, and certainly nothing that urges Heck's retention.

While at DDKH, “[v]irtually all of the cases [Heck] was involved in involved, or included, claims for benefits under individual and group long-term disability insurance policies.”(Del Mauro Decl. ¶ 7). In particular, Heck worked closely with many First Unum in-house attorneys on matters substantially related to this case including, *Ferguson v. Unum Life Ins. Co. of America*, *Feinstein v. Unum Life Ins. Co. of America*, *Kosiba v. Unum Life Ins. Co. of America* (Maker Decl. ¶¶ 3-8), and *Donna Jacobson v. Decker Transp. Comp., Inc., et v. Unum Life Ins. Co. of America, et al.*, (Furey Decl. ¶¶ 3-5). In addition, Heck also attended at least one of UnumProvident's “outside counsel meetings” (Del Mauro Dec., ¶ 19; LoBosco Aff., ¶ 3) and was privy to information regarding claims by *ex-employees of UnumProvident* that “others were making, and-even more importantly, regarding the company's response to those claims so that we could best defend the company.”(Del

Mauro Dec., ¶ 23). In short, Heck maintained an advanced, highly developed understanding of First Unum's claims review procedure.

*3 Accordingly, Lott, Heck, and Heck's prior attorney/client relationship with First Unum and Unum Provident are “substantially related.” While it is likely that Lott's decision to draft a broad legal claim, which anticipated First Unum's oft used defenses, Heck's several years as a named partner billing hundreds of hours to First Unum doing just this kind of work, coupled with an analysis of his discovery requests,^{FN3} which demonstrate his understanding, from the inside, of his knowledge of First Unum's most confidential legal tactics in cases such as this,^{FN4} may well be sufficient to establish a “substantial relationship.” Add to this the clear appearance of impropriety and satisfying this aspect of the test is a no brainer.

^{FN3}. The discovery requests included, and were not limited to, “procedures and guidelines for handling short-term disability claims and the manner in which clam reserves are set.”(Kanner Decl. ¶ 7).

^{FN4}. Heck's prior interaction with First Unum included knowledge of “confidential, trade secret and proprietary materials from's underwriting files,” the company's settlement positions, strategy for resolving cases, and claim evaluation procedures.” (Maker Decl. ¶¶ 3-6).

Given that Heck's prior representation of First Unum and UnumProvident was “substantially related” to his present representation of Lott, this determination does not necessarily affect Heck's future relationship with other plaintiffs in other matters against UnumProvident or any of its subsidiaries. Heck's position at DDKH is analogous to a former in-house counsel's attempt to represent a client adverse to his former corporate employer. In such instances, the ABA has recommended that a former in-housel counsel *may* represent a client adverse to his

former employer under certain circumstances:

The fact that the lawyer had represented his former employer in similar types of matters or that the lawyer had gained a general knowledge of the strategies, policies, or personnel of the former employer is not sufficient by itself to establish a substantial relationship between the current matter and matters in the legal department at the organization for purposes of Rule 1.9(a).^{[FN5](#)}

^{[FN5](#)}. Model Rules of Prof'l Responsibility 1.9 (2003) states:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a 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.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) Whose interests are materially adverse to that person; and

(2) About whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) Reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 415 (Sept. 8, 1999). However, in the same Formal Opinion, the ABA recognized the need for a substantial caveat, which the Court finds particularly applicable in this matter:

The Committee nevertheless is of the opinion that an in-house lawyer may, in the course of his employment as in-house counsel, gain such sensitive information concerning matters in which the legal department represented the organization that is material to the subsequent representation as to be disqualified from subsequent representation under Rules 1.9(a) or 1.9(b) or prohibited from disclosing that information under Rule 1.9(c).

Id. Accordingly, while there is a "substantial relationship" between Heck's current representation of Lott and prior representation of First Unum, such a relationship *may* not exist in a different action brought by Heck against First Unum. Such a determination must be made on the facts of each case and not in the broad stroke of a single determination. Therefore, while there is no doubt, that Heck's representation of Lott is "substantially related" to Heck's prior representation of First Unum, this determination is limited to the facts and circumstances of this particular case.

3. Relevant Privileged Information

*4 While the movant has demonstrated the existence of a former attorney-client relationship and a substantial relationship between the former relationship and the current relationship, the movant must also demonstrate that the attorney “at issue had access to, or was likely to have access to, privileged information in the course of his prior representation.” Blue Planet Software, Inc. v. Games Intern., LLC, 331 F.Supp.2d 273, 277 (S.D.N.Y.2004) (emphasis added). As part of his prior representation of UnumProvident, Heck was authorized to access large amounts of privileged and confidential information through UnumProvident's “legal extranet system” (Heck Aff., ¶ 45) and “was privy to, among other things, UnumProvident's strategies for opposing broad discovery requests, and for responding to allegations that the company had acted in bad faith ... who might make a good witness on behalf of the company and who might be a poor witness.” (LoBosco Aff., ¶ 7). While the movant is not required to demonstrate that “an attorney actually had access to or received privileged information while representing the client in a prior case,” *Gov't of India*, 569 F.2d at 740, “no such presumption is necessary in this case.” Guerrilla Girls, Inc. v. Kaz, No. 03 Civ. 4619, 2004 WL 2238510, at *6 (S.D.N.Y. Oct. 04, 2004). The Complaint, the anticipation of Defendant's strategy, and the discovery requests indicate the effect of Heck's prior relationship. In addition, while at DDKH, Heck had numerous privileged and confidential telephone calls, shared correspondence, and discussed settlement values and strategies with respect to cases involving UnumProvident and its subsidiaries. (LoBosco Aff. ¶¶ 7-8).

Because of Heck's prior representation of First Unum and UnumProvident and his affiliation with DDKH, it is more likely than not that Heck had access to “privileged information in the course of his prior representation.” Blue Planet Software, 331 F.Supp.2d at 277.

II. BINDER & BINDER

Pursuant to Code Canon 5, Disciplinary Rule 5-105(D), the conflict of a single attorney may be imputed to the attorney's entire firm. However, Rule 5-105 does not establish a “*per se* rule of disqualification based upon imputed confidences” because such a rule “would create unnecessarily preclusive and indiscriminate restraints upon an entire law firm, regardless of whether they have knowledge of a former client's confidences.” Blue Planet Software, 331 F.Supp.2d at 278 (internal citations omitted). The imputation rule is based upon the belief that when attorney-client confidences are disclosed to a member of the law firm, every other attorney in the law firm has the opportunity to ascertain the information gleaned from the disclosure. This presumption, however, may be rebutted when one attorney “screens” the rest of the attorneys from the disclosure.^{FN6} Here, however, neither Heck nor Binder & Binder implemented any screening procedures. Accordingly, in these circumstances, imputation is appropriate and disqualification of Binder & Binder is appropriate. *See generally ABA Model Rules of Prof'l Conduct R. 1.10* (2003).

^{FN6} *See Am. Law Inst. Rest. (Third) of the Law Govern' Lawyers*, § 124 “[T]here is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client because: (a) any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter; (b) the personally prohibited lawyer is subject to screening measures adequate to eliminate participation by that lawyer in the representation; and (c) timely and adequate notice of the screening has been provided to all affected clients.”

III. CONCLUSION

*5 For the foregoing reasons, Defendants motion to disqualify Heck and Binder limited to the instant case is GRANTED. Accordingly, within 45 days of the date hereof, Lott must (a) inform the Court by letter of her

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2004 WL 2980193 (S.D.N.Y.)
(Cite as: Not Reported in F.Supp.2d, 2004 WL 2980193 (S.D.N.Y.))

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intention to proceed with the case *pro se*, or (b) find new counsel who shall file a notice of appearance with the clerks office and a courtesy copy to Chambers. Failing receipt of a resolution within that time frame, this case will be dismissed without prejudice. In addition, provided Lott decides to proceed, the parties are directed to appear for a Pre-Trial Scheduling Conference on March 10, 2005 at 2.15 p.m.

The clerk is instructed to close this motion.

IT IS SO ORDERED.

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