

New York Law Journal

Select 'Print' in your browser menu to print this document.

Copyright 2011. ALM Media Properties, LLC. All rights reserved. New York Law Journal Online

Page printed from: <http://www.nylj.com>

[Back to Article](#)

9/11 Plaintiffs Firm Is Ordered to Work With Conflicts Counsel

Mark Hamblett

03-15-2011

The lead law firm for some 10,000 plaintiffs in the 9/11 respiratory illness litigation has been ordered to cooperate with a special counsel appointed by Southern District Judge Alvin K. Hellerstein to alleviate a conflict of interest the judge said may have "seriously prejudiced" 59 plaintiffs.

In an order issued Friday, the judge faulted Worby Groner Edelman & Napoli Bern for removing the 59 plaintiffs from the eligible plaintiffs' list for the 2010 settlement in *In re World Trade Center Disaster Site Litigation*, 21 MC 100, a deal that calls for upwards of \$700 million in payouts to those who responded after the terrorist attacks of Sept. 11, 2001, and cleaned up the site.

"Any way one looks at it, Napoli Bern's common representation of these 59 plaintiffs and its thousands of other plaintiffs put the firm in conflict," Judge Hellerstein said in his order instructing the firm to turn over its files to special counsel Noah H. Kushlefsky of Kreindler & Kreindler.

But lead plaintiffs' lawyer Paul Napoli said yesterday that the judge's order "is based on a factual misunderstanding that we're attempting to correct through additional filings."

"The factual misunderstanding is that we could not unilaterally add to, or remove those plaintiffs' from, the eligible plaintiffs' list by the terms of the settlement itself," Mr. Napoli said.

The judge said the conflict, which rendered the 59 plaintiffs "second class citizens," was shaped in part by the terms of the settlement that required 95 percent participation to become effective.

Napoli Bern, he said, had every incentive to strike the 59 plaintiffs from the list, thus lowering the number of plaintiffs to make it easier to meet the 95-percent threshold, and get the ball rolling on recovering more than \$150 million in fees plus expenses at a time it was deeply in debt from financing the massive, marathon litigation.

Mr. Napoli's position is that there is no conflict because the 59 plaintiffs waived their rights to participation in the settlement when they accepted payment from Sept. 11 Victim Compensation Fund administered by Kenneth Feinberg.

But the judge said in his 13-page order that the firm, which sued on behalf of the 59 people in the first place, was obligated to make every argument possible for their inclusion in the settlement because new injuries had become manifest since they accepted payment from the compensation fund.

"When it came time to settle, Napoli Bern removed these plaintiffs from the list of plaintiffs eligible to settle—for reasons, it seemed, that preferred their other clients and were against the wishes of some, perhaps all, of these 59 clients," Judge Hellerstein said. "Napoli Bern had previously represented it would find an independent special counsel to advise these plaintiffs with regard to their cases in this litigation, but never did so."

But Mr. Napoli insisted yesterday that a conflict of interest was impossible.

"The terms of the settlement itself provided that these people could not be paid through the settlement—and the judge himself found this provision among all others fair and reasonable," Mr. Napoli said. "This language was always part of the settlement so it's both surprising and disheartening to see the court now believes that some conflict exists."

Mr. Napoli said he has consulted with ethics experts, including W. Bradley Wendel, a professor at Cornell Law School, and Roy Simon of Hofstra University School of Law, the expert approved by the court to ensure that communications with clients are proper. Those experts, Mr. Napoli said, agree there is no conflict.

Mr. Napoli also insisted he did not refuse to find independent counsel—the alleged foot-dragging that last month prompted Judge Hellerstein to appoint as special counsel Mr. Kushlefsky, who works in the general tort, complex litigation and aviation practice groups, to work with the 59 plaintiffs.

The judge explained Napoli Bern's alleged conflict in detail.

If the 59 plaintiffs were allowed to be part of the settlement, Judge Hellerstein said the final amount "would be spread thinner" and affect the most severely injured plaintiffs, because their recovery was variable and depended on how much of the settlement would remain after less severely injured plaintiffs were compensated.

But if Napoli Bern litigated the right of the 59 to participate, that could delay compensation for the vast majority of their clients, he said.

And if those 59 were allowed to stay on the list, and then opted out of the settlement, the judge said it would harm Napoli Bern's ability to hit the 95 percent threshold and increase the size of the settlement, which called for increased payouts for every percentage point above and beyond the 95 percent.

Firm 'Deeply in Debt'

Judge Hellerstein said the pressure on the firm to win fees and recover expenses was intense after nine years of litigation without seeing a dime.

"As I learned later in the litigation, from a motion Napoli Bern later withdrew, the firm was deeply in debt, to the extent of millions of dollars, secured by personal guaranties of the principals at the firm, payable at high compounding rates," the judge said.

He said he raised the conflict in September, when Mr. Napoli offered to retain independent counsel.

But counsel was never retained, and the judge appointed Mr. Kushlefsky at Napoli Bern's expense.

Since then, the judge said, Napoli Bern has "refused to cooperate" with the special counsel and failed to turn over the files.

Instead, the firm asked the judge to vacate his order appointing Mr. Kushlefsky, and argued the firm was not in conflict because there was no merit to these plaintiffs' claims.

Even if there was a conflict, the firm argued in the alternative, the appointment of special counsel was too broad a remedy and an unfair sanction under Federal Rule of Civil Procedure 11.

The judge was unpersuaded. He noted that the problem was already percolating last summer, when some of the 59 "pleaded to the court" at public meetings on Staten Island and in Queens, "and in letters that they wanted—even needed—to settle."

"But Napoli Bern did not respond to the problem; instead, it removed these 59 plaintiffs from the EPL (eligible plaintiffs list)," the judge said. "Having thus been in conflict for months, and having done nothing about it, Napoli Bern failed to give these 59 plaintiffs the proper representation to which they were entitled."

With a November deadline approaching for Napoli Bern to reach the 95 percent threshold, Judge Hellerstein said that in October he continued to discuss the 59 plaintiffs with counsel informally.

According to the judge, Mr. Napoli said during that time he would remove the 59, but then withdrew that vow because of statements made by counsel for the WTC Captive Insurance Company, the federally funded entity established to help New York City and its contractors defend the litigation and, ultimately, pay the cost of the settlement.

The Captive, led by Margaret Warner of McDermott Will & Emery, the judge said, "pointed out that if these plaintiffs had no right to litigate, then they had no right to accept or reject the settlement, and that 59 opt-outs would jeopardize the plaintiffs' ability to obtain a 95 percent approval."

Captive Insurance, Mr. Napoli responded, had an incentive to have a larger plaintiffs eligible list, thereby decreasing the percentage that accepted the settlement and decreasing the overall amount of the pay out.

Nonetheless, once those discussions were complete, the judge said, Mr. Napoli "simply removed" the 59 plaintiffs from the list, making them "non-persons" for purposes of the settlement.

'Unprofessional Conduct'

But Mr. Napoli said that was not possible, as his hands were tied. He said that almost all of the 59 plaintiffs were included in some \$100 million in additional settlements Mr. Napoli reached with other defendants in the litigation that were not covered by the Captive Insurance.

Among those defendants was the Port Authority of New York and New Jersey, which was facing the possibility that, under New York law, the 59 who participated in the September 11 Victims Compensation Fund might be able to sue for a new injury that was not evident when they signed their waivers.

At a February conference, Mr. Napoli argued the problem could be solved by the James Zadroga 9/11 Health and Compensation Act signed into law in January. The act provides for compensation for first responders and cleanup workers at the site as well as funding for health clinics and screening programs to treat those with 9/11-related illnesses.

There are some 200 cases remaining before Judge Hellerstein that are now in pretrial practice that will include motions to dismiss on immunity grounds and motion in limine.

"The Zadroga Act was not passed to alleviate Napoli Bern's dilemma or provide a relief from its unprofessional conduct," Judge Hellerstein said.

Following the judge's order Friday, Denise Rubin of Napoli Bern on Sunday submitted a proposed protective order to protect the files under the attorney-client, attorney work product and other privileges.

The judge's orders appointing Mr. Kushlefsky and the production of the 59 files, Ms. Rubin wrote, places the firm "in the untenable position of choosing between our obligation under the ethical rules and other binding authority for the protection of our clients' confidences and privileges on the one hand and disobeying the order of a United States District Judge, on the other."

Mr. Napoli said he believed the dispute would be resolved.

"At the end of the day, I'm confident Mr. Kushlefsky will come to the same conclusions we came to and give the same advice we have given to these individuals," he said.

@|Mark Hamblett can be contacted at mhamblett@alm.com.