

08RVWTCA

Argument

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

IN RE:  
WTC DISASTER SITE LITIGATION,

-----x

21 MC 100, 102, 103

New York, N.Y.  
August 27, 2010  
2:45 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

WORBY GRONER EDELMAN & NAPOLI BERN  
Attorneys for Plaintiffs

BY: WILLIAM GRONER  
PAUL NAPOLI  
DENISE RUBIN

-AND-

SULLIVAN PAPAIN BLOCK McGRATH & CANNAVO

BY: NICHOLAS PAPAIN  
MICHAEL BLOCK  
ANDREW J. CARBOY

PATTON BOGGS

Attorneys for Defendants  
BY: JAMES E. TYRRELL, JR.  
JOSEPH E. HOPKINS

08RVWTCA

## Argument

1 (In open court)

2 THE COURT: This proceeding was brought on by my order  
3 to show cause. And there's a bit of a history to that, so let  
4 me state it.

5 I learned, in connection with various letters that  
6 were being sent by the plaintiffs' offices to the plaintiffs,  
7 that there was a significant amount set out as an expense to be  
8 deducted from recovery in the nature of financing expenses.

9 I had not seen that before on disbursements, nor  
10 encountered it in 38 years of practice, before I became a  
11 judge. And so I thought it would be appropriate to have a  
12 discussion about those issues from various points of view.

13 I learned in research that there are various ethical  
14 pronouncements and sections of the code of professional  
15 responsibility that deal with the issue, a number of bar  
16 opinions and a canvas of thought by various second admissions  
17 and some excellent papers submitted by Ms. Rubin of Napoli  
18 Bern, have educated me further with regard to some of those  
19 precedents. And I thank you, Ms. Rubin, for those submissions.

20 I also thought that there needed to be greater clarity  
21 with regard to various practices. And for that purpose I filed  
22 an order to show cause just to have an order asking for various  
23 documents in connection with this hearing.

24 A lengthy submission was made to me on Wednesday, the  
25 25th, and I've read that. An even greater length of submission

08RVWTCA

## Argument

1 was made yesterday evening. And because of an extraordinarily  
2 crowded calendar this morning, including a number of difficult  
3 sentences, I was not able to inspect those papers. So, in  
4 argument, please indulge me on that and lead me through what I  
5 need to know with regard to those papers.

6 All right. So, Mr. Napoli, you have the issue, and I  
7 turn the floor over to you.

8 MR. NAPOLI: Thank you, your Honor.

9 Your Honor, we have reviewed your questions and  
10 understand your inquiries and interest on this topic of case  
11 financing. And as your Honor is aware, it costs a significant  
12 amount of money to finance and litigate a case such as this.

13 Financing in a case such as the World Trade Center  
14 case is necessary for a number of reasons. Without it, it  
15 would not be possible to litigate this case. Without financing  
16 these clients' cases, it would have been impossible, if not, to  
17 say the least, very difficult to proceed with the cases that we  
18 have, whether it was a single case or many cases on our  
19 clients' behalf.

20 As you know, and as your Honor just indicated, this  
21 topic has been well-covered by the ethics rules and opinions;  
22 and we have tried in the process of communicating with our  
23 clients from the beginning of the retainer to the end, signing  
24 the disbursements that are in this litigation, to be  
25 transparent.

08RVWTCA

## Argument

1           Throughout the years, we have consulted with various  
2 ethics professors on this issue because we know that issues  
3 like this are sensitive. But just as sensitive they are, they  
4 are important for prosecuting a client's case.

5           So, your Honor, the papers we submitted detail our  
6 arguments, our objections, and our positions. We stand ready  
7 to present witnesses and testimony, if you should so choose.  
8 We also stand ready to answer any questions you may have.

9           As you know, your Honor, we have submitted affidavits  
10 from Professor Wendel from Cornell Law School. He is here in  
11 the courtroom today, if you would like to have testimony from  
12 him.

13           We've also submitted an affidavit from Professor Sebok  
14 from Cardozo Law School. He is also available.

15           We understand your Honor has received from the  
16 allocation neutral memorandum on this issue. And I myself have  
17 also had discussions with Professor Simon on this topic.

18           And everyone's pronouncement to us is that what this  
19 is, the process of financing a case, is reasonable and ethical  
20 and appropriate in a contingency case.

21           And while your Honor has read at least the papers in  
22 response to the August 4 submission, and not had a chance to  
23 necessarily read the response to the August 17th submission,  
24 I'm not sure if everyone here has had the opportunity to read  
25 those papers. And maybe a pronouncement or some short

08RVWTCA

## Argument

1 testimony from Mr. Wendel, Professor Wendel, might help  
2 enlighten you on this issue, but I leave that to your Honor if  
3 you believe that is necessary.

4 What I should say, though, your Honor, and it should  
5 not be lost on anyone --

6 THE COURT: Just to beg my point, I've heard about  
7 borrowing. I've not heard of disbursing interest expense.

8 MR. NAPOLI: So, your Honor, what I would say, and I  
9 shouldn't be lost to anyone here, there was no one else that  
10 was willing to take this case. This was not like another mass  
11 tort where there were dozens, if not hundreds, of firms that  
12 could help finance and move this case along.

13 In this case, there was really essentially one, maybe  
14 two, plaintiffs firms that were handling any number of cases on  
15 these people's behalf.

16 THE COURT: We don't really know that, do we,  
17 Mr. Napoli? We know that you were there early and  
18 aggressively. We don't know what the situation would have been  
19 if you were not there, or we don't know what the situation  
20 would have been if you were content with having, say, the first  
21 50 signed up and saying, That's all I can handle. Or doing a  
22 different intake procedure so that you would take only people  
23 who were substantially injured rather than all who came.

24 MR. NAPOLI: Your Honor, what I do know is that the  
25 people who came to me in the beginning of the case and who came

1 to me throughout said that they had gone to other lawyers, that  
2 they had gone to other firms, and those firms were unwilling to  
3 take those cases.

4 What I do know, your Honor, is that when we began  
5 taking those cases, other firms who ordinarily -- significant  
6 firms in New York City, who would ordinarily handle these types  
7 of cases, were unwilling to take those cases and asked if we  
8 would take those cases on their behalf.

9 THE COURT: I don't know what that means, Mr. Napoli.  
10 They could decide that you were there, and economically it made  
11 sense for you to have additional cases. And you've mentioned  
12 before various aspects of forwarding fees. Maybe they were  
13 content with that. I don't know. I mean I can't say. We  
14 can't speculate on something that didn't happen.

15 What I do know is that you were willing to take the  
16 cases and you worked them aggressively.

17 MR. NAPOLI: Your Honor, I can tell you from my  
18 experience in being in over a dozen of these mass tort types of  
19 situations and cases before, I have never seen law firms to  
20 such an extent not want to take on cases. Usually it's part of  
21 the nature of the business to take on cases on behalf of  
22 clients. That's how they make their money and how they  
23 represent people.

24 And I can tell you, your Honor, that an overwhelming  
25 number of firms did not want to take the cases and turned to us

1 and handed us the cases because we were willing to take on the  
2 risk. Financing, your Honor, is part of what you have to do to  
3 go up against a behemoth like the WTC Captive and these  
4 defendants.

5 There's no other way, your Honor, to match the money  
6 they have to the claims. We need that money in order to  
7 prosecute the claims against these type of defendants, these  
8 big law firms. We need that financing to match it. And it's  
9 not even dollar-for-dollar.

10 If your Honor looks at how much they spent to how much  
11 we spent, it's comparatively a lot less. And, your Honor, when  
12 you look at the interest that's involved in this case and we  
13 set it out in our papers, the clients are only paying a portion  
14 of what we spent. And so, your Honor --

15 THE COURT: What do you mean by that?

16 MR. NAPOLI: Well, your Honor, there was over  
17 11,000,000 in interest in total. And 6.128, I believe, is the  
18 number that was charged to the client. So 5,000,000 in the  
19 interest was actually paid by us and not assessed to the  
20 clients in any way.

21 And out of that 6.128 million, since the expenses come  
22 off the top, what happens is the lawyers end up eating 25  
23 percent of it because we reduced our fee from a third to 25  
24 percent.

25 THE COURT: Oh, come on, Mr. Napoli.

1 MR. NAPOLI: That's how it works, your Honor.

2 THE COURT: The history of that is I rejected the  
3 first settlement. People were getting too much; the lawyers  
4 were getting too much. And I said a few things there in terms  
5 not only of the plaintiffs' lawyers, but actually most of the  
6 defendants' lawyers and the way they ran the case.

7 The settlement was improved by a contribution of  
8 \$50,000,000 or more by the captive on condition that you add  
9 \$50,000,000. So you knew that I was going to undoubtedly  
10 review your fee anyhow. Indeed, I said as much at the hearing  
11 when I rejected the settlement. And you offered, reluctantly,  
12 to reduce your fee from 33 percent to 25 percent.

13 I then told you that I would look well on that, but I  
14 would be examining your submissions and your hours. And one of  
15 the key components of the reasonableness of fee are the hourly  
16 inputs. You told me you didn't have any records.

17 I'm rather -- well, I won't register my comment with  
18 that. I knew how hard you worked. I also knew that you  
19 undoubtedly carried a very large expense, whether you financed  
20 it directly or you obtained financing from others.

21 And one of the reasons I gave for giving you 25  
22 percent was because I recognized the huge carrying expense that  
23 you have. And I said as much to you. And I recognize that.  
24 I'm not saying that borrowing is inappropriate. It's not. I'm  
25 not saying I didn't applaud your efforts of vigorously

1 prosecuting the case throughout. I did. And I do.

2 The question is the appropriateness from various  
3 considerations of passing on the disbursements to clients. I  
4 had never seen it before. I've seen lots of class actions. I  
5 know there's borrowing with class actions. I've never seen it  
6 there.

7 Now, I can recognize a practice where a lawyer and  
8 client are sitting down and the client says, I've got a good  
9 case, Mr. Lawyer, but I can't pay you.

10 And the lawyer will say, OK. I'll do it on a  
11 contingency. But you'll have to pay your expenses, because  
12 that is the provision in the code of professional  
13 responsibility.

14 And the client says, Well, I can't pay my expenses; I  
15 don't have the money.

16 The lawyer can't fund the money. Professional  
17 responsibility allows that to happen.

18 And if the lawyer doesn't have enough funds to carry  
19 on the case, the lawyer can borrow, with the consent of the  
20 client, recognizing with the client that the lawyer is, in  
21 effect, advancing the client's obligation.

22 And then there must be some kind of practice that's  
23 worked out of regularly billing; and so the client knows at  
24 every step how much it's costing him and why, and for what, and  
25 why it is.

1 I can understand that practice.

2 I also know that one of the most vexing problems in a  
3 lawyer/client relationship is when the client feels that the  
4 lawyer is spending too much on expenses. And having issued  
5 many bills when I was in practice, and hearing the comments of  
6 clients throughout, I know that expenses are very delicate  
7 objects.

8 I don't know in the way that all this is presented,  
9 notwithstanding what I saw in the sample reference retainers in  
10 Wednesday's submission of the laconic reference to the  
11 possibility of borrowing, I don't know to what extent clients  
12 see this. I don't know to what extent there is a segregation  
13 of money for purposes of borrowing for disbursements. I don't  
14 know to what extent -- which disbursements and to what extent  
15 they are being fronted an advance and financed.

16 I don't know to what extent money is being charged to  
17 an early client because the expenses are incurred in getting  
18 later clients. I don't see much advantage to an early client  
19 that you have a profusion of later clients. At some point, the  
20 economies of scale vanish, and there are diseconomies of having  
21 too many.

22 So all these are complexities. And I look upon this  
23 settlement, which is extraordinarily complicated, and I look  
24 upon what people are receiving and the perceptions of adequacy  
25 as to what they are receiving, and the need for simplicity in

1 administration, and the fact that I've taken into consideration  
2 and given you a 25 percent fee, the huge carrying expenses that  
3 I considered you had, without really knowing, and I've come to  
4 the view that questions the appropriateness in the context of  
5 this settlement of charging interest. That's why I called this  
6 hearing. I wanted to hear your views.

7 MR. NAPOLI: I understand. And we set out, your  
8 Honor, in our papers that we submitted last night, the  
9 accounting methods and the way this is dealt with.

10 And, your Honor --

11 THE COURT: As I said, I haven't had the opportunity  
12 of seeing that, so why don't you take me through that.

13 MR. NAPOLI: I will try to take you through it a  
14 little bit, your Honor. Certainly the papers -- I haven't had  
15 a lot of sleep, but the papers certainly --

16 THE COURT: I join you, Mr. Napoli. This has not been  
17 the easiest month for any of us.

18 MR. NAPOLI: Right.

19 THE COURT: We are all fighting a lack of sleep.

20 MR. NAPOLI: Your Honor, what we set out in our papers  
21 is what we have done all along. And we've done -- throughout  
22 the time we've done any litigation financing, and as part of  
23 the obligation of the lawyer, is to first get the best rates,  
24 make sure that the interest that's charged on cost are at the  
25 lowest available rates possible.

08RVWTCA

## Argument

1           And we did that by negotiating with various companies  
2 at various times, and by my partner and myself personally  
3 guaranteeing the credit lines that are used to finance the  
4 litigation costs.

5           And what does that mean? These were recourse credit  
6 lines. If your Honor had dismissed the case last year on  
7 immunity grounds, we wouldn't be going after the client for the  
8 interest. And the \$35 million we spent on disbursements, we  
9 would be subject to, from a bank, to having to pay that money  
10 back to them out of our own pocket.

11           THE COURT: A bank didn't lend you, did it?

12           MR. NAPOLI: Yes. Well, your Honor, the finance  
13 companies that are used are, in essence, middlemen. They work  
14 with other banks whose commercial lines ordinarily wouldn't use  
15 tort cases as collateral.

16           THE COURT: It's, in a sense, like accounts receivable  
17 financing.

18           MR. NAPOLI: In essence.

19           THE COURT: Except the problem is in the tort field,  
20 the accounts receivable are much less certain, and they are  
21 certainly not seasonal. And they are typical of accounts  
22 receivable financing, and I am quite familiar with it, because  
23 that was an important practice of mine for some period of time.

24           In accounts receivable financing, the typical  
25 situation is you get an interest rate that's six to eight

08RVWTCA

## Argument

1 points above prime, and it's secured by a seasonal business.  
2 So you need inventory financing at a certain point in time.  
3 And then the business sells the inventory, often seasonally,  
4 comes in with revenue, plants the inventory. There are tight  
5 controls exercised by businesses that are factors sometimes,  
6 and extend accounts receivable financing. And the accounts are  
7 liquidated usually in the course of six months.

8 This is novel because you have much less certainty of  
9 there being a receivable. Even the fashion industry is more  
10 certain than your business. And you may have to wait, and  
11 there are huge numbers of variables.

12 And, frankly, it sets up terrible pressures on the  
13 part of the lawyer, because at a certain point in time the  
14 financial pressures may be so great as to make a lawyer rather  
15 anxious to get a settlement, when it might not be the most  
16 advantageous circumstance or result for a client.

17 That's one of the reasons, incidentally, why I felt it  
18 was important to become involved in the case.

19 These are most unusual cases. The whole field of mass  
20 torts is extremely vexatious in the nature of the relationships  
21 that come to play in terms of a settlement. They are not  
22 necessarily individual; they tend to be settled in the  
23 aggregate like a class action. And then the overall money is  
24 divided in some fashion. And that process or provision creates  
25 numerous other potentialities for conflict just begging for

08RVWTCA

Argument

1 judicial supervision, which is why I exercised it.

2 MR. NAPOLI: Your Honor, I don't want there to be some  
3 misconception that the money paid on disbursements, the  
4 interest of financing on these cases on disbursements, was all  
5 that we laid out. My partners and I had laid out a significant  
6 amount of other expenses that are overhead above and beyond  
7 what was there. And that should also be taken into account  
8 when the Court is understanding why we reduced our fee and to  
9 what extent.

10 But your Honor raised a question about accounting.

11 And your Honor should know that what we do, and we set  
12 out in the papers on August 17th, if a client has a specific  
13 expense particular to their case, a case-specific expense, the  
14 interest is only assessed to them on their case-specific  
15 expense for that borrowing, not to everybody else, not to later  
16 clients; but it's unique to that individual. If they were  
17 earlier or later, whenever the expenses they incurred on their  
18 case-specific expense, that's assessed to them.

19 There is separate interest on case-wide stuff that  
20 would go across the docket. But that's only to our clients.

21 So you know from looking at our computer system the  
22 person it's assigned to, the amount, and the date of interest.  
23 And as the interest changes, so does the application of each  
24 individual client for that period of time. So the accounting  
25 is there on a case-specific basis.

08RVWTCA

Argument

1 THE COURT: Are you able to show me that in the  
2 papers?

3 MR. NAPOLI: I explain it to you in the papers.

4 Your Honor, we attest to in the papers that's how it's  
5 done. I mean I can give you the computer runs. It actually  
6 takes days and days for the computers to initially calculate.  
7 And I'm sure they can print it out, and it would be a large  
8 filing, but I can get a certification of whatever your Honor  
9 feels comfortable with other than our affidavits.

10 THE COURT: Was every disbursement the subject of  
11 borrowing?

12 MR. NAPOLI: Yes, your Honor.

13 THE COURT: Every single one?

14 MR. NAPOLI: Yes, your Honor. That's how these cases  
15 are financed, your Honor.

16 THE COURT: From the very beginning?

17 MR. NAPOLI: From the very beginning, your Honor.

18 THE COURT: And when you incur interest -- your loan  
19 is not specific to a particular case, is it?

20 MR. NAPOLI: The loan is, in general, dependent upon  
21 the big cases that we're handling at the time. And this --

22 THE COURT: So the firm has a general borrowing; it  
23 applies that borrowing to many cases?

24 MR. NAPOLI: Sometimes. And that's assessed through  
25 accounting, your Honor. But we have specific accounts just

08RVWTCA

Argument

1 for --

2 THE COURT: OK. But first time you go to a financing  
3 agency --

4 MR. NAPOLI: Yes.

5 THE COURT: -- which you called a middleman.

6 MR. NAPOLI: Yes.

7 THE COURT: In the business of lending money to  
8 lawyers.

9 MR. NAPOLI: Yes.

10 THE COURT: And then you say what? I just have a need  
11 for a certain amount of money?

12 MR. NAPOLI: No. They say -- well, you tell them what  
13 your need is or what you believe your need is. And they ask  
14 for what they believe is sufficient collateral to back that  
15 loan.

16 And in this case, it was the World Trade Center In Re:  
17 World Trade Center case. And so they have -- as a lien, they  
18 have that as their collateral on their books.

19 THE COURT: What do they have as collateral, besides  
20 your personal guarantees?

21 MR. NAPOLI: Well, arguably, it's the cases, which is  
22 it's worth whatever the case ultimately ends up being worth.

23 THE COURT: The receivables -- are your firm's  
24 receivables on the case?

25 MR. NAPOLI: The potential receivable, yes, your

08RVWTCA

Argument

1 Honor, on the case.

2 THE COURT: Your potential fee?

3 MR. NAPOLI: Yes, your Honor.

4 THE COURT: Is what is --

5 MR. NAPOLI: And disbursements. They attach the fee  
6 and the disbursements is the potential collateral on the case.

7 And what happens is when you need money --

8 THE COURT: So Mr. Garretson is going to process this  
9 and set off or give you instructions to set off X dollars for  
10 the client and Y dollars for you. That Y dollar then applied  
11 to liquidate the loans you made.

12 MR. NAPOLI: Yes, your Honor. Yes. That's how it  
13 would work.

14 And Mr. Garretson can also --

15 THE COURT: I've never seen it done. And I've started  
16 asking other judges in this Court if they have any experience  
17 so far. I've not run into any experience.

18 MR. NAPOLI: Well, your Honor, that's why I have  
19 Professor Sebok and Professor Wendel here. They can talk a  
20 little bit about it.

21 In our August 17th submission, we set out --

22 THE COURT: Why don't you just sort of defer a little  
23 bit to one of the professors, and then you come back.

24 MR. NAPOLI: Sure. Professor Wendel. Tony first?

25 OK.

08RVWTCA

## Argument

1 THE COURT: Nice to see you, Professor Sebok.

2 MR. SEBOK: Your Honor, it's good to see you again.

3 THE COURT: Last time we met, we were in Brooklyn.

4 MR. SEBOK: That's correct. I think that we also met  
5 in other scenarios, as well.

6 THE COURT: Well, that's good. It shows that I meet  
7 you more frequently than once or twice.

8 MR. SEBOK: I want to direct your attention in the  
9 submission you haven't had a chance to review yet, but you  
10 asked us to give you some direction.

11 There's a discussion there of a Louisiana Supreme  
12 Court case, the *Chittenden* case. The *Chittenden* case is  
13 probably the best example of how courts have handled this  
14 admittedly unusual practice.

15 In that case, you had an individual large tort case  
16 selling for \$1.4 million -- it was a significant case -- where  
17 the firm asked for the client as part of expenses to cover the  
18 cost of borrowing. It was a small-ish loan in a \$1.4 million  
19 case. I think the loan itself was maybe in the order of  
20 \$50,000 used for expenses in litigating this difficult and  
21 complex personal injury case.

22 The client was surprised. The client said, I don't  
23 remember agreeing to this. I thought this was a sort of  
24 soup-to-nuts operation; you basically put out all the expenses,  
25 and then you recover everything as like overhead in your

1 contingency fee.

2 And the lawyer said, Well, actually, that's not what  
3 you agreed to.

4 And the client went to the courts and -- up to the  
5 Louisiana Supreme Court. And the Louisiana Supreme Court had a  
6 very learned discussion of this, referring to four or five  
7 other jurisdictions: Maryland, Virginia. This is something  
8 which is permissible and done.

9 THE COURT: To the rules of ethical behavior of most  
10 jurisdictions.

11 MR. SEBOK: Exactly. Which are identical to the rules  
12 in New York State.

13 Now, the question about whether or not it's done in  
14 class actions, we have to be careful here.

15 The reasons why it is not done in class actions -- I  
16 will say as a matter of my experience, it is not done in class  
17 actions -- is because there is no client signing a retainer  
18 agreement in a class action.

19 Much of what needs to be understood here is whether or  
20 not we want to attribute too much awareness to clients about  
21 what they are signing when they sign retainer agreements. And  
22 Professor Wendel can speak about how the rules of professional  
23 responsibility are sensitive to the fact that laypeople are not  
24 really looking carefully at retainer agreements.

25 In a class action, it doesn't matter. Whatever you

08RVWTCA

Argument

1 attribute to a client, there's no claims.

2 On the other hand, these cases, these cases, either  
3 the *Chittenden* case or the cases involved in the World Trade  
4 Center, are based on a different model; they are not class  
5 actions. Whether this is like a class action, I understand.  
6 But this particular piece of it, the root of the problem that  
7 you are looking at now is rooted in structuring this as an  
8 aggregation of individual cases.

9 THE COURT: There haven't been too many experiences  
10 with mass torts. There have been some in this Court, but not  
11 too many. And I'm trying to find out if there has been any  
12 practice in this Court with regard to disbursements of  
13 financing expenses. I suspect a lot of it will also depend on  
14 how much is being disbursed, how much is asked of the client.

15 What aroused my attention, frankly, was the  
16 significant percentage of a recovery that was involved in a  
17 disbursement for financing expense. It came up in the  
18 newspaper. I tried and made several requests through my law  
19 clerk to Mr. Napoli's firm for a copy of that retainer  
20 agreement. I haven't examined the submission, but we couldn't  
21 get it; it was never sent to us.

22 So all I had was what was in the newspaper, which,  
23 notwithstanding the reporters here, lawyers tend not to take as  
24 the most authentic reliable source for information of this  
25 type, with apologies. But, nevertheless, that's all I had.

08RVWTCA

Argument

1           So, as I remember, it was in the high 500s against a  
2 claim -- against a recovery of \$3,250. And when it all came  
3 down at the end, the client was getting less than 50 percent  
4 recovery.

5           And it aroused my attention because if that was an  
6 expensive experience, the prospect of having a fair attorney  
7 was diminished; the prospect of having a good return in general  
8 in terms of adoption of the settlement was prejudiced; and it  
9 seemed to me that the lawyer perhaps lost a sense of balance.

10           Beyond legality and beyond ethics, there's also a  
11 sense of balance and what's appropriate, particularly in this  
12 field, particularly in relationship to clients who sign, as you  
13 say, retainer agreements without thinking too much about what  
14 they mean.

15           MR. SEBOK: Your Honor, I understand what you are  
16 saying. My abilities here extend to commenting on the  
17 commonality of this practice, whether it's done, and the  
18 reasonableness of the practice compared to what.

19           The calculations that would add up to a reduction of  
20 total recovery for any individual in the World Trade Center  
21 case, I would have to leave that to a discussion between you  
22 and the attorneys here.

23           But I'd like to talk a little bit about the  
24 reasonableness --

25           MR. NAPOLI: I just want to add --

08RVWTCA

Argument

1 THE COURT: No, no. Make a note.

2 MR. NAPOLI: OK.

3 MR. SEBOK: I'd like to talk about the reasonableness  
4 of borrowing, as this firm did --

5 THE COURT: I don't question that.

6 MR. SEBOK: -- compared to what.

7 THE COURT: See, I don't question that. You know, I  
8 don't know whether you made the point or Judge Weinstein made  
9 the point or maybe both made the point, this is big-time stuff.  
10 And unless someone is willing to step up to the plate, it means  
11 a lot of individuals have to suffer injury without getting the  
12 champion to seek redress for them.

13 MR. SEBOK: I want to speak to a further point, which  
14 is I'm seeing an emerging industry of third-party funders who  
15 would be more than happy for the lawyers in this case not to do  
16 what they have done, but, rather, hand them over to the  
17 third-party funders and to take a much bigger piece of the  
18 recovery. And that will be the alternative.

19 THE COURT: I'm not sure that's the alternative.  
20 There are various alternatives.

21 One alternative is to require more capacity in the  
22 lawyer. Another alternative is to take fewer cases. Frankly,  
23 I think Mr. Napoli has bit off much too many cases, which has  
24 led to numbers of different problems in the cases. And I don't  
25 believe that it's the advantage of the first 50, say, that

08RVWTCA

Argument

1 there are 9,000 more.

2 At some point you reach early the critical mass; you  
3 say, Enough. I'll do these cases. Let someone else do the  
4 others. I can't take them.

5 I mean I feel that many times lawyers lose their best  
6 clients by accepting what they have and not, therefore, being  
7 able to take the ones that come as part of being a lawyer.

8 So I'm not sure it was to the benefit of the early  
9 ones to have all this financing. There's a lot of financing in  
10 this case, an unhealthy amount, in relationship to what the  
11 lawyer has to do, I think.

12 MR. SEBOK: If you want me to speak to that, what I  
13 understand about the --

14 THE COURT: Rare opportunity to have you in my  
15 courtroom, Professor Sebok. I want to take every advantage of  
16 it.

17 MR. SEBOK: Well, I mean the reference that you made  
18 to the material about what Judge Weinstein said and the  
19 reflections on Agent Orange I think are important here.

20 The recent history of class action and aggregated mass  
21 tort litigation, whether we begin with Agent Orange, go through  
22 asbestos, go up to Vioxx, is that as the Second Circuit noted  
23 with concern, increasingly courts, the media, and clients,  
24 expect lawyers to be bankers, bankers for their clients' cases.  
25 That's a relatively recent phenomena. It was once viewed as

08RVWTCA

Argument

1 deeply unethical.

2 THE COURT: I found that to be true in individual  
3 practice sometime. There's many situations where the lawyer  
4 turns out to be working *pro bono* where he thinks he's supposed  
5 to be paid.

6 MR. SEBOK: What I think we need to recognize within  
7 the last ten years is that it's becoming increasingly more  
8 difficult for firms to be bankers, partly for two reasons:

9 One is courts are becoming really tougher now in class  
10 action certification. It's becoming less attractive for firms  
11 to come in as they did in Agent Orange and be passed as  
12 bankers. And that's, in some sense, what would have had to  
13 happen here.

14 And, secondly, the environment for litigation is  
15 becoming more hostile.

16 This case is unusual, in my opinion, in that you did  
17 not have a team of firms, mass tort firms, coming in where one  
18 acts or a few act as the bankers. Now, why that happened, I  
19 can't say whether or not -- I don't know the personally  
20 histories here; I don't know whether this firm did anything to  
21 make it unattractive for other firms to come in. But it is  
22 unusual in a case of this size, one firm basically tried to do  
23 so much in ways of different roles.

24 And when you have one firm playing different roles,  
25 yes, you're going to have one firm leveraging. And if they are

08RVWTCA

Argument

1 going to do that much leveraging, they have no choice, but  
2 either have the clients put the money by selling their cases or  
3 have lenders come in and lend through them to the clients.

4 As to the ethics of it, I mean I really would defer to  
5 my colleague from Cornell who I think might have some things to  
6 say about whether this is or is not something that should make  
7 our antennae go up or not.

8 I think I encourage you to speak to Professor Wendel a  
9 little bit about this issue.

10 THE COURT: Sure. Thank you very much, Professor  
11 Sebok.

12 This is our first meeting.

13 MR. WENDEL: Good afternoon, your Honor. Hope we have  
14 others.

15 THE COURT: The special masters tell me that they  
16 regard both of you with extreme respect.

17 MR. WENDEL: That's nice to hear, your Honor.

18 THE COURT: You've got in the profession.

19 MR. WENDEL: Thank you.

20 May it please the Court, my last name is Wendel,  
21 W-E-N-D-E-L.

22 I just wanted to briefly address the disclosure issue  
23 which your Honor mentioned earlier as something that caused you  
24 some concern.

25 And these attorney-client agreements really are

1 contracts; they are governed by the law of contracts. But the  
2 ethical responsibilities of lawyers go beyond simply what  
3 contract law would require. And there are a lot of fiduciary  
4 responsibilities that are part of the lawyer's role, as well.

5 And the Rules of Professional Conduct have extensive  
6 requirements for disclosing the basis of calculating attorneys'  
7 fees and expenses. And that's particularly true in the context  
8 of contingency fees, where the clients may be unsophisticated  
9 individual consumers of legal services, not institutions.

10 The custom for institutional clients used to be, as  
11 your Honor may know, to simply send a bill at the end of the  
12 engagement saying, For legal services rendered, here is the  
13 amount.

14 THE COURT: Long time since we can do that.

15 MR. WENDEL: Right. The times are long past. Large  
16 institutional clients have the power to demand more disclosure  
17 from their lawyers. And in the case of individual client  
18 representation, the rules require quite extensive disclosure.

19 The New York rules, Rule 1.5, and also New York  
20 statutes --

21 THE COURT: I can tell you when my firm issued bills,  
22 this is eleven years ago and longer, there were copies in the  
23 computer.

24 MR. WENDEL: Right. And I'm a former defense site  
25 tort lawyer, actually, as it happens. And I remember our

08RVWTCA

## Argument

1 clients used to go round and round with us about our bills, as  
2 well. And in order to avoid those clients kinds of problems,  
3 the rules require extensive disclosure at the outset.

4 I've seen a lot of retainer agreements and engagement  
5 letters entered into between lawyers and clients, and these  
6 disclosures are very good. They specify that disbursements and  
7 expenses will be paid, and may include a long list of  
8 disbursements and expenses.

9 And there are numerous ethics opinions that say  
10 borrowing costs are a reasonable, ordinary, and customary  
11 aspect of expenses that may be incurred and passed onto clients  
12 as part of financing cases.

13 And these ethics opinions, it's kind of interesting,  
14 they often arise in response to requests by lawyers. Ethics  
15 committees don't sit around and dream of issues to write about;  
16 they respond to questions from the bar.

17 THE COURT: They are also responsive to segments of  
18 the bar, too.

19 MR. WENDEL: That may be the case, your Honor. That's  
20 right. I think it's significant actually --

21 THE COURT: And trial lawyers may have large input in  
22 a particular opinion.

23 MR. WENDEL: That's right. Although in New York, the  
24 city bar is often thought to be kind of the big-firm captured  
25 bar association.

08RVWTCA

## Argument

1 So I think it's interesting that in New York --

2 THE COURT: Depends on the committee.

3 MR. WENDEL: That's right. I think it's significant  
4 that in New York you have the state bar and the city bar both  
5 taking the same position. And these positions are the same  
6 positions taken by all other ethics opinions that I'm aware of.  
7 And these are responses to queries from the bar, what can we  
8 do.

9 And I think that goes to the question of custom. And  
10 it goes to what Professor Sebok was talking about, about the  
11 emergence of a financing industry. You have a lot of lawyers  
12 saying, I need this financing in order to represent clients.  
13 Can we do this ethically. And there's relatively little  
14 guidance. And so lawyers go to their state bar associations.  
15 And that's where these opinions come from. That's why you see  
16 them in lots and lots of different jurisdictions.

17 And uniformly nationwide, applying the same legal  
18 standard, the ethics opinions say that along with photocopying,  
19 and travel, and filing fees, and expert witnesses, and things  
20 like that, lawyers may borrow and pass along borrowing costs as  
21 an ordinary incidental expense of litigation.

22 THE COURT: You set out in your opinion -- I'm looking  
23 for it in my notes -- a number of criteria that the retainer  
24 agreement has to set out.

25 MR. WENDEL: Yes, your Honor. That's paragraphs 16,

08RVWTCA

Argument

1 17 in my affidavit; 15, 16, 17.

2 THE COURT: And I think it deals with the New York  
3 State Bar Association opinion.

4 MR. WENDEL: That comes from the ethics rules  
5 themselves, actually, the Rules of Professional Conduct, which  
6 actually are binding law. The ethics opinions are advisory;  
7 they are very helpful; they can be very influential. But they  
8 are not, strictly speaking, binding law.

9 In my affidavit, I rested my opinion on the rules  
10 themselves and New York statutes. I use the opinions for  
11 illustrative purposes, but not as a source of authority.

12 So the opinion is based on Rule 1.5(b) primarily,  
13 which is, by the way, substantively identical to the former New  
14 York code, which was recently changed in '08.

15 THE COURT: I have it here. This is the New York  
16 State Bar Association Committee on Professional Ethics.  
17 Opinion 729; May 10, 2000.

18 We conclude that under the code, subject to any legal  
19 restrictions, a contingent-fee attorney may impose an interest  
20 charge on unpaid disbursements as long as, one, the client is  
21 clearly advised an interest charge will be imposed on  
22 disbursements that are not paid within the stated period of  
23 time, and the client consents to that arrangement before it  
24 goes into effect.

25 Two. The client is billed for the disbursements

1 promptly after they have been incurred so the client may decide  
2 whether to pay the disbursements or incur the interest charge.

3 Three. The period of time between the bill and the  
4 imposition of the interest charge is reasonable.

5 Four. The disbursement itself is appropriate.

6 And five. The interest rate is reasonable.

7 And then it goes on to talk about excessiveness of  
8 fees. And the interest rate has to be no more than the lawyer  
9 incurs.

10 I didn't do a very detailed comparison, except to the  
11 general retainer sample that was in the Wednesday submission.  
12 And I'm not sure that these five criteria are satisfied.

13 MR. WENDEL: Well, opinion 729 deals with a slightly  
14 different issue, which is whether the lawyer can charge, in  
15 effect, interest on overdue bills submitted to the client. A  
16 follow-up opinion deals with the interest -- the issue of  
17 passing on borrowing costs.

18 But I do think your Honor is onto something important,  
19 which is what is workable with the case of one client and a  
20 relatively small number of discrete disbursements would be  
21 cumbersome and almost impossible to manage with a large number  
22 of plaintiffs, and a large number of disbursements, and a large  
23 number of borrowings.

24 I reviewed the borrowing chart submitted by the Napoli  
25 firm as an exhibit to the affidavit. And there are a number of

08RVWTCA

Argument

1 loans taken out -- I'm not sure whether it's against a line of  
2 credit or specifically from a lender -- but there are a number  
3 of different borrowings and many, many different clients who  
4 would need to be consulted about using that -- using those  
5 funds to pay specific expenses.

6 This is the problem in this case, is that mass torts  
7 are so different in some ways from ordinary single-client tort  
8 cases. And it would simply overwhelm the plaintiffs' lawyers  
9 to have to talk to their clients specifically about each  
10 borrowing and each expense.

11 That's why I spent some time in my affidavit talking  
12 about the lawyer's authority to make decisions about the means  
13 of representation and charge clients' expenses for doing so,  
14 provided that they are reasonable.

15 Lawyers have a fiduciary obligation always to act in  
16 the best interest of their client. And by placing the  
17 responsibility on lawyers to do that, it makes this process  
18 administrable.

19 THE COURT: Wouldn't it have been advisable to have  
20 this candid discussion with the judge well before the issue was  
21 in crisis mode?

22 MR. WENDEL: Well, your Honor --

23 THE COURT: Something is being done here that is not,  
24 your opinion, part of the mold. Much of our rules have been  
25 promulgated for individual client, individual lawyer. And the

08RVWTCA

Argument

1 bar has not really faced off to the special issues of mass  
2 torts. It's hard enough to do it in class actions; it's been  
3 much more difficult with mass torts.

4 This might have been a very good discussion in 2007 or  
5 2008. It's very hard to deal with it now.

6 MR. WENDEL: It would be a very important discussion  
7 to have with one's clients. And, actually, something that  
8 struck me as I reviewed the record is how many different ethics  
9 specialists, people I know and respect from the industry, have  
10 gone over lawyer-client communication? Because that's a very  
11 tricky aspect of aggregate representation.

12 THE COURT: One of the reasons I had Professor Simon  
13 engaged with this case --

14 MR. WENDEL: Absolutely.

15 THE COURT: -- is to deal with that issue. Because  
16 one lawyer representing clients in many different interests is  
17 in a potentiality of conflict.

18 MR. WENDEL: Exactly. But that's the important  
19 communication to have, your Honor, is between lawyer and  
20 client. The clients need to be fully informed; there needs to  
21 be candid communication with clients. And as long as there's  
22 been candid communication with clients, this is a contract.  
23 This fee agreement is an attorney-client contract.

24 THE COURT: It's more than a contract. Yes, I agree  
25 if there had been full communications with clients where this

1 was discussed and the clients were informed of how much money  
2 was really involved, it might have been a different situation.  
3 Maybe a client's committee would have been formed to check with  
4 a lawyer on various things.

5 When lawyers have to make decisions that are  
6 essentially clients' decisions, the potentiality for trouble  
7 comes up.

8 I'm not impugning Mr. Napoli's good faith in this. I  
9 want that to be very clear. I think I, as a judge, have a role  
10 that's different from his. I have to look at the overall  
11 fairness of the case, and the appropriateness of particular  
12 charges in relation to the case, and in relation to the fee  
13 that I granted to Mr. Napoli, without my usual requirement of  
14 records that justify every aspect of the fee.

15 Anyway, I thank you very much for your input. It's  
16 enlightening. It's certainly a difficult issue that the bar  
17 has to confront in a much greater nuance than so far it has.

18 MR. WENDEL: Thank you.

19 MR. NAPOLI: Your Honor, I just want to add a couple  
20 points.

21 In our August 17th -- in our response to your August  
22 17th order and our submission last evening, as Exhibit B, we  
23 attached the retainer agreements with our clients that we  
24 utilized in both English, Polish, and Spanish.

25 THE COURT: My knowledge of Spanish is rudimentary.

08RVWTCA

Argument

1 My knowledge of Polish is nonexistent. So I'm not sure I could  
2 be helped by those documents.

3 MR. NAPOLI: The important point, your Honor, is that  
4 we recognize that our clients, in communicating with them,  
5 don't all have the same ability in English. And so we try to  
6 be as clear as we can in whatever language they speak. And so  
7 we try to meet the Court's and our ethical requirement of  
8 client communication.

9 And you need to remember one thing, your Honor. Part  
10 of why this issue arose is because we sent the disclosure  
11 letter to our clients, the letter that was vetted by Professor  
12 Simon. And it included not hidden, but spelled out in the  
13 disbursement statement that there was a return on interest.  
14 That's why it arose. And we specifically reiterate what we say  
15 in the retainer statement in asking them to sign off on the  
16 disbursements.

17 THE COURT: I have the Exhibit B in front of me. I  
18 have to ask you here what is not to be filed in full and what  
19 is. Where in the retainer -- because I've read this before --  
20 should I look?

21 MS. RUBIN: Judge, I believe it's paragraph 8.

22 THE COURT: Thank you, Ms. Rubin.

23 Miscellaneous. If the firm borrows money from any  
24 lending institution to finance the cost of a client's case, the  
25 amounts advanced by this firm to pay the cost of prosecuting or

08RVWTCA

Argument

1 defending a claim or action or otherwise protecting or  
2 promoting the client's interest will bear interest at the  
3 highest lawful rate allowed by applicable law. In no event  
4 will the interest be greater than the amount paid by the firm  
5 to the lending institution.

6 This doesn't really correspond to all the criteria I  
7 read out with Professor Wendel. And the reference to the cost  
8 of prosecuting or defending -- or promoting the client's  
9 interest is a concept that is much broader than customary  
10 allowance of disbursements.

11 MR. NAPOLI: Your Honor, I asked Professor Wendel to  
12 opine on this. And I'd ask that he just respond to your  
13 questions. He's better suited than I to do that.

14 MR. WENDEL: I can address that, your Honor. I think  
15 I did review this retainer agreement in reaching my opinion.  
16 And my conclusion is that this is adequate to satisfy the  
17 requirements of New York law regarding specific disclosure to  
18 the clients of the fact that lawyers may bill them for  
19 disbursements, and that those disbursements may include  
20 interest.

21 If you read paragraph 2 and paragraph 8 together, that  
22 very clearly advises clients of the fact that they have to pay  
23 back expenses, including court costs, stenographers, experts,  
24 and so on. And specifically, paragraph 8 goes on to elaborate  
25 on the nature of the interest expense that may be charged that

1 lawyers may borrow from financial institutions to finance the  
2 cost of litigation, and they will charge the prevailing  
3 interest rate.

4 THE COURT: This says that disbursements may include  
5 some of the following expenses: Court filing fees, sheriff  
6 fees, medical and hospital report record fees, doctor's report,  
7 court stenographer fees, deposition costs, expert fees for  
8 expert depositions and court appearances, trial exhibits,  
9 computer online search fees, express mail, postage, photocopy  
10 charges, long distance telephone charges, among other things.

11 There are many consultants who are used to evaluate  
12 various aspects of the case I understand are being challenged  
13 for Wednesday's hearing. And I suspect that interest was  
14 applied to those expenses, as well.

15 Some or all of these things could have been done much  
16 more economically, particularly if anticipated by the client  
17 rather than the lawyer. And if the client had been given the  
18 opportunity, it might have saved some money. It doesn't really  
19 tell me too much, frankly, in relationship to financing costs.

20 MR. WENDEL: But I think you have to read that again  
21 in paragraph 8, which wouldn't be in there if it weren't  
22 contemplated that the lawyers would pass on borrowing costs to  
23 the client. That's why that's in the contract.

24 THE COURT: I think one can say that if a client read  
25 this, the client would have appreciated that he might get a

1 bill for financing expenses, because you said before it's more  
2 than a contract; it's also a fiduciary relationship.

3 And the example given, this is also interesting, gross  
4 settlement, as a sample, is \$100, less disbursements of \$10,  
5 which suggests a ten percent item. We are talking about  
6 disbursements that exceed that amount, that percentage.

7 Look, it's a complicated business. I make the same  
8 point as I made before. This should have been anticipated; the  
9 problem should have been anticipated and brought to my  
10 attention.

11 Mr. Napoli knows I was sympathetic to many of his  
12 problems as he went along the case. And it was of particular  
13 concern to me that this case be prosecuted and brought to a  
14 merits result. And that's the way I conducted not only this  
15 master calendar, but all the others, as well; economically and  
16 efficiently, so that people can get what they are entitled to  
17 get: The maximum return possible.

18 MR. NAPOLI: Your Honor, respectfully, we did not  
19 anticipate this earlier for two reasons. Ordinarily, your  
20 Honor, in any mass tort that I've been involved in, expenses  
21 don't undergo court scrutiny or court vetting as they are here.  
22 So that's first.

23 But second, your Honor, I don't think it was  
24 beneficial to my clients in any way to come to the Court in  
25 2007, 2008 with the defendants by my side and discuss how the

1 case is financed.

2 THE COURT: You could have made this an *ex parte*  
3 hearing. There are provisions for that.

4 MR. NAPOLI: We never anticipated, your Honor, that  
5 this would occur, quite frankly. And, your Honor --

6 THE COURT: Well, maybe you should have done a number  
7 of things looking to the possibility the Court might want to  
8 review the fairness of the overall result.

9 MR. NAPOLI: Your Honor, I think, this, as has been  
10 stated many times, is an unusual circumstance. We understand  
11 where we are. We're not griping on where we are, but we  
12 certainly didn't anticipate it, and maybe that is my fault that  
13 I didn't anticipate. And if it is, I apologize. But, we never  
14 suspected that we would be in this situation where the Court  
15 would be looking at these contracts between our clients and  
16 looking at the disbursements.

17 Your Honor stressed one other thing I'd just like to  
18 address before I get to my letter one last time, is that the  
19 clients, if they had the opportunity, could have done this more  
20 economically.

21 And, your Honor, we do what we can on the limited  
22 resources we have. And while financing helped to extend our  
23 resources, our resources are dwarfed by the resources of  
24 defendants in this case. And when we go against pharmaceutical  
25 companies and other companies, our resources are dwarfed in

08RVWTCA

Argument

1 relation to the resources they have. A lot of times these  
2 pharmaceutical companies are \$40 billion capitalized companies.

3 THE COURT: Mr. Napoli, I designed a discovery program  
4 specifically to make it possible for all your clients to  
5 advance their merits, notwithstanding the disparity of economic  
6 power. I conducted this case in many other respects to  
7 equalize the balances.

8 I know that problem. I've confronted it many times.  
9 As long as I'm a judge in this Court, I and most of my  
10 colleagues, if not all my colleagues, will assure that justice  
11 comes to the weak and the powerful, the rich and the poor.  
12 That was our oath when we became judges, and we take it  
13 seriously. You've suffered no prejudice in this.

14 MR. NAPOLI: We appreciate that, your Honor. And by  
15 financing the case, it helped us level the playing field to  
16 advance the clients' cases.

17 But, your Honor, I want to go back to how this came  
18 about. And your Honor said there was an article in the paper  
19 that raised your attention. And, your Honor, when it raised  
20 your attention and before it raised our attention, as well, and  
21 that is the reason why we sent the letters to the clients, to  
22 show them the disbursements, show them where they fit in the  
23 settlement, show them how much money they are getting. And if  
24 the client --

25 THE COURT: That was at my insistence, Mr. Napoli.

1 MR. NAPOLI: And we do it anyway, your Honor. That's  
2 why we have professors that we consult like Professor Wendel,  
3 Professor Sebok, or Professor Green or others. We do this as a  
4 matter of course.

5 And so the client can come to us and say, There is a  
6 problem. Please explain. And we deal with it.

7 The client in that circumstance went to the newspaper  
8 before they came to us. And when we saw it in the newspaper,  
9 we went to him and we resolved the problem.

10 We're not always 100 percent right on the things we  
11 send out, and that's why we're able to have an interaction with  
12 the client, before we submit any releases. Before we submit  
13 any claim forms to Mr. Garretson, we want to make sure that the  
14 client fully appreciates what they are signing; that they fully  
15 appreciate how much they are getting. And that was part of the  
16 process, your Honor. This is what we do to make sure that  
17 there's adequate communication.

18 And that's why there's no requirement that we put it  
19 on our disbursement sheet, or even send the disbursement sheet  
20 anywhere in the rules or in the opinions. But we do that extra  
21 step and put it on the disbursement sheet.

22 And, your Honor, I will tell you, of the clients who  
23 have returned the releases, they have all signed off on the  
24 interest expense specifically, your Honor.

25 THE COURT: I need to stop you for a minute

08RVWTCA

Argument

1 Mr. Napoli.

2 MR. NAPOLI: OK.

3 (Recess)

4 THE COURT: We'll resume with the motion again.

5 MR. NAPOLI: Your Honor, I just wanted to reiterate,  
6 as I was stating, that this process of providing this  
7 disbursement and showing disbursement, asking the client to  
8 sign off on the disbursement is part of the transparency that  
9 you demanded. It is something we ordinarily do to make sure  
10 that a client fully understands --

11 THE COURT: Let's move on, Mr. Napoli. What points  
12 did you want to bring up?

13 MR. NAPOLI: Lastly, your Honor, of the clients that  
14 have returned the packets and releases, they have signed off.  
15 Not one client has not signed off on the interest charged  
16 specifically as part of the disbursement sheet. We've asked  
17 for their signature of them and their spouse, and as they did  
18 in the retainer, they have agreed.

19 THE COURT: What's the range of disbursement for  
20 financing expense?

21 MR. NAPOLI: Your Honor, for a Tier 1, the average, I  
22 believe, is about -- I have the -- do I have it here?

23 MS. RUBIN: It's in a footnote in the brief.

24 MR. NAPOLI: I just want to give the appropriate  
25 numbers, your Honor. Your Honor, the average for a Tier 1 is

08RVWTCA

Argument

1 \$78.23.

2 THE COURT: What's the range?

3 MR. NAPOLI: And for a Tier 4 is -- I just want to  
4 make sure I'm giving you the right example, your Honor.

5 THE COURT: And the aggregate is 6.128 million?

6 MR. NAPOLI: Excuse me?

7 THE COURT: The aggregate of all interest charges to  
8 clients is 6,128,000?

9 MR. NAPOLI: Yes, your Honor. And so your Honor --  
10 and for a Tier 4 claim it would be \$2300.

11 THE COURT: It's hard to figure the consonance of both  
12 those kinds of numbers totaling 6,128,000.

13 MR. NAPOLI: That's what it adds up to, your Honor.

14 And as I was saying, your Honor, the clients are  
15 signing off on it as they signed off in the retainers.

16 THE COURT: Mr. Napoli, you're standing to make a fee  
17 of \$150,000,000. In the context of a fee of \$150,000,000, I  
18 believe you can absorb \$6,128,000. This doesn't go with the  
19 fees you're going to be making given additional settlements in  
20 the cases, whatever that fee is going to be.

21 MR. NAPOLI: Your Honor, as I've tried to impress upon  
22 my clients and the Court, in reducing our fee, your Honor, I am  
23 willing to try to resolve this situation so that it satisfies  
24 both myself and the Court and the clients.

25 But your Honor should be aware --

08RVWTCA

## Argument

1 THE COURT: Given the fee I told you I'm going to  
2 award to you, and just take 25 percent of \$625 million, the  
3 lower number, 25 percent comes out to more than \$150,000,000.  
4 You can surely absorb \$6,128,000. Given that fee, this  
5 disbursement is unreasonable.

6 MR. NAPOLI: But, your Honor, the question, your  
7 Honor, is we accounted for that in our reduction.

8 THE COURT: You're making a big point before that you  
9 swallowed some money before. Just think about it. I got an  
10 additional \$50,000,000 in this case. You're getting 25 percent  
11 of that. What does that come to? \$12,500,000. Take a third  
12 of the lower number, 575,000,000. The marginal difference  
13 between \$12,500,000 and a third, if you would get a third, of a  
14 lower number, which you might not have gotten, because there  
15 might not have been a settlement -- Mr. Napoli, I'm going to  
16 write an opinion on this. But I can tell you now that I'm not  
17 going to allow this charge.

18 The people who are coming into this settlement in the  
19 various numbers and the various expectations I think want to  
20 have the fruits of this settlement, not diminished by an effort  
21 of lawyers to finance much of the way they work this case,  
22 partly because of disbursements, partly to raise their  
23 capacity, partly to get new clients, partly to lobby for  
24 extensions of statutes of limitations, and numerous other  
25 places.

08RVWTCA

## Argument

1           If we were to go and try to administer this settlement  
2 so as to make sure that only classical disbursements were  
3 subjected to these financing fees, we would be involved in  
4 administrative harass and improperly increase the expenses of  
5 administration.

6           I don't see it.

7           I'm not saying this was unethical. I'm not saying  
8 that you didn't try to stay attuned with the rules of  
9 professional responsibility. But my job is to measure the fees  
10 and allowances in this case, is reasonable and not excessive.  
11 And the relation, in my judgment, of what is expected by the  
12 various parties and what you got in fee or what you're getting  
13 in fee I think is too much.

14           You've also challenged my right to do this and my  
15 power to do this.

16           This settlement, in many respects, is akin to a class  
17 action settlement. The settlement number is an aggregate  
18 number. And incentives are also making it an aggregate number.  
19 And that number is to be divided in many ways, some of which  
20 are fixed, some of which are subject to adjustment. And  
21 adjustments are to be made so that the aggregate number is not  
22 exceeded.

23           So this is not just a collection of individual  
24 settlements; it's much more an aggregate class action  
25 settlement over which the district judge clearly has power.

1           Furthermore, given the wide variety of clients that  
2 you had and represent in many different situations, when it  
3 comes to settling and deciding who gets what, and what the fees  
4 will be, and how they are to be allocated, all these kinds of  
5 questions are to be measured in relationship to potentialities  
6 of conflict over which the Court has power to make sure that  
7 the cases are fairly run and people are fairly represented.  
8 And so this Court has jurisdiction with respect to that, as  
9 well.

10           And with respect to fees, they have to be reasonable  
11 and not excessive under New York laws, as Professor Wendel and  
12 Professor Sebok have amply shown.

13           It's the job of the district judge who has this case,  
14 and who's had this case now for seven years, to make sure that  
15 things proceed in a reasonable way.

16           So my jurisdiction is reasonably exercised, and this  
17 also will be in my decision, but I wanted to announce the  
18 results.

19           Thank you all very much. I thank you for the amazing  
20 work that you've done.

21           MS. RUBIN: Judge, just for the record, your Honor  
22 ordered us to file papers by 4 o'clock today. They are shortly  
23 ready for drafting -- for filing, rather. I worked till 6:30  
24 this morning. But as I am standing here, I cannot possibly be  
25 filing by 4 o'clock.

08RVWTCA

Argument

1 THE COURT: When do you want me to enlarge that time  
2 frame?

3 MS. RUBIN: Well, I need some time to get to my  
4 computer and take a look. Can we do it for Monday, your Honor?

5 THE COURT: Yes. How about 4 o'clock Monday?

6 MS. RUBIN: Four o'clock Monday would be wonderful.  
7 Thank you.

8 THE COURT: I need to know what is to be redacted and  
9 what is to be filed.

10 MS. RUBIN: B through B4, C through C4.

11 THE COURT: B?

12 MS. RUBIN: All of the retainer statements.

13 THE COURT: B is a sample.

14 MS. RUBIN: Right. B through B4. Those are  
15 proprietary documents, your Honor.

16 THE COURT: I think you need to file the retainers.

17 MS. RUBIN: Your Honor, those are proprietary  
18 documents.

19 THE COURT: Can people stay for another few minutes  
20 until I resolve this? Please sit down.

21 MS. RUBIN: They are produced at great expense and  
22 great trouble with ethics counsel. And they are a trade secret  
23 and a proprietary document, your Honor. I cannot stress that  
24 strongly enough.

25 THE COURT: All right. Then what parts of it will you

08RVWTCA

Argument

1 want to put on the table? The paragraph that I read out in the  
2 record, paragraph 2, seems to be something for me to put down.  
3 Paragraph 3 needs to be in the public record. Paragraph 8  
4 needs to be in the public record. I don't think anything else  
5 was too --

6 MS. RUBIN: Fair enough, your Honor.

7 At this point, what was filed was simply a sheet  
8 saying that those documents, B1 -- B through B4 have not been  
9 filed with ECF because they are --

10 THE COURT: B1 through 4 can be redacted.

11 MS. RUBIN: Also, C through C4.

12 THE COURT: Seems to me that these disclosure  
13 statements to the lawyers -- to the clients need to be put on  
14 the record in some fashion, someplace.

15 MS. RUBIN: Are we still talking about B or are we  
16 onto C?

17 THE COURT: C.

18 MS. RUBIN: Your Honor, I must confess that having  
19 been up all night briefing, I don't honestly remember what C  
20 is. I just remember it was redacted.

21 THE COURT: C is your letter to clients.

22 MS. RUBIN: OK. Those are attorney-client  
23 communications, your Honor; and, as such, are privileged.

24 And lastly, I believe F was redacted.

25 THE COURT: Just a minute. Just a minute. C is a

08RVWTCA

## Argument

1 sample letter; it's not addressed to anybody in particular.

2 MS. RUBIN: It actually is, but the name has been  
3 redacted. It contains specific information to an individual  
4 client's case and disbursements. And if you look at the top of  
5 each page, you'll see that the name has been blocked out. But  
6 it is a specific client's letter, it is privileged, and has not  
7 been filed with the system for exactly that reason.

8 THE COURT: The communications to resolve a case  
9 typically are part of the public record.

10 MS. RUBIN: The short form letter I believe already  
11 is. I can give you the short form letter.

12 THE COURT: I'll put this to you, Ms. Rubin. If there  
13 is anything in particular that you would like redacted here,  
14 I'll be willing to hear it. But my ruling is that the  
15 communication sample form --

16 MS. RUBIN: What I would propose, your Honor, is that  
17 I give you the template short form letter without a specific  
18 client's numbers in it.

19 THE COURT: I'll review it, but I'm not going to make  
20 a ruling yet.

21 And F is your record of the borrowings and the  
22 amounts.

23 MS. RUBIN: Exactly. And, again, we consider that  
24 proprietary and trade secret.

25 THE COURT: Particularly in light of my ruling, I'll

08RVWTCA

Argument

1 let you redact it.

2 MS. RUBIN: Thank you, Judge.

3 And what I can do is send you the template short form  
4 letter which your Honor has, of course, already seen, but as  
5 our proposed replacement for the C1 through C4, which will be  
6 identical but for the inclusion of specific client numbers.

7 THE COURT: And I'll review it then.

8 Thank you very much.

9 MS. RUBIN: Thank you, Judge.

10 MR. PAPAIN: Your Honor, can I just be heard for one  
11 moment?

12 THE COURT: Yes, Ms. Papain.

13 MR. PAPAIN: Your Honor, with regard to Ms. Rubin's  
14 application to extend the time to submit their response to our  
15 objections regarding certain claimed common benefit expenses  
16 from 4 o'clock today to Monday, we do not object to that so  
17 long as we are provided with one day in which to reply, if  
18 appropriate.

19 THE COURT: Well, I'm going to hear you Wednesday.

20 MR. PAPAIN: Yes.

21 THE COURT: Tomorrow -- you can do it by Tuesday.

22 MR. PAPAIN: Yes.

23 And, your Honor, with regard to the retainer  
24 agreement --

25 MS. RUBIN: Your Honor, our paper is being -- that

08RVWTCA

Argument

1 were being filed today were a reply. They were a reply to the  
2 Carboy firm's objections. I see no basis for a further  
3 response to our reply papers.

4 THE COURT: That's true, too. OK.

5 MR. PAPAIN: Your Honor, I think it depends upon what  
6 the response raises.

7 THE COURT: Ask me for permission.

8 MR. PAPAIN: Thank you, your Honor.

9 In that regard, as far as the retainer -- the Napoli  
10 retainer agreement, we would also ask that paragraphs 11 and 12  
11 not be redacted, since they address the issue of retaining  
12 associate counsel and who is to bear that expense, which goes  
13 to the very heart of our application.

14 THE COURT: That may be relevant to your issue. I'll  
15 take it up Wednesday.

16 MR. PAPAIN: Thank you, your Honor.

17 THE COURT: OK. We're finished with this case.

18 MR. PAPAIN: Thank you.

19 \* \* \*

20

21

22

23

24

25