

THE CONNECTICUT LAW TRIBUNE

WEEK OF OCTOBER 30, 2006 • VOL. 32, NO. 47 • \$10.00 • WWW.CTLAWTRIBUNE.COM

ALM

DEFENSE FIRMS, PLAINTIFFS' WORK:

A Recipe For Conflicts

As plaintiffs' practice grows, dilemma can be 'insolvable'

By **DOUGLAS S. MALAN**

In the end, multimillion-dollar contingency fee recoveries couldn't keep Hartford-based Robinson & Cole and the chairman and founder of its nationally prominent mass tort group together under the same roof.

Like for other high-end plaintiff practices operating within large defense-oriented law firms, client conflicts eventually convinced Alex H. MacDonald that greener pastures lay elsewhere, he said.

Last month, he took the reputation he gained from brokering a record-breaking Fen-Phen settlement and joined forces with two high-profile Philadelphia trial lawyers to form MacDonald Rothweiler Eisenberg.

The message to other defense firms: dabbling in plaintiffs' work can be lucrative, but the more lucrative it gets, the more inevitable an eventual break-up becomes.

MacDonald said his departure from Robinson & Cole was "amicable," but essentially unavoidable. "However supportive the firm and available the resources, you're still talking about an approach to practice that inevitably has limitations," he said, "because of other work being done in the firm that is potentially at loggerheads with the plaintiffs' practice."

The dilemma over client conflicts "really is insolvable even in the most flexible law firms," MacDonald maintained. "It happened with enough frequency [at Robinson & Cole] that it finally came to the point that the better and necessary course for my

Edward J. Sullivan, Esq. is managing director of Bingham Legg Advisers LLC in Boston. Previously, he was senior vice president, regional manager, Connecticut, for Fleet Investment Services.



Alex H. MacDonald, who founded and chaired Robinson & Cole's mass tort group, said his recent departure from the firm was 'amicable,' but essentially unavoidable. The dilemma over client conflicts 'really is insolvable even in the most flexible law firms,' he said.

Contributed Photo

clients was that I leave. It was a difficult decision."

Specifically, MacDonald said, it was Robinson & Cole's longtime representation of Pfizer Inc. that prevented his group in late 2004 from participating in litigation over the arthritis medicine Vioxx because Pfizer produced a similar drug. A few years earlier, the mass tort group was barred from taking Rezulin litigation after Pfizer announced it was on the verge of acquiring

Warner-Lambert, the company that made the diabetes drug.

Different Economics

When not handling criminal defense work, Shipman & Goodwin partner James A. Bergenn focuses between 20 percent to 40 percent of his practice on representing plaintiffs in big-ticket wrongful death and personal injury cases. "The frustration of turning away a number of large cases

because of conflicts tends to discourage attorneys receiving those referrals from continuing to do the work, or from staying at the firm where they have to turn [such cases] down," Bergenn agreed.

For Bergenn, the trade off in working at a large defense firm like Hartford-based Shipman is the joy of having such a varied caseload. "You just get used [to the client conflicts] and you get over it. There's plenty of work to do. [When a conflict arises], I refer cases to other firms. I'm confident based on my experience that other [plaintiffs'] cases will come in."

In Westport-based legal management consultant Peter A. Giuliani's estimation, no more than 15 percent of large defense-oriented firms across the country have a plaintiff practice component to them. And those that do, generally keep that component to between 10 percent and 15 percent of the firm's overall business, said Giuliani, of Smock•Sterling Strategic Management Consultants. What plaintiffs work they do is largely kept to commercial disputes rather than personal-injury cases.

The most successful plaintiffs' practices identify the cases that will pay out multiples of a firm's time and litigation costs. The risk of sinking lots of resources into a case that doesn't pay off, however, runs counter to the steady, hourly-rate cash flow of defense work, Giuliani noted.

"There's usually a tension in these firms" between the defense and plaintiffs' practices, Giuliani added. "There's the strong cash flow of defense cases being sucked away by contingency cases. If you want to be liked [as a plaintiffs' lawyer], the hit rate in a defense firm has to be a lot higher than in a plaintiffs' firm."

The irregular income stream that comes with contingency cases, Bergenn noted, also makes it difficult for defense firms to gauge the worth of their plaintiffs' lawyers. "[T]he wait for the payment curve to 'mature' comes at a cost when all other attorneys are collecting [regular fees] as they do their work," he acknowledged.

'Enormously Profitable'

MacDonald's affiliation with Robinson & Cole began when it absorbed the Boston litigation firm of Harrison & Maguire in 1993. Running the mass tort group from R&C's Boston office, MacDonald's profile grew exponentially after he was retained by the family of Hingham, Mass., resident

Mary Linnen.

Linnen had taken the popular diet drug Fen-Phen to lose weight prior to her wedding. After her 23-day exposure to the drug, she died of primary pulmonary hypertension (PPH), launching a historic wrongful death action against Madison, N.J.-based American Home Products, parent company of Fen-Phen maker Wyeth-Ayerst. The case

The irregular income stream that comes with contingency cases makes it difficult for defense firms to gauge the worth of their plaintiffs' lawyers, said Shipman & Goodwin partner James W. Bergenn.



Law Tribune File Photo

became the subject of the nonfiction book *Dispensing With The Truth*, by Alicia Mundy.

As the court-appointed overseer of the multi-district litigation, MacDonald helped broker a \$4 billion settlement of 200,000 Fen-Phen diet pill claims. When approved in August 2000, it became one of the largest mass tort resolutions in U.S. history.

MacDonald said he and his five-lawyer trial team spent \$1 million in litigation costs and \$2.5 million in billable time before the Linnen case ever went to trial. To that point, MacDonald had never fronted more than \$100,000 in costs and never more than \$250,000 in time leading up to a single trial, he said.

The level of the firm's investment in the Linnen case initially stunned Robinson & Cole partners, but MacDonald noted that they "never" shortchanged funding for any

of his cases. "One [partner] said, 'How can we be gambling this kind of money?'" MacDonald recalled. "[I] commend an old-line law firm that did not have a long history of [specializing in high-stakes plaintiffs'] personal injury or wrongful death [cases] being willing to support a new lateral partner in a case that was extremely high-stakes," he said. "Few other

major firms would've done so; Robinson & Cole did."

MacDonald went on to serve as lead counsel in 49 additional PPH wrongful death cases linked to Fen-Phen exposure in nine states.

From the time of the Fen-Phen settlement in 2000 to December 2005, contingency fees brought in the mass tort group collectively amounted to \$73 million, according to MacDonald. Of that amount, roughly \$60 million was "pure profit" for Robinson & Cole, he said. "Obviously, mass tort litigation undertaken on the scale that marked my practice in the last decade—if undertaken with care and an

informed insight regarding what cases to take and which to reject—can be enormously profitable," MacDonald said.

Robinson & Cole Managing Partner Eric D. Daniels wouldn't confirm the figures

The more lucrative the plaintiff's work gets, the more inevitable a break-up becomes.

provided by MacDonald. He said MacDonald's departure from the mass tort group, "from a practice standpoint, ... was not disruptive." His hope, Daniels added, is that, "from an economic standpoint, it works out for everyone," as well.

"To my knowledge," Daniels said, "we have never lost a corporate client because of work our mass tort group was doing." In some cases, he said, "a client of a certain magnitude probably is entitled to some kind of market exclusivity."

The firm's mass torts practice is now chaired by Boston partner Steven B. Rotman, a veteran of the Linnen case. "Time will tell" what effect MacDonald's transition will have on R&C's six-member mass torts group, Daniels said.

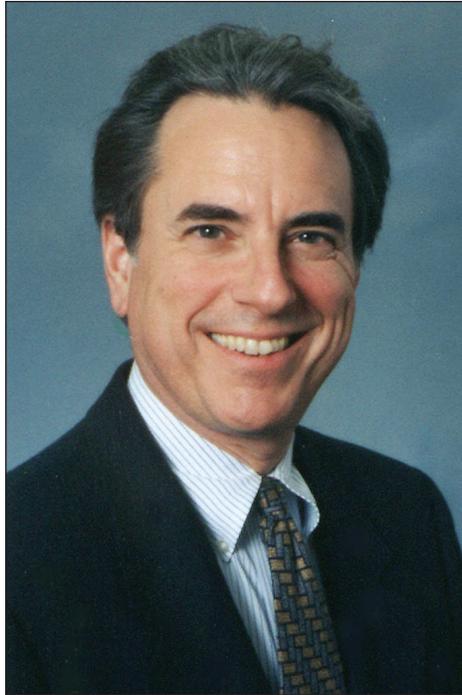
Changing Attitudes?

"Conflicts, Daniels maintained, are part of everyday life at large firms. We have certain clients within an industry that desire us not to represent competitors. That's not unique to mass tort." He noted that, in the past, conflicts have emerged between the firm's insurance coverage practice and its environmental practice in which one side represented the insurance industry and the other manufacturers and policy holders.

Bergenn said that even perceived conflicts prohibit some firms from taking cases out of concern for upsetting existing clients. "[A] firm representing a certain subset of manufacturers would probably not be comfortable taking on products liability cases in the industry involved," he said. "On the other hand, large firms' sophisticated clients increasingly are choosing their attorneys for their talent and skill, and without regard to the cases handled by

their colleagues."

Plaintiffs' lawyer Richard J. Kenny, of the Hartford firm of Kenny, O'Keefe & Usseglio, previously worked at Hartford-based Rome McGuigan. He agreed that working at a defense-oriented firm can hinder a plaintiffs' practice. "Most of the time,



Law Tribune File Photo

'If you want to be liked [as a plaintiffs' lawyer], the hit rate in a defense firm has to be a lot higher than in a plaintiffs' firm,' Westport-based legal management consultant Peter A. Giuliani said.

it's hard to take a case from a guy in the suburbs and send it to a major corporate law firm," Kenny said. "People want to know their plaintiffs' cases aren't going to get lost in the corporate shuffle."

But with an arsenal of more than 200

lawyers at Robinson & Cole, MacDonald said he could convince potential clients that he had the wherewithal to stand on a level playing field with the world's largest defense firms.

"I had the extraordinarily good fortune to be partner in a firm with unlimited

According to Alex MacDonald, from the time of the Fen-Phen settlement in 2000 to December 2005, contingency fees brought in by Robinson & Cole's mass tort group collectively amounted to \$73 million.

resources," MacDonald said. However, "the practice reached a point that I didn't need 250 lawyers behind me."

With 12 attorneys, MacDonald Rothweiler Eisenberg is double the size of Robinson & Cole's mass tort group. The firm's partners include two past presidents of the Philadelphia Trial Lawyers Association, Kenneth M. Rothweiler and Stewart J. Eisenberg. MacDonald, who will continue to be based in Boston, said he brought "virtually all the cases in which I was primary counsel" with him to his new firm. ■