

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2004

4 (Argued: April 4, 2005

Decided: November 17, 2005)

5 Docket No. 04-2675-cv

6 - - - - -  
7 MARVIN SCHICK,

8 Plaintiff-Appellant,

9 - v. -

10 DAVID BERG and MORIARTY LEYENDECKER,

11 Defendants-Appellees.  
12 - - - - -

13 B e f o r e: WINTER, McLAUGHLIN, and CABRANES, Circuit Judges.

14 Appeal from grant of summary judgment in the Southern District of  
15 New York (Leonard B. Sand, Judge). The judgment dismissed an action  
16 against a class action counsel for a breach of a fiduciary duty to a  
17 member of the class. We conclude that defendants had no duty to  
18 appellant because they never represented him. We therefore affirm.

19 STUART A. BLANDER (Eli Feit, on the brief) Heller,  
20 Horowitz & Feit, P.C., New York, New York, for  
21 Plaintiff-Appellant.  
22

23 SALVATORE A. ROMANELLO (James W. Quinn, on the  
24 brief), Weil, Gotshal & Manges, LLP, New York, New  
25 York, for Defendant-Appellee David Berg.  
26

27 BRETT A. SCHER, Wilson, Elser, Moskowitz, Edelman  
28 & Dicker, LLP, New York, New York, for Defendant-  
29 Appellee Moriarty Leyendecker.  
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1  
2 WINTER, Circuit Judge:

3 Marvin Schick appeals from Judge Sand's grant of summary judgment  
4 to appellees David Berg, an individual, and Moriarty Leyendecker, a  
5 law firm. Berg and Moriarty Leyendecker were counsel for a group of  
6 investors that brought suit against the Marriott Corporation.  
7 Pursuant to a negotiated settlement, that suit was converted into a  
8 class action, and Schick became an unnamed member of the class.  
9 Schick claims that Berg and Moriarty Leyendecker breached their  
10 fiduciary duty to him by counseling a third party to bring suit  
11 against him. However, Schick was never represented by Berg and  
12 Moriarty Leyendecker because, under the notice to class members, his  
13 representation by other counsel prevented him from being represented  
14 by class counsel. Berg and Moriarty Leyendecker therefore owed Schick  
15 no fiduciary duty, and we affirm.

16 BACKGROUND

17 In late 1986, the Marriott Corporation created the Courtyard by  
18 Marriott I Limited Partnership ("CBM I") and issued approximately  
19 1,200 CBM I investment units for \$100,000 each. Schick was one of  
20 the original investors. Schick and other investors eventually became  
21 dissatisfied with the performance of the CBM I units. In 1994, Schick  
22 formed an ad hoc committee of investors to promote their interests and  
23 served as committee chairman.

24 In 1998, Berg and Moriarty Leyendecker filed suit against

1     Marriott in Texas state court on behalf of over 300 named plaintiffs  
2     (the "Texas Action"). After an unofficial "mini-trial," the "jury"  
3     returned a verdict unfavorable to Marriott. That hypothetical  
4     verdict spurred negotiations that resulted in a settlement agreement  
5     dated March 9, 2000. Under the terms of the settlement, each CBM I  
6     unit holder would receive \$134,130 per unit before attorneys' fees.

7             To include as many potential claimants as possible, the  
8     settlement required plaintiffs' counsel to "move for and be granted  
9     certification of a settlement class consisting of all CBM I LP Unit  
10    holders . . . ." This class certification was for the purpose of  
11    settlement only. If the proposed settlement were "terminated,  
12    modified in any material respect, or fail[ed] to become effective for  
13    any reason," the parties would have "reverted to their respective  
14    status . . . as of the date and time immediate prior to the execution  
15    of this Settlement Agreement . . . ."

16            Schick expressed his "doubts about the proposed settlement" in a  
17    March 8, 2000 letter, one of many he sent to CBM I unit holders. On  
18    May 8, 2000, Schick filed a Petition in Intervention in the Texas  
19    court objecting to the settlement. That petition identified Schick as  
20    "an individual[] and . . . a limited partner of the Courtyard by  
21    Marriott Limited Partnership" and was filed on Schick's behalf by two  
22    attorneys, one of whom was Lawrence P. Kolker. In a May 18, 2000  
23    letter to CBM I unit holders, Schick reported that he had "intervened  
24    on behalf of myself and as chairman of our partners committee . . . ."

1 In response to Schick's intervention, Berg took a deposition of Schick  
2 on May 24 and 31, 2000. Kolker appeared "for the witness" at the  
3 deposition.

4 One month before that deposition, in April 2000, Berg received a  
5 phone call from a man named Les Fuchs, who thought he had been  
6 swindled by Schick. In 1987, Fuchs had purchased three CBM I units,  
7 and by 1999, he was interested in selling them. He contacted Schick  
8 by telephone and offered to sell his units. In an August 16, 1999  
9 letter agreement, Fuchs agreed to sell the units to Schick for \$75,000  
10 per unit. Fuchs, after learning of the March 2000 proposed  
11 settlement, suspected that Schick had inside knowledge of the  
12 favorable mini-trial when he bought Fuchs's units.

13 According to Fuchs's characterization of his April 2000  
14 conversation with Berg, Berg told Fuchs that he had been "screwed" by  
15 Schick. Berg suggested that Fuchs consider some response to Schick  
16 but said he would not represent him. Fuchs later called Moriarty  
17 Leyendecker, and by August 30, 2000, that firm had agreed to represent  
18 Fuchs.

19 In the Texas Action, a settlement class was certified on August  
20 3, 2000, consisting of all persons who held CBM I units on March 9,  
21 2000. A sixteen-page notice of settlement was sent to class members.  
22 Under the terms of the notice, potential class members had until  
23 September 15, 2000 to request to be excluded from the settlement  
24 class. The notice also stated that "you will automatically be

1 represented by Class Counsel"--including Berg and Moriarty  
2 Leyendecker--"unless you request to be excluded from the Class or you  
3 enter an appearance through counsel of your own choosing at your own  
4 expense." Final judgment approving the settlement was entered in the  
5 Texas Action on October 24, 2000, and the agreement was to become  
6 final on November 27, 2000. Schick never requested to be excluded  
7 from the class.

8 Meanwhile, on August 31, 2000, Fuchs wrote a demand letter to  
9 Schick seeking the difference between their transaction price and the  
10 final settlement price with Marriott. Schick responded that he had no  
11 inside information at the time of the transaction. On December 11,  
12 2000, an attorney from Moriarty Leyendecker wrote Schick on Fuchs's  
13 behalf and reiterated the demand for the difference between their  
14 transaction price and the settlement price.

15 In March 2001, Fuchs filed suit against Schick in Texas state  
16 court. Moriarty Leyendecker represented him in that action. The  
17 Texas court dismissed the complaint for lack of jurisdiction over  
18 Schick. In December 2001, Fuchs then filed an action against Schick  
19 in the Southern District of New York, where Schick maintains his place  
20 of business. Fuchs claimed fraud and breach of a fiduciary duty that  
21 Schick owed Fuchs by virtue of the role Schick assumed with his  
22 committee. Fuchs continued to be represented by Moriarty Leyendecker,  
23 whose attorneys applied for admission to the Southern District pro hac  
24 vice. Schick moved to disqualify Moriarty Leyendecker because it had

1 served as class counsel in the Texas Action. On April 10, 2002, Judge  
2 Sand denied Moriarty Leyendecker's motion for admission pro hac vice  
3 on that ground and dismissed Schick's motion to disqualify as moot.  
4 On June 4, 2003, Judge Sand granted Schick's motion for summary  
5 judgment, concluding that there was no evidence showing that Schick  
6 had any advance knowledge of the settlement nor any other confidential  
7 information about the litigation when he purchased Fuchs's CBM I  
8 units.

9 On July 25, 2003, Schick filed this action against Berg and  
10 Moriarty Leyendecker, arguing that they wrongly helped Fuchs bring  
11 suit against him. The Complaint alleged two claims: (i) champerty or  
12 barratry and (ii) breach of fiduciary duty. In early 2004, both Berg  
13 and Moriarty Leyendecker moved for summary judgment. Schick cross-  
14 moved for summary judgment.

15 Judge Sand granted the defendants' motions for summary judgment  
16 and denied Schick's cross-motion. He concluded that no claim for  
17 champerty exists under Texas law and that Schick had not met the  
18 statutory requirements for barratry. Schick does not challenge these  
19 holdings on appeal.

20 On the breach of fiduciary duty claim, Judge Sand noted that,  
21 under Texas law, no attorney-client relationship exists between class  
22 counsel and an unnamed class member until certification of the class.  
23 Because the class in the Texas Action had not yet been certified,  
24 there was no attorney-client relationship between Berg and Schick at

1 the time Berg spoke to Fuchs in April 2000. Consequently, no duty  
2 arising out of an attorney-client relationship could have been  
3 violated. Further, any independent duty that might have existed  
4 between Schick and Berg did not extend beyond a duty to refrain from  
5 prejudicing Schick's claims against Marriott. Judge Sand concluded  
6 that urging Fuchs to enforce his legal rights against Schick did not  
7 prejudice Schick's claims against Marriott.

8 On the breach of fiduciary duty claim against Moriarty  
9 Leyendecker, Judge Sand noted that, though Schick "had advice of other  
10 counsel when he intervened" in the Texas Action, he did not ask to be  
11 excluded from the class. Thus, certification of the class created an  
12 attorney-client relationship between Schick and Moriarty Leyendecker.  
13 Judge Sand concluded, however, that the firm's duties under that  
14 relationship ended with the approval of the settlement on October 24,  
15 2000. Because the firm did not write to Schick on Fuchs's behalf  
16 until December 11, 2000, Judge Sand concluded that the firm did not  
17 simultaneously represent Fuchs and Schick and therefore did not breach  
18 any duty to its clients under Texas law. In addition, he concluded  
19 that Moriarty Leyendecker did not breach its duty to Schick as a  
20 previous client because the two matters -- the class action against  
21 Marriott and Fuchs's claim against Schick -- were not "substantially  
22 related" and there was no risk of disclosing Schick's confidences in  
23 handling the Fuchs matter. Schick appealed.

#### 24 DISCUSSION

1           We review a grant of summary judgment de novo. Allianz Ins. Co.  
2 v. Lerner, 416 F.3d 109, 113 (2d Cir. 2005). We construe all evidence  
3 in the light most favorable to the non-moving party and draw all  
4 inferences in that party's favor. Id.

5           Under Texas law, lawyers owe a fiduciary duty to their clients.  
6 Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 199 (Tex. 2002)  
7 ("Our courts have long recognized that certain fiduciary duties are  
8 owed by . . . an attorney to a client.") (citing Burrow v. Arce, 997  
9 S.W.2d 229, 240 (Tex. 1999)). We need not, however, address the  
10 content of any fiduciary duty in this matter because Moriarty  
11 Leyendecker and Berg never represented Schick. Schick intervened in  
12 the action through counsel of his own choosing, and, under the terms  
13 of the class notice, he was never a client of Berg or Moriarty  
14 Leyendecker.

15           The Texas Action was not filed as a class action. It was filed  
16 on behalf of over 300 individual plaintiffs and converted to a class  
17 action only pursuant to the terms of the March 9 settlement. The  
18 class was certified on August 3, 2000, and the sixteen-page notice of  
19 class settlement dated that day informed the class members, "If you  
20 are a Class member . . . you will automatically be represented by  
21 Class Counsel unless you request to be excluded from the Class or you  
22 enter an appearance through counsel of your own choosing at your own  
23 expense."

24           Schick clearly entered an appearance in the Texas court through

1 counsel of his own choosing: Kolker. Schick argues in his reply  
2 brief that Kolker was counsel to Schick not in his personal capacity  
3 but only in his capacity as chairman of Schick's ad hoc committee. He  
4 notes in that regard that Kolker was paid by the committee. However,  
5 this assertion is clearly belied by the record. Schick notified the  
6 other investors that he had "intervened on behalf of myself and as  
7 chairman of our partners committee," and the Petition in Intervention  
8 described Schick only as "an individual[] and . . . a limited partner  
9 of the Courtyard by Marriott Limited Partnership." When Schick was  
10 deposed, Kolker appeared "for the witness." These statements, so  
11 clearly at odds with his present contention, are conclusive on the  
12 issue of his representation as an individual investor by Kolker, even  
13 if Kolker also represented the committee.

14 For similar reasons, we conclude that Kolker's representation was  
15 "at [Schick's] expense," as those words were intended in the notice of  
16 settlement. Schick solicited funds for expenses incurred in  
17 challenging the settlement from committee members and makes no claim  
18 that he did not participate in whatever payments were made by the  
19 committee.<sup>1</sup> The notice's statement regarding the representation by  
20 independent counsel at the class member's expense surely includes  
21 collective payments of litigation expenses by individual investors.  
22 Schick has not argued otherwise.

23 Schick also argues that, because he never requested to be  
24 excluded from the class, he was represented by class counsel.

1 Whether Schick opted-out, however, is distinct from the question of  
2 whether Schick was represented by class counsel. Under the terms of  
3 the notice of settlement, Schick was represented only by Kolker even  
4 though a member of the class.

5 Finally, Schick argues that Berg and Moriarty Leyendecker owed  
6 him a duty -- independent of the attorney-client relationship -- by  
7 virtue of Schick's class membership. However, under Texas law,  
8 counsel for a class does not, prior to certification of the class, owe  
9 a fiduciary duty to unnamed class members simply by virtue of their  
10 membership in the class. The Court of Appeals of Texas has explained  
11 that:

12           Until a trial court determines that all  
13           prerequisites to certification are satisfied,  
14           there is no class action, the case proceeds  
15           as an ordinary lawsuit, and attorneys for  
16           named class members have no authority to  
17           represent or otherwise act on behalf of the  
18           unnamed class members. Under these  
19           circumstances, we decline to hold that named  
20           plaintiffs' attorneys owe a precertification  
21           duty to unnamed class members.

22  
23 Gillespie v. Scherr, 987 S.W.2d 129, 132 (Tex. App. 1998) (footnotes  
24 omitted).

#### 25 CONCLUSION

26 We therefore affirm.

FOOTNOTES

1. Schick's reply brief states that Kolker "was paid entirely by the Committee." We note that the judgment in the Texas Action ordered class counsel to forward a portion of their fees to "counsel for Schick intervenor." How Kolker was ultimately paid does not affect our disposition of this matter.