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Is Mass Reckoning Coming for the Plaintiff's bar?

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Of the Legal staff

Tom Girardi needed no introduction when stepping into a courtroom.

Founding attorney of Los Angeles-based Girardi Keese, he made his name working on the environmental contamination case made famous from the 2000 film "Erin Brockovich" and took lead roles in numerous mass torts. He handled large numbers of cases over pharmaceutical drugs and for NFL players claiming concussion injuries. He has innumerable accolades for his professional successes: The National Law Journal's annual Elite Trial Lawyers, president of the International Academy of Trial Lawyers and the State Bar of California's Trial Lawyer Hall of Fame.

Even his flamboyant personal life was on display. Since 2015, his wife, Erika Jayne, has starred on the Bravo reality TV show "The Real Housewives of Beverly Hills," which included Girardi and his home in Pasadena, California, which a bankruptcy trustee said could be worth $16.5 million.

Then came the lawsuits Girardi settled for victims of the 2018 crash of Lion Air 610, a Boeing 737 Max 8 aircraft. In open court, Chicago attorney Jay Edelson accused Girardi, his co-counsel in California, of embezzling millions of dollars from four settlements in early 2020. At a Dec. 14 hearing, U.S. District Judge Thomas Durkin of the Northern District of Illinois asked lawyers then at Girardi Keese what happened to the $2 million in client funds. No one, including Girardi, had an answer.

But the judge had a question for Edelson.

"Mr. Edelson, these disputes, at least with the four that have not been paid their full amount of the settlement, go back some time," he said. "Why am I finding this out in December?"

The question slices to the heart of a growing debate in mass torts about whether judges should have more power to review settlements. Many in the defense bar, and even some plaintiffs attorneys, have called for more oversight in multidistrict litigation, a procedural tool often used in mass torts to coordinate thousands of lawsuits. Critics often point to the unmanageable size of mass torts, some of which can be tens of thousands to hundreds of thousands of lawsuits.

The question is, would any of the proposed reforms, or any other possible actions, have made a difference in the Girardi matter?

"It seems to me that the Girardi situation is more about one high-profile firm's apparent ethical and legal lapses rather than a reflection of a problem with the mass tort bar as a whole," wrote Paul Geller, a partner in the Boca Raton, Florida, office of Robbins Geller Rudman & Dowd, in an email. He did not anticipate a "major overhaul" because of the Girardi matter. "That said," he added, "perhaps the Girardi case may cause judges involved in large catastrophic loss or mass tort cases to ask more questions."

Girardi did not respond to requests for comment.

For Girardi, it's a stunning downfall. Durkin referred the matter to the U.S. Attorney's Office in Chicago, and Girardi and his law firm are now in Chapter 7 bankruptcy protection, abruptly leaving behind clients who have suffered deaths, injuries and illnesses. Even worse, Girardi, 81, may not even know how bad things really are. A Los Angeles Superior Court judge named Girardi's brother,

Robert Girardi, to serve as his conservator. Robert Girardi also has asked the bankruptcy judge to appoint him "next friend" guardian ad litem for his brother, who is "incapable of realizing and understanding the repercussions of the bankruptcy filings pending against him."

Edelson isn't convinced of Tom Girardi's mental decline. In fact, he gave Girardi the benefit of the doubt, exchanging phone calls and texts with him and other lawyers at Girardi Keese for months before alerting Durkin to the missing funds.

"I've been practicing for 25 years, and never once encountered a situation where co-counsel was stealing money from a client," he told the judge. "We did not want to come forward and accuse attorneys who've been practicing a long time of criminal behavior until we were 100% sure."

'Potential for Abuse'

Lawyers say the circumstances surrounding Girardi were anomalies, and that the vast majority of plaintiffs lawyers would never steal from their clients

But those in the defense bar, such as the U.S. Chamber of Commerce's Institute for Legal Reform and Lawyers for Civil Justice, have raised numerous complaints about the mass tort practice in which Girardi worked. They have pushed for judges to get more involved, arguing that lawyers file lawsuits without reviewing the claims. Some judges have heard the concerns and taken their own initiatives, ordering an "initial census" of cases.

"I've been through experiences, on numerous occasions being at MDL hearings where people will approach you and say, 'do you know who my lawyer is?'" said John Beisner of Skadden, Arps, Slate, Meagher & Flom in New York. "There is a lot of uncertainty among plaintiffs in these MDL proceedings about what they've gotten themselves into, who their lawyer is, what they're supposed to be doing, how they get information about the case."

In class actions, which involve large numbers of class members not represented by counsel, lawyers and judges must go through a series of steps under Federal Rule 23 of Civil Procedure before signing off on settlements.

That doesn't happen in mass tort litigation.

"When a party settles, the judge has no role at all," said John Rabiej, a consultant to the George Washington Law School Complex Litigation Center. "In the MDL, that's the issue. Do you have a legal responsibility to review it? I think you do. Some people say you don't."

His reason: Each plaintiff in a mass tort theoretically has his own attorney but, in reality, only two or three attorneys are making the calls—basically, similar to a class action.

It's not clear, however, what authority judges have to review the fairness of settlements that are private agreements between parties, Rabiej said. And many lawyers resist the idea, particularly if it means dragging out the payments.

Yet some plaintiffs attorneys question whether mass torts have gotten too big for a lawyer to adequately represent all his clients. "There's too much potential for abuse and therefore it's important that a neutral party, in this case, a judge, assess the fairness of the settlement," said plaintiffs attorney **Shanin Specter, of Philadelphia's Kline & Specter.**

Specter wrote a Dec. 18 letter to the Judicial Conference's Committee on Rules of Practice and Procedure insisting that a plaintiffs lawyer in very large mass torts could be more focused on getting a large fee than on his clients, who end up with small recoveries.

Specter isn't alone. In many mass torts, Edelson said, some lawyers are sitting on the sidelines signing up as many clients as possible so they obtain a larger share of the fees, rather than doing the legal work. A lot of times, he said, the clients don't even have claims.

Of course, that wasn't the case in the Lion Air matter, where the judge actually approved the four Girardi settlements because they involved minors, Edelson said.

The Girardi matter, however, points less to what happened in the Lion Air cases and more to the settlements in which judges didn't question him. Girardi has handled many more clients at once. His firm, for instance, represents 8,000 of the 35,000 plaintiffs affected by a 2015 gas leak in the Porter Ranch neighborhood of Los Angeles.

"There are many, many lawyers who do it right, and they represent their clients well, but the system

itself is set up to basically encourage bad behavior," said Lance Cooper, of The Cooper Firm in Marietta, Georgia.

Cooper had his first experience with the mass tort world when he first uncovered the General Motors ignition switch defect in his own individual case in 2013. He challenged the fees awarded to lead counsel in the multidistrict litigation, particularly after they dismissed the first bellwether case midtrial following revelations that the plaintiff might have committed perjury and fraud.

He questioned whether the client relationship was adequate in multidistrict litigation. Instead of a lawyer discussing potential settlement amounts with her client, a small group of lawyers negotiates with defense attorneys and insurance firms and comes up with a "grid" that determines case values for everyone, he said.

"It's all about the numbers when it comes to the MDL," he said. "It's not about Mrs. Smith who has this injury, what do we do to settle the case? She becomes another number, as opposed to a client."

Girardi's 'Miserable, Rotten, Despicable' Funders

Many of Girardi's creditors are litigation financing firms. According to court documents, Girardi's lenders approved millions of dollars in loans, unknowingly relying on the same cases as collateral. Some began suing Girardi Keese in 2019, claiming Girardi has not made payments in years. (Girardi referred to one lender's lawsuit as a "hit piece," and called another funder "a miserable, rotten, despicable company.")

Had Durkin known about the outside financing, would he have realized Girardi was having financial problems?

Beisner, of Skadden, thought so. "That would have prompted the court to ask some questions about what was going on here," he said.

Beisner, who often represents the U.S. Chamber of Commerce, is among many in the defense bar who have pushed for disclosures of litigation financing in all cases, not just mass torts.

Republicans in Congress have introduced legislation that would require such disclosures, and the Northern District of California in 2018 issued guidelines requiring lawyers to reveal litigation financing in class action settlements.

Whether judges should issue disclosure orders is complicated, said U.S. District Judge Paul Grimm of the District of Maryland.

"You can imagine instances in which it could happen in ways that would concern a judge," said Grimm. "You can see it in a way where a judge might say there's nothing wrong with this. You can see a situation where a judge can say, 'Who am I to jump into this?'"

Grimm has some experience with jumping into the debate. In 2019, he asked lawyers who sought leadership appointments in the data breach class actions against Marriott to disclose outside litigation financing agreements. He is among a handful of judges that have sought such disclosures, typically when plaintiffs lawyers have sought appointments as lead counsel.

Yet most plaintiffs lawyers see outside financing as a means to combat the well-funded defendant on the other side of a mass tort. They don't think judges should force them to divulge how they run their law firms. After all, they note, they don't ask defense attorneys to do so.

Edelson takes a different view.

"They had so many cases and big wins that it just didn't make any sense that they would be out of money," Edelson said of Girardi Keese. "But when you see how much money they borrowed from litigation finance companies, that is something where people may have asked questions."

"This is something that needs to get enforced at the bar level," said Chris Seeger, of Seeger Weiss in New York. "I'm not trying to move away from judicial oversight, but when you ask judges to do something they're not comfortable, or familiar, with, you might not be solving the problem. You're causing more problems for people doing it perfectly right to get at that one in a million."

'Enforced at the Bar Level'

One solution might not involve rules or judges.

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While some lawyers said the allegations uncovered about Girardi came as a shock, particularly given his reputation, many weren't surprised. There was talk of sloppiness and inefficiencies at his firm. Girardi had prior disputes about money with other lawyers. He also faced potential discipline before—most notably, when the U.S. Court of Appeals for the Ninth Circuit formally reprimanded him for making misrepresentations about a $489 million Nicaraguan judgment against Dole—and had been sued for misappropriating settlement funds from clients.

There are also lessons learned in how Girardi ran his law firm. As sole equity partner, Girardi was totally in charge of Girardi Keese. Most plaintiffs firms have accountants and supervisors who would have the authority to write checks, or a partner who keeps an eye on the finances, Seeger said.

For his part, Edelson has insisted that Girardi didn't act alone. He has accused at least two other lawyers who have since left Girardi Keese of participating in a scheme to defraud the Lion Air clients.

But Girardi's practice also came with a lot of risks that required a disciplined approach to finances. That "up and down" business was particularly a factor in 2020, during the pandemic, when courts are closed and insurance companies "are not interested in paying money unless you're close to the courtroom door and facing a jury," Cooper said.

Girardi Keese's outside funders have indicated in court papers that Girardi used potential fees from the Porter Ranch gas leak cases as collateral. He insisted a settlement could gross $1 billion. But the litigation against Southern California Gas Co. has not settled and, in fact, is headed to trial later this year.

"Mr. Girardi was very successful, and thought the money would keep coming," Cooper said. "It sounds like he stepped over the line with his clients but, at some point in time, it stops coming in, and you have to have the resources and processes come into place so that when that dry day comes, you have the opportunity to weather the storm."