

## Records opened in fen-phen case Secret meeting with judge detailed

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Post staff report

When attorneys representing hundreds of clients in a class-action lawsuit over the diet drug fen-phen met secretly with former Boone Circuit Judge Jay Bamberger in February 2002 to discuss their fees, they already had awarded themselves three-quarters of the \$200 million settlement, an attorney involved in the case says in court papers.

They told Bamberger their clients had received their portions of the settlement and had signed off on any additional money, according to the court documents. They said they wanted to take 49 percent for their labors and as a hedge against any future claims.

"My response was, it's important to stay under 50 percent," Bamberger said he told them, according to a deposition he gave.

"So your recollection is they specifically requested approval for 49 percent of the settlement amount as their fee?" attorney Angela Ford asked Bamberger, according to a copy of his deposition on file in Boone Circuit Court.

"And expenses, yes," Bamberger replied.

Eventually, the attorneys paid another \$27 million to their clients, leaving them with some \$126 million, according to court records.

"The bottom line is that when Judge Bamberger signed the order approving fees, the escrow account in which all the settlement funds were transferred was drained," Ford said in court documents, in which she is seeking all of the settlement money for her clients.

"Even setting aside the fact that Judge Bamberger failed to follow any established notice and hearing procedure in connection with the ... settlement itself, relying on Judge Bamberger's approval of the attorneys' fees does only one thing: It established that the attorneys went to court for 'cover;' they asked for an order in an attempt to hide their theft."

Information about the settlement - originally sealed - is coming out in connection with a lawsuit some 400 former clients have filed against those attorneys, demanding a greater share of the settlement fund.

Already, a judge has ordered that the \$20 million put in a charitable fund be turned over to the clients, the state Judicial Conduct Commission has reprimanded Bamberger for his behavior, and the state Supreme Court has suspended three of the central Kentucky attorneys involved - Shirley Cunningham Jr. and William Gallion of Lexington, and Melbourne Mills Jr. of Versailles - for what the Kentucky Bar Association called "absolute, unbridled greed."

A fourth attorney, Stan Chesley of Cincinnati, is named in the lawsuit. He received some \$20 million for his role,

which he said was limited to negotiating the settlement.

The deposition is the first time Bamberger's reaction to the case has been made public. He testified that he has been haunted by the controversy.

"I've been taken aback by all of this," Bamberger said in the deposition, given over two days in October. "It's pretty much dominated my depressing life since it came up."

The original lawsuit stemmed from claims that the popular diet drug known as fen-phen caused health problems. Lawsuits were filed all over the country, including one in Boone Circuit Court.

That was settled when American Home Products, which manufactured and sold the drug combination, put up \$200 million in what is called a "walkaway" settlement. That means it was settling any and all cases arising from its actions.

The attorneys argue they are entitled to additional money because they were risking their own funds if the claims had amounted to more than \$200 million.

But even after paying all outstanding claims - and then a second round - the settlement fund had \$126 million left in it. The attorneys then set up the charitable fund, which they called the Kentucky Fund for Healthy Living, and deposited \$20 million into it.

They pocketed the remainder, divvying up \$126 million among 11 attorneys, firms or others involved in the case.

There were concerns about the healthy living fund. It gave out little to charitable organizations, but paid its directors - the three attorneys - \$60,000 a year. When Bamberger retired as judge, he joined the board at the same salary.

In his deposition, Bamberger said he originally attended board meetings in his role as judge.

"You know, I just thought the court ought to oversee it at that point," he said.

"It wasn't because I really wanted to. I wasn't looking for things to do."

He said in agreeing to allow the fund to be set up and funded from the settlement, he relied on the attorneys involved to justify the move.

The Judicial Conduct Commission concluded that Bamberger's decisions in the case "may reasonably be perceived to exploit his judicial position." They also "gave the appearance of influencing performance of his judicial duties and gave the appearance of impropriety by profiting from his judicial actions."

Specifically, the commission criticized Bamberger for his friendship with Mark Modlin, a consultant who worked with the attorneys in the case and received a fee of \$2 million. It also faulted Bamberger for sealing the settlement, allowing the excessive fees, and becoming a paid director of the charitable fund.

Bamberger later resigned from the fund's board of directors and returned his salary and expenses. He also resigned as a senior judge, costing him some \$45,000 a year from his pension.

The Kentucky Bar Association also is looking into the case. Bamberger said in his deposition that he met with the group in September.

It's unclear if any action has been taken; the association's Web site still lists him as an active member.