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The Odyssey of Rudolph Eisner

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In this era of per curium opinions and the predictable life cycle of a case from birth to split baby, it can be hard to find inspiration. As a corrective, or maybe just a nostalgic interlude, I offer the odyssey of one Rudolph Eisner, solo practitioner.

In 1938, a man by the name of Thomas Hughes was fired from his job at Eureka Flint & Spar Company, a Trenton business that pulverized minerals for use in the manufacture of pottery. At the time of his dismissal, Hughes was suffering from silicosis, a debilitating lung disease caused by inhaling fine particles of silica dust. Even now there is no cure for silicosis. In 1938, there were few treatment options and very few means by which a worker in Hughes' position could obtain financial assistance. The workers compensation law did not then cover occupational diseases such as silicosis, and the Social Security Act did not provide benefits for disabled workers until 1956. There were many barriers to a suit in tort, not the least of which was the statute of limitations, which was traditionally held to accrue as soon as the injury occurred. In an occupational exposure case, that meant upon first exposure to the injury-causing substance and in Hughes' case, that implied that his claim was long time-barred.

Nevertheless, Eisner took the case on a contingency basis and filed a negligence action against Eureka Flint & Spar in what was then called the Circuit Court. In 1939, the case came before A. Dayton Oliphant, scion of a patrician Mercer County family whose father was for many years the clerk of the Third Circuit Court of Appeals and whose uncle was a United States Senator. Nothing would have been simpler for Judge Oliphant, no one's idea of a liberal, than to toss the case. Instead, in a published opinion he adopted a ground-breaking new theory of the statute of limitations, holding that in occupational exposure cases, a wrong "should be treated as single and continuous, not plural and discrete." That meant that Hughes' case accrued on his last day of employment.

After the decision was announced, Eureka Flint & Spar quickly settled. Hughes received an upfront payment of $2,500 (roughly

$46,000 in today's dollars), a life insurance policy and $30 a week (roughly $554 in today's dollars) for the rest of his life.

Judge Oliphant's career did not stall as a result of the decision. He was subsequently appointed Chancellor, which, before the court system was reorganized by New Jersey's 1947 Constitution, was the highest judicial office in the state. After reorganization, Chancellor Oliphant became Justice Oliphant, and served on the Supreme Court of New Jersey until his retirement in 1957.

Things took a strange turn for Eisner in the years after he settled the Hughes case. One of the assumptions of the lawyers negotiating the settlement was that Hughes was a very sick man who would likely not live very long. Ten years after the settlement, still very much alive, he

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sued Eisner to void the contingency fee agreement that required him to pay $10 every week out of his $30 check.

The case came before the incomparable Wilfred H. Jayne, then a chancery judge, in 1950. It is safe to say that there has never been a prose stylist on the New Jersey bench like Judge Jayne, not before, not since. There is no way to describe his style. If you have not read a Judge Jayne opinion, particularly from the 1940s when he was Vice Chancellor, you should.

Drawing Judge Jayne was a mixed blessing for Eisner. On the one hand, the judge was positively laudatory of his work on behalf of Hughes. He described Eisner's work product as "conspicuously evidential … of meticulous care and foresight." He described the result of the case as "an eventful and most advantageous legal victory for his client." Heady stuff.

But on the question of the fee, Judge Jayne's conclusion was that enough was enough: Eisner had received fair compensation for his work up until that point, and the $10 weekly payments would stop. In typical Jaynesian style, he concluded his published opinion with a bit of "ancient doggerel": "When your patient abed is lying, or your client's case you're trying, that's the time to collect your fee. For when the patient hath recovered, or the lawsuit's won and smothered, he will never think of thee."

Eisner must have been flattered by the compliments, but not so flattered that he forwent appeal. He had better luck in the next court. In a published opinion authored by Judge John Bigelow, the Appellate Division reversed Judge Jayne's order. Judge Bigelow's opinion is not stylistically interesting, not, in any event, by contrast with Judge Jayne's. But in spare, matter-of-fact language, it evinces wisdom that sometimes seems lost in more recent decisions regarding contingency fees. Eisner took a significant risk on behalf of a poor person who would otherwise have been utterly abandoned. He did great work and improved the prospects for other needy people who would come later. He deserved his full fee.

Judge Bigelow lived a long life, dying in 1975 at age 91. His obituary in the *New York Times* noted that after he retired from the bench, he resumed his law practice at the firm then known as Pitney & Hardin. In 1956, Governor Robert Meyner nominated him for an appointment to the Rutgers Board of Governors, an appointment that hit a snag when the State Senate Judiciary Committee refused to confirm his nomination because he had previously represented a man who invoked the Fifth Amendment before the House Un-American Activities Committee. According to the *Times*, Judge Bigelow "stood his ground and told the State Senate committee that he would be reluctant to dismiss a Rutgers employee solely because he invoked the Fifth Amendment." Under pressure from the bar, the press and the public, the Judiciary Committee relented, and he was easily confirmed by the full Senate. ■