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Famed Plaintiffs Lawyer in Federal Judge's Crosshairs

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A corporation's worst nightmare, famed plaintiffs lawyer Richard "Dickie" Scruggs has unflinchingly taken on asbestos companies, Big Tobacco and scads of insurance companies in the wake of Hurricane Katrina.

But the 61-year-old Mississippi lawyer may have finally met his match in a controversial and outspoken Alabama federal judge.

U.S. District Judge William M. Acker Jr. has held Scruggs in criminal contempt for failing to abide by a court order to return allegedly purloined documents he received from two former employees of a State Farm Mutual Automobile Insurance Co. contractor to the insurance company.

Scruggs -- who is representing hundreds of Hurricane Katrina victims in lawsuits against insurance companies -- instead sent the documents to Mississippi Attorney General Jim Hood, who has been investigating the insurance companies for alleged malfeasance.

After U.S. Attorney Alice Martin in Birmingham, Ala., refused to bring charges against Scruggs, Acker took the highly unusual step of appointing three private special prosecutors to bring charges against Scruggs.

PERSONAL BATTLE

The case has triggered an ugly, personal battle between the warring sides, with Scruggs alleging that the special

prosecutors have a conflict of interest and that the judge is not neutral.

Scruggs' opponents, for their part, say that the litigator is too cozy with Hood, noting that Scruggs contributed \$44,000 to the state attorney general's campaign.

On a broader level, the case has raised the vital issue of separation of powers, and of when it is appropriate for a judge to appoint special prosecutors.

Guy Lewis, a former U.S. Attorney for the Southern District of Florida, said he was approached by a federal judge while he was U.S. Attorney to prosecute an attorney for criminal contempt, but declined to take the case. The judge let the issue die.

"I'm a firm believer in separation of powers," he said. "The U.S. Attorney in the Scruggs case made a fair and reasoned review of the case and decided not to prosecute. That's why we have professional prosecutors. I think the matter should end there."

According to Scruggs' lead attorney, John Kecker of Kecker & Van Nest in San Francisco, Scruggs is due to be arraigned at a hearing shortly before Thanksgiving. At that hearing, a magistrate judge will also hear arguments on Scruggs' motion to dismiss the case.

"Mr. Scruggs takes these accusations very seriously," Kecker said. "We will take this as far as we need to to have justice done."

One of the three special prosecutors, Michael Rasmussen, a former federal prosecutor, defended Acker's appointments, saying, "the procedure and authority of the court to take such actions has been recognized for centuries."

When asked what might have motivated Martin not to pursue charges against Scruggs, Rasmussen said, "there are any number of reasons -- a lack of resources, other priorities or political concerns."

As evidence that politics may have played a part in Martin's decision, Rasmussen cited a letter sent by Hood to Martin urging her not to prosecute Scruggs, as he was a "confidential informant" of Hood's.

Hood did not return phone calls seeking comment on the matter.

Earlier this year, the **Washington Legal Foundation**, a nonprofit, Washington-based public interest law and policy center, sent out a press release urging the federal courts and the U.S. Department of Justice to investigate possible ethical improprieties committed by Scruggs and applauding Acker's actions.

The complex and highly unusual case against Scruggs began when he was approached by two sisters who were former employees of E.A. Renfroe & Co., a contracted claims processor for State Farm. While employed by Renfroe in fall 2005, the sisters copied documents they believed showed State Farm was guilty of misconduct in its handling of Katrina victims. They gave the documents to Scruggs and retained him as their lawyer in a whistleblower case.

Scruggs, whose own home was destroyed by Katrina, in turn hired the sisters as consultants at \$150,000 each.

In fall 2006, Renfroe sued the sisters for return of the documents, and Acker issued a protective order and injunction forcing return of the documents to State Farm. Instead, Scruggs sent them to Hood, saying the order provided an exception for law enforcement sources.

Scruggs also sent the documents to the television program "20/20."

Ironically, the sisters, Cori Rigsby and Kerri Rigsby, had already sent Hood the documents separately.

Enraged at Scruggs' action, Acker asked Martin, the U.S. Attorney for the Northern District of Alabama, to bring criminal contempt charges against Scruggs and his law firm for allegedly violating his protective order. Martin, after what she called a careful review of the case, declined to bring charges.

A HARD-LINE JUDGE

Unsatisfied, Acker appointed three special prosecutors, local lawyers Joel Williams and Charles Sharp of Birmingham and Rasmussen. Williams and Sharp declined to comment for this story.

Acker charged the prosecutors with investigating Scruggs' actions in the case and looking into filing criminal contempt charges.

Acker is known as a hard-line conservative judge who sometimes takes unpopular stands. In 2005, he informed his alma mater, Yale Law School, that he would no longer accept any of its law students for clerkships because of the school's policy of not allowing military recruiters there. The school had stopped allowing recruiters due to the military's "don't ask, don't tell" policy against gays.

In 1988, Acker invited government lawyers to appear before him to consider whether he should remove himself from hearing any cases involving the government. He made the request after the 11th U.S. Circuit Court of Appeals handed down an opinion raising doubts about his judicial impartiality in reversing a ruling he made involving the Ku Klux Klan. In that case, Acker sided with defense lawyers for the Klan, holding that key evidence against it was inadmissible.

"I hear he doesn't like plaintiffs lawyers," said Jim Cohen, a professor at Fordham University School of Law.

Acker did not return calls for comment.

The prosecutors, who are being paid \$200 an hour by the federal court, have charged Scruggs with criminal contempt, and the case is moving toward trial. Another Alabama federal judge, L. Scott Coogler, has been assigned the case.

'FRIENDS OF THE JUDGE'

Scruggs and his lawyers are fighting the charges vigorously, calling it a violation of the Constitution's separation of powers doctrine. Scruggs also claims the special prosecutors have a conflict of interest, since they represent some railroads Scruggs is suing in an unrelated case. And Scruggs argues that Acker's order contained an exception to providing the documents to law enforcement agencies.

Additionally, he maintains that Acker himself is not neutral in the case, since he joined with the special prosecutors in signing the allegation of criminal contempt of court against Scruggs.

"They're not independent," Kecker said. "They are not separate from the judge. These friends of the judge have been ordered to bring criminal contempt charges. They haven't been asked to evaluate the case and then decide."

In court papers, the prosecutors deny most of the allegations raised by Scruggs.

"There is no evidence that the Court is somehow controlling the Prosecutors," they state. "While he had the power to appoint prosecutors, they have the power to refuse such appointments, and once appointed, have the power, without restraint, to proceed, or not proceed, as they deem best."

In a pre-emptive move, Kecker raised the issues in a motion to dismiss filed with the 11th Circuit. Late last month, the court denied the motion.

The special prosecutors have fired back with harsh accusations of their own, throwing out vague accusations of Scruggs' cozy relationship with Hood and his predecessor, Mike Moore. Scruggs paid \$44,000 in campaign contributions to Hood, according to a court filing by the prosecutors, and was hired by Moore to sue the tobacco industry, which resulted in a \$1 billion fee to Scruggs.

While Scruggs could face fines and even jail time, few legal experts expect that to happen.

Stephen Gillers, a professor at New York University School of Law who specializes in legal ethics, said Scruggs has a "legitimate complaint" about the prosecutors having a conflict of interest.

"You can see the opportunity for mischief," he said. "I think their appointment was a mistake."

Gillers also called the judge's appointment "highly unusual.

"Judges sometimes, although not often, refer a lawyer to a grievance committee for investigation," he said. "Rarely, judges may be so offended by the conduct of a lawyer that they appoint a special prosecutor."

Cohen of Fordham said that he handled the only case that went to the U.S. Supreme Court in which someone was sentenced to criminal contempt after prosecution by private prosecutors. In that case, the Supreme Court sided with Cohen and stated that the appointment of a private prosecutor violates the separation of powers doctrine. *Young v. U.S.*, 106 S. Ct. 3270 (1987).

"It's hard to see how turning over documents to law enforcement violates a court order," Cohen said.

"There is some ambiguity there. I think this case will be dismissed and Scruggs is going to come out OK. This is very, very problematic ethically."

Bruce Rogow, a prominent appellate attorney and professor at Nova Southeastern University Shepard Broad Law Center in Davie, Fla., agreed that Scruggs has a good chance of beating the contempt charge. "This is a very tricky area of the law for judges to plow their way through," Rogow said.

"The number of reversals of contempt charges is perhaps the highest of any class of case law. It's a very complicated area of law for judges and they make a lot of mistakes," he said.

The fact that the Scruggs case involved the appointment of special prosecutors "makes it even more treacherous," Rogow said. "In terms of the separation of functions, the prosecutor is supposed to be the one to bring the charges. Here, the judge is both the charging official and the appointing official and that's problematic too."