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## MATTER OF NEW YORK DIET DRUG

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**47 A.D.3d 586 (2008)**  
**850 N.Y.S.2d 408**

**In the Matter of NEW YORK DIET DRUG LITIGATION.**  
**CLARA APPEL-HOLE et al., Plaintiffs,**  
**v.**  
**WYETH-AYERST LABORATORIES et al., Defendants.**  
**PARKER & WAICHMAN LLP et al., Intervenor Respondents;**  
**NAPOLI, KAISER & BERN, LLP, et al., Intervenor Appellants.**

**Appellate Division of the Supreme Court of the State of New York, First Department.**

Decided January 31, 2008.

Concur — Mazzarelli, J.P., Marlow, Catterson and Kavanagh, JJ.

P & W, the referring attorneys, claim that in a mass settlement of **litigation** arising from the use of Fen-Phen, settling attorneys Napoli, Kaiser & Bern (NKB) misallocated settlement awards and costs to the referred clients. The court properly allowed P & W, as well as a group of its clients, to intervene and seek disclosure of certain documents in support of a settlement order dated November 7, 2001. "The remedy for fraud allegedly committed during the course of a legal proceeding must be exercised in that lawsuit by moving to vacate the civil judgment (CPLR 5015 [a] [3]), and not by another plenary action collaterally attacking that judgment" ([St. Clement v Londa, 8 AD3d 89, 90 \[2004\]](#)). P & W and its clients properly so moved. Furthermore, P & W's action in moving to intervene was not untimely. To the contrary, any delay in P & W's motion was due largely to NKB's own action in moving ex parte for the settlement order despite its own awareness that P & W disputed the settlement allocations.

We have considered NKB's other contentions and find them unavailing.

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