The Expert's Corner

2009: Class Action Fee Awards Go Out With A Bang Not A Whimper

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As 2009 pulled to a close, courts approved fees in three significant megafund cases: the long-running landmark *Fen-Phen Diet Drugs Litigation* (Third Circuit), the *IPO Securities Litigation* (S.D.N.Y.), and the *Currency Conversion Fee Antitrust Litigation ("Credit Card")* (also S.D.N.Y.). All told, the three courts handed out over $655 million in fees from funds totaling over $7.4 billion. I sum up the year by taking a closer look at the first of these decisions – the *Diet Drug* case – as it raises a few issues that will remain pertinent in coming years. In January, I will take a closer look at the *IPO* and *Currency Conversion* cases: they were both decisions coming out of district courts in the Southern District of New York, but they embody some interesting distinctions that I will review in my next column.

First, The Numbers:

Here is a comparison of the relevant statistics for the three cases discussed above.

	FUND	FEE	%	LODESTAR	HOURS	RATE	MULTI-PLIER
Diet Drugs	$6,437,211,516	$434,511,777.33 (final in addition to interim fee)	6.75%	$166,835,339.24	553,020.53	$302 (blended)	2.6
IPO	$586,000,000 Net fund: $510,254,849.99	$170,084,950	33.33% of net	$202,359,423.63	1,027,000.00	$197 (blended)	0.84
Credit Card	$336,000,000	$51,250,000	15.25%	$31,990,501.60	76,877.94	$416 (blended)	1.6

The Diet Drugs Fee Decision – The Issues

In December of last year, I wrote about the federal district court's final fee award in the *Fen-Phen Diet Drugs* cases – $434 million, representing 6.75% of the settlement agreement valued by the court at $6.44 billion.[1] Last month, the Third Circuit affirmed.[2] The $434 million award represented a lodestar multiplier of 2.6, based on an estimated 553,020.53 hours spent by class counsel since the inception of the litigation. The appeal to the Third Circuit focused on three issues: the transparency of the process of determining the size of the award, the size of the award as derived from various

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1 *In re Diet Drugs Products Liability Litigation,* 2008 WL 942592 (E.D. Pa. 2008).

2 *In re Diet Drugs Products Liability Litigation,* 582 F.3d 524 (3d Cir. 2009).

(continued on page 484)

(continued from **Expert's Corner**, page 483)

settlement funds, and the applicability of common benefit assessments to various groups of plaintiffs. The court rejected all three objections, but two (transparency and common benefits) raise interesting issues.

On the transparency point, the Third Circuit began by acknowledging the recent Fifth Circuit decision *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220 (5th Cir. 2008). In that case, the Fifth Circuit overruled a district court fee allocation that had taken place more or less in secret, insisting on the need for transparency in fee decisions, particularly those allocating fees among counsel. When I wrote about that case in our April 2008 issue,[3] I compared it to the fee process in the *Diet Drugs* case at the district court level, noting that "the *Diet Drugs* decision provides pretty much the opposite approach from the *High Sulfur* case: "everything, one might say, is illuminated." The Third Circuit agreed with my assessment, affirming the district court's handling of the *Diet Drugs* fee process. In so doing, the Third Circuit acknowledged the transparent quality of the *Diet Drugs* case: contrasting it with the *High Sulfur* matter, the Circuit wrote that "this case is so factually distinct from that one that comparing the two is fruitless." *Diet Drugs*, 582 F.3d at 538. The Third Circuit also held that, in any case, the *Diet Drugs* process conformed to its own precedent. In making the latter holding, the Circuit appeared to distance itself from fully embracing the Fifth Circuit's approach. ***For this reason, I'd keep an eye on the topic of transparency in fee proceedings as we head into the new decade – this is likely a topic that objectors will continue to attempt to mine.***

The other interesting objection in the *Diet Drugs* case concerned the common benefit fee, also a topic of one of my recent columns.[4] The common benefit fee is essentially a tax whereby lawyers with contingent fee arrangements with individual plaintiffs are required to share a portion of their contingent fee with the attorneys who produced the global settlement; the rationale is that because the global settlement produced "common benefits," the individual attorneys must compensate the plaintiffs' management committee (PMC) lawyers who did the common benefit work. The issues in the *Diet Drugs* case concerned whether the individual attorneys could be taxed where their clients' injuries were not those covered by the global settlement (the "PPH claimants") and whether the individual attorneys could be taxed when their clients opted out of the settlement (the "initial opt out" plaintiffs). The Third Circuit's answer to both questions – yes, tax away.

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Bracketing the magnitude of the tax, the court first found that that these plaintiffs received sufficient benefit from the efforts of the Plaintiffs Management Committee to justify a tax, writing in an interesting passage:

> Wyeth had to defend itself against the initial opt-out and PPH claimants knowing that they had access to pertinent discovery and understanding that they, in turn, knew Wyeth was heavily invested in settling. It stands to reason, then, that those plaintiffs stood a better chance of recovery from Wyeth than they would have absent the PMC's efforts. Thus, the PMC conferred a substantial benefit on the initial opt-out and PPH claimants.

Id. at 548. Quickly noting the slippery slope of this holding, the Circuit added in a footnote:

(continued on page 485)

3 William Rubenstein, *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel,* 2 Class Action Att'y Fee Dig. 137 (April 2008).

4 William Rubenstein, *On What a "Common Benefit Fee" Is, Is Not, and Should Be,* 3 Class Action Att'y Fee Dig. 87 (March 2009).

(continued from **Expert's Corner**, page 484)

> We do not mean to imply that the existence of a settlement agreement by itself constitutes a substantial benefit to opt-out claimants in every class action. This case presented a unique set of circumstances—the staggering amount of liability that Wyeth faced, the quality and quantity of the discovery that the PMC amassed, and the speed with which Wyeth and Class Counsel reached a settlement—that severely weakened Wyeth's bargaining position against PPH and initial opt-out claimants. The District Court did not abuse its discretion in deciding that the PMC deserves to be compensated for increasing those claimants' leverage against Wyeth.

Id. at 548 n.47.

Having found that a benefit had been conferred, the court then ruled that the level of the tax in this matter — 4% or 6% on differing claimants — was not an abuse of discretion by the district court. The real challenge to the level of the fee came because a third group of claimants (the "downstream opt out" plaintiffs, as opposed to the "initial opt out" plaintiffs) was assessed a common benefit fee at a lower level than the other two groups. The majority of the Third Circuit panel brushed aside the problem, ultimately relying on the "abuse of discretion" standard of review and the fact that it would have been unfortunate to unravel this whole complex settlement over this relatively minor sub-issue. In a very thoughtful dissent of this remarkably complex settlement, Judge Ambro thought the disparity of taxes among the similarly-situated groups warranted reversal on that point.

What's all this amount to? Some relatively significant scrutiny of common benefit taxing – both the rationale and level of it. While this decision is a victory for common benefit attorneys (i.e., plaintiffs management committees in big cases) and a defeat for individual tort attorneys at the local level (i.e., the ones paying the tax), I believe that ***the philosophical and practical terms of these institutional arrangements are still in flux, and I therefore predict that common benefit fees will remain a hot button issue in mass tort settlements in the coming years. Stay tuned.***

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In January, I will return to the other two big late 2009 decisions – the *IPO* and *Currency Conversion* cases – and look at some issues these fee decisions raise.