The Expert's Corner

THE LARGEST FEE AWARD – EVER!

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This month U.S. District Judge Melinda Harmon of the Southern District Court of Texas approved the largest class action attorney fee award in history. The plaintiffs, former shareholders of Enron, recovered approximately $7.2 billion. Class counsel sought 9.52% of the total recovery, or approximately $688 million. Judge Harmon approved the fee award in a lengthy opinion that provides a splendid overview of the state of fees law in large class cases. Let's examine the holding then identify the themes.[1]

The Holding

Because the Enron case was litigated under the Private Securities Litigation Reform Act (PSLRA), the lead plaintiff – the Regents of the University of California – had negotiated a fee arrangement with Lead Counsel, Coughlin Stoia, at the outset of the case ("ex ante" in the terminology of law and economics). According that agreement, the firm was to receive 8% of the first billion dollars recovered, 9% of the second billion, and 10% of any amount of recovery exceeding $2 billion. As applied to the $7.2 billion dollar settlement, the fee agreement yielded an overall percentage of 9.52%. Class counsel's lodestar amounted to roughly $132,000,000 (289,593.35 hours at a blended hourly rate of $456). This meant that plaintiffs' counsel's $688 million fee request represented a lodestar multiplier of 5.2.

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After dispensing with a number of preliminary issues, Judge Harmon examined the relative merits of the lodestar and percentage methods for determining fee awards. In class action cases where the total amount of recovery is uncertain at the time of settlement, Fifth Circuit precedent embraces the lodestar method because the percentage method results in indeterminate fee recovery. When recovery comes in the form of a common fund, by contrast, many courts prefer the percentage method. Awarding a set percentage of a common fund rewards lawyers for taking cases with a high risk of failure. In addition, the percentage method avoids the lodestar method's tendency to encourage inefficient work and shoddy time-keeping. Harmon noted that the Fifth Circuit has yet to commit to either the lodestar or percentage approach in common fund cases, although the recent trend has been towards using the percentage method.

For this case Judge Harmon adopted what she dubbed "a hybrid approach." The court took the contractual percentage fee as a starting point but used a lodestar analysis as a cross-check. Applying first the percentage method, Judge Harmon started from the fact that the ex ante fee agreement created a strong presumption in favor of granting the 9.52% award. The court held that because

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1 In re Enron Corporation Securities, Derivative & "Erisa" Litigation, 2008 WL 4178130 (S.D.Tex. Sept. 8, 2008).

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the Lead Plaintiff in this case was a sophisticated entity with ample access to legal expertise, the Lead Plaintiff was unlikely to have been duped into an unreasonable percentage fee agreement.

In addition, the testimony of plaintiffs' expert weighed in favor of approving the percentage fee award. Columbia Law School Professor John Coffee compared the size of the fee award in this case to fee awards in comparable "megafund" securities cases. For example, in the recent WorldCom case, the fee award of $336.1 million amounted to 5.5% of the total class recovery. Professor Coffee distinguished this precedent by pointing out that in WorldCom the shareholders recovered only 2.9% of the lost market capitalization of the company, while in this case plaintiff's counsel had recovered 8.3% of the lost market capitalization on behalf of the class. Professor Coffee argued that the higher recovery as a percentage of market capitalization justified a percentage fee award nearly double that of plaintiffs' counsel in the WorldCom case.

Finally, plaintiffs' counsel presented a chart displaying the percentage recoveries of all post-PSLRA securities fraud class action suits with settlements greater than or equal to $400 million. The percentage fee awards ranged from 1.73% to 21.4%, while the average was 11.61%. The court found that this chart was strong evidence of the reasonableness of the fee award in this case.

The court similarly credited the lodestar analysis as supporting class counsel's fee request. Plaintiffs' expert Kenneth Moscaret presented evidence that the blended hourly rate of $456 was within the average range of hourly rates for law firms in the Houston/Dallas area. Moscaret also pointed to the fact that more than 65% of the total hours were billed by the same "core" group of 14 attorneys as evidence that the firm had staffed the matter efficiently and had not artificially inflated the total number of hours billed.

After considering the testimony of plaintiffs' experts, the court proceeded to an application of the twelve *Johnson* factors (including the time and effort required, the novelty and difficulty of issues faced by plaintiffs' counsel, the skill required, the experience of the attorneys, and the size of awards in similar cases) as a means to deciding the appropriateness of the requested multiplier of 5.2. Judge Harmon's application of the *Johnson* factors in this case reads like promotional literature for the Coughlin Stoia firm. According to Harmon, Lead Counsel prosecuted the suit "vigorously, tenaciously, and efficiently" in the face of legal issues that were "extremely complex and very frequently novel." The opinion raves: "the skills, expertise, commitment, and tenacity of Lead Counsel in this litigation cannot be overstated." For Judge Harmon, the skill demonstrated by the plaintiffs' attorney and the difficulty of the case weighed heavily in favor of a large lodestar multiplier.

> *[T]he court argued that the presence of a very large common fund recovery does not imply that the lodestar multiplier should be limited to a low number. Such a policy would give plaintiffs' attorneys an incentive to seek out easy cases with low recoveries while avoiding larger cases that require more attorney hours and a greater assumption of risk.*

As for the last *Johnson* factor looking to awards in similar cases, the court stated that a 9.52% fee award was below the average percentage requested in similar cases. The court admitted that most other cases did not result in recoveries as large as the common fund in this case. However, the court argued that the presence of a very large common fund recovery does not imply

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that the lodestar multiplier should be limited to a low number. Such a policy would give plaintiffs' attorneys an incentive to seek out easy cases with low recoveries while avoiding larger cases that require more attorney hours and a greater assumption of risk. For these reasons, the court concluded that a multiplier of 5.2 was reasonable and appropriate in this case.

Of course, Lead Counsel's fee proposal did not pass without objection. Individual members of the class objected to the fee arrangement on various grounds. One claimed that the hourly rate for the lodestar analysis was too high. Another class member protested that the firm's timekeeping sheets failed to clearly distinguish between worked performed by associates and work performed by paralegals. A third objector insisted that the hourly rates for attorney and paralegal work should have been calculated using the *Laffey* matrix published by the US Attorney's Office. The court dealt with these and similar objections in turn, concluding that none were strong enough to dissuade the court from approving the fee award.

Anatomy of a fee decision in significant cases:
(1) some discussion of percentage vs. lodestar;
(2) some discussion of percentage benchmarks, along with a multiplier discussion;
(3) some discussion comparing the fee to fees in similar cases;
(4) the use of expert testimony to support the fee award;
(5) the application of the circuit's own law to justify the points outlined above; and
(6) the rejection of objections.

The Themes

While this is the largest class action fee award in history and would appear an outlier for that reason, there are a series of themes that run through the case which are characteristic of fee litigation today.

First, the court, as do many these days, weighed the pluses and minuses of the percentage approach as opposed to the lodestar, gently favored the percentage approach, but then undertook a lodestar cross-check in any case; Judge Harmon characterized this as a "hybrid" approach. My own sense is that while courts articulate all of the reasons for favoring the percentage approach, most nonetheless end up checking the outcome against the case's lodestar; and courts that use a lodestar will often, nonetheless, evaluate what percentage of the outcome the fee amounts to. So the "hybrid" type approach used here is relatively typical of most fee cases.

Second, the court's identification of a "benchmark" percentage in the 25-33% range, coupled with its use of a lower percentage in a "mega-fund" case like this, is consistent with the approach and numbers used by most other courts.

Indeed, *third,* the court analyzed its ultimate outcome by comparing it to the percentages in other similar "mega-fund" cases. This "comparison" approach is increasingly common, typically provoked by a doctrinal requirement that the court do it.

Fourth, the manner by which the court developed the comparison group – and for that matter, the hourly rate for its lodestar analysis – was to rely on expert testimony submitted by class counsel. Again, as I've noted in previous columns, the utilization of experts to perform these functions is increasingly common.

Fifth, the court of course churned through all of the necessarily multi-factor test analysis, both as to the

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reasonableness of the fee and as to the reasonableness of the multiplier. This doctrinal work is necessary to support the fee award – and though the factors themselves vary by circuit, they tend to look at the same issues – but all of this feels somewhat "after-the-fact" once the percentage and multipliers have been set within a reasonable range. In other words, my own sense is that courts find the quantitative aspect of the fee-setting to be more straightforward than the qualitative analysis they must engage in when explaining in words why the numbers themselves are justifiable. That said, as noted above, Judge Harmon was at no loss for words in exclaiming the Coughlin firm's work here.

Sixth, the case of course attracted objectors, each of whom suggested some defect in the fee request (and asked for fees for their work) and each of whom was dismissed in turn. Most cases – certainly those of this magnitude – will attract objectors, but it is quite rare that they have a significant impact on the level of the fee award in a case in which the settlement is so large, so professionally negotiated, and already approved. This is particularly true when the fee follows from an ex ante arrangement with an institutional client.

In sum, then, a reader of fee awards in significant cases is likely to see (1) some discussion of percentage vs. lodestar, ending in adoption of percentage with a lodestar cross-check; (2) some discussion of percentage benchmarks ranging from a third to a quarter in standard cases, to somewhere around 10% in mega-fund cases, along with a multiplier discussion setting a multiplier in normal cases in a five point range from 2-7, give or take a few percentage points on the higher side in big cases; (3) some discussion comparing the fee in the present case to fees in similar cases; (4) the use of expert testimony to support the fee award, typically from a law professor; (5) the tail wagging the dog – the application of the circuit's own law to justify the points outlined above; and finally (6) the tail's tail – the rejection of objections.

The Enron decision begs the question of whether results like this – for the underlying plaintiffs – will continue in a post-Lerach world or whether this tremendous outcome was due in large part to Bill Lerach's unique abilities, abilities that may or may not be found in his successors.

The Missing

The elephant in the room in this opinion is of course Bill Lerach. He famously tried this case in the media when it started (even the judge here remembered that in appointing him co-lead counsel, she had written in 2002 that "Mr. Lerach has *justifiably* 'beat his own drum' in demonstrating the role his firm has played thus far in zealously prosecuting this litigation on Plaintiffs' behalf") (emphasis added) and Lerach was surely responsible in large part for the case's phenomenal outcome. But now he is in jail. (The media reported that he is entitled to $50 million of this award off the top.) It is interesting to see the Court work through such a long analysis (my Westlaw® printout is 82 pages long) with only a few passing references to Lerach. That he ended up incarcerated for issues unrelated to his work on this case is no reason to deny his firm money for his work on this case, though one could imagine other areas of law where that might result. As critically, though, the *Enron* decision begs the question of whether results like this – for the underlying plaintiffs – will continue in a post-Lerach world or whether this tremendous outcome was due in large part to his unique abilities, abilities that may or may not be found in his successors. Only time will tell, of course, though with the latest round of Wall Street fiascos dotting the media daily, that time may be sooner rather than later.

Is there a new Bill Lerach out there ready to take on this current mess?