

The Experts' Corner

LODESTAR VS. PERCENTAGE: THE PARTIAL SUCCESS WRINKLE

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For the past several decades, judges and scholars have debated whether courts should employ the lodestar or percentage method in calculating fee awards. The percentage method has essentially prevailed in common fund cases. The Federal Judicial Center's monograph, *Awarding Attorney's Fees and Managing Fees Litigation* (co-authored by Prof. Hirsch), included among the advantages of the percentage method that it: (1) better approximates a market fee, (2) best aligns counsel's incentives with those of the class, and, perhaps most importantly, (3) is simple to administer.

Despite the percentage method's advantages, most circuits permit use of the lodestar when particular cases recommend it. A federal judge in Manhattan recently found such an occasion, arguing that because the plaintiffs achieved only partial success, the lodestar enabled the court to identify with precision which hours to reward. While this may sound logical, we find it misguided.

In re Stock Exchanges Options Trading Antitrust Litigation, 2006 U.S. Dist. LEXIS 87825 (S.D.N.Y., Dec. 4, 2006),¹ concerned antitrust challenges to the trading practices of exchanges involved in listing stock option contracts. In 1999, the Judicial Panel on Multidistrict Litigation consolidated more than 20 putative class actions and sent them to Judge Richard Casey for pretrial proceedings. The plaintiffs settled with some defendants, but Judge Casey did not approve the settlements. Ruling that federal securities laws impliedly repealed the antitrust laws upon which plaintiffs' claims were based, he entered summary judgment for the defendants. The Second Circuit essentially affirmed, yet upon remand the parties reached a settlement agreement establishing a common fund worth about \$47 million. Counsel sought \$14.1 million, a 30% award.

¹ See also 1 *Class Action Attorney Fee Digest* 6 (Jan. 2007).

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The opinions expressed in this article are solely those of the authors.

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The court's fee assessment started from an uncontroversial premise: attorneys should be compensated "only for the portions of the case that led to some benefit for the class." Fair enough. But then the court concluded that, "the lodestar method is best suited to the task." Why? Because the lodestar "allows the Court to easily decipher which efforts resulted in a benefit for the class and which did not." This strikes us as problematic for two reasons – the first pertaining to the deciphering function, the second to the ease of application.

First, the fund itself is a remarkably precise measurement of the attorneys' success. It captures *exactly* what they produced for the class. Yet, Judge Casey considered the percentage approach "simply too blunt (and perhaps too arbitrary) an instrument for cases where the Court must excise from a requested fee those portions of the representation that yielded no benefit to the class." However, taking a percentage of the fund created automatically excises from the requested fees "those portions of the representation that yielded no benefit to the class."

Second, there is nothing "easy" about using the lodestar method. Counsel's submissions included affidavits with forty exhibits (one for each firm involved), time records, a plethora of distinct proposed rates for different professionals, bios, and – smartly – the declaration of an expert witness. Why scrutinize all this when the fund itself is the successful part of the case and it takes no more than a nanosecond to gauge its size?

Two arguments can be made in support of Judge Casey's approach, but both prove un-compelling. First, the Second Circuit "encourage[s] the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). If the percentage method must be checked by the lodestar, this undermines the efficiency argument in its favor. (This is, of course, an argument against the cross-check.) However, the Second Circuit, perhaps appreciating this problem, has stated that, "where used as a mere cross-check, the hours documented by

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counsel need not be exhaustively scrutinized by the district court." *Id.* Thus Judge Casey's rejection of the percentage method cannot be defended on the basis that an extensive lodestar analysis still would have been needed.

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Perhaps Judge Casey's approach can be defended on a different basis: because counsel achieved only partial success, the percentage of recovery itself should be reduced – and only the lodestar can determine how to reduce it. To be sure, extensive case law supports reducing a requested fee award based on "partial success." In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court held that when the plaintiff prevails on some claims but fails on discrete, essentially unrelated claims, fees should be allotted only for work in furtherance of the successful claims. However, partial success is typically invoked, as in *Hensley*, to justify a downward adjustment of the lodestar, not as a basis for choosing between lodestar and percentage. Moreover, in a common fund case, why should the percentage be reduced for limited success when the fund itself reflects only the success? The fund provides a natural limitation on recovery when fees are a percentage of it.

Even if a court insists that limited success be taken into account, such a decision still does not counsel the choice of

the lodestar method over the percentage method. After all, the concept of downward adjustment is not limited to lodestars. A court can just as easily make a downward adjustment from an otherwise appropriate percentage as it can from a lodestar. See *Sutton v. Bernard*, 446 F. Supp. 2d 823, 2006 U.S. Dist. LEXIS 52349 (N.D. Ill., July 17, 2006) ("the degree of success has the same critical importance in determining percentage fees as it does in determining lodestar fees."). Employing his scalpel-like lodestar in *Stock Exchanges*, Judge Casey awarded \$11.1 million instead of \$14.1. He would have reached the same outcome by knocking counsel's percentage from 30% down to 24% – and that would have taken but a moment. Sure, identifying the "right" lower percentage would have been more of a guess, but it would have been an efficient one. It also bears repeating that it is unclear why the percentage of what was achieved should be reduced at all. Counsel's failures already tempered the size of the fund they were able to recover and limited their take accordingly.

Judge Casey's yeoman effort in painstakingly auditing counsel's submissions does not support the notion that limited success warrants use of the lodestar. The advantages of the percentage method in common fund cases are, if anything, stronger when plaintiffs' success is incomplete. The fund itself provides an objective measure of success, and the percentage method spares the laborious task of lodestar review – a task even more laborious than usual when the court attempts to distinguish the often-indistinguishable good from bad hours.Ω

Attorney Fee Awards Summary Chart

This chart summarizes recent class action attorney fee awards. For each case the chart provides: settlement amount, attorney fees, both in dollar amounts and as a percentage of the recovery, any multiplier explicitly or implicitly awarded, jurisdiction, substantive topic, and the page number on which the full case abstract begins. Because of limited space, we have simplified some details on this chart. Some settlements, such as *Rolnik v. AT&T Wireless*, involved a combination of cash and non-cash relief (e.g., injunctive relief, equitable relief, coupons, or certificates). Where the parties have ascribed what appears to be a reasonable estimate of the settlement's total value, we have reported that dollar figure for the settlement benefits and indicated so with "est." The full case abstract explains the parties' source or reasoning behind the estimate.

In other cases, such as *Dancer v. Catholic Healthcare West*, we were not able to determine a value for the non-cash component. For those settlements, we reported the known aspect of the settlement as the settlement benefits value but

indicated with a "+" symbol that the settlement actually was some unknown amount greater.

Some cases, such as *Fulton v. Nat'l General Assurance*, are claims-made settlements for which the total amount paid to class members is unknown.

Every case in the chart lists the amount the court awarded in attorney fees. When possible, we have calculated the fee as a percentage of the total settlement. We also provide the multiplier either as explicitly awarded by the court or by calculating it from the underlying fee data. Sometimes, there is no multiplier data. Sometimes, the attorneys did not request a multiplier. In a few cases, the multiplier figure reflects the court having adjusted the lodestar, e.g., by denying compensation for certain hours or reducing hourly rates. Again, we suggest you read the full case abstract.

To help practitioners scan for the most relevant cases, we have listed the jurisdiction and the substantive topic. The jurisdiction column uses the two-letter postal code and then (F) or (S) to designate federal or state court.