

## The Expert's Corner

### YOU CUT, I CHOOSE: (TWO RECENT DECISIONS ABOUT) ALLOCATING FEES AMONG CLASS COUNSEL

William B. Rubenstein\*

Most of the action in attorney fees is contained in the adjudication that sets class counsel's fee. In large cases with multiple counsel, however, that decision will often mask the more complex dance that follows: the division of the court's lump sum fee award among the many class counsel. Last May, I wrote a column in this space identifying three critical issues that arise at this moment of "fee allocation," namely: (1) who divides the aggregate fee, lead counsel or the court? (2) according to what standard should the aggregate fee be divided? and (3) should the division be made known among all counsel or to the class or public more generally?<sup>1</sup>

In the past few weeks, courts have issued two important new decisions on point, one involving the \$7 million fee case that I wrote about last year, *In re High Sulfur Content Gasoline Products Liability Litigation*, 517 F.3d 220 (5th Cir. 2008), and the other involving the recent – get this – roughly \$600 million fee and cost decision in the long-running *Fen-Phen* litigation, *In re Diet Drugs Products Liability Litigation*, 2008 WL 942592 (E.D. Pa. Apr. 8, 2008). The cases each raise allocation issues, each took a unique approach, and thus the pair demonstrate a better and worse approach to the allocation problems. The *Fen-Phen* decision contains a host of other interesting issues as well.

In the *High Sulfur* case, a federal district court judge in New Orleans (Ivan Lemelle) had blessed a fee split (developed by a

committee of two co-lead and three other plaintiffs' attorneys) allocating about \$7 million among 32 law firms and 79 plaintiffs' attorneys following a 20 minute, *ex parte* hearing, culminating in a sealed decision not even made available to the involved attorneys. The U.S. Court of Appeals for the Fifth Circuit recently reversed, striking a blow to secrecy and adding an important appellate decision favoring transparency in fee awards. *In re High Sulfur Content Gasoline Products Liability Litigation*, 517 F.3d 220 (5th Cir. 2008). Upon remand, the trial judge has now "re-allotted" the case to another judge (i.e., recused himself) to oversee the allocation issues. *In re High Sulfur Content Gasoline Products Liability Litigation*, 2008 U.S. Dist. LEXIS 28061 (E.D. La. March 31, 2008).

*[The High Sulfur and Fen-Phen cases] demonstrate a better and worse approach to the allocation problems.*

The *High Sulfur* case arose out of the fact that for several weeks back in 2004, Shell Oil Company sold gasoline with too high a sulfur content, (allegedly) causing fuel gauges to break. Multiple class actions were coordinated by the Judicial Panel on Multidistrict Litigation ("JPML") and sent to Judge Lemelle. In September 2006, a settlement was reached on behalf of residents of four southern states (Louisiana, Mississippi, Alabama, and Florida). More than 80,000 consumers filed claims and close to \$100 million was distributed. The Court approved the settlement's agreed-to aggregate fee of \$6.875 million.

At a hearing on January 22, 2007, the judge agreed to divide the \$7 million in the manner that his lead counsel committee proposed, but he simultaneously ruled that the awards to each

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<sup>1</sup> See William B. Rubenstein, *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007). In that column, I disclosed that I served as a consulting expert to some class counsel in the *Fen-Phen* litigation (*In re Diet Drugs (Phen/Fen) Products Liability Litigation*, U.S. Dist. Court, E.D. Pa. (2006)) regarding lead counsel's proposed division of the aggregate fee – I write about recent developments in that case here, but constrict my discussion to describing and analyzing what is contained in the public record.

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attorney must be sealed and that none of the attorneys would be permitted to reveal their award to anyone. Why? Because it was thought that if the plaintiffs' lawyers knew what one another were making, it would lead to an entire new round of litigation. Following a flurry of objections from disgruntled attorneys, a local law professor, and the local newspaper, the district judge held another *in camera* hearing, sealed the proceedings, and affirmed his earlier ruling by a sealed order. Although some of the records were later unsealed, the objectors appealed.

On February 4, 2008, the Fifth Circuit reversed and remanded, finding that the procedures employed in the district court constituted an abuse of the trial judge's discretion. The court criticized the judge for two reasons: for not closely scrutinizing the fee committee's allocation and for concealing the facts of the allocation from the interested parties and the public. As to the oversight: the court acknowledged that appointment of a committee to take an initial swing at the split was appropriate, but it rebuked the trial judge for not looking carefully at the outcome of that recommendation:

The record lacks the attorneys' time and expense statements, letters, comments, hourly billing rates, and other materials allegedly submitted by the Fee Committee to the district court on or before the *ex parte* hearing on January 22, 2007....Nor does the record contain a breakdown of the hours and rates claimed by each attorney or their respective lodestars. In other words, the record strongly suggests that at the time of the *ex parte* hearing the court possessed no documents, other than the Fee Committee's proposed fee allocation, upon which it could base factual findings for awards of individual attorneys' fees.

*High Sulfur*, 517 F.3d 220, 230. As to the secrecy: the court acknowledged that the record might be sealable in extreme circumstances, but it found none present:

The only justification posited for sealing the record here is to discourage internecine fee sharing disputes among the plaintiffs' lawyers. This is a weak and unconvincing reason for dispensing with the public nature of our judicial proceedings. Sealing the record protects no legitimate privacy interest that would overcome the public's right to be informed.

*Id.*

In so holding, Judge Edith Jones, writing for the panel, coined the two best fee phrases of 2008 (to date). Of the secrecy, Judge Jones stated that: "Attorneys' fees, after all, are not state secrets that will jeopardize national security if they are released to the public." *Id.* And writing of the consequences — that counsel had no way of knowing whether their share was fair without being able to compare it to others' shares — Judge Jones stated that: "One cannot even compare apples to oranges without knowing what the oranges are." *Id.* at 232.

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The Fifth Circuit's decision is surely correct on the law, though class counsel was just as surely correct on the facts — namely, that their job would have been easier had they been able to conceal from their co-counsel the precise outcome of their allocation. Their problem is that the other values at stake — actual judicial oversight and transparency — outweigh their interest in ease of administration.

There is no ease of administration at stake in the long-running and remarkably complex *Fen-Phen* matter, but there is lots more transparency and seemingly more oversight — though the allocation aspects of the case have yet to be fully determined. A quick reminder of the background: during the 1990s, American Home Products (now Wyeth) marketed two prescription weight loss drugs (fenfluramine and dexfenfluramine), either of which was commonly prescribed in combination with a third drug (phentermine), and hence referred to as "fen-phen." After the Mayo Clinic identified heart problems resulting from use of the drugs in 1997, the FDA and Wyeth suspended sales of the drugs. "A tidal wave of litigation followed," according to the recent district court decision, consisting of more than 100,000 individual lawsuits and 130 class actions. The JPML consolidated the federal litigation in an MDL proceeding in Philadelphia in 1997, which

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culminated in a multi-billion dollar global settlement in 1999, approved in 2000, and affirmed by the Third Circuit in 2001. But that was only the beginning: the Trust set up to dole out the settlement money was flooded with claims and roughly 70,000 class members exercised opt-out rights. Several years, several settlement amendments, and several billion Wyeth dollars later, the case was finally brought under control and the settlement essentially effectuated. The end result was a series of funds the court ultimately valued at \$6.44 billion, benefitting close to a million claimants.

Fee time. (Well, not exactly – the court had awarded a \$77 million interim fee back in 2005, so it's more accurate to call this "final fee time.") Everything about the MDL court's decision differs from the district court decision in the *High Sulfur* case: it's long (over 100 slip opinion pages); it was preceded by in-depth briefing and hearing, including the appointment of an independent auditor to oversee the collection and auditing of counsel's hours; it carefully scrutinizes every detail in the case; and it leaves (relatively) little hidden behind a veil of secrecy. The bottom line is that the court approved a fee constituting 6.75% of the \$6.44 billion settlement value, or roughly \$435 million (and another \$24 million in costs); counsel had logged roughly 550,000 hours, for a lodestar of \$167 million, so the final fee embodied a multiplier of 2.6. If that were not enough – and apparently it wasn't – a separate but overlapping group of counsel that undertook work in the MDL court benefiting the opt-out and non-federally consolidated plaintiffs were awarded another \$133 million in fees (ostensibly, for helping to create about \$1 billion for those other plaintiffs). Thus, in one judicial decision, a federal district judge approved an award of about \$600 million in fees and expenses in one case – short of the tobacco litigation, likely the largest payday in American – hell, in planetary – legal history.

The *Diet Drugs* outcome compares favorably to recent super mega-fund cases (fund values over \$1 billion). The closest analog appears to be the *Tyco* decision, which I wrote about in January,<sup>2</sup> in which the court awarded a very similar fee (\$464 million) for a similar number of hours (about 500,000) and hence with a similar multiplier (2.697) – though the *Tyco* litigation took about half as long in real time (six years as

<sup>2</sup> See William B. Rubenstein, *The "Lodestar Percentage:" A New Concept For Fee Decisions?*, 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008) (discussing *In re Tyco International Ltd. Sec. Litig.*, 2007 WL 4462593 (D. N.H., Dec. 19, 2007)).

opposed to 11), realized about half the recovery (\$3.2 billion as opposed to \$6.44), and hence amounted to a percentage award more than twice that in the *Diet Drugs* case (14.5% as opposed to 6.75%). The *Fen-Phen* Judge, Harvey Bartle III, in fact charts out nine other super mega-fund cases, showing that the *average* percentage in them is 8.26% and hence making this percentage (6.75%) look low; in fact, though, the more pertinent figure is the *median* of these other 9 cases, which is 6.5%, so the *Diet Drugs* percentage is in the upper half of the super mega-fund cases. That said, the average multiplier in the other cases (eight reported) was 3.41, and the median were 3.5 and 3.69, so the 2.6 multiplier here seems eminently fair. In short, the *Diet Drugs* decision holds up well in comparison to the other super mega-fund awards.

The decision also compares quite favorably to the *High Sulfur* decision on both the scrutiny and transparency prongs. The *Diet Drugs* decision is remarkably intricate, even as these things go, as the settlement involved a variety of different funds, settling a variety of different types of cases, in a variety of courts and contexts, across a great number of years and hundreds of thousands of plaintiffs, and, of course, distributing perhaps the largest payout in American history outside the tobacco litigation, somewhere between \$5-10 billion dollars. The fee decision is denominated Pretrial Order No. 7763A – in other words, it is nearly the eight thousandth pretrial order the court has issued in the 11 years the case has been pending (if you do the math at 250 work days per years, there are 2750 in 11 years, meaning that the district court is issuing roughly 3 *pretrial orders every day for 11 years!*). As such, it seems rather unlikely that the Third Circuit will, if and when it reviews this decision, criticize the district judge for not carefully following the litigation as the Fifth Circuit criticized the district judge in the *High Sulfur* case.<sup>3</sup>

<sup>3</sup> In fairness to Judge Lemelle in that matter, it is worth acknowledging his statement on remand that:

We respectfully disagree with the comment in the panel opinion that this Court dispensed with impartiality, procedural fairness or oversight. That language adversely implicates the countless hours spent at the trial court level by all who successfully settled this multidistrict litigation. The class wide settlement, as recognized in the concurring opinion, represents excellent work by class counsel to obtain, value-wise, in excess of \$99 million for the class. For that work this judge stands appreciative still—not only to class counsel who negotiated that settlement, but also to all others, including movants, who played varying roles in it's achievement.

*High Sulfur*, 2008 U.S. Dist. LEXIS 28061 at \*6.

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On the transparency score, the *Diet Drugs* decision provides more or less the opposite approach from the *High Sulfur* case as well: everything, one might say, is illuminated. Specifically, the court required all counsel to submit fees to a court-appointed auditor and to class counsel, so all of the numbers are available (somewhere). Perhaps as impressively, class counsel has submitted as part of its fee petition all of the agreements it made with the many co-class counsel in the many parts of the case concerning what portions of the fee they would be allotted in exchange for their agreeing to one aggregate fee petition. These agreements are remarkable documents, all available on PACER (though through the MDL docket number not the case number), shedding light on the intricacy and detail of the arrangements that are worked out among and between class counsel in these large cases. They also demonstrate an incredible effort on class counsel's part to ensure unanimity among the hundreds of lawyers and law firms serving in some capacity deserving of a cut of the fee class counsel.<sup>4</sup>

<sup>4</sup> Here's a taste. The filed compendium of agreements included:

(1) The PMC/MDL Attorneys Agreement; (2) The Seventh Amendment Liaison Committee Agreement; (3) the "Free States" Agreement; (4) the Agreement with the "Non-PMC Refund Counsel"; (5) the Agreement with "the Remaining Individual Petitioners;" (6) Letter-Agreement with Counsel for the Washington State Class; (7) Letter-Agreement between Class Counsel and Ervin A. Gonzalez, Counsel for the Florida Class; (8) Letter-Agreement Between Class Counsel and Feldman, Shepard & Wohlgelemer, Counsel for Sub-Class 2(A); (9) Letter-Agreement Between Class Counsel and Strauss & [Troy], Counsel for Sub-Class 3; (10) the Fleming Agreement; and, (11) the "Major Filers" Agreement. The "Major Filers" include fifty law firms, which together represent: (1) 97% of the Downstream Opt-Out plaintiffs who filed lawsuits subject to MDL 1203 fee assessments; (2) 26,000 Level I and Level II Matrix Benefits claimants whose claims were ultimately disposed of as Category One Claims under the Seventh Amendment; and (3) half of all Class Members who have been paid Matrix Benefits by the Trust through May 31, 2007.

2008 WL 942592 at \*10 (footnotes omitted).

That said, the allocation itself has yet to take place and so the final results are not in. The court's decision ends by directing class counsel to submit an allocation proposal within 45 days and then provides counsel 15 days to object on the grounds that the allocation does not comport with the prior agreements. This all sets forth a process more coherent than those overturned in the *High Sulfur* case and it surely implies, if it does not absolutely guarantee, that the forthcoming allocation will be as publicly available as the information to date.

If there's a quibble with the *Diet Drugs*' "our books are open" approach, it's that the level of detail is overwhelming. It has the feel of a discovery response that provides a billion documents to opposing counsel so as to ensure that the two-page smoking gun will be hidden in the mass. Don't get me wrong – there's no reason to suspect a smoking gun here – but there is also no reason to imagine anyone sifting through this mound of materials (every hour of every counsel, all of the agreements among counsel, etc.) to make sure. In this sense, the *Diet Drugs* case's remarkable transparency provides something of a cautionary response to the Fifth Circuit's insistence on full transparency in *High Sulfur*: namely, be careful what you ask for. But of course, cases as grand as the *Diet Drugs* litigation only come about every decade or so. So far.

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By these agreements:

The Joint Fee Applicants agreed to apply for the award of common benefit fees as set forth in the ... Joint [Fee] Petition, and the Major Filers agree to join in that Petition and to refrain from making or pursuing any objections to such an award;

The Joint Fee Applicants and the Major Filers agreed to jointly apply for an order directing a refund of certain amounts previously deposited in the Fund B Attorneys' Fees Account and the MDL 1203 Fee and Cost Account as set forth in the ... Joint [Fee] Petition;

The Joint Fee Applicants agreed to allocate the aggregate amounts awarded by the Court among themselves on a percentage basis such that the allocation agreement will be operative regardless of the dollar amount awarded by the Court from any given fund; and

The Joint Fee Applicants agreed to creation of a Fee Reserve (also the "Reserve Fund") in the amount of [approximately] \$ 30 million, to provide compensation for future common benefit services performed in this litigation.

2008 WL 942592 at \*11 (quoting Joint Petrs' Br. at 31).