

## The Expert's Corner

### 2008: THE YEAR IN CLASS ACTION FEE AWARDS

William B. Rubenstein\*

In this year-end review, I identify three major developments on the fee front in 2008. In the January issue, I will discuss three emerging issues to keep an eye on in 2009.

#### Issue #1 — Biggest Fee Award(s) Ever!

In January 2008, I wrote about the fee award in the \$3.2 billion *Tyco* settlement:<sup>1</sup> U.S. District Judge Paul Barbadoro of the District of New Hampshire approved a \$464 million fee, 14.5% percent of the fund, embodying a multiplier of 2.7 times counsel's lodestar. Within the year, U.S. District Judge Melinda Harmon of the Southern District Court of Texas approved a larger fee in the \$7.2 billion *Enron* settlement:<sup>2</sup> \$688 million, or 9.52% of the settlement amount, embodying a multiplier of 5.2. If those two awards did not themselves make 2008 remarkable, in April, the federal court in Philadelphia overseeing the long-running *Fen-Phen Diet Drug* cases<sup>3</sup> awarded a final fee of \$412 million, on top of an interim fee of \$156 million that had been awarded several years ago,

*Some big fees were awarded in 2008:*

*Tyco = \$464 million*

*Enron = \$688 million*

*Fen-Phen = \$412 million*

*TOTAL = \$1.564 billion*

<sup>1</sup> *In re Tyco International Ltd.*, No. 02-md-1335, \_\_\_ F. Supp. 2d \_\_\_, 2007 WL 4462593, 2007 U.S. Dist. LEXIS 95199 (D. N.H., Dec. 19, 2007).

<sup>2</sup> *In re Enron Corporation Securities, Derivative & "Erisa" Litigation*, 2008 WL 4178130 (S.D. Tex. Sept. 8, 2008).

<sup>3</sup> *In re Diet Drugs Products Liability Litigation*, 2008 WL 942592 (E.D. Pa. Apr. 8, 2008).

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bringing the total diet drug fee award in at \$568 million. The awards in these three cases alone amount to more than \$1.5 billion — in a year in which most of us saw a third of our savings turn to dust.

These awards would suggest that the plaintiffs' bar is alive and well. Nonetheless, one should be careful drawing conclusions too quickly: it's often the case that a few data points like this can be outliers that mask underlying trends. It is plausible that the downturn in the economy will hit plaintiffs' firms and/or that other developments in class action law (e.g., CAFA) and fees

law (see below) may make life more difficult for the entrepreneurial bar. In sum, while these three awards do not present a full picture of the state of the plaintiffs' bar across the country and across practice areas, they are pretty nice pay days nonetheless.

#### Issue #2 — Prison!

As 2008 closes, three of the leading (if not "the three leading") plaintiffs' attorneys in the United States — Mel Weiss, Bill Lerach, and Dickie Scruggs — are all behind bars. In February, Lerach was sentenced to 24 months in prison and in June, his former partner Weiss, was sentenced to 30 months; both were prosecuted for the manner in which their firm had shared fees with named plaintiffs in securities class actions and, more specifically, how they had misrepresented this to courts. Scruggs, a pioneering Alabama-based mass tort attorney, was sentenced in July to five years in prison for bribing a judge. Three other plaintiffs' attorneys have been on trial in federal court in Kentucky this

(continued on page 466)

(continued from **Expert's Corner**, page 465)

*Prison time:*

*Lerach = 24 months*

*Weiss = 30 months*

*Scruggs = 5 years*

year on wire fraud charges arising out of their handling of their clients' recoveries in a piece of the *Fen-Phen Diet Drug* litigation that opted out of the national class action. Dissension — though no criminal problems — has also plagued another leading plaintiffs' firm, Cohen Milstein, which this fall ousted one of its key founding partners, Michael Hausfield.

The interesting question for class action law is what will happen in the wake of these prosecutions. Milberg Weiss had long been the largest class action law firm in the US, indeed one of very few to pursue class action lawsuits in a relatively large firm (200 lawyers) setting. With Mel Weiss leading the firm's East Coast practice and Bill Lerach leading its West Coast practice, the firm dominated securities class actions, in particular, for the last several decades. Even after Lerach split off and started his own practice, these two firms continued to dominate. One might have predicted they would both fold like a house of cards in the wake of these guilty pleas — but both firms appear to be going strong, renamed as Milberg LLP and Coughlin Stoia respectively. Indeed Coughlin Stoia was the primary beneficiary of the record-setting *Enron* fee award, so there's likely little problem meeting payroll in the years ahead.

Two developments will be interesting to watch: first, whether the incoming Democrat administration shows less zeal for prosecuting plaintiffs' attorneys and more interest in supporting their cases and causes; and second, whether plaintiffs' firms continue to grow to record sizes or instead strive to prosper as smaller outfits. In short, the shape of the plaintiffs' bar is up for grabs as 2008 comes to a close.

### Issue #3 — Most Interesting Decision of The Year?

2008 will not be remembered as year that marked any critical fee law decisions, though a number of developments in the doctrine are worth noting. Perhaps most centrally, the Supreme Court's holiday gift to the plaintiffs' bar was its December ruling that state consumer laws are not preempted by the FDA regulations, a ruling that enabled the "lite tobacco" misrepresentation cases to proceed.

A central issue that continues to be central to class action settlements and fee awards is the left-over money problem and its related "percentage of what?" fee concern. If a class case ends with the class not receiving 100% of the fund made available, the first question is what to do with the left over money — options vary from distributing it *pro rata* to those class members who did claim, having it revert to the defendant, or sending it to a third party via a *cy pres* award or escheat to the state. Only under the first option do the class members receive 100% of the fund, though under the third option (*cy pres/escheat*) the defendant is disgorged of all the funds. Courts have struggled in percentage fee award situations with identifying the proper number from which to assess the percentage award: the claims made by the class or the total disgorged from the defendant?

A 29-page November 3 decision of Boston federal district court judge William G. Young in a multidistrict litigation action is the latest entry in this field of decisions and a must-read for a variety of reasons. *See In re TJX Companies Retail Sec. Breach Litigation*, 2008 WL 4786658 (D. Mass. Nov. 3, 2008). First the basics: the underlying consolidated cases all involve security breaches at TJX stores [primarily T.J. Maxx and Marshalls] involving 45,000,000 credit cards, a breach of privacy announced by the stores in January 2007. The Judicial Panel on Multidistrict Litigation consolidated the many class action cases that ensued,

(continued on page 467)

(continued from **Expert's Corner**, page 466)

sending them to Judge Young in Boston. The cases were settled within a year, with primarily non-monetary relief like credit monitoring services.

Class counsel had a lodestar of \$3,300,000 and sought a fee award of \$6.5 million embodying a 1.97 multiplier. Although the fee award was calculated according to a lodestar method, Judge Young looked at the request in light of the percentage of the benefits produced. Class counsel valued the settlement at \$200,000,000, meaning the fee sought, even with the multiplier, amounted to but 3.25% of the benefit achieved. However, Judge Young calculated that the class claimed only about \$6,100,000 in benefits, which meant that the fee sought exceeded the funds claimed, or amounted to about 52% of the total payout. Judge Young then thoroughly canvassed the doctrinal and policy arguments regarding whether the fee ought to be set against the available fund or claimed fund. He came down squarely on the side of setting the fee according to the funds claimed — but nonetheless awarded the lawyers in this case the fee they sought. He achieved that bottom line by revisiting the benefits available and concluding that “the Court is comfortable characterizing this litigation as creating \$177,000,000 in potential benefits for the class and using this figure as a benchmark against which to measure the award of attorneys’ fees.” *Id.* at \*11. One of the decisive factors for Judge Young was that he had not warned class counsel prior to the fairness hearing that he would consider a different approach, though he concludes his opinion by so warning future counsel: “In the future . . . plaintiffs’ counsel can expect that this Court, when confronted with reversionary common fund or claims-made settlements, will award attorneys’ fees *by reference to the value of benefits actually put in the hands of the class members.*” *Id.* (emphasis in original).

So what’s so interesting about Judge Young’s decision?

First, he quotes us! *See id.* at \*7 (“*See also* William B. Rubenstein, *The Expert’s Corner: Percentage of What?*, 1 CLASS ACTION ATT’Y FEE DIG. 63, 64 (March 2007) (“The weakness in this approach [of awarding fees based on benefits made available] is it arguably sets up a conflict between counsel and the class by creating an incentive for counsel to accept a settlement unlikely to yield a high claiming rate—e.g., a coupon—in exchange for being guaranteed a percentage of the fund made available, not claimed.”)). This is the first judicial reference to the *Expert’s Corner* column, so a landmark opinion for that reason if no other.

*The “percentage of funds claimed” approach presents a sound policy argument, essentially reasoning that such an approach better aligns counsel’s interests with those of the class they represent, while forestalling windfall fee awards and strike suits.... I am somewhat less convinced that this argument is surely right, but it is certainly plausible and well-set forth by Judge Young in this decision.*

Second, as noted, the decision is a thorough analysis of the arguments on both sides of the “percentage of what?” debate, with a clear conclusion for the “percentage of funds claimed” approach. It presents a sound policy argument in favor of that conclusion, essentially reasoning that such an approach better aligns counsel’s interests with those of the class they represent, while forestalling windfall fee awards and strike suits. As I argued in the column that Judge Young cites to, I am somewhat less convinced that this argument is surely right, but it is certainly plausible and well-set forth by Judge Young in this decision.

(continued on page 468)

(continued from **Expert's Corner**, page 467)

Finally, Judge Young's decision includes marvelously entertaining passages. Here are a few examples. In acknowledging that his approach will likely lessen fee awards, Judge Young shows little concern for plaintiffs' attorneys:

The Court does not believe that the plaintiffs' bar as a whole will throw up their hands and abandon class action litigation so long as there is still money to be made, even if that amount is not quite as much as it was in the past.

It is much like diners complaining that their dinner has been reduced from six courses to four. The diners' disappointment about this development is understandable; the food is good, and the diners are accustomed to the additional courses. Nonetheless, the scaled-back meal still provides an abundance of food. Most diners will realize this and be content, and even if some diners leave in a show of protest, there are other hungry people who will be more than willing to pull a chair up to the table.

*Id.* at \*9.

In the opinion's conclusion, Judge Young opines:

A common theme recited by class action lawyers when confronted with concerns about fee awards disproportionate to benefits actually disbursed to class members is, "You can lead a horse to water, but you can't make him drink." In this case, for example, class counsel argued that the Court's proposed linkage of fees to benefits claimed was not "fair" because counsel "made much, much more available to people than they chose to accept," and because the low claim rate was

not class counsel's "fault." This may be true, but it stands to reason that one can maximize the chances that a horse will drink by, for example, verifying the horse can see the water, choosing clear, fresh, and cold water so that the horse is given the utmost incentive to drink, and making sure there are no obstacles in the horse's path. This Court plans to ensure that class counsel does everything in their power "to ensure that the settlement provides real value (or, to extend the metaphor of the just quoted aphorism, 'actual drinks')" to the class.

*Id.* at \*11 (citations omitted).

And finally, in a footnote, Judge Young takes a passing swipe at multi-district litigation by quoting my colleague Sam Issacharoff:

As this Court has remarked in the related area of multi-district litigation, an over-emphasis on settlement rather than trial preparation tends unfairly to skew the bargaining process. Or as Professor Samuel Issacharoff, Visiting Professor of Law at Harvard Law School, tells his students with succinct brilliance, "Multi-district litigation is like the old Roach Motel ad: 'Roaches [the transferred cases] check in-but they don't check out.'"

*Id.* at \*7 n.16 (citations omitted).

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Let's check out of 2008 with this summary then: it was a record year for fee awards, though one in which the plaintiffs' bar was rocked by as much scandal as success, and 2008 generated a lot of interesting fee decisions, though no particular crucial doctrinal changes. Stay tuned for 2009!