

## The Expert's Corner

### 2009: EMERGING ISSUES IN CLASS ACTION FEE AWARDS

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In 2009, keep an eye on these breaking issues:

#### Issue #1 - Mark Ups?

A new, but recurring, issue in fee opinions—largely because objectors have now caught on to it—is the question of how “contract lawyers” should be accounted for in fee petitions. Here’s the deal: Class counsel will often hire temporary lawyers via contract to perform discrete functions in a particular case and pay them at low rates. They then put them in a fee petition using a lodestar calculation embodying a higher hourly rate. And, for the trifecta, class counsel then seek a multiplier for the work done by these contract lawyers. To put numbers on the idea: a firm may hire contract lawyers for a particular case at \$50/hour, then put them in their lodestar at \$350/hour based on their years out of law school, experience, the type of work they were performing, etc., then seek a multiplier of, say 2, garnering \$700/hour for an attorney they paid \$50. Hence my mantra in these pages: good work if you can get it (class counsel, that is, not the contract attorney).

Objectors argue that the contract lawyers’ fees should be treated as “costs” and reimbursed at the rate they were paid. Courts have generally rejected this argument. See, e.g., *Carlson v. Xerox Corp.*, No. 3:00CV01621 (AWT) (D.Conn.) (Ruling on Motion for Award of Attorneys Fees at 14-16, Jan. 14, 2009); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 2008 WL 4178130 at \*34-\*36 (S.D. Tex. 2008); *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F. Supp.

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2d 249, 272 (D.N.H. 2007). The primary reason that the objection fails is that this practice of class counsel is similar to how firms bill clients in the private market for contract attorneys and is a practice generally approved by the ABA so long as the contract attorneys are properly supervised and hence are acting as attorneys. See *Carlson, supra*, at 15 (citing ABA Formal Op. 00-420 and ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451, at 5-6 (2008)).

Although class counsel’s approach is therefore consistent with the bar’s approach to contract lawyers generally, some recent examples have received significant public media attention, suggesting that the issue is unlikely to die easily. The *Xerox* case discussed above, for example, was the subject of a tendentious article in *FORBES*, entitled (stealing my mantra), *Nice Work If You Can Get It*, and subtitled, “Only in class action land can a \$35-an-hour temp attorney rate a \$500-an-hour-fee.” In fact, as just noted, there’s nothing unique to class action law about this practice at all. But that never stopped the media. Nonetheless, the case garnered attention because an enormously high portion of the submitted lodestar was attributable to the contract attorneys and because those contract attorneys (graduates of Yale and NYU Law Schools) themselves opined that their work was largely administrative in nature.

#### **Prediction:**

*given the lightning rod nature of this issue, the significance of this practice in many large cases, and the legal standard that requires firm attorneys to supervise the legal work of contract attorneys, look for this issue to reappear.*

(continued on page 4)

(continued from **Expert's Corner**, page 3)

## Issue #2 - Incentive Awards: Declining?

Class plaintiff incentive awards have crept up in magnitude over the past few years, far outstripping inflation. It used to be that such figureheads were given nothing, or a nominal amount of money, slowly inching toward about \$5,000 in the early part of the decade. Nowadays, it is quite common to see incentive awards of \$25,000 and higher.<sup>1</sup> (The awards have grown so much that I regularly have students ask me how they can become named plaintiffs!)

Perhaps because these practices have gone too far—or perhaps for independent reasons—some courts have begun to question the whole practice. A New York appellate court recently did so, technically bottoming its decision on statutory grounds, but in so doing, casting aspersion on the whole practice:

New York law does not authorize incentive awards for named plaintiffs in class actions. Federal courts grant incentive awards where there are special circumstances, such as personal risk incurred by the plaintiff, exceptional time and effort expended in assisting class counsel, advancement of litigation expenses and acceptance of the risk of loss, or other similar burdens. Such awards make named plaintiffs whole by compensating them for their extraordinary efforts or expenditures on behalf of the class, and encourage others to act as private attorneys general to promote important public and individual rights.

On the other hand, there are policy arguments against incentive awards. Class representatives may be tempted to accept

suboptimal settlements at the expense of the remaining class members in exchange for special awards in addition to their share of the recovery, thus undermining their effectiveness as fiduciaries of the class. Some individuals may commence spurious class actions with the expectation of settlements leading to compensation in the form of incentive awards. New York courts generally only allow plaintiffs to recover for their injuries, not for their time or efforts in bringing lawsuits from which they will be compensated. The Legislature did not statutorily provide for incentive awards when enacting CPLR article 9, and we decline to create new law, leaving that policy determination within the purview of the Legislature.

*Flemming v. Barnwell Nursing Home and Health Facilities, Inc.*, 865 N.Y.S.2d 706, 709 (App. Div., 3 Dept. 2008) (citations omitted).<sup>2</sup> This attitude is consistent with that of the Private Securities Litigation Reform Act (“PSLRA”), which limits incentive awards to costs and expenses actually incurred by the class representative. *See* 15 U.S.C. §78u-4(a)(4). *See also, In re Synthroid Marketing Litigation*, 264 F.3d 712, 722-23 (7th Cir. 2001) (doubting whether there is need for incentive awards if other class members would step forward without the lure of an award).

### **Prediction:**

*I doubt incentive awards  
will disappear anytime soon,  
but it will be worth watching  
whether or not they have capped out.*

<sup>1</sup> *See, e.g., Sutton v. Hopkins Co., Ky.*, No. 03-3 (W.D. Ky. Oct. 20, 2008), reported in 2 CLASS ACTION ATT’Y FEE DIG. 474 (Dec. 2008), awarding \$35,000 each to two individuals and \$25,000 each to six more; *Parker v. American Medical Security*, No. 04-1-1980-42 (Ga. Super. Ct. Cobb Co. Sept. 15, 2008), reported in 2 CLASS ACTION ATT’Y FEE DIG. 440 (Nov. 2008), awarding individual amounts of \$100,000 and \$25,000; *Barrett v. Hewlett-Packard*, No. CJ-2003-967 L (Okla. Dist. Ct. Cleveland Co. May 9, 2008), reported in 2 CLASS ACTION ATT’Y FEE DIG. 392 (Oct. 2008), awarding \$25,000 each to nine class representatives; and *McCoy v. Health Net*, No. 03-1801 (D.N.J. Aug. 8, 2008), reported in 2 CLASS ACTION ATT’Y FEE DIG. 344 (Sep. 2008), awarding \$60,000 each to four class representatives.

<sup>2</sup> *See also, Warren v. Xerox Corp.*, No. 01-2909, 2008 U.S. Dist. LEXIS 73951 (E.D.N.Y. Sept. 19, 2008)(For Electronic Publication Only), reported in 3 CLASS ACTION ATT’Y FEE DIG. 20 (Jan. 2009) (reducing plaintiff awards significantly and echoing the concern that named plaintiffs may be tempted to accept suboptimal settlements in exchange for special awards.).

(continued on page 5)

(continued from **Expert's Corner**, page 4)

### Issue #3 - Incentive Awards: Objectors?

While incentive awards for class representatives may increasingly raise an eyebrow, a simultaneous development is that those who are forcing that raised eyebrow – objectors – themselves want to secure incentive awards! Typically, objectors' counsel may be awarded fees for objections that work to provide a benefit to the class itself. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002). And objectors' counsel, of course, routinely seek such fees. I've been wondering for years whether a successful law firm practice could be organized around objectors' fees, and if so, why none has yet arisen—a possibility I continue to look out for.

The closest current example may be perennial objector Lawrence Schonbrun. In an interesting recent case, *UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Mining Corp.*, 2008 WL 4452332 (D. Colo. Sept. 30, 2008), Schonbrun appears to have sought an incentive award, not attorney's fees, as an objector. Specifically, Schonbrun asked for between \$55,000-\$85,000. The court did not characterize it as an attorney award, noting that it was unaware whether Schonbrun was an attorney, *id.* at \*4 n.2 [California bar records suggest that he is admitted to practice there], but in any case Schonbrun had no client so that his quest for an attorney fee would fail on the grounds that *pro se* litigants cannot collect attorney's fees. *Id.* (citing *Kay v. Ehrler*, 499 U.S. 432, 438 (1991); *Demarest v. Manspeaker*, 948 F.2d 655, 656 (10th Cir. 1991)).

The court's reaction to Schonbrun's request questioned the legal validity of providing incentive awards to objectors, noting that it could identify only one such previous case, *Machulsky v. Lilliston Ford, Inc.*, 2008 WL 2788073 (N.J. App. 2008),<sup>3</sup> that it deemed factually distinct:

<sup>3</sup> My own editors identified and described several others:

\* *Sheller, Ludwig & Badey v. Gateway 2000, Inc.*, No. 96-08-SD-01659 (Pa. Ct. C.P. Philadelphia Co. Jan. 23, 1997). Objectors' counsel received \$250,000 in fees plus \$17,748 in expenses. Additionally, as an incen-

the class member seeking the incentive award participated substantively in the litigation as an intervenor, engaging in discovery and joining in a partially successful summary judgment motion that prompted renegotiation of a prior settlement. Although the court rejected his argument that this made him a "de facto class representative," a class member's substantive participation in the litigation is clearly distinguishable from a class member whose participation is limited to challenging the successful plaintiff's attorney's fee request.

*UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Mining Corp.*, 2008 WL4452332 at \*4 n.4. The court concluded that even if it had the authority to grant an incentive award for a fee objection alone, it would not do so here because "it is not clear that Mr. Schonbrun's particular efforts conferred a benefit on the class," because Schonbrun's objections "were general in nature, largely unsupported by specific citation to the record or to supporting caselaw, and, compared to the far more comprehensive objections submitted by [another objector who did get attorney's fees], lacking in meaningful analysis." *Id.*

While this is but one data point, and we could identify only a few others scattered over the last decade, I nonetheless believe this development worth watching. For one, objectors are likely to keep asking for it. And, as importantly, with the exception of Schonbrun representing himself, the concept behind the idea is soundly analogized to regular incentive

tive award, defendant provided two objectors with Pentium P5-200 CPUs in exchange for their older computer units.

\* *Graham v. Security Pacific Housing Servs., Inc.*, No. 96-132 (S.D. Miss. June 26, 1997). The court awarded (1) \$1,920,000 in fees and expenses to class counsel, (2) \$350,000 in fees and expenses to objectors, and (3) \$2,000 in bonuses to each of two class representatives and \$2,000 in bonuses to each of four objectors/intervenors.

\* *In re Lifescan, Inc. Consumer Litigation*, No. 98-20321 (N.D. Cal. Mar. 18, 2002). Counsel for objector who was a named plaintiff in related action, and whose objection to the request for attorney fees and expenses was withdrawn, received \$49,198 in attorney fees and expenses (pursuant to agreement of the parties) and the objector received a \$10,000 service award (also pursuant to agreement of the parties).

(continued on page 6)

(continued from **Expert's Corner**, page 5)

awards. We incentivize class members to step forward as class representatives, particularly in small claims cases, because the collective action problem presented by such situations—who, with \$100 at stake, would waste time being a class representative?—may not otherwise be overcome. The same collective action problem—who, with \$100 at stake, would waste time by closely scrutinizing the terms of a complex class action settlement?—plagues settlement review, and a class member who stands up as an objector (even if counsel is the real party in interest) provides a similar service to the class *if and when a settlement is improved through their efforts*.

**Prediction:**

*the combination of greed and common sense will continue to propel the concept of objector incentive awards forward.*

**Issue #4: Percentage of What?**

My perennial favorite recurring issue is how to deal with settlements, particularly in small claims cases, where few class members may claim an award and, relatedly, how to calculate a fee in such situations. The former question has been the topic of significant debate, with the recent American Law Institute Project on the Principles of Aggregate Litigation urging that class recoveries neither revert to the defendant nor be distributed *cy pres* to third parties, but rather, in the first instance, be re-distributed *pro rata* among those class members who do step forward to claim an award. See William Rubenstein, *Expert's Corner: The American Law Institute's New Approach to Class Action Attorneys Fees*, 1 CLASS ACTION ATT'Y FEE DIG. 307 (October

2007). The latter issue is posed where funds revert to the defendant and/or go to third parties—should a percentage award be based on a percentage of the available fund or a percentage of what actually went to the class members themselves? See William Rubenstein, *Expert's Corner: Percentage of What?*, 1 CLASS ACTION ATT'Y FEE DIG. 63 (March 2007). I wrote about a recent case on point in the December 2008 issue. See William Rubenstein, *Expert's Corner: 2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATT'Y FEE DIG. 465 (December 2008) (discussing *In re TJX Companies Retail Sec. Breach Litigation*, 2008 WL 4786658 (D. Mass. 2008)). Relatively speaking, the *cy pres* cases are straightforward—since the defendant is disgorged of a full amount, class counsel should get a percentage of that full amount—while reversionary cases are more complex.

**Prediction:**

*reversionary fund and cy pres settlements will continue to occur and hence the fee question of how to calculate a percentage will continue to be raised. Courts will generally split between the two prevailing approaches.*

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Finally, I am always on the lookout for the next big big fee award. The last few years saw dramatic examples in the *Enron* fee (\$688 million) and the *Tyco* fee (\$464 million), not to mention the multi-billion dollar tobacco fees that continue to be disbursed. Time will tell whether such behemoths will continue to lurk on the fee horizon or whether the massive class actions that generate such fees are on the decline.