The Expert's Corner

ON THE DIFFERENCE BETWEEN WINNING AND GETTING FEES

William B. Rubenstein*

Two recent decisions provide insight into class action fee awards: in both cases, class certification was denied; in one, a $650 judgment was then entered (pursuant to Rule 68) for the plaintiff, while in the other, the plaintiffs' case effectively died, with neither a judgment nor court-ordered relief for the plaintiff. Surprisingly, attorneys for the $650 victor in the first case received no fees, while attorneys for the plaintiffs in the second case received nearly $5 million in fees and expenses. While both cases were decided under state law (Illinois and California, respectively), review of them nonetheless sheds light on at least three general governing principles of class action fee awards.

The "plaintiff judgment but no fee" case was a 2004 Illinois state clase alleging that Coke engaged in consumer fraud because its fountain diet Coke product was sweetened with a mixture of aspartame and saccharin, while its cans and bottles represented that diet Coke was sweetened with aspartame alone. *Oshana v. Coca-Cola Company,* 2007 WL 1280244 (N.D. Ill. 2007). Defendant removed on diversity grounds, class certification was denied, and the federal court then ruled that plaintiff could recover only on her individual disgorgement claim and only up to $650. Coca-Cola made an offer of judgment for $650 without conceding liability, which plaintiff accepted.

Plaintiff's counsel then sought roughly $1 million in fees and costs (under Illinois law) for 2,600 hours of work performed by 19 attorneys at six law firms. The magistrate, in a report adopted by the Court, relied on the Seventh Circuit decision in *Fisher v. Kelly*, 105 F.3d 350 (7th Cir. 1997), which held that fees could be denied to a prevailing party where the recovery is *de minimis*, as assessed by considering: "1) the difference between the judgment recovered and the recovery sought; 2) the significance of the legal issue on which the plaintiff prevailed; and, 3) the public purpose served by the litigation." *Id.* at 353. In denying fees, the magistrate held that the difference between the award received ($650) and that sought (tens or hundreds of millions) was so vast that plaintiff had not succeeded in any meaningful way and hence that the litigation did not serve a public purpose.[1] The essence of the magistrate's report is captured in his conclusion that "plaintiff's counsel's vision of this case proved badly mistaken. It was not a class case, and it was not a multi-million dollar case—it was a simple, individual plaintiff $650.00 case."

Chin v. DaimlerChrysler Corp., 2007 U.S. Dist. LEXIS 35335 (D. N.J. May 14, 2007), also a products case, also turned out not to be a class case—and yet yielded a $4.6 million fee award. In March 1994, the National Highway Traffic Safety Administration ("NHTSA") commenced an investigation of an anti-lock braking system ("ABS"), Bendix 10, used in some of defendant's vehicles. In October 1995, this class action followed. In April 1996, Chrysler recalled vehicles with Bendix 10 ABS. One month before the recall, the class case had been expanded to challenge Bendix 9 ABS, as well, which NHTSA later investigated and which Chrysler also ultimately recalled, in April 1997. The class action met its death knell when the court denied class certification in September 1998, finding that predominance did not exist because of the 52 disparate state legal regimes under which the claims would have to be adjudicated. *See Chin v. Chrysler Corp.,* 182 F.R.D. 448 (D.N.J. 1998).

If things looked bad for plaintiffs' counsel at that point, they only got worse. Counsel moved for fees under the "catalyst theory," arguing that although no judgment was entered in plaintiffs' behalf, nonetheless the case was a motivating factor of the recall and hence they were entitled to fees for having produced this result. But nearly simultaneously, the U.S. Supreme Court ruled that federal law did not permit catalyst fees absent a judgment on the merits or a court-ordered consent decree. *See Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598

*William B. Rubenstein, a law professor at UCLA School of Law, specializes in class action law; he has litigated, and regularly writes about, consults, and serves as an expert witness in class action cases, particularly on fee-related issues. Professor Rubenstein provides regular reporting on class action issues, including fees, at **www.classactionprofessor.com**. The opinions expressed in this article are solely those of the author.*

1 The magistrate noted that the fee request alone was about 1,460 times the recovery. The closest analogy the parties could locate was a Seventh Circuit case with fees of 47 times the plaintiff's $1,000 recovery. *See Estate of Borst v. O'Brien*, 979 F.2d 511 (7th Cir. 1992).

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(2001). Hence the district court found that fees could not be recovered under federal law in this matter.

But lo and behold, counsel's fee request was salvaged by one key fact: their complaint contained California claims and California's high court ruled that catalyst fees were available under California law notwithstanding *Buckhannon's* interpretation of federal law. *See Tipton-Whittingham v. City of Los Angeles,* 101 P.3d 174 (Cal. 2004); *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140 (Cal. 2004). Applying California law to the facts of the case, the court found that individual California plaintiffs were catalysts of change and awarded them about $4.5 million in fees, including a 1.5 multiplier for the underlying litigation and a 1.2 multiplier for the fees litigation.[2]

Three fee principles can be teased from these cases:

1. A plaintiff's judgment doesn't guarantee fees anymore than a defendant's judgment bars them.

2. What courts look for when they look beyond the formal outcome is the actual effect of the litigation.

3. State law is a double-edged sword in class action cases.

Three fee principles can be teased from these disparate cases. First, ***a plaintiff's judgment doesn't guarantee fees anymore than a defendant's judgment bars them.*** In *Oshana*, plaintiff prevailed but got no fee because of the *de minimis* nature of her recovery, while in *Chin*, no judgment was entered against the defendant but plaintiff got a fee because of the catalytic nature of the case. In both cases, the courts looked beyond the surface of who appeared to prevail to get at the true nature of the outcome and to assess fees accordingly. The courts got this right, validating substance over form.

Second, ***what courts look for when they look beyond the formal outcome is the actual effect of the litigation.*** *Chin* proved successful because the plaintiffs were able to convince the court that their action, though technically unsuccessful, had the effect of contributing to Chrysler's change in policy. The fact that the *Oshana* plaintiff was a single plaintiff and received but $650 in compensatory damages, standing alone, should not have been fatal to her fee petition. If, for example, defendant's willingness to pay her $650 was coupled with an admission of liability and a change of policy, the case, though individual, would have had a classwide effect. The same would have been true had the *Oshana* lawyers secured an injunction in addition to the individual compensatory damages; even if the injunction were secured for a single plaintiff, such relief may have wider impact and support broad fees even in the face of minimal compensatory damages.[3] What damned Oshana was not her individuality, *per se*, but the very limited nature of her recovery. [4]

Third, ***state law is a double-edged sword in class action cases.*** In *Chin*, the fact that the nationwide case was based on state law was the very reason the class certification was precluded — the variations among state laws were seen to preclude a finding of predominance. Yet simultaneously, when federal law barred a fee award, Chin's lawyers were able to secure one nonetheless by relying on California state law for the award. What *Chin* may exemplify more than anything are the reasons that class action attorneys increasingly center big cases in California. If courts are loathe to certify a nationwide class in state law actions, a California-only class remains large enough to ensure a significant fee award. Moreover, California substantive law and fee law are generally both more advantageous to plaintiffs than are the laws in most other states.[5] The complicated effect of state law on class actions means that choice of law fights will remain a staple of class action litigation — as to certification, claims, and fee awards—for the foreseeable future.

Oshana and *Chin* are good reminders that plaintiffs who appear to have lost may win and plaintiffs who appear to have won may lose: the show's not over until the fee award is litigated. Ω

2 Plaintiffs had requested nearly $11.5 million in fees and expenses, for more that 6,300 hours and a proposed multiplier of 3.5. Read the *Chin* decision for more details, including a discussion of prevailing hourly rates for class action attorneys.

3 This is, of course, difficult in cases in which the practice ended in the past — the *Oshana* facts are inscrutable in this regard.

4 It also appeared that the magistrate, judge, and Seventh Circuit were unhappy with the plaintiffs' attorneys in *Oshana* because they attempted to resist removal by insisting that their claims did not exceed $75,000, yet once in federal court, appeared to refuse to stipulate to this fact.

5 What makes this strategy difficult is, of course, the Class Action Fairness Action, which enables out of state defendants to remove such large cases and perhaps have them transferred to their home states. Nonetheless, under long-standing removal and transfer rules, California law will generally follow the case wherever it travels, so plaintiffs may still gain its advantages even if left litigating in foreign fora.