

## The Expert's Corner

### DIVVING UP THE POT: WHO DIVIDES AGGREGATE FEE AWARDS, HOW, AND HOW PUBLICLY?

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A curious event is taking place in a courtroom in downtown New Orleans: a battle has erupted over the confidentiality of a class action attorney fee award. Class actions are, of course, public lawsuits, so the attorneys' bill ought to be public information. And indeed, it is: class counsel is getting about \$7 million. What this peculiar fight is about is whether the dozens of attorneys splitting this money will get to know how their particular portion compares to that of their co-counsel. The lead counsel committee doing the division has pleaded that the split ought to be kept secret so as forestall infighting among all the class counsel. Is that goal so important – and so well-served by secrecy – that it should trump the value of transparency? While it would seem not, the issues presented are greater in number and their solutions more deceptive than might be immediately apparent.

First, the facts. 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 and sent to U.S. District Judge Ivan Lemelle in New Orleans. In September 2006, a settlement was reached on behalf of residents of four southern states (Louisiana, Mississippi, Alabama, and Florida). See *In re High Sulfur Content Gasoline Products Liability Litigation* case abstract, page 140. The settlement expanded upon Shell-Motiva's voluntary reimbursement program and provided some additional benefits. More than 80,000 consumers have filed claims, with close to \$100 million in various awards

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having been distributed.<sup>1</sup> The Court approved the settlement's proposed aggregate attorney fee of \$6.875 million.

So far so good. But here comes the interesting part. Thirty-two law firms (encompassing about 80 lawyers) claimed a share of the fee award. Judge Lemelle approved co-lead counsel's recommendation to create a five-lawyer fee committee comprised of co-lead counsel and three additional attorneys to develop a plan for dividing the fees. At a hearing on January 22, 2007, the judge agreed to the fee division that lead counsel proposed,

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Now a New Orleans law professor and several disgruntled class counsel have filed unsuccessful petitions with the Court seeking to uncover who got what among all plaintiffs' counsel. The petitions highlight the privacy issue, but this whole situation raises three sets of concerns, none of which is well-worked out in class action fee awards: (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>2</sup>

<sup>1</sup> Plaintiffs' fee petition states that "To date, Defendants have spent over \$99 million in connection with the resolution of more than 85,000 individual consumers' claims . . . and more will be paid upon the effective date of the settlement." See *In re High Sulfur Content Gasoline Products Liability Litigation*, Civil Action No. MDL 1632 (E.D. La. Aug. 18, 2006) (Petition for Attorneys' Fees, Costs and Expenses, and Incentive Awards at 5). These monies were distributed under both the original and expanded reimbursement programs.

<sup>2</sup> Full disclosure: I serve as a consulting expert to some class counsel in the *Phen-Fen* 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; and I am also a part of a large RAND Corporation/UCLA Law School study of transparency in litigation, my portion of which focuses on public access to class action settlements. Needless to say, the views expressed in this column are solely my personal views.

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### **Who Divides the Pot?**

When a class case settles, class counsel typically petitions for a fee award. When the class has been represented by multiple firms, generally lead counsel makes one omnibus fee petition on behalf of all the lawyers in the case. The Court can approve the fee in the aggregate based on the general factors that go into assessing fee awards. But once the Court awards the fee, who gets it and who decides how to divide it?

Technically, the Court has the power to decide which plaintiffs' attorneys get what amount of money. But no judge in her right mind wants to undertake this task, particularly in cases involving large numbers of plaintiffs' attorneys. Courts therefore generally leave it to lead counsel to do the division. This deference is based on expertise – lead counsel, after all, knows better than anyone who among the plaintiffs' attorneys did what work.<sup>3</sup> At the same time, however, lead counsel has something of a conflict of interest; because his firm is likely to get the largest chunk of the award, lead counsel might have some incentive to be stingy with everyone's awards but his own.

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But the dynamics are more complex than this simple conflict. If lead counsel stiffs all other counsel, they will all object to the Court, which will then be forced to take over the task from lead counsel – and lead counsel will therefore be the big loser. Lead counsel's desire to maximize his own take is thus limited by the need to get the other class counsel to go along so that the Court will be inclined to approve the proposed split. Unanimity among all class counsel would be ideal, of course, but even a big consensus does the trick. If lead counsel secures near unanimity, a single defector (or two or three) is unlikely to get far with the Court. Would you want

<sup>3</sup> As Judge Lemelle put it, "Counsel in leadership roles are generally well situated to evaluate the weight and merit of the relative contributions made by those performing common benefit work, particularly in cases such as this where dozens of attorneys performed hundreds of hours of widely-varying professional services outside the direct observation of the District Court and under the overall supervision of court-appointed counsel in leadership roles." *In re High Sulfur Content Gasoline Products Liability Litigation*, Civil Action No. MDL 1632 (E.D. La., Jan. 23, 2007) (Order Awarding Individual Attorney's Fees, Costs and Expenses, at 1-2) (citing *Copley Pharmaceutical, Inc.*, 50 F.Supp.2d 1141, 1148 (D. Wyo. 1999); *In re Indigo Securities Litigation*, 995 F. Supp. 233, 235 (D. Mass. 1998); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 395, 400 (D.D.C. 1978)).

to be the one of 79 attorneys asking a judge to overturn lead counsel's proposed division, with which the other 78 attorneys agree?

These dynamics are the key to understanding everything about how lead counsel might go about dividing the pot and why it is he might want secrecy in doing so.

### **How to Divide the Pot?**

The obvious manner in which to divide the pot among class counsel is simple: do it by their relative lodestar. But note the problems this creates. First, plaintiffs' counsel are generally opposed to lodestar awards, insisting (1) that percentage awards set incentives better, and (2) that if the lodestar method is used, multipliers must acknowledge risk and skill. If counsel sought an aggregate fee on a percentage basis, it may seem odd to now retreat to lodestar as a means of dividing the pot. Second, consider the intra-counsel problems lodestar creates: it encourages each plaintiffs' attorney to distrust her co-counsel's time records. What if the pot contains more than the total lodestar?

For these reasons, lead counsel tends to divide the pot using some mixture of lodestar and multiplier, with the multiplier varying among the many plaintiffs' counsel depending on their relative contributions. This is a smart approach as it enables lead counsel to sort out real from puffed billing records and to reward those class counsel who really made significant contributions not necessarily reflected in lodestar alone. This is how counsel in the New Orleans case proceeded, dividing the pot based on a combination of the basic factors that go into a fee award in the first place<sup>4</sup> and the more specific types of things that co-counsel in a large case might do in particular.<sup>5</sup>

### **Why Demand Secrecy?**

But here's where secrecy comes in. Once lead counsel departs from pure lodestar, he has to justify the particular awards he is making in some other way. To do so, he may have to tell some counsel that they did worse jobs than others or that he distrusts their billing records. No one likes having to deliver such news. Consider how often weak colleagues are not fired or are promoted simply because it is easier than

<sup>4</sup> *See id.* at 2-3 (citing fee factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974)).

<sup>5</sup> In the *High Sulfur Content* case, these additional factors were all preceded by the search for "direct and meaningful participation" in, such things as discovery efforts; retaining and working with experts; preparing pleadings, handling motion practice, and conducting legal research; committee leadership positions; committee infrastructure and organizational issues; developing litigation strategy; developing settlement strategy; consummating the settlement; and coordinating the litigation efforts. *Id.* at 3-4. This list was then punctuated by the comment that "Total hours spent were also one of many factors considered." *Id.* at 4.

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giving an honest assessment of their performance and handling the consequences.<sup>6</sup> Why not just ask the judge to keep the division secret?

Well, as the New Orleans' objectors point out, there are a variety of good reasons that the fee award should be public. First, court proceedings are public proceedings – we, the people, built the courthouse and pay the costs of adjudication; one of the values we get for our money, in addition to the peaceful resolution of disputes, is the public information that disputing yields. Second, beyond the general value of transparency, class action lawsuits, in particular, are public lawsuits. The class action raises a civil suit among private parties to a public dimension by foreclosing the rights of non-present parties, with a public official (the judge) charged with appointing adequate class counsel and class representatives to safeguard the rights of the absent class members. Third, and most particularly, as the objecting counsel here point out, they do not know the reasons that their own fee seems particularly low; knowing what others in the group received could provide valuable context in which to evaluate their award. For these reasons, the default position in American adjudication is that what happens in a courtroom is public in nature and those arguing for the sealing of records must carry the burden of convincing us to do so.

*Does the absence of conflict  
outweigh the value of transparency?*

The sole argument lead counsel relies on here is that a secret division is less likely to yield dissent, second-guessing, and further litigation among class counsel. That argument faces an initial factual problem: the secret division here *did lead to dissent, second-guessing, and further litigation among class counsel*, albeit, so far, further litigation about the secrecy. Nonetheless, the attempt to cram down lead counsel's division has not capped off all the steam.

More centrally, even if lead counsel is right that secret fees will be less contentious, does the absence of conflict outweigh the value of transparency? Probably not, although the case may be closer than it seems. It is not, after all, that the public generally knows nothing – they know that the attorneys got about \$7 million for settling what could be seen as a \$100 million lawsuit. They can make their assessment of the relationship of the fee to the work accomplished without knowing the more particular lawyer-by-lawyer breakdown. Moreover, a public official – the judge – actually does know the break-down, he just has kept it under seal. So framed, the

<sup>6</sup> In some sense it should be easier in the class structure because co-counsel are not colleagues, per se, just independent lawyers joined together for the purpose of this case. Yet most plaintiffs' counsel are repeat players, particularly within a certain band of cases (mass torts, securities, antitrust, etc.). So if lead counsel irks too many class counsel, he is unlikely to be supported as lead counsel in a future case.

access issue is whether the public itself (not just the public court system) has a right to know *what each individual attorney got*. But even that framing is deceptive in that the public really does not have a deep interest in that question – the only people who really do are the class counsel themselves. So it may be fairest to frame the balancing question as whether the absence of conflict outweighs the value of transparency *among class counsel*.

I don't think it does, though I'm also happy not to be lead counsel. At the end of the day, each class counsel is entitled to some explanation of why he got what he got and how it compares to what other class counsel received. If a lawyer in a simple fee-shifting case submitted a petition to a judge for a \$500,000 fee and the judge simply issued an order awarding a \$300,000 fee, the situation would cry out for a bit more transparency – why did the judge reduce the fee award? Similarly, lead counsel should have some burden of explaining what he did to those affected by his decision, perhaps by both publicly giving reasons and publicly revealing who did better and who did worse by his division. Objecting class counsel seeking transparency should be careful what they ask for, as transparency means that lead counsel will create a public record detailing what he believes were the objector's shortcomings or puffery.

Beyond the value to class counsel that an explanation provides, transparency also creates a public record of what lead counsel did that might shed light on future fee awards. Because class counsel are repeat players, there is some risk that they could collude with one another over a band of cases – you give me a high award when you're lead counsel in this case, and I'll scratch your back when I'm lead counsel in the next. A public record of the fee split, hours, multipliers, etc. helps minimize the possibility of these back-room fee deals.

Lead counsel may be correct that publicity will lead to dissension. But the way to deal with it is to deal with it, not to avoid it through secrecy. Publish the breakdown, let lead counsel do the best he can by explaining his decisions to the defecting class counsel – and then let those defectors object in court if they want to. A good lead counsel will minimize such defections by striving for fairness across the board.<sup>7</sup> This aspect of lead counsel's job is no fun, but it is a job that he sought out and benefited by and he should not be able to duck out of its hard parts by sealing records.

A group of attorneys (represented by a Loyola Law School ethics professor), as well as the local New Orleans newspaper (*THE TIMES-PICAYUNE*), have noticed appeals to the Fifth Circuit of Judge Lemelle's fee allocation and confidentiality rulings. It will be interesting to watch how the case plays out in the Fifth Circuit – as it is likely to set precedent on one or more of the three issues I outline here. Ω

<sup>7</sup> Oddly, it may be the case that although lead counsel has a conflict in that he is setting his own fee, too, he may end up securing consensus by chopping into his own fee to buy himself out of some grief.