

## The Expert's Corner

### "THE LAWYERS GOT MORE THAN THE CLASS DID!": IS IT NECESSARILY PROBLEMATIC WHEN ATTORNEYS FEES EXCEED CLASS COMPENSATION?

William B. Rubenstein\*

In my March column, I wrote about the recurring problem that arises in many percentage fee award cases – the “percentage of what?” issue. The problem arises because funds are often established but not distributed in full, or distributed via *cy pres* to third parties, or with provisos that permit funds not claimed to revert to the defendants. What on paper may look like a \$100 million case legitimating a \$33 million fee, might end up being a \$100,000 dollar case – but still with a \$33 million fee!

That sounds like an exaggerated hypothetical that a law professor would use to make a point in the classroom. But it's not: a case with such characteristics is unfolding in what is surely one of the most interesting fee dramas playing out in American courts. The case pits two court systems against one another, puts two state judges in conflict with each other, threatens to upset a large nationwide settlement – and cuts to the heart of class action fee practice.

This Peyton Place started innocently enough. Sears, through its automotive centers, performed wheel alignments, allegedly under the heading “all wheel alignment,” suggesting a four-wheel alignment and charging a concurrent price. However, vehicles with rear wheel drive only need a two-wheel alignment, which is generally less costly. A statewide class action was filed in state court in North Carolina in late 2002<sup>1</sup> and, four days later, a nationwide class action was filed

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in state court in Illinois.<sup>2</sup> In mid-2003, the New Jersey attorney general also filed suit in state court on behalf of New Jersey consumers.<sup>3</sup>

*Wrobel*, the nationwide Illinois case, settled after the class of about 1.5 million consumers was divided into two groups: one group got \$10 in cash, the second group got a \$4 coupon redeemable at Sears, the named plaintiffs got \$500 incentive payments, and the attorneys got \$1,050,000 in cash and

\$50,000 in coupons. Not surprisingly, the Illinois court approved the settlement – normally the end of the matter.

But that's just when the fun began. The parties moved to dismiss *Moody*, the North Carolina case, based on the binding effect of the Illinois judgment. Enter the central player in the drama, the North Carolina state judge, Ben Tennille. Judge Tennille sits in New Hanover County – population less

than 200,000 – and he is the Special Superior Court Judge for Complex Business Cases. Before you wonder how complex the business cases are in New Hanover County, N.C., consider the smarts Judge Tennille brought to the matter.

He began by asking what seemed like a simple and logical question about the Illinois settlement – what was the claiming rate, and in particular, what did North Carolina residents get out of the nationwide Illinois settlement?<sup>4</sup> This touched off a round of motions and appeals, all aimed at keeping this information from the judge and all, ultimately, for naught. What Judge Tennille learned was that North Carolina citizens secured a total of \$66 in cash and coupons from the

<sup>1</sup> *Moody v. Sears, Roebuck and Co.*, 2007 NCBC LEXIS 11, No. 02-CVS-4892 (N.C. Super. Ct. New Hanover Co. May 7, 2007).

<sup>2</sup> *Wrobel v. Sears, Roebuck and Co.*, No. 02 CH 23058 (Ill. Cir. Ct. Cook Co.).

<sup>3</sup> *Peter C. Harvey, Attorney General of the State of New Jersey v. Sears, Roebuck and Co.*, No. HUD-C-144-02 (N.J. Super. Ct. Hudson Co.).

<sup>4</sup> In fact, it is interesting to ponder whether the only question in front of Tennille – whether to give Full Faith and Credit to the judgment of the Illinois court – permits him to review the *substance* of the settlement or outcome there. As noted below, however, Judge Tennille managed to turn these substantive issues into procedural problems suggesting a judgment lacking enforceable qualities.

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settlement. You might think, wow, where were they while the rest of America was busy claiming? But it turns out, the entire nationwide settlement yielded a total distribution of \$2,402 in cash and coupons. (Note to Judge Tennille: North Carolinians accounted for 2.95% of the American population in 2006 and took home 2.75% of the Sears settlement – right in line, assuming Sears stores are randomly distributed throughout the whole population.)

What upset Judge Tennille, though, was not North Carolina's portion of the total settlement, but the absence of any meaningful consumer compensation arising out of that settlement anywhere in the United States. Since the Illinois judge who had approved the settlement had not asked for an accounting, Judge Tennille took it upon himself to send her one, suggesting it might raise issues about the settlement. Subsequently, the parties amended the settlement such that the plaintiffs' attorneys made a \$100,000 cash donation to a *cy pres* fund and gave up their \$50,000 in coupons and Sears contributed another \$50,000 to the *cy pres* fund. Apparently basing her decision on these changes, the Illinois judge wrote back to Tennille reporting that she was taking no action to upset her prior approval of the nationwide settlement.

Nonetheless, Judge Tennille refused to give it binding effect in North Carolina. He wrote, in *Moody*, that the Illinois judgment contained three defects: erroneous information provided to the Illinois judge (about the claims rate); an inadequate notice program (as demonstrated by the illogical placement of ads and the poor content of those ads); and inadequate representation (as evidenced by the low claims rate and, in relation to it, the seemingly high fee).<sup>5</sup> For these reasons, Judge Tennille dismissed the North Carolina class's claims *without prejudice*, suggesting that they remain viable and could be pursued in another case. (His May 2007 decision post-dates the 2005 Illinois settlement by so long, though, that the claims may well be stale.)

Before turning to the fee questions in the case, it is worth noting for a moment Judge Tennille's insistence on *transparency*. Why did the Illinois court not require an accounting of the original settlement? Why are such accountings difficult

to get?<sup>6</sup> The principle is not a complicated one: these cases are public law cases, requiring a judge to approve them. As such, their claiming rates constitute public information and should be easily available to the court and public. This is especially simple because private companies administer these settlements and have the results readily available. They will not release them, however, as – oddly enough – they consider them proprietary to their clients, the lawyers in the case. I recently proposed a simple graphic that could be published at the fairness hearing and final hearing stages of a class case so as to present and summarize this information in simple form.<sup>7</sup> [Eds. See graphic at p. 236.] This is more than an academic suggestion because any judge settling any class case could simply require it be used.

Of course, the reason the lawyers don't like the claiming rates to be made public is that they might tend to present results similar to that in *Moody* – results by which the attorneys get far more than the class members themselves. Such a sentence standing alone sounds outrageous, but it is worth checking the outrage for a moment. The fact that a lawyer gets more monetary relief in a case than does the client does not, in and of itself, tell us that something is amiss. Many civil rights cases are brought for so-called "nominal" damages, sometimes even a \$1, yet the attorneys are compensated for their time and effort at much higher rates. We not only applaud such an outcome, fee statutes exist to ensure such cases get brought.

Similarly, the plaintiffs' lawyers in *Moody* appear to have argued that their fee was a lodestar based fee, not a percentage, and thus it can be conceptualized in ways analogous to my nominal fee case. Indeed, I have elsewhere argued that consumer (small claim) cases are primarily deterrent in nature and that their compensatory aspects are of secondary importance.<sup>8</sup> Assuming Sears was a wrongdoer here, if it had been forced to pay 100% of the money back, but it all went to defray the plaintiffs' attorney's fees on a reasonable lodestar

<sup>5</sup> Again, it is worth questioning what right Judge Tennille had to revisit these questions given that no litigant in his court was asking him to do so and, more crucially, given that the Illinois judge had necessarily entered findings of fair notice and adequate representation. Why weren't her rulings entitled to an issue preclusive effect? For my own recent analysis, see William B. Rubenstein, *Finality in Class Action Litigation: Lessons From Habeas*, 82 N.Y.U. L. REV. 791 (2007).

<sup>6</sup> This is a subject dear to my heart as RAND Corporation researcher Nick Pace (to whom I am indebted for bringing the *Moody* case to my attention) and I are fast at work on a paper – part of a larger RAND/UCLA Law School project on transparency in litigation – looking at transparency of class action outcomes.

<sup>7</sup> See William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435, 1464 (2006).

<sup>8</sup> See William B. Rubenstein, *Why Create Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006).

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basis, this would seem a fair solution even though the plaintiffs themselves received no compensation.

The problem with this approach is that the *Moody* case did not purport to be a nominal fee case – it purported to deliver real compensation to real plaintiffs, representations that proved more or less untrue at the end of the day. Thus, Judge Tennille characterized as “shocking” the “incongruity between the class benefit and the fees afforded counsel,” commenting that this incongruity left “the appearance of collusion.”

*Judge Tennille's point highlights three central aspects of class action practice:*

- *cash is better than coupons and plaintiffs' counsel should always pursue such relief;*
- *just sending the cash is better than publishing notice and using claim forms and plaintiffs' counsel should always pursue such relief; and*
- *public attorneys' general are much better situated to get that relief than are private counsel.*

As proof of the outrage, Judge Tennille used the New Jersey Attorney General's settlement as a foil. There, the AG's office specifically identified more than 12,000 New Jersey class members using Sears' own records and the settlement required that Sears send a check for \$10 to each class member – no claim forms nor coupons were required. Judge Tennille calculated that the New Jersey action therefore returned at least \$125,440 to customers, for which the AG's office was given a \$500,000 payment “to be used for consumer protection” and Sears “reimburse[d] the Attorney General for his expenses.” Judge Tennille summed up the disparity by noting “Sears paid twice that amount to class counsel and got a settlement with the **entire rest of the United States** for **\$2,402**. Compared to the **12,544** citizens of New Jersey who were compensated with cash, **9** citizens of North Carolina were compensated and four of those got four dollar coupons.”

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- cash is better than coupons and plaintiffs' counsel should always pursue such relief;
- just sending the cash is better than publishing notice and using claim forms and plaintiffs' counsel should always pursue such relief; and
- public attorneys' general are much better situated to *get* that relief than are private counsel.

I concede that my last point is debatable: perhaps if private counsel tried harder, put more time, money, and effort, into the case they could secure a settlement similar to that of the AG. But ultimately an AG has much more muscle – and this fact should not be overlooked.

What Judge Tennille does not emphasize is the following: first, where was the North Carolina attorney general's office? Aren't they the truly culpable party here? The private attorneys general are simply filling a void left when the public AG does not act – as Judge Tennille's order makes clear, it's probably preferable to have the public AG act because they are likely to secure more relief. But chances are they are not well funded and do not have the expertise to pursue these forms of consumer cases. So we're left with the private alternative, with all of its warts.

But wait, doesn't the public resolution suffer precisely the problem at the heart of the private one? Using Tennille's own measuring stick – the relationship of the class relief to the attorney's fees – why isn't the New Jersey outcome outrageous? Notice that the class members got about \$125,000 but the AG secured *for his own office's use* four times that amount of money *on top of his expenses (i.e., fees)*. In other words, one might say the New Jersey AG was bought off, too, albeit for a far lower bounty, per capita. We're less outraged, of course, because the money is going to the public treasury and will be used to perform public functions. But it is also quite likely that the private attorney's fees will be invested in future litigations of this sort. Granted, the private attorneys will pay their salaries (and perhaps bonuses) out of the money as well. But it is hardly their fault that we've created a system of private law enforcement that relies on their greed to get the job done. Judge Tennille opined that class actions are “not entrepreneurial activities,” but so long as the state officials charged with enforcing the laws don't, the private attorneys general who step in to do so are, in fact, entrepreneurs.

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Having aired both sides of the argument, I nonetheless applaud Judge Tennille. His decision is very helpful in illuminating, through the New Jersey comparison, that consumer class actions *can* yield cash, not coupons, and that compensation *can* be paid directly to consumers without notice programs and claims forms. We don't know all of the reasons that class counsel does not push for such results more often, but it is fair to hypothesize that one reason they might not is that it is hard to push for such relief (that costs the defendant more money) and tempting to settle for a nice fee and a coupon/notice program. Once done, it makes perfect sense to make sure that the results never see the light of day, and Judge Tennille should be especially applauded for insisting that these data be outed.

Indeed, let me end where Judge Tennille began – he prefaced his opinion with a quotation from a book by Justice Brandeis: “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Making claiming rates transparent will have a far great effect on consumer class action practice than CAFA ever will. It will either push class counsel to pursue relief more vigorously, or push them to concede that these case are deterrent, not compensatory, and hence should result in some sort of *cy pres* type resolution (like the payment to the NJ AG's office) with perhaps a generous lodestar/multiplier rather than a straight percentage fee.

<b>Pre-Approval Notice</b>	
<b>In re Megasoft Antitrust Case</b>	
<i>All figures are best estimates as of July 1, 2006</i>	
	% Total Settlement
<b>Settlement</b> \$50 million	<b>100%</b>
<b>Plaintiff fund</b> \$38.5 million	<b>77%</b>
<b>Expected claims</b> \$4.7 million	9%
Class members 500,000	
Projected claims 60,000 (12%)	
Settlement per class member \$79*	
<b>Expected residual</b> \$33.8 million	68%
Cy pres – Public schools, \$22.5 million	
Reversion – Megasoft, \$11.3 million	
<b>Attorneys' fees requested</b> \$10 million	<b>20%</b>
<b>Lodestar</b> \$4.0 million	
Hours 10,000	
Melded billing rate \$400/hr	
<b>Multiplier</b> 2.5	
<b>Attorney costs</b> \$0.5 million	<b>1%</b>
<b>Administrative costs</b> \$1 million	<b>2%</b>

The median award for class members filing a claim is estimated to be **\$79**. Instructions for filing your claim appear elsewhere in this settlement notice.

\* Settlement per class member is based on median damage. Actual individual settlements may be higher or lower depending on factual circumstances.

This settlement received an 'A' grade from the Class Action Settlement Rating Association.

<b>Post-Claim Filing Audit</b>	
<b>In re Megasoft Antitrust Case</b>	
<i>All figures are actual amounts as of June 30, 2007</i>	
	% Total Settlement
<b>Settlement</b> \$50 million	<b>100%</b>
<b>Claims paid</b> \$5.9 million	<b>12%</b>
Class members sent notice 500,000	
Actual claims 74,700 (15%)	
Opt-outs 2,000 (0.4%)	
Median recovery per claimant \$79	
<b>Residual</b> \$34.3 million	<b>69%</b>
Cy pres distribution \$22.9 million	
Reversion \$11.4 million	
<b>Attorneys' fees awarded</b> \$8.3 million	<b>17%</b>
Portion of distributed fund 22%	
<b>Attorney costs</b> \$0.5 million	<b>1%</b>
<b>Administrative costs</b> \$1 million	<b>2%</b>

(Professor Rubenstein's suggested forms to be published at the settlement hearing stages.)