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7th Circuit Explains Rationale of Class Action Attorneys' Fees

In a case that Westlaw has designated for a future in the Federal Appendix, Seventh Circuit Chief Judge Frank H. Easterbrook addressed the objections of a member of a settlement class who objected to the attorneys' fee award. In rejecting the objector's position and affirming the class action settlement, Chief Judge Easterbrook provided a useful and insightful discussion of the rationale for how class action attorneys' fees are determined.

The case, *Silverman v. Motorola Solutions, Inc.*, stems from a $200 million settlement of claims by Motorola investors in connection with allegedly false statements made "in order to disguise [Motorola's] inability to deliver a competitive mobile phone that could employ 3G protocols. When the problem became public, the price of Motorola's stock declined." In addition to the $200 million settlement – an amount that was deemed fair by both the court and the objector to the settlement – the trial judge approved an attorneys' fee award of 27.5% of the $200 million fund. Unlike most cases where the amount of fees paid to an attorney is set by private negotiation between the client and his/her lawyer, class action cases require the court to determine and award a suitable fee that combines the costs and hours put into the litigation with an award to incentivize attorneys to vindicate the rights of persons harmed by the defendant's actions.

The objector's grievance stemmed from two bases. The first was that the fee

schedule – the value of each hour spent on the case – was fixed at the end of the litigation. The objector argued that the "fee schedules should be set at the outset, preferably by auction in which law firms competing to represent the class tell the judge how much they will accept, and the judge picks the low bidder." Before delving into the court's response to the objector's argument, I think it merits note that when someone begins to address a complex issue with what sounds like a very simple solution, the "simple solution" is probably too overly simplistic to work.

The court acknowledged that the overarching premise that the fees "should approximate the market rate that prevails between willing buyers and willing sellers of legal services" is a sound premise. However, outside of the class action context litigants do not hold auctions to choose lawyers. The basic flaw in the auction concept is that legal acumen is not a fungible good where every lawyer is just as good as any other. Consequently, an auction style selection process cannot act as a feasible method for selecting adequate counsel. Further, while the establishment of a fee structure at the outset of the litigation is desirable, it is not a requirement. Though, the court did lament that it was unfortunate that the initial judge on the case – who passed away after the class action was certified but before the settlement – did not consider establishing a fee schedule.

More insightful is the court's response to the objector's second argument. The objector argued that the 27.5% award was excessive. In support, the objector pointed to data demonstrating that 27.5% is above the norm for cases exceeding $100 million. A study cited by the objector indicated that the average award in such a case is 12% with a median of 10.2%. The data further indicated that typically the percentage awarded declines as the fund grows. Consequently, the award in this case was exceptionally high. However, just because it was exceptionally high did not mean that it was "legally excessive."

The court noted that contingent fees exist for the purpose of compensating lawyers for taking a risk of nonpayment. As a result, the greater the risk, "the higher the award must be to attract competent and energetic counsel." In determining the fee award, the trial judge considered a report from an expert that concluded this case to have been "unusually risky." Moreover, this suit lasted four years and required counsel to spend more than $5 million out-of-pocket. Another factor in support of the award was that when the class was certified, no other law firm wanted to serve as lead counsel. "Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices."

Ultimately the court, applying a deferential standard of review, upheld the fee. Nevertheless, the court did express some concerns with the award. The court

stated the "award may be at the outer limit of reasonableness[.]" The court also expressed a clear preference that fee awards decrease by percentage as the award increases.

Join us again next time for further discussion of developments in the law.

Sources

- *Silverman v. Motorola Solutions, Inc.*, ---F. App'x. ---, No. 12-2339, 2013 WL 4082893 (7th Cir. Aug. 14, 2013).

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