

The Expert's Corner

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

William B. Rubenstein*

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.¹ 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, but he simultaneously approved lead counsel's request to seal the awards. Why? Because, he said, it might "encourage resolution as opposed to inviting some sensitivity to come out," that would lead to an entire new round of litigation.

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?²

¹ 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.

² 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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