

The Expert's Corner

ON THE DIFFERENCE BETWEEN WINNING AND GETTING FEES

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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 class 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

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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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