

The Expert's Corner

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

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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 2002¹ and, four days later, a nationwide class action was filed

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

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?⁴ 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

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

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

³ *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.).

⁴ 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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