

The Expert's Corner

THE AMERICAN LAW INSTITUTE'S NEW APPROACH TO CLASS ACTION ATTORNEY'S FEES

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The American Law Institute ("ALI") is in the midst of a project considering aggregate litigation practices in the United States. The effort will not culminate with a "restatement," but rather aims to develop Principles of the Law of Aggregate Litigation. There are four reporters on the project, led by New York University law professor Sam Issacharoff, and a group of thirty-seven formal "Advisers" comprised of lawyers from both sides of the aisle, state and federal judges, and class action scholars and experts (I am one of these Advisers). The group's current draft – Discussion Draft No. 2 (April 6, 2007) – has been vetted at several recent sessions and will likely move to a final draft within the next year or so.¹

Several aspects of the effort will interest class action fee observers. The draft itself is divided into three sections – the first provides a background to the *general principles* that underlie litigation aggregations; the second focuses on when *aggregate treatment of common issues* is called for; and the third and final section identifies principles applying to *aggregate settlements*. The aggregate settlement chapter contains two sections focusing on attorney's fees – one about class counsel's fee (§3.13), the other about objectors' fees (§3.08).

In this month's issue, I will discuss these attorney's fees provisions and in November's issue, the objectors' fees provision.

¹ It remains, nonetheless, a draft that neither the ALI's governing Council nor the membership of the Institute has taken a position on, so its views do not yet represent those of the Institute.

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CLASS COUNSEL'S FEES

The ALI draft expresses a presumption in favor of percentage fees and against lodestar-based fee awards; the lodestar approach is something that "may" be used as a cross-check on percentage awards and in those cases in which only non-monetizable injunctive or declaratory relief is sought or in which fee-shifting statutes insist upon lodestar. Otherwise, the draft's preference is that plaintiffs' counsel be awarded a percentage and that the percentage be of "both the monetary and nonmonetary value of the settlement." §3.13(b). The value of the settlement may encompass *cy pres* payments under the ALI's approach, but may not encompass portions of funds that revert to the defendant at the end of the claiming period or coupons offered but not used by the plaintiff class. *Id.* Comment a.² This approach parallels the provision of the Class Action Fairness Act of 2005 ("CAFA") that limits percentage awards to a percentage of redeemed coupons.³

The ALI's suggested approach has several benefits, each most easily viewed by examining the three organizing aspects of the fee recommendations.

1. *Percentage vs. Lodestar.* If widely recognized, the ALI draft would put to an end the seemingly interminable debate about whether lodestar or percentage is a preferable fee method. If you read only caselaw, it would appear that there is a raging debate about whether lodestar or percentage is a better method (particularly in California). Interestingly, no heated dispute occurred at the ALI sessions I attended. The ALI's draft captures the spirit of the moment by succinctly identifying and defending the advantages of the percentage method and by placing on this method the imprimatur of the

² The draft also includes a recommendation that courts should be encouraged to set fee ranges early in a case based on the expected value of the litigation, if possible, and then to deviate from those ranges later only in exceptional circumstances. §3.13(d).

³ 28 U.S.C. §1712(a) ("If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.")

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