

The Experts' Corner

LODESTAR VS. PERCENTAGE: THE PARTIAL SUCCESS WRINKLE

William B. Rubenstein and Alan Hirsch*

For the past several decades, judges and scholars have debated whether courts should employ the lodestar or percentage method in calculating fee awards. The percentage method has essentially prevailed in common fund cases. The Federal Judicial Center's monograph, *Awarding Attorney's Fees and Managing Fees Litigation* (co-authored by Prof. Hirsch), included among the advantages of the percentage method that it: (1) better approximates a market fee, (2) best aligns counsel's incentives with those of the class, and, perhaps most importantly, (3) is simple to administer.

Despite the percentage method's advantages, most circuits permit use of the lodestar when particular cases recommend it. A federal judge in Manhattan recently found such an occasion, arguing that because the plaintiffs achieved only partial success, the lodestar enabled the court to identify with precision which hours to reward. While this may sound logical, we find it misguided.

In re Stock Exchanges Options Trading Antitrust Litigation, 2006 U.S. Dist. LEXIS 87825 (S.D.N.Y. Dec. 4, 2006),¹ concerned antitrust challenges to the trading practices of exchanges involved in listing stock option contracts. In 1999, the Judicial Panel on Multidistrict Litigation consolidated more than 20 putative class actions and sent them to Judge Richard Casey for pretrial proceedings. The plaintiffs settled with some defendants, but Judge Casey did not approve the settlements. Ruling that federal securities laws impliedly repealed the antitrust laws upon which plaintiffs' claims were based, he entered summary judgment for the defendants. The Second Circuit essentially affirmed, yet upon remand the parties reached a settlement agreement establishing a common fund worth about \$47 million. Counsel sought \$14.1 million, a 30% award.

¹ See also 1 *Class Action Attorney Fee Digest* 6 (Jan. 2007).

*William B. Rubenstein, a law professor at UCLA School of Law, specializes in class action law; he has litigated, and regularly writes about, consults, and serves as an expert witness in class action cases, particularly on fee-related issues. Professor Rubenstein provides regular reporting on class action issues, including fees, at www.classactionprofessor.com. Alan Hirsch, a visiting professor of legal studies at Williams College, is an expert on attorney's fees; he co-authored the Federal Judicial Center's monograph on the subject and has been retained as an expert on fees matters. Professor Hirsch provides regular reporting on fees issues at www.feeslaw.com.

The opinions expressed in this article are solely those of the authors.

The court's fee assessment started from an uncontroversial premise: attorneys should be compensated "only for the portions of the case that led to some benefit for the class,"...then concluded that, "the lodestar method is best suited to the task." This strikes us as problematic.

The court's fee assessment started from an uncontroversial premise: attorneys should be compensated "only for the portions of the case that led to some benefit for the class." Fair enough. But then the court concluded that, "the lodestar method is best suited to the task." Why? Because the lodestar "allows the Court to easily decipher which efforts resulted in a benefit for the class and which did not." This strikes us as problematic for two reasons – the first pertaining to the deciphering function, the second to the ease of application.

First, the fund itself is a remarkably precise measurement of the attorneys' success. It captures *exactly* what they produced for the class. Yet, Judge Casey considered the percentage approach "simply too blunt (and perhaps too arbitrary) an instrument for cases where the Court must excise from a requested fee those portions of the representation that yielded no benefit to the class." However, taking a percentage of the fund created automatically excises from the requested fees "those portions of the representation that yielded no benefit to the class."

Second, there is nothing "easy" about using the lodestar method. Counsel's submissions included affidavits with forty exhibits (one for each firm involved), time records, a plethora of distinct proposed rates for different professionals, bios, and – smartly – the declaration of an expert witness. Why scrutinize all this when the fund itself is the successful part of the case and it takes no more than a nanosecond to gauge its size?

Two arguments can be made in support of Judge Casey's approach, but both prove un-compelling. First, the Second Circuit "encourage[s] the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). If the percentage method must be checked by the lodestar, this undermines the efficiency argument in its favor. (This is, of course, an argument against the cross-check.) However, the Second Circuit, perhaps appreciating this problem, has stated that, "where used as a mere cross-check, the hours documented by

(continued on page 32)