

## The Expert's Corner

### PERCENTAGE OF WHAT?

William B. Rubenstein\*

It is well-established that counsel who secure a common fund or benefit for a class are entitled to a percentage of what they produced. To be sure, there is always a debate about what percentage that should be. A less apparent but growing problem concerns not what percentage should be used but rather what the fee should be a percentage of.

The obvious answer is that counsel should receive a percentage of the common fund that their work created. But the value of a common fund may be uncertain. The fund may consist of non-monetary benefits that must be monetized to assess its scope. More centrally, though, a critical unresolved issue is whether to set the size of the fund according to the monies *made available* by counsel's work or to the monies *actually claimed* by the class members. The two are not always the same.

The fund may exceed the recovery because not all the plaintiffs come forward for relief or because not all can provide sufficient documentation to engender full relief. Three common methods exist for disposing of the leftover funds: (1) they can be distributed *pro rata* to the plaintiffs that did come forward; (2) they can be sent to third parties with interests similar to those of the class through a "cy pres" distribution; or (3) they can *revert* to the defendant.

Under the latter two methods, class members themselves receive only a portion of the total fund: what, then, should the fee be a percentage of? A recent Second Circuit decision ruled that the fee should be a percentage of the full fund, reversing a District Court decision that had set the fee solely as a percentage of the class members' recovery. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007).

*Masters* was an anti-trust class action alleging price fixing of commission rates among modeling agencies. The settlement agreement established a fund of nearly \$22 million. The agreement permitted the court to distribute unclaimed portions of the fund in its discretion. The District Court awarded the unused funds via the *cy pres* method to various eating disorder and women's health organizations. The Second Circuit remanded this portion of the opinion, implying that the District Court should have distributed the funds directly to the plaintiffs *pro rata* rather than to third parties via the *cy pres* method.

The District Court awarded counsel 40% of the roughly \$9.3 million in *claims made by class members* against the fund; this \$3.8 million amounted to only 17% of the \$22 million *total fund*. The District Court held that to give counsel a percentage of the total fund would provide a windfall since the class itself did not realize the value of the total fund and since Congress seemed, in both the Private Securities Litigation Reform Act (PSLRA) and the Class Action Fairness Act

(CAFA), to express a preference for the fee to be set as a percentage of recovery not availability.

The Second Circuit dismissed the statutory arguments as inapposite, in that the PSLRA did not apply to this antitrust action and that CAFA's only fee provision concerns coupon settlements, which this was not. Rather than relying on either statute, the Circuit concluded that counsel's work had created "[t]he entire Fund, and not some portion thereof" and hence counsel should be rewarded for that full accomplishment, even if some of the fund ends up via the *cy pres* doctrine going to non-class members.

In cases like *Masters*, where the residuary fund will either be re-distributed *pro rata* among the class members or sent to a third party via the *cy pres* method, awarding counsel a percentage of the total fund made available makes perfect sense. It captures the fact that the defendant has been disgorged of this amount of money regardless of where the funds end up. The small claims class action is primarily a deterrent device, not a compensatory one: the class members' claims are often so small that the cost of litigating them outweighs the recovery. Absent representative litigation (or government law enforcement) there would be no efficient means for stopping a wrongdoer from engaging in such conduct. Because this

(continued on page 64)

*The [Second] Circuit concluded that counsel's work had created "[t]he entire Fund, and not some portion thereof" and hence counsel should be rewarded for that full accomplishment.*

\*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](http://www.classactionprofessor.com). The opinions expressed in this article are solely those of the author.