

## The Expert's Corner

### YOU CUT, I CHOOSE: (TWO RECENT DECISIONS ABOUT) ALLOCATING FEES AMONG CLASS COUNSEL

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Most of the action in attorney fees is contained in the adjudication that sets class counsel's fee. In large cases with multiple counsel, however, that decision will often mask the more complex dance that follows: the division of the court's lump sum fee award among the many class counsel. Last May, I wrote a column in this space identifying three critical issues that arise at this moment of "fee allocation," namely: (1) who divides the aggregate fee, lead counsel or the court? (2) according to what standard should the aggregate fee be divided? and (3) should the division be made known among all counsel or to the class or public more generally?<sup>1</sup>

In the past few weeks, courts have issued two important new decisions on point, one involving the \$7 million fee case that I wrote about last year, *In re High Sulfur Content Gasoline Products Liability Litigation*, 517 F.3d 220 (5th Cir. 2008), and the other involving the recent – get this – roughly \$600 million fee and cost decision in the long-running *Fen-Phen* litigation, *In re Diet Drugs Products Liability Litigation*, 2008 WL 942592 (E.D. Pa. Apr. 8, 2008). The cases each raise allocation issues, each took a unique approach, and thus the pair demonstrate a better and worse approach to the allocation problems. The *Fen-Phen* decision contains a host of other interesting issues as well.

In the *High Sulfur* case, a federal district court judge in New Orleans (Ivan Lemelle) had blessed a fee split (developed by a

committee of two co-lead and three other plaintiffs' attorneys) allocating about \$7 million among 32 law firms and 79 plaintiffs' attorneys following a 20 minute, *ex parte* hearing, culminating in a sealed decision not even made available to the involved attorneys. The U.S. Court of Appeals for the Fifth Circuit recently reversed, striking a blow to secrecy and adding an important appellate decision favoring transparency in fee awards. *In re High Sulfur Content Gasoline Products Liability Litigation*, 517 F.3d 220 (5th Cir. 2008). Upon remand, the trial judge has now "re-allotted" the case to another judge (i.e., recused himself) to oversee the allocation issues. *In re High Sulfur Content Gasoline Products Liability Litigation*, 2008 U.S. Dist. LEXIS 28061 (E.D. La. March 31, 2008).

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The *High Sulfur* case arose out of the fact that for several weeks back in 2004, Shell Oil Company sold gasoline with too high a sulfur content, (allegedly) causing fuel gauges to break. Multiple class actions were coordinated by the Judicial Panel on Multidistrict Litigation ("JPML") and sent to Judge Lemelle. In September 2006, a settlement was reached on behalf of residents of four southern states (Louisiana, Mississippi, Alabama, and Florida). More than 80,000 consumers filed claims and close to \$100 million was distributed. The Court approved the settlement's agreed-to aggregate fee of \$6.875 million.

At a hearing on January 22, 2007, the judge agreed to divide the \$7 million in the manner that his lead counsel committee proposed, but he simultaneously ruled that the awards to each

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<sup>1</sup> See William B. Rubenstein, *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007). In that column, I disclosed that I served as a consulting expert to some class counsel in the *Fen-Phen* litigation (*In re Diet Drugs (Phen/Fen) Products Liability Litigation*, U.S. Dist. Court, E.D. Pa. (2006)) regarding lead counsel's proposed division of the aggregate fee – I write about recent developments in that case here, but constrict my discussion to describing and analyzing what is contained in the public record.

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