

## The Expert's Corner

### THE "LODESTAR PERCENTAGE:" A NEW CONCEPT FOR FEE DECISIONS?

William B. Rubenstein\*

If you remember the size of the Tyco International mess – CEO L. Dennis Kozlowski had Tyco buy him an \$18 million Fifth Avenue apartment, then spent another \$5 million of shareholder money fixing it up by purchasing, for example, a \$6,000 shower curtain – you won't be terribly shocked to hear that the fiasco gave rise to a securities class action that recently settled for \$3.2 billion.<sup>1</sup> The court reports that this is the "largest cash payment ever made by a corporate defendant in the history of securities litigation" and "the second-largest auditor settlement in securities class action history." How much would you pay the attorneys who achieved such a settlement for the shareholders? A federal judge in New Hampshire approved a fee, including expenses, amounting to a grand total of . . . nearly \$500 million. As I'm sure I've said before in these pages and doubtless will again: good work if you can get it. So good, in fact, that the court never actually came out and named the total it was awarding, preferring instead to reference it as a 14.5% fee (repeat after me: "four hundred and sixty four million dollars") and \$29 million in expenses.

To be fair to class counsel, even if it is \$464 million,<sup>2</sup> the attorney fee still amounts to but 14.5% percent of the fund, is supported by a lodestar cross-check embodying a multiplier

of 2.697 (why not just call it 2.7?), and was recommended by two retired federal judges retained by lead counsel for that purpose.<sup>3</sup> The lodestar embodies about 500,000 \$350 hours. That sounds like a lot of hours: for instance, if a hard-working associate logs 2,000 hours a year, that's 250 lawyer years. The Tyco case unfolded over a six year period, so that's about 40 lawyers working full-time on the case for those six years. Sounds high, until you hear the court's description of the magnitude of the case: "Co-Lead Counsel propounded over 700 requests for admission, documents requests, and interrogatories; participated in over 220 depositions in New York, Florida, Massachusetts, and New Hampshire; and reviewed some 82.5 million pages of documents produced by defendants." Given this scope, my quick back of the envelope analysis suggests a justifiable lodestar.

Of course, class counsel's fee request was based on the percentage method and counsel argued that both the percentage (14.5%) and the multiplier (2.69) were reasonable and consistent with acceptable fee awards in similar mega-fund cases. To support that conclusion, class counsel submitted a list of mega-fund securities cases to the courts (funds with more than \$400 million) showing that counsel's fee in those cases ranged from 1.73-21.4%, with six cases above the requested 14.5% and 10 cases below it, hence putting the percentage here somewhere near the middle. Similarly, the court's decision encompasses a table showing multipliers in 12 other mega-fund securities cases ranging from 2.59 to 6.875, putting the multiplier here at the very low end of the range.

Notwithstanding its apparent reasonableness – and likely because of the whopping size of the nearly \$500 million award – the fee attracted objectors, most significantly the Commonwealth of Pennsylvania State Employees' Retirement

<sup>1</sup> See *In re Tyco International Ltd.*, 2007 WL 4462593 (D. N.H., Dec. 19, 2007). This decision approved settlement with Tyco (\$2.975 billion) and its auditor, PriceWaterhouseCoopers (\$225 million). Claims against three individual defendants are transferred by the settlement to Tyco, with 50% of any net recovery from those individuals returning to this settlement fund.

<sup>2</sup> The Final Order indicates that fees will be calculated as 14.5% of the net settlement fund, after deducting expenses. So, the actual fee will be a bit less than \$464 million.

\*William B. Rubenstein, a law professor at Harvard Law School, 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.

<sup>3</sup> The judges were Abner Mikva, the retired Chief Judge of the D.C. Circuit, former White House Counsel, and Member of Congress; and Alfred M. Wolin, a retired federal district court judge from New Jersey. The process by which Lead Counsel retain retired judges to recommend a fee level seems novel (the judge called it "unique"). It also seems smart: the federal judge overseeing the settlement remarked that class counsel had not "unilaterally selected" the 14.5% figure, suggesting that the judge-selected fee level was more legitimate (even if the judges were surely paid well by counsel for their service).

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