

The Expert's Corner

THE LARGEST FEE AWARD – EVER!

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This month U.S. District Judge Melinda Harmon of the Southern District Court of Texas approved the largest class action attorney fee award in history. The plaintiffs, former shareholders of Enron, recovered approximately \$7.2 billion. Class counsel sought 9.52% of the total recovery, or approximately \$688 million. Judge Harmon approved the fee award in a lengthy opinion that provides a splendid overview of the state of fees law in large class cases. Let's examine the holding then identify the themes.¹

The Holding

Because the Enron case was litigated under the Private Securities Litigation Reform Act (PSLRA), the lead plaintiff – the Regents of the University of California – had negotiated a fee arrangement with Lead Counsel, Coughlin Stoia, at the outset of the case (“ex ante” in the terminology of law and economics). According to that agreement, the firm was to receive 8% of the first billion dollars recovered, 9% of the second billion, and 10% of any amount of recovery exceeding \$2 billion. As applied to the \$7.2 billion dollar settlement, the fee agreement yielded an overall percentage of 9.52%. Class counsel’s lodestar amounted to roughly \$132,000,000 (289,593.35 hours at a blended hourly rate of \$456). This meant that plaintiffs’ counsel’s \$688 million fee request represented a lodestar multiplier of 5.2.

¹ In re Enron Corporation Securities, Derivative & “Erisa” Litigation, 2008 WL 4178130 (S.D.Tex. Sept. 8, 2008).

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After dispensing with a number of preliminary issues, Judge Harmon examined the relative merits of the lodestar and percentage methods for determining fee awards. In class action cases where the total amount of recovery is uncertain at the time of settlement, Fifth Circuit precedent embraces the lodestar method because the percentage method results in indeterminate fee recovery. When recovery comes in the form of a common fund, by contrast, many courts prefer the percentage method. Awarding a set percentage of a common fund rewards lawyers for taking cases with a high risk of failure. In addition, the percentage method avoids the lodestar method’s tendency to encourage inefficient work and shoddy time-keeping. Harmon noted that the Fifth Circuit has yet to commit to either the lodestar or percentage approach in common fund cases, although the recent trend has been towards using the percentage method.

For this case Judge Harmon adopted what she dubbed “a hybrid approach.” The court took the contractual percentage fee as a starting point but used a lodestar analysis as a cross-check. Applying first the percentage method, Judge Harmon started from the fact that the ex ante fee agreement created a strong presumption in favor of granting the 9.52% award. The court held that because

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