

The Expert's Corner

2008: THE YEAR IN CLASS ACTION FEE AWARDS

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In this year-end review, I identify three major developments on the fee front in 2008. In the January issue, I will discuss three emerging issues to keep an eye on in 2009.

Issue #1 — Biggest Fee Award(s) Ever!

In January 2008, I wrote about the fee award in the \$3.2 billion *Tyco* settlement:¹ U.S. District Judge Paul Barbadoro of the District of New Hampshire approved a \$464 million fee, 14.5% percent of the fund, embodying a multiplier of 2.7 times counsel's lodestar. Within the year, U.S. District Judge Melinda Harmon of the Southern District Court of Texas approved a larger fee in the \$7.2 billion *Enron* settlement:² \$688 million, or 9.52% of the settlement amount, embodying a multiplier of 5.2. If those two awards did not themselves make 2008 remarkable, in April, the federal court in Philadelphia overseeing the long-running *Fen-Phen Diet Drug* cases³ awarded a final fee of \$412 million, on top of an interim fee of \$156 million that had been awarded several years ago,

Some big fees were awarded in 2008:

Tyco = \$464 million

Enron = \$688 million

Fen-Phen = \$412 million

TOTAL = \$1.564 billion

¹ *In re Tyco International Ltd.*, No. 02-md-1335, ___ F. Supp. 2d ___, 2007 WL 4462593, 2007 U.S. Dist. LEXIS 95199 (D. N.H., Dec. 19, 2007).

² *In re Enron Corporation Securities, Derivative & "Erisa" Litigation*, 2008 WL 4178130 (S.D. Tex. Sept. 8, 2008).

³ *In re Diet Drugs Products Liability Litigation*, 2008 WL 942592 (E.D. Pa. Apr. 8, 2008).

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bringing the total diet drug fee award in at \$568 million. The awards in these three cases alone amount to more than \$1.5 billion — in a year in which most of us saw a third of our savings turn to dust.

These awards would suggest that the plaintiffs' bar is alive and well. Nonetheless, one should be careful drawing conclusions too quickly: it's often the case that a few data points like this can be outliers that mask underlying trends. It is plausible that the downturn in the economy will hit plaintiffs' firms and/or that other developments in class action law (e.g., CAFA) and fees

law (see below) may make life more difficult for the entrepreneurial bar. In sum, while these three awards do not present a full picture of the state of the plaintiffs' bar across the country and across practice areas, they are pretty nice pay days nonetheless.

Issue #2 — Prison!

As 2008 closes, three of the leading (if not "the three leading") plaintiffs' attorneys in the United States — Mel Weiss, Bill Lerach, and Dickie Scruggs — are all behind bars. In February, Lerach was sentenced to 24 months in prison and in June, his former partner Weiss, was sentenced to 30 months; both were prosecuted for the manner in which their firm had shared fees with named plaintiffs in securities class actions and, more specifically, how they had misrepresented this to courts. Scruggs, a pioneering Alabama-based mass tort attorney, was sentenced in July to five years in prison for bribing a judge. Three other plaintiffs' attorneys have been on trial in federal court in Kentucky this

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