

## The Expert's Corner

### WHY THE PERCENTAGE METHOD?

William B. Rubenstein\*

I am often asked, in my capacity as an expert witness in fee matters, to explain to courts why the percentage method is preferred to the lodestar. There is a plethora of writing on this subject in both the academic literature and case law, so I find it surprising that it is still something that lawyers feel that they need to explain to judges. But many judges come anew to class action law generally, and/or to fee matters specifically, and most of them have no particular prior exposure to this debate. I thought it might therefore be useful to publish a pared down version of the arguments in favor of the percentage method; what follows is taken from a declaration I recently filed in a fee case in California, though stripped of most of its footnotes and of the facts of the particular case. It nonetheless summarizes the best arguments for the percentage approach, while at the end noting some balancing thoughts. Most readers of this journal will be familiar with these arguments but might find the collection and presentation of them in this straightforward format useful in future cases.

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*\*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's work can be found at [www.billrubenstein.com](http://www.billrubenstein.com). The opinions expressed in this article are solely those of the author.*

#### **FOUR ARGUMENTS IN FAVOR OF THE PERCENTAGE METHOD**

Courts employ one of two methods in arriving at fee awards in common fund class action cases – the lodestar method (which is essentially a variation on an hourly fee adjusted for the risk of the case) and the percentage method (which is essentially a variation on a contingent fee in that it awards counsel a fee in relation to the benefit achieved for the class). The percentage method is strongly preferred in common fund class actions. More than a quarter century ago, the United States Supreme Court described common fund cases as those in which “a reasonable fee is based on a percentage of the fund bestowed on the class.”<sup>1</sup> Thus, the Federal Judicial Center’s *MANUAL FOR COMPLEX LITIGATION, FOURTH* states that “After a period of experimentation with the lodestar method . . . the vast majority of courts of appeal now permit or direct district court to use the percentage-fee method in common fund cases.”<sup>2</sup>

Courts and commentators have identified a variety of reasons that the percentage method is favored over the lodestar method. Four of these – ease of administration, alignment of interests, efficiency, and encouragement of private policing – are particularly salient.

#### *Ease of Administration*

*The first reason* that the percentage method is favored over the lodestar method is ease of administration.

*The pain of the lodestar.* In applying the lodestar calculation, “petitioning attorneys must present detailed time records of the hours expended by each lawyer indicating the nature of the particular work done by each.”<sup>3</sup> The reviewing court must then scrutinize the hours spent on various tasks so as to

<sup>1</sup> *Blum v. Stenson*, 465 U.S. 866, 900 n.16 (1984).

<sup>2</sup> FEDERAL JUDICIAL CENTER, *MANUAL FOR COMPLEX LITIGATION, FOURTH* §14.121 at 187 (2004) (citations omitted).

<sup>3</sup> Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d* §2675.1 (1998) (hereafter “*Federal Practice and Procedure*”).

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