

The Expert's Corner

BEWARE OF *EX ANTE* INCENTIVE AWARD AGREEMENTS

William B. Rubenstein*

Two cheers for me – in the January 2009 issue, I offered predictions concerning trends in fee awards. One of my predictions was that readers should keep an eye on class representative incentive awards. The amount of such awards seems to have crept up over the past few years and there were signs of courts' growing discomfort with them. My bottom line, highlighted in a box by my editors, read: "I doubt incentive awards will disappear anytime soon, but it will be worth watching whether or not they have capped out."

Lo and behold: on April 23, 2009, in *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009), the Ninth Circuit struck another blow to incentive awards. I give myself but two cheers, though, because the Ninth Circuit's objection was primarily to the fact that plaintiffs' counsel had contracted to seek incentive awards along a sliding scale depending on the size of the settlement or judgment; the court was more upset by the *agreement* than it was by the sheer *size* of the award – so upset by the *agreement* that it voided (and remanded for further consideration) the attorney's fee award as well, possibly punishing the attorneys for entering into such a contract. After spelling out the details, I offer a few thoughts about the case – and on its meaning for future cases.

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THE DETAILS

The underlying case, filed in federal district court in Los Angeles in May 2005, was an antitrust class action against West and Kaplan, Inc., concerning an alleged agreement to restrict the market for bar preparation courses. The class consisted of all those who purchased BAR/BRI courses for the decade from 1997-2006. A settlement reached in 2007 created a \$49 million settlement fund. The settlement notice stated that class counsel would seek 25% of the fund as fees, \$25,000 incentive payments for four class representatives, and \$75,000 incentive payments for three other class representatives. As described by the Ninth Circuit:

It turns out that, as part of their retainer agreement, [some of] the named plaintiffs . . . had entered into an incentive arrangement with [initial counsel]. The incentive agreements obligated class counsel to seek payment for each of these five [named plaintiffs] in an amount that slid with the end settlement or verdict amount: if the amount were greater than or equal to \$500,000, class counsel would seek a \$10,000 award for each of them; if it were \$1.5 million or more, counsel would seek a \$25,000 award; if it were \$5 million or more, counsel would seek \$50,000; and if it were \$10 million or more, counsel would seek \$75,000. [Two other class representatives were not parties to these incentive agreements.]

Id. at 957.

(continued on page 176)