

The Expert's Corner

2009: EMERGING ISSUES IN CLASS ACTION FEE AWARDS

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In 2009, keep an eye on these breaking issues:

Issue #1 - Mark Ups?

A new, but recurring, issue in fee opinions—largely because objectors have now caught on to it—is the question of how “contract lawyers” should be accounted for in fee petitions. Here’s the deal: Class counsel will often hire temporary lawyers via contract to perform discrete functions in a particular case and pay them at low rates. They then put them in a fee petition using a lodestar calculation embodying a higher hourly rate. And, for the trifecta, class counsel then seek a multiplier for the work done by these contract lawyers. To put numbers on the idea: a firm may hire contract lawyers for a particular case at \$50/hour, then put them in their lodestar at \$350/hour based on their years out of law school, experience, the type of work they were performing, etc., then seek a multiplier of, say 2, garnering \$700/hour for an attorney they paid \$50. Hence my mantra in these pages: good work if you can get it (class counsel, that is, not the contract attorney).

Objectors argue that the contract lawyers’ fees should be treated as “costs” and reimbursed at the rate they were paid. Courts have generally rejected this argument. See, e.g., *Carlson v. Xerox Corp.*, No. 3:00CV01621 (AWT) (D.Conn.) (Ruling on Motion for Award of Attorneys Fees at 14-16, Jan. 14, 2009); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 2008 WL 4178130 at *34-*36 (S.D. Tex. 2008); *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F. Supp.

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2d 249, 272 (D.N.H. 2007). The primary reason that the objection fails is that this practice of class counsel is similar to how firms bill clients in the private market for contract attorneys and is a practice generally approved by the ABA so long as the contract attorneys are properly supervised and hence are acting as attorneys. See *Carlson, supra*, at 15 (citing ABA Formal Op. 00-420 and ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451, at 5-6 (2008)).

Although class counsel’s approach is therefore consistent with the bar’s approach to contract lawyers generally, some recent examples have received significant public media attention, suggesting that the issue is unlikely to die easily. The *Xerox* case discussed above, for example, was the subject of a tendentious article in *FORBES*, entitled (stealing my mantra), *Nice Work If You Can Get It*, and subtitled, “Only in class action land can a \$35-an-hour temp attorney rate a \$500-an-hour-fee.” In fact, as just noted, there’s nothing unique to class action law about this practice at all. But that never stopped the media. Nonetheless, the case garnered attention because an enormously high portion of the submitted lodestar was attributable to the contract attorneys and because those contract attorneys (graduates of Yale and NYU Law Schools) themselves opined that their work was largely administrative in nature.

Prediction:

given the lightning rod nature of this issue, the significance of this practice in many large cases, and the legal standard that requires firm attorneys to supervise the legal work of contract attorneys, look for this issue to reappear.

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