

## The Expert's Corner

### THE PUZZLING PERSISTENCE OF THE "MEGA-FUND" CONCEPT

William B. Rubenstein\*

In two recent large settlements, both from the U.S. District Court in the Southern District of New York, the judges considered how the size of a fund should affect the percentage of the fee award. Interestingly, their approaches deviated, with one court having granted counsel a standard 33% (albeit of the net, not gross, fund) while the other granted counsel less than half of that - 15.25% - because of the size of the fund. These competing decisions pose two questions: How have courts approached so-called mega-funds? And how should they do so?

#### THE RECENT CASES

##### *The Currency Conversion Fee Antitrust Litigation*

In litigation involving claims against VISA and MasterCard alleging that these companies failed adequately to disclose the existence and amount of currency conversion fees charged to its customers and conspired to fix these fees at the same rates, Judge William H. Pauley, III approved \$51.25 million in fees from a \$336 million settlement.<sup>1</sup>

Putting aside the discussion of attorneys' fees momentarily, what may be the most remarkable aspect of this case is its remarkably high claiming rate. In March 2007, the parties and the court engineered an initial notice program, sending out 25 million notices as inserts into its customers' credit card bills, resulting

<sup>1</sup> *In re Currency Conversion Fee Antitrust Litig.*, \_\_\_ F.R.D. \_\_\_, 2009 WL 3415155 (S.D.N.Y. 2009).

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in class members filing only 80,000 claims; that meant that less than one-third of 1% of the class claimed. The court then sent out a second notice which reflected a restructured claiming program in which class members could claim, as the simplest option, a flat \$25 award. This adjusted settlement structure and second round of notice resulted in more than 10 million class members filing claims – yes ten *million*, or about 40% of the class. The notice program was so successful that all of the claims had to be reduced pro rata, with the \$25 claimants actually expected to receive \$15-17.

***"there is simply no reason why plaintiffs' counsel should be awarded a percentage of their expenses in addition to being reimbursed for those reasonable expenses."***

**— Judge Shira Scheindlin**

Class counsel initially requested \$86 million in fees, representing approximately 25.5% of the settlement fund and a lodestar multiplier of 2.69. The court instead awarded \$51.25 million, representing 15.25% of the fund and a lodestar multiplier of 1.6. The court arrived at this reduction after reviewing the Second Circuit's *Goldberger* factors, all of which seemed to support the requested award but one: the fact that other courts in the Second Circuit have awarded lower percentages in "mega-fund" cases.<sup>2</sup> The court stated:

<sup>2</sup> The other factor that appeared to motivate the court's reduction here was the high claiming rate: the court noted that because counsel's fee came out of the fund, a lower fee meant more money for the class, which seemed particularly important given that the high claiming rate had reduced each class member's take. There is, of course, some irony in the fact that a high claiming rate justified a lower fee award, in that courts are typically

(continued on page 40)