

## The Expert's Corner

### CLASS ACTION FEE AWARD PROCEDURES

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#### INTRODUCTION

The Ninth Circuit recently issued a decision that will likely alter *the procedures* by which class action attorneys' fees are often governed. In the typical practice prior to this decision, the class notice disseminated following preliminary approval of a class action settlement would identify the level of fee likely to be sought, set an objection deadline, and then require a fee petition and final approval brief to be filed thereafter. Under this process, objectors would have the opportunity to object to the gross fee level but often would not have the benefit of referencing the specific fee petition in framing objections.

In *In re: Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988 (9th Cir. 2010), the Ninth Circuit held (2-1) that Rule 23(h) prohibits a district court from setting a deadline for objections to a proposed settlement or award of attorneys' fees before the date on which class counsel files a completed attorneys' fees motion, as such a schedule deprives class members of an adequate opportunity to examine thoroughly, and object to, the completed motion.<sup>1</sup> While *Mercury Interactive* does not specify the precise amount of time that objectors must

be allotted to respond to a fee petition, it nonetheless will likely change class action settlement schedules to ensure that a full fee petition is filed reasonably prior to the objection deadline.

#### THE CASE

*Mercury Interactive* was a securities class action that arose following public disclosures by Mercury regarding possible unreported backdating of stock options, the resignation of Mercury's CEO, CFO, and General Counsel, and a significant subsequent fall in Mercury's stock price. After the parties agreed upon a \$117.5 million cash settlement in mediation, the district court certified a settlement class, preliminarily approved the settlement, and ordered notice to the class. The notice described the general terms of the proposed settlement and disclosed that lead counsel would "request . . . attorneys' fees in the amount of 25% (29.375 million)." *Id.* at 990. The notice required objectors to the settlement or proposed fees to write and postmark their objections by September 4, 2008.

While no objections were made regarding the settlement, two timely objections were filed with respect to the proposed amount of 25% in attorneys' fees, one by appellant New York State Teachers' Retirement System ("Teachers"). Noting that the "case was settled early, at the motion to dismiss stage," and that many awards by federal courts after the Private Securities Litigation Reform Act of 1995 were less than 25%, Teachers argued that the court "must critically examine class counsel's application and award no more than what is absolutely required to provide reasonable compensation to class counsel." *Id.* at 991. It claimed this amount would be no more than 18%.

<sup>1</sup> The dissenting judge agreed with the Court's interpretation of the law in this case, but dissented as he believed that the appellants had waived the issue at hand.

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