

McCARTER & ENGLISH, LLP

MEMORANDUM

TO: Toby D. Slawsky, Circuit Executive

FROM: Andrew T. Berry, Chairman, Executive Committee - McCarter & English, LLP

DATE: June 1, 2001

RE: Task Force on Selection of Class Counsel

Some personal observations on a few of the "List of Questions".

1. Assumptions.

- some degree of inherent tension between interests of counsel and class members (e.g., "coupon deals")
- virtually all cases settle (Hensler, Rand Study in Progress) if:
 - class is certified over objection; or
 - material likelihood class could be certified over objection; or
 - certification is stipulated.
- fairness of settlement usually scrutinized reasonably carefully.
- ex post judicial scrutiny of fee frequently affected by (a) parties' prior agreement on amount and terms of fees and (b) understandable reluctance to risk the baby by draining bathwater.
- class action settlements usually are one-off events; probably no future business/economic relationships among the parties.

2. "Lowest Responsible Bidder" Analogy.
 - frequency used in public and private sector; private legal services pricing and Fortune 500 "convergence" initiatives; legal fees in public finance work.
 - "responsible" in class selection context surely can include competence and capacity.
 - some evaluation difficulties with new entrants.
3. Special Problems in "Mass Tort" Cases: Prospective Class Counsel With Non-Class Clients.
 - Amchem/Ortiz did not eliminate cases; e.g., tobacco settlements, "medical monitoring" claims.
 - effect of temporally-related "inventory" settlements and contingent fees.
 - effect of opt-out clients and contingent fees.
 - front-end "regulation" by court.
4. Where Are We?
 - are traditional leading class counsel refusing to play?
 - or are they playing, but charging the class less? (In non-punitive context, lower frictional costs are socially beneficial.)
 - have low bidders "sold out" the class? (Were the judge and both ad hoc and institutional objectors asleep?)

5. **Conclusion.**

- **it's too soon to answer those questions; but --**
- **the burden has shifted to those who argue that free-market analysis (subject only to some judicial involvement) is flawed in non-obvious ways.**