

A PRACTITIONER'S PERSPECTIVE ON THE SELECTION OF CLASS COUNSEL

by Elizabeth J. Cabraser

Introduction

The use of a court-supervised selection process aids in the establishment of an efficient and definite leadership structure from the outset of litigation. If plaintiffs' counsel are left to organize themselves, without court supervision, the political considerations governing that organization process may not all be in the best interest of the class. The court, in carrying out its fiduciary duty to the class, should oversee the selection process at the outset and choose counsel for the class based on considerations of both quality and price of representation. The court should appoint, for the class, the best counsel for the lowest cost. Where a proposed fee is established at the outset and has been factored into the court's selection of counsel, it must be allowed to inform the court's award of fees at the end of the litigation.

The Status Quo

Frequently, in a class action context, multiple law firms will have filed similar complaints, alleging the same claims against the same defendants and proposing to represent the same class. At some point, in order to drive the litigation forward in a cost-effective and efficient manner, plaintiffs' counsel must be organized and a leadership structure established. Common sense dictates that this must occur as early as possible in the litigation, and the benefits to all parties involved, including the court, the class and counsel, are undisputable. Establishment of such a structure identifies for the court and defense counsel the attorneys who will have authority to act

on behalf of and bind the plaintiffs, thereby reducing confusion and streamlining contact procedures. Appointment of lead counsel also creates a clearinghouse for plaintiffs' litigation strategy and work assignments, thereby eliminating uncoordinated efforts and preventing attorneys from later attempting to charge the class for duplicative or unnecessary work.

Aside from the securities context, there is no statute or rule that prescribes such an organization process at the inception of a case, and no requirement for the court's active involvement in the process, although the Manual for Complex Litigation, Third, certainly recommends the designation of lead counsel, liaison counsel, and/or steering committees at the outset of every complex case, and suggests procedures and criteria for their selection. Some version of this process, culminating in court appointment of lead counsel, occurs in most "MDL" litigation shortly after coordination and transfer to the transferee court.

Under the current version of Rule 23 of the Federal Rules of Civil Procedure, class counsel is not formally appointed until class certification is granted, which can occur relatively late in the litigation, depending upon the amount of motion practice over the complaint and the discovery allowed prior to class certification.

When there is no formal procedure in place, plaintiffs' counsel prefer to devise an organizational structure on their own, turning to the court as a last resort to resolve disagreements as to the appropriate level of participation of competing firms in the litigation. In the larger cases, the negotiation of a leadership structure acceptable to all plaintiffs' counsel may be a more impressive feat than any eventual settlement with the defendants. Where this process is performed solely by plaintiffs' counsel, and

without court supervision, a number of considerations shape the ultimate leadership structure. These may include a firm's prior experience in a relevant legal or factual area of the case, the work-up or discovery done by a particular firm on a case to date, a firm's relationship with defense counsel or the judge, a firm's working relationship or history with other firms, pre-existing case referral or fee sharing arrangements among the firms, promises by one firm to give a firm work in another case, the number of clients a firm represents, and a desire to be overly inclusive with respect to the management structure to lessen the possibility of exclusion from the management structure in other cases. Despite the fact that many of these considerations are political, and appear to have nothing to do with choosing the best counsel to represent the class in a given case, most often, the firm or firms that emerge as the de facto leaders only do so because of their experience and past success in prosecuting the types of claims at issue. Track records count.

Ultimately, the court must pass judgment on who will represent the class. If the designation is to be made earlier than at the class certification stage, courts have two choices: they can sign off on the process described above, and incorporate the self-selected leadership structure of plaintiffs' counsel in a case management order; or, they can be more proactive and establish an approval or selection process themselves. The Manual recommends the latter approach, which is frequently used in multidistrict litigation in the mass tort arena, see Manual, §§ 20.2, et seq., and this approach seems to be the direction in which the law is moving. For instance, the current draft amendments to Rule 23 advocate that counsel should be selected by application process within a "reasonable period after the commencement of the action." Proposed

Amendments to Rule 23, Rule 23(h). In addition, the Private Securities Litigation Reform Act also has implemented a process for choosing counsel at the outset. See 15 U.S.C. § 78u-4(a)(3)(B). This proactive approach is also consistent with the court's fiduciary duty to the class, whether it is presently mandated in a particular substantive area, as with the PSCR, whether it may be ultimately incorporated in Rule 23, or whether, as at present, it remains a case management option.

In serving as a fiduciary for the class, the court must, at a minimum, look at the qualifications of counsel. If the court abdicates this duty and does nothing to ensure that counsel for the class are, at the very least, qualified and adequate, there can be no assurance that the class' best interests are being served. Allowing plaintiffs' counsel to self-select their leaders pursuant to the factors described above will nearly always result in a leadership structure that features experienced and savvy counsel, but may not always ensure that the class' best interests are foremost in the process.

Counsel Selection: Quality or Price?

If a court is to actively engage in a selection process, the factors it must evaluate undoubtedly must include a qualitative component. In many instances, however, all of the firms before the court will be adequately, if not well, qualified to prosecute the case on behalf of the class. Courts, that have considered this issue, have devised some fairly standard criteria to enable them to evaluate the candidates. See, e.g., In re Wells Fargo Sec. Litig., 156 F.R.D. 223, 228-29 (N.D.Cal. 1994) (firm's experience in type of litigation before court, identity and experience of counsel who will be working on case, ability of one firm to complete the litigation); In re Cendant Corp. Litig., 182 F.R.D. 144, 151 (N.D.J. 1998) (history of involvement in similar litigation,

including cases, dates, courts, resolution, stage of litigation when resolution reached); In re Lucent Technologies, Inc. Sec. Litig., 194 F.R.D. 137, 157 (D.N.J. 2000) (experience of firm and lawyers who will prosecute case, demonstration that firm has thoroughly evaluated case). See also Proposed Amendments to Rule 23, Rule 23(h) (including counsel's experience in handling class actions, complex litigation, type of claims asserted in case before court, investigation counsel has conducted, and firm resources to be committed). Basically, counsel's responses to these criteria inform the court about their quality, their creativity and the effort they plan to expend on behalf of the class. In recognition that there are usually a number of qualified firms vying for leadership, the court's application and evaluation of these factors should not be applied or evaluated in such a way so as to create barriers which prevent firms from ever being appointed or which result in the repeated selection of the same firm.

In addition to quality, the selection of counsel should also involve price competition. In any other context where a client hires counsel to represent her, quality and price are twin, paramount considerations. There is no reason one half of this equation should be neglected simply because the client is now a class. Judge Walker has defined the problem facing the court as "how to approximate what the class members would do if they were involved in the decision-making," and has concluded that they would "demand in advance of the litigation the following information: how much their lawyers will charge for their services and the best price available for those services." In re Oracle Sec. Litig., 131 F.R.D. 688, 692 (N.D.Cal. 1990) (emphasis is original). It is this need to know at the outset, coupled with the presence of many

qualified firms, who are willing and able to handle the representation, which creates the competition that drives down price and yields the greatest recovery for the class.

The Northern District of California presents some of the clearest examples of competition driving down price. While the Ninth Circuit, in awarding percentage-based fees in class action cases, has recognized a “benchmark” of twenty-five percent see, e.g., *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir.1993); *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir.1989), those cases in which the district courts have employed a market process for selecting counsel have culminated in fee awards will below that benchmark. See, e.g., *In re Oracle Sec. Litig.*, 85 F. Supp. 1437 (N.D. Cal. 1994) (settlement of \$25 million and fee of 19.2%); *In re California Micro Devices Sec. Litig.*, No. 94-2817 (N.D. Cal.) (if pending motion for final settlement approval granted and requested fees awarded, total settlements in case of \$31 million and fees of 12.6%); *In re Network Associates Sec. Litig.*, No. 99-01729 (N.D. CAL.) (if pending motion for final settlement approval granted and requested fees awarded, settlement of \$30 million and fee of 7%).

Plaintiffs’ counsel are well equipped to evaluate the risks and rewards in pursuing certain litigation and to propose an appropriate price structure for such cases. The contingency nature of their practice makes this type of evaluation necessary before they decide to pursue any case. After determining that the facts and circumstances of a case are meritorious, counsel may determine a reasonable range for a potential settlement or verdict and then attempt to anticipate the time and risk in achieving that range. A firm will generally want to begin with a proposed fee that is low enough to be under, or at least in the same range, as the proposed fees of other firms. A firm may

decide to increase the proposed fee in order to ensure a multiplier on time, or a profit above hourly rate in order to compensate the firm for the risk of unsuccessful litigation, or the lost time value of money in terms of the firm's time "receivables" and out-of-pocket costs while the litigation is ongoing. See, e.g., Ketchum v. Moses, 104 Cal. Rptr.2d 377, 388-89 (Cal. 2001) A firm may also decide to decrease its proposed fee to increase its chances of being chosen as counsel for the class.

Fees Established at the Outset Should Not Be Subject to One-Way Ex Post Reduction

Where price competition at the outset of the litigation has been factored into the court's counsel selection process, and a "winning" bid announced, this fee must be afforded definitive, or at least presumptive weight in the court's award of fees at the end of the litigation. A proposed fee cannot be so crucial as to cause a firm to be selected as class counsel, yet so unreliable as to be disregarded when it comes time to award fees. Courts and counsel will be discouraged from participating in a process that is redone later. The Third Circuit's recent decision in In re Cendant Corp. Prides Litig., 243 F.3d 722 (3d Cir. 2001) ("Cendant/Prides"), raises concerns that benefits achieved through an ex ante fee determination will be lost, as hindsight will "invariably alter the perceived fairness of class counsel's compensation arrangements." Oracle, 131 F.R.D. at 692. The perceived benefits of auctions will be lost if the successful bid is not respected.

A fee reached at the outset is similar to any settlement in that, it is imperfect because it is not based on complete information, but based on only information that can be known and is known at the time. Such uncertainty does not

make a settlement subject to renegotiation whenever additional information is obtained, nor should it make a fee subject to renegotiation. To ensure that fee awards are fair to both the class and to its counsel, it is first imperative that the district court examine at the outset the assumptions and conclusions underlying counsel's fee proposals. At the conclusion of the litigation, any fee proposal accepted at the outset should be treated as presumptively fair and, after an analysis such as that conducted by the Third Circuit in Cendant/Prides, should be adjusted, either up or down, only in the most extraordinary circumstances.

If counsel face the specter of downward adjustment, they should in fairness also be afforded the possibility of an upward adjustment, a performance bonus, to recognize extraordinary effort and result, and to correct for a situation in which adherence to the auction fee would penalize counsel. If, as in Cendant/Prides, courts are to endorse or require a second look at pre-set fees to avoid a windfall, they should likewise do so to avoid a penalty. This will restore the proper incentives to the bidding process.

Incentives and Markets

In the past decade's academic literature on attorneys' fees and auctions, legal scholars have devoted herculean efforts to identifying the rational economic incentives that are thought to govern the behavior of plaintiffs' lawyers in class actions. They have devised elegant systems to exploit and manipulate such incentives, for the economic benefit of clients and classes, by fine tuning the auction process, and specifying the actual components of competing bids. Thus we are treated to the endless debate over whether percentages should ascend, or descend, as the recovery

increases; whether percentages should rise, fall, or remain constant as time passes; and whether out-of-pocket costs ought to be separately accessed, or included in the percentage fees. Compare Coffee, "Securities Class Actions" The National Law Journal p. 130 (Sept. 14, 1998) (preferring ascending structure) with In re Quintus Securities Litigation, No. C00-4263 VRW (N.D. Cal.) April 12, 2000) (Walker J.) (preferring descending percentages)

My own view is that a larger settlement, achieved sooner, deserves a bonus, either in the form of an enhanced percentage, or an additional award, because smaller absolute recoveries generally reflect a smaller percentage recovery of the class loss, and larger absolute recoveries generally represent a larger percentage recovery as well. Thus, even with an enhanced percentage award, the net recovery, as a percentage of the original loss, is greater.

Additionally, any settlement at a specified amount, achieved sooner rather than later, is of greater utility to the class, because it returns money to them for the reinvestment or other use of their choice, and also promotes judicial efficiency and economy.

That's about as far as I get in the law and economics analysis because, subjectively, I am not at all sure that plaintiffs' lawyers' actual behavior is governed by any of the variables that enchant academics. Plaintiffs' lawyers can, generally speaking, pick and choose their cases, and the selection of a case to which to devote considerable resources, in terms of time and energy, has the most to do with the subjective appeal of the case. Plaintiffs' lawyers will risk more to become involved in cases they perceive as especially interesting and worthwhile. Once engaged, they will

devote the time, energy, and money necessary to produce a success. They will not recalibrate and ratchet down their efforts as the case passes particular milestones, because they tend to equate their clients' interests with their own professional reputations. That is why cases in which plaintiffs' counsel tenaciously persevere in difficult and protracted cases, and ultimately receive "negative multipliers" of their lodestar, are not uncommon.

A case that goes up on multiple appeals, becomes morassed in necessary, but tedious discovery, and/or requires a lengthy trial may generate a substantial, positive result for the class, and an unspectacular fee for its counsel. The great benefit of the percentage-of-recovery methodology, whether put in place at the beginning of a case, or applied at its end, is that the jurisprudence has long recognized an historical range of percentage awards (e.g., 20% to 30%) that transcended substantive areas of the law, and was applied to recoveries of all magnitudes. If, at the end of a particularly long and grueling case, the application of a 30% award meant a negative multiplier in terms of the lodestar expended, so be it. If, at the end of a speedily resolved case, the application of the same award resulted in a multiplier of 3 X or 4 X, so be it.

Most counsel realized, although courts rarely heeded the previous Task Force recommendation that fees be set at the outset of a case, that in fact there was a "benchmark" in terms of the historical range of percentage fees, within which they could expect an award to be made, based on their performance in a particular case. Thus, there was the incentive to save time, which always works to the benefit of all litigants and the court, and the incentive to maximize the recovery, which benefits the clients.

Awarding fees on a percentage basis also does away with time-consuming collateral litigation on fee applications.

In Cendant/Prides we see, the never ending quest for the market. In Cendant/Prides, this Circuit updates the survey of percentage awards in large settlements in an attempt to construct a market, at least in terms of recent “comparables”. Courts have periodically engaged in such endeavors, which have proved useful to the bench and bar in terms of the range of percentage awards which are, presumptively, appropriate in a given range of recoveries, or other circumstances. In this sense, Cendant/Prides follows the tradition of earlier decisions, such as Activision^{1/} and Mashburn^{2/}, that thoroughly surveyed the fee award jurisprudence to determine ranges or benchmarks of appropriate awards.

If this jurisprudential marketplace is to be revived, there is less need for auctions at the outset of the case, unless the auction is transformed into a primarily qualitative process for selecting class counsel, or lead plaintiffs’ counsel, at the outset of the case. It is my suspicion that the court’s desire to identify and establish, early on, the counsel with whom it will be dealing, has lead to the embrace of the auction as a mechanism to justify this process, despite the fact, as the Manual notes, that courts already have the authority and discretion to select and appoint counsel, through an application process, without conducting a fee auction to do so.

1/In re Activision Securities Litigation, 723 F. Supp. 1373 (N.D. Cal. 1989).

2/Mashburn v. Nat’l Healthcare, Inc., 584 F. Supp. 660 (M.D. Ala. 1988).

Yet another market may be developing that can be invoked to determine an appropriate range of percentage fees in complex class cases of any type. In the past five years, the increasing use of the Internet by clients in mass tort cases has led to a situation in which the clients themselves exchange information about the fees charged, and the qualifications touted, by the many law firms that are competing for clients. For example, in the Breast Implants, Diet Drugs, and Sulzer Hip Replacement^{3/} mass tort litigations, clients visited the official court websites and bulletin boards to obtain ongoing information about the litigation, hit the plaintiffs' lawyers firm websites,

^{3/}For example, the "Totally Hip Support Group" formed by recipients of the Sulzer hip prosthesis that is the subject of In re Inter-Op Hip Prosthesis Product Liability Litigation, MDL 1401, rates and discusses plaintiffs' lawyers in its website chat room. One discussion, earlier this month, related specifically to attorneys' fees, and discusses the wisdom and necessity of contingent versus hourly fees in general, and the 1/3 fee in particular. In response to a suggestion that plaintiffs should try to avoid contingent fees and pay counsel by the hour, one patient responds:

"The alternative would be that you pay them by the hour, win or lose. The trouble with this is that it can get expensive very fast. And it gives them an incentive to run up the number of hours spent shuffling papers. With the contingent fee, at least it keeps them focused on getting the largest possible settlement."

With respect to the contingent fee itself, the word is out: "No, they don't expect you to pay 1/3." As one client reported,

"You get what you negotiate with your lawyer. You can get them to agree that they will pay any costs, or to do it for less than 1/3, or both. I got both. In this situation, you pretty much just have to ask for it. Plenty of lawyers want the kind of money involved here, so your lawyer should do this for less. Their other option is to get '100% of nothing' if you go across the street. And this is very much less work for them, and has a very much higher return to them, than the usual one-of-a-kind case they get. But — you've got to ask."

The notion of informed, unsophisticated tort clients, and the sanctity of the "standard" contingent fee contract, is obsolete. There is a market in the making; one that may serve as a useful factor in setting the market for class action contingent fees.

and established their own support groups and Internet chat rooms to exchange information on their medical conditions, possible treatments, liability issues, and the fees their lawyers were charging. As a result, clients began to negotiate, individually, the terms and conditions of previously standardized contingent fee agreements. Again as a result, percentages have trended downward: in the mass tort context, a 25% contingent fee agreement, rather than a “traditional” 33a percent/40% agreement, has become common. Clients have also negotiated on costs, and on exempting certain categories or levels of recoveries from application of a percentage award.

This situation is beginning to approximate the “sophisticated client” or “empowered plaintiff” model discussed by courts and commentators. In these mass tort cases, attorneys are looking to aggregate large numbers of clients in order, to gain the bargaining and leadership leverage, and economies of scale, that result. These are the same characteristics that mark formal classes, as well as informal aggregates, of clients. Accordingly, the prevailing contingent fees in mass tort litigation may serve as a useful analog to appropriate percentage fees that may be awarded in class actions.

Tort claimants possess claims that are both economically valuable and personally important; they are thus highly motivated to bargain for the best deal with their attorneys. The exchange of information, via the Internet, gives them both the strength of information, and the power of numbers. Because personal injuries — circumstances that effect their daily lives and the quality of their lives — are involved — these clients are probably more motivated in negotiating with potential attorneys than are the much-touted institutional investors in the securities context. Thus, the resulting “market” of attorneys’ fees, at least as it applies to analogous tort or consumer class

action litigation, may be particularly valuable, and may substitute for auction bidding in determining the percentage fee, or range of fees, that the court establishes as the presumptive fee at the outset of the case.

Conclusion

Active court participation in the selection of lead counsel in a class action early on promotes effective case management. Awarding fees on a percentage basis aligns the interests of class counsel and the class, avoids collateral litigation about fees, and rewards prompt resolution. Setting the percentage *ex ante* through a market mechanism, such as an auction, reduces the fee paid by the class and raises the net recovery to the class. Court review of the *ex ante* fee at the conclusion of the litigation can ensure that unforeseen events do not cause unfairness to either the class or its class counsel.