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on Selection of Class Counsel
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My name is Arthur R. Miller, and I am the Bruce Bromley Professor of Law at Harvard Law School. It is a very great pleasure and a privilege to be invited to testify before this distinguished Task Force.[1]

Background

By way of background, and in the interests of full disclosure, this is not my first experience with a Third Circuit Task Force. More than 15 years ago, I had the honor of serving as the Reporter for this Circuit's Task Force on Court Awarded Attorneys' Fees, whose report is published at 108 F.R.D. 237 (1985).

I also have served on several other advisory panels and committees assisting the Supreme Court, the Judicial Conference of the United States, the American Law Institute ("ALI"), and the American Bar Association on various facets of federal civil litigation and complex and multi-district litigation. For example, I have served as the Reporter for and then as a member

[1] I apologize to the Task Force for the unfinished character of this statement. I did not receive my invitation to appear until May 22nd, as I was leaving the United States, and did not return to the United States until May 29th.

of the Advisory Committee on Civil Rules of the Judicial Conference of the United States, and as the Reporter for the ALI's Complex Litigation Project (which led to the adoption and publication by the ALI of *Complex Litigation: Statutory Recommendations and Analysis with Reporter's Study* (1994)). I also have served as a special consultant to the original *Manual for Complex Litigation*, and as a member of the ABA's Special Committee on Complex and Multidistrict Litigation. In addition, I have written extensively regarding class actions and attorneys' fees, as well as an on other facets of federal civil litigation.

Over the years, I have appeared as a lawyer or as an expert in numerous class actions and complex cases -- on behalf of both plaintiffs and defendants -- involving issues of the propriety of class certification, the fairness and reasonableness of class settlements, attorneys fees, and a variety of other issues that have been generated by the contemporary phenomenon of aggregated litigation. This activity has included arguing a number of significant class action settlement and attorney fee cases before the Third Circuit, including the appeal in Lindy,[2] and, more recently, the appeal in the main Cendant action.[3]

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[2] Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) ("Lindy I"), appeal following remand, 540 F.2d 102 (3d Cir. 1976) ("Lindy II").

[3] In re Cendant Corp. Litigation, Nos. 00-2520, 00-2733, 00-2769, 00-3653 (3d Cir. 2001).

However, I am testifying today as a scholar of federal procedure and of class actions in particular, and not as an advocate of any client or organization.

The 1985 Third Circuit Task Force

Before addressing some of the specific questions that this Task Force is considering, I believe that some context on the issue of attorneys' fees is appropriate. In this regard, an appropriate starting point is the Third Circuit's own 1985 Task Force on attorneys' fees.

A central purpose of the 1985 Task Force was to consider the relative advantages and disadvantages of the two main methods for calculating judicially awarded attorneys fees in class actions: the "lodestar" approach and the "percentage" approach.

Under the "lodestar" approach -- which the Third Circuit previously had been a leading proponent of following its seminal opinions in Lindy I and Lindy II -- courts multiply the number of hours worked by the petitioning attorneys' "normal billing rates" and then by a multiplier determined by the court that takes into account, inter alia, the risks that the attorney assumed in undertaking the representation, the relative skill that the attorney displayed in prosecuting the action, and the results achieved for the class members. However, as the Task Force noted, the lodestar approach can be exceedingly cumbersome and often embroils the courts in the minutiae of reviewing

lawyers' time sheets and expenses. The lodestar method also can create unfortunate incentives for a plaintiff's lawyer to engage in unnecessary work to prolong the litigation in an effort to later justify a larger fee,[4] which, of course, causes inefficiency, inhibits settlement, and misaligns the interests of counsel and class.

In accordance with controlling Supreme Court precedent, the Task Force concluded that the "lodestar" method continued to be the appropriate method for determining attorneys' fees in statutory fee cases. However, after noting the fundamental differences between statutory fee (fee shifting) cases and common fund (fee sharing) cases, and after considering the numerous limitations and problems associated with the "lodestar" approach, the 1985 Task Force strongly endorsed the percentage approach in common fund cases.

The 1985 Task Force's recommendation to move to a percentage approach in common fund cases was the study's most important conclusion, although it was accompanied by two additional recommendations. First, to help insure that the percentage fee awarded was reasonable and reflected the marketplace for comparable services, the 1985 Task Force also recommended that the fee be "negotiated in an open and appropriately arm's length manner" between counsel and a

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[4] For a fuller discussion of the deficiencies of the lodestar methodology identified by the 1985 Task Force, see Court Awarded Attorneys Fees, 108 F.R.D. 237, 246-49 (1985).

representative of the Class (although, as noted below, the Task Force cautioned that "in most instances, particularly in complex cases, that task probably should not be undertaken by the district judge who will hear the case"[5]). The 1985 Task Force also recommended that the percentage fee arrangement in a common fund case should be established "at the earliest practical moment" in the litigation to

(a) eliminate the incentive to run up unnecessary "lodestar" hours (since the amount of work would not alter the fee);

(b) increase the incentive for early settlements (since the fee scale would already have been established and counsel's compensation would not be increased by a delay); and

(c) provide attorneys a degree of predictability regarding compensation.[6]

In sum, in common fund cases (including statutory fee cases that result in a settlement fund, and are converted thereby into common fund cases), the 1985 Task Force's recommendations can be summarized as follows: (1) use percentage fees that are (2) negotiated in the marketplace and are (3) established early in the litigation.

The Impact of the 1985 Task Force Report

Since the publication of the 1985 Task Force Report, courts across the country have increasingly followed its

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[5] 108 F.R.D. at 256 (emphasis added).

[6] See 108 F.R.D. at 258.

recommendation that fees in common fund class actions be awarded using the percentage-of-the-fund method,[7] thereby returning fee award practice to what it had been for almost a century before the development of the "lodestar" method.[8]

By contrast, very few courts pursued the 1985 Task Force's suggestions that the percentage fee be actively negotiated by the court or a court-appointed representative, or that the fee be established at the beginning of the case. But cf. Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000); Manual for Complex Litigation, Third, ¶ 24,231 (1995). The reasons why these aspects of the 1985 Task Force's recommendations have not been embraced are open to debate.

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[7] See, e.g., In re General Motors Corp. Pick-Up Fuel Tank Prods. Liability Litigation, 55 F.3d 768, 821 (3d Cir. 1995); In re Thirteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litigation., 56 F.3d 295, 307 (1st Cir. 1995); Savoie v. Merchants Bank, 166 F.3d 456, 460 (2d Cir. 1999); Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 515-17 (6th Cir. 1993); Florin v. Nationsbank, N.A., 34 F.3d 560, 564-65 (7th Cir. 1994); Johnston v. Comerica Mortgage Corp., 83 F.3d 241, 246 (8th Cir. 1996); Chemical Bank v. City of Seattle (In re Washington Public Power Supply Sys. Sec. Litigation), 19 F.3d 1291, 1296 (9th Cir. 1994); Gottlieb v. Barry, 43 F.3d 474, 487 (10th Cir. 1994) (authorizing percentage approach and holding that use of lodestar/multiplier method was abuse of discretion); Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) ("Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class."); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (percentage of the fund recovered is the ***only*** permissible measure of awarding fees in common fund cases).

[8] See, e.g., Trustees v. Greenough, 105 U.S. 527, 533 (1881) (when a common fund has been created for the benefit of a class as a result of counsel's efforts, the award of fees should be determined on a percentage of the final basis).

In my opinion, however, the most likely explanation is that as District Judges (and Courts of Appeals) have gained greater experience with the percentage methodology, they have found that it produces reasonable, predictable, relatively easily administered, and fair results in the vast majority of common fund cases -- even if a specified percentage fee arrangement is not "negotiated" by an intermediary and even if it is not established at the outset of the litigation. For example, as long as it is reasonably certain that a court will award a fee based on the percentage methodology, the incentive for class counsel to run up excessive "lodestar" hours (or to reject early offers to settle cases on terms favorable to the class) is minimized, regardless of whether the specific percentage fee awarded is established at the beginning of the case or at its end. In addition, to the extent that the Task Force was convinced that a well-functioning fee award system should have sufficient predictability to ensure that skilled counsel would be adequately incentivized to undertake the representation of plaintiff classes on a fully contingent basis in complex actions, the widespread adoption of the percentage method appears to have met this objective and brought the interests of class and counsel into alignment.

Many courts also appear to be satisfied that even if a "benchmark" percentage award of 25% to 33% in the typical (or "mainstream") case does not exactly match the percentage that

might have been agreed to between counsel and a hypothetical sophisticated plaintiff (or between counsel and a court-appointed special master or other designated "negotiator" for the class), a court's post facto percentage fee generally will still approximate what a reasonable ex ante marketplace rate would have been.[9]

Finally -- and perhaps most importantly -- courts appear to have implicitly recognized that there is a definite trade-off between early determination vs. late determination of fees. For example, given that the uncertainties of litigation are inevitably at their greatest at the early stages of a lawsuit, there can be no assurance that an ex ante fee arrangement -- even one negotiated by sophisticated parties -- will produce a "fairer" or "better" arrangement for the class than one established by the court at the end of the case. Worse still, a fee arrangement that is established at the outset locks the class into paying a set percentage (or a sliding scale) of the recovery, regardless of how the attorney actually performs as

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[9] See, e.g., Kirchoff v. Flynn, 786 F.2d 320, 325 (7th Cir. 1986) ("When the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee ***is*** the 'market rate'.") (emphasis in original); Continental Ill. Sec. Litigation, 962 F.2d 566, 572 (7th Cir. 1992) ("The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client"); Swedish Hospital, 1 F.3d at 1270 (percentage method "more closely reflects the marketplace"); In re U.S. BioScience Sec. Litigation, 155 F.R.D. 116, 119 (E.D.Pa. 1994) (adopting conclusion of special master that 30% fee would likely have been negotiated in securities action).

the case develops or what is achieved for the class. In favor of early determination, there are the advantages seen by the 1985 Task Force, namely the potentially more direct simulation of the marketplace, the alignment of class and counsel interests from the outset of the litigation by virtue of an express percentage fee arrangement, and the avoidance of ex post procedures.

In contrast, although a post facto fee determination presumably will be less predictable for class counsel than one that is established at the outset of a case,[10] and may suffer from the distortions of 20-20 hindsight, deferring an ultimate percentage-based fee decision to the end of a case has the advantages of

(a) enabling the court to exercise maximum control over class counsel throughout the litigation;

(b) providing the fullest record against which to measure counsel's performance and to select an appropriate percentage fee based on that performance; and

(c) giving class counsel the greatest incentive to continue to perform at the maximum level throughout the case, knowing that the attorneys' fee percentage remains at risk until the case is actually concluded.

Viewed another way, provided that the case law precedent advocating (or mandating) a percentage approach is

[10] But see In re Cendant PRIDES Securities Litigation, 243 F.3d 722 (3d Cir. 2001) (holding that even fee arrangements established pursuant to competitive bidding at the outset of a case nonetheless may cause difficulties at the end of the case if class counsel seeks to depart from (or ignore) the arrangement, or if the Court substantially modifies it).

sufficiently coherent and consistent in a given jurisdiction, the force of precedent in itself will provide a significant amount of predictability as to how the fee ultimately will be calculated, while simultaneously also aligning class and counsel interests at the outset, as intended by the 1985 Task Force. The trade-off for the certainty of a pre-agreed, fixed fee is some flexibility to adjust the jurisdiction's particular percentage benchmark (either up or down) based on the quality of counsel's actual performance.

Although it is my belief that both the bench and the bar now overwhelmingly approve of percentage fees, the percentage fee approach has been criticized as applied in specific cases -- particularly those in which a relatively large and/or early settlement has been achieved. In these circumstances, using the percentage approach can result in an award of attorneys fees that translates into a multiple on counsel's "lodestar" that is much greater than would have occurred if the case had settled for less or if the attorney had litigated the case for additional months or years. This, of course, is a phenomenon that always has been characteristic (and can work in precisely the opposite direction as well) of the contingent fee arrangement.

Ironically, however, commentators are divided as to the nature of the "problem" when this occurs. Some suggest that the problem is that the percentage approach results in undeserved "windfalls" to class counsel in such situations. In contrast, I

-- and numerous others -- believe that more often the problem in these situations is that courts *penalize* skilled class counsel, whose effective lawyering has produced a superior recovery without unnecessary delays, time expenditures, and procedural activities by using a hindsight-based "lodestar crosscheck" as an excuse to award a lower, "lodestar" based fee. In other words, in my view, the primary problem with the percentage based approach as presently applied by some courts is that too often those courts simply refuse to apply the percentage approach in cases in which exemplary results have been obtained for the class.

It seems to me that facile invocations of a cliche or epithet like "windfall" are becoming a substitute for (or reflect an unwillingness to come to grips with) responding to more challenging questions. "Windfall" to whom? By what standards is that to be judged? Aren't there countervailing values and policies? In a subjective, human process aren't some outlier cases (including cases in which class counsel are significantly undercompensated) inevitable? Should we make policy based on the possibility of a few outlier cases (particularly when there is no assurance that the proposed alternatives will do any better at eliminating "outliers")? Aren't outlier cases an inevitable cost of a contingency fee system designed to give citizens access to the civil justice system?

The Impact of the PSLRA

The passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA") has further consolidated the trend towards the award of percentage-based fees in class actions brought under the federal securities laws. In particular, Section 78u-4(a)(6) of the PSLRA, which relates to the payment of attorneys' fees and expenses, recognizes the appropriateness of percentage-based awards by providing that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of any damages and prejudgment interest actually paid to the class."

The PSLRA also added a new procedural wrinkle to the attorney selection and retention process by including provisions that were intended to encourage institutional investors to step forward as lead plaintiffs in securities class actions. The PSLRA's preference for large, institutional investors is reflected in Section 78u-4(a)(3)(B)(iii)(I)(bb) of the statute, which creates a strong presumption that the "most adequate plaintiff(s)" -- that is the plaintiff(s) who should be appointed lead counsel -- is "the person or group of persons that ... has the largest financial interest in the relief sought by the class."[11] Section 78u-4(a)(3)(B)(v) of the PSLRA then answers

[11] Indeed, as long as they are interested in serving as lead plaintiff and "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure," the presumption in favor of appointing the person or group of persons who has "the largest financial interest in the relief sought" is so strong that it can be rebutted under the statute *only* "upon proof by a member of the purported plaintiff class that the presumptively most adequate

the question of who selects lead counsel by providing that "the most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class."

The PSLRA's provisions giving lead plaintiffs the authority to "select and retain" class counsel implies that a lead plaintiff has the authority (subject, of course, to court approval) to negotiate a reasonable percentage-based attorneys' fee arrangement of the beginning -- and that the court and the absent class members (assuming that the lead plaintiffs' choice of counsel has the requisite skill and experience to prosecute the interests of the entire class vigorously) normally should thereafter honor those arrangements. However, the statute and the critical Conference Committee Report both made it clear that district judges retain their historic control over fees and expenses. Thus, the statute can more easily be read as authorizing lead plaintiffs to retain qualified counsel on terms which provide that counsel will apply for a reasonable award of attorneys fees at the end of the case, subject to traditional court review and approval. The statute is rather explicit in leaving the matter of fee-setting to the District Court, and its text and the Conference Committee Report seems clear that the judicial power in this regard is undiminished.

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plaintiff (aa) will not fairly and adequately protect the interests of the class; or (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class." Section 78u-4(a)(3)(B)(iii)(II).

Mandatory Competitive Bidding -- And Why It's Not A Better Way

Even though the practice of court awarded percentage fees at the end of class actions has proven to be highly successful and advantageous for all concerned in common fund cases, some District Judges and commentators have argued in recent years that the PSLRA did not go far enough. Instead, they contend that current practices should be largely abandoned in favor of a new regime of competitive bidding, conducted by (or under the close supervision of) the court, in which the opportunity to serve as class counsel is awarded to the "winning" bidder.

Advocates of the "competitive bidding" or "auction" model typically argue that their approach has the following benefits:

(1) Economy. Proponents claim that auctions will drive down the fees paid to class counsel, thereby benefitting class members in common fund cases (whose share of the fund is reduced by the amount paid out in attorneys fees) and eliminating (or at least reducing) the number of "windfall" awards to class counsel;

(2) Alignment of Class Interests with Counsel's Interests. Proponents claim that auctions may more closely align the interests of class counsel with the interests of the class than either the traditional lodestar method (which suffers from the evils discussed earlier) or the percentage fee method (which, according to some, can overly incentivize class counsel to reach early settlements).

(3) Objectivity. Proponents claim that auctions result in a more "objective" or "market-based" method of setting fees.

Respectfully, I do not agree with the advocates of judicially mandated class counsel "auctions." I fear that they (1) do not give proper weight to the true interests of class members, (2) fail to acknowledge the inherent subjectivity of the elements of "competitive bidding," which make it different from a true "auction," (3) underestimate the procedural burdens and traps of judicial involvement in these procedures, and (4) do not properly estimate the intrusion on the relationship between class and counsel, particularly in contexts such as the PSLRA, which requires that deference be given to lead plaintiffs' selection and retention of class counsel.

Economies -- And False Economies. With respect to the alleged economies of auctions, I cannot stress too strongly that the real issue is not whether a particular fee regime will give class members a larger percentage share of the common fund recovery, but whether it will maximize the net recovery class members actually receive. For example, a rational class member would obviously much rather receive 70% of a $1000 settlement fund than 90% (or even 100%) of a $500 fund. Viewed from a slightly different perspective, a class member also obviously would much rather receive 70% (or a larger portion) of his or her legally compensable damages than 90% of a much smaller percentage of those damages. The importance of these truisms is most obvious when the defendant's liability is acknowledged or virtually certain, so that the only issue is "how much" will be

made available to those who have been injured (as was true in a recent prominent case in this Circuit and another prominent case in the Second Circuit).

I doubt that it will come as a surprise to anyone on this Task Force that I have concluded, based on my own personal experience as an expert or advocate or consultant in numerous class actions over the years, that there can be significant differences between and among different plaintiffs' firms in terms of quality, experience, and resources, and in terms of their willingness and ability to litigate cases aggressively (up to and through trial, if necessary). As Professor Issacharoff already has noted in his statement:

> As with dentistry, there may be some pain associated with delivering yourself to professionals whose chief attribute is their willingness to work you over cheaply, as even the chief proponents of auctions recognize. If we may assume that the interests of absent class members consist chiefly in maximizing the return from the prosecution of their claims, there is no reason to believe that the lowest percentage bidder can realize that goal. The lowest percentage bidder may simply be lawyers with lesser overhead, lesser ambition, or volume discounters.

Comments of Prof. Samuel Issacharoff, dated May 5, 2001, at 4. In short, questing after the "lowest bid" and preoccupation with the class' share, or worrying about the occasional "windfall" may be penny-wise and pound-foolish, and not in the best interest of the class members.

Similarly, there is no assurance whatever that auctions are any better at avoiding so-called "windfalls" than the traditional percentage approach. Indeed, assuming that the auction is intended to set a binding rate, if a case ultimately yields a substantially greater recovery than anyone had expected at the outset of the litigation there may well still be complaints that (a) the auction undervalued the case, (b) class counsel must therefore have received a "windfall," and (c) the court must therefore re-evaluate the fee. It is hard to see how an auction that operates with limited information at a litigation's outset is any better at avoiding "windfalls" than one in which the court -- having adopted (either directly, or through stare decisis or the intermediation of a special master in an appropriate case) a rebuttable presumption that a 25% or 30% benchmark percentage is appropriate -- evaluates the case at the end of the litigation and makes any appropriate adjustments to the benchmark percentage based on relevant factors to assure itself that the fee is reasonable and appropriate.

Of course, the foregoing example assumes that a case whose risks and complexity is uncertain at the outset actually results in a large recovery for the benefit of the class. However, in cases in which it is difficult (if not impossible) to assess accurately the "true value" of a case at the "auction" stage and in which the low bidder has agreed to be bound by a relatively low fee (or even a capped fee), the low bidder may

well prefer a cheap, early settlement rather than run the risk of heavily investing in a risky and complex case. Creating incentives for "volume discounters" to settle uncertain cases early and cheaply may simply substitute a large number of small windfalls for the far less infrequent large fee "windfall" attributed to non-auction approaches (in which the lawyer receives a large fee based on a large recovery) that auction proponents criticize[12] -- the only difference being that class members usually are much better served by the skilled lawyer who is willing to take greater risks in exchange for greater rewards.[13]

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[12] As noted above, many large fee awards that critics pejoratively characterize as "windfalls" are, in my view, appropriate compensation for counsel whose skill, hard work, creativity, and willingness to expend resources and take significant risks (generally without any guarantee of a return on their investment) have resulted in a significant benefit for the class. That, it seems to me, always has been one of the basic premises of the contingent fee system.

[13] The incentives for early settlement are likely to be further enhanced if lawyers believe that courts will consider "revising" pre-agreed auction rates or employing a "lodestar" cross-check (a not so subtle return to the pre-1985 Lindy regime) at the end of a case as a final check against "over-large" recoveries of attorneys fees. For example, if a winning bidder invests heavily in a case but it nonetheless results in a lower than expected recovery, there is little likelihood that most courts would grant that lawyer an upward adjustment from the pre-agreed fee at the end of the case, since the lawyer will have "assumed the risk" of a disappointing outcome. However, if the case proves to be an unexpected "home run," in many cases a lawyer may well be concerned that a court will -- with the benefit of hindsight -- impose a downward adjustment in the fee to avoid the appearance of a "windfall." The perception or concern that winning auction bids serve as a ceiling -- but not a floor -- on the ultimate fee award will further diminish a low bidder's incentive to maximize recoveries.

Alignment of Interests. As even most auction proponents admit, it is the basic framework of a percentage-based fee award -- rather than anything having to do with auctions per se -- that is the fundamental mechanism that aligns the interests of class and counsel. The real issue, therefore, is whether the auction approach does a better job at the margins in aligning the relevant players' interests.

However, as the immediately preceding discussion suggests, the auction system is hardly a panacea for eliminating the perceived dangers of early settlements under a benchmark percentage approach. In fact, auctions are likely to create significant additional incentives for low bidders to cut corners and cut early deals. Ironically, in some situations the fee grid resulting from an auction may also create incentives to litigate past the point at which it is in the best interests of the class to risk further combat, rather than settle.

As Professor Coffee has written, to the extent that one is concerned about early settlements that are too cheap, the most effective remedy is to embrace percentage formulas by which the percentage awarded increases as the amount of the recovery increases (as occurred in Cendant and, in effect, in Auction Houses). I agree with him that such an approach is appropriate and beneficial to the class in certain cases, such as cases in which a very significant recovery appears *highly* likely from the outset, and when it makes sense to reward counsel more heavily

for the last -- and, intuitively, hardest -- dollars, rather than the first dollars, that are ultimately recovered.

However, I have serious doubts as to whether most courts are ready to consider bids based on increasing percentages favorably -- particularly since it is the award of large fees in big cases that is most likely to result in cries of "windfall" from critics even when the result achieved is applauded as "extraordinary" or "spectacular." Moreover -- even assuming arguendo that some general principles could be agreed upon as to the types of cases that are appropriate for increasing percentage awards -- in most instances it will be exceedingly difficult or impossible to know at the outset whether a given case is appropriate for increasing percentage treatment. Accordingly, I do not believe that auctions will do better than a non-auction percentage-based approach in producing fee structures that align class members and counsel.

Objectivity. Although auctions may create the appearance of objectivity to an unsophisticated observer (as the "lodestar" methodology once gave the appearance of mathematical precision), in reality virtually every element of a class counsel auction is subjective. For example, a court's perception of a bidding firm's quality, experience, resources, willingness to litigate -- to trial, if necessary -- all have substantial subjective elements. Similarly, determining what weight to give to the varying perceived strengths and weaknesses of different

law firms and competences in various substantive contexts is inherently subjective. Is it a case in which a firm's demonstrated ability and resources to try a case will help maximize recovery for the class? Or is it a case that is sufficiently routine that a much smaller or less experienced firm could be expected to handle it well? Answers to these and a host of other questions -- including the unknown strategies, tactics, and objectives that will be pursued by the defendant -- will vary, as will the particular weight given to those questions.

In addition, as others already have testified, even price is not necessarily objective. To the contrary, to the extent that auction advocates have supported the use of fee grids (which provide that the fee award will be calculated differently -- for example, by using different percentages -- depending on the recovery ultimately obtained and/or the stage of the litigation at which the case is resolved) or "caps" or other variable fee structures, determining what bid is "lowest" is dependent on a court's subjective ex ante perception of a range of factors. These include the likely value of the case, the likelihood that a case will settle early or late, and on and on. In short, trying to assess just how big the price difference between Bidder A and Bidder B is -- let alone determining whether the "price difference" is outweighed by other factors -- is an inherently subjective task. And, it is already proven to be obvious, in some cases, everyone (or almost everyone) will be wrong.

Additional Comments

Having addressed the primary arguments offered by auction proponents, let me briefly mention some of my further concerns about the auction approach.

Judicial Burden and Judicial Involvement. As the foregoing discussion indicates, ensuring that a judicial auction produces the best results for the class is hardly a simple matter. Evaluating each bid is a time consuming and highly subjective matter, and requires that the court -- in the absence of a developed record -- to make numerous assessments and assumptions that may (or may not) be correct, and that may (or may not) ultimately have to be reconsidered at the end of the case. Moreover, if there is a perceived shortage of adequate bids, the court may have to become involved in soliciting additional bids. Conversely, if there are numerous bids from all-comers, the burden on the court of trying to evaluate each of those bids fairly and properly is multiplied. One must ask whether one of the system's most precious and limited resource -- judicial time -- is better expended in running competitive bidding regimes or devoted to other, more judicial, matters.

Intrusion into the Client-Counsel Relationship. In addition, the auction process risks improper intrusion into pre-existing attorney-client relationships -- particularly in PSLRA cases in which institutional clients already have made -- or can

be required to make -- their own careful, wide angle appraisals regarding the selection and retention of counsel. If, for example, an institution already has conducted its own bidding or "beauty contest" process (or if it has concluded based on past experience with a particular law firm that that firm is the one that is most able to maximize any potential recovery and be responsive to client control), it seems to me that the Court has little basis under the PSLRA to impose its own auction, or otherwise to unseat the lead plaintiff's choice of counsel in favor of a forced "shotgun" marriage of lead plaintiff with a lawyer of the court's own choosing.

Possible Exceptions, And Modest Additional Suggestions

The views expressed above should not be construed as suggesting a lack of judicial power to conduct competitive bidding or a refusal to recognize that there are situations in which there are reasons to do so. As the SEC's amicus brief before the Third Circuit in the Cendant appeal acknowledges, there are exceptions that prove the rule.

But, as the foregoing discussion suggests, it is much easier to identify situations in which the use of auctions is plainly inappropriate than to identify situations in which auctions offer any clear advantages. For example, like Professor Coffee, I have no difficulty in concluding that auctions are presumptively inappropriate, inter alia, when:

(a) the action arises under the PSLRA, particularly when one or more substantial institutions is lead plaintiff;

(b) there has been significant pre-filing investigation or the action would likely not have been brought except for information discovered by the original plaintiffs' attorney (since promoting auctions in these cases would significantly reduce a plaintiff lawyer's incentive to ferret out wrongdoing);

(c) there has been a shortage of bona fide bids; and

(d) the action has been commenced in a jurisdiction in which case law provides a basis for arbitrary post facto "rewriting" of the terms of the winning bid (for example, in any jurisdiction that would permit reducing a fee award based on a mechanical post facto application of a "lodestar crosscheck").

See Outline of Testimony by Prof. John C. Coffee, May 5, 2001, at 11-12.

Obviously, it is not particularly wise to treat class members as subjects in a grand trial-and-error experiment, especially when it appears likely that the experiment will prove successful only in a modest number of cases. However, some experimentation may be justified in the non-PSLRA context when the action is following on the heels of the initiation of a government action (such as in the antitrust area). In these circumstances (a) there may be sufficient public knowledge of pertinent underlying facts at the beginning of the private civil action for the court to make a more informed assessment of the

relative merits of competing bids (and bid structures)[14]; and (2) there is less risk that independent investigations into wrongful conduct by members of the plaintiffs' bar would be discouraged by an auction (since the action presumably would be based primarily on the prior government investigation, rather than on the work of the original plaintiffs' lawyer). However, it should be noted that cases where only the existence of a government investigation has been disclosed -- but not any details concerning the underlying facts -- need to be distinguished, since in the former situation it will likely still be appropriate to incentivize plaintiffs' counsel to pursue their own independent investigation.[15]

Another plausible exception would be if there were credible evidence of deficiencies in the selection and retention process or improper motivation by either the lead plaintiff or their chosen counsel, which would raise questions under the PSLRA as to whether the lead plaintiff "will not fairly and adequately protect the interests of the class." Section 78u-

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[14] For example, as noted above, a court's ability to predict accurately whether an increasing, decreasing, or some other type of percentage arrangement will be most beneficial for the class in a particular case is heavily dependent on the court's ability to accurately estimate the likely settlement value of the case.

[15] Although Professor Issacharoff has suggested in his submission that the auction approach also might be appropriate in PSLRA cases brought on the heels of a government action. (Issacharoff, Comments at 6). I respectfully disagree, since it is in precisely those circumstances (a high likelihood of liability) that an institutional plaintiff will come forward and make an informed decision to select and retain counsel.

4(a)(3)(B)(iii)(II)(aa). Similarly, because, as a practical matter, putative lead plaintiffs select and retain counsel to assist in seeking lead plaintiff and lead counsel status, changes in circumstances may occur that render the original engagement terms inappropriate by the time lead plaintiff is selected.

However, even in the limited scenarios in which an auction approach is acceptable, I would urge the Task Force to consider carefully whether a court-conducted auction is superior to other alternatives. As I noted earlier, the 1985 Task Force was justifiably wary of involving District Judges too directly in the subjective processes of choosing plaintiffs' counsel and setting their fees. Instead it expressed a strong preference in favor of delegating that task (subject to court approval) to a special master or other ad hoc guardian of the class's interests. 1985 Task Force Report, 108 F.R.D. at 256. Indeed, because representative agents have far greater freedom than a District Judge to interview prospective counsel and consult with third parties as to the relative strengths and weaknesses of the candidates, a court-appointed agent is in a much better position to employ methods that are frequently used in the marketplace to select and retain counsel. After all, how many defendant corporations in a major securities class action would select their counsel solely on the basis of price and a firm resume?[16]

[16] Cf. 1985 Task Force Report, 108 F.R.D. at 256 (recommending that an attorney be appointed for the class in appropriate cases, who would be expected to have direct

In weighing the appropriateness of the auction methodology, the Task Force also would do well to ask another, even more significant (and not facetious) question: "In the event of an auction, which bidder would the *defendants* likely prefer to have the court select?" Assuming that the identity of the bidders (but not the bids themselves) were concealed from a given defendant, one can safely assume that in most cases a rational defendant, if forced to choose, would take its chances on whichever law firm submitted the *lowest* bid (on the theory that the best plaintiffs' lawyers logically would expect to command some premium for their superior abilities). If a defendant instinctively is likely to prefer to litigate against the lower bidding plaintiffs' law firms, what does that say about the wisdom of equating low auction bids with the best interests of class members? This paradigm is a further reminder that even in the few cases in which an auction truly can be expected to be superior to all other fee setting mechanisms, price is only one of many factors to be considered (and in some contexts may be among the least important factors).

Conclusion

Due, in part, to the work of the 1985 Task Force, the percentage-based approach to attorney fee awards has now been

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discussions with potential class counsel and "negotiate the [retention and fee] arrangement in the usual marketplace manner and submit the proposal for the court's approval").

widely embraced, and in my opinion has been admirably successful in aligning the interests of plaintiff classes and their counsel, while providing an easily understood, reasonably predictable, and market-based mechanism for determining fair and appropriate awards of attorneys fees across all types of common fund cases.

At best, the auction approach may offer an approach to fee-setting in some cases that will more closely link the fee awarded to "real world" market rates. However, the percentage approach already is well grounded in real-world experience concerning what typical market rates for contingent litigation in various substantive fields are, and for the reasons discussed above there can be no assurance in any particular case that the auction approach ultimately will result in fees that are any more fair, reasonable, or appropriate than what courts reasonably can be expected to award under the percentage approach. Indeed, there is much to suggest that the auction approach will produce a "race to the bottom" and introduce undesirable incentives that actually will weaken the alignment of class plaintiffs and class counsel. Beyond these concerns are the additional administrative burdens and costs imposed by the auction process.

Accordingly, I respectfully suggest the obvious. There is no "perfect" system of court supervised fee awards because fee setting is a human process, with all the pluses and minuses attendant thereto. Thus, in my view, and although "competitive bidding" may offer advantages to non-auction percentage fee

approaches in a limited range of cases, fee awards are best left to the discretion of District Judges operating with a "benchmark" and procedural guidelines provided by the Court of Appeals.