THIRD CIRCUIT TASK FORCE
ON SELECTION OF CLASS COUNSEL

STATEMENT OF MICHAEL D. FISHBEIN, ESQUIRE

The auction concept for appointment of class counsel is necessarily based on the assumption that such an auction follows an existing competitive model and, therefore, will result in higher quality services at a lower cost. It is my view that this assumption is wrong.

In the area of contingent legal services, competition produces little variability in the percentage contingent fee which counsel are willing to accept from clients. Absent a controlling statute or court rule, attorneys normally charge and clients normally agree to pay thirty to forty percent of their recovery as a contingent fee regardless of the location of the case, the experience of the law firm, the probable complexity, expense and duration of the litigation, or the intensity of competition for clients in a given matter. Our experience in reviewing literally thousands of private contingent fee contracts in connection with settlement distributions in both the *Diet Drug Litigation* (MDL 1203) and the *Orthopedic Bone Screw Products Liability Litigation* (MDL 1014) provides strong empirical support for this observation.

Why is this? Two reasons come to mind.

First, the enormous uncertainties of litigation make it impossible for plaintiffs' counsel to make an accurate judgment concerning the likelihood or potential magnitude of success in a given case at the point in time when they are asked to commit their resources to the litigation and to assume the economic risks of non-recovery. Even where the objective facts known to counsel at the outset of litigation make it appear as though a lawsuit is a "slam dunk," such cases will be frequently be unsuccessful because of unknown facts subsequently unearthed in discovery, unforeseen changes

in the existing science, changes and variations in the application of law, or even the peculiarities of a given judge or jury. Thus, from an economic standpoint, the risk of contingent litigation is a large one which justifies the attorney and client in sharing the benefits derived from that litigation to a significant degree.

Second, the role which is played by the skill, competence, experience and integrity of counsel in the calculus of contingent fee litigation can not be underestimated. It would do a client little good to pay a contingent fee of 10% if his or her attorney did not have the skill to generate a significant recovery. Similarly, a client would be ill served by a contingent fee of 15% if the attorney involved did not have the integrity to resist a cheap and early settlement. Thus, counsel tend to be selected based on reputation rather than on "price."

For both of these reasons, competition in the area of contingent legal services is based primarily on the abilities and reputation of counsel and not on discounting contingent fees.

The very reasons which have dissuaded the marketplace from adopting an "auctioned" contingent fee substantially less than one-third of recovery in private litigation argue against the adoption of a mechanism in which lead counsel or class counsel status is awarded by a court based upon a "bid" to provide such services for a relatively small percentage of the plaintiffs' aggregate recovery. Because such "auctions" necessarily produce a low contingent fee which may not be economically sufficient to compensate counsel for the services which may become necessary to steer the litigation through the dangerous shoals produced by unanticipated facts, unexpected applications of law, development of new legal principles, and the like, an auctioned fee does not create appropriate incentives to provide high quality legal services with the integrity and tenacity which class litigation demands.

In particular, I believe, the economic risks engendered by the fee auction create incentives for class counsel to settle early and cheap, or, failing that, to abandon the litigation if it becomes too tough or complicated to justify the auctioned fee. In addition, the auctioned fee creates disincentives for class counsel to work collegially with other attorneys who seek to participate in class representation. Because class litigation frequently involves a range of skills, knowledge and abilities in a variety of fields such as legal analysis and writing, trial skills, medicine, economics, and finance, and since most law firms do not have strengths in all of these areas, this disincentive tends to deprive the class of the amalgamation of skill and talent which would best serve the interests of the class members. Indeed, it is the possibility for such an amalgamation of talent which provides one of the justifications for consolidated or coordinated litigation. And, the auctioned fee does create an incentive for unscrupulous attorneys to collude with the defendants. In virtually every case we know of where the auction approach has been used, there are rumors that the successful bid was predicated on an undisclosed prior agreement with defendants concerning settlement. Regardless of whether these rumors ever have any validity, there is no question that they undermine confidence in the legal process.

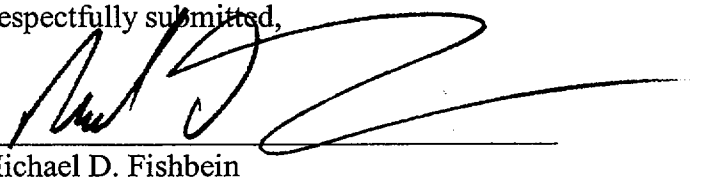
I believe that the interests of the justice system are far better served by appointing lead or class counsel based upon factors which the courts have traditionally used – an assessment of the experience, competence, and abilities of such counsel as they apply to the needs and interests of the plaintiffs in any given litigation.

With respect to the award of counsel fees, the courts should continue to use a percentage of the fund approach modeled on the economics of contingent compensation in private litigation.

Awarding a presumptive fee of twenty-five percent of the amount recovered by the class appropriately ties counsel's economic return to the risk undertaken and the result achieved.

If Bill Gates' compensation had been fixed by auction or tied to his "hourly rate," it is unlikely that he would be one of the richest men in the world. But it is equally true that the opportunity for an entrepreneurial return to Mr. Gates produced benefits in terms of productivity and economic growth which are of incalculable magnitude for society as a whole. So too, in a litigation system fraught with economic peril, the opportunity for an entrepreneurial return, in my view, has the best chance of producing the finest quality of representation. This can only serve to benefit the legal system as a whole.

Respectfully submitted,



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