

CLASS ACTION BLOG

Common Fund Settlement Attorney Fee Awards are Controlled by Common Fund Law Despite Statutory Fee Shifting Provisions.

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The Second Circuit addressed the family trust's objection to the fee awarded to lead class counsel in the *Fresno County* securities fraud class action case. The "novel issue" raised was whether "an attorney's fee is presumptively limited to the unenhanced lodestar fee" when the case is prosecuted for violations of "a statute with a fee shifting provision" even if the case was settled by "the creation of a common fund." The objector argued that class counsel could not get a fee larger than the "unenhanced lodestar fee" whereas the lead class counsel argued that the equitable principles usually employed when a common fund is created "permit the district court to award a fee that can be calculated using either the lodestar-fee method or a percentage-of-the-fund method."

The court stated that Second Circuit precedent supported its holding that "even if a case is brought pursuant to a fee-shifting statute, common-fund principles control fee awards authorized from a common fund, and a common-fund fee award may be calculated as the lodestar or as a percentage of the common fund." The panel recognized "the acute difference between assessing a fee award against a defendant, who reaps no benefit from an action brought against him, and requiring class members to compensate counsel for representation that enriches the class."

Based on its holding, the court ruled that the district judge properly awarded lead class counsel 25% of the settlement fund of \$10,900,000.00, plus expenses of \$133,565.28. The lead class counsel's actual fee award was \$2,725,000.00 plus interest. That fee award represented a 1.39 multiplier of the lodestar fee. In arriving at its holding, the Second Circuit relied on multiple decisions by the Supreme Court as well as opinions from the Second Circuit and its sister circuits.

The court was not persuaded by the objector's contention that a common fund fee would misalign the interests of class counsel and the interests of the class. Awarding a fee to class counsel from a common fund gives class counsel an "incentive to maximize the settlement payout for the class because a larger settlement yields a proportionally larger fee." Furthermore, the district court is always "required to review class settlements and class counsel's fees" when making a fee award. That review provides "an extra layer of security that class counsel will fairly and adequately represent the class." The Second Circuit pointed out that the district court judge retains the discretion to award either a lodestar fee with or without a multiplier or to award a percentage of the common fund. At all times the court has the power to determine the amount of any multiplier as well to determine the percentage of the fund. The court can also use a lodestar cross-check to determine the reasonableness of a percentage fee.

The *Fresno County* case helps clarify a district court's fee setting authority whenever the legal basis for the litigation is a statute with a fee shifting provision and the class action settlement establishes a common fund to benefit the class members. The Second Circuit is a high profile court often followed by other courts, a factor which heightens the importance of its ruling on this "novel issue."

Case Citation: *Fresno County Employees' Retirement Association v. Isaacson/Weaver Family Trust*