§ 3.13 Attorneys' Fees

(a) Attorneys' fees in class actions, whether by litigated judgment or by settlement, should be based on both the actual value of the judgment or settlement to the class and the value of cy pres awards satisfying the criteria of § 3.07.

(b) Subject to subsection (c), a percentage-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and the nonmonetary value of the judgment or settlement. The court may consider using the “lodestar” approach as a cross-check, particularly when the value of the judgment or settlement is uncertain.

(c) Other than its use as a cross-check, or its use in cases seeking solely injunctive or declaratory relief, the lodestar method should be limited to:

(1) situations in which fees will be awarded under a fee-shifting statute that requires the lodestar method, or

(2) cases in which the court makes a specific finding that the percentage method would be unfair or inapplicable based on the specific facts of the case.

(d) In appropriate cases, the court should consider defining the expected fee recovery as a percentage set early in the litigation rather than after the fact. When courts do so, they may, where appropriate, adjust the fees in exceptional cases where settlement is reached very early in the litigation or the level of recovery is extraordinary.

(e) In any litigated judgment or settlement in which monetary relief is awarded, a court should, absent special circumstances, require the parties to submit to the court a final accounting describing the amount and distribution of all benefits to class members, other beneficiaries, and counsel.

Comment:

a. Calculation based on actual value. Several courts and commentators have addressed attorneys' fees that are not tied to the actual value of claims by class members, i.e., payments and other relief going directly to class members. For instance, a pot of money may be set aside for claims with no realistic expectation that more than a small percentage of the fund will actually be claimed by class members, i.e., payments and other relief going directly to class members. Even if the unclaimed funds revert to the defendant, a number of courts have based fee awards on the total value of the fund rather than on the amount actually claimed by class members. In addition, at least some of the impetus toward expansive cy pres distributions has been a desire to enlarge the apparent recovery of the class. The Class Action Fairness Act of 2005 (“CAFA”) addressed this issue solely in
the context of coupon settlements by requiring that the fees requested by counsel be based on the actual value of redeemed coupons. Apart from coupon settlements, CAFA does not require that fees be based on the actual value of a settlement.

This Section addresses the issue globally, not just in the context of coupon settlements, and requires that fee awards be based on the actual value of the judgment or settlement to the class members. For cash judgments or settlements, the actual value is the value actually paid to class members or to third parties under an appropriate cy pres settlement. See § 3.07 (allowing proper cy pres payments to count in calculating attorneys' fees ensures that attorneys may recover sufficient fees even in “negative value” or small-claim cases). For judgments or settlements involving equitable relief, the value is the actual value of the relief to the class.

Determining the value of nonmonetary relief is difficult, and courts should avoid approaches that inflate or deflate the true value of such relief. For “coupon” settlements, the value is the actual value of those coupons actually redeemed by class members or distributed through a cy pres remedy pursuant to § 3.07. Based on the specific circumstances, the court may defer full fee determinations until the amounts actually paid to the class (directly or indirectly through cy pres) are ascertained. In addition, because cy pres payments (even those that comply with § 3.07) only indirectly benefit the class, the court need not give such payments the same full value for purposes of setting attorneys' fees as would be given to direct recoveries by the class.

Illustrations:

1. A settlement fund of $100 million is put aside to pay claims of consumers who purchased allegedly defective computers. After the period for making claims expires, $95 million of the fund remains, and under the settlement agreement this remaining sum reverts to Defendant. Fees should be based on a percentage of $5 million, not on a percentage of $100 million.

2. The settlement of claims involving defective computers provides in its entirety for one year of free telephone technical support for any class member. The cost to Defendant of providing this service is $10 million. Before the filing of the lawsuit, the company had already announced (and set aside funds for) this program of one year of free technical support for all purchasers, and it planned to implement the program regardless of whether any lawsuit was filed or settled. Such relief in the settlement cannot be used in evaluating the actual value of the settlement to the class.

3. The settlement of claims involving defective computers provides in its entirety that each of the 100,000 class members would receive a coupon worth $100 off the price of a new computer. Only 10,000 class members actually use the coupons. Attorneys' fees must be calculated based on the actual value of the settlement to the class, here, a maximum of $1 million.

b. Percentage versus lodestar approach. Although many courts in common-fund cases permit use of either a percentage-of-the-fund approach or a lodestar (number of hours multiplied by a reasonable hourly rate), most courts and commentators now believe that the percentage method is superior. Critics of the lodestar method note, for example, the difficulty in applying the method and cite the undesirable incentives created by that approach—i.e., a financial incentive to extend the litigation so that the attorneys can accrue additional hours (and thus, additional fees). Moreover, some courts and commentators have criticized the lodestar method because it gives counsel less of an incentive to maximize the recovery for the class.

A number of courts require or permit the lodestar method to be used as a cross-check against the percentage calculation, and this Section endorses that approach at the discretion of the trial court, particularly in cases in which there is uncertainty about the true value of the judgment or settlement. The lodestar method is also suitable in cases seeking solely nonmonetizable injunctive or declaratory relief or where the court determines that the percentage method would be unfair in a particular case.
As this Section recognizes, the percentage method may not be feasible when the value of the common fund is difficult to assess. The percentage method is also inappropriate in cases involving a fee-shifting statute that requires the lodestar method. In those circumstances, the court should use the lodestar method.

c. Setting the expected fee recovery. This Section recognizes the value of creating reasonable expectations by providing that courts should attempt to define the parameters of attorneys' fees early in the litigation. After that point, fees could be reduced only in exceptional circumstances, for example, if a settlement is a tag-along settlement, required less-than-expected work, or involved a much higher than anticipated level of recovery. Likewise, after the various parameters are defined, the court should increase fees only in unusual circumstances, such as when the litigation lasts longer than expected or is more costly than could reasonably have been anticipated.

Illustration:

4. Plaintiffs file a putative class action alleging that Defendant, a pharmaceutical company, withheld information that its arthritis medication caused a serious risk of complications during pregnancy. The class was estimated at approximately one million members, each of whom stood to recover substantial damages. The company announced that it recognized its wrongdoing and hoped to settle the case quickly. Because of the likelihood of a large settlement early in the litigation, the court would be justified in setting the expected fee percentage at less than the usual rate for other pharmaceutical class-action settlements in the jurisdiction. Should it subsequently turn out that Defendant refused to settle for several years, until plaintiffs had conducted years of expensive discovery and uncovered numerous “smoking gun” documents, the court may deem it appropriate to adjust the fee percentage upwards.

Reporters' Notes

Comment a. For cases upholding the calculation of fees based on the total fund, without regard to actual claims, see Waters v. Int'l Precious Metals Corp., 190 F.3d 1291, 1297 (11th Cir. 1999); Williams v. MGM-Pathe Commc'n's Co., 129 F.3d 1026, 1027 (9th Cir. 1997); Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 437 (2d Cir. 2007) (citing Waters and Williams with approval). See also Boeing Co. v. Van Gemert, 444 U.S. 472 (1980), which notes that “a proportionate share of the fees awarded to lawyers who represented the successful class may be assessed against the unclaimed portion of the fund created by a judgment.” Id. at 473. The Court reasoned that, in common-fund cases, “[a]lthough [the defendant] cannot be obliged to pay fees awarded to the class lawyers, its latent claim against unclaimed money in the judgment fund may not defeat each class member's equitable obligation to share the expenses of litigation.” Id. at 482.

For concerns raised by such cases, see Int'l Precious Metals Corp. v. Waters, 530 U.S. 1223, 1224 (2000) (statement of Justice O'Connor) (noting that the Court in Boeing, supra, which upheld a fee award in a nonsettlement context based on the total amount available to the class, did not “address whether there must at least be some rational connection between the fee award and the amount of the actual distribution to the class”); Fears v. Wilhelmina Model Agency, Inc., No. 02-Civ-4911(HB), 2005 WL 1041134 (S.D.N.Y. May 5, 2005), rev'd in relevant part sub nom. Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007). See also Strong v. BellSouth Telecommns., Inc., 137 F.3d 844, 852 (5th Cir. 1998) (district court did not abuse its discretion in awarding fees based on actual payout rather than on total fund).

The little commentary that exists on this issue is split. One article notes that “[a]lthough calculating attorney's fees … as a percentage of the total fund carries the risks of encouraging collusion and frivolous lawsuits,” that approach “creates a needed incentive for class counsel to bring small claims consumer class actions.” Hailyn Chen, Comment, Attorneys' Fees and Reversionary Fund Settlements in Small Claims Consumer Class Actions, 50 UCLA L. Rev. 879, 902 (2003). But the incentive for small-claims class actions can still be offered by permitting cy pres settlements, as permitted by § 3.07. For criticism of
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Basing fees on the entire fund rather than the amount claimed, see Manual for Complex Litigation (Fourth) § 21.71, at 337 (2004) (fees should be based on actual claims).


For cases giving courts discretion to utilize either the percentage method or the lodestar method, see, e.g., Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000); In re Thirteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995). For outlier state-court cases expressing a preference for the lodestar method over the common-fund method, see, e.g., Kuhnlein v. Dep't of Revenue, 662 So.2d 309, 312 ( Fla. 1995).

With respect to the use of the lodestar method as a cross-check, courts have recognized that “the lodestar may provide a useful perspective on the reasonableness of a given percentage award.” Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1050 (9th Cir. 2002). See also In re Cendant Corp. Litig., 264 F.3d 201, 285 (3d Cir. 2001) (discussing cases using lodestar as cross-check).

For a survey of the various approaches taken by courts, including a discussion of cases using the lodestar as a cross-check, see Vaughan R. Walker & Ben Horwich, The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About “Reasonable Percentage” Fees in Common Fund Cases, 18 Geo. J. Legal Ethics 1453, 1455-1464 (2005).


For a discussion of the need for the lodestar approach when the fund is difficult to value or involves a fee-shifting statute, see Manual for Complex Litigation (Fourth) § 14.121, at 190 (2004).

Comment c. For authority for the concept of setting attorneys'-fee parameters early in a case, see Silver, Due Process and the Lodestar Method, 74 Tul. L. Rev. at 1836 n.126 (citing unpublished Texas state trial-court cases).

Effect on current law. Subsection (a) rejects cases that uphold awards of attorneys' fees based on the total fund regardless of the actual value of the judgment or settlement to the claimants. Subsections (b) and (c) reject cases that prefer the lodestar approach to the percentage-of-the-fund approach or that allow a choice between the two methods. Subsections (d) and (e) are within a court's discretion and require no change of law.

Case Citations - by Jurisdiction

C.A.3,
N.D.Ill.
S.D.Tex.
C.A.3, 2013. Sec. and com. (a) quot. in sup. In consolidated antitrust actions by consumers against baby product retailers and manufacturers, an unnamed class member objected to a settlement approved by the district court, alleging, among other things, that the district court should have discounted the value of the settlement's *cy pres* distribution for purposes of calculating attorney's fees, which were awarded on a percentage-of-recovery basis. In vacating the settlement and the attorney's fee award, the court confirmed that the level of direct benefit provided to the class had to be considered in calculating attorney's fees, and, although the amount that defendants had paid into the settlement fund had the potential to compensate class members significantly, the distribution of the funds approved by the district court arguably overcompensated class counsel at the expense of the class. In re Baby Products Antitrust Litigation, 708 F.3d 163, 179.

N.D.Ill. 2011. Cit. in sup. Customer filed a class action against bank, alleging that it improperly “resequenced” customers’ debit card purchases and ATM withdrawals in order to maximize overdraft fees for insufficient funds. This court approved a settlement reached by the parties, which provided for the creation of a $9,500,000 settlement fund from which class members could receive reimbursement for overdraft charges, as well as class counsel's request for attorney's fees in the amount of $3,166,666, or one-third of the fund. The court concluded that the fee award was reasonable, noting that it was much less than one-third of the class's total recovery once the value of prospective relief was taken into account; among other things, the settlement also provided for nonmonetary consideration, including bank’s agreement to modify its business practices to process future charges chronologically and to train its call center operators to waive certain overdraft fees for good cause. Schulte v. Fifth Third Bank, 805 F.Supp.2d 560, 599.

S.D.Tex. 2012. Subsecs. (b) and (c) cit. in ftn., com. (a) quot. in sup. Payment-card holders filed a consumer class action against payment-card processor, after defendant disclosed that hackers had breached its computers systems and obtained confidential payment-card information for 130 million consumers. Granting plaintiffs' motion to certify a settlement class, this court held, among other things, that, while the proposed *cy pres* payment under the settlement was proper, the amount of the payment had to be discounted by 50% in valuing the benefit conferred to the class for purposes of calculating attorney's fees; the class benefit conferred by a *cy pres* payment was indirect and attenuated, which made it inappropriate to value such payments on a dollar-for-dollar basis. In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litigation, 851 F.Supp.2d 1040, 1073, 1077.