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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Class Action Attorney Fee Applications Under Closer Scrutiny

By
Edward M. Spiro
And
Judith L. Mogul

Relying on his 20 years on the bench and 24 years in private practice, U.S. Southern District Judge Lewis A. Kaplan issued two decisions this year commenting on the lack of effective adversarial testing of proposed fee applications following securities class action settlements, and stressing the fiduciary obligation of the court to exercise stewardship over settlement funds in that circumstance. In that context, without questioning the good faith of the particular firms involved, he reduced the proposed fee awards and expressed concern about systemic inefficiencies in the handling of class actions. Kaplan's thoughtful approach to the fee awards in these two decisions is likely to influence other judges in the Southern District of New York, and beyond, and may well reinforce the trend of shrinking fee awards of which Judge Kaplan himself makes note.

'In re Weatherford International Securities Litigation.' Judge Kaplan's first decision, issued in January in *In re Weatherford International Securities Litigation*,[1] is a brief, two-page decision considering a fee application in connection with a $52.5 million settlement of that securities class action. Kaplan expressed dissatisfaction with both the percent-of-recovery model, which he noted "many plaintiffs' counsel relentlessly urge upon this and other courts," and the lodestar approach (often used as a check on the percentage of the fund method) in which the number of hours reasonably expended times an hourly rate, is multiplied by a factor reflecting the complexity and risk associated with the case and the performance of the attorneys.[2]

The lead counsel's firm in *Weatherford* sought a fee of just over $14 million from the $52.5 million settlement fund. Kaplan expressed serious "misgivings" about the requested fee based on his experience on the bench as well as in private practice, including the litigation of securities class actions. In particular, while noting that he did not doubt that the firm had in fact expended the 30,000 hours of time which it claimed as the base for its lodestar, he did doubt that the case, if "handled efficiently and especially for a paying client, would have justified an expenditure of hours that great." Notably, he also found unreasonable that the firm had marked up the hourly rate for staff attorneys who conducted document review to more than 600 percent of their direct cost to the firm.[3]

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Judge Kaplan also briefly noted drawbacks with the percent-of-recovery model, including that it encourages premature settlements, and serves the interests of the lawyers but "perhaps not those of the classes they represent."[4]

Kaplan stressed that because most securities class actions are settled, with the fee award coming out of the settlement fund, defendants and their counsel are generally unconcerned with the amount of plaintiffs' attorney fees, leaving courts to approve fee applications without effective adversarial testing. He observed that:

> [i]n consequence, courts in the position in which this one finds itself are left pretty much at sea, aided however by the principles that (1) the Court is a fiduciary for the class members who ultimately pay any fee, (2) the class lawyers' interests at this stage diverge sharply from those of the class members, (3) it is the lawyers who bear the burden of justifying the size of the award they seek at their clients' expense, and (4) the risk of non-persuasion is with those lawyers.[5]

Based on these considerations, Kaplan adjusted downward both the hours and the staff attorney hourly rates to reduce the requested lodestar from $14 million to $9.45 million, and awarded that amount, without any multiplier.[6]

'In re IndyMac Mortgage-Backed Securities Litigation.' Building on the foundation laid in *Weatherford*, Judge Kaplan elaborated on his analysis of the challenges associated with deciding attorney fee applications in his subsequent decision in *In re IndyMac Mortgage-Backed Securities Litigation*.[7] The settlement fund in that case totaled $346 million, which Kaplan recognized as the second largest settlement in a mortgage-backed securities (MBS) case. Eight separate firms requested an aggregate fee award of $44.89 million, totaling approximately 13 percent of the settlement fund.

Judge Kaplan first considered the reasonableness of the fee request as a percentage of the fund. He rejected counsels' argument, based on fee awards ranging from 17 percent to 20 percent in five other MBS class actions, that 13 percent was "modest and very much on the low end" of awards by other courts in similar cases. Commenting that comparisons with other cases can be useful, he found that in this case, most of the decisions relied on for comparison lacked any substantive analysis. He also objected to the non-random sample, commenting that the sample presented in this case "amounts to no more than looking out over a crowd and picking out one's friends."[8]

Kaplan then considered three empirical studies, all of which established that fee awards tend to decrease on a percentage basis as total recov-

EDWARD M. SPIRO *and* JUDITH L. MOGUL *are principals of Morvillo Abramowitz Grand Iason & Anello P.C., both concentrating in commercial litigation and co-authors of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson West 2014).*

eries increase. Those studies included a 2014 report noting that the median fee award in securities cases with recoveries between $100 million and $500 million between 1996 and 2013 was 22.2 percent of the total recovery (with percentages shrinking in recent years);[9] a smaller 2010 study of cases settled in 2006 and 2007 that found for eight cases settled in the range of $250-$500 million, mean fees were 17.8 percent and median fees were 19.5 percent;[10] and another larger 2010 study of settlements between 1993 and 2008, finding that for cases settling for amounts over $175 million, the mean and median awards were 12 percent and 10.2 percent respectively.[11]

Kaplan concluded that in this case a fee award of 8 percent to 10 percent of the settlement fund was appropriate, relying in part on the latter study, to which, he noted, other courts in the Southern District have looked for guidance. "More fundamentally," he held, the 13 percent proposed fee award was "simply too high."

Judge Kaplan countered counsels' assertion that the litigation risks were high in the IndyMac case noting first that securities cases almost always settle, making the risk of total non-recovery almost non-existent, and second, that where, as in this case, the litigation follows a government investigation, the risks are less than in other circumstances.

Judge Kaplan supported that conclusion and his decision to award a fee in the 8 percent-to-10 percent range with reference to his own experience, to the six case-specific factors that the U.S. Court of Appeals for the Second Circuit directed courts assessing fee applications to consider in *Goldberger v. Integrated Resources*,[12] and the lodestar "cross check" based on the work actually performed by the plaintiffs' firms.

As to his own experience, Kaplan referred not only to his general experience, but specifically to the procedure he employed in selecting lead counsel in a non-securities class action relating to price-fixing in the auction industry. In that litigation—*In re Auction House Antitrust Litigation*[13]—Judge Kaplan constructed an auction-like process for selecting lead counsel by fixing compensation for lead counsel at 25 percent over "X," with the class receiving any amounts under "X" without deductions for fees. Each firm vying for lead counsel status submitted bids for what it would accept as "X." Judge Kaplan noted that that "competitive environment," yielded a fee of 5.2 percent of the recovery—a fact he found interesting, notwithstanding the differences between the two cases at issue.[14]

Judge Kaplan next analyzed the six Goldberger factors: (1) counsels' time and labor; (2) the magnitude and complexity of the litigation; (3) the risk of the litigation; (4) the quality of the representation; (5) the requested fee in relation to the settlement; and (6) public policy concerns. With respect to counsel's time and labor, he acknowledged that the more than 55,000 hours worked indicated that "much effort was expended in litigating this case," but questioned whether that expenditure was reasonable.

Judge Kaplan agreed that the case was indeed complex, involving 50 offerings, based on 74,000 loans, and 465 certificates each of which arguably might have required expert proof. He countered counsels' assertion that the litigation risks were high in this case noting first that securities cases almost always settle, making the risk of total non-recovery almost non-existent, and second, that where, as in this case, the litigation follows a government investigation, the risks are less than in other circumstances.

Kaplan acknowledged that class counsel had litigated the case effectively, and achieved the second largest MBS settlement on record, although he observed that "the significance of these facts is not as strong as counsel would have it." In assessing the requested fee in relation to the settlement amount, he discounted counsel's assertion that lead plaintiffs had reviewed the fee and found it reasonable, noting that he had already concluded that the 13 percent award was too high. Finally, he rejected counsel's proffered public policy concern that too low an award will discourage lawyers from taking on class representations. Noting that he intended to award counsel less than requested, but still in excess of their lodestar amount, he quipped that "if such an award 'amounts to punishment…there will be many attempts to self-inflict similar punishment in future cases.'"[15]

Finally, Judge Kaplan performed a cross-check of his proposed fee award through analysis of counsels' proposed lodestar. He found the proposed hourly rates upon which the lodestar was built ($210-$420 for associates and $410-$835 for partners) were reasonable, particularly in the absence of any objections. He concluded, however, that the number of hours expended was not reasonable, focusing primarily on the amount of time spent on discovery.

Kaplan found that the more than 32,000 hours the attorneys reported having spent on discovery was "eyebrow-raising," and that particularly in a case where only 15 depositions were taken, that amount of time on discovery "border[ed] on astounding." He remained unpersuaded by the argument that much of that time was spent reviewing and analyzing over 11 million documents, noting that many of the documents were likely duplicates and that relatively few of the offering documents and other voluminous materials "contained much if anything that mattered to the case."[16]

Judge Kaplan concluded that "having conducted a conscientious and detailed inquiry into whether such hours were expended usefully and reasonably, and bearing in mind plaintiffs' counsels' burden of persuasion," he could not "conclude that an efficient attorney would have engaged in similar time expenditures."[17] Accordingly, Kaplan reduced the portion of each firm's lodestar attributed to discovery by 25 percent, resulting in a revised lodestar of $21.42 million. Holding that some multiplier was in order, he declined to grant the aggregate multiplier of 1.8 requested by counsel, reducing each firm's requested multiplier over 1 by 60 percent, for a blended multiplier of 1.33. The aggregate adjusted fee award of $28.48 million was 8.2 percent of the total recovery, and represented 116 percent of counsels' original lodestar and a blended hourly rate of $514.[18]

Acknowledging that his adjustments to the fee proposal represented "rough justice" rather than "auditing perfection," Judge Kaplan closed with the assurance that nothing in his decision was "intended to impugn the lawyers who toiled on this case."[19] His rigorous examination of the components of the fee proposal in both *Weatherford* and *IndyMac* suggest that fee awards, particularly in cases involving large settlement funds, may be subject to increasing scrutiny even when unopposed.

1. 2015 WL 127847 (S.D.N.Y. Jan. 5, 2015).
2. See *In re IndyMac Mortgage-Backed Sec. Litig.*, 2013 WL 1315147 (S.D.N.Y. March 24, 2015) (Kaplan, J.).
3. 2013 WL 127847, at *1.
4. Id. at *2.
5. Id. at *1.
6. Id. at *2.
7. 2013 WL 1315147.
8. Id. at *3.
9. Id. at *3 (citing Renzo Comoli & Svetlana Starykh, NERA Economic Consulting, Recent Trends in Securities Class Action Litigation 2013 Full-Year Review (2014).
10. Id. at *3 (citing Brian T. Fitzpatrick, "An Empirical Study of Class Action Settlements and Their Fee Awards," 7 J. Empirical Legal Studies 811 (2010)).
11. Id. at *3 (citing Theodore Eisenberg and Geoffrey P. Miller, "Attorney Fees and Expenses in Class Action Settlements 1993-2008," 7 J. Empirical Legal Studies 248 (2010)).
12. 209 F.3d 43 (2d Cir. 2000).
13. 197 F.R.D. 71 (S.D.N.Y. 2000).
14. Id. at *7, n. 41.
15. 2013 WL 1315147, at *5 (quoting *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 525 (E.D.N.Y. 2003) (Gleeson, J.)).
16. Id. at *5.
17. 2013 WL 1315147, at *5 (internal quotations and citations omitted).
18. Id. at *2.
19. Id. at *6 (internal quotations and citations omitted).

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