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Ethical Risks in Class Litigation: Locating and Communicating With Class Members, Settlements, and More

Strategies for Plaintiff and Defense Counsel to Avoid Ethics Violations and Malpractice Liability

TUESDAY, FEBRUARY 10, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Ethical Issues Raised By Contacts With Class Members

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Overview

- Ethical rules
- First Amendment considerations
- Pre-certification
- Post-certification

Ethical Rules

- Defense counsel contact limited by Model Rule 4.2 if potential class member is represented by counsel.
  - "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order".

    – See also Model Code of Prof'l Responsibility Section EC 7-18 ("[A] lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person").

Ethical Rules

- Both plaintiffs' and defense counsel contact limited by Model Rule 4.3 if potential class member is not represented by counsel.
  - "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client".

Ethical Rules

- Plaintiffs' counsel contact limited by Model Rule 7.3(a) if potential class member is not represented by counsel.
  - "A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (i) is a lawyer; or (ii) has a family, close personal, or prior professional relationship with the lawyer".
    - See also Model Code of Prof'l Responsibility Section EC 2-4 ("A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter").
- Plaintiffs' counsel contact also limited by Model Rule 7.3(c).
  - Permissible communications must include the words "Advertising Material" on the outside of the envelope or at the beginning and end of any electronic communication.
- Rule 7.3 does not limit contact with potential class members as witnesses.

First Amendment Considerations

- Only one U.S. Supreme Court case – *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981).
  - – Court rejected district court's ban on communications with potential class members without court approval.
  - – Such restrictions only available after case-by-case factual findings.
    - See also *Coles v. Marsh*, 529 F.2d 186, 189 (3d Cir. 1977).
      - – "[T]o the extent that the district court is empowered . . . To restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise that power without a specific showing by the moving party of the particular abuses by which it is threatened."

First Amendment Considerations

- If restrictions are appropriate:

  – Court should issue "[a] carefully drawn order that limits speech as little as possible" *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 (1981).

  – "District court must find that . . . the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties". Id. at 102 (quoting *Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir. 1977)).

Pre-Certification

Pre-Certification

- Majority rule – no attorney-client relationship exists until class is certified.

  – See, e.g., *Hammond v. Junction City*, 167 F. Supp.2d 1271 (D. Kan. 2001) (“It is fairly well-settled that prior to class certification, no attorney-client relationship exists between class counsel and putative class members”).

- “A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired.” ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-445 (2007) (“ABA Opinion”).

- “Most judges are reluctant to restrict communications between the parties or their counsel and potential class members, except when necessary to prevent serious misconduct.” Manual for Complex Litigation, Fourth § 21.12.
- “As is its right, each side sent a communication to the class members.” *EEOC v. Mitsubishi Motor Mfg. of Am.*, 102 F.3d 869 (7th Cir. 1996) (citing *Gulf Oil*).

Exceptions to Majority Rule

- *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001) (Bartle, J.): “The ‘truly representative’ nature of a class action suit affords its putative members certain rights and protections including, we believe, the protections contained in Rule 4.2.”
- N.D. Ga. Local Rule 23.1(c): “[N]either the parties nor their counsel shall initiate communications with putative class members regarding the substance of the lawsuit until counsel presents the required report to the court.”

Concerns About Defense Counsel Pre-Certification Contacts With Absent Class Members

- Coercion
- Misrepresentations
- Interference with Litigation

Pre-Certification – Ongoing Relationships

- Some courts have restricted contact with potential class members if the contact was potentially coercive.
  - See, e.g., *Ralph Oldsmobile, Inc. v. Gen. Motors Corp*., 2001 WL 1035132, at *4 (S.D.N.Y. Sept. 7, 2001) (defendant required to place a notice of pending class action in materials sent to franchisees because the materials required settlement of potential class claims and franchisees' businesses depended on GM).

Pre-Certification – Ongoing Relationships

- Some courts have limited communications with potential class members who are current employees based on "inherent coercion".
  - See, e.g., *Abdallah v. Coca-Cola Co.,* 186 F.R.D. 672 (N.D. Ga. 1999).
- But employers generally allowed to communicate settlement offers to employees who are potential class members.
  - See, e.g., *Bublitz v. E.I. DuPont de Nemours & Co.*, 196 F.R.D. 545 (D. Iowa 2000).

Pre-Certification – Litigation-Related

- Courts have allowed defendants to enter into business arrangements with potential class members, even if the proposed business arrangements:
  - Included waiver of the potential plaintiffs' claims; and
  - Had likely been offered as a result of the pending lawsuit.
    - See, e.g., *Jenifer v. Solid Waste Auth*., No. 98-270, 1999 WL 117762 (D. Del. Feb. 25, 1999).

Pre-Certification – Litigation-Related

- Courts have allowed defendants to repurchase stock from potential class members, even if defendant's program was designed to defeat the class action.
  - See, e.g., *Nesenoff v. Muten*, 67 F.R.D. 500, 502-03 (E.D.N.Y. 1974).
    - Court noted that it was not obligated to protect plaintiffs' proposed class action.

Pre-Certification – Litigation-Related

- Courts have not allowed defendants to contact potential class members if communications seek to interfere with pending litigation.
  - See, e.g., *In re Currency Conversion Fee Antitrust Litig*., 224 F.R.D. 555, 570 (S.D.N.Y. 2004).
    - Defendant credit card company attempted to modify its cardholder agreements after class action was filed.
    - Modification would have required potential class members to arbitrate their claims.

Pre-Certification - Settlement

- Courts have generally allowed defense counsel to contact potential class members for settlement purposes.

  – See, e.g., *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999) (before certification, defendant may communicate with absent class members to negotiate settlement).

  – See also *Weight Watchers of Phila., Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770 (2d Cir. 1972) (no legal basis for prohibiting defendants from communicating with absent class members to negotiate settlement before certification).

Camilotes: Full disclosure with no coercion or inaccuracies.

Camilotes v. Resurrection Health Care Corp., No. 10 C 366, 2012 U.S. Dist. LEXIS 8731 (N.D. Ill. Jan. 25, 2012).

- Project assistants at defendant hospitals' law firm interviewed nurses who had not yet opted out of an FLSA class action.
- Before each interview, the project assistant read the following statement:

My name is [] and I am a project assistant at the Chicago law firm of Vedder Price P.C. My firm is representing [insert hospital] in a lawsuit filed by some current and former nurses who claim they were not paid all wages that were due [sic] them. These nurses are seeking to bring their claims on behalf of all nurses who worked at the hospitals during the last [five] years, which includes you.

To help us in defending this case, I'd like to ask you some questions about your job and how your hours of work are recorded and paid.

Before we begin, have you have [sic] been contacted by any lawyer about this case? **[If so, did you agree to be represented by counsel?] [Note - if they talked to counsel and are represented by counsel, END the conversation.] [DO NOT ASK WHAT THEY SPOKE ABOUT]**.

Please understand that you don't have to speak with me or answer any of my questions. You can leave right now if you wish to. Or at any time while we're talking, you can stop the interview and leave. Your participation is completely voluntary.

Also, please understand that your job will not be affected in any way because you decide to talk with me, or not to talk with me. The Hospital will not give you any benefits or take any action against you. The Hospital will not do anything to affect your job, either favorably or unfavorably, because of any answers you give to my questions.

Do you understand what I have just explained? Do you have any questions about what I have just told you? Is it all right with you if we go ahead with the interview?

Camilotes: Full disclosure with no coercion or inaccuracies.

The district court held that this preliminary statement ensured that the communication was not coercive or misleading.

- "This is an accurate representation of the lawsuit." Id. at *22.
- By stating that they wanted to "help [the hospitals] defend the case," the interviewers "made it clear that their statements during the interview could be used against the plaintiffs." Id.

Post-Certification

Post-Certification

- Are plaintiffs represented by counsel after certification but before end of opt-out period?
  - – ABA Formal Opinion 07-745 says no.
  - – Some courts have said defense counsel must treat potential class members as represented individuals during opt-out period.
    - See, e.g., *Gainey v. Occidental Land Research*, 186 Cal. App. 3d 1051 (1986).
    - See also *Impervious Paint Indus. v. Ashland Oil*, 508 F. Supp. 720 (W.D. Ky. 1981).

Post-Certification

- Ongoing relationships
- Litigation-related
- Settlement

Post-Certification – Ongoing Relationships

- Defendants may communicate with employee class member in the ordinary course of business if the communications do not relate to the litigation.
  - See William B. Rubenstein, Newberg on Class Actions § 9.9 (Database Updated 2014).

Post-Certification – Ongoing Relationships

- Courts have noted that defendants should be allowed to communicate with class members in the ordinary course of business.
  - See, e.g., *In re Winchell's Donut Houses, L.P.*, 1988 WL 135503, at *1 Del. Ch. Ct. 1998).
    - "Particularly where the class is comprised of persons with whom the defendant has an ongoing commercial relationship, it would seem distinctly ill-advised to attempt to require the defendant to deal with what may be an important aspect of a commercial relationship only through the channel of a self-appointed class action plaintiff."

Post-Certification – Ongoing Relationships

- Courts have not allowed communications with customers if the communications seek to interfere with pending litigation.
  - – See, e.g., *Kleiner v. First Nat'l Bank of Atl.*, 751 F.2d 1193, 1197-99 (11th Cir. 1985).
    - Defendant bank called customer class members and provided misleading information about the litigation in order to secure opt-outs.

Post-Certification – Litigation-Related

- Many courts have not allowed communications with class members related to the litigation after certification.
  - See, e.g., *Erhardt v. Prudential Group, Inc.,* 629 F.2d 843 (2d Cir. 1980).
    - Defendant sent letters warning class members of the costs of suit and urging them not to participate.
  - See also *Haffer v. Temple Univ.*, 115 F.R.D. 506 (E.D. Pa. 1987).
    - Defendant communicated orally and in writing with class members and urged them not to meet with class counsel.
  - *Impervious Paint Indus., Inc. v. Ashland Oil*, 508 F. Supp. 720, 723-24 (W.D. Ky. 1981).
    - Defendants urged plaintiffs to opt out of class after certification.

Post-Certification - Settlement

- Defendants can only communicate post-certification through plaintiffs' counsel.
  - See William B. Rubenstein, Newberg on Class Actions § 9.9 (Database Updated 2014) ("[After class certification] absent class members are … 'represented parties' and ethics rules prohibit opposing counsel from contacting them directly.")
- This restriction includes settlement offers.

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The Use of *Cy Pres* Awards in Class Actions and Their Ethical Implications

Strafford Webinar,
February 10, 2015

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Cy Pres

- Shorthand for “cy pre’s comme possible”--French for “as near as possible.”

- Originated in trusts & estates law to save testamentary gifts that otherwise would fail because their intended use is no longer possible.

- Courts would permit the gift to be used for another purpose as close as possible to the gift's intended purpose.

Cy Pres in Class Actions

Two scenarios:

1) Distribution to class members is infeasible

   – *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672 (7th Cir. 2013) (reversing district court's decertification of class, noting that small stakes should not prohibit certification and that *cy pres* remedy "may be the only one that makes sense" in such a case).

2) Residual class settlement funds

Ethical Considerations

- *Cy pres* distributions present a potential conflict of interest between class counsel and their clients because the inclusion of a cy pres distribution may increase a settlement fund, and with it, attorneys' fees, without increasing the direct benefit to the class. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013).

Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012)

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- Plaintiffs sued Facebook over "Beacon."
- Settlement fund totaled $9.5 million, including $3 million in costs & attorney's fees.
- Remaining $6.5 million earmarked for a new charity organization called the Digital Trust Foundation ("DTF"), whose mission was to "fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats."
- Facebook's Director of Public Policy was one of three DTF board members.

Lane v. Facebook, Inc.

Ninth Circuit:

- **“**The *cy pres* remedy the settling parties here have devised bears a direct and substantial nexus to the interests of absent class members and thus properly provides for the ‘next best distribution’ to the class.”

- Fact that DTF was a new entity and had “no substantial record of service” was not fatal, since **“**DTF's Articles of Incorporation tell us exactly how funds will be used[.]”

- Fact that Facebook’s Director of Public Policy sat on DTF’s Board of Directors was the “unremarkable result of the parties' give-and-take negotiations.”

Lane v. Facebook, Inc.

- Ninth Circuit dissent from denial of rehearing:
  - "That the DTF is committed to funding 'programs' regarding 'critical issues' says *absolutely nothing* about whether class members will truly benefit from this settlement; it simply promises that DTF will do some 'stuff' regarding some more 'critical stuff.'"
  - "[A]n appropriate *cy pres* recipient must be dedicated to protecting consumers from the precise wrongful conduct about which plaintiffs complain."

Marek v. Lane, 134 S. Ct. 8 (2013)

Chief Justice Roberts wrote a Statement on the denial of the petition for certiorari:

- "I agree with this Court's decision to deny the petition for certiorari."
- "Granting review of this case might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on."
- "In a suitable case, this Court may need to clarify the limits on the use of such remedies."

Pearson v. NBTY, Inc., No. 2014 WL 6466128 (7th Cir. Nov. 19, 2014) (Posner, J.)

- Class action stemming from alleged false claims regarding dietary supplements designed to help people with joint disorders.
- Plaintiffs brought six separate lawsuits under various states' consumer protection acts
- Class counsel in all six cases negotiated a nationwide settlement and submitted it to the district court for approval.

Pearson v. NBTY, Inc.

- The District Court approved the settlement with modifications.
- Under the approved settlement, defendants would pay a total of $5.63 million, including:
  - $2.1 million in *attorneys' fees and expenses*;
  - $1.5 million in *notice and administration costs*;
  - $1.13 million to the *Orthopedic Research and Education Foundation*;
  - $895,284 to the 30,251 *class members* who submitted claims.
- Absent class members and class counsel appealed.

Pearson v. NBTY, Inc.

On Appeal to the 7th Circuit:

- Judge Posner rejected the settlement and remanded.
- District Court "is a fiduciary of the class"
  - The settlement violated that duty because the fees awarded to class counsel ($1.9m) were excessive relative to the payments to the class ($900k).
- Judge Posner rejected the *cy pres* award:
  - Limited to funds that can't feasibly awarded to the class.
  - Only 25% of all class members submitted claims.
  - The claims process should have been altered to reach more class members before funds were given away pursuant to cy pres.

In re BankAmerica Corp. Sec. Litig., No. 13-2620, 2015 WL 110334 (8th Cir. Jan. 8, 2015)

- Arose out of 1998 merger of NationsBank and BankAmerica.
- Shareholders filed numerous class actions alleging state and federal securities violations.
- Cases were consolidated.

In re BankAmerica Corp. Sec. Litig.

- District Court approved $490m settlement.
- There were multiple distributions to class members.
- Eventually class counsel moved to terminate the litigation and give the remaining funds to three local charities chosen by class counsel.
- District Court approved *cy pres* distribution to the Legal Services of Eastern Missouri.
- Shareholder appealed.

In re BankAmerica Corp. Sec. Litig.

- The Eighth Circuit reversed the *cy pres* award.
- The court cited numerous decisions from other circuits and Roberts' Statement in *Lane* criticizing *cy pres* awards.
- The court relied heavily on ALI principles.

In re BankAmerica Corp. Sec. Litig.

The court held that *cy pres* awards are only appropriate in two situations:

1. Further distributions not feasible.

2. Class members already fully compensated and extra funds would provide a windfall.

In re BankAmerica Corp. Sec. Litig.

1. Feasibility

- Additional distributions were feasible:
  - Could locate additional class members
  - Claims administrator offered to distribute free of charge
  - Primary inquiry here should be cost of distribution versus benefit to the class
- Rejected argument that distribution would only benefit large institutional investors who were “less worthy” than a charity.

In re BankAmerica Corp. Sec. Litig.

2. Fully Satisfied

- Class members who received full amount under settlement distribution were not "fully compensated" for their harm.
- Class members generally only get a percentage of their loss repaid pursuant to settlement agreements.

In re BankAmerica Corp. Sec. Litig.

Additional Findings

- District Court is not bound by language of settlement agreement.
- Class counsel was required to provide class notice of motion for *cy pres* distribution.
- *Cy pres* recipient must be “next best” recipient after the class.

ALI Principles - § 3.07 Cy Pres Settlements

The court must apply the following criteria in determining whether a cy pres award is appropriate:

a) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members.

b) If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

c) If the court finds that individual distributions are not viable based upon the criteria set forth in subsections (a) and (b), the settlement may utilize a cy pres approach. **The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class**. If, and only if, no recipient whose interests reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class.

Bigger Issue: Is Class Certification Appropriate When Class Member Recovery Not Feasible?

- Judge Posner reasons that *cy pres* awards are the right vehicle when it's not feasible to make distributions to the class. *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672 (7th Cir. 2013).
- Or should class not be certified if members are getting no recovery?

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Ethical Risks in Class Litigation:

An Introduction to Attorney Fee Awards in the Class Context

Strafford Webinar

February 10, 2015

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Attorneys at Law

The American Rule

- **The attorney for the prevailing party is ordinarily not entitled to collect a reasonable attorney's fee from the loser.**

Alyeska Pipeline Service Co. v. Wilderness Society, 421 US 240, 247 (1975)

Rule 23 Directs District Court Scrutiny of Class Counsel's Fee Awards

Fed R. Civ. P. 23(h) Attorney's Fees and Nontaxable Costs.

In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions.

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge.

Common-Fund Theory to Award Attorneys' Fees

- **"[W]here a fund is established for the benefit of a group, that fund will be used to pay attorney's fees that benefit the group as a whole."**

Bd. Of Trs. Of the City Pension Fund for Firefighters and Police Officers in the City of Tampa v. Parker, 113 So.3d 64, 68 (Fla. 2d. DCA 2013), *rev. granted*, 337 So. 3d 1021 (Fla. 2013).

Compensation for Common Fund Creation

- **A "lawyer who recovers a common fund … is entitled to a reasonable attorney's fee from the fund as a whole."**

  - *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)

Methods for Determining Reasonableness of Attorneys' Fee Award

- **Lodestar** – multiplication of reasonable hours expended on the litigation by an adjusted reasonable hourly rate;
- **Percentage** – attorney compensation is tied to a percentage of the class recovery; and
- **Blended** – a combination of lodestar and percentage methods: a percentage is selected and cross checked for reasonableness by applying the lodestar method.

The Lodestar Method of Attorney Fee Calculation

- **Reasonable number of hours expended on the litigation by those seeking common benefit fees …**

  Multiplied by …

- **an appropriate hourly rate.**

Establishing the Appropriate Hourly Rate

- **Ascertain the rate charged for comparable work by experienced attorneys in the region.**

- **The *Johnson* Factors to determine an appropriate rate.**

The *Johnson* Factors

- **(1) Time and labor required;**
- **(2) Novelty and difficulty of the questions:**
- **(3) The skill required to perform the legal service properly;**
- **(4) The preclusion of other employment due to acceptance of the case;**
- **(5) The customary fee;**
- **(6) Whether the fee is fixed or contingent;**
- **(7) Time limitations imposed by the client or the circumstances;**
- **(8) The amount involved and the results obtained;**
- **(9) The experience, reputation and ability of the attorneys;**
- **(10) The "undesirability" of the case;**
- **(11) The nature and length of the professional relationship with the client; and**
- **(12) Awards in similar cases.**

The Percentage Method

- **The common benefit award is based on a percentage of the amount recovered.**
- **Compensates class counsel for (i) services rendered and (ii) for the risk of loss or nonpayment assumed by carrying through with the case.**
- **Predictability – for attorneys, class members.**
- **Efficient – limits the risk of protracted litigation to accumulate hours.**

What Percentage?

- **Each case should be assessed on its merits to determine a reasonable fee.**
- **Empirical studies show:**
  - **The higher the settlement, the lower the percentage awarded as attorneys' fees.**
    - **Settlements between $190M and $900M: fees between 10%-12% have been allowed.**
    - **Settlements between $1M and $2M: fees between 32%-37% have been allowed.**

The *Goldberger* Factors

- **The Second Circuit articulated six factors to consider in determining the reasonableness of fee applications:**

(1) The time and labor expended by counsel;

(2) The magnitude and complexities of the litigation;

(3) The risk of litigation;

(4) The quality of representation;

(5) The requested fee in relation to the settlement; and

(6) Public policy considerations.

Market Price for Legal Services in the Seventh Circuit

- **District courts should "do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time."**

In re Synthroid Mktg. Litig., 264 F.3d 712, 718 (7th Cir. 2001)

Majority of fee awards apply the percentage method.

Blended Method or Lodestar Cross Check

- **To ensure the percentage selected is reasonable, the percentage fee is cross-checked by the lodestar method.**
- **Assessing the lodestar multiplier.**
- **A lodestar multiplier is warranted based on:**

  (1) The contingent nature of expected compensation for services rendered;

  (2) The consequent risk of non-payment viewed as of the filing of the lawsuit;

  (3) The quality of representation; and

  (4) The results achieved.

Reimbursement of Expenses

- **Paid from the Common Benefit Fund**

  "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation' of those clients."

  In re Indep. Energy Holdings PLC Sec. Litig., 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (quoting *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993).

Attorneys' Fees in Non-Cash Claims Made Coupon Settlements

- **In non-cash coupon claims-made settlements, some Courts insist on calculating attorneys' fees based on the actual claims made. This leads to considerable delay in awarding attorneys' fees.**
- **Increasingly, Courts use the lodestar method here.**

‘Clear Sailing’ Fee Provision Remains Subject to Court Approval

- **A ‘clear sailing’ provision whereby the defendants agree not to object to the fee award (up to a pre-agreed limit) sought by plaintiffs’ attorneys is still subject to review and approval by the Court.**

State Court Adheres to Federal Fee-Shifting Rule

- **Where a federal statute provides the substantive rule for attorney fee-shifting, a state court award of fees is limited by that rule in state class actions under the federal fee-shifting rule.**

Samuel-Bassett v. Kia Motors America, Inc., 34 A.3d 1, 57 (Pa. 2011).

Statute May Limit Attorneys' Fees in Class Action Litigation Against Public Entities

- **The limitation in C.R.S. § 1317203, which limits attorneys' fees awarded in class actions against public entities to an amount not more than $250,000, is unambiguous, enforceable and constitutional.**

  - *Buckley Powder Co. v. State*, 70 P.3d 547, 561-63 (Colo. App. 2002)