Legal Opinion Letter

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INCENTIVIZING APPROPRIATE RESTITUTION IN CLASS ACTION CASES

by
Senator Tom Harman

The class action lawsuit is one of the more strangely compartmentalized processes in the American legal system. In addition to the standard hearings seen in the typical P sues D civil action, there is an entirely separate procedure to determine the plaintiffs' attorney's fee, in the event that the plaintiff emerges victorious. Basically, the plaintiffs' attorneys submit a bill to the court, and the court approves or alters it. Most of the time, the court approves the suggested fee. After that, in many cases, the plaintiffs' attorneys must seek out the class members in order for the restitution won to be distributed.

Of course, the plaintiffs' attorneys have no real incentive to actually find the class members as they have already been paid in full before any of the class members receive their payment. Most of the time, after a search of varying degrees, the part of the award set aside for class members who could not be found is instead awarded to a charity by the judge as *cy pres*. Realistically, charities are tangentially related at best to a class, such as giving money to an eating-disorder clinic when the class was a bunch of models. Adam Liptak, "Doling Out Other People's Money," N.Y. TIMES, Nov. 26, 2007, Sidebar. Even worse, some judges have been known to patronize charities that they themselves work for. Walter Olson, "The Trouble with Cy Pres," Mar. 6, 2008, http://www.overlawyered.com/2006/03/judge-resigns-in-ky-fenphen-sc.html.

The point of the civil justice system is primarily to restore injured parties to the state they were in before the injury, not to punish the parties inflicting the injuries. While exceptions exist for intentional or particularly egregious conduct, the focus is on helping those who are wronged. When a class action remedy goes to an unrelated charity instead of to the injured class members, the system has failed in a substantial way. Admittedly, class action suits are supposed to provide a societal benefit by providing a penalty for widespread, though individually minor, wrongdoing. There is no reason, however, that providing that benefit is incongruous with serving justice by making whole the injured class members.

Recently, in Alameda County, in California, some judges have been trying to rectify these problems by injecting an incentive into the search process. Instead of receiving the full amount of their fees, the judge holds a portion (around 10% seems to be the standard) of the total fee until the judge determines that as many of the class members as possible have been found. The attorneys that have been the guinea pigs for this practice report that they do indeed work harder to find the class members when they know they have something still at stake. The amount of money is not significant enough to endanger their business, but is large enough that it is not ignored.

I tried to encourage this practice statewide in California, by introducing Senate Bill 1202. SB 1202 was written to provide a statutory basis for the common law practice already being used by the judges. The bill was defeated in its first policy hearing by the Senate Judiciary Committee.

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In the hopes that my bill might be a model for use in other states, I would like to explain and address the nature of the opposition the bill faced. The concerns of the opposition to the bill were of varying reasonableness. Some were valid, as the proposed language was perhaps less specific than it should have been. Others were less understandable, such as the concern that the defendants would be keeping the withheld fees until the class members received the money.

Two issues the opponents of the bill raised were admittedly valid and reasonable, and both were related to either poor wording or lack of specificity. The relevant statutory language read: "[T]he judge may order a part of the attorney's fees awarded pursuant to this section to be withheld until the class members have received their portion of the settlement funds." California Senate Bill 1202 for the 2007-2008 session, suggested alteration to Section 1021.5 of the Code of Civil Procedure.

A plain-text reading of the statute requires that the entirety of the class members have been found and their award paid out. This is a problem because expecting the plaintiffs' attorneys to successfully locate 100% of the class in all, or even most, cases is unreasonable. In any class action suit, especially one where the class numbers in the hundreds of thousands, some of the class members will simply be unreachable. One way this issue might be fixed is by replacing "until the class members" with the phrase "until, in the judge's discretion, the class members that can be reasonably found." This should clear up the ambiguity and remove some of the apprehension the more pro-plaintiff groups might have.

The second problem with the language as it was introduced was the lack of specificity on the size of the part to be withheld. The goal of the practice is not to place the plaintiffs' attorneys into financial difficulty. Instead, the goal is give them some incentive to pursue locating the class members that they otherwise would not have. In order to resolve this concern, specifying a maximum, or even mandated, percentage of the fee to be withheld is recommended. If this number is a maximum value, 20% is probably the highest amount to try, and even that maybe too much. If this number is a specific mandated value, 10% is probably the best number to use, as it is the percentage that has been used in practice in the past. The specific statutory language changes for these suggestions would be replacing "a part" with "up to 20%" and "10%" respectively.

Not all of the concerns raised were as valid as those. One such concern is that the defendants had best access to the class membership, and could withhold that information thereby depriving the plaintiffs' attorneys of a portion of their fees. This concern is unfounded, as a simple pre-trial discovery request should provide whatever relevant information the defendants possess. Should this be a concern, language could be added to proposed statutes that require disclosure of contact information of class members known to the defendant.

The final issue raised was regarding the disposition of the withheld attorney's fees. Opponents of the bill were concerned that the defendant would keep the money until the judge decided to release it to the plaintiff's attorneys. The intent of SB 1202 was that the money would be held by the court until such time as the court released it. Again, a simple amendment to the language could make this clearer.

Fighting through the special interests to a more just legal system is a difficult and often frustrating task, but in the end, worth the effort. Class action suits are more easily subject to abuse because the injured parties often are unaware of their injuries. Their injuries deserve to be made whole.

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