

September 6, 2000

COURT SLASHES ATTORNEYS' FEES IN MAJOR CLASS ACTION CASE

(In re Synthroid Marketing Litigation)

In a clear victory for the Washington Legal Foundation (WLF) and its clients, the United States District Court for the Northern District of Illinois significantly reduced an attorneys' fees request in a major class action lawsuit from 29 percent of the settlement amount to 10 percent. WLF, in conjunction with its Economic Freedom Law Clinic at George Mason University School of Law, had filed objections on behalf of two class members to the attorneys' fee request on the grounds that it was excessive. WLF successfully argued that the court should award no more than 10 percent of the settlement fund to the plaintiffs' attorneys. In addition, the court sharply reduced the amounts awarded for litigation expenses, finding them inflated or unsupported.

In re Synthroid Marketing Litigation is a class action case that was filed in April 1996 on behalf of consumers who had purchased and consumed the medication Synthroid after January 1, 1990. The allegations in the complaint concerned only the marketing of the drug; no allegations were made as to Synthroid's safety or effectiveness. In short, the lawsuit alleged that the advertising associated with Synthroid inaccurately suggested the superiority of Synthroid over other products which are used to treat certain thyroid disorders, thereby deterring consumers from purchasing less expensive alternatives to Synthroid. A proposed settlement to the class action was originally submitted in 1997, and a hearing was held in 1998; however, certain insurance carriers and state Attorneys General intervened in the case to share in the award. Accordingly, another proposed settlement agreement was recently reached, and class members were given an opportunity to lodge their objections to the proposed settlement for the Court's consideration.

The settlement fund for the consumers contained approximately \$87 million for the benefit of the class members. However, the attorneys sought 29 percent of that amount, or approximately \$26 million in fees. Because this is a common fund case, every dollar that is allocated to attorneys' fees is one dollar less for the class members. WLF, representing two senior citizens who purchased Synthroid, objected to the proposed percentage because it was clearly excessive, unfair, and not in the interests of the class. In particular, WLF demanded that the attorneys provide the Court with contemporaneous time records to justify any award of attorneys' fees. In addition, WLF cited a number of other similar multimillion dollar class action cases where attorneys' fees were awarded by the court in the 6-10 percent range; accordingly, the 29 percent fee being requested in this case was at least triple the amount that is usually awarded.

In her opinion issued last month, Judge Elaine E. Bucklo quickly recognized that it was her duty to ensure that the fee request was reasonable inasmuch as the fee was being assessed against the settlement fund for the class members. As the court noted, in these kind of common fund cases, the attorneys' role "changes from one of a fiduciary for the clients to that of a claimant against the fund created for the clients' benefit." Accordingly, fee requests from common funds

are subject to "heightened judicial scrutiny." The court then carefully determined the reasonableness of the amount of fees that should be awarded based upon several factors, including the complexity of the case, the number of hours expended by the attorneys in litigating the case, and the amount recovered for the class members.

While the court recognized that the plaintiffs' attorneys did an adequate job of litigating the case, it noted that the "lodestar" fee amount, or the amount that would be paid on a hourly basis, came to approximately \$12 million. Thus, the amount originally requested by the attorneys, \$26.3 million, was over twice the lodestar figure. The court also looked at similar "megafund" cases to better determine the appropriate award of attorneys' fees, and determined that they were in the 6-10 percent range. Accordingly, the court awarded the plaintiffs' attorneys a fee of 10 percent, which, although admittedly at the high end of the range, resulted in a fee of \$8.74 million compared to the original request of \$26.3 million. Any amount greater than 10 percent would constitute a windfall to the plaintiffs' attorneys at the expense of the consumer class.

Finally, the court sharply reduced the amounts requested for unitemized and undifferentiated litigation expenses, such as travel and copying costs. The court noted that the class counsel represented to the court that they had document support for the litigation costs, and offered to provide it to the Court "if the Court so wishes." In a terse response, the court stated: "It's too late for that." Counsel had a duty to provide justification of its expenses when they submitted the fee application in the first place. The court also found that other costs seemed "vastly excessive." Accordingly, the court reduced certain expenses by half.

"Judge Bucklo's ruling is a breath of fresh air," said Paul Kamenar, WLF's Senior Executive Counsel and Director of WLF's Economic Freedom Law Clinic at George Mason University School of Law, who worked on the case. "All too often, judges simply rubberstamp the high fee request by the class action attorneys. Judge Bucklo took her job seriously and followed WLF's request to reduce to the fee award for the benefit of the class members." WLF and its clinic have also filed similar objections in another class case in federal court in New Jersey, and are monitoring other cases for possible participation. Last week, the plaintiffs' attorneys filed a notice of appeal of the court's decision to the U.S. Court of Appeals for the Seventh Circuit.

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