Legal Opinion Letter

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"PIGGYBACK" CLASS ACTION SUITS DON'T MERIT EXORBITANT FEES

by
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After the settlement of a major class action lawsuit against Microsoft Corporation, San Francisco Superior Court Judge Paul H. Alvarado sharply reduced the amount of attorneys' fees requested by class action lawyers from $258 million to approximately $100 million. *Microsoft I-V Cases,* J.C.C.P., No 4106 (S.F. Super. Ct.) (Sept. 9, 2004). The court's decision to reduce the fee request sends a much-needed message to avaricious trial lawyers, as well as hope to defense counsel and objecting class members, that "piggyback" class action lawsuits — suits principally based on lawsuits already litigated by the government or other private parties — do not warrant the award of huge awards because others have already done the heavy lifting in the litigation.

This class action was filed on behalf of indirect purchasers of specified Microsoft operating systems, word processing, and spreadsheet software in California and alleged overcharges in violation of state antitrust and unfair competition laws. The suit was one of 27 similar suits coordinated by the trial court and was filed shortly *after* the federal district court in Washington, D.C. entered its findings in the lawsuit brought by the Justice Department in *United States v. Microsoft* in 1999.

Microsoft settled the California lawsuit last year by agreeing to provide class members with up to $1.1 million in vouchers toward the purchase of future hardware or software; each voucher is worth $5-$29. The trial court approved this part of the settlement on July 26, 2004. However, the separate request for attorneys' fees for an unprecedented one quarter of a billion dollars was subsequently rejected on September 9, 2004, and substantially reduced. Normally, when parties settle a class action case, the defendant company agrees with the plaintiffs' attorneys not to oppose their fee request which is based either on a specific dollar amount or a percentage of the settlement fund, oftentimes in the 20-30% range.

Under these so-called "clear sailing agreements," trial judges rarely scrutinize, let alone reject, the fee requests so long as they are in the general ballpark of fees awarded in other cases. But thanks to a vigorous opposition by Microsoft and certain class member objectors, the trial court reduced the fee request, principally on the grounds that the assumed risk to prosecute this case was minimal as it was based on extensive prior litigation by the government and other private parties against Microsoft.

The team of trial lawyers requested fees of $258 million, a sum which was five times the amount of their lodestar fees, *i.e.,* the amount determined by multiplying the number of hours devoted to the case by the reasonable hourly rate, or approximately $50 million. Expressed as a percentage, the fee

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request amounted to approximately 24% of the $1.1 billion voucher settlement. In determining the reasonableness of a fee award, courts use either the lodestar approach or the percentage of the fund approach, and sometimes both as a cross-check of each other.

In this case, Judge Alvarado rejected the percentage-of-the-fund approach because the "fund" did not consist of a cash-common fund; rather, it was a "constructive" fund consisting only of vouchers, the value of which depends upon the number eventually redeemed. Accordingly, under California practice, courts rightly use the lodestar approach. In doing so, the courts first determine the basic lodestar amount, and then adjust it upwards (or downwards) depending upon several factors, including the novelty of the case and the risk of non-recovery. Microsoft argued that the blended multiplier of 5.05 requested in this case would grossly overcompensate the attorneys, and that a multiplier of 1.5 would be more than a sufficient fee.

In assessing the originality of the litigation and the risks that the lawyers undertook, Judge Alvardo noted that "more than 50 of the 80 substantive paragraphs [from plaintiffs' amended complaint] repeat, in part or in whole, paragraphs from the government's May 19, 1998 complaint" from the Justice Department lawsuit, and that almost all the other paragraphs were "traceable to an earlier DOJ action that resulted in the 1995 consent decree" with Microsoft. The judge further noted that class plaintiffs' discovery responses "included verbatim approximately 80 pages" from the findings by the federal court in the Microsoft case in Washington, D.C. Many of the documents produced by Microsoft in the California litigation had already been turned over in the federal case, as well as third-party deposition transcripts. "More important," said the court, the earlier federal and private class actions provided class counsel "with detailed roadmaps to the theories they borrowed from those actions."

In rejecting class counsel's assertion that a lodestar multiplier of 5.05 was justified because they allegedly "took a huge risk in prosecuting this case," the court relied on other cases where fees were reduced because of parallel government proceedings, such as *In re Vitamins*, 110 Cal. App.4th 1043 (2003). The court noted that class counsel "did not identify any alleged wrongful conduct by Microsoft that had not been previously uncovered by others, nor did they secure injunctive relief because the government had already obtained a similar remedy" in the federal case brought by the United States. More importantly, the court properly noted that the plaintiffs' argument about the risk of prevailing at trial was misdirected; rather, the relevant inquiry is the risk of non-settlement. Here, the plaintiffs' attorneys conceded that "95% of all civil cases settle," and that consideration of settlement prospects were particularly relevant in this case because Microsoft was pressured to settle the California action in light of other actions pending against it across the country.

In the end, the court awarded plaintiffs' attorneys a $100 million fee using a generous lodestar multiplier of 2.0, slightly more than the 1.5 figure argued by Microsoft, but substantially below the 5.05 multiplier sought by the plaintiffs' attorneys who did little more than piggyback their case off taxpayer-funded litigation by the U.S. Department of Justice.