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COURT OF APPEALS REMANDS FEE ISSUE IN CLASS ACTION CASE TO DISTRICT COURT

(*In re Synthroid Marketing Litigation*)

The United States Court of Appeals for the Seventh Circuit reversed a lower court decision that capped the attorneys' fees to 10 percent of the settlement fund in this class action case, and remanded the case to the trial court to reconsider the fee award. WLF had filed a brief in the case on behalf of itself and two class members objecting to the original attorneys' fee request as excessive, and supported the district court's original decision to cap the fee at 10 percent.

In re Synthroid Marketing Litigation 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 contained approximately $87 million for the benefit of the class members. However, the attorneys sought to be awarded 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 in the district court 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 6-15 percent range; accordingly, the 29 percent fee being requested in this case is at least double the amount that is usually awarded.

The district court agreed with WLF's arguments made in its brief filed in that court, and awarded fees in the amount of 10 percent of the settlement fund. On appeal, the trial attorneys had argued that the district court abused her discretion by sharply cutting their fee request. In its brief on appeal, WLF reiterated its argument in the district court that the fee awarded by the trial court was fair and reasonable in this "megafund" case.

WLF argued in the alternative that if the court of appeals determined that the district judge did abuse her discretion by awarding a 10 percent fee, the case should be remanded for further proceedings, rather than ordering her to rubber-stamp class counsel's request for their original 29 percent fee. There are numerous fact questions that appear to be unresolved regarding the validity of both the "lodestar" fee determination and the costs. The lodestar is a figure that is supposed to represent the actual number of hours worked on the case, times the attorneys' normal hourly billing rates. The class counsel claim that the 10 percent figure amounts to an award that is below the lodestar of fees incurred.

WLF noted that the lodestar figure of $12.5 million is broken down into two categories: approximately $7.4 million lodestar for five firms who were designated as Lead Counsel, and some $5 million lodestar for 67 other firms. WLF thus argued that the district court should have the opportunity to determine in the first instance, for example, whether much of time billed was reasonable, or whether the bill was "padded" for duplicative and unnecessary legal services that were expended, especially by the 67 non-Lead Counsel firms. If that scrutiny were performed, it may very well turn out that the 10 percent fee awarded by the court could approximate or exceed the lodestar amount, or that a slightly higher percentage than 10 percent would be appropriate, such as 15 percent, but certainly not the full 29 percent requested by the plaintiffs' attorneys.

The court of appeals ultimately reversed the trial court's 10 percent cap. The court ruled that the cap does not reflect the actual practice for setting fees to maximize the incentives for attorneys to obtain larger damage awards for the class. The court ruled that counsel should have an economic incentive to increase the settlement amount. A flat rate of 10 percent in a megafund case, however, could possibly result in higher fees for attorneys for obtaining less money for the class. For example, an award of 30 percent for fees in a $50 million case yields an attorney fee of $15 million, whereas an award of 10 percent in a $100 million case yields only $10 million. The court suggested that a sliding percentage mechanism or blended rate may be more appropriate, such as 25 percent for the first $50 million, 15 percent for the next $25 million, 10 percent for the next $25 million, and so forth. Accordingly, on remand, the attorneys' fees could still be substantially reduced from the amount originally requested.

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