

Blog Entry: Eight-Figure Class Action Attorney Fee Award Dissolves in the Court of Appeals

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There's something uniquely interesting about judicial opinions involving class action attorneys' fees. For class counsel, it's the culmination of years of work. They researched the claim, brought the case, slogged through discovery, endured motion practice, battled through class certification, lost sleep, sacrificed weekends and holidays, and waited. If they prevailed on class certification, they high fived each other and pressed forward, preparing for a trial that might never occur, because the case may settle. And if it does settle, class counsel can get paid for it all.

That's the theory. Reality may differ.

Consider *Chieftain Royalty Company v. Enervest Energy Institutional Fund XIII-A, LP*, a case filed in 2011 in the Western District of Oklahoma. Plaintiffs claimed that defendants underpaid their gas well royalties. Some five years after suit was filed, the parties agreed to certify a settlement class and to settle the case for a cash payment of \$52 million and other relief.

Class counsel then moved for fees. They asked for 40% of the settlement fund pursuant to their contingency fee contract with the class representative, plus interest. That's a fee of \$20,800,000, excluding interest.

Two objections were filed, contending that the fee request was improper because under Oklahoma law, which applied, they claimed, to this diversity case, attorneys' fees must be based on a lodestar calculation, which means that fees must be calculated by multiplying the number of hours reasonably worked by the reasonable value of that time. Class counsels' fee application deviated from that requirement, they argued, by seeking a fee award based not on the lodestar, but on a percentage of the settlement fund. Class counsel, they noted, "have not provided records to support a lodestar, nor any argument as to a reasonable enhancement. [They] failed to submit any lodestar figure, or even an estimate of the number of hours they expended on the case. Consequently, this Court lacks the most fundamental information necessary to set a reasonable fee under the applicable law."

The district court overruled the objections and granted the fee application, albeit with a modification: instead of awarding class counsel 40% of the settlement fund, it awarded them one-third. That's \$17,333,333.33, a haircut of about \$3.5 million from what they had requested, but a hefty payday nonetheless.

Objectors appealed to the Tenth Circuit Court of Appeals, which, on July 3, 2017, reversed. "Appellants argue that Oklahoma law governs the award of attorney fees in this case and requires

using the lodestar approach rather than a percentage-of-the-fund analysis,” the court stated. “We agree.”

The objectors, it turns out, performed the correct analysis: federal jurisdiction *was* grounded in diversity of citizenship, and so “Oklahoma law governing the award of attorney fees in common-fund cases” applied, both to the form of allowable fees and the method for computing them.

And what does Oklahoma law say?

It says that “to enable a court to determine attorney fees, attorneys in Oklahoma must ... present detailed time records showing the work performed and offer evidence as to the reasonable value for the services performed. This allows the court to determine the lodestar. Then other factors can be considered to provide an incentive fee or bonus.”

So how did the district court err? Let’s let the Tenth Circuit answer:

“The district court did not use the lodestar method to calculate class counsel’s fee in this case. Class counsel failed to provide the information necessary to apply that method. As already noted, in 1979 the Oklahoma Supreme Court stated that attorneys seeking fees must present ‘detailed time records’ and ‘evidence as to the reasonable value for the services performed.’ *Class counsel did not come close to performing this task.* As the district court recognized, ‘Now, if I were to determine that the lodestar is applicable, then I think you will agree with me we just don’t have enough information in this case right now.’ Although class counsel claimed to have spent ‘much more’ than 10,000 hours on the case, the firm acknowledged that ‘we don’t keep detailed time records on every hour we do in these cases.’ Any time figures were mere estimates. ... Therefore, *we must set aside the attorney-fee award. The district court will have to decide in the first instance whether any award can be made in light of the absence of contemporaneous time records. It is unfortunate that class counsel did not do the necessary homework on Oklahoma law.* (Emphasis added.)

The objectors, on the other hand, *did* do their homework. And the class members may wind up reaping an enormous windfall as a result.

The case is *Chieftain Royalty Company v. Enervest Energy Institutional Fund XIII-A, LP*, Tenth Circuit Court of Appeals, case no. 16-6022. The opinion can be found at <https://goo.gl/gejJTU>.