

Blog Entry: How'd You Come Up With That? Third Circuit Vacates Class Counsel's Fee Award

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There are several different stakeholders in class actions. There are the named parties, of course, and the members of the putative class, to the extent plaintiff seeks to sweep them into the lawsuit. And then there's the class itself, if certified, as well as opt-outs and objectors, if any. And let's not forget class counsel. They get paid only if the court approves.

Plaintiff brought a class action lawsuit in the District of Delaware alleging violations of the American Inventors Protection Act of 1999 ("AIPA") and breach of contract. The AIPA permits customers injured under that statute to recover "reasonable costs and attorneys' fees." (The USPTO's summary of that statute can be found at <https://goo.gl/Y827xL>.)

The parties mediated the case and agreed to a class-wide settlement. They also agreed that defendant would pay class counsel's attorneys' fees, but couldn't agree on an amount, so class counsel filed a motion asking for \$2 million in fees "under a percentage-of-recovery calculation." Defendant opposed, and argued that the lodestar method should instead be used to calculate those fees, and the lodestar here was \$257,226.76. ("Lodestar" means hours worked on the case multiplied by counsels' hourly rate. The term derives from the "lode star" - or guiding star - that ancient mariners used to assist in celestial navigation. The nexus between celestial navigation and attorney's fees mystifies this writer, although the imagery is undoubtedly appealing.)

In any event, the district court addressed the fee issue at the settlement fairness hearing and awarded class counsel \$1,118,936.40 in fees. It arrived at that sum by applying a 4.35 multiplier to lodestar amount. Its rationale?

Applying the lodestar method[,] the fees amount to \$257,226.76. While [defendant] argues that no multiplier should be used because this is a "tag-along case," this ignores the substantial case law that applies multipliers. ... [Plaintiff] asserts that the Third Circuit typically applies multipliers up to 15.6 with an average of 4.35. Following [Plaintiff's] alternative recommendation, the court will adopt the average multiplier within the Third Circuit of 4.35 and impose a fee of \$1,118,936.40.

Defendant appealed, and on January 6, 2017, the Third Circuit Court of Appeals vacated. It noted that when the lodestar method is used to calculate fees, there is "a strong presumption that the lodestar represents the reasonable fee for class counsel's work." Any upward adjustment, the court stated, is permissible "only in certain rare and exceptional circumstances," such as where the lodestar does not adequately measure the attorney's "true market value," or where "the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted," or where there was an "exceptional delay in the payment of fees, particularly where the delay is unjustifiably caused by the defense."

A fee applicant seeking a multiplier on top of the lodestar bears the burden of proving that the case meets these “rare” and “exceptional” criteria. If it satisfies that burden, the court must then “tailor the method of enhancing the lodestar to that specific case.” And “to ensure that [the court’s] calculation is objective and capable of being reviewed on appeal,” it must also “provide detailed findings justifying any enhancement to the lodestar.”

That’s why the Third Circuit vacated the fee award. It found that the lower court “offered no explanation for why the simple lodestar calculation would not adequately compensate class counsel or why this case presented ‘rare’ and ‘exceptional’ circumstances needed to enhance the lodestar.” It also found the record devoid of any evidence justifying the fee enhancement. Instead, “the District Court simply adopted [class counsel’s] recommended 4.35 multiplier, understanding it to be the ‘average’ multiplier used in the Third Circuit.”

Not good enough. The appeals court vacated the \$1,118,936.40 fee award and remanded so that the district court could “reassess whether an enhancement to the lodestar calculation is appropriate in this case and, if so, it should provide factual findings supporting any multiplier used.” We’ll follow this and keep you posted on what happens next.

The moral of the story? If you choose to navigate your vessel by more than the light of the evening stars, bring along a GPS.

The case is *Dungee v. Davison Design & Development Inc.*, Third Circuit Court of Appeals, case no. 16-1486. Here’s the opinion: <http://www2.ca3.uscourts.gov/opinarch/161486np.pdf>.