Argument Analysis: Laffitte v. Robert Half International Inc.

Lafitte poses a deceptively simple question, which the California Supreme Court framed as: "Does *Serrano v. Priest* (1977) permit a trial court to anchor its calculation of a reasonable attorney's fees award in a class action on a percentage of the common fund recovered?" After nearly forty years of judicial experience reviewing attorney's fee award requests in light of *Serrano*, one might think that the question was settled and the answer is "yes." The appellant, however, hopes to convince the court that the right answer is "no." Having granted review, we will see if the court can be convinced.

1. *Laffitte* in Summary

Mark Laffitte filed a wage and hour suit against Robert Half in 2004, which was certified as a class action. After more than eight years of contentious litigation, Half settled in 2012 with the *Laffitte* class as well as two other actions making similar allegations. The settlement provided that Half would pay a gross amount of $19 million to settle all three actions. For present purposes, the most important provision of the settlement agreement was that Half would not oppose a request by class counsel to the trial court for an award of attorney's fees from the common fund of not more than $6,333,333.33—that is, one-third of the gross settlement amount. *Laffitte*,at 139–40.

After notice of the settlement was sent to nearly 4000 class members, only one class member, through his attorney Lawrence Schonbrun, proffered procedural and substantive objections to the settlement. The primary substantive objection was that the requested fee was excessive. After two hearings and the receipt of ordered supplemental declarations, the trial court approved the requested amount in full in 2013. *Id.* at 141. The trial court thought that the requested one-third was "not an atypical contingency agreement in a class action." *Id*.

At the second hearing, where the request was approved in full, the trial court stated it

> *[C]onsiders in this case that there is a contingency case, and so I do a double check on the attorneys fees by looking at the lodestar amount. I do believe I have sufficient information on the number of hours that were present and that the hourly rates charged therefore were within the norm and not overstated. Given the lodestar, I then also find I have information in the record which supports the multiplier that would be applied to lodestar if you're looking at a strict lodestar calculation, which we're not, we're looking at a contingency calculation, the amount of the contingency is not unreasonable. I'm considering the novelty and difficulty of the questions involved, the skill displayed in presenting them, the extent to which the litigation precluded other employment by the attorneys and the inherent risk whenever there is a fee award that is contingent. On that basis, I am granting final approval.*

Id. at 143.

The Court of Appeal affirmed in 2014, because it found no abuse of discretion in how the trial court had handled the fee request. The appellate court acknowledged the "primacy of the lodestar method in California." *Id*. at 148, quoting *Lealao v. Beneficial Finance California, Inc.* (2000) at 26. After discussion of how the lodestar works (reasonable hours worked by counsel times a reasonable hourly rate), the *Laffitte* court noted that *Lealao* had raised a key question: After *Serrano*, could California courts continue to award attorney's fees based on a percentage of the award in a common fund case? *Laffitte* agreed with *Lealao*'s conclusion that it "may still be done." *Laffitte*, at 148, quoting *Lealao,* at 27. *Laffitte* cited to several other Court of Appeal decisions reaching the same conclusion before it held that the "percentage of fund method survives in California class action cases." *Id*. at 149. The court then found that carving out one-third of the common fund for attorney's fees was "consistent with, and in the range of awards" in other cases. *Id*.

The appellate panel then approved the trial court's use of the lodestar as a "cross-check" (rather than the primary method of calculating the fee) to ensure that the fee awarded as a percentage was reasonable. The court rejected the objection that class

counsel had not submitted detailed time records to support the declarations of hours worked on the case. The court said that such records are not required in California state courts. Even though class counsel claimed over 4000 hours of work on the case over more than eight years, it was not an abuse of discretion for the trial court to rely on the declarations alone, buttressed by that court's intimate knowledge of the case, in using the lodestar to cross-check the fee calculated as a percentage of the fund. *Id*. at 151.

Accepting counsel's declarations on the hours worked completely at face value, as well as requested hourly rates ranging from $500 to $750 per hour, the lodestar yielded a figure of $2.9 to $3.1 million. To support the $6.3 million figure requested, the trial court accepted class counsel's request to apply a multiplier of 2.02 to 2.13, and pointed to the factors justifying a lodestar multiplier. The appellate panel, in turn, found no abuse of discretion in doing so. *Id*. at 151. The panel rejected all the other objections and affirmed the final judgment. The California Supreme Court accepted the case for review in 2015, limited to the question noted above.

2. The Ambiguity in *Serrano*

Given the analysis in *Laffitte* and the many appellate cases it cited, why is there any question about the propriety of using the percentage method in a common fund case? May it "still be done?" The uncertainty arises from ambiguity in *Serrano*. The *Lealao* opinion, which was the key precedent in *Laffitte* on this point, engaged in a thorough review of the issue. *Lealao* noted that *Serrano* declared in 1977: "The starting point of every fee award . . . must be a calculation of the attorney's services in terms of the time he has expended on the case. . . . " *Lealao* at 26-27, quoting *Serrano* at 48 n.23. *Lealao* also asserted that, "[d]espite its primacy, the lodestar method is not necessarily utilized in common fund cases." *Lealao* at 27. Both *Lealao* and *Laffitte* noted that *Serrano* discussed the common fund exception and stated that it had been applied often in California cases. *Id.* and *Laffitte* at 149, both quoting *Serrano* at 35.

The uncertainty rests in the context of *Serrano*'s holding: Does "every" really and truly mean without any exception? What *Serrano* primarily did was to recognize the private attorney general theory as an acceptable equitable basis for the recovery of an attorney's fee in California. (This holding was subsequently ratified and expanded

by the legislature as Code of Civil Procedure § 1021.5). In accepting the private attorney general theory, *Serrano* went beyond the previously-recognized common fund and substantial benefit theories of recovery for attorney's fees. It acted despite the fact that the U.S. Supreme Court had rejected the theory in *Alyeska Pipeline Co. v. Wilderness Society* (1975) at 257. A substantial portion of Justice Sullivan's opinion in *Serrano* was devoted to explaining why the court was not following the lead of the U.S. Supreme Court. After making this path-marking holding, Justice Sullivan turned to the reasonableness of the fee awarded. In briefly explaining why it agreed that the fee awarded was reasonable, using what we now call the lodestar method, the court in a footnote stated:

> *We are of the view that the following sentiments of the United States Court of Appeals for the Second Circuit, although uttered in the context of an antitrust class action, are wholly apposite here: "The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts."*

Serrano at 48 n.23.

Thus, the question posed above for the California Supreme Court in 2016 requires a determination of whether numerous appellate and trial courts were correct in assuming for nearly forty years that the percentage method of recovery still could be used notwithstanding this language. Or, should today's court conclude that in declaring the "starting point of every fee award," the court in 1977 also intended to exclude the well-recognized alternate means of measuring a reasonable fee?

3. Oral Argument in *Laffitte*

At the oral argument in San Francisco on May 27, 2016, all seven justices asked questions of the three well-prepared lawyers who argued the case. Based on the tenor of that argument, it seems fairly clear that the court will conclude that *Serrano* does permit a trial court to anchor its fee calculation in a class action on a

percentage of the common fund recovered. Mr. Schonbrun, for the objector, did not appear to have any support on the bench for the proposition that *Serrano* foreclosed the use of the percentage method in a common fund case. A few justices hinted very strongly that they viewed the language from the footnote as dicta, as *Serrano* was not a common fund case.

The justices did seem concerned that the class needed some protection from unreasonable fee requests. As Justice Werdegar put it to Kevin Barnes, the lead lawyer for the plaintiffs' class counsel, it "seems right" to acknowledge that no one was representing the clients at the fee award stage. Mr. Barnes' response was that the lead plaintiffs, the lawyers, and the trial court all were involved in the process. He also noted that the U.S. Supreme Court, the Third Circuit Task Force Report, and language in California cases dating back to 1895 supported the use of the percentage method in common fund cases.

There was some debate as to whether the trial courts' experience in implementing the "reasonable" fee standard was enough protection for the class and for judicial integrity. The Chief Justice and Justice Chin picked up on the point that the vast majority of class actions are not given to general assignment judges in state superior courts. They are almost always filed in and assigned to the complex litigation departments of the nine largest superior courts in the state—this case was filed in Los Angeles. The Chief Justice observed that the judges assigned to complex litigation are highly skilled and experienced in these cases, suggesting that leaving them broad discretion to review fee applications is appropriate.

Some justices were concerned with the intrinsic difficulty of determining fair market value of the legal services and how to assess whether a particular percentage paid out of a common fund was the right amount of money to encourage lawyers to take these cases. Justice Liu returned several times to the idea that the court should provide some guidance on a reasonable ceiling for multipliers from the award derived from the lodestar method.

In sum, it appears that the court will allow fees in common fund cases to continue to be set by a percentage method, but it is unclear how much additional guidance will be provided in the opinion. For example: Will the trial judges be admonished to

always use the lodestar method as a cross-check of a fee based on the percentage method? Will class counsel be required to submit detailed time sheets and will trial judges be required to scrutinize them in detail? Will the court set a ceiling on the allowable percentage of the common fund that may be carved out for the attorney's fee? Will the court set a rule of thumb for the maximum permissible multiplier for a fee based on the lodestar?

No one in the argument made reference to this passage, but it seems that observations from *Lealao*, written in 2000 and the prime precedent utilized by the Court of Appeal in *Laffitte*, is worthy guidance for the task faced by the California Supreme Court now as it finalizes its opinion:

> *What constitutes a reasonable fee in a representative action has been shown to be a far more complex question than the judiciary once thought it to be. There are no easy answers. The lodestar methodology originated as an alternative to percentage recoveries, which often resulted in exorbitant fee awards clearly unjustified by the contributions of counsel, which in turn undermined public confidence in the bench and bar. (See Report of the Third Circuit Task Force, supra, 108 F.R.D. 237, 242; see also Serrano III, supra, 20 Cal.3d at p. 48, fn. 23.) Considering the fee only as a percentage of the benefit would simply resurrect that problem. Refusing ever to take that consideration into account, however, would, as we have indicated, create equally pernicious problems. The federal judicial experience teaches that the "reasonableness" of a fee in a representative action will often require some consideration of the amount to be awarded as a percentage of the class recovery. How much weight that factor should receive may well be, as an experienced trial judge has said, "the most difficult question in present-day jurisprudence concerning attorney's fees." (Grady, Reasonable Fees: A Suggested Value-Based Analysis for Judges, supra, 184 F.R.D. at p. 141.) However difficult this question, it cannot be avoided; and the ability of California courts to intelligently address it would not be enhanced by diminishing the tools with which they have to work.*

Lealao at 53–54. Later this summer, we will see if the California Supreme Court feels compelled by the use of one word in one footnote in *Serrano* to diminish those tools

by taking away the percentage method in common fund cases.

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David Levine & Scott Dodson
Professors of Law at UC Hastings College of the Law
Scott Dodson graduated from Duke University School of Law (JD 2000) and Rice University (BA Biology 1996). After graduating from law school, Professor Dodson clerked for the Hon. Nicholas G. Garaufis on the U.S. District Court for the Eastern District of New York. An expert in civil procedure and federal courts, Professor Dodson has authored more than thirty articles, and is the author or editor of three books: The Legacy of Ruth Bader Ginsburg, New Pleading in the Twenty-First Century, and Civil Procedure: Model Problems and Outstanding Answers.

David Levine is Raymond Sullivan Professor of Law at UC Hastings. A Phi Beta Kappa graduate of the University of Michigan in psychology and history, Professor Levine also studied at University College, University of London on the London Exchange Fellowship, researching in the area of developmental psychology. He graduated from the University of Pennsylvania Law School, where he was an editor of the law review and a legal writing instructor.
Before joining the UC Hastings faculty, Professor Levine lived in New Orleans while serving as a law clerk to Judge Alvin B. Rubin of the US Court of Appeals for the Fifth Circuit and was also an associate in the litigation department of Morrison and Foerster in San Francisco. He served as Associate Academic Dean from 1989-1991 and has been the advisor for the Civil Litigation and Dispute Resolution Concentration.

He is coauthor or coeditor of seven books, including Remedies: Public and Private and California Civil Procedure, as well as the author of articles on civil procedure, torts and institutional reform litigation. He has served as the Reporter for the District of Nevada's Committee on the Implementation of the Civil Justice Reform Act and as a research analyst for the Northern District of California's Early Neutral Evaluation Program.

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