Opinion Analysis: Laffitte v. Robert Half International Inc.

On August 11, 2016, the California Supreme Court unanimously decided *Laffitte v. Robert Half International, Inc.*, and, as we predicted, held that when an attorney fee is awarded out of a common fund preserved or recovered by means of litigation, the fee award is not per se unreasonable merely because it is calculated as a percentage of the common fund.

Facts

The following facts are summarized from the opinion. For additional background, see our argument analysis posted on June 4, 2016.

Three related wage-and-hour class-action lawsuits were filed against staffing firm Robert Half and related companies in Los Angeles County Superior Court. The parties jointly moved for conditional certification and preliminary settlement approval. The trial court granted the motion and preliminarily approved the settlement.

Under the settlement agreement, Robert Half would pay $19 million, and class counsel would request (and defendants would not oppose) attorney fees of not more than $6,333,333.33 (one-third of $19 million), to be paid from the settlement amount. If a smaller amount was approved by the court, the remainder would be retained in the settlement amount for distribution to claimants, rather than reverting to Robert Half. The settlement agreement further provided that any unclaimed portion of the net settlement amount would be reallocated to qualified claimants.

Class member David Brennan objected to the proposed settlement on several grounds, including that the projected $6,333,333.33 attorney fee appeared to be excessive and class counsel had not provided enough information to evaluate it.

Class counsel argued that a one-third fee is within a historical range of 20 to 50 percent of a common fund and is also within the range provided in contingent-fee agreements signed by the named plaintiffs. Class counsel also supplied data

supporting its assertion that its attorneys would expend between 4,263 and 4,463 attorney hours, resulting in a lodestar fee amount of between $2,968,620 and $3,118,620. The multiplier needed to reach the requested fee of $6,333,333.33 would thus be 2.03 to 2.13. Class counsel submitted a declaration that argued that the multiplier was reasonable in light of counsel's "hard work and determination" in a difficult case and the "enormous" risks of nonpayment counsel undertook. For example, the opinion noted that there had been 68 depositions and numerous motions in the case before it was settled.

The trial court overruled Brennan's objections and gave the settlement and attorney-fee request its final approval. The trial court accepted the percentage as reasonable and justified by a cross-check using the lodestar-multiplier method. Objector Brennan appealed, and the Court of Appeal affirmed. The Court of Appeal held that *Serrano v. Priest* ("*Serrano III*") did not preclude award of a percentage fee in a common fund case, that an award of one-third the common fund was in the range set by other class action lawsuits, and that the trial court did not abuse its discretion by cross-checking the reasonableness of the percentage award by calculating a lodestar fee and approving a multiplier over lodestar of 2.03 to 2.13.

The California Supreme Court granted review on a single issue: whether *Serrano III* permits a trial court to calculate an attorney fee award from a class-action common fund as a percentage of the fund, while using the lodestar-multiplier method as a cross-check of the selected percentage.

Opinion

The Court, with Justice Werdegar writing, first set out the longstanding recognition in California that an attorney fee can be awarded from a common fund. The question, of course, is how to calculate the attorney fee appropriately. Two calculation methods dominate practice: the percentage method and the lodestar-multiplier method. Each has its virtues. The percentage method more accurately reflects the results achieved, is easy to calculate, establishes reasonable expectations, and encourages early settlement. The lodestar-multiplier method more accurately reflects the work done, provides better accountability, and encourages attorneys to pursue even small increases in recovery.

Both methods have attained historical acceptance in the courts and among commentators in common-fund cases, though many courts endorsing the percentage method also advocate checking the percentage against the lodestar-multiplier method. Indeed, the Court found, "empirical studies show the percentage method with a lodestar cross-check is the most prevalent form of fee method in practice."

California courts, for many years, followed national practice in allowing a percentage fee in common-fund cases. In 1977, however, the Court decided *Serrano III*, which considered attorney's fees when plaintiffs obtained an injunction against the California public-school financing system. There, the Court approved of a lodestar-based attorney-fee award under a private-attorney-general theory and, in a footnote, stated: "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." The *Laffitte* Court also noted that fee-shifting cases had previously endorsed the lodestar method.

The Court in *Laffitte* distinguished *Serrano III* as restricted to the private-attorney-general context and distinguished the fee-shifting cases as restricted to that realm. The Court noted that *Serrano III* itself cited with approval decisions using the percentage method in common-fund cases. Further, the Court noted that even the fee-shifting cases did not purport to exclusively endorse the lodestar method. In sum, the Court found no clear precedent preventing the use of a percentage method in common-fund cases.

The Court then made clear "that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." Further, the Court held, trial courts have discretion to use a lodestar-multiplier cross-check or to forgo a lodestar-multiplier cross-check if some other means to evaluate the reasonableness of a requested fee percentage exists.

The Court refused to go beyond its common-fund rationale: "We do not address here whether or how the use of a percentage method may be applied when there is no conventional common fund out of which the award is to be made but only a

‘constructive common fund’ created by the defendant’s agreement to pay claims made by class members and, separately, to pay class counsel a reasonable fee as determined by the court or when a settlement agreement establishes a fund but provides that portions not distributed in claims revert to the defendant or be distributed to a third party or the state, making the fund’s value to the class depend on how many claims are made and allowed.” That is because “[t]he settlement agreement in this case provided for a true common fund fixed at $19 million, without any reversion to defendant and with all settlement proceeds, net of specified fees and costs, going to pay claims by class members.”

Applying this standard to the settlement reached by the parties and approved by the trial court, the Court found no abuse of discretion in the trial court’s use of a percentage fee or in the trial court’s cross-check using a lodestar-multiplier method.

Justice Goodwin Liu joined the unanimous opinion, but also penned a separate concurrence to “suggest practices that may help to promote accuracy, transparency, and public confidence in the awarding of attorneys’ fees in class action litigation,” namely setting and approving attorney-compensation schemes early.

Significance

Laffitte brings a measure of clarification to attorney-fee calculations in California courts. The use of the percentage method in common-fund cases is consistent with both California lower-court practice and national practice. Further, it is consistent with established attorney practice. A contrary holding could have disrupted how legal services are funded in class actions and are distributed in California state court actions. *Laffitte* makes clear that California trial courts retain great discretion to review and approve reasonable fee awards in common fund cases.

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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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