Journal of the Institute for the Study of Legal Ethics

Volume 2 Article 21

1-1-1999

Plaintiffs' Class Action Attorneys Earn What They Get

Patricia M. Hynes

PLAINTIFFS' CLASS ACTION ATTORNEYS EARN WHAT THEY GET

*Patricia M. Hynes**

INTRODUCTION

One of the many ways in which our profession has been criticized recently is over attorneys' fees. The most prominent examples have arisen in connection with the fight over "tort reform" and securities class actions in Congress, in which proponents of the so-called reform legislation castigated the contingency fees received by the plaintiffs' bar. More recently the same criticisms have been raised in connection with the settlement of tobacco litigation brought by several states, notably Florida and Texas, in which disputes have broken out over fees for the attorneys representing the states.

In the view of this writer, as a trial attorney representing plaintiffs in complex class actions, that criticism of the courts' methods for compensating plaintiffs' counsel in these cases is almost uniformly uninformed, unfair, and incorrect. This paper will explain why awards of fees and expenses in those cases in which a benefit has been obtained for class members are usually well-deserved, and how the system that has evolved for assessing and making those awards produces good and fair results. In short, we in the plaintiffs' class action bar earn what we get.

Any discussion of the reasonableness of fees awarded to successful plaintiffs' class action attorneys must bear in mind the important role contingency fees play in our legal system. As recently pointed out by Lawrence J. Fox, Chair of the American Bar Association's Standing Committee on Ethics and Professional Responsibility, unlike the majority of European democracies, the United States does not provide its citizens significant civil legal aid or legal insurance.[1] As a result, individuals who have been injured and have meritorious claims might be

* Partner, Milberg Weiss Bershad Hynes & Lerach LLP, New York, New York.

1. Hearings on Contingency Fees in Product Liability Cases: Subcommittee on Telecommunications, Trade and Consumer Protection of the Committee on Commerce of the United States House of Representatives (statement of Lawrence J. Fox, Chair, Standing Committee on Ethics and Professional Responsibility on Behalf of the American Bar Association at 1) (Apr. 30, 1997).

deterred or prevented from pursuing their legal remedies. As Mr. Fox correctly points out, the contingency fee fills this gap by allowing parties who would not otherwise be able to afford representation access to the legal system.[2] Thus, in this country, the professional rules of ethics that govern attorneys' conduct have developed in such a way as to allow contingent fee agreements. This system has ensured that the concept of "equal justice under the law" is not just words, "but a concept that says, rich or poor, you may hire a lawyer to represent you with the lawyer's fee turning solely on the result."[3]

Of course, the question of whether attorneys' fees in these cases are appropriate or well-deserved does not have a single answer that is meaningful. For example, empirical economic analysis of the "market" for legal services devoted to prosecuting class actions will yield one set of perspectives and conclusions; judges, who are on the front lines of reviewing and awarding (or denying) applications for attorneys' fees in these cases, probably will have a different analysis; and the other participants in the process, such as class members, defendants, and their counsel, are sure to have their own viewpoints. Taking into account all of those views, however, I think it can be concluded that, objectively speaking, our present system works efficiently and fairly.

EMPIRICAL STUDIES ON ATTORNEYS' FEES

Two Harvard economists undertook an empirical study of class action attorneys' fees in the early 1990's, providing an important window into the forces of litigation risk and prospect of reward (fees) in the commencement of these cases.[4] The economists observed that, in "the only market segment where buyers and sellers" of contingent-representation legal services freely arrive at a compensation arrangement for the attorneys (i.e., private contingency fee agreements for fairly small cases), the "market rewards risk by assigning risk-taking counsel a percentage of the amount he or she recovers for the client. Almost invariably, that percentage is a one-third share in the recovery."[5] The economists went on to conclude that large-scale class actions involve larger risks (because

2. *Id.*

3. *Id.* at 6.

4. James H. Stock and David A. Wise, *Market Compensation in Class Action Suits: A Summary of Basic Ideas and Results*, 16 CLASS ACTION REPORTS 584 (1993). Although the primary focus of this article is on protracted and innovative litigation prosecuted by small plaintiff firms, the same analysis regarding the relationship between risk and compensation is applicable to any firm that regularly engages in complex, risk-laden class action litigation, regardless of the size of the firm or firms involved.

5. *Id.* at 603.

they consume a larger fraction of a firm's resources over an extended period of time, the resulting non-diversification increases the firm's risk). As a result, most large cases were viewed as economically impractical if the anticipated fee multiplier (i.e., the relationship between the fee awarded and the lodestar expended) upon successful conclusion of the case was no higher than two, even if the likelihood of success in the case was 70%.[6]

Those two observations about contingency fees—that the private market sets percentage fees at about 33% even for small and less risky cases, and that lodestar-based fees representing multipliers of less than two will dissuade lawyers from prosecuting even highly meritorious cases—should provide a rough benchmark for any discussion about appropriate levels for plaintiffs' attorneys' fees in class actions.

As Judge Posner emphasized in *In re Continental Illinois Sec. Litig.*:[7] "[t]he object in awarding a reasonable attorney's fee . . . is to simulate the market . . . The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client." Quoting at length from Judge Posner's opinion in *Continental Illinois*, Judge Mukasey explained in *In re RJR Nabisco, Inc. Sec. Litig.*:[8] "[w]hat should govern such [fee] awards is not the essentially whimsical view of a judge, or even a panel of judges, as to how much is enough in a particular case, but what the market pays in similar cases . . . ."[9]

There are numerous instances in which sophisticated corporate clients have agreed to pay extremely large fees based on the results achieved. For example, the prominent Houston law firm of Vinson & Elkins prosecuted the case of *ETSI Pipeline Project v. Burlington Northern, Inc.*:[10] on a one-third contingent-fee basis. After obtaining a $1 billion verdict at trial and subsequently settling the case for $635 million, Vinson & Elkins realized a fee of approximately $212 million. In a publicly-filed declaration, an attorney from Vinson & Elkins explained with respect to the fee paid in the case: "Absent a willingness to pay on a current basis, it is my belief that a client with a claim such as the one we

6. *Id.* at 604.

7. *In re* Continental Illinois Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992).

8. *In re* RJR Nabisco, Inc., 1992 U.S. Dist. LEXIS 12702, *20 (S.D.N.Y. Aug. 24, 1992).

9. *See also* Kirchoff v. Flynn, 786 F.2d 320, 324 (7th Cir. 1986) ("When the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate.'") (emphasis in original); *In re* M.D.C. Holdings Sec. Litig., 1990 U.S. Dist. LEXIS 15488 (S.D. Cal. Aug. 30, 1990).

10. ETSI Pipeline Project v. Burlington Northern Inc., 1989 U.S. Dist. LEXIS 18796 (E.D. Tex. June 5, 1989).

prosecuted would be required to offer a significant percentage of the recovery to his counsel in order to obtain representation."[11]

The same market forces that apply to an individual plaintiff's ability to retain counsel are equally applicable to class actions. Data concerning the level of fees actually awarded by judges in class actions show that this "market" produces, if anything, a bargain for class members. Even commentators who might predictably be hostile to class plaintiffs have published data showing that many percentage- and multiplier-based fee awards are considerably lower than the amounts discussed above.[12]

Critics of the fees awarded to class action attorneys tend to focus on a few unusual cases where attorneys have received high fees if measured in terms of hours. However, often it is appropriate to measure a contingency fee award in terms of the economic results achieved rather than the hours expended.[13] Moreover, these critics rarely, if ever, acknowledge the significant risk involved in contingency fee litigation and the number of attorneys who end up with nothing for their efforts.

Even if contingency fee attorneys are paid slightly more than attorneys who charge on an hourly basis for those cases that are successful, the many cases that contingency fee attorneys bring where there is no recovery must also be considered. When such cases are factored into the equation, contingency fee attorneys are compensated comparably with most other groups of attorneys, and in fact, the fees they receive are necessary to ensure the economic feasibility of the contingency fee system. Moreover, the contingency fee system provides incentives for attorneys to devote their time and effort to those cases that, in their view, are the most meritorious. Attorneys who charge on an hourly basis have little incentive to turn down cases that are of questionable merit. Similarly, attorneys who charge on an hourly basis may be tempted to run up the number of hours expended on a case, a practice that increases the overall costs of the litigation process. In contrast, contingency fee attorneys are only rewarded when the case is over, and even then, only if they are successful. Thus, rather than encouraging unnecessary litigation, contingency fees provide a mechanism that promotes the prosecution of meritorious claims in an efficient manner.

---

11. Declaration of Harry Reasoner, Nov. 30, 1990.

12. William J. Lynk, *The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class-Action Litigation,* XXIII JOURNAL OF LEGAL STUDIES 185, 202-3 (Jan. 1994).

13. Letter from Lawrence J. Fox, Chair, Standing Committee on Ethics and Professional Responsibility of the American Bar Association, to Honorable W. J. Tauzin, Chair, Subcommittee on Telecommunications, Trade and Consumer Protection Committee on Commerce, U.S. House of Representatives, at 14 (May 28, 1997).

PRACTICAL CONSIDERATIONS IN ASSESSING ATTORNEYS' FEE AWARDS

The vociferous criticism of attorneys' fee awards, which was heard most loudly during the debates leading to enactment of the Private Securities Litigation Reform Act of 1995, invariably ignores the risks—both monetary and otherwise—that are involved in prosecuting contingent fee litigation, whether the case involves antitrust, consumer, environmental, securities fraud, or other types of claims arising under federal and state law.[14] Moreover, these critics often ignore the well-settled procedural and substantive principles underlying the trial courts' exercise of their fiduciary obligations to supervise class action litigation, approve any settlement reached, and carefully scrutinize attorneys' fee petitions filed by successful plaintiffs' counsel. These procedures and principles provide a safety mechanism to ensure that any award of attorneys' fees is appropriate and reasonable.

Under Rule 23 of the Federal Rules of Civil Procedure (and its state law counterparts), the federal district courts have consistently guarded and exercised their express authority to approve class action settlements that are fair and reasonable, reject those settlements that are not, and properly award reasonable attorneys' fees to plaintiffs' counsel who have obtained an ascertainable economic benefit for absent class members. A review of judicial opinions in this area confirms that, given the well-recognized risks that are attendant to prosecuting any type of contingent fee litigation, successful plaintiffs' counsel who specialize in such cases can hardly be called overcompensated for their efforts. Similarly, the results of the studies cited above confirm that the system works as it should.

RULE 23 AND THE ROLE OF THE DISTRICT COURTS

Under Rule 23 of the Federal Rules of Civil Procedure, the federal courts are responsible for protecting the interests of class members when class actions are settled.[15] Although Rule 23(e) is silent respecting the

14. Professor Herbert Kritzer disputes the assertion that contingent fee lawyers are overpaid, at least on average. He points out that plaintiffs' lawyers incur risk when they invest time and energy in a portfolio of contingent fee cases and that on the whole they do not earn excessive returns, particularly when this risk is taken into account. *See* Herbert M. Kritzer, *Rhetoric and Reality . . . Uses and Abuses . . . Contingencies and Uncertainties: The Political Economy of the American Contingent Fee* 20-21 (1995) (paper published by Wisconsin Institute for Legal Studies).

15. Rule 23(d), which was added in 1966, gives the trial court extensive power to control the conduct of a class action, including the authority to determine all procedural aspects of the case. *See generally* 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D §§ 1791-96 (1986 & Cum. Supp. 1997) ("7B WRIGHT, MILLER & KANE"). Rule 23(e), which was amended in 1966, provides that a class action cannot be dismissed

standard by which a proposed class action settlement is to be evaluated, "the universally applied standard is whether the settlement is fundamentally fair, adequate, and reasonable."[16] Given the broad powers granted by Rule 23 and the express authority extended by the equitable doctrines discussed below, it is not surprising that the federal trial courts have vigorously exercised their fiduciary role as guardians of absent class members' rights to ensure that the ultimate division of settlement funds is fair, adequate and reasonable.

Although Rule 23 does not refer to the trial court's power to award attorneys' fees in a class action, federal district court judges have undisputed discretion to order appropriate awards of attorneys' fees.[17] The Supreme Court has repeatedly recognized that the court's authority in this regard is derived from the fact that the class action is a creature of equity and the allowance of attorneys' fees falls under the equity power of the federal courts.[18] The Supreme Court and lower federal courts have reasoned that by bringing the lawsuit, the class representatives have conferred a benefit upon the entire class and accordingly class counsel deserve compensation.[19] The Supreme Court has recognized that this is a proper application of the "common fund" doctrine.[20] Federal courts are vested with "broad discretion" in determining the amount of the attorneys' fees to be awarded to successful plaintiffs' counsel,[21] and the benchmark is the "reasonableness" of the amount sought, given the facts and circumstances of the case.

---

or compromised without court approval, thereby protecting the nonparty members of the class from unjust or unfair settlements affecting their rights. *Id.*, § 1797, at 340.

16. 5 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.85, at 23-347 (3d ed. 1997) ("5 J. MOORE") (footnote and citations omitted). *See, e.g., In re* Pacific Enters. Sec. Litig., 47 F.3d 373, 377 (9th Cir. 1995) (affirming district court's approval of $45 million settlement of shareholder class and derivative action); Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir.) (noting that this is "universal" standard), *cert. denied*, 506 U.S. 953 (1992) ; County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1323 (2d Cir. 1990) (affirming district court's approval of settlement).

17. 7B WRIGHT, MILLER & KANE, *supra* note 15, at § 1803, at 493-94.

18. *See, e.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166-67 (1939); Trustees v. Greenough, 105 U.S. 527, 532 (1881).

19. "Most frequently fees are awarded when the plaintiff-representative successfully establishes or protects a fund or property in which the other class members have a beneficial interest." 7B WRIGHT, MILLER & KANE, *supra* note 15, at § 1803, at 498. *See, e.g.*, Sprague, *supra* note 18, at 166-67; United States v. Equitable Trust Co. of New York, 283 U.S. 738, 744 (1931); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116, 126-27 (1885); Greenough, *supra* note 18, at 532; County of Suffolk, *supra* note 16, at 1326. *See generally* Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions,* 76 CORNELL L. REV. 656 (1991).

20. *See* Boeing Co., *supra* note 18, at 479; Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970).

21. 7B WRIGHT, MILLER & KANE, *supra* note 15, § 1803, at 507 (footnote omitted).

Such discretion is exercised in two stages: First, in determining whether to grant preliminary approval to a class action settlement agreement, courts make a preliminary evaluation of the fairness of the settlement, prior to a hearing on notice.[22] Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval should be granted.[23] Once preliminary approval is granted, the second step of the process ensues: Notice of a hearing is given to class members pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, at which time class members and the settling parties may be heard with respect to final court approval as to all aspects of the settlement—including the reasonableness of the amount of attorneys' fees sought by successful plaintiffs' counsel.[24]

"REASONABLE" VS. "EXCESSIVE" FEES

Numerous commentators have asserted that trial courts devote considerable energy to scrutinizing attorneys' fees in class action settlements to ensure that such fees are "reasonable," rather than "excessive" compensation.[25] Indeed, contrary to the assertions of various commentators who often miscite various cases involving purported abuses of Rule 23 and payment of "excessive" attorneys' fees to plaintiffs' counsel, Professors Charles Alan Wright and Arthur R. Miller have stated that "there is a virtual absence of empiric data showing any significant incidence of

22. *See In re* General Motors Pick-up Truck Fuel Tank Litig., 55 F.3d 768, 785 (3d Cir. 1995) (containing lengthy review of class action settlement law and procedure), *cert. denied*, 516 U.S. 824 (1995); 5 J. MOORE, § 23.85[3], at 23-353 to 23-354 (discussing preliminary approval of settlement).

23. *See, e.g.*, General Motors, *supra* note 22, at 785; *In re* Nasdaq Market-Makers Antitrust Litig., No. 94 Civ. 3996 (RWS), MDL Docket No. 1023, 1997 U.S. Dist. LEXIS 20835, at *22, 1997-2 Trade Cas. (CCH) ¶ 72,028 (S.D.N.Y. Dec. 31, 1997); FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, THIRD § 30.41 (1995).

24. *See* Nasdaq, *supra* note 23, at *24. In that opinion, Judge Sweet gave preliminary approval to a settlement whereby 30 defendants in price collusion antitrust class action against Nasdaq brokers agreed to pay $910 million to plaintiffs. Combined with approximately $100 million garnered in earlier settlements with six defendants, the combined proposed settlement totals $1.01 billion. *Id.* at *23-*24. The procedural history of this extraordinary and precedent-setting litigation is set forth in Judge Sweet's opinions on class certification. *See In re* Nasdaq Market-Makers Antitrust Litig., 169 F.R.D. 493 (S.D.N.Y. 1996) and 172 F.R.D. 119 (S.D.N.Y. 1997).

25. *See, e.g.*, Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 AM. U. L. REV. 1429, 1433 (1997); 1 ALBA CONTE, ATTORNEY FEE AWARDS 50-55 (2d ed. 1993); ARTHUR R. MILLER, ATTORNEY'S FEES IN CLASS ACTIONS: A REPORT TO THE FEDERAL JUDICIAL CENTER 74-185 (1980). *See generally Report of the Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237, 270-73 (1985) (hereinafter "Task Force Report ").

excessive fees."[26] Given the procedural protections imposed by Rule 23 (as applied by the federal courts over the past three decades), which requires that trial judges carefully consider fee applications, it would be the unusual case in which an objective observer could rationally state that plaintiffs' counsel somehow obtained an "unreasonable" fee.[27]

FEE AWARDS: *"PERCENTAGE" VS. "LODESTAR"*

The Supreme Court has consistently held in decisions involving the computation of a common fund fee award that the fee should be determined on a percentage-of-the-fund basis.[28] Indeed, as recently as 1984, the Supreme Court expressly approved the use of the percentage-of-recovery approach in common fund cases, stating that "under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class . . . ."[29]

Notwithstanding that historically the percentage-of-recovery method was used to determine reasonable attorneys' fees in common fund cases, a number of years ago some lower federal courts began employing an alternative method, known as the "lodestar/multiplier" method, devised by the Third Circuit in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*[30]

The lodestar/multiplier approach entails two steps. First, to determine the lodestar, the court multiplies the number of hours spent on the case by the hourly rate of compensation for each attorney involved. Second, the court adjusts that figure (usually by applying a multiplier) to reflect such factors as the contingent nature of the litigation and the inherent risk of non-payment (or under-payment), the quality of the attorney's work, and the result achieved.[31] The Second Circuit, relying primarily on *Lindy*, adopted a similar approach.[32] However, the Supreme Court never formally adopted or authorized the use of the *Lindy* lodestar/multiplier approach in the common fund context.

---

26. 7B WRIGHT, MILLER & KANE, *supra* note 15, at § 1803, at 508 (footnote and citations omitted).

27. *See* General Motors, *supra* note 22, at 819 (thorough judicial review of fee applications is required in all class action settlements); 5 J. MOORE, § 23.85[7], at 23-356 (same).

28. *See e.g.*, Greenough, *supra* note 18, at 532; Pettus, *supra* note 19, at 126-27; Sprague, *supra* note 18, at 166-67.

29. Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984).

30. Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d 161, 165 (3d Cir. 1973) ("Lindy I ").

31. *See, e.g.* Lindy I, *supra* note 30, at 167-169. Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 116-18 (3rd Cir. 1976) ("Lindy II ").

32. *See* City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d. Cir. 1974).

In 1985, shortly after the Supreme Court's decision in *Blum*, Chief Judge Aldisert of the Third Circuit, the author of *Lindy II*, convened a Task Force of prominent judges and practitioners to reconsider *Lindy* because "a number of difficulties [had] been encountered in applying the [lodestar method]"[33] The Third Circuit Task Force identified at least nine perceived deficiencies of the *Lindy* lodestar approach.[34] The Task Force noted that "there is a widespread belief" that these deficiencies "either offset or exceed [the] benefits" of the lodestar/multiplier method.[35] The Task Force specifically concluded that the *Lindy* lodestar/multiplier approach should no longer be followed in common fund cases and that fee awards in such cases should be based, instead, on a percentage of the recovery.[36] In General Motors,[37] the Third Circuit has now confirmed that the percentage method should be used in common fund cases.

Since the Third Circuit Task Force issued its report, at least eight circuits, the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh and District of Columbia Circuits, have affirmatively endorsed the percentage-of-recovery method as an appropriate method for determining an amount of attorneys' fees in common fund cases.[38] In *Swedish Hosp. Corp. v. Shalala,*[39] the Court discussed at length the many deficiencies of the lodestar/multiplier approach and the advantages of the percentage method and adopted "a percentage-of-the-fund methodology . . . because it is more efficient, easier to administer, and more closely reflects the

33. Task Force Report, *supra* note 25, at 238.

34. *See* Task Force Report, *id.* at 246-49.

35. *Id.* at 246.

36. *See id.* at 254-59.

37. General Motors, *supra* note 22, at 821-22.

38. *See, e.g., In re* Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 305 (1st Cir. 1995) (permitting use of percentage method; "[c]ontrary to popular belief, it is the lodestar method, not the [percentage] method, that breaks from precedent"); Gottlieb v. Barry, 43 F.3d 474, 487 (10th Cir. 1994) (authorizing percentage and holding that use of lodestar/multiplier method was abuse of discretion); Florin v. Nationsbank of Georgia, N.A., 34 F.3d 560, 564-65 (7th Cir. 1994) (percentage approach is appropriate in common fund case); Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1376-77 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 2707 (1994) (percentage approach appropriate); Rawlings v. Prudential-Bache Properties, Inc., 9 F.3d 513, 515-16 (6th Cir. 1993) (recognizing trend toward percentage-of-fund method); *In re* Continental Illinois Sec. Litig., 962 F.2d 566 (7th Cir. 1992) (same); Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) (percentage approach is the better reasoned in a common fund case); Harman v. Lyphomed, Inc., 945 F.2d 969 (7th Cir. 1991) (recognizing trend toward percentage-of-the-fund method); Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989) (endorsing use of percentage approach); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454, 456 (10th Cir.), *cert. denied,* 488 U.S. 822 (1988) ("a fee award based on a percentage of a common fund is appropriate").

39. Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993).

marketplace."[40] Following this trend, the recently enacted Public Securities Litigation Reform Act also provides that attorneys' fees are to be measured as a percentage of the amount of damages actually paid to the class.[41]

In practical application, the "percentage" method results in plaintiffs' counsel receiving appropriate and reasonable compensation for successfully prosecuting a class action, and reflects the market value for attorneys' services. Thus, it is simply unwarranted for any commentator to opine that successful plaintiffs' class action counsel are being compensated by the courts at the expense of absent class members. Rather, the cases demonstrate that successful class action counsel are fairly and equitably rewarded based upon the benefit they confer upon the class—a benefit that might not otherwise have been recovered but for the availability of the current contingency fee system.[42]

CONCLUSION

As should be clear from the foregoing discussion, all available empirical evidence points to the conclusion that the federal trial and appellate courts, empowered by Rule 23 and their inherent equitable authority, exercise their fiduciary obligation to carefully scrutinize pro-

---

40. *Id.* at 1270. The District of Columbia Circuit further noted with regard to recent Supreme Court fee jurisprudence that:

> [T]he latest guidance from the [Supreme] Court counsels the use of a percentage-of-the-fund methodology. In *Blum v. Stenson*, 465 U.S. 886, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984), where the Court approved the use of the lodestar method in a statutory fee-shifting context, the Court distinguished the common fund cases stating: "unlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under [the fee-shifting statute before the Court] reflects the amount of attorney time reasonably expended on the litigation." *Id.* at 900 note 16. . . . More importantly, the *Blum* footnote makes it plain that the decision's approval of the lodestar method in the fee-shifting context was not intended to overrule prior common fund cases, such as *Boeing Co. v. Van Gemert*, 444 U.S. 472, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980)].

Id. at 1267-68.

41. *See* 15 U.S.C. § 78u-4(a)(6).

42. Former Federal Judge Abraham Sofaer succinctly set forth the reasons for adequately compensating capable counsel in securities class actions:

> It unquestionably is true that without able lawyers handling these matters not only do some of them go unprosecuted, but the big difference in my experience is in the amount obtained, and you don't get the highest recovery when you are paying at the low end of the scale of fee recovery in contingent actions. It seems to me that I as the protector of the class can fairly say, and honestly say, that I believe it is in the class' best interest — of this class and of future classes yet unknown — to pay this kind of money for these kinds of benefits.

In re Pepsico Sec. Litig., No. 82 Civ 8403 (ADS), Transcript at 17-18 (S.D.N.Y. Apr. 26, 1985) (*cited in* H. NEWBERG, ATTORNEY FEE AWARDS §1.04 at 6, note 30 (1986)).

posed settlements of class action settlements, including attorneys' fee petitions filed by successful plaintiffs' counsel. The procedural mechanisms adopted by the federal courts over the past three decades (since Rule 23 was amended in 1966) ensure that a settlement must be fair, reasonable and adequate in order to merit approval and that "unreasonable" or "excessive" attorneys' fees are not being awarded.

Given the risks inherent in prosecuting contingent fee litigation, the federal courts have recognized that successful plaintiffs' counsel are entitled to be justly compensated for their efforts. There is no empirical evidence establishing that class action attorneys fail to earn the fees that they are awarded by courts after successfully prosecuting a class action.