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PLAINTIFFS' ATTORNEYS' FEES IN CLASS ACTION LITIGATION: AN ETHICAL SOLUTION?

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INTRODUCTION

The premise of this paper entails the notion that there are too many instances in which plaintiffs' attorneys are making unjustifiable sums in attorneys' fees. Those situations occur most notably in class action litigation. I view this problem as a natural, but unhealthy byproduct, of a system which creates the incentives for litigation in which the attorneys' fees are disproportionate to both the legal work performed and the benefit of the litigation to the plaintiffs or society in general, and a system which possesses inadequate safeguards against excessive fees. The current challenge to the legal system is whether it can responsibly deal with this problem within the current structure of ethics rules and the rules of court procedure, or whether more draconian reforms will be necessary through amendments of the federal rules, the rules of ethics for lawyers, or through legislative restrictions.

I will not spend a great deal of time trying to substantiate the existence of the problem, since it is ground that has been covered extensively by others. Instead, I will discuss why this problem has occurred, despite the existence of some safeguards against it, and propose some thoughts as to how these safeguards can be enhanced. A few examples will hopefully serve to set the stage for a discussion on the need for possible reforms.

FEE AWARDS IN CLASS ACTION LITIGATION

Recent reports have brought to light numerous class action settlements in which the plaintiffs' attorneys would recover tens of millions of dollars and more in fees. In some of these cases, the actual benefit to the

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class members appears to be negligible or speculative. In all of these cases, the fee requests are truly breathtaking.

- In a Texas case dubbed by the WALL STREET JOURNAL as the "mother of all procurement scandals," private class action attorneys hired by the State are seeking a staggering $2.3 billion in legal fees for eighteen months worth of work in tobacco litigation.[1] As of this writing, the fee award is currently under review by the court.
- Also in Texas, an attorney sought $108.8 million in fees, plus $20 million in expenses, amounting to nearly two-thirds of the settlement cash, for settling claims for faulty plumbing. His proposed fee was calculated based on his 37,000 clients, each of whom had agreed to pay a 40% contingency fee. Fortunately, a state judge, who referred to the fee request as "excessive and indeed almost scandalous" reduced the award to a "mere" $43.5 million.[2]
- In Florida, a court approved a fee award of $46 million in fees in the second-hand smoke settlement for flight attendants, in which the principal benefit to the class was $300 million cash, paid not to the class members, but instead to a medical research foundation to be named after the lead plaintiff.
- In yet another class action settlement, class members, who purchased a particular pick-up truck which was allegedly prone to fires, sued for repairs or retrofitting. As a settlement they were provided with a $1,000 coupon (laden with restrictions on its use), good for only 15 months, towards the purchase of a new truck. Over one-half of the class members would have likely received nothing from the settlement. The plaintiffs' lawyers requested $10 million in costs and fees.
- Finally, in the now infamous Banc Boston case, thousands of unsuspecting homeowners were docked as much as $90 from their escrow accounts as the end result of a settlement in which their attorneys received an $8.5 million fee award.

Of course, this is by no means an all-inclusive list. Moreover, the problem is not simply one of frivolous claims in which defendants settle to avoid the costs of discovery and trial. Indeed, even in cases where the

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1. To put this proposed award in perspective, $2.3 billion is the approximate Gross Domestic Product of Nicaragua ($2.214 billion), and the combined GDP of the island nations of Barbados, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines ($2.317 billion). Central Intelligence Agency, The World Factbook 1995, Appx. G. The budget for the entire federal judiciary, consisting of the U.S. Supreme Court and all the U.S. Courts of Appeal and U.S. District Courts, including salaries and expenses, was approximately $2.9 billion in 1997. Office of Management and Budget, The Budget for Fiscal Year 1999 at 43, 45.

2. *See* Alison Frankel, *Greedy, Greedy, Greedy*, AM. LAW., Nov., 1996, at 71; Dean Starkman, *Judges' Authority to Slash Fees Expands*, WALL ST. J., Nov. 20, 1996, at B9.

plaintiffs' claims appear to have considerable merit, settlements often appear to provide little benefit to the class, while providing a generous attorney's fee award to the class counsel. Awards such as these have garnered increased attention in the media, and they should. Our civil justice system should not be used to enrich either a small class of lawyers at the expense of the free enterprise system, or, indeed, the class plaintiffs themselves.

It is all too easy to engage in lawyer-bashing these days, and I do not intend today to add fuel to that fire. But in my view, these fee awards are a serious problem which will only add to the disrepute of the legal profession, if the profession does not engage in some serious self-analysis. It is telling that the fee awards issue has attracted the interest of some rather strange bedfellows. Groups as diverse as my own organization, Washington Legal Foundation, and Ralph Nader's Public Citizen, have both become involved in this issue from the standpoint of opposing excessive fee awards. In addition, Congress, has taken an interest, and has begun consideration of such legislative measures that would alter the Federal Rule 23 for class action litigation, as well as proposals to place limits on contingency fee agreements.

WHY EXCESSIVE FEES HAPPEN

If we are to address the problem of excessive fee awards sensibly, we need to assess realistically why they have occurred in the past. The factors that I feel are most prevalent are: 1) the conflict of interest between class counsel and their clients; 2) the lack of strict judicial scrutiny of fee awards; and 3) the lack of any significant check on class counsel by either the class members or the defendants involved in the litigation.

Conflicts Between Class Counsel and Their Clients

In reviewing some of the legal literature in preparation for this conference, I noted numerous articles that outlined a conflict between the interests of the class plaintiffs and their attorneys.[3] It was almost embarrassing to note that none of these articles, all written by fine legal schol-

3. For varied expressions of concern, *see* Judge Friendly's remarks in *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (dissenting op.), and *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972), and commentary in B. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479 (1997); J. Macey & G. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); K. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975).

ars, seemed to broach the idea that ethical self-restraint by attorneys was likely or even plausible. Instead, virtually everyone who has looked at this issue seems to assume that there is a substantial conflict of interest between plaintiffs' attorneys and the class members, and as such we should assume that the attorney's economic self-interest will predominate the attorney's thinking.

What this tells us is that we should not blithely assume that the fee agreement, most typically a standard percentage contingency fee, is fair or appropriate in a particular case. What is a fair and reasonable percentage in one case may not be so in another. Moreover, in some cases, a percentage contingency may not be the most appropriate way to determine the fee at all.

In fact, there is evidence which suggests that contingency fee agreements are widely overused, and is a problem both in class action and individualized litigation. The percentage contingency fee agreement serves a valuable purpose in our civil justice system: it allows injured persons who lack the financial capability to pay an attorney up front to retain counsel to vindicate their rights. This method may also be appropriate where the risk of non-recovery is relatively high and the plaintiff cannot realistically afford the risk of a net loss from bringing suit.

But in my view, the notion that class action litigation is universally high-risk—therefore, justifying all percentage contingency agreements—is far overstated. The attorneys who bring these class actions suits are not stupid or mindlessly heroic. They are, by their own characterization, being entrepreneurial in pursuing a money-making opportunity where they can; they are not engaged in some quixotic litigation quest where they have little or no hope of a recovery. This does not necessarily suggest that contingency fee agreements should be prohibited or restricted *per se*, but it does suggest that courts in reviewing fee awards should not assume that a fee based on a contingency agreement is reasonable or that a contingency-type analysis is always appropriate.

For example, in the Texas tobacco case, referenced above, the plaintiffs' attorneys are making the well-worn argument about the tremendous risk they undertook in bringing the case because of the dismal track record of prior lawsuits on behalf of individual cigarette smokers over the years. However, much of the work against the tobacco industry had already been done by others by the time the Texas suit was filed, and tobacco companies had started settling other similar cases on a state and national level.

There can be no serious argument about the fact that risk may vary considerably from one case to another. For a simple example, consider

the use of a standard one-third contingent percentage agreement for an auto accident case in which liability is clear because, for example, the defendant may have already pleaded guilty to a traffic infraction which caused the accident. In such a case, the plaintiff's lawyer's role may be little more than filing an insurance claim for the policy limits.[4] A fee based on one-third of the recovery may well be excessive in that case, whereas the same fee in a more complex matter may not.

Because a percentage contingency agreement cannot be relied upon as universally appropriate, the courts should use the lodestar method as a means to check on the reasonableness of a contingency fee agreement as applied in a specific case. Under the lodestar method, the court must determine the reasonable number of hours expended on the litigation and the reasonable hourly rate for the participating lawyer. The lodestar is then computed by multiplying the number of hours reasonably expended by the reasonable hourly rate. The district court may then adjust the lodestar upward or downward depending on the respective weights of twelve factors, such as the time and labor required by the case, the experience, reputation and ability of the attorneys involved, and the risk involved in the case.

Surely, when class counsel asks the court to approve a fee with zeroes extending like vapor trails in the sky, it is not too much to ask the attorneys to spend just a little more of their time calculating approximately how many hours were reasonably spent on the case. Thus, even if courts do not adopt a strict lodestar approach, the courts may still use the approach to inform the exercise of their discretion and to double-check whether a percentage-of-the-fund amount is reasonable.[5] This exercise not only helps to protect the public interest by ensuring the integrity of the fee award, but it also provides valuable assistance to an appellate court in deciding whether the district court's discretion was properly exercised.

Inadequate Incentives and Notice for Class Members

Another factor which may lead to excessive fee awards is the fact the class members themselves cannot function as an adequate check on plaintiffs' counsel. Simply stated, class members are generally not well-

4. In individual cases involving contingency fee agreements, courts have only recently begun using the ethics rules to curb fee excesses. *See* Richard B. Schmitt, *Courts Whittle Down Lawyers' Fat Contingency Fees*, WALL ST. J., Jan. 28, 1998, at B1. *See also* Forbush v. J.C. Penney Co., 98 F.3d 817 (5th Cir. 1996).

5. *See, e.g., In re* Combustion, Inc., 968 F. Supp. 1116 (W.D. La. 1997); *In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 348 (N.D. Ga. 1993).

informed about their rights, or their interest in the litigation may be so minor as to dissuade them from actively monitoring their attorney's conduct. This problem is compounded with the late provision of legalistic notices cast in fine-print which are most likely tossed into the trash can with the rest of the day's junk mail.

The inadequacy of the class members as a check on plaintiffs' counsel is seen easily by comparing the relationship of the defense attorneys to their clients. In response to some of the concerns about plaintiffs' fee awards, some have suggested that attention has been focused unfairly on the plaintiffs' side of the table. I am told that at a recent hearing on the attorneys' fees to be awarded as part of the national tobacco settlement, one member of Congress snidely asked one of the tobacco industry attorneys how much he charged per hour and stood to make from the tobacco settlement. The attorney responded with a rather high figure, drawing derisive laughter from the gathering.

The point apparently missed in such comparisons, again, relates to the incentives of, and information available to, the actors in class action settlement. Do we really believe that corporations such as R.J. Reynolds, et al., do not have the litigation savvy sufficient to police their attorneys and negotiate a mutually satisfactory fee agreement? Of course not. But in the case of class action plaintiffs, it is appropriate to question whether the class has had an adequate say. The class members are not likely to be well-informed and may, in fact, be utterly unaware of the litigation. In any event they are not likely to be educated legal consumers. If Tobacco, Inc.'s attorneys make some eyebrow-raising figure per hour, it may not be beyond scrutiny, but what reason do we have for rushing to the aid of that industry as a potential victim of overreaching by its lawyers?

The other response to the tobacco fee objectors is that wise, savvy state governments knowingly entered into contingency contracts with their attorneys, and so we should not now upset those contracts. My response to that is that the state attorneys general offices and, in turn, the private attorneys they hire, may not be very good agents for the ultimate beneficiaries of the settlement moneys, which are the taxpayers who are funding state health care programs. None of the actors purporting to represent their interests have adequate incentives to avoid disproportionately high attorneys' fees.

Time Pressures Upon Courts and Lack of Information

If we cannot expect restraint from plaintiffs' counsel, or adequate policing by the class members, then we are left with looking to the courts

to review attorneys' fee awards in class action settlements. And, in fact, courts routinely scrutinize class action fee awards for their reasonableness. Unfortunately, the courts are operating under severe time pressures and a lack of information which may prevent them from doing an adequate job.

We have all become acquainted with the clogged dockets in our courts. The prospect of conducting a class action trial, which could take months or even years of the court's time, is no doubt not a desirable prospect in the eyes of the court. Courts routinely apply pressure, ranging from the subtle to more coercive arm-twisting, in an attempt to persuade parties to civil litigation to settle their case. Is it any wonder then, why a judge must breathe a sigh of relief when a proposed class action settlement is brought forward? I do not suggest that most judges are intentionally ignoring the costs to class members, defendants, or society in general, in approving settlements, but I think it is only natural for a judge to be inclined to approve a settlement brought forth by two agreeing parties in the absence of any significant objection.

Compounding this problem is the fact that the judge may be at the mercy of those very same settling parties when trying to obtain information necessary to evaluate the reasonableness of the settlement and fee award. The parties themselves may be presenting the judge with a pair of rose-colored glasses with which to view the settlement, and if any objectors appear, they are likely to be treated as some rude, uninformed interloper. Again, given the court's severe time constraints, a judge may develop a view of the settlement with only the parties' overly-optimistic portrayal of the settlement at hand.

The Role of the Defendants

One of the more curious takes on this issue I have heard in recent months is the notion that blame should be cast upon defendant corporations and their attorneys for engaging in collusive settlements.[6] To me, this explanation, while perhaps partially correct as a positive explanation, seems to be grossly misplaced, at least to the extent that we are discussing this as an ethics issue. The argument made is that the real problem in class action settlements is the "collusive settlement," in which the defendants agree to a beneficial settlement which buys the defendants peace from litigation, pays off the plaintiffs' attorneys, but shortchanges

6. *See, e.g.*, Testimony of Brian Wolfman, Esq., Staff Attorney, Public Citizen Litigation Group, Before the Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, on "Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees" (Oct. 30, 1997).

the plaintiffs themselves. Under this scenario, the Court is presented with a rosy picture of the proposed settlement, and it has little basis to find fault. Thus, the argument goes, that the real culprits are the defendants who are buying litigation peace at the expense of the plaintiffs.

I do not doubt for a second that there are "collusive settlements" in which the defense counsel nods agreeably while plaintiffs' counsel explains a proposed settlement to the court. But if by a collusive settlement we mean one in which we think the plaintiffs' attorneys' fees are disproportionate to the benefit of the class, it is not clear to me why we should wag our fingers at the defense counsel for supporting these settlements. It is, after all, the plaintiffs' attorneys whose ethical obligations run to the plaintiffs.

Certainly, defense counsel owes a duty of candor to the court, and so has an ethical responsibility for properly representing the facts of the settlement and the governing law, but beyond that it seems to me the defense counsel's ethical responsibility to zealously represent its client (which presumably now wants the settlement approved) overcomes any general obligation to ensure that the plaintiffs' attorneys' fees are not too high in relation to the work performed or the value of the settlement to the class.[7] In many of these cases I would expect the defendants to deny any liability for their conduct whatsoever. Should we really expect defense attorneys to then blow the whistle on the settlement and say, no, stop everything, this settlement is too good for my client, or, more plausibly, too bad for the plaintiffs?

None of this is to say that courts should not scrutinize collusive settlements; in fact, I think they should do so more than they have in the past. But I think it is ludicrous to suggest that reform efforts should be directed at the defense side of the table when the problem is one of the lack of safeguards against the conduct of plaintiffs' attorneys.

The Use of Ethics Rules as a Check on Attorneys' Fees

Of course, courts have long assumed the power to review the reasonableness of attorneys' fees, and ethical codes of conduct have likewise imposed a reasonableness limitation. Based upon some recent cases, I am hopeful that courts will assume this power more readily than they have in the past. Currently, all fifty states limit the attorneys' fees charged and collected to a reasonableness standard, and most states have

7. As one caveat to this point, I note that, at least in Massachusetts, a comment to Rule 3.3, concerning the duty of candor, provides that the duty of candor applicable in an *ex parte* proceeding applies when parties describe a proposed settlement to the court. It will be interesting to see whether that comment has any effect on the conduct of counsel.

also adopted some form of Rule 1.5 of the ABA Model Rules of Professional Conduct, which requires that all fees "shall be reasonable." Such limits apply to both contingency fees and fees based on work performed.

Using Florida's variation of this rule, a Florida state court judge recently invalidated a twenty-five percent contingency fee contract between the State of Florida and its private counsel in the state's action against the tobacco industry.[8] In that case, the total value of the settlement was reportedly $11.3 billion, and the private attorneys sought a $2.8 billion fee award. The trial judge characterized the request as "patently ridiculous," noting that the award would result in an effective hourly rate of $7,716, even if the attorneys had each worked twenty-four hours a day for forty-two months. Although nobody had raised the ethical rules on the reasonableness of attorneys' fees in their arguments, the judge held that the state's ethical rules applied to limit the fees, notwithstanding the fee agreement previously reached with the States.[9]

The Court explained:

> The "dream team" of private attorneys representing the Plaintiffs in this case are not members of a professional sports franchise but are officers of the Court [who,] by accepting the title of attorney in this State, submit themselves to the Rules of Professional Responsibility. What may have seemed to be a reasonable and ordinary contract when this case began has now developed into an unconscionable one. It is not so much the formation of the contract but its enforcement, *i.e.*, the *collection* of fees that is now without a reasonable doubt excessive.

Similarly, other courts have invoked their power to apply ethics rules to void or modify contingency fee agreements.[10]

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8. State of Florida v. The American Tobacco Co., No. 95-1466 (AH) (Fla. 15th Cir. Ct. Nov. 12, 1997) (Cohen, J.) (unpublished opinion).

9. For a more elaborate discussion of this case and the use of ethical rules to limit attorneys fees, *see* Frank A. Shepherd, *State Professional Conduct Rule Limits Excessive Attorneys' Fees*, WLF LEGAL BACKGROUNDER, March 20, 1998, *available in LEXIS, News Library, Current News File.*

10. *See, e.g.*, Krause v. Rhodes, 640 F.2d 214 (6th Cir. 1981) (court refused to enforce one-third contingency fee agreement in settlement of wrongful death claim); U.S. Steel Corp. v. Green, 353 So.2d 86, 88 (Fla. 1977) (characterizing it as "capricious" to assume reasonableness of attorney compensation based solely upon results obtained for client); *see also* McKenzie Constr. v. Maynard, 758 F.2d 97, 100-02 (3d Cir. 1985) ("the relationship of trust owed by a lawyer to his client . . . [creates] a concomitant obligation to charge only a reasonable fee whether the arrangement be contingent or otherwise . . . [C]ontingent attorney fee agreements . . . are not to be enforced on the same basis as ordinary commercial contracts, [and the] court must be alert to fees where 'the lawyer's retention of it would be unjustified and would expose him to the reproach of oppression and overreaching.").

However, it remains to be seen how extensively courts will assume this authority to police attorneys' fees.[11] I note that in similar tobacco litigation in the State of Texas, the court there has thus far upheld the private attorney's contingency fee agreement with the State, even though the award would result in $2.8 billion in fees for eighteen months worth of work. Moreover, under the current system, there is little reason for the plaintiffs' attorneys to refrain from making an excessive fee request when the only negative consequence is that the court will reduce the award to a more reasonable level. In other words, plaintiffs' attorneys are not truly disciplined for an unethical fee request.

One area which I suggest deserves further consideration is the idea of having the court involve itself more heavily from the outset in the appointment of lead class action counsel. I think the court's involvement could have two principal benefits: first, introducing competition among prospective class counsel at the outset of litigation could counter some of the current incentives that result in disproportionate fees, and, second, by involving the court up front, I think it effectively educates the court about the case and ultimately the settlement that will be proposed. In addition, it increases the court's stake in the litigation. By that I mean that a court which has involved itself from the outset in the appointment of class counsel is more likely to scrutinize a proposed settlement and fee award.

It appears that such an approach is being attempted in the brewing diet pill litigation. The court, in that case, has set up a "beauty contest" to pick a dozen or so lawyers to serve on a panel of plaintiff's attorneys, which will steer the course of the litigation.[12] The court has held hearings and received confidential filings from the attorneys as to their qualifications, fees, method of solicitation of clients, and the like. In contrast to cases in which lawyers handpick their own representatives, a generally incestuous process, in which cases are often controlled by a relatively small group of repeat players, having the court involved helps to insure a healthy competition among the plaintiffs' lawyers and may help prevent involving an excessive amount of lawyers, with a resulting excessiveness of fees.

It has been reported in that case that the court plans to subject the chosen attorneys to a strict code of conduct, including a ban on first-class

11. For a skeptical view of the case-by-case approach, *see* Lester Brickman, *The Proposed Tobacco Settlement Would Award Plaintiffs' Lawyers Excessive Contingent Fees And, What Is Worse, Undue Influence Over Public Policy*, LEGAL TIMES, March 9, 1998, at 33; Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247 (1995).

12. *See* Richard B. Schmitt, *Lawyers Brag, Plead to Join Diet-Pill Panel*, WALL ST. J., Feb. 5, 1998, at B1; Richard B. Schmitt, *Judge Names Mix of Lawyers to Diet-Pill Panel*, WALL ST. J., Feb. 6, 1998, at B2.

air travel and limits on the number of lawyers who will be paid for attending depositions. The court also plans to hire a certified public accountant to regularly audit the lawyers' work. In terms of educating the court, the court has ordered the plaintiffs' steering committee to develop a list of plaintiffs in the case, including information about their alleged injuries. Such a process is made in an effort to gauge the scope of the proceeding. It remains to be seen, however, whether this approach will be effective, but hopefully there will be some benefit.

Likewise, I believe that courts must universally perform more aggressive scrutiny of the fees to be awarded in proposed settlements. As mentioned above, courts should not assume that an agreed-upon percentage contingency fee is reasonable, and should utilize the lodestar approach to inform the exercise of their discretion in establishing the reasonableness of a fee. In order to perform this type of review, it is essential that courts require the attorneys to produce time records and engage in a realistic assessment of the risk involved in bringing a particular case. In making this review, courts must pay particular attention to whether the attorneys have truly blazed the litigation trail, or whether they have simply jumped onto a stagecoach that was already moving thanks to the work of government agencies or other attorneys.

Another way that courts can police attorneys' fees in class action settlements, particularly in cases where the class members' recovery comes in the form of coupons or rebates, is to withhold all or part of the fee award until it is clear exactly how much the class has benefitted from the settlement. This approach is currently being used in one high-profile class action involving the John Hancock Mutual Life Insurance Company. In that case, former Senator Howard Metzenbaum and Public Citizen have objected to a settlement on behalf of life insurance policyholders on the grounds that the proposed deal would immediately pay $39 million to plaintiffs' counsel, while the class members would have to go through a claims process and alternative dispute resolution before they could collect any recovery.[13] A similar situation arises when a settlement significantly overestimates the number of people harmed by a product who will qualify for relief.[14] By withholding all or part of the attorneys' fees until it is clear how much the plaintiffs actually benefit,

13. *See* Karen Donovan, *Sen. Metzenbaum Fights Milberg Weiss*, NAT'L L. J., December 29, 1997, at A6.

14. *See, e.g.*, Richard B. Schmitt, *Class Counsel Seek Top Fees Despite Cuts in Settlement*, DAILY J., Dec. 8, 1997 (describing fight over attorney's fees in asthma drug case after plaintiff class was less than half the size of what was anticipated in settlement agreement).

the court can help to guard against collusive or disproportionate settlements.

Further, I would suggest that courts make a standard practice of appointing a special master or settlement guardian to evaluate the reasonableness of a proposed fee award. The master or guardian would be charged with making a detailed analysis of the work expended on the case and the risk involved in bringing the litigation. This would help alleviate the time problem faced by the court, and would provide a neutral arbiter to assess the fee award. This would also meet the objection raised by class counsel against settlement objectors that such objectors are either ill-informed or have their own ulterior motives for trying to block a settlement.

BEYOND THE REASONABLENESS STANDARD

If courts are unable to use the ethics rules to adequately police attorneys' fees in class actions, I have no doubt that more draconian across-the-board solutions will be in the offing. The alternatives, legislative restrictions and the like, are likely to be far more painful to the legal profession. Even putting aside constitutional concerns, I would not count myself as a likely fan of ham-handed fee restrictions. But the legal profession should not delude itself into thinking that such measures will not happen if it is incapable of reform. We have already seen Congress target the plaintiffs' securities class action bar, with numerous procedural reforms, and two years ago Congress passed legislation to require a thirty-day waiting period before an attorney may contact an airline crash victim's family.

Legislation has now been proposed, and congressional hearings held, to limit the amount of attorneys' fees to be awarded in the national tobacco settlement to $150 per hour for actual time spent on a case, plus actual expenses.[15] Further, legislation has also been introduced, and hearings held, concerning proposals which require state attorneys general to be notified of proposed class action settlements, in order to allow them to object on behalf of class members from their respective states, to improve notice requirements to class members, and to alter Rule 23 to provide that class members must "opt-in" rather than "opt-out" of class action litigation. If abuses in class action litigation continue to occur, I do not doubt that similar legislative proposals will follow.

15. *See* Marcia Coyle, *Cap on Tobacco Lawyer Fees Fought*, NAT'L L. J., Dec. 22, 1997, at A9.

The U.S. House of Representatives Subcommittee on Courts and Intellectual Property recently heard testimony which included proposals to make class actions filed in state court removable to federal court, regardless of whether total diversity exists, where interstate commerce is involved, in order to prevent excessive certifications of classes in state courts. Congress may also consider providing mandatory discovery rights for objectors to class action settlements and requirements to improve the quality of notice to class members, including information about possible conflicts of interest and fees in plain language. Further, proposals have been put forth that would impose as a precondition to class certification self-executing disclosure requirements regarding class counsel's prior settlements and fees, disciplinary actions taken against them, and malpractice suits against them as class counsel.

CONCLUSION

Although courts have the power under the ethics rules to police class action attorneys' fee awards, courts have been too hesitant to use that power in the past. It is my hope that the courts will use all tools at their disposal to review these awards more aggressively. Instead of resisting court scrutiny or pretending that no problem exists, the bar should recognize that strict review of fee awards is essential to the integrity of our civil justice system.