Representing Consumers

Ethical and Practical Considerations in the Attorney-Client Relationship

By Stephen Gardner*

INTRODUCTION

This is something of a hodge-podge paper. Because any consumer law practice is likely to be multifaceted, this paper touches on a variety of topics.

The topics covered in this paper are:

1. Communicating with a defendant's employees.
2. Taping telephone calls.
3. Using undercover testers or investigators.
4. Ethical class action representation.

1. COMMUNICATING WITH A DEFENDANT'S EMPLOYEES

If a defendant is a large company, it is often desirable to contact the employees of that defendant — either before a lawsuit or after filing — to learn what the defendant is up to. This usually arises from one of two motivations: (1) a wish to obtain testimony that can be used to impeach the defendant's official position or even to improve your own case; or (2) a plan to use a tester or investigator to obtain independent proof of the defendant's practices.

The initial ethical consideration is the same in either context. However, because the use of testers or investigators involves additional considerations, it will be covered separately in Section 3 below. The guideposts are, of course, the Texas Disciplinary Rules of Professional Conduct ("Disc. R.").

> In this case, Rule 402 applies. It says:
> In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.[1]

Thus, if you want to contact an employee of a company before suit is filed and with no knowledge that the company has counsel, then you are essentially free to do so.

Note also that the rule provides that you cannot contact someone about a matter whom you know is represented by a lawyer "regarding that subject." This means that you are not precluded from contacting a company just because you recall that the company was represented in another matter at a time in the past.

However, if the company has a general counsel, you should assume that the company is "represented by another

lawyer regarding that subject," as long as the subject involves the company's activity.

Rule 402 also defines what it is to communicate with the company:

> For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.[2] [emphases added].

First, do not call management. This is an easy one. The rule prohibits "communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject matter of the representation."[3]

You can usually contact a non-management employee. The Rule does not prohibit "interviewing a potential witness, other than a party to the suit, even though such witness may be an employee of a party to the suit, where such attorney makes a full disclosure of his connection with litigation and explains the purpose of the interview."[4]

The one sticky area is if you want to contact the employee who is in fact the cause of the problem to your client. Rule 402 prohibits contact with an employee "whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable." This would almost certainly prohibit seeking to create vicarious liability of the corporation by contacting an employee. But another ethics opinion seems to take it further, prohibiting contact if the conduct by the employee is "the subject of the controversy."[5] The best practice here is to avoid that type of contact.

2.TAPING TELEPHONE CALLS

So, you have decided to contact someone (defendant or otherwise) and have decided that rule 402 is not going to stop you. Can you record the conversation without telling the person? The answer is a firm, "Maybe."

There is no law in Texas that prohibits one party to a conversation from recording that conversation, whether in person or on the phone. The Texas Wiretap Law prohibits any "interception" of any communication, and is not limited to the recording of the communication but to any interception of it.[6] Federal wiretap law is similar. However, if the person making the recording is a party to the conversation, then there is not an interception for purposes of the wiretap law.[7]

But it does not stop there, because there is a long line of opinions that hold that it is unethical for a lawyer to record telephone conversations without telling the other party, just because it looks sleazy (or, in the words of ethics mavens, fails to avoid the appearance of impropriety).

The granddaddy of these opinions was ABA Opinion 337, which held that recording without consent is conduct involving fraud, dishonesty or misrepresentation.[8] This is prohibited by Rule 8.04(a): "A lawyer shall not: …. (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation …."

However, in 2001, the ABA reversed itself and held that "the mere act of secretly but lawfully recording a conversation inherently is not deceitful."[9] The ABA noted that many states disagree with this new position of the ABA.

Texas seems to disagree, but perhaps because Texas Ethics Opinions have not caught up with the ABA. Texas Ethics Op. 514 says, in pertinent part:

> In February 1978, this committee addressed the issue of whether an attorney, in the course of his or her practice of law, could electronically record a telephone conversation without first informing all of the parties involved. (See Ethics Opinion 392, Tex. B.J., July 1978, page 580.) The committee concluded that, although the recording of a telephone conversation by a party thereto did not per se violate the law, attorneys were held to a higher standard. The committee reasoned that the secret recording of conversations offended most persons' concept of honor and fair play. Therefore, attorneys should not electronically record a conversation with another party without first informing that party that the conversation was being recorded.[10]

The question then arises: Can a lawyer get around this apparent prohibition by having the client do the taping? The answer to this is easy: NO. A lawyer can never have the client do something that it would be unethical for the lawyer to do. As noted in Tex. Ethics Op. 514:

> An attorney, however, may not circumvent his or her ethical obligations by requesting that clients secretly record conversations to which the attorney is a party. Under these circumstances, the attorney would be ethically required to advise the other parties of the electronic recording, in advance. An attorney may not solicit the aid of his or her clients to undertake an action that the attorney is ethically prohibited from undertaking.[11]

But that same ethics opinion also provides:

> This brings the committee to the issue of whether an attorney can ethically advise a client to electronically record a telephone conversation to which the client is a party, without first informing all other parties involved. Both Texas and federal law permit a party to a conversation to tape record that conversation without first informing the other parties that the conversation is being recorded. (See 18 U.S.C. § 2511 (2)(d); Tex. Penal Code Ann. (Vernon 1986).) An attorney is required to provide his or her client with both an accurate statement of the law, and an honest opinion of the consequences likely to result from a particular course of conduct. (See Comment 7 to DR 1.02.) Hence, an attorney may advise his or her client that both Texas and federal law permit the client to electronically record conversations without first informing the other parties involved, where the equities

of the situation merit such advice.[12]
[emphasis added].

It appears to the author that the Bar giveth and the Bar taketh away. After saying you cannot get a client to do something you are ethically prohibited from doing, the Opinion seems to say you can tell the client what s/he could do, and let them move forward, with a nudge and a wink.

This confusion is increased by an interesting letter sent out by the Bar's General Counsel. It reads:

> February 4, 1997
> Chuck Lanehart
> Chappell & Lanehart, P.C.
> 1217 Avenue K
> Lubbock, Texas 79401
> Dear Chuck: Pursuant to our conversation I am setting forth how we deal with writings alleging professional misconduct in the taping of telephone conversations that are otherwise illegal.
> Professional Ethics Opinion 514 sets forth the Professional Ethics Committee's opinion that such taping is unethical. Those opinions are not binding on the grievance system.
> The Board of Disciplinary Appeals reviews classification decisions from our staff that are appealed. Currently this position is that such conduct, if otherwise legal, is not unethical. Based on that position, we currently classified any allegation such as described in the opinion as any inquiry and as such it is dismissed at the initial stage review by the Chief Disciplinary Counsel staff.
> I hope this helps clarify what is an unusual situation.
> Sincerely,
> /s/ Steve
> Steven W. Young
> General Counsel

[Emphasis added.] Thus, the "Dear Chuck" letter appears to say that the Bar doesn't intend to follow what the Bar says is the rule. And bear in mind that all of the Texas opining took place before the ABA did its about-face.

So, maybe.

If you are going to tape record, you should bear in mind how courts react, which is well demonstrated in these opinions:

> Secretly taped interviews with witnesses are considered unethical,[13] and do damage to that system, regardless of whether the attorney or the client operates the tape recorder.[14] Combining this disruption of the system with the inherent unfairness of allowing one party to use the tapes to further their case while preventing the other party from doing the same requires the Court's conclusion.[15] Work product protection, therefore, is not available for the secretly recorded tapes in this case.[16]
> [emphasis added].

We also observe that an Ethics Opinion concerning an attorney's obligation to inform all parties before tape recording a conversation was published during the same month as this recording occurred.[17] We emphasize that Ethics Opinion 514 is a legally binding part of Rule 8.04(a)(3), supra, and is applicable to all attorneys licensed in this state.[18] [emphasis added]. So, maybe not.[19]

3.USING UNDERCOVER TESTERS OR INVESTIGATORS

Sometimes it may be necessary to send an investigator or tester to a prospective defendant in order to obtain documentation of what the defendant is up to. When the author was with the Texas Attorney General, he used his investigators undercover extensively because it was his experience that if they showed up at a Defendant's door and said, "Hello, I'm an Investigator with the Texas Attorney General. Would you mind telling me whether you are engaged in the widespread screwing of your customers?" they were not likely to get a true picture of things. Similarly, a private attorney may want to test out a prospective client's story or just get additional information on the prospective defendant.

Step One is, of course, whether it is ethical to contact the defendant by talking to its employees, as discussed above. If so, go to Step Two.

Step Two is whether it is lawful to have the tester tape the conversation. As discussed above, that is probably just fine.

Step Three is the actual visit. While it is true that an accurately recorded undercover visit to an unsuspecting weasel can be very probative, it is also true that it can look somewhat sleazy itself. This is the primary consideration before using a tester, or at least using a tester for anything other than work product that will not be disclosed.

For those considerations, see "The Truth Be Told? The Ethics of Using Undercover Testers and Investigators in Civil Litigation," by Prof. David Hricik of the Mercer University School of Law.[20]

4. ETHICAL CLASS ACTION REPRESENTATION

As securities class actions become more restricted and as tort "reform" has its expected effects, consumer lawyers find their turf being invaded by lawyers who have not previously made the consumer protection laws their longtime companions.

While the ranks of consumer advocates can always use augmentation, some of these newcomers have brought with them a relatively new brand of consumer advocacy—one in which the lawyers stand first, if not alone, in the benefits line at the time of settlement.

Simply put, many consumer class actions are now being settled on the basis of what the lawyers get and not what the consumers in the class get. Added to this very real problem in consumer class actions is the perception prevalent in American society that all lawyers are in it for the money. This one-two punch has created an atmosphere in which the true benefits of consumer class actions are at risk.

This article raises and discusses some of the most important ethical issues relating to consumer class actions today, with an eye for suggesting ways in which the process and results can be improved. Where Federal Rule 23 and Texas Rule 42 are identical or similar, this article will refer to Rule 23, but observations should apply to Rule 42 as well. Where Rule 42 is peculiar to Texas, those differences will be discussed.

An excellent source for responsible and ethical advocacy is the NATIONAL ASSOCIATION OF CONSUMER

Advocates ["NACA"], Standards and Guidelines for Litigating and Settling Consumer Class Actions, 176 F.R.D. 375 (1998).[21] The NACA Standards and Guidelines were adopted after much consideration and debate, with input from a wide variety of experienced consumer lawyers and other interested parties. This paper will quote at length from the NACA Standards and Guidelines.

Settlement Classes after Amchem

Virtually all the current ethical issues in class actions arise when a case is settled, and not when it is actually tried. Seven years ago, the United States Supreme Court answered the question of whether a class action that is certified only after settlement must nonetheless meet all requirements that Federal Rule 23 imposes on a litigated class.[22] The Third Circuit had held that the requirements of Rule 23(a) and (b)(3) must be satisfied without taking the settlement into account.[23]

After lengthy analysis, the Supreme Court agreed with the Third Circuit's holding that the requirements of Rule 23(a) and (b)(3) must be satisfied even in the case of a settlement class, but disagreed with the Third Circuit's holding that the fact of the settlement was irrelevant.

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Because the Supreme Court determined that the Third Circuit had in fact taken the settlement sufficiently into account, the Supreme Court affirmed the decision of the Third Circuit, in a 6-2 decision.

The Amchem holding significantly raised the bar in the continuing debate over when and how it is appropriate to certify a settlement class. The specific basis for rejecting certification in this particular mass tort action—lack of commonality and inadequacy of class representation—are, from a consumer lawyer's point of view, secondary to the manner in which the Supreme Court approached its analysis and its procedural pronouncements.

Before discussing the holding, the background of the case is important. The best summary is contained in the Syllabus to the Supreme Court's opinion:

> This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class action certification sought to achieve global settlement of current and future asbestos related claims. Never intending to litigate, the settling parties—petitioners and the representatives of the plaintiff class described below—presented to the District Court a class action complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification. The complaint identifies nine lead plaintiffs, designating them and members of their families as representatives of a class comprised of all persons who had not previously sued any of the asbestos manufacturing companies that are petitioners in this suit, but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos attributable to a petitioner, or (2) whose spouse or family member had been so exposed. Potentially hundreds of thousands, perhaps millions, of individuals may fit this description. All named plaintiffs alleged exposure; more than half of them alleged already manifested physical injuries. The others, so called "exposure only" claimants, alleged that they had not yet manifested any asbestos related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the entire class.
>
> The exhaustive agreement, inter alia, (1) proposed to settle, and to preclude nearly all class members from litigating, claims not previously filed against petitioners; (2) detailed an administrative mechanism and a schedule of payments to compensate class members who meet defined exposure and medical criteria; (3) described four categories of compensable cancers and nonmalignant conditions, and specified the range of damages to be paid qualifying claimants for each; (4) did not adjust payments for inflation; (5) capped the number of claims payable annually for each disease; and (6) denied compensation for family members' loss of consortium claims; for exposure only plaintiffs' claims for emotional distress, enhanced risk of disease, medical monitoring, and for "pleural" claims involving lung plaques but no physical impairment, even if otherwise applicable state law recognized such claims.
>
> The District Court approved the settling parties' plan for giving notice to the class and certified the proposed class for settlement only. The court found, over numerous challenges raised by the objectors, that the settlement was fair, the court's jurisdiction properly invoked, and representation and notice adequate. Pending the issuance of a final order, the District Court enjoined class members from separately pursuing asbestos suits in any federal or state court.[24]

The class certification issues trump Article III issues.

The objectors to the settlement sought to have the Supreme Court first consider the fact that the settlement preceded filing of a lawsuit and that therefore there was no Article III "case or controversy." Objectors also urged lack of standing as to the exposure-only plaintiffs. The Supreme Court held that resolution of the class action issues was "logically antecedent" to Article III issues, and therefore only addressed the class action issues.[25]

To the author, it seems that Article III issues are usually the first resort of any court that does not wish to reach the merits of a case and that the issue of whether there is Article III jurisdiction is fundamentally antecedent to the issue of whether, once jurisdiction has been properly invoked, a settlement should be approved. Accordingly, the fact that

the Supreme Court avoided, almost in passing, the Article III issues betokens a strong desire on the part of the majority to give lower courts guidance, and in many cases, to rein them in on the issue of approving an uncertified settlement class.

Rule 23's requisites must be met when there is a class-wide settlement.

The Supreme Court generally agreed with the Third Circuit's holding that all Rule 23 requisites for certification must be met, without regard to the fact of settlement.[26] The sole point on which the Supreme Court differed from the Third Circuit was the narrow issue of application of Rule 23(b)(3)(D) on the difficulties to be encountered in managing the trial of a class action. In this one respect, the fact of settlement can be conclusive, "for the proposal is that there be no trial."[27]

The Supreme Court stressed that "other specifications of the rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." [emphasis added].[28]

Adequacy of notice is an important consideration in approving a settlement.

The Supreme Court declined to rule explicitly on the issue of the adequacy of the notice to the class. Objectors and the Third Circuit had noted that the forward-looking construction of the class made it impossible to notify all those in the class. Unborn children and future spouses of asbestos victims, among others, would have no reason to realize that they were covered by the settlement. Without ruling, the Supreme Court noted that it "recognizes, however, the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous as the class certified by the District Court."[29]

Here, too, the Supreme Court indicates its intent to drive the development of the law in the important area of meaningful notice.

Courts are not free to expand on Rule 23 procedures as they now exist.

Addressing issues raised in the dissent, the Court discussed the possible desirability of a mechanism to address mass tort claims such as the ones at issue.

The Court said "The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load [the settling parties] and the District Court heaped upon it."[30]

The Court concluded that "courts must be mindful that they are bound to enforce the rule as now composed, for Federal Rules may be amended only through the extensive deliberative process Congress prescribed."[31] However, the Court went on to note that Rule 23 as it is now written provides practical checks in the settlement context. First, their standards "serve to inhibit . . class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness."[32] Second, to permit certification of a settlement class that could not be certified if litigated, would "disarm" both class counsel and the court because class counsel could not use the threat of litigation to improve a settlement offer. Additionally, the court could not rely on the benefits of adversarial investigation to support the adequacy of a settlement.[33]

The Court noted that the Judicial Conference Standing Committee on Rules of Practice and Procedure had proposed an amendment to Rule 23 that would have permitted certification of a settlement class that did not otherwise meet Rule 23 requirements.[34] It also noted that "voluminous public comments—many of them opposed to, or skeptical of, the amendment—were received" by the Committee.[35] This indicates the Supreme Court's own skepticism of such a proposal, at least as it was then worded. Heeding this skepticism, the Committee rejected the settlement-only rule

The fundamental purpose of Rule 23 is to address smaller claims.

The Court drew a sharp contrast between wrestling mass tort actions into the class action device and using class actions to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[36] The Court further approvingly cited a recent Seventh Circuit holding that the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."[37]

Thus, while the continued viability of the class action as a remedy (or purported remedy) for mass tort victims is seriously in doubt as the result of Amchem, there is no question that the use of class actions to remedy identifiable and similar small wrongs done to many is still alive and kicking.

Not unmindful that the Rules Committee was considering amendments to Rule 23, the Court took the opportunity of the Amchem decision to anticipate issues that might come before it in the form of proposed amendments. In so doing, it struck a strong blow for the protection of the rights of the class members, especially absent class members, over concerns for the wishes of class counsel, defendants, or even trial judges, all of whom often wish that settlements could sail through the approval process unfettered by any real examination.

Class counsel with good, certifiable cases need not worry. Those who bring cases that can never be tried must be much more concerned.

Attorneys' Fees

Some of the settlements in class actions provide for such high levels of relief to class counsel at the evident expense of the class, that they would appear to be the reason "why a hearse horse snickers hauling a lawyer's bones."[38]

Class counsel should unquestionably be compensated based on the benefits they obtain for the class. The problem is that, sometimes, the benefits to the lawyers far outweigh the benefits to the class members.

New Texas Rule 42(i)(1) makes things simple for Texas state courts. Incorporating provisions of 2003 Texas legislation, Tex. Civ. Practice & Remedies Code § 26.003,

the amended rule prohibits any fee determination other than a lodestar calculation. Thus, percentage recoveries are out. However, the rule expressly allows a multiplier of 400% on the lodestar amount. On the other hand, the rule also allows reduction of the lodestar amount to as little as 25%. The logic of the latter provision is unclear, since a lodestar calculation by its very nature involves determination of a reasonable hourly fee and reasonable time spent. Thus, any reduction from the amount determined to be reasonable as a lodestar would itself appear to be unreasonable. The jurisprudence on this provision is undeveloped, since it only became effective as to cases filed on or after September 1, 2003.

The NACA Standards and Guidelines:

A. The Issue

The issue of attorneys' fees is extremely important in class actions today, both because it serves as a rallying point for criticism of class actions and because the criticisms of excessive fees are in some instances well grounded. This is also a difficult and complicated issue since fee awards may be made on three different bases: statutory fee shifting, in which defendant pays the fee; common fund, in which the class members pay the fee from their recovery; and common benefit, in which the defendant pays the fee. There is no one problem and no one cure.

The prime focus of criticism is the size of the fees. In many instances, this problem is more apparent than real. For example, when the individual recovery is $50.00 per consumer, an attorneys' fee of $2 million seems excessive at first glance. However, if the dollars actually recovered by the individual class members in such a case were $15 million, then fees are less than 14% of the total recovery achieved for the class. This makes the fee reasonable with respect to the total actual recovery.

However, the cases that receive the most criticism are those where the class does not obtain cash recovery that is several times the fees received by the attorneys. The strongest criticism is directed at cases in which the actual cash received by the class is minimal, if any, and the only other benefits received by the individual members are certificates of questionable value. The GM Pickup Truck cases, are well known examples of this problem, but it had its roots in cases such as the airline antitrust settlement, which also provided certificates to consumers and millions of dollars in attorneys' fees to the class lawyers.[39]

B. Viewpoints

There are a variety of proposed solutions, none of which would take care of the problem entirely. One viewpoint holds that class counsel should be paid only by hourly lodestar rates, enhanced by multipliers when appropriate, and that percentage calculation of fees is not appropriate. The leading lodestar calculation cases primarily consider time spent, hourly rates, the work done, and the results obtained.[40] Because the availability of multipliers of the lodestar fee is uncertain, prohibiting percentage fees could make some class actions impossible to bring. This could occur if the resources needed to commit to the litigation were so sizable that the only way a law firm could economically justify taking on the case and running the risk of recovering nothing, would be the potential of a large percentage recovery. In addition, some commentators have suggested that basing a fee on an hourly rate could lead some class counsel to perform unnecessary work ("churning").

The opposite end of the spectrum from this viewpoint holds that a percentage recovery in the 20-30% range is entirely appropriate and should be left to court approval. Percentage fees have been held appropriate in common fund cases[41] and have been required in cases not involving a fee shifting statute.[42] However, some commenters urge that this approach could result in class counsel being unduly compensated for insufficient time and effort.

Others feel that a blended approach is best— evaluating both percentage and lodestar fees to determine a reasonable fee for the particular case. Under this approach, judges would make a lodestar calculation based on the hours spent and hourly rates and compare that figure with the percentage awards made in similar cases.[43]

Still others urge that different bases for fee awards raise different issues and require different solutions. A complicating factor is that it is not always clear whether a case is a common fund, a fee-shifting, or a common benefit case. If the entire case is based on statutes that provide for fee-shifting (and most consumer class actions are primarily based on fee-shifting statutes,) some commenters felt that it would be inappropriate for class counsel to seek fees based on a percentage of the amount awarded the class. This view finds support in case law holding that the lodestar calculation is required in fee shifting cases.[44] These commenters found it even more objectionable if class counsel sought to obtain percentage fees out of the amounts awarded the class, rather than insisting that the defendant pay the fees over and above all amounts given the class. These commenters felt that this problem was particularly acute in instances where fees are assessed against members of the class who did not actually receive any monetary benefit. This situation can arise when class members' recoveries are credited to their accounts with the defendant but not every class member receives a credit.

These alternative bases for awarding fees are not necessarily in conflict: fees could be recovered from the defendant under a fee shifting statute or other theory and paid into the common fund, with class counsel receiving a percentage of the total recovery. This approach finds support in Skelton v. General Motors Corp., which involved the settlement of statutory fee shifting claims.[45] The court noted that a settlement merges all claims, including the client's statutory fee shifting claim, into one common fund that belongs to the class clients, and ordered fees to be calculated under common fund principles. This view is also consistent with case law noting that the amount which an opposing party can be required to pay as a "reasonable" fee may be substantially less than a reasonable fee owed by the client (or class of clients).[46]

Whatever the method of calculating fees, there is no question that any contingent fee award must take into account the difficulty, complexity, and the risk of the case, the relief obtained for the class, as well as the fact that some cases will result in no fee at all. Therefore, it is entirely appropriate in most class action cases to award fees that are in excess of a fee calculated solely on an hourly basis without any multiplier.

When a fee is to be calculated on a percentage basis, there is no fixed percentage that is appropriate to all cases. A fee of 10% on a class recovery of $100 million might be excessive depending on the circumstances. On the other hand, a 40% fee award would be insufficient in a case where the primary relief sought is injunctive and the payment to the class minimal, but where thousands of hours of attorneys' time

was required and the extent of the injunctive relief justified it. Some commenters argue that there is an inherent problem with negotiating fees with opposing counsel, even when counsel have first agreed on relief to the class. Since the Court has an independent duty to examine the fees, these commenters feel that prior agreement does little but create the appearance of collusion between class counsel and the defendant. Others contend that settlement often would be impossible to achieve unless the defendants understand the extent of their total exposure, and urge that it is preferable to obtain relief promptly for class members. They contend that there is no reason not to reach agreement on fees so long as negotiation of fees follows the obtaining of an agreement to relief for the class on the merits.

C. NACA Guidelines

Reasonable attorneys fees must be awarded in consumer class actions because fees are the incentive for lawyers to engage in private enforcement of the law, but excessive and unreasonable amounts should not be sought or awarded. Because the issue of reasonable attorneys' fees is one that will be determined by the merits of the lawsuit and the nature of the settlement, [FRD 397] there is no one possible remedy for the abuses that exist. However, a variety of partial solutions will be beneficial.

Time to discuss fees. The Supreme Court has recognized that in a fee-shifting case the defendant has an economic interest in resolving the fee issues in a settlement negotiation along with all other statutory claims.[47] Therefore, class counsel should avoid any conflicts of interest that may increase the danger of an improper quid pro quo detrimental to the class. For example, if a defendant offers a $5 million lump sum settlement, with $4 million for the class and $1 million to counsel, it would be improper to accept this offer contingent upon $3 million being made available to the class and $2 million available to counsel. It would be appropriate, however, to state that the $4 million for the class is acceptable as long as counsel's compensation is increased.

One alternative is to obtain the defendant's binding agreement to all class relief and then to submit the fees issue to the court for determination. In statutory fee-type cases, an acceptable alternative is to obtain the defendant's agreement on class relief contingent on successfully negotiating an agreement on fees. It is also acceptable to negotiate fees after all relief has been agreed on for the class, and then submit the entire agreement as a whole to both the court and the class for review and approval. In common fund cases, there is no need to discuss fees with the defendant since the class clients, not the defendant, pay the fee from the fund that was created by their counsel, subject to court approval.

Percentage Benchmarks for most Common Fund Cases. For the vast majority of common fund cases, courts and counsel should examine the reasonableness of the fees requested by the percentage benchmarks that have been recognized in similar cases.[48] In the absence of special circumstances, including either an unusually large monetary recovery or a relatively small monetary recovery coupled with very beneficial but difficult to value equitable relief, the courts have recognized percentage benchmarks ranging from 19 percent to 45 percent of the common fund.[49] As one court has observed, "[w]hen the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee is the 'market rate'."[50]
In the few (often highly publicized) cases in which the monetary relief, however valued or estimated, exceeds $30 million, reasonable fees will nearly always, though not necessarily, represent smaller than the benchmark percentages. In such cases, courts have encouraged use of a lodestar analysis to cross-check the reasonableness of fees in such large cases.[51] Although such cross-checks in typical cases simply add another level of analysis, and may even undermine the purposes of the percentage-of-the-fund approach, in large cases the cross-checks are a useful tool in protecting the class from windfall fee awards. Similarly, when the common fund is relatively small or difficult to value precisely and the common benefit is undoubtedly valuable but difficult to quantify, the lodestar approach may properly supplant the percentage-of-the-fund benchmarks. Provided the class receives real value and is receiving benefits commensurate with the fees to be awarded to class counsel, it is not per se unreasonable for counsel to set aside a monetary fund from which attorneys fees will be paid even though the class may be receiving primarily equitable benefits. However, counsel should be aware that "the timing of fee negotiations" in such cases may be considered as a factor by the courts in the "review of the adequacy of the class' representation."[52]

Recovering fees from the class. In a common fund case where the underlying claims are based on fee-shifting statutes, it is generally best to negotiate an additional amount representing the right to fees from the defendant directly, in order to limit the fees paid by class counsel's clients and maximize the total recovery to the class. It may be appropriate in such a case to merge the statutory fee into the common fund and to also obtain a portion of the fees from the common fund. The same is true in common benefit cases. In instances where the only source of fees is the common fund, class counsel must insure that (1) no class member is assessed fees if that member did not receive a benefit and (2) the percentage of fees assessed against any class member is a reasonable percentage of that class member's recovery. Class counsel must refuse to discuss any proposal by a defendant to pay one amount itself, or to pay nothing itself but agree to class counsel seeking a greater amount from a common fund. If the defendant can be persuaded to offer an additional sum for fees, that can be accepted as a credit toward a common fund award made by the court. In a statutory fee shifting case which is not converted to a common fund case, fees should be recovered solely from the defendant and be based on the lodestar.

Non-cash settlements. In a case where relief to the class is not paid in cash (or by credit to an existing account), the attorneys' fees should be based solely on a lodestar rate, with a multiplier when appropriate under existing case law. Otherwise, it is impossible to determine the value of the actual relief received by the class (as opposed to the theoretical value of non-cash relief) on which to base a percentage amount. If an agreement is negotiated with the defendant as to an amount of fees, which the defendant will not contest, class counsel should still submit sufficient documentation to the court to justify, on a lodestar basis, whatever amount of fees is being sought. Alternatively, a percentage fee might be recovered, but only after a delay, as described below.

Percentage fee request if cash value of settlement cannot be determined at time of settlement approval. In some situations, the total cash value of a settlement may not be calculable at the time the settlement is finally approved. The two most common situations where this is true are (1) certificate settlements, where it is unknown how many of the certificates will ultimately be redeemed; and (2) "claims

made" settlements, where it is unknown what proportion of the available funds will be claimed by class members or paid to a cy pres recipient. In such cases, it is inappropriate for class counsel to seek a percentage fee unless one of the following is true: (a) the settlement provides for a minimum settlement level which is guaranteed to be paid (either to class members or as a cy pres payment) and the fee sought is based upon a percentage of the minimum amount; (b) the settlement provides for an initial payment to class members (or as a cy pres payment) and the fee is sought based on a percentage of that initial payment; or (c) approval of payment of the fee to class counsel is not requested until such time as the court can accurately assess the actual value of the settlement (i.e. after the deadline for class member claims are after the certificates expire).

Notice to the class of fees. Another essential, but not sufficient, component of reform is a requirement that the maximum amount of attorneys' fees to be sought must be disclosed to the class members at the time the notice of proposed settlement is sent to them, stated as a total dollar amount. In a common fund case where a percentage will be sought, that fact and the specific percentage to be requested should be stated in the notice. In statutory fee shifting cases, the lodestar, if agreed to by the parties, should be disclosed in the class notice. If there is no agreement, the amount class counsel intends to request from the court should be disclosed. It is also a good idea to disclose the amount of fees per class member, but the members of the class have the right to know how much their attorneys are making in total. For example, the class must be told that the lawyers will receive $2 million, but could also be told that this amounts to $6.67 per class member. The average fee per class member need not be disclosed when recoveries vary substantially among class members, since that number would not be meaningful.[53] Perhaps the easiest way to recognize an excessive fee award is to determine whether the relief to the class comes in the form of scrip, and not cash. Certificate settlements represent the low-water mark for consumer class actions, as will be discussed in the next section.

In a case where relief to the class is not paid in cash (or by credit to an existing account), the attorneys' fees should be based solely on a lodestar rate.

Certificate Settlements

The remarkable growth of certificate settlements—offering relief to the class members in the form of certificates that are redeemable on future purchases from the defendant—presents an ethical landmine for class action settlements. Many questions have been raised about the propriety of such settlements. Recently, though, there appears to be some decline in the use of certificate settlements, very possibly because they frequently draw objections.

In addition, Texas has responded to coupon settlements in a clever way—the "sauce for the gander" approach. Prompted by new Tex. Civ. Practice & Remedies Code § 26.003, the new Rule 42(i)(2) provides for fees when there are coupons as part of the class settlement. "If any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, ***the attorney fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery*** for the class." The jurisprudence on this provision is undeveloped, since it only became effective as to cases filed on or after September 1, 2003.

The new Texas rule does not apply in federal court, where the problems with certificate settlement will persist. The NACA STANDARDS AND GUIDELINES addressed this issue in depth:

A. The Issues

It is important to differentiate between certificate settlements, which are discussed herein, and other settlements that do not deliver dollars directly into the hands of the class members, which may well be appropriate. An example of the latter type of settlement is one in which credits are issued to class members' accounts with the defendant. When credits are made to existing accounts, the effect is similar to delivering cash, with increased efficiency.

By contrast, the General Motors ("GM") sidesaddle pickup truck case is a good example of the type of certificate settlement that should never have been proposed for court approval. That class action sought to resolve the worst vehicle-fire safety hazard in history: exploding side-saddle gas tanks on GM pickups that have killed 400 people and badly burned more than 2,000 more. The plaintiffs alleged that these trucks are flawed by a dangerous and latent design defect—the placement of the gas tanks outside the frame rail—that increases the likelihood that their fuel tanks will rupture in side-impact crashes, causing fuel-fed fires. The class action sought a recall of these GM trucks, with restitution and refunds to all class members, and an order directing GM to pay for the retrofitting of all GM pickups to correct the fuel tank defects.

However, in the settlement, class counsel abandoned the recall/retrofit remedy in favor of an approach that limited class members' recovery to discount coupons to buy new GM trucks. There was no provision requiring GM to recall or repair the trucks, or to reimburse owners who made the repairs themselves, nor was there any provision requiring GM to warn consumers about the hazards of the trucks, despite the demand for such relief in the complaint. In other words, nothing in the settlement addressed the animating principle of this lawsuit: that these GM pickup trucks pose a serious—but remediable—safety hazard.

The settlement was criticized and rejected by both federal and state courts.[54] One of the main points of criticism was the inadequacy of the certificates as the sole redress for the injured class members.

The GM case and others have served to demonstrate the problems inherent in non-cash settlements. It is important to note, however, that settlements that do not actually deliver dollars into the hands of the class may be entirely appropriate. For example, credits to existing accounts are usually adequate substitutes for mailing checks to each class member; indeed, crediting is more efficient than mailing and should serve as the basis for increasing the amount paid to each class member. Similarly, if the amounts available to each class member are so small as to make delivery by checks economically unviable or if the class members are impossible to determine with certainty, distribution of the class benefit through

cy-pres awards is advisable, as discussed in Issue 6 below. The comments here are directed solely to certificate settlements that only offer class members the opportunity to purchase a product or service from the defendant in the future at a claimed discount from the regular price to the consumer.

B. Viewpoints

There are many potential problems with non-cash settlement of class members' damages:

- There is no principled reason why delivery of cash settlements cannot be achieved, aside from the fact that the defendant prefers not to do so.
- For most of the class, redemption may not be an option, because they are unwilling or unable to make a future purchase. Thus the class members are not equally compensated—some get more, others get less. This situation is at its most aggravated when the certificate requires purchase of a new car or other "big ticket" item.
- Even where the coupon is for a small ticket item or is freely transferable, the defendant may be able to use its specialized knowledge of the industry to recover the cost of the coupon in the marketing of the relevant product.
- Policy considerations disfavor rewarding the wrongdoing defendant with new sales from the victims of its illegal practices.
- The actual value of certificates is uncertain, making valuation of attorney's fees impossible on a percentage basis, especially where discounted prices are common.
- Proponents of certificate settlements claim that use of certificates makes settlements easier because the defendant is more willing to settle for terms that will only mean a discount from the retail price of the product or because the cost to the defendant is in the future, requiring the immediate outlay of less money. Proponents stress that the particular facts involved in a proposed certificate settlement may justify it, pointing for example, to In re Sears Automotive Center Consumer Litigation, in which these proponents averred that the certificates involved could be redeemed for any merchandise sold at Sears stores (not merely the services and merchandise at issue in the litigation) and that 99.6% of the certificates issued were redeemed.[55]

C. NACA Guidelines

Certificate settlements have many disadvantages and should be proposed by class counsel only in the rare case. For example, if (1) the primary goal of the litigation is injunctive and the defendant agrees to an injunction, or the certificates are good for the purchase of small ticket consumable items which class members are likely to purchase, or the certificates represent true discounts that would not otherwise be available, (2) the certificates are freely transferable, and (3) there is a market-maker to insure a secondary transfer market, a certificate settlement might be appropriate. A few basic positions are clear:

- Certificate-based settlements should never require identifiable class members to purchase major, large ticket items from the defendant as the sole significant relief to the class.
- Certificates should have some form of guaranteed cash value. For example, the certificates could have a lesser cash redemption value (either upon issuance or within a reasonable period of time) that still gives the class members a benefit that is significant in relation to the actual damages, which would be provable at trial. As a less-preferable approach, the defendant could contract with a market maker that would promise to purchase all available certificates for a set price that is significant in relation to the likely recovery at trial.
- Certificate settlements should never be proposed to the court unless it is apparent that the defendant is providing greater true value (i.e. not just the face value of the certificates or their potential value) to class members than would be available from an all-cash settlement. There may be legitimate tax or financial-accounting reasons why a greater recovery for class members can be had from a non-cash settlement. However, class counsel should inquire about the defendant's reasons for preferring a non-cash settlement. The beginning assumption should always be that the defendant prefers a non-cash to a cash settlement because it believes the true value to be less. Since the defendant will usually be in a superior position to predict the ultimate redemption rate and benefit to the class, its preference for a non-cash settlement should be viewed with skepticism.
- A settlement involving certificates should require a minimum level of redemption by the class members within a reasonable period of time. In the event actual redemption does not meet this minimum level, the defendant should provide alternative relief in the form of a common fund. This requirement protects against the use of a meaningless certificate settlement that has little or no impact on a defendant, and little or no compensatory value to the plaintiff class.
- Class counsel and defendants should submit to the court and all counsel of record detailed information about redemption rates and coupon transfers during the entire life of the coupon. By doing so, a public record will be made of what works and what does not work in non-cash settlement cases.[56]

Counsel following these guidelines can have a sense of the likelihood of approval of any settlement that involves certificates, and be certain that they have met their ethical and fiduciary responsibilities to the class members.

Competing Classes

One issue that repeatedly rears its head is when there is more than one class action seeking the same relief against the same defendant for the same class of consumers. This situation can arise by synchronicity or design. That is, several lawyers in different areas of the state or country can identify the same problem and file separate suits in honest ignorance of already-pending litigation, or one sees the legal equivalent of carrion birds coming late to the carcass, drawn by the smell of sustenance.

Whether by accident or design, parallel class actions create a panoply of potential problems, for the class, for the counsel, for the defendant, and for the court.

It is therefore essential to find some way to coordinate the separate proceedings.

If all cases are in federal court, any party can ask the Judicial Panel on Multidistrict Litigation to consolidate the cases for pretrial purposes before one federal judge, pursuant to 28 U.S.C.A. § 1407.

In 2003, the Texas Legislature followed suit, creating a Texas Judicial Panel on Multidistrict Litigation.[57] "Notwithstanding any other law to the contrary, the judicial panel on multidistrict litigation may transfer civil actions involving one or more common questions of fact pending in the same or different constitutional courts, county courts at law, probate courts, or district courts to any district court for consolidated or coordinated pretrial proceedings, including summary judgment or other dispositive motions, but not for trial on the merits."[58]

If the cases are in a mixture of state and federal courts, neither of these procedures can solve the problem completely. If all cases are in state courts in several states, these procedures may not help at all.

The NACA Standards and Guidelines discussed this problem and proposed solutions:

There is general agreement that in settling a case, class counsel should be sensitive to the potential for wiping out claims asserted in other pending cases, and should resist doing so. This problem is particularly apparent where the defendants suggest expanding a settlement class beyond the class definition contained in the complaint or in a prior order certifying a class, or expanding the claims settled, but offer no increased benefit to the additional class members or for settlement of the additional claims. There is also concern about the filing of nationwide class actions and agreeing to settlements which do not exclude from the class cases pending in certain states or locales. In either instance, the interests of the classes will not be well served by settlements which do not maximize benefits to class members.

One particular area of concern exists when the multiple cases are pending in both state and federal courts and thus cannot be consolidated under the federal multi-district litigation rules.[59] Class counsel from California might be concerned about becoming involved in a related case pending in a rural area of Texas or Louisiana, where they are unfamiliar with the rules and traditions of practice. The Manual for Complex Litigation addresses this issue, and proposes several procedural steps to increase coordination. These steps include (1) joint conference calls among all judges; (2) coordination of discovery; and (3) joint appointment of experts.[60]

Another area of concern is the settlement of cases through a "reverse auction" by which defendants propose a cheap settlement and shop around among plaintiffs' counsel until they find a lawyer willing to settle on their terms. Although there is no empirical evidence that this problem exists, anecdotes abound, and the potential for collusion and abuse is obvious if a lawyer agrees to a bad deal in order to secure fees.

Commenters agree that class counsel in overlapping actions should communicate with each other and work together to ensure that class members obtain the maximum settlement benefit. The personal interests of particular class counsel in receiving attorney's fees could discourage such cooperation at times. One member proposed that courts should be encouraged not to approve settlements in "copy cat" actions and to consolidate actions whenever possible. However, experience in the federal securities area suggests that use of a "first to file" rule (whether used to determine who will be lead counsel or which should be favored for settlement approval) often produces unsatisfactory results. Cooperation among class counsel through a variety of means including sharing discovery, conducting joint discovery, using joint experts, coordinating document production, and coordinating scheduling of important motions, including motions for class certification, can expedite the handling of cases and minimize the cost to each counsel.

Class counsel should attempt to learn of any pre-existing cases and to communicate with other plaintiffs' counsel in such cases prior to or promptly after filing an overlapping case. Counsel should cooperate with each other to the maximum extent feasible in the pre-trial stage by agreeing to conduct joint discovery, use joint experts, and coordinate document production; or at a minimum sharing discovery among counsel in similar cases; and, where possible, by allocating responsibility for researching and drafting important pleadings and coordinating scheduling of important motions, including motions on the pleadings, for summary judgment, and for class certification.

Counsel should be alert to the possibility that a defendant in multiple cases may seek to conduct a "reverse auction," in which it negotiates separately with various plaintiffs' counsel and attempts to strike a settlement most favorable to it. Bearing in mind the entitlement of class counsel to a fair fee given all the circumstances, the interests of the class must remain paramount.

Counsel (1) should be reluctant to agree to expand the class definition at the settlement stage, (2) should refrain from agreeing to unnecessarily-broad releases which wipe out claims asserted in other pending cases, and (3) should be cautious about settling anything beyond what is alleged in the complaint and mindful of preserving the opt-out rights of class members.

When a settlement has been reached, counsel should always notify class counsel and the court in other cases involving the same defendant and the same or similar issues. Such notice should occur well before the fairness hearing, in sufficient time to permit those counsel the opportunity to appear.

After settlement, class counsel should also consider notifying persons and groups who have an interest in the proceedings that a tentative settlement has been reached and that a preliminary hearing will be scheduled to consider the fairness and adequacy of the settlement. For example, Trial Lawyers for Public Justice and Public Citizen would routinely be notified of class action settlements, the National Association of Attorneys General would receive notice of settlements involving motor vehicles which states purchase in large quantities, the American Association of Retired Persons would receive notice of settlements involving schemes that adversely affect the elderly such as telemarketing fraud and home equity scams, and NACA and the National Consumer Law Center would receive notice of settlements in consumer class actions such as challenges to deceptive home improvement financing schemes or overcharges by financial institutions. While such notification should not be an invariable rule, it should be the practice usually followed.[61]

Lawyers who are involved in competing classes must coordinate and take care to ensure that they do not become the low-bidders in a settlement process, by agreeing to less relief than is appropriate.

CONCLUSION

This paper has just scratched the surface of the interplay of ethical and practical considerations of being a consumer lawyer. However, the issues covered here are (1) the ones most likely to arise; and (2) good examples of how one can be an effective and ethical advocate for consumers.

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1. Tex. Disciplinary R. Prof'l Conduct 4.02(a).

2. Tex. Disciplinary R. Prof'l Conduct 4.02(c).

3. Op. Tex. Ethics Comm'n No. 474 (June 1991). All Texas ethics opinions may be reviewed at this Internet site maintained by the University of Houston: www.law.uh.edu/ethics/Opinions/ethicssubjectindexb.html .
4. Op. Tex. Ethics Comm'n No. 17 (December 1948).
5. Op. Tex. Ethics Comm'n No. 461.
6. TEX. CIV. PRAC. & REM. CODE Ch. 123.
7. These observations are limited to conduct occurring in Texas. Other state laws do prohibit all secret recordings. For a good source on other state laws, see Can We Tape? A Practical Guide to Taping Phone Calls and In-Person Conversations in the 50 States and D.C., an online resource of the Reporters Committee for Freedom of the Press. www.rcfp.org/taping/. Note: as with many things on the Internet, you should read the source material yourself before making any decisions.
8. ABA Comm. on Ethics and Prop'l Responsibility, Formal Op. 337 (1974).
9. ABA Comm. on Ethics and Prop'l Responsibility, Formal Op. 01-422 (2001).
10. Op. Tex. Ethics Comm'n No. 514 (1996).
11. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 8.04 (a)(1) (discussing violations of the disciplinary rules through the acts of others).
12. Op. Tex. Ethics Comm'n No. 514 (1996).
13. *See* Chapman & Cole, 865 F.2d at 686.
14. *See* Otto, 177 F.R.D. at 701.
15. *See* Pfeifer, 1997 WL 276085, at 3.
16. Smith v. WNA Carthage, L.L.C., 200 F.R.D. 576, 579 (E.D. Tex. 2001)
17. *See* 59 TEX. BAR J. 181 (Ethics Opinion 514) (Feb.1996).
18. McWhorter v. Sheller, 993 S.W.2d 781 (Tex.App.—Houston [14th Dist.] 1999, pet. denied).
19. For another court's opinion, albeit in New York, see Mena v. Key Food Stores Co-Op., 195 Misc. 2d 402, 758 N.Y.S.2d 246 (Sup. Ct. Kings Co. 2003). In Mena, the court said that "[c]ontemporary ethical opinions hold that a lawyer may secretly record telephone conversations with third parties without violating ethical strictures so long as the law of the jurisdiction permits such conduct." Id. at 406, 758 N.Y.S.2d at 248, citing American Bar Association Formal Ethics Opinion 01-422 (2001), and New York County Lawyers' Association Committee on Professional Ethics, Opinion No. 696 (1993) [emphases added]. The Mena court further explained that "the attorney's conduct, even had it involved more hands on participation than it actually did, should not be subject to condemnation under the disciplinary rules and does not warrant the extreme sanction of suppression [of the tape] or [the attorney's] disqualification." Id. at 407, 758 N.Y.S.2d at 250 [emphases added]. So, maybe.
20. Consumer & Personal Rights Litigation Newsletter, Vol. VIII, No. 3 (Summer 2003), published by the ABA Section of Litigation. Prof. Hricik also maintains an Internet site on ethical issues, which is an excellent source: www.hricik.com/business.html .
21. In the spirit of disclosure, the author advises that he was one of the editors of the NACA STANDARDS AND GUIDELINES.
22. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231 (1997).
23. Georgine v. Amchem Products, Inc., 83 F.3d 610, 626 (3d Cir. 1996)
24. Amchem, 117 S.Ct. at 2234.
25. *Id.* at 2244.
26. *Id.* at 2248
27. *Id.*
28. *See* FED. R. CIV. P. 23(c), (d); Amchem, 117 S.Ct. at 2248
29. Amchem, 117 S.Ct. at 2252.
30. *Id.*
31. *Id.* at 2248.
32. *Id.*
33. *Id.*
34. *Id.* at 2247.
35. *Id.*
36. *Id.* at 2246, citing KAPLAN, A Prefatory Note, 10 B. C. IND. & COM. L. REV. 497, 497 (1969).
37. Mace v. Van Ru Credit Corp., 109 F. 3d 338, 344 (7th Cir. 1997).
38. C. SANDBURG, "THE LAWYERS KNOW TOO MUCH," CHIEF MODERN POETS OF ENGLAND AND AMERICA, 4th Ed (Sanders, Nelson & Rosenthal).
39. In re: General Motors Corp. Pick-Up Truck Fuel Tank Products Liability, 55 F.3d 768 (3rd Cir.), cert denied, 116 S. Ct. 88 (1995); Bloyed v. General Motors Corp., 881 S.W.2d 422, (Tex. App.–Texarkana 1994), aff'd, General Motors Corp. v. Bloyed, 916 S.W.2d 949 (Tex. 1996); In re: Ford Bronco II Products Liability, 1995 U.S. DIST. LEXIS 3507 (E.D. La. 1995) (rejecting settlement of a class action challenging dangerous vehicles that provided relief to the class in the form of a flashlight and safety video but no damages).
40. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1975); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), on remand, 383 F. Supp. 999 (E.D. Pa. 1974), rev'd on other grounds, 540 F.2d 102 (3d Cir. 1976) (en banc).
41. Boeing Co. v. Van Gemert, 444 U.S. 472, 478-79 (1980); In re Activision Sec. Litig., 723 F. Supp. 1373 (N.D. Cal. 1989); Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268 (9th Cir. 1989).
42. Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993); Camden I Condominium Assn. v. Dunkle, 946 F.2d 768 (11th Cir. 1991).
43. *See* Strang v. JHM Mortgage Sec. Ltd. P'ship, 890 F. Supp. 499, 502-03 (E.D. Va. 1995) (comparing the lodestar and percentage of common fund calculations to conclude that 25% rather than 30% of the fund was a reasonable fee).
44. City of Burlington v. Dague, 505 U.S. 557, 562 (1992); Blum v. Stenson, 465 U.S. 886, 895 (1984).
45. Skelton v. General Motors Corp., 860 F.2d 250 (7th Cir. 1988)
46. Venegas v. Mitchell, 495 U.S. 82 (1990).
47. *See* White v. New Hampshire, 455 U.S. 445, 452 N.14 (1982).
48. *See, e.g.*, Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768 (11th Cir. 1991); Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir.), cert. denied, 488 U.S. 822 (1988); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1272 (D.C. Cir. 1994); Bebchick v. Washington Metro Area Transit, 805 F.2d 396, 406-07 (D.C. Cir. 1986). See also In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 820-21 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995); In re Continental Illinois Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992).
49. *See, e.g.*, In re Greenwich Pharm. Sec. Litig.; [1995] Fed. Sec. L. Rep (CCH) ¶ 98,774, p. 92,523 (E.D. Pa. Apr. 26, 1995); In re SmithKline Beckman Corp. Sec. Litig., 751 F. Supp. 525, 533 (E.D. Pa. 1990); In re Unysis Corp. Retiree Med. Benefits ERISA Litig., 886 F. Supp. 445, 467 (E.D. Pa. 1995); Mashburn v. Nat'l Med. Healthcare, Inc., 684 F. Supp. 679, 692 (M.D. Ala. 1988); In re Activision Sec. Litig., 723 F. Supp. 1373, 1374-78 (N.D. Cal. 1989).
50. Kirchoff v. Flynn, 786 F.2d 320, 324 (7th Cir. 1986).
51. *See, e.g.*, General Motors, 55 F.3d at 822; In re Washington Public Power Supply Sys. Litig., 19 F.3d 1291, 1295, 1298 (9th Cir. 1994).
52. General Motors, 55 F.3d at 803-04.
53. NACA Standards and Guidelines, 176 F.R.D. at 394
54. In re: General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litig., 55 F.3d 768 (3d Cir.); cert. denied, 116 S.Ct. 88 (1995); Bloyed v. General Motors Corp., 881 S.W.2d 422, (Tex. App.—Texarkana 1994), aff'd, General Motors Corp. v. Bloyed, 916 S.W.2d 949 (Tex. 1996).
55. In re Sears Automotive Center Consumer Litig., (N.D. Cal. No. 92-2227 RHS)
56. NACA Standards and Guidelines, 176 F.R.D. 382-84.
57. TEX. GOV'T CODE § 74.161(Vernon 1988).
58. TEX. GOV'T CODE § 74.162 (Vernon 1988).
59. 28 U.S.C. §1407.
60. MANUAL FOR COMPLEX LITIGATION, THIRD §§30.3, 31.14, & 31.3 (1995).
61. NACA STANDARDS AND GUIDELINES, 176 F.R.D. at 385.