

An End to Class Action Abuse?

By: Steven I. Kern*

Tired of getting a two dollar coupon as your part of a class action settlement, while the lawyers get tens of millions in legal fees? The United States Supreme Court has just issued an opinion which may put an end to many of these abuses.

Class action lawyers have made hundreds of millions of dollars because courts have been willing to calculate legal fees either as percentage of the total recovery, or as a multiple of attorneys' hourly fees. In some cases legal fees have even been calculated as a percentage of the estimated benefit of a settlement to the class, even where members of the class receive no money.

These huge fees have been justified by lawyers' claims that class action lawsuits are highly complex, take a long time to resolve, and involve substantial risk. The Supreme Court has now rejected most of these arguments, finding that except in "rare and exceptional circumstances" payment of a reasonable hourly fee, based upon prevailing community rates, is all that class action lawyers can receive. Unless the class action lawyers can prove that a reasonable hourly fee would be adequate to attract competent counsel - a very difficult undertaking in today's environment -- fees will be limited to a reasonable hourly rate.

In reaching its decision, the Court held that while class actions make it possible for persons without means to bring suit to vindicate their rights, unjustified enhancements that serve only to enrich attorneys are not consistent with that purpose. According to the Court, a reasonable attorney's fee should be one that is adequate to attract competent counsel, but that does not produce a windfall to attorneys. In even stronger language, the Court found that the aim of the federal civil rights statute, under which the class action litigation under consideration was brought is "not to provide a form of economic relief to improve the financial lot of attorneys."

In its decision the Court specifically rejected arguments that the novelty and complexity of a case should result in a fee enhancement because these factors should already be reflected in the number of billable hours recorded by counsel. In other words, the more complicated the case, the more hours it will take to prosecute it and, therefore, the more the attorney will receive based on an hourly reimbursement. Similarly the quality of an attorney's performance, according to the Court, should not be used to enhance an hourly fee because the quality of a prevailing party's counsel's representation is normally reflected in the reasonable hourly rate. Or, the better the lawyer, the higher his hourly rate and the superior work expected of a high quality lawyer would already be incorporated in that hourly rate.

Class action litigation often involves years of time, thousands of hours, and an outlay of hundreds of thousands of dollars in expenses. Fees are only awarded if the case is won. But the threat of having to pay exorbitant fees to class counsel often compels defendants to settle cases that they might otherwise choose to fight to the end.

With an end to huge windfalls to attorneys, and the loss of leverage created by the risk to business and government of having to pay those huge attorneys' fees, the number of class action cases brought in the future should drop precipitously. The litigation costs associated with doing business in the United States should decline, saving consumers and taxpayers far more than the value of the occasional coupon that comes in the mail.

*Steven I. Kern is a principal in the healthcare law firm of Kern Augustine Conroy & Schoppmann, P.C., with offices in New Jersey, New York, Pennsylvania and affiliates in Florida and Illinois. He is a nationally recognized expert on Healthcare law who defends physicians throughout the United States. Mr. Kern is also an Editorial Consultant to Medical Economics Magazine and to ModernMedicine.com and a frequent contributor to Medscape Today. He is a former New Jersey Deputy Attorney General assigned to the State Board of Medical Examiners.