UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: READY-MIXED CONCRETE ANTITRUST LITIGATION	)	Master Docket No. 1:05-cv-00979-SEB-JMS
THIS DOCUMENT RELATES TO: ALL ACTIONS	)	

NON-SETTLING DEFENDANTS' JOINT RESPONSE TO PLAINTIFFS' MOTION FOR APPROVAL OF PROPOSED PLAN OF DISTRIBUTION OF SETTLEMENT FUNDS

Plaintiffs use the vehicle of a motion for leave to distribute settlement funds to argue yet again their motion for class certification, which demands a response from the non-settling defendants.[1] Plaintiffs refer to "worn" defense arguments and claim that non-settling "defendants sing the same tired song repeated by most conspiracy participants" which, plaintiffs say, fails to defeat class certification "in most anti-trust cases."[2] These statements have no place in a motion purportedly addressing distribution of settlement funds, but are also wrong on two scores.

[1] References to the "defendants" herein are to the non-settling IMI, Builder's and Beaver defendants unless otherwise specifically noted.

[2] *See* Memorandum in Support of Plaintiffs' Motion for Approval of Proposed Plan of Distribution of Settlement Funds ("Plaintiffs' Memo"), at 2; Levin Declaration (Doc. No. 724), ¶¶ 4, 24.

A. Counsel's Request For Fees and Expenses Creates The Likelihood of Due Process Violations.

Class counsel's motion for an award of attorneys' fees and expenses does not provide notice to class members and therefore does not comply with Fed. R. Civ. P. 23(h) or with due process. Both require that class members "must" be given notice of the motion and an opportunity to object. Although non-settling defendants may not have standing to lodge a formal objection to counsel's motion for fees and costs, the undersigned counsel feel obligated to note the rule violation as officers of the Court. Given the timing of class counsel's motion, there is no one to object in the adversarial setting contemplated by the rule. As a practical matter, if non-settling defendants fail to bring these issues to the Court's attention, then no one will do so. *In re Continental Illinois Securities Litigation*, 962 F.2d, 566, 572 (7th Cir. 1992).

Rule 23(h) provides:

> In a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
>
> (1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), *at a time the court sets*. Notice of the motion must be served on all parties and, *for motions by class counsel, directed to class members in a reasonable manner*.
>
> (2) A class member, or a party from whom payment is sought, may object to the motion.
>
> (3) The court may hold a hearing and *must find the facts and state its legal conclusions* under Rule 52(a). [Emphasis added].

Adequate notice of proceedings to absent class members is a due process right. *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877, 881-82 (7th Cir. 2000). Although the Court has an independent fiduciary duty to review fee and cost petitions from class counsel with "beady-eyed

scrutiny",[3] Rule 23(h) and due process ensure that the Court has every possible benefit of an adversarial presentation.

Class counsel did not file their motion for fees and costs "at a time the court set" and they have not provided prior notice of the substance of their current motion to settlement class members.[4] The Court's orders granting preliminary approval to the three settlement classes each

[3] *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 279-80, 286 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries"); *In re Synthroid Marketing Litigation*, 264 F.3d 712, 720 (7th Cir. 2001) (judge acts as an agent for the class in supervising counsel to ensure the highest recovery for class members net of fees); *In re Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992) (noting that "no member of the class has a sufficient stake to drive a hard -- or any -- bargain with the lawyer. So the judge has to step in and play surrogate client. Apparently judges do this with fair success").

[4] The 2003 Advisory Committee Note to Rule 23(h) indicates that class counsel's motion for a fee award should ordinarily accompany the notice to the class about a Rule 23(e) settlement proposal – *i.e.*, prior to the fairness hearing. The Note states:

> When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel's fee motion *would ordinarily accompany the notice to the class about the settlement proposal itself*. . . . For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion [for a fee award] in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). . . . Besides service of the motion on all parties, notice of class counsel's motion for attorneys' fees must be 'directed to the class in a reasonable manner.' Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, *notice is required in all instances*. In cases in which a settlement approval is contemplated under Rule 23(e), notice of class counsel's fee motion *should be combined with notice of a proposed settlement*, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). . . . *In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to*

set a time certain for any motion requesting an award of fees and costs to be filed prior to the fairness hearings. The approved notices to potential class members explicitly set the time for filing for fees at five (5) days before the hearing.[5] However, class counsel did not file a fee and cost request prior to any of the hearings. Thus, while class members may have had some notice that a fee and cost request might be filed prior to each of the fairness hearings (and perhaps were on notice to check the docket five days prior to each fairness hearing), class members have no notice of the current motion, which seeks to reduce the distributable settlement funds by $10 million.

There are facts surrounding class counsel's current motion that may support a colorable objection to parts of class counsel's motion as improperly shifting the risk of continued litigation to class members. For example, class counsel has requested a reimbursement of $1.5 million in expert fees through December 2008.[6] The last settlement, however, was reached on April 24,

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> *enable potential objectors to examine the motion.* [2003 Advisory Committee Note to Rule 23(h) (emphases added).]

[5] The orders preliminarily approving the Shelby and American settlement classes each stated: "No less than Five (5) days prior to the Fairness Hearing, Class Counsel shall file a motion for approval of the attorneys' fees and reasonable expenses, to be paid from the Settlement Fund under the terms of the Settlement. . . ." *See* Order Preliminarily Approving [American Concrete] Settlement, Certifying Settlement Class, and Directing Notice (Doc. No. 451), p. 6, ¶ 17; Order Preliminarily Approving [Shelby] Settlement, Certifying Settlement Class, and Directing Notice (Doc. No. 452), p. 6, ¶ 17.

The Order preliminarily approving the Prairie settlement stated: "No less than Five (5) days prior to the Fairness Hearing, Class Counsel may file a motion for approval of the attorneys' fees and reasonable expenses, to be paid from the Settlement Fund under the terms of the Settlement. . . ." *See* Order Preliminarily Approving [Prairie/Southfield] Settlement, Certifying Settlement Class, and Directing Notice (Doc. No. 569), p. 7, ¶ 18.

[6] *See* Exhibit E to Plaintiffs' Motion for Approval of Proposed Plan of Distribution of Settlement Funds (Doc. No. 724-6), which seeks reimbursement for $1,479,267.09 in expert witness fees.

2008, when an agreement was executed with Southfield (Prairie).[7] Since that time, class counsel has employed a new expert, Dr. Rausser, and submitted his expert report. Class counsel has also submitted a report and submitted a second report of Dr. Beyer. Neither expert report was necessary to the Prairie Settlement -- Dr. Rausser wasn't employed until May 15, 2008.[8] Although it is impossible to tell from the limited information in class counsel's spreadsheet,[9] it appears likely that almost $1 million of the requested expert expenses were generated after the Prairie Settlement.[10] Defense counsel is aware of this only because copies of Dr. Beyer's bills were obtained through discovery, and they totaled only $543,000 by the time of the Prairie Settlement.[11] With these facts, it is certainly foreseeable that a class member, given adequate notice and information, might object to a proposed distribution that appears to reduce the Settlement Fund by $1 million for expenses incurred litigating against the non-settling defendants and arguably shifts to class members, at least in part, the risk of no further recovery.[12]

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[7] *See* Settlement Agreement with Southfield Corporation f/k/a Prairie Material Sales Inc. and Gary Matney (Doc. No. 567-2).

[8] A copy of Dr. Rausser's May 15, 2008 engagement letter addressed to plaintiffs' counsel is attached hereto as Attachment 1.

[9] Class Counsel provides a spreadsheet showing only gross totals for various costs without dates for individual expenditures.

[10] Plaintiffs' Memorandum and Class Counsel's Declaration are quite open about seeking to include Dr. Rausser's fees in the amount subject to reimbursement. *See* Plaintiffs' Memo, p. 3 (plaintiffs "have submitted reports from two testifying economic experts"), p. 4 (referring to both Dr. Beyer and Dr. Rausser), p. 19 (class counsel have "retained and prepared two experts"); Levin Declaration, ¶ 24 (class counsel have "retained and prepared two experts").

[11] Copies of Dr. Beyer's bills as produced by plaintiffs, through the invoice dated March 24, 2008, are attached hereto as Attachment 2. Attachment 2 excludes copies of bills carried over and paid more than 30 days following the date of the original invoice.

[12] Other expenses likely were also incurred after April 24, 2008, given that discovery continued through plaintiffs' October 8, 2008 filings. In addition, counsel also made representations that certain costs would not be sought in the event they were selected as class

Likewise, the same timing issue may give rise to objections as to class counsel's fee request. Again, one cannot tell from counsel's summary because of the lack of detail, but it is likely that a substantial portion of class counsel's hours were expended after April 24, 2008. After April 24, counsel hired and prepared a new expert, took discovery and litigated numerous discovery issues, deposed defendants' experts, drafted voluminous filings (including the materials filed on October 8, 2008), and prepared for and attended a settlement conference with the non-settling defendants. Under *Sutton v. Bernard* only *necessary* work is to be considered in determining the market rate for services.[13] Nothing done after April 24 was necessary to the Prairie settlement. As such, counsel's loadstar calculation may be substantially skewed.[14]

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counsel. *See* Declaration of Stephen D. Susman (Doc. No.25-1), ¶ 26. It is unclear whether such discounts are reflected in counsel's request for costs.

[13] 504 F.3d 688, 693 (7th Cir. 2007). In *Sutton*, the Seventh Circuit described four factors to be considered when the Court-as-fiduciary establishes the required market rate for legal services provided by class counsel:

(1) Risk of non-payment, considered *ex ante*;

(2) The quality of class counsel's work;

(3) The amount of work necessary; and

(4) The stakes involved in the litigation.

Id.

[14]Objectors may have additional grounds to question counsel's request for a 33% fee. The Federal Judicial Center's empirical study of percentage-based fees in common-fund class litigation reflected a median fee award of 9%, with a range between 5% and 22.5%, all far below the fees sought by class counsel here. *See* L. Hoover & M. Leary, *Auctioning The Role Of Class Counsel In Class Action Cases*, 209 F.R.D. 519, 531 & Table 1 (2001).

For their part, class counsel relies on a law review article that its own authors admit is not representative of attorneys' fees in all class actions. *See* Plaintiffs' Memorandum, pp. 21-22; Levin Declaration, ¶ 29 (*relying on* R. Lande & J. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, U.S.F. L. Rev. 879 (2008). The authors of that article avowedly selected only the most "successful" cases from a plaintiff's standpoint, while excluding from their study cases they deemed to be unsuccessful. *Id.* at 889-890. As the authors

In sum, the foregoing points indicate that a proper notice with adequate opportunity for class members to object to counsel's fee and cost petition is the only way to avoid substantial due process violations in this matter.

B. Plaintiffs Have Used Their Distribution Memorandum as an Improper Forum to Again Argue Their Motion for Class Certification.

As plaintiffs' actions demonstrate, their motion for class certification was doomed even under their own formulation of the standard for class certification (which as discussed below, is not the law). That's why plaintiffs hired a new expert – Dr. Rausser – and submitted new substantive expert reports from Dr. Rausser and Dr. Beyer in violation of the Court's orders. Dr. Beyer's opinions did not pass the *Daubert* test: He did no scientific testing, and the tests he claimed to perform were either unreliable and meaningless or no tests at all.[15]

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state: "We also did not include any cases that were dismissed or were otherwise unsuccessful, or cases that yielded only 'small' recoveries. . . . Rather, we defined success simply in terms of plaintiffs either winning a favorable decision in court or obtaining a substantial settlement. . . . Finally, we made no attempt to ascertain what proportion of all private cases can be defined as successful, unsuccessful, or somewhere between the two." *Id.* at 890.

[15] When Dr. Beyer's deficiencies and deceptions were revealed in defendants' responses to the motion for class certification on April 7, 2008 (Doc. Nos. 550-559), plaintiffs scrambled to hire Dr. Rausser, who was retained on or about May 15, 2008. Plaintiffs then sought a lengthy extension to file their reply (Doc. No. 570), never disclosing their new expert or asking permission to file a new substantive report, which was precluded under the plain language of Court's March 10, 2007 and June 20, 2008 orders (Doc. Nos. 283 and 617). As the time for filing their reply approached, plaintiffs sought leave to file a 90-page reply brief, which was denied by the Court. (Doc. Nos. 668 and 670.) Not to be deterred, however, and apparently seeing nothing to lose, plaintiffs flagrantly violated the Court's orders when they made their filings on October 8, 2008:

- Plaintiffs filed new substantive expert reports –one by Dr. Rausser, one by Dr. Beyer – though the Court clearly limited any new expert testimony to responding to defendants' *Daubert* motion – *i.e.* plaintiffs could provide new testimony only to defend Dr. Beyer's original methodology or lack thereof.

- Plaintiffs filed two briefs totaling 95 pages, instead of the single, combined 60-page brief authorized by the Court.

What plaintiffs call the "same tired song" has for at least six years been the standard in the Seventh Circuit and is now poised to become the universal anthem in all the circuits. In *Szabo* and *West* the Seventh Circuit held that the Court must resolve a "battle of the experts" at the certification stage and make findings of disputed fact (including credibility determinations), even given an overlap with merits elements.[16] Plaintiffs have consistently argued that the Court is not to decide the battle of the experts,[17] relying heavily on decisions from the Third Circuit including the district court opinion in *In re Hydrogen Peroxide Antitrust Litigation*, 240 F.R.D.

See generally Defendants' Joint Memorandum in Support of Motion to Strike Plaintiffs' October 8, 2008 Filings (Doc No. 684) and Defendants' Joint Reply in Support of Motion to Strike Plaintiffs' October 8, 2008 filings (Doc. No. 721).

[16] As described in the IMI Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification (Doc. No. 551), the Seventh Circuit was in the vanguard of this approach in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001) and *West v. Prudential Securities Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) ("The district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification may also affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary, by holding evidentiary hearings and choosing between competing perspectives"). This view is now shared by the overwhelming majority of other circuits to consider the issue after *Szabo*. *See* IMI Defendants' Memorandum in Opposition to Class Certification, pp. 24-26 & n. 43 (collecting cases).

For another recent case from the First Circuit, *see In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6, 24 (1st Cir. 2008) ("It is a settled question that some inquiry into the merits at the class certification stage is not only permissible but appropriate to the extent that the merits overlap Rule 23 criteria.").

[17] In support of their motion to certify, plaintiffs contend that economic criticisms of "the correctness of Dr. Beyer's analysis of the market . . . are not relevant at the class certification stage. Courts have repeatedly rejected defendants' attempts to defeat a showing of the predominance of impact as a common issue in antitrust price-fixing cases based on attacks on the plaintiffs' economic analysis. . . . Such arguments are so routinely rejected because courts recognize that class certification is not the right time to engage in a 'battle of the experts'". Plaintiffs' Memorandum in Support of Motion for Class Certification (Doc. No. 401), pp. 42-43 & n. 29.

In reply, plaintiffs again argued that the Court is not required "to decide between the experts at the class certification stage." *See* Plaintiffs' Reply in Support of Motion for Class Certification (Doc. No. 674), pp. 3, 33.

163, 173-74 (E.D. Pa. 2007).[18] However, that decision was reversed when the Third Circuit considered the case in *In re Hydrogen Peroxide Antitrust Litigation,* 552 F.3d 305 (3d Cir. Dec. 30, 2008). As plaintiffs know, the Third Circuit now has joined the vast majority of other federal circuits in holding that a battle of the experts *must* be resolved at the class certification stage, even if the district court's findings of fact overlap with merits elements.[19]

With the Third Circuit's decision in *Hydrogen Peroxide*, the only federal circuit still adhering to the pre-*Szabo* approach was the Ninth Circuit, but that appears about to change. In *Dukes v. Wal-Mart, Inc.*, a panel of the Ninth Circuit disagreed with the majority approach and relied on old case law from the Second Circuit -- law expressly disavowed in *In re Initial Public Offerings Securities Litigation,* 471 F.3d 24 (2d Cir. 2006) -- to conclude that arguments evaluating the weight of expert testimony or the merits of a case are improper at the class certification stage and to affirm the district court's grant of certification. 509 F.3d 1168, 1179-80 (9th Cir. 2007). On February 13, 2009, however, the Ninth Circuit granted rehearing *en banc* and stated "[t]he three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit." *Dukes v. Wa-lmart, Inc.*, ___ F.3d ____, Westlaw 635818 (9th Cir., Feb. 13, 2009) (No. 04-16688, 04-16720). If, as now seems likely, the full Court reconsiders the *Dukes* panel opinion and agrees with the other circuits, then all the circuits will be singing the same song, the Seventh Circuit song, the song sung by defendants.

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[18] Plaintiffs' Class Certification Memo (Doc. No. 401), pp. 42-43 & n. 29.

[19]Not surprisingly, it is Dr. Beyer's testimony that is under scrutiny in *Hydrogen Peroxide. Id.* at 312-315. In light of *Hydrogen Peroxide*, the Third Circuit also vacated and remanded a certification order in another of Dr. Beyer's cases, *In re Plastics Additives Antitrust Litigation*, Nos. 07-2159 and 07-2418, ordering the district court to conduct "further proceedings consistent with this Court's opinion in *In re Hydrogen Peroxide Antitrust Litigation*, No. 07-1689 (3rd Cir. Dec. 30, 2008)." A copy of the Third Circuit's January 27, 2009 Order in *Plastics Additives* is attached hereto as Attachment 3.

This body of case law – now approaching unanimity among the circuits – is fundamentally at odds with plaintiffs' misplaced arguments in plaintiffs' Distribution Memorandum that this Court must uncritically accept Dr. Beyer's flawed work and grant certification.[20] If plaintiffs truly hear in this "the same tired old song",[21] it is the acoustic result of having their heads in the sand.

[20] *See* Plaintiffs' Memorandum in Support of Motion for Class Certification [Doc. No. 401], pp. 42-43; Plaintiffs' Consolidated Reply in Support of Motion for Class Certification [Doc. No. 674], p. 3.

[21] Levin Declaration, ¶ 4.

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