

The Expert's Corner

CLASS ACTION FEE AWARD PROCEDURES

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INTRODUCTION

The Ninth Circuit recently issued a decision that will likely alter *the procedures* by which class action attorneys' fees are often governed. In the typical practice prior to this decision, the class notice disseminated following preliminary approval of a class action settlement would identify the level of fee likely to be sought, set an objection deadline, and then require a fee petition and final approval brief to be filed thereafter. Under this process, objectors would have the opportunity to object to the gross fee level but often would not have the benefit of referencing the specific fee petition in framing objections.

In *In re: Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988 (9th Cir. 2010), the Ninth Circuit held (2-1) that Rule 23(h) prohibits a district court from setting a deadline for objections to a proposed settlement or award of attorneys' fees before the date on which class counsel files a completed attorneys' fees motion, as such a schedule deprives class members of an adequate opportunity to examine thoroughly, and object to, the completed motion.¹ While *Mercury Interactive* does not specify the precise amount of time that objectors must

be allotted to respond to a fee petition, it nonetheless will likely change class action settlement schedules to ensure that a full fee petition is filed reasonably prior to the objection deadline.

THE CASE

Mercury Interactive was a securities class action that arose following public disclosures by Mercury regarding possible unreported backdating of stock options, the resignation of Mercury's CEO, CFO, and General Counsel, and a significant subsequent fall in Mercury's stock price. After the parties agreed upon a \$117.5 million cash settlement in mediation, the district court certified a settlement class, preliminarily approved the settlement, and ordered notice to the class. The notice described the general terms of the proposed settlement and disclosed that lead counsel would "request . . . attorneys' fees in the amount of 25% (29.375 million)." *Id.* at 990. The notice required objectors to the settlement or proposed fees to write and postmark their objections by September 4, 2008.

While no objections were made regarding the settlement, two timely objections were filed with respect to the proposed amount of 25% in attorneys' fees, one by appellant New York State Teachers' Retirement System ("Teachers"). Noting that the "case was settled early, at the motion to dismiss stage," and that many awards by federal courts after the Private Securities Litigation Reform Act of 1995 were less than 25%, Teachers argued that the court "must critically examine class counsel's application and award no more than what is absolutely required to provide reasonable compensation to class counsel." *Id.* at 991. It claimed this amount would be no more than 18%.

¹ The dissenting judge agreed with the Court's interpretation of the law in this case, but dissented as he believed that the appellants had waived the issue at hand.

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Class counsel filed a motion for attorneys' fees on September 18, 2008, providing information on the number of hours worked by each firm, hourly rates, and general task descriptions. At a fairness hearing on the settlement and attorneys' fees on September 25, 2008, which neither objector attended, the district court approved the settlement and the award of attorneys' fees, reasoning that as objectors "do not object to any line item of work that was done, but rather they simply believe that the amount of the contingency fee should be 18 percent rather than 25 percent... the court doesn't see any reason to depart from the standard percentage that's awarded in the Ninth Circuit." *Id.* at 991.

Because Teachers did not raise the issue of timing – that the objection deadline had passed before lead counsel filed the motion for fees – in the district court, the Ninth Circuit first considered whether it had discretion to address this issue on appeal: "whether *Federal Rule of Civil Procedure 23(h)* requires district courts to set the deadline for objections to attorneys' fees on a date after the fee motion has been filed."² Concluding that it did have the discretion to address the issue and deciding to exercise it, the Ninth Circuit found that the district court erred as a matter of law, "misapplying" *Rule 23(h)* by setting the objection deadline on a date prior to the date by which lead counsel had to file the full fee motion. *Id.* at 993. This bordered on being "a denial of due process because it deprives objecting class members a full and fair opportunity to contest class counsel's fee motion." *Id.* The Court based its holding on the "plain text" of the rule:³

² As this question of law was dispositive in this case, the Court declined to address two other issues raised by Teachers: one, whether the Ninth Circuit's 25% standard for attorneys' fees in common fund cases should apply in PSLRA cases, and two, whether the district court abused its discretion by failing to discuss the requisite factors in approving the award and by inadequately explaining the basis for its award.

³ Rule 23(h) provides:

(1) A claim for an award must be made by motion... 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.

The plain text of the rule requires that any class member be allowed an opportunity to object to the fee "motion" itself, not merely to the preliminary notice that such a motion will be filed. In this case, although notice of the motion was provided to the class, class members were deprived of an adequate opportunity to object to the motion itself because, by the time they were served with the motion, the time within which they were required to file their objections had already expired.

Id. at 993-94.

The Court found additional support for this reading in two sources. The Advisory Committee Notes to the 2003 amendments to Rule 23(h) state that "[i]n setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion." Fed. R. Civ. P. 23, 2003 Advisory Committee Notes, p.68. *Moore's Federal Practice* states that "[a]ny objection deadline set by the court should provide the eligible parties with an adequate opportunity to review all of the materials that may have been submitted in support of the motion..." 5 MOORE'S FEDERAL PRACTICE § 23.124[4] (Matthew Bender 3d ed. 2009). In admonishing that "the declarations supporting [the] fee requests only broadly summarized the work done by each firm," the Ninth Circuit implies that had Teachers been given the chance, they might well have successfully "inquire[d] into the bases for various charges and ensure[d] that they [were] adequately documented and supported." *Id.* at 991, 994.

Finally, the Ninth Circuit reminded the district court that in the "adversarial" setting of deciding a fee award that comes from a common fund, the district court "must assume the role of fiduciary for the class

(2) A class member, or a party from whom payment is sought, may object to the motion.

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plaintiffs.” The Ninth Circuit found that the district court abused its discretion by setting a schedule that “denies the class an adequate opportunity to review and prepare objections to class counsel’s completed fee motion,” and that the district court “fail[ed] to fulfill its fiduciary responsibilities to the class.” *Id.* at 994-95.

THE MEANING

Mercury Interactive raises three interesting issues to watch:

1. *Timing.* Although the *Mercury Interactive* Court declined to adopt a bright-line rule of a length of time that satisfies the Rule 23(h) requirement for a class to have “an adequate opportunity” to oppose a fee motion, the Court made clear that the deadline for objections must come at some point in time after the filing of the motion for fees, as “a schedule that requires objections to be filed before the fee motion itself is filed denies the class the full and fair opportunity to examine and oppose the motion...” *Id.* at 995.

At least one court in another circuit has approved a **three-week period**, see *Dewey v. Volkswagen of America*, 728 F. Supp. 2d 546 (D.N.J. 2010) (finding 20 day period between fee petition and objection deadline to be a “sufficient opportunity for review of the motion”). It seems reasonable to conclude that a **two-week period** is sufficient, given that this is the time period for motion opposition briefs and given that objectors will likely have had some longer period following the notice dissemination and prior to the fee petition filing to review the whole record in the case. For example, the *Mercury Interactive* case arose in the Northern District of California; local rules there require a motion to be filed 35 days in advance of a hearing, Local Rule 7.2, with the opposition brief due not less than 21 days before the hearing (14 days after the motion), *id.* at 7.3, and a reply brief due not less than 14 days before the hearing (7 days after the opposition). *Id.* at 7.4.

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While the precise time span between the fee petition and the objector deadline will be worked out in subsequent case law, the key take home point of *Mercury Interactive* is that these settlement points must unfold in that order.

2. *Beginning of a Trend?* It would not be surprising to find other circuits adopting the *Mercury Interactive* rule requiring fee petitions to be filed sufficiently in advance of the objection deadline. It will be interesting to watch whether they do and whether (and why) any circuits do not.

3. *Effect on Fee Objections.* It will also be interesting to watch what effect this timing requirement has on the content of fee objections. Repeat objectors appear to recycle fee objection briefs from one case to the next, with little of the content of a fee objection having anything specific to do with the particular case in which it is filed. Arguably, objectors have been at a disadvantage in not being able to scrutinize a fee petition before filing an objection and hence have only been able to make cursory objections in many cases. After *Mercury Interactive*, objectors will have the benefit of reviewing a specific fee petition and will have more information available to inform their objections. They ought, therefore, to be held to a higher standard: objectors, particularly those with lawyers, should be expected to have reviewed the fee petition and to target any objections to the specifics of the case. Courts may be less tolerant of lawyer-produced broadside fee objections if targeted objections are now plausible. Whether this is how *Mercury Interactive* will affect the practice of fee objections is worth watching.