

**Remarks of Michael L. Denger
before the
FTC Class Action Workshop
Panel 4: Class Action Attorneys Fees***

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**ATTORNEYS FEES IN ANTITRUST AND CONSUMER PROTECTION
CLASS ACTIONS – AN APPROPRIATE ROLE FOR THE COMMISSION**

- I. The Commission's Consumer Protection and Competition Missions
- A. The Commission was established and has developed as an independent regulatory agency with special expertise and broad authority to proscribe "unfair methods of competition" and "unfair or deceptive acts or practices" that cause or are likely to cause substantial injury to consumers and the competitive process.
- B. The Commission recently has initiated the Class Action Fairness Project, filing amicus briefs challenging petitions for attorneys' fees in circumstances where it believed fees were excessive given (1) the relief provided to the class or (2) the significant contributory role of the underlying government enforcement proceeding upon which the follow-on class actions were based. *See* E. Kolish, "The FTC's Interest in Class Action Settlements," *Antitrust* 26 (Summer 2004); FTC Amicus Memorandum at 3, *Haese v. H.R. Block, Inc.*, Dist. Ct. Case No. CV-96-423, 105th Judicial District for Kleberg County, Texas (challenging "disparity between the modest value of the coupons to be provided to plaintiffs and the \$49 million in fees to be paid to class counsel"); FTC Amicus Memorandum at 1, *In re First Databank Antitrust Litig.*, D.D.C. Master File No. 1:01CV00879 (Jan. 2, 2002) (class counsel's fee calculation should "be based only on the incremental value provided by class counsel, *i.e.*, on that part of the common fund for which [they] were directly responsible," and not that part based on a prior "disgorgement" settlement offered to the Commission).
- C. Excessive class counsel attorneys fee awards are an appropriate subject of Commission concern because they may (1) deprive class members of a portion of what they would otherwise receive, (2) create increased costs that will be ultimately passed on to consumers in the form of higher prices, or (3) reflect a breakdown of the competitive process. *See, e.g., FTC Amicus Brief, First Databank Antitrust Litig., supra* at 3-4 ("although the Commission recognizes that class counsel are entitled to fees for their contributions, the agency has a responsibility to injured customers and to this Court to ensure that those fees are

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reasonable and not overstated.); Kolish, *supra* at 27 ("[T]he consumer remedies and the attorney fees all come from the same place, and the amount the defendant expects to pay in fees can affect the value of the remedy that consumers will receive. The Commission's concerns, however, also include whether fees are reasonable and whether they may unnecessarily raise the cost of goods and services for consumers generally").

- D. This paper considers whether the FTC should undertake an even more active role in seeking a more competitive process for obtaining reasonable attorney fees in certain types of antitrust and consumer protection class actions.

II. The Traditional Approaches To Class Action Attorneys Fees

- A. Private actions to enforce the antitrust laws provide for a "reasonable attorneys fee" to a prevailing plaintiff to be paid by defendants. 15 U.S.C. § 15(a).
- B. A fundamental aim of the Clayton Act attorneys' fee provision is to ensure that plaintiffs can attract competent counsel and thereby have a meaningful opportunity to vindicate their rights under the antitrust laws.
- C. Courts have used two basic methods to award attorneys fees in class actions
 - 1. The "lodestar" approach (basically applying a multiplier to hours reasonably expended at reasonable hourly rates to take into account a variety of factors including the efficiency of time spent, the quality of the work, the results obtained, the degree of risk, etc.). *See, e.g., In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 76 (S.D.N.Y. 2000) (Kaplan, J.).
 - 2. The "percentage of the common fund" approach.
 - a. The value of class counsel's efforts is purportedly measured by the results obtained for the benefit of the class. *Id.* at 77.
 - b. The percentage of the fund recovery approach has been increasingly used by the majority of the circuits, with some using the "lodestar" approach as a cross-check on the reasonableness of a "percentage of fund" award. *See Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 521, 524 (E.D.N.Y. 2003).
 - c. Where multiple law firms represent the plaintiff class, courts in awarding a percentage of the fund often have made an overall award to class counsel, delegating to lead counsel the discretion to apportion the award among other class counsel on the theory that lead counsel is best positioned to know the relative contributions of the various class counsel.
 - d. Class counsel in fee petitions often seek a percentage award near the average or high end of common fund percentages previously awarded, irrespective of the circumstances of the case (degree of

risk, effort expended, state of litigation when settlement occurs, amount recovered, etc.).

III. Appropriate Antitrust Class Action Attorneys' Fees – "one size does not fit all"

A. Antitrust class actions that are "follow-ons" to government enforcement actions.

1. Such cases ordinarily present minimal risks of recovery to class counsel.
 - a. A criminal plea, conviction or civil judgment in a government antitrust action is admissible as prima facie evidence of liability in follow-on private civil litigation. 15 U.S.C. § 16(a) (2002).
 - b. Government investigations and/or litigation will often have developed the key relevant evidence of liability; this evidence usually becomes available to class counsel minimizing both their risk and burden. *See In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96, 99 (D.D.C. 2002) ("The government's substantial involvement [in performing much of the spadework] not only reinforces a private plaintiff's case, but also reduces the risk of nonpayment of class counsel, as well as the need for, and the value of, highly skilled and experienced class counsel").
 - c. The antitrust laws were amended in June (H.R. 1086, Pub. Law No. 108-237, 108th Congress, 118 Stat. 661) to allow an amnesty applicant to limit its civil damage liability (no joint and several liability or treble damages) if it "cooperates" with private plaintiffs, further reducing class counsel's litigation risk.
 - d. Defendants (including amnesty participants) can often be played off against each other in the class action settlement process (*i.e.*, first one in gets the best deal).
 - e. Direct purchaser class actions in follow-on cases are relatively easy to certify under Rule 23.
 - f. The rule of joint and several liability with no right of contribution is a powerful incentive to settle.
 - g. The risk and uncertainties of a multi-defendant jury trial provides an additional incentive to settle.
 - h. In follow-on actions, class counsel ordinarily benefits from the *per se* rule in establishing liability.
 - i. The amount of the overcharge to direct purchasers is the measure of actual damages even if it is passed on with a mark-up. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

- j. The Clayton Act provides for automatic statutory "punitive" (*i.e.*, treble) damages. 15 U.S.C. § 15(a) (2000).
 - 2. The minimal risk to class counsel in taking on follow-on class actions is reflected in
 - a. The very high percentage (estimated 95% plus) of follow-on antitrust class actions that settle without trial.
 - b. The large number of law firms (frequently 20-50 or more) that bring duplicative class complaints following the disclosure of government investigations or enforcement actions. *E.g.*, *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494 (D.D.C. 1981) (30 firms); *In re European Rail Pass Litig.*, 166 F. Supp. 2d 836 (S.D.N.Y. 2001) (38 firms); *In re Vitamins Antitrust Litig.*, 2001-1 Trade Cas. (CCH) ¶ 72,862 (D.D.C. 2000) (60 firms); *In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp. 1190 (N.D. Ill. 1996) (over 25 firms); *In re NASDAQ Market Makers Litig.*, 187 F.R.D. 465, 481 (S.D.N.Y. 1998) (69 firms).
 - c. The growth in the number of antitrust follow-on class actions. *See* S. Calkins, "*Perspectives on State and Federal Antitrust Enforcement*," 53 Duke L. J. 673, 699-700 n.140 (2003). *See also* Kolish, *supra* at 29 n.5 (apparent increase in consumer protection class actions following FTC enforcement actions).
- B. Class actions unaided by government enforcement actions can present considerable risk to class counsel.
 - 1. May involve only a single defendant (such as Section 2 cases), limiting bargaining leverage.
 - 2. May raise rule of reason versus per se liability issues.
 - 3. Will not benefit from the prima facie effect of government judgment.
 - 4. Will not be able to "piggy-back" on the government's collection of key liability evidence after "the kill" has already been made. *See Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d at 523-24.
 - 5. May not have cooperating co-defendants to provide damaging liability evidence.
 - 6. May be less likely to settle short of trial.
 - 7. One or a few plaintiffs' firms is more likely to shoulder the bulk of the litigation risk.

8. When class counsel prevail in such cases, they frequently can make a compelling case for a substantial fee award. *See Visa Check/MasterMoney Antitrust Litig.*, *supra*, 297 F. Supp. 2d at 508-09 (\$220 million fee award for largest antitrust settlement in history (with minimal opt outs (18 of 5 million merchants)) achieved at start of trial after seven years of litigation; case involved 400 depositions and 21 experts, successful class certification, partial summary judgment for plaintiffs, and consumed a high percentage of class counsel's firm's resources over an extended period, was very risky litigation, and reflected excellent quality work by plaintiffs' counsel, etc.)

IV. Problems With Class Counsel Selection And Attorneys Fees in Follow-on Actions

A. The class counsel selection process.

1. In most MDL follow-on class actions, multiple law firms (often 20-50 or more) file class complaints on behalf of competing class representatives.
2. After the MDL decision on district court venue, plaintiffs counsel frequently negotiate and decide among themselves who will be lead or co-lead counsel, members of the steering committee, and liaison counsel. *See In re Auction Houses Antitrust Litig.*, *supra*, 197 F.R.D. at 75 (in some cases "the plaintiffs' lawyers negotiate among themselves to select lead counsel, . . . and the choice is presented as a *fait accompli* for the court summarily to endorse").
3. Class counsel form committees allocating areas of responsibility (*e.g.*, discovery, expert witnesses, motions practice) to various class counsels' firms.
4. Few if any of the firms seeking to be lead class counsel drop out, and all are typically given some role in the prosecution of the class action by lead counsel.
5. Plaintiffs firms do not regularly compete to become lead counsel or class counsel (it is typically worked out behind closed doors) and, where they do compete, it is even more rarely in whole or in part based on fees to be charged. In other contexts, competitive process considerations would favor initial competition based in part on price. *See United States v. Nat'l Society of Professional Engineers*, 435 U.S. 679, 690-92 (1978) (ban on competitive bidding prior to selection of an engineer unlawful).
6. Courts on their own initiative have only rarely used competitive bidding to select class counsel. *See In re Auction Houses Antitrust Litig.*, 197 F.R.D. at 78-81 (reviewing cases).
 - a. Auction approach was pioneered by Judge Vaughn Walker in the *In re Oracle Securities Litig.*, 131 F.R.D. 688 (N.D. Cal. 1990); 132 F.R.D. 538 (N.D. Cal. 1990); 136 F.R.D. 639 (N.D. Cal. 1991).

- v. Virginia State Bar*, 421 U.S. 773, 782 (1975); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421-23 (1990) (*per se* unlawful for a group of lawyers representing indigent defendants to refuse to take new cases unless the D.C. government increased their compensation).
- b. Antitrust jurisprudence teaches that agreements to refrain from bidding for particular matters are unlawful. *E.g.*, *United States v. MMR Corp.*, 907 F.2d 489, 495-96 (5th Cir. 1990); *COMPACT v. Metropolitan Gov't*, 594 F. Supp. 1567, 1575-77 (M. D. Tenn. 1984) (agreement not to bid except through joint bid that allocated work and profits is unlawful).
 - c. Antitrust learning recognizes that joint ventures among competitors to bid on a project or provide service can be unlawful when they are so overly inclusive as to preclude effective competition. *See* U.S. Dep't of Justice and FTC, *Antitrust Guidelines for Collaborations Among Competitors* §§ 3.33, 4.2 and Example 4 (2000); *COMPACT, supra*, 594 F. Supp. at 1577-79; *cf.*, *United States v. Aviant Tech Systems, Inc.*, 1994-1 Trade Cas. (CCH) ¶ 70,595 (C.D. Ill. 1997) (teaming agreement preventing two defense contractors from submitting an individual bid or entering into joint bids with other contractors unlawful).
3. There is a substantial risk that in many cases post-settlement or judgment fee awards may not receive the close scrutiny they deserve.
- a. Settlement provisions frequently preclude the settling defendant from objecting to attorneys' fees below a specified percentage. Moreover, a settling defendant typically has little or no incentive to object to attorneys' fees paid from a common fund.
 - b. In many cases, the court has limited access to information necessary to review the reasonableness of the attorneys' fees being sought. *See* R. Posner, *An Economic Analysis of Law* 570 (4th ed. 1992) ("Although the judge must approve the settlement, the lawyers largely control his access to the information – about the merits of the claim, the amount of work done by the lawyer for the class, the likely damages if the case goes to trial, etc. – that is vital to determining the reasonableness of the settlement."); Thomas B. Leary, *The FTC and Class Actions*, based on remarks before the Class Action Litigation Summit, Washington, D.C. (June 26, 2003) ("judges are accustomed to resolving disputes between adversaries but, once the case settles, the lawyers for the class and the lawyers for the defendant(s) are no longer adversaries. They have a common interest in touting the advantages of settlement and minimizing the difficulties. Ordinarily, the judge has no other source of information or contrary views"); *see also In re Auction*

Houses Antitrust Litig., 197 F.R.D. at 77 ("[O]nce a settlement is agreed upon, the adversary system typically abandons the judge, as plaintiffs' lawyers and defendants band together to convince the court to approve the settlement and the fee award.").

- c. The review of fee petitions is also a burdensome task for the trial court.
 - d. Named plaintiffs often are not "real clients" in the traditional sense. *See Amino Acid Lysine Antitrust Litig.*, *supra*, 918 F. Supp. at 1194 (noting that "the putative class representative who brings an action" does not choose a particular lawyer but rather "vice versa" is "frequently the case in the real world"); *see* T. Leary *supra* at 2. The prospect of "incentive awards" disproportionate to what class representatives otherwise would recover as class members also provides a disincentive to named plaintiffs objecting to a fee petition.
 - e. Opt-outs do not have standing to object to attorneys' fees because they are no longer class members and those remaining in the class often do not have the financial interest or information to meaningfully object.
4. There is some evidence from a limited number of cases employing auctions that bidding at the outset when lead class counsel is selected offers the prospect of lower attorneys fees. As the *Final Report of the Third Circuit Task Force Report on the Selection of Class Counsel* (January 2002) states:

It appears that the percentage of the recovery awarded to counsel in the auction cases is often less than that awarded by traditional methods. Professor Joseph A. Grundfest relies on research to conclude that fees in securities fraud litigation in the 1990's averaged approximately 30% of gross settlements, and ranged from 25 to 33%. By contrast, in auction cases and cases involving "hard bargaining by a competent named plaintiff," awards range from 7% to 21.2%. Likewise, Professor John C. Coffee reported that it is reasonable to assume that "a series of antitrust class action auctions demonstrated that qualified counsel would generally offer to represent the class for fee awards in the 10-15% range," whereas in the two antitrust class actions in which counsel was appointed by auction the fee percentage has been in the single digits. Auction proponents argue that lower fees result in more

settlement assets going to benefit the class members.

Id. at 38 (citations omitted).

5. Structuring the fee arrangement at the outset offers also the prospect of obtaining an arrangement that more closely aligns the interests of class counsel and the class. *See In re Auction Houses Antitrust Litig., supra* 197 F.R.D. at 82.

V. An Auction To Select Class Counsel At The Outset Offers The Prospect For Lowering Attorneys Fees, Better Protecting The Class, And Furthering Competition.

A. Auctions in follow-on class actions

1. Class actions following government enforcement proceedings provide enough information to enable experienced class counsel to make informed bids at the outset of litigation.
2. Counsel representing opt-outs in similar follow-on litigation have been able to negotiate compensation arrangements with their clients.
3. Auctions increase the opportunity for qualified new entrants to represent the class who would be unlikely to be selected as lead counsel by traditional class counsel. *See Third Circuit Task Force Report, supra*, at 40.

B. Suggested procedures if auctions are used in follow-on actions:¹

1. Bids should occur early in the process (soon after class actions have been transferred to an MDL venue for pre-trial consolidation or after state actions have been consolidated or transferred).
2. Bids should be sealed.
3. There should be limits to firms forming coalitions and joint bids to insure there will be sufficient competitive bids.
4. There should be an absolute limit on the number of plaintiffs' firms allowed to serve as class counsel to protect against duplication, inefficiency and an excessive need to coordinate; any plaintiff could, of course, elect to have its counsel continue to represent it individually, but

¹ Many of these procedures have been used in *Auction Houses* and prior bidding cases or are discussed in the Third Circuit Task Force Report. For criticisms of the bidding approach, *see Third Circuit Task Force Report* at 41-57.

such counsel would not be eligible to receive fees awarded to class counsel. *See In re Amino Acid Lysine Antitrust Litig., supra*, 918 F. Supp. at 1202.

5. Little, if any, priority should be given to the first to file; this has a potential side benefit of reducing the incentive to making hasty filings and drafting superficial complaints to win the race to the courthouse. *See Third Circuit Task Force Report* at 38-39. Removing the priority on being first to file should not harm incentives to investigate in follow-on actions because the class action piggybacks on prior government enforcement actions. *See In re Auction House Antitrust Litig., supra* 197 F. Supp. 2d at 82.
 6. Plaintiffs attorneys should be permitted to bid even when they have not filed a class complaint.
 7. The criteria for selection should include qualitative criteria as well as financial criteria. *See, e.g., In re Auction Houses Antitrust Litig., supra*, 197 F. Supp. 2d at 84; Rule 23(g)(1)(C).
 8. Bids should not be made known to defendants before or after a winning bid is selected.
 9. Bidders should be required to certify that they have prepared their bids independently of other bidders and have not had any settlement-related discussions with defendants after the bid process had been announced.
 10. The court presiding over the litigation should establish the criteria for reviewing bids, but should delegate the selection decision to another. *Cf.*, Rule 23(h)(4).
 11. Any use of caps on fees should be evaluated from the standpoint of their effect on counsel's incentive to prosecute the litigation vigorously on behalf of the class.
- C. The FTC should consider advocating an auction process in follow-on antitrust and consumer protection class actions and in related forums such as the Judicial Conference, the National Association of Attorneys General, and Congress.
1. The traditional adversarial system does not provide the necessary checks and balances after a settlement has been reached to ensure low and competitive attorneys fees. *See Pt. IV.B.3., supra*.
 2. The FTC is uniquely positioned as a disinterested party with competitive and consumer protection expertise to provide the courts with general guidance on this important issue.