# District Court Reduces Class Counsel's Attorney Fee Award in Light of Reversionary Clause

by Thomas E.L. Dewey

When parties to a class action reach a settlement agreement and include a clause that defendant will not oppose class counsel's attorney fee award, they may expect that the unopposed fee will be approved by the court. But a recent decision from the Southern District of New York reminds us that courts have an interest in ensuring the reasonableness of attorney fees and protecting the members of the class. Courts are particularly wary of reversionary clauses, which allow the defendant to recoup portions of the settlement fund not claimed during a claims process.

In *Grice v. Pepsi Beverages Co.*, No. 17-CV-8853 (JPO), 2019 WL 340714 (S.D.N.Y. Jan. 28, 2019), after reaching a class action settlement, class counsel sought approval of their attorney fees. The court reduced the attorney fee award by more than one-third based primarily on the reversionary clause in the settlement agreement.

## Background

In *Grice*, plaintiffs brought a class action against defendant Pepsi Beverages Company (Pepsi) based on Pepsi's alleged violations of the Fair Credit Reporting Act (FCRA). Id. at *1. Plaintiffs alleged that Pepsi had violated the FCRA by procuring plaintiffs' consumer reports for employment purposes without making the required disclosure in a stand-alone document. Id. Less than eight months after the case was filed and before any significant discovery or motion practice, the parties engaged in a private mediation and settled the case. Id.

Under the proposed settlement, Pepsi agreed to pay approximately $1.2 million to a common fund, which would cover all payments owed under the settlement, including class member payouts, attorney fees and costs, the cost of settlement administration, and a service fee to the named class plaintiff. Id. After deducting all costs and fees, the remaining amount in the settlement fund was $710,850, which was to be distributed to the class members submitting valid claims forms. Id. However, only about 8 percent of the class members submitted valid claims forms. Id. This low participation rate triggered a reversionary clause under the settlement agreement that allowed Pepsi to claw back 40 percent of the settlement fund, meaning that only $426,510 remained to be distributed among the participating class members. Id.

Class counsel then moved for an attorney fee award of $397,387. Id. The $397,387 attorney fee figure represented one-third of the initial $1.2 million common fund. Id. In support of their application, class counsel stated that they had worked over 450 hours at hourly rates ranging from $500-875 per hour, which resulted in a lodestar figure of $331,281. Id.

# District Court Reduces Attorney Fee Award

Even without a motion opposing class counsel's proposed attorney fee award, Judge J. Paul Oetken performed an in-depth analysis of the reasonableness of the requested fees, and ultimately ruled that a lower amount was appropriate.

In determining the reasonableness of class counsel's attorney fees, the court followed the three-step analysis set forth in *Goldberger v. Integrated Res.*, 209 F.3d 43, 47 (2d Cir. 2000). Id. at *2. The first step in the *Goldberger* analysis is to compare the attorney fee sought to fees in other common fund settlements of similar size and complexity. Id. The court noted that recent studies of attorney fees in common fund settlements for similarly sized cases found the median percentage to be 26.4 percent to 30 percent of the settlement fund. Id. The court also cited empirical evidence showing that for FCRA cases, the median fee is approximately 29 percent. Id. In distinguishing the cases offered by class counsel, the court reasoned that those cases "differ[] materially" while the empirical studies offered a more comprehensive view. Id. at *3.

The court determined that the *Grice* class action was "not very complex" since it involved a "single claim" and a "single statutory provision." Id. Therefore, the "magnitude and complexity" of the case favored a baseline fee percentage on the lower end of the median fees found by empirical studies. Id. (citing *McGreevy v. Life Alert Emergency Response*, 258 F. Supp. 3d 380, 386 (S.D.N.Y. 2017)). Furthermore, the court noted that the parties settled early in the litigation, without any extensive discovery. Id. The court rejected class counsel's arguments that the need to prove willfulness under the FCRA statute and the inherently complex nature of Rule 23 class actions justified a higher baseline fee percentage. Id. As such, the court concluded that a reasonable baseline fee for this case was 27 percent. Id.

The second step in the *Goldberger* analysis is to consider (1) the risk of the litigation; (2) the quality of class counsel's representation; and (3) any remaining public policy considerations to determine whether there is any basis to further adjust the baseline fee. Id. With respect to the riskiness of litigation, the court determined that though class counsel would have had to prove willfulness in order to recover any statutory damages under the FCRA, the risks were "not so unusual as to merit a change in the reasonable baseline fee for this case." Id. at *4 (quoting McGreevy, 258 F. Supp. 3d at 387).

Next, to analyze the quality of class counsel's representation, the court compared the total possible recovery to that obtained in the settlement. Id. The court noted that each class member had obtained a recovery of $51.54, which was only 5 percent of their maximum potential recovery, since the FCRA statutory damages range from $100 to $1,000. Id. (citing 15 U.S.C. §1681n(a)(1)(A)). However, this payout was "generally in line with other FCRA class action settlement recoveries" and in light of the "factual and legal hurdles" the class would have had to overcome to obtain a favorable judgment, the court determined that the settlement was a "good result" for the class members. Id. Despite finding that the settlement was favorable, the court ruled that it was "not so exceptional as to merit an increase in the baseline percentage, especially where the court does not have the benefits of an adversarial examination of the issues." Id.

The third step involved a lodestar "cross-check" on the reasonableness of the award. Id. A reasonable fee under lodestar is generally "the product of a reasonable hourly rate and the reasonable number of hours required by the case." Id. (quoting *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 166 (2d Cir. 2011)). Notwithstanding class counsel's hourly rates of $500 and $875 in other states, the court determined that the "prevailing market rates in the Southern District of New York" for partners in consumer cases is $300 per hour. Id. at *5-6. The court accepted class counsel's representation that they had worked 450.4 hours on the case, despite their failure to "substantiate their representation." Id. at *6. Based on the lodestar cross-check, the court concluded that the $262,300 fee award was reasonable. Id.

# Practice Tips

The *Grice* case provides helpful insight into the factors courts consider when faced with a class action attorney fee award motion. Furthermore, this case reminds us that even if the class action settlement agreement includes a clause that defendant will not oppose class counsel's attorney fee award and even if no other class member objects, the award may still be modified sua sponte by the court. In class actions, courts typically take on a proactive role in approving settlements and awarding costs. Here, the court reduced the proposed attorney fee award by more than one-third.

This case also shows that courts disfavor reversionary clauses and practitioners should be mindful that including such clauses may result in a lower attorney fee award. As explained by Judge Oetken, there are other options to address a situation when some portion of a common fund goes unclaimed: (1) pro rata redistribution among the class members who did make claims; (2) escheat to the state; or (3) cy pres distribution to charitable organizations. Id. at *5. The court described reversion as the "least favored" option due to "its potential to create perverse incentives." Id. In drafting settlement agreements, practitioners should consider whether including a reversion clause is in the best interests of the class and how such clauses may be perceived by courts.

This article first appeared in the *New York Law Journal* on April 24, 2019. Sarah A. Sheridan, an associate at the firm, assisted with the preparation of this article.