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Class Action Settlements and the Duty of Candor Toward the Tribunal

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I have written before about one of the peculiar characteristics of a class action settlement; namely, that once a class action settlement is reached, the interests of the named plaintiffs and the defendant in obtaining settlement approval are aligned, which makes the court's role as fiduciary to the members of the class all the more important. That lack of adversity is present in class counsel's fee petition as well. A defendant is generally indifferent to the amount of fees to be awarded to class counsel, because the fee award often represents nothing more than an amount to be allocated to class counsel out of a larger sum that the defendant has already agreed to pay. Class members, on the other hand, often have a real stake in the amount of the fee award, because the larger the attorneys' slice of the settlement pie, the less pie remains for distribution to the class. At the time the fee petition is presented, therefore, class counsels' interests conflict with the interests of the class they represent, and unless one or more class members object to the fee award, the adversary process provides them with little protection from potential overreach. It then becomes primarily the responsibility of the court, acting as a fiduciary to the class, to probe the fee request and make sure that the bite it takes out of the settlement proceeds is reasonable.

The court's ability to perform this fiduciary role depends on class counsel's performance of their ethical duty to present their request for attorneys' fees with candor, as required by Rule 3.3 of the ABA's Model Rules of Professional Conduct. As every attorney, or at least every litigator, should know, Rule 3.3(a) requires that lawyers shall not knowingly "make a false statement of fact or law to a tribunal or," if they have done so, fail to correct it; shall not fail to disclose adverse legal authority in the controlling jurisdiction not disclosed by opposing counsel; and shall not offer evidence the lawyer knows to be false, and must take "reasonable remedial measures" if they learn that material evidence they have offered was false. Failure of class counsel to adhere to these standards can result in a reduction of the requested amount for attorneys' fees, denial of the fee petition altogether, and in some cases, referral to bar authorities for potential disciplinary action.

This duty of candor places on class counsel a special duty of care in ensuring the accuracy of their fee petition and its supporting declarations. A recent decision from the District of Massachusetts demonstrates one potential consequence of including inaccurate information in such materials, even if the inclusion is the result of inadvertence.

The Decision

In *Arkansas Teacher Retirement System v. Insulet Corp*., C.A. No. 15-12345-MLW (D. Mass., June 25, 2021) ("*Insulet*"), Judge Mark Wolf awarded a reduced amount of attorneys' fees to two plaintiff law firms because the declarations attorneys from those firms submitted in support of their fee requests included language that the court found to be false and misleading. Specifically, the declarations stated that the hourly rates the firms were using for their lodestar analyses "are the same as the regular rates charged for [the attorneys'] services, which have been accepted in other securities or shareholder litigation." Judge Wolf found that these statements were false because the firms "worked almost exclusively on a contingent fee basis and had very few paying clients." In other words, he concluded, contrary to the statements in the declarations, there were no "regular rates" against which the fee requests could be assessed.

Two other firms submitted supporting declarations as well, but omitted the reference to having regular rates charges for their services. The court found that those firms "did not err in their representations to the court with regard to the rates each used to calculate their respective lodestars." [E]xercising its equitable authority to award attorneys' fees from a common fund," and acting "as a quasi-fiduciary for the class," the court awarded the two offending firms what they would have received had the overall award been 23% of the common fund, and awarded the two non-offending firms what they would have received had the overall award been 25% of the common fund. This amounted to a reduction of approximately $200,000 in one fee award and approximately $70,000 in the other.

Given that, despite his finding of "false and misleading" representations, Judge Wolf still awarded significant attorneys' fees to the two law firms, it appears that he did not consider the inaccuracies in *Insulet* to be the result of intentional misconduct, but at most a lack of sufficient care by counsel in ensuring the accuracy of the fee submissions. As the judge explained, one of the court's purposes in reducing the two fee awards in *Insulet* was to provide guidance to class counsel for future cases: "The court hopes that its decision in this case will be another reminder to counsel that their representations with regard to requests for attorneys' fees, among other things, will be scrutinized by judges, and that there will be consequences if they have not satisfied their duty to provide the court information that is accurate, complete, and reliable."

Take-Aways

Beyond its application to the attorneys before it, the court's decision is significant in at least two respects.

First, what seems to have happened in *Insulet* is that counsel submitting the declarations the court found to be false and misleading copied the "regular rates" language from declarations that they had submitted in other cases and that were accepted by other courts. They argued, probably correctly, that it is a common practice for class counsel to include the language or similar language in their fee declarations. The court rejected this "but-everybody-does-it" argument, holding that "[t]he fact that the false and misleading representations made by [the two attorneys] concerning the 'regular rates charged by their attorneys' may be common, does not mean that they should be ignored or excused." This was especially so, Judge Wolf noted, because he had rejected similar language in another case, *Arkansas Teacher Retirement System v. State Street Bank & Trust Co.*, 2020 WL 949885 (D. Mass., Feb. 27, 2020) ("*State Street*"), with which the lawyers admitted they were familiar.

Second, the court in both *Insulet* and *State Street* pointed to another subsection of the Model Rule, subsection 3.3(d), governing *ex parte* proceedings. Section 3.3(d) of both the ABA Model Rules and the Massachusetts Rules of Professional Conduct provides: "In an *ex parte* proceeding, a lawyer

shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." In other words, because an *ex parte* proceeding by definition lacks the adversarial nature that helps ensure that judges will not be misled by inaccurate information, the rules impose on the attorneys appearing before the court a heightened duty of candor beyond that imposed by Rule 3.3(a).

In *State Street*, which involved the same plaintiff but different attorneys, and more examples of potentially false and misleading statements, Judge Wolf had concluded that "[a] petition for an award of attorneys' fees in a class action is appropriately treated as an ex parte submission because at that point the attorneys' interests in maximizing their compensation [are] adverse to the interest of the class in maximizing its recovery." 2020 WL 949885, at *14 (citing *In re Rite Aid Corp. Secs. Litig*., 296 F.3d 294, 307-08 (3d Cir. 2005)). There, he held: "In view of the fact that the adversary process is not operating when attorneys representing a class seek a fee award, it is especially important that they satisfy their duty of candor to the court." 2020 WL 949885, at *13. In support of this conclusion, Judge Wolf relied on Comment 14A to the Massachusetts version of Rule 3.3, which provides: "When adversaries present a joint petition to a tribunal, *such as a petition to approve the settlement of a class action suit* or the settlement of a suit involving a minor, the proceeding loses its adversarial character and in some respects takes on the form of an *ex parte* proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in *ex parte* proceedings and should be guided by Rule 3.3(d)." (Emphasis added).

Although this Comment may not appear in every jurisdiction's version of Rule 3.3, its characterization of a class action settlement proceeding as *ex parte* aptly reflects the diminished adversity present in the settlement approval process, and the importance of attorney candor in assisting courts in fulfilling their fiduciary obligations to settlement class members.

Conclusion

Judge Wolf's decisions in *Insulet* and *State Street* should serve as a wake-up call to attorneys seeking judicial approval of class action settlements. Counsel requesting awards of attorneys' fees in class action settlements, and especially counsel appearing in Massachusetts federal and state courts, would be especially well-advised to study both decisions in order to avoid the adverse outcomes experienced by the attorneys whose declarations in support of their fee requests were found wanting.

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