Chapter 5Settlement: Court-Award Attorneys' Fees, Reimbursement of Costs, Service Awards to Class Representatives, and Cy Pres Distribution

Synopsis

§ 5.01Overview

Attorney's fees and related litigation costs are usually a matter of private contract regulated by the ethical rules governing lawyers.[1] That is not true in the class

[1] See, e.g., Model Rule of Professional Conduct 1.5.

context. When a class action settles, the court creates what is called a common fund. The court oversees allocation of the money from the common fund to class members and others. Its decisions largely displace the ethical rules that would otherwise govern the distribution of the settlement funds.

When a common fund is created in a federal class action, the majority of the fund is typically distributed to the members of the class. This chapter explores other distributions from the common fund, including payments to class counsel as fees and for reimbursements of costs expended during the litigation, service awards to class representatives, and *cy pres* distributions to charitable organizations.

Because these payments reduce the funds available for distribution to class members, courts have developed robust guidelines to ensure their appropriateness. The guidelines for payments from the common fund other than distribution to class members are rooted in the framework of Rule 23 and its accompanying jurisprudence. The Rules of Professional Conduct, which are premised on a traditional attorney-client relationship, are of limited utility in the federal class action context, including regarding payments from the common fund. For instance, as discussed below in Section ___, courts have explicitly held that the standard provisions concerning fee sharing found in the Model Rules of Professional Conduct do not apply in a federal class action where a common fund has been created.

The guidelines premised on Rule 23 governing the payment of fees, costs, and service awards are designed to balance competing goals. On the one hand, the guidelines help incentivize litigation that benefits society—including by providing financial motivation for attorneys to pursue such litigation on a contingent basis and compensating class representatives for their service to the class. The guidelines also ensure that the common fund is equitably distributed, for instance, by compensating for time spent pursuing the litigation and reimbursing litigation expenditures.

On the other hand, the guidelines help ensure that the portion of the common fund distributed to the class is not unduly diminished. At the fee-setting stage, the interests of class counsel and class members are in tension. Class counsel wants to be compensated fairly for work on behalf of the class; class members may want to maximize the portion they receive. Class members, however, do not tend to be sophisticated participants in litigation. Further, defendants often do not take a position on issues related to class counsel's fee award or requests for reimbursement of costs or service awards to class representatives. Thus, courts may not have the benefit of an adversarial process when assessing requests for fees, costs and service awards. The court thus has a duty to ensure common funds are allocated appropriately.

§ 5.02Court-Awarded Attorneys' Fees

[1]Rationale for Awarding Fees

Courts routinely award attorneys' fees to class counsel who create a common fund—whether through settlements or a jury award—on behalf of multiple parties. The rationale for awarding fees is premised on two principles: (1)

basic fairness and equity, and (2) incentivizing attorneys to bring socially beneficial litigation.

The awarding of attorneys' fees from a common fund is rooted in long-standing principles of equity. Prior to establishment of the class action device, the Supreme Court recognized that a litigant or a lawyer who recovers funds to the benefit of persons other than himself or his client is entitled to a reasonable fee.[2] Stated differently, equitable principles also recognize that persons should not be permitted to benefit from the fruits of the litigation without contributing to fund that litigation.[3] Pre-Rule 23 cases also established that the payment to the attorneys was properly made from the common fund created by their efforts.[4] Courts have reiterated the applicability of these equitable principles class action cases.[5]

Awarding attorneys' fees out of a class action settlement or jury award helps facilitate the purpose of Rule 23—to permit the aggregation of claims where individual harm may be small, but the collective harm is significant—by encouraging counsel to bring class cases.[6] In particular, fee awards incentivize socially beneficial litigation and discourage misconduct by would-be defendants.[7] To effectuate this purpose, the fee awards must be sufficiently robust to attract well-qualified attorneys.[8]

Awarding attorneys' fees out of the common fund helps class members maximize

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[2] *See Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527, 532-33 (1881) ("[W]here one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts."); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 125-26 (1885) (holding that attorneys were entitled to a fee where their efforts benefitted a large group of creditors).

[3] *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *14 (S.D.N.Y. Sept. 9, 2015) (explaining that an award of attorneys' fees serves "to ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf).

[4] *See Greenough*, 105 U.S. at 532-537; *see also Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939).

[5] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (a lawyer who obtains a recovery "for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."); *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973) ("[O]ne whose labors produce a favorable result deserves adequate recompense. . .")

[6] *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2011 WL 2909162, at *6 (E.D.N.Y. July 15, 2011) ("Fee awards should 'provid[e] lawyers with sufficient incentive to bring common fund cases that serve the public interest.") (quoting *Goldberger Integrated Res., Inc.*, 209 F.3d 43, 51 (2d Cir. 2000)).

[7] *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *24 (S.D.N.Y. Mar. 24, 2014) ("Class actions serve as private enforcement tools. . .plaintiffs' attorneys need to be sufficiently incentivized to commence such actions in order to ensure that defendants who engage in misconduct will suffer serious financial consequences. . .awarding counsel a fee that is too low would therefore be detrimental to this system of private enforcement.").

[8] *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("To attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."); *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the renumeration should be both fair and rewarding."); *Fleisher*, 2015 WL 10847814, at *14 (fees "encourage skilled counsel to represent those who seek redress").

recovery. It is tempting to think of awarding fees as *reducing* recovery, but this is fallacy. For instance, if fees were set at the lowest possible level—$0—the claims would not be brought because no attorney would take the case, and the class member would not obtain any recovery. The same is true if the fees were set significantly below market rate. As the Third Circuit Task Force explained, "The goal of appointment [of class counsel] should be to maximize the net recovery to the class and to provide fair compensation to the lawyer, not to obtain the lowest attorney fee. The lawyer who charges a higher fee may earn a proportionally higher recovery for the class than the lawyer who charges a lesser fee."[9]

Courts have recognized that the incentives created by attorneys' fees are particularly important to private enforcement of certain laws, including antitrust laws[10] and securities laws.[11]

[2]Calculating the Amount of the Award

[a]In General

While courts agree that attorneys who create a common fund should receive compensation and that such fee awards should be judged on a reasonableness standard, they adopt different approaches to calculating reasonable fee awards. These different approaches recognize that "a reasonable fee will often fall within a broad range."[12]

In the context of awarding attorneys' fees, the court assumes a fiduciary role on

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[9] *Third Circuit Task Force Report*, 208 F.R.D. 340, 373 (Jan. 15, 2002).

[10] *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc*., 481 F.2d 1045, 1050 (2d Cir. 1973) ("[O]ne whose labors produce a favorable result deserves adequate recompense. Such a notion is particularly applicable in the area of the antitrust class action, which depends heavily on the notion of the private attorney general as the vindicator of the public policy. In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation."). *See also In re Linerboard Antitrust Litig.*, 2004 WL 1221350 *17 (E.D. Pa. June 2, 2004) ("As the Second Circuit has explained, the incentive for 'the private attorney general' is particularly important in the area of antitrust enforcement because public policy relies so heavily on such private action for enforcement of the antitrust laws.") (citing *Alpine Pharmacy*, 481 F.2d at 1050); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *18 (S.D.N.Y. Apr. 26, 2016) ("It is important to encourage top-tier litigators to pursue challenging antitrust cases such as this one. Our antitrust laws address issues that go to the heart of our economy. Our economic health, and indeed our stability as a nation, depend upon our adherence to the rule of law and our citizenry's trust in the fairness and transparency of our marketplace."); *In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *5 (E.D. Tenn. May 17, 2013) ("[F]ailing to fully compensate class counsel for the excellent work done and the various substantial risks taken would undermine society's interest in the private litigation of antitrust cases. Society's interests are clearly furthered by the private prosecution of civil cases which further important public policy goals, such as vigorous competition by marketplace competitors. Simply put, anti-competitive conduct such as that alleged in this case would likely go unchallenged absent the willingness of attorneys to undertake the risks associated with such expensive and complex litigation."); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 487-88 (S.D.N.Y. 1998) ("Meritorious class actions, such as the present action, promote private enforcement of, and compliance with, the antitrust laws.").

[11] *City of Providence*. 2014 WL 1883494, at *17 ("[T]he federal securities laws are remedial in nature, and, to effectuate their purpose of protecting investors, the courts must encourage private lawsuits.")

[12] *In re Stericycle Secs. Litig.*, 35 F.4th 555, 559 (7th Cir. 2022).

behalf of the class.[13] Courts are mindful that they cannot rely on the adversarial process to generate information needed to evaluate class counsel's motion for attorneys' fees.[14] The variations in fee calculation methods across different courts may reflect the high level of judicial engagement on this issue. Indeed, courts are skeptical of private arrangements to structure the attorneys' fees as part of the settlement, observing that such arrangements should not be used to circumvent the court's calculation of a fee award.[15] Some courts treat a separate payment of attorneys' fees by defendant as part of the common fund.[16]

Courts have developed three primary approaches to assessing the reasonableness of a requested attorneys' fee award: the percentage method, the lodestar method, and the market rates approach.

[b]Percentage Method

Under the percentage method, the "court sets some percentage of the recovery as a fee."[17] The percentage of the fund awarded as a fee varies, depending on several factors, but, as a general matter, courts using the percentage method typically award between 20 percent and 50 percent of the settlement fund as fees to class counsel.[18] Some courts, such as those in the Ninth Circuit, set a benchmark fee award percentage, although the court has discretion to depart from the benchmark, if circumstances justify.[19] In calculating the value of the

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[13] *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922 (9th Cir. 2020) ("Because the relationship between class counsel and class members turns adversarial at the fee setting stage, district courts assume a fiduciary role that requires close scrutiny of class counsel's requests for fees and expenses from the common fund.").

[14] *Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011) ("We and other courts have often remarked that the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers—the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests."); *Goldberger v. Integrated Resources, Inc.*, 209 F. 3d 43, 53 (2d Cir. 2000) (observing that when class counsel argued "for a bigger slice of his clients' recovery, no one sat adjacent to him at opposing counsel's table").

[15] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011). *See also Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) ("[I]n essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal.").

[16] *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995) (observing that the payment of fees by the defendant is "in economic reality a common fund situation").

[17] *Goldberger*, 209 F.3d at 47.

[18] *Velez*, 2010 WL 4877852, at *21 ("The federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit.") (collecting cases).

[19] *In re Wells Fargo & Co. Shareholder Derivative Litig.*, 445 F. Supp. 3d 508, 519 (N.D. Cal. 2020) ("For more than two decades, the Ninth Circuit has set the benchmark for an attorneys' fee award in a successful class action at twenty-five percent of the entire common fund.") (internal quotation omitted); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure.") (quoting *Six Mexican Workers v.*

settlement, courts may consider the value of both monetary and non-monetary relief.[20]

The percentage of the fund method has emerged as the preferred approach across federal courts.[21] Two circuits—the Eleventh Circuit and the D.C. Circuit—explicitly require their courts to use the percentage method to calculate fee awards.[22] Most circuits, including the First,[23] Second,[24] Third,[25] Fourth,[26] Fifth,[27] Sixth,[28] Eighth,[29] Ninth,[30] and Tenth,[31] give their courts

Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990)).

[20] *Fleisher*, 2015 WL 10847814, at *15 ("In calculating the overall settlement value for purposes of the 'percentage of recovery' approach, courts include the value of both the monetary and non-monetary benefits conferred on the class."). *But see Well Fargo*, 445 F. Supp. 3d at 520 (finding that the value of injunctive relief in the form of corporate governance reforms was "not sufficiently quantifiable to be directly included in the common fund" for purposes of calculating a percentage fee award).

[21] *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 586 & n.7 ("[T]here is strong consensus—both in [the Second] Circuit and across the country—in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery."); *In re Diet Drugs*, 582 F.3d 524, 540 (3d Cir. 2009) ("When calculating attorneys' fees in such cases, the percentage-of-recovery method is generally favored.").

[22] *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class."); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 87-88 (D.D.C. 2013) ("[T]his [C]ircuit has indicated that in cases involving a common fund that has been established for the benefit of plaintiffs, the percentage of the fund methos is the appropriate mechanism for determining the attorney fee award.").

[23] *Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016 ("[I]n a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar.") (quotation omitted).

[24] *Goldberger*, 209 F. 3d at 50 ("[W]e hold that both the lodestar and percentage of the fund methods are available to district judges in calculating attorneys' fees in common fund cases.").

[25] *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) ("In assessing attorneys' fees, courts typically apply either the percentage-of -recovery method or the lodestar method. . .").

[26] *McAdams v. Robinson*, 26 F.4th 149, 162 (4th Cir. 2022) ("There are two main methods for calculating the reasonableness of attorneys' fees—the lodestar method and the percentage-of-recovery method. . .. A district court may choose the method it deems appropriate based on its judgment and the facts of the case.").

[27] *Union Asset Management Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644, (5th Cir. 2012) ("We join the majority of circuits in allowing our district courts the flexibility to choose between the percentage and lodestar methods in common fund cases. . .").

[28] *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 517 (6th Cir. 1993) ("[W]e conclude that use of either the lodestar or percentage of the fund method of calculating attorney's fees is appropriate in common fund cases, and that the determination of which method is appropriate in any given case will depend upon its circumstances.").

[29] *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019) ("The district court has discretion to use either a lodestar or percentage-of-the-fund method in determining an appropriate recovery.").

[30] *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) ("Under Ninth Circuit law, the district court has discretion in common fund cases to choose the percentage-of-the-fund or the lodestar method.").

[31] *Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1263 (10th Cir. 2023) ("Two methods exist for determining attorneys' fee awards in common-fund class action cases. One is the percentage-of-the-fund method, which awards class counsel a share of the benefit achieved for the class. The other is the lodestar method. We have approved both methods in common fund cases, although expressing a preference for the percentage-of-the-fund approach.") (citing *Chieftain Royalty Co. v. Enverest Energy Institutional*

discretion whether to select the percentage method or the lodestar method.

Courts have articulated several reasons why the percentage of the fund method is the superior method to calculate attorneys' fees, including aligning the interests of the class and class counsel to maximize recovery and efficiently prosecute the action,[32] spreading the costs of representation proportionally across class members,[33] and consistency with approaches in non-class cases.[34]

[c]Lodestar and Multiplier

Under the lodestar method, the attorneys' fee award is calculated by multiplying the number of hours expended on the litigation by each particular attorney or legal staff member by their hourly rate and totaling the amounts for all timekeepers.[35] Lodestar may be calculated using either historical rates or current rates, which may vary significantly depending on the length of the litigation. Courts often use current rates in making lodestar calculations as a method for accounting for the delay in payment and general inflation during the course of the litigation.[36] In assessing the reasonableness of class counsel's rates, courts should look to the rates charged by comparable firms on the plaintiff side and the defense side litigating cases of similar complexity and size.[37]

Once the court ascertains class counsel's total fees, it typically applies a multiplier. The purpose of the multiplier is to compensate class counsel beyond the straightforward fee calculation to account for factors such as the risk of the litigation (including the risk of non-payment), the delay in

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Fund XIII-A., L.P., 888 F.3d 455, 458 (10th Cir. 2017)).

[32] *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (finding that the percentage of the fund method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.").

[33] *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 483 (S.D.N.Y. 1998) (finding that the percentage of the fund method "allow[s] for the cost of the litigation to be spread proportionally among each of the beneficiaries, prevent[s] unjust enrichment by class counsel at the expense of the class, and yet provide[s] an incentive to the bar to pursue cases where the prospect of compensation is uncertain and remote in time.").

[34] *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002) (observing that the percentage method also "most closely approximates the manner in which private litigants compensate their attorneys in the marketplace contingency fee model.").

[35] *See, e.g., Fleisher*, 2015 WL 10847814, at *17.

[36] *Wit v. United Behavioral Health*, 5878 F. Supp. 3d 1060, 1076 (N.D. Cal. 2022) ("Here, the Court finds Plaintiffs' request that the lodestar be calculated using current rates to account for the nearly six-year delay in compensation is reasonable."); *Fleisher*, 2015 WL 10847814, at *18 (holding lodestar should be calculated at current hourly rates "as a means of accounting for the delay in payment inherent in class actions and for inflation.") (collecting cases); *see also Johnson v. University College of the University of Alabama*, 706 F.2d 1205, 1210 (11th Cir. 1983) ("district courts should take into account inflation and interest. . .perhaps by compensating at current, not historical rates"); *Daly v. Hill*, 790 F.2d 1071, (4th Cir. 1986) ("Delay necessarily erodes the value of a fee that would have been reasonable if paid at the time the services were rendered. Consequently, an award based upon historic rates which does not take delayed payment into account will not be a fully compensatory fee.") (holding that the district court erred in adopting historic rates without considering the effect of delay in payment on the value of the fee).

[37] *Fleisher*, 2015 WL 10847814, at *18 (finding hourly rates are reasonable where they are "comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude.").

payment, and the skill of the attorneys.[38] Courts have found a wide range of multipliers to be reasonable. Most multipliers fall within the range of 2 to 6,[39] but higher multipliers have been awarded when justified by the circumstances.[40] A negative multiplier—a multiplier of less than one[41]—may be appropriate in limited circumstances.[42] Courts should be mindful that class counsel's work will continue after the fee award, particularly during the claims administration process, and class counsel will not be separately compensated for that time. Thus, the true multiplier will likely be lower than the multiplier calculated at the fee award stage.[43]

The lodestar method may be used where the percentage of the fund approach would result in an inadequate fee for class counsel. This situation most typically arises in litigation brought to address societal ills, as opposed to litigation focused on economic redress.[44]

Many courts use the lodestar method in concert with percentage of the fund method. Where both methods are utilized, the percentage of the fund is usually the primary approach to calculating attorneys' fees, and the lodestar method serves as a cross-check on that calculation to ensure the fee award is reasonable.[45] The lodestar cross-check may cause the court to adjust the fee award calculated by the percentage of the fund method. For instance, where

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[38] *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004)("Under the lodestar method of fee computation, a multiplier is typically applied to the lodestar. The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors.").

[39] *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 623-24 (S.D.N.Y. 2012) ("Courts regularly award lodestar multipliers from 2 to 6 times lodestar."). *See also Vizcaino*, 290 F.2d at 1051 (affirming a fee award that resulted in a 3.65 multiplier).

[40] *See, e.g., In re Cardinal Health Inc. Secs. Litig.*, 528 F. Supp. 2d 752, 767-68 (S.D. Ohio 2007) (awarding a fee award amounting to a 7.89 multiplier, despite protestations from objectors, "[g]iven the outstanding settlement in this case and the noticeable skill of counsel"); *In re Rite Aid Corp. Secs. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (approving a fee award amounting to a 6.96 multiplier).

[41] *Pacheo v. Ford Motor Co.*, 2022 WL 845108, at n. 1 (C.D. Cal. Mar. 22, 2022) ("Strictly speaking, the phrase 'negative multiplier' is a misnomer. The multiplier itself is not a negative number; it is a positive number with a value of less than 1, such that applying the multiplier decreases the lodestar.").

[42] *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 662 (9th Cir. 2020) (negative multiplier on lodestar appropriate where relief was primarily based on coupons).

[43] *Velez*, 2010 WL 4877852, at *23 ("In this case, class counsel will continue working with the Class and monitoring the company's compliance with the settlement for three years. So the multiplier in this case is actually less than 2.4."); *Parker v. Jekyll & Hyde Entm't Holdings, L.L.C.*, 2010 U.S. Dist. LEXIS 12762, at *7–8 (S.D.N.Y. Feb. 9, 2010) (noting that, "as class counsel is likely to expend significant effort in the future implementing the complex procedure agreed upon for collecting and distributing the settlement funds, the multiplier will diminish over time").

[44] *In re Diet Drugs*, 582 F.3d at 540 ("The lodestar method is 'designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation.'") (quoting *Prudential*, 148 F.3d at 333); *id.* at 541 (observing that the lodestar method was not favored where "the lawyers were primarily concerned with obtaining relief for their clients and the members of the class, not with serving the public interest").

[45] *See Bluetooth Headset*, 654 F.3d at 944-45; *Vizcaino*, 290 F.2d at 1050 ("the lodestar may provide a useful perspective on the reasonableness of a given percentage award."); *Fleisher*, 2015 WL 10847814,

class counsel obtained an early settlement, the lodestar cross-check may cause a downward adjustment of a percentage-of-the-fund calculation given class counsel's limited investment in the case and the minimal delay in payment. Conversely, the lodestar cross-check may cause a court to increase a fee award based on the percentage-of-the-fund method where class counsel invested significant time in the case and faced a complicated and protracted course of litigation.[46] Or, most commonly, the lodestar cross-check will provide confirmation that the calculation of attorneys' fees under the percentage-of-the fund method was reasonable.[47] Where lodestar is being utilized as a cross-check on the reasonableness of a percentage-based award, "the hours documented need not be exhaustively scrutinized by the district court."[48]

The lodestar method is less commonly used than the percentage-of-the-fund method.[49] Three primary reasons have emerged for lessened reliance on the lodestar method to calculate fee awards—one pragmatic, one optical, and one policy-driven. First, as a practical matter, reviewing and scrutinizing class counsel's hourly time reports—which may span many years of litigation—is a time-consuming, cumbersome task for busy courts.[50] Second, the lodestar method may create an illusion that fee awards are calculated with precision—down to the penny and the six-minute billing increment—when, in reality, courts have significant discretion in how to calculate lodestar.[51] Last, and most importantly, the lodestar method can create misaligned incentives between class counsel and class members. Specifically, the lodestar method

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at *17 ("The Second Circuit also permits courts to utilize a lodestar 'crosscheck' to further test the reasonableness of a percentage-based fee.").

[46] *Vizcaino*, 290 F.2d at 1050 ("Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award. Where such investment is minimal, as in the case of an early settlement, the lodestar calculation may convince a court that a lower percentage is reasonable. Similarly, the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted.").

[47] *See Velez*, 2010 WL 4877852, at *22 ("Although lodestar analysis is no longer the preferred method of calculating attorneys' fees in connection with class action settlements, if a percentage of fund figure compares favorably with a lodestar that uses reasonable hourly rates and a reasonable multiplier, it tends to validate the percentage of funds figure.").

[48] *Goldberger*, 209 F.3d at 50.

[49] *See also Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999) (observing that the "percentage of the fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases").

[50] *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *11 (S.D.N.Y. May 9, 2014) ("In expressly approving the percentage method, the Second Circuit recognized that 'the lodestar method proved vexing' and had resulted in 'an inevitable waste of juridical resources.'") (quoting *Goldberger*, 209 F.3d at 48). *See also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (explaining that the Ninth Circuit has "allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating lodestar").

[51] *NASDAQ Market-Makers*, 187 F.R.D. at 483 ("The task force found that [the lodestar method] unnecessarily taxed the judicial system, created an illusory sense of mathematical precision leading to disparate results, was easily manipulated by judges, and created disincentives to an early settlement.") (citing *Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 237, 246-49 (1985)).

may deter class counsel from entering an early settlement, even if the settlement may be in the best interests of the class.[52]

[d]Market Rates

[i]In General

The Seventh Circuit takes a unique approach to calculating reasonable attorneys' fee awards, which is premised on assessing the fees that counsel would have been paid in an ordinary attorney-client fee arrangement. As the Seventh Circuit explained: "The court should do its best 'to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.'" [53] The court's analysis should not take into account the result of the litigation. Rather, the court should make best efforts to "approximate the fee that the parties would have agreed to at the outset of the litigation without the benefit of hindsight."[54] The Seventh Circuit does acknowledge that certain unique aspects of contingent litigation should also be considered in crafting a fee award. It has directed its courts to also consider the risk of nonpayment, the quality of the legal work, and the amount of work necessary to resolve the litigation.[55]

Taken together, the Seventh Circuit's fee calculation analysis essentially asks the court to make three inquiries: (1) what fees would have been negotiated before the commencement of the litigation; (2) what risk of non-payment was faced by class counsel; and (3) what quantity of work did class counsel perform.

[ii]What Fees Would Have Been Negotiated Before the Commencement of the Litigation?

The Seventh Circuit's market rates analysis directs courts to consider what fees would have been negotiated at the beginning of the litigation. Courts should, as an initial matter, look at any relevant pre-litigation fee agreement, including, for instance, a fee agreement with a class representative.[56] A fee agreement with a class representative may be extrapolated to the entire class.[57] Further class counsel's bids in auctions—including in other courts and other cases—may provide insight into the fees that would have been negotiated *ex ante*.[58]

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[52] *Id.*

[53] *In re Stericycle Secs. Litig.*, 35 F.4th 555, 559 (7th Cir. 2022) (quoting *Camp Drug Store, Inc. v. Cochran Wholesale Pharmaceutical, Inc.*, 897 F.3d 825, 832-33 (7th Cir. 2018)). *See also In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("We have held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.").

[54] *Stericycle*, 35 F. 4th at 560.

[55] *Stericycle*, 35 F. 4th at 560.

[56] *In re Stericycle Secs. Litig.*, 35 F.4th 555, 560 (7th Cir. 2022) (explaining that, where a pre-litigation fee agreement between the party and its counsel exists, it serves as "a useful guidepost for determining the market rate.").

[57] *Id.* at 561.

[58] *In re Broiler Chicken Antitrust Litig.*, 2023 WL 5599636, at *4-5 (7th Cir. Aug. 30, 2023) (district

If no relevant fee agreement exists, the courts should look to the likely fee agreement that would have been entered at the outset of the litigation, using its knowledge prevailing types of fee agreements in the private market. For instance, the Seventh Circuit has cited that many private fee agreements provide for a sliding fee scale, whereby counsel receives a declining percentage of the common fund as the size of the common fund increases.[59] According to the Seventh Circuit, sliding scale arrangements "are logical because many litigation costs do not depend on the amount of damages, so it is hard to justify awarding counsel as much as the second hundred million as of the first."[60]

What is the risk of non-payment? The Seventh Circuit directs district courts determining fee awards to assess the risk that counsel will be paid nothing. The risk of non-payment is relevant to the market rate analysis because "[i]n a high-risk case, counsel is more likely to come away with nothing and thus would negotiate a high contingent fee ex ante."[61] The risk of non-payment should be "based on the risk that existed when the litigation began—not at the time of settlement."[62] Prior litigation involving the same defendant may provide insight into the risk of non-payment assumed by counsel.[63]

[iii]What Quantity of Work Was Performed?

The Seventh Circuit instructs district courts to consider the amount of work necessary to resolve the litigation. It explained, "A reduction may be warranted if the requested fee award is 'disproportionate to the amount of work expended by class counsel.'"[64] The Seventh Circuit's rationale for considering the quantity of work performed is premised on the practice of fee auctions to select class counsel, including that "some bids in class-counsel auctions compensate lawyers based on how far the litigation progresses."[65] It elaborated, "All other things being equal, a case that settled before the motion-to-dismiss sage, for instance, would be expected to result in a lower fee than a case that proceeded all the way to trial or beyond. Such terms are common in private fee agreements and 'tie the incentives of lawyers to those

court abused its discretion in setting a fee award where it "discounted bids made by one of the two firms serving as class counsel in other cases").

[59] *See In re Synthroid Marketing Litigation (Synthroid II)*, 325 F.3d 974, 975 (7th Cir. 2003) ("[T]he market rate, as a percentage of recovery, likely falls as the stakes increase. . ."); *In re Stericycle Secs. Litig.*, 35 F.4th 555, 561 (7th Cir. 2022) (explaining that the market rates analysis acknowledges that many fee agreements are based on a sliding scale that provides for "declining [fee] percentages, as the settlement fund increases.").

[60] *Stericycle*, 35 F.4th at 562 (citation omitted).

[61] *Stericycle*, 35 F.4th at 563.

[62] *Id.* at 565.

[63] *Id.* at 563-64 (finding that a prior qui tam litigation involving Stericycle reduced the risk of non-payment in a securities litigation, noting that "even if class counsel carried the securities fraud ball across the goal line, the prior litigation gave them excellent starting field position, strengthening the plaintiffs' case and substantially reducing class counsel's risk of recovering nothing").

[64] *Stericycle*, 35 F.4th at 566 (quoting *Camp Drug Store*, 897 F.3d at 833).

[65] *Stericycle*, 35 F.4th at 566.

of the class by linking increased compensation to extra work.'"[66] The existence of a prior, related litigation may also factor into consideration the quantity of work.[67]

Other circuits have criticized the Seventh Circuit's approach. The Ninth Circuit wrote, "An attempt to 'estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers had bargaining occurred at the outset of the case' strikes us as entirely illusory and speculative. . .to the extent that a market analogy is on point, in most cases, it may be more appropriate to examine lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds in comparable cases."[68] The Seventh Circuit, itself, has characterized its jurisprudence on fee awards as "admittedly intricate."[69]

[e]Relevant Factors to Assess the Reasonableness of an Attorneys' Fee Award

The above approaches should yield a reasonable fee award. The court nonetheless may consider a further analysis to ensure the fee award is reasonable.[70] Courts may consider several factors to assess the reasonableness of the fee. They typically review the factors in a fluid and flexible manner, tailoring the approach to fit the circumstances of the litigation. Courts have explicitly rejected a formulaic approach.[71] Relevant factors may include aspects of the settlement, class counsel's work on behalf of the class, and the nature of the litigation itself, specifically:

- The size of the settlement fund and number of beneficiaries.[72]

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[66] *Id.* (quoting *Synthroid I*, 264 F.3d at 722).

[67] *Id.* (finding that the "groundwork" laid during a prior litigation reduced the amount of work required of class counsel in a subsequent case).

[68] *Vizcaino*, 290 F.3d at 1050. *See also Goldberger*, 209 F.3fd at 51-52 ("[M]arket rates, where available, are the ideal proxy for compensation. The problem is that we cannot know precisely what fees common fund plaintiffs in an efficient legal market for services would agree to. . ."); *Nilsen v. York County*, 400 F. Supp. 2d 266, 276 (D. Me. 2005) ("The Seventh Circuit approach presents special concerns in the context of class actions, of course, for generally no contract exists between lawyers and the class. After all, attorneys fees in a class action require court, not client, approval. Thus, there is no readily apparent source of information about the market.").

[69] *Broiler Chicken*, 2023 WL 5599636, at *5.

[70] *Wal-Mart*, 396 F.3d at 121; *Bluetooth Headset*, 654 F.3d at 942 ("Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result.").

[71] *In re AT&T Corp.*, 455 F.3d 160, 166 (3d Cir. 2006) ("The fee award reasonableness factors 'need not be applied in a formulaic way' because each case is different, 'and in certain cases, one factor may outweigh the rest.'") (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3d Cir. 2005)); *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 303 (3d Cir. 2005) (holding that Third Circuit district courts must adhere to the "fact-intensive *Prudential/Gunter* analysis" and noting that "[w]e have generally cautioned against overly formulaic approaches in assessing and determining the amounts and reasonableness of attorneys' fees"); *Optical Disk Drive*, 959 F.3d at 931 ("Ultimately, district courts must ensure their fee awards are 'supported by findings that take into account all of the circumstances of the case.'") (quoting *Vizcaino*, 290 F.3d at 1048).

[72] *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195, n. 1 (3d Cir. 2000); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 336-40 (3d Cir. 1998); *Goldberger*, 209 F.3d at 50; *Fleisher*, 2015 WL 10847814, at *21 ("Courts have consistently recognized that the result achieved is a

- Any non-monetary benefits created by the settlement.[73]
- The class's reaction to the fee request, including the presence or absence of objections.[74]
- Requested fee in relation to the settlement.[75]
- Fee awards in similar cases.[76]
- The skill and efficiency of the attorneys and overall quality of representation.[77] Courts may also consider the quality of opposing counsel in making this assessment.[78]
- The time and labor expended by counsel as well as future time and labor that will be expended during the settlement administration process.[79] Courts are also cognizant of the fact that class counsel may have foregone other profitable work in order to focus its resources on the litigation.[80]
- The magnitude, complexities, and duration of the litigation.[81] When assessing the magnitude, complexities, and duration of the litigation, courts have identified several subfactors to be potentially considered, including:
    - The volume of discovery.[82]

major factor to be considered in making a fee award and in assessing the quality of the representation.").

[73] *Vizcaino*, 290 F.3d at 1049 (crediting the district court's finding that "counsel's performance generated benefits beyond the cash settlement fund" including that the defendant agreed to change its employee classification practices and that counsel "benefitted employers and workers nationwide by clarifying the law of temporary worker classification").

[74] *Gunter*, 223 F.3d at 195, n. 1; *Prudential*, 148 F.3d at 336-40; *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1007 (3d Cir. 2002) ("A district court should consider the presence or absence of substantial objections by members of the class to the fees requested by counsel."); *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *13, n. 1 (D.N.J. Nov. 9, 2005) ("When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections indicates the appropriateness of the fee.").

[75] *Goldberger*, 209 F.3d at 50.

[76] *Gunter*, 223 F.3d at 195, n. 1; *Prudential*, 148 F.3d at 336-40.

[77] *Gunter*, 223 F.3d at 195, n. 1; *Prudential*, 148 F.3d at 336-40. However, class counsel "should not be penalized for prosecuting [a] case in an efficient manner." *Stop & Shop*, 2005 WL 1213926, at *12.

[78] *City of Providence*, 2014 WL 1883494, at *17. *NASDAQ Market-Makers*, 187 F.R.D. at 488 (citing class counsel's ability "to obtain record-breaking settlements in the face of a stubborn and well executed defense" as "further evidence [of] the excellent quality of petitioners' work").

[79] *Goldberger*, 209 F.3d at 50; *Gunter*, 223 F.3d at 195, n. 1; *Prudential*, 148 F.3d at 336-40; *Fleisher*, 2015 WL 10847814, at *20 (noting that class counsel's "time and lodestar figures will increase as counsel prepare for final-approval proceedings, handle claims administration issues, and continue to respond to class member inquiries").

[80] *Vizcaino*, 290 F.2d at 1050 (noting that counsel's representation of the class "required counsel to forgo significant other work, resulting in a decline in the firm's annual income").

[81] *Goldberger*, 209 F.3d at 50; *Gunter*, 223 F.3d at 195, n. 1; *Prudential*, 148 F.3d at 336-40.

[82] *City of Providence*, 2014 WL 1883494, at *16 (noting that lead counsel "undertook to review and analyze over 1.3 million pages of documents, which included complex accounting work papers and intricate and voluminous inventory and sales reports" and that counsel "prepared for and took 12 fact depositions").

- ◦ Whether the case involved novel issues or issues of first impression.[83]
- ◦ The lack of a government investigation. Cases developed by class counsel without the benefit of a parallel government investigation may be more complex.[84]
- ◦ The result of a parallel government investigation. For instance, a case where class counsel obtained a settlement but the parallel government investigation ended with no repercussions for defendant, may reflect a more complex case.[85]
- ◦ A subsequent government investigation premised on class counsel's case.[86]

- The risk of the litigation and non-payment.[87] In assessing the risk of the litigation and non-payment, courts are mindful of the difference between contingency work and hourly work, including the delay in compensation in contingency cases.[88] The risk of the litigation and of non-payment increases as the case proceeds.[89] Indeed, courts recognize that class

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[83] *Velez v. Novartis Pharmaceuticals Corp.*, 2010 WL 4877852, at *19 (S.D.N.Y. Nov. 30, 2010) (fee award justified where "many of the issues or particular challenges of taking this matter to trial involved issues of first-impression or matters that otherwise had little development in the law"); *NASDAQ Market-Makers*, 187 F.R.D. at 488 ("Certainly the issues were novel and difficult requiring a challenge to a long-standing industry practice and the exercise of skill and imagination.").

[84] *City of Providence*, 2014 WL 1883494, at *16 (finding significant complexity where, among other things, "there was no road-map for Lead Counsel to follow in this action as no governmental agency investigated or brought action against defendants").

[85] *Credit Default Swaps*, 2016 WL 2731524, at *17 (awarding fees where, among other things, the settlement "was obtained against a backdrop of government investigations that produced no charges against dealer defendants").

[86] *NASDAQ Market-Makers*, 187 F.R.D. at 488 (observing that "[t]he role of class counsel was critical, not only in achieving the significant recovery, but in framing the issues which became the subject of the later served civil investigative demands of the Antitrust Division of the Department of Justice").

[87] *Goldberger*, 209 F.3d at 50; *Gunter*, 223 F.3d at 195, n. 1; *Prudential*, 148 F.3d at 336-40. *See also NASDAQ Market-Makers*, 187 F.R.D. at 488 ("Risk, of course, must be judged as it appeared to counsel at the outset of the case, when they committed their capital (human and otherwise).") (noting that, at the outset of the litigation, "journalists and some world renowned economists all expressed skepticism on the merits of the claim, as well as the feasibility of a class action encompassing 1,659 different securities, and more than a million class members").

[88] *Fleisher*, 2015 WL 10847814, at *21 (observing that "[u]nlike counsel for the defendants, who are paid hourly rates and reimbursed for their expenses on a regular basis, [class counsel] has not been compensated for any of its time. . ."); *City of Providence*, 2014 WL 1883494, at *14, ("Lead counsel was obligated to ensure that sufficient attorney and paraprofessional resources were dedicated to the prosecution of the action and that funds were available to compensate staff and to pay for the considerable costs which a case such as this entails. Because of the nature of a contingent practice where cases are predominantly complex lasting several years, not only do contingent litigation firms have to pay regular overhead, but they also must advance the expenses of the litigation. Under these circumstances, the financial burden on contingent fee counsel is far greater than on a firm that is paid on an ongoing basis."); *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.").

[89] *Velez v. Novartis Pharmaceuticals Corp.*, 2010 WL 4877852, at *19 (S.D.N.Y. Nov. 30, 2010)

counsel's risk increases as it invests more resources in the case and also that late settlements, such as those on the eve of trial, may create the best results for the class.[90] The risk of the litigation and non-payment may also increase when class counsel faces adverse rulings at the district court level and must succeed on appeal.[91]

- Public policy considerations, including incentivizing attorneys to undertake cases that provide a societal benefit and hold wrongdoers to account.[92]

While this multi-factor analysis is widely employed by many courts, the Seventh Circuit has criticized it, instead advocating for courts to set fee rates early in the litigation based on market rates. It explained, "The Second Circuit has criticized this Court's market-mimicking approach on the ground that one 'cannot know precisely what fees common fund plaintiffs in an efficient market for legal services would agree to.' 'Instead,' that court 'adhere[s] to [the] practice that a fee award should be assessed based on scrutiny of the unique circumstances of each case, and 'a jealous regard to the rights of those who are interested in the fund.' We grant the premise; it is indeed impossible to know *ex post* the outcome of a hypothetical bargain *ex ante*. But a court can learn about *similar* bargains. This is at least a starting point. The Second Circuit's consider-everything approach, by contrast, lacks a benchmark; a list of factors without a rule of decision is just a chopped salad." It concluded, "[A]ny method other than looking to prevailing market rates assures random and potentially perverse results."[93] These criticisms seem to have fallen on deaf ears outside of the Seventh Circuit.

[f]Megafund Concept

The megafund concept may be applied in cases involving a very large settlement fund, typically over $100 million.[94] It is designed to address a concern that class counsel may receive a windfall or an unfairly large multiplier if they

(awarding fees and citing, among other things, "[t]he fact that the case proceeded to trial, a risky proposition in and of itself, [which] also serves as strong evidence that the two sophisticated parties nonetheless widely disagreed about the strength of the plaintiffs' case").

[90] *Fleisher*, 2015 WL 10847814, at *21 ("The risk of no recovery in complex cases of this type is real, and is heightened when class counsel opt to fight up to the eve of trial, in order to achieve the very best result for the class, rather than reaching a less attractive settlement early in the litigation.").

[91] *See Vizcaino*, 290 F.3d at 1048 (observing case was "extremely risky for class counsel" where "[t]wice plaintiffs lost in the district court—once on the merits, once on the class definition—and twice counsel succeeded in reviving their case on appeal").

[92] *Goldberger*, 209 F.3d at 50; *Fleisher*, 2015 WL 10847814, at *22 ("Public policy considerations strongly favor incentivizing skilled private attorneys to undertake this type of litigation, especially since the action is on behalf of small claimants who lack the financial incentive to obtain a recovery on their own behalf.").

[93] *In re Synthroid Marketing Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) (quoting *Goldberger v. Integrated Resources, Inc.* 209 F.3d 43, 53 (2d Cir. 2000)).

[94] *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926, at *9 (E.D. Pa. May 19, 2005) ("In cases involving common funds of $100 million on more, commonly referred to as 'megafund' cases, the size of the fund is generally given less weight in the analysis of the appropriate fee percentage.").

awarded fees under the percentage of the fund approach. [95] The reasoning behind the megafund doctrine is that "in many instances, the increase in recovery is merely a factor of the size of the class and has no direct relationship to the efforts of counsel."[96]

In practice, the megafund concept is murky, puts undue emphasis on the size of the settlement while downplaying other relevant considerations, and leads to inconsistent results. As courts have observed, the percentage fee awards in megafund settlements vary considerably—from 2.8% on the low end to up to 40% on the high end.[97]

Two cases from the Southern District of New York in 2009 help illustrate this inconsistency and unpredictability. In *In re Currency Conversion Fee Antitrust Litig.*, class counsel achieved a $336 million settlement and requested a 25.5% fee.[98] Based on the size of the settlement fund, the court determined that a fee award of 15.25% would be appropriate.[99] The court did so despite recognizing, among other things, the "significant hurdles facing this litigation" and that "[c]lass counsel provided extraordinarily high quality representation."[100]

Conversely, in *In re Initial Public Offering Secs. Litig.*, the district court awarded a $195 million fee where class counsel created a $586 million settlement fund—a 33.3% fee award.[101] The district court rejected arguments by objectors that the percentage award should be lower because the settlement constituted a megafund, citing factors—other than the size of the settlement fund—including that the one-third award represented a negative multiplier.[102]

The guidance from courts concerning application of the megafund concept can be difficult to parse. For example, Third Circuit has advised its district courts that reasonable fee awards in megafund cases *may* require a smaller

[95] *NASDAQ Market-Makers*, 187 F.R.D. at 486 ("[W]hen a common fund is extraordinarily large. . .the application of a benchmark or standard percentage may result in a fee that is unreasonably large for the benefits conferred.").

[96] *Bluetooth Headset*, 654 F.3d at 943. *See also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (reasoning that because "economies of scale could cause windfalls in common fund cases, courts have traditionally awarded fees for common fund cases in the lower range of what is reasonable").

[97] *See Vizcaino*, 290 F.3d at 1052-54 (surveying megafund cases with awards ranging from 2.8% to 40%) (affirming a 28% fee of a $97 million common fund); *In re Cendant PRIDES Litig.*, 243 F.3d 722, 737-38 (3d Cir. 2001) (surveying 18 megafund cases where fees awards ranged from 2.8% to 36% of the fund). *See also Alexander v. FedEx Ground Package Sys., Inc.*, 2016 WL 3351017, at *2 (N.D. Cal. June 15, 2016) ("Although a percentage award in a megafund case can be 25% or even as high as 30-40%, typically the percentage award in such a case is substantially less than the 25% benchmark applicable to typical class settlements in this Circuit.").

[98] 263 F.R.D. 110, 128 (S.D.N.Y. 2009).

[99] *Id.* at 130.

[100] *Id.* at 129.

[101] 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009).

[102] *Id.*at 514.

percentage award.[103] However, it made clear "there is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizable fund."[104]

The megafund concept has been criticized for dampening the incentives of class counsel to pursue large recoveries. The Seventh Circuit explained this in its opinion in *In re Synthroid Marketing Litig.* In *Synthroid*, the district court judge had defined megafunds as settlements of $75 million and up and opined that fees in megafund cases should be capped at 10% of the recovery, while recognizing that fees of 30% and more are common and proper in smaller cases.[105] The Seventh Circuit described the problem created by the district court's rigid approach:

> This means that counsel for the consumer class could have received $22 million in fees had they settled for $74 million but were limited to $8.2 million in fees because they obtained an extra $14 million for their clients (the consumer fund, recall, is $88 million). Why there would be such a notch is a mystery. Markets would not tolerate that effect; the district court's approach compels it. . . . Private parties would never contract for such an arrangement because it would eliminate counsel's incentive to press for more than $74 million from the defendants. . . .[106]

The Seventh Circuit did note that the perverse incentives created by the megafund doctrine could be mitigated if "the 10% cap in megafund cases were applied only to the *portion* of the recovery that exceeded" the megafund definition. *Synthroid*, 264 F.3d at 718.[107]

Last, the megafund concept may be superfluous, given the availability of well-established methods to assess the reasonableness of a fee award, specifically the lodestar cross-check and the multi-factor assessment. As one district court explained, "[T]his court does not find that it is appropriate to apply special standards or presumptions categorically to reduce fee awards in all megafund cases, including this one. The customary *Goldberger* factors capture considerations relevant to determining the most reasonable award in a megafund case, such as the time attorneys devoted to the case, their skill, and their efficiency. A properly calculated lodestar allows the court to assess whether the multiplier being requested by counsel is justified by the complexity of the

103 *In re Rite Aid Secs. Litig.*, 396 F.3d at 302 ("[O]ur jurisprudence confirms that it may be appropriate for percentage fees awarded in large recovery cases to be smaller in percentage terms than those with smaller recoveries.").

104 *Id.*

105 *Synthroid*, 264 F.3d at 718.

106 *Id.*

107 Despite its criticism of the megafund doctrine, the Seventh Circuit held that information from other jurisdictions applying the megafund concept should be factored into the market rates analysis. It explained that "continued participation in litigation in the Ninth Circuit is an economic choice that informs the price of class counsel's legal services and the bargain they may have struck." *In re Broiler Chicken Antitrust Litig.*, 2023 WL 5599636, at *5 (7th Cir. Aug. 30, 2023).

case, the risks of the litigation, and the benefit they conferred on the class."[108]

[g]Other Issues

[i]Competitive Bidding

In some instances, class counsel submits a competitive bid regarding its fees, if the litigation results in a common fund, as part of its application to be appointed to lead the litigation early in the litigation. When a competitive bid is submitted during the class counsel appointment process, the bid becomes the "starting point for determining a reasonable fee" after the creation of a common fund.[109] The fees contemplated in class counsel's bid at the outset may be adjusted "upward or downward depending on circumstances not contemplated at the time of the bid, but the court must provide an adequate explanation for any variance." [110]

Courts are divided on how a firm's bid in one circumstance is relevant to another circumstance. For instance, in *In re Lithium Ion Batteries Antitrust Litigation*, the Ninth Circuit held that where a firm (Hagens Berman) submitted a bid to be the sole lead counsel in a case but the district court appointed three co-lead firms, the bid need not be considered in the fee award. The Ninth Circuit explained, "[W]he the counsel structure differs from that conceived of in the singular competitive bid submitted, that bid offers little insight into market rates. The district court did not abuse its discretion by excluding the bid from its calculations."[111]

The Seventh Circuit, however, held that a bid by a firm (again, Hagens Berman) in one litigation was relevant to setting to setting Hagens Berman's fees in another litigation under the market rates doctrine.[112] It explained, "Bids that class counsel made in auctions around the time this litigation began in September 2016 would ordinarily be good predictors of what *ex ante* bargain would have been negotiated."[113] The Seventh Circuit held that Hagens Berman's bid was relevant even though it was an unsuccessful bid to lead a different case as sole lead counsel and was one of three co-lead counsel in the instant case.[114]

[ii]Contract Attorneys

A recurring issue in attorney fee awards is how to address class counsel's use of contract attorneys[115] when calculating lodestar—whether for the purpose of

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[108] *Arkansas Teacher Retirement Sys. v. State Street Bank & Trust Co.*, 512 F. Supp. 3d 196, 239 (D. Mass. 2020).

[109] *Optical Disk Drive*, 959 F.3d at 934-35.

[110] *Id.*

[111] 2022 WL 16959377, at *1 (9th Cir. Nov. 16, 2022).

[112] *In re Broiler Chicken Antitrust Litig.*, 2023 WL 5599636, at *4-5 (7th Cir. Aug. 30, 2023) (district court abused its discretion in setting a fee award where it "discounted bids made by one of the two firms serving as class counsel in other cases"). *See also Synthroid*, 264 F.3d at 721.

[113] *Broiler Chicken*, 2023 WL 5599636, at *3.

[114] *Id.* at *4-5.

[115] The term "contract attorneys" is used here to describe attorneys are not members of the law firm, but rather work on projects on an as-needed basis.

calculating the fee award in the first instance or conducting a lodestar cross-check. Class counsel occasionally engage contract attorneys to assist in time-consuming litigation tasks, such as analyzing discovery documents. Complex cases often involve extensive discovery, including the production of millions of documents. Reviewing documents to build support for plaintiffs' claims and undermine defendants' likely defenses is a time-intensive process, which often requires a temporary increase in attorney-power.

The lodestar calculation issue stems from the fact that class counsel typically pay contract attorneys one hourly rate (e.g., $50/hour) and then bill contract attorneys at a much higher rate (e.g., $400/hour). As discussed above, the lodestar method involves multiplying the number of hours expended on the litigation by each particular attorney or legal staff member by their hourly rate and totaling the amounts for all timekeepers. Courts have puzzled over how to set hourly rates for time billed by contract attorneys in tallying lodestar. As one district court observed, "The courts have not spoken with one voice concerning the proper treatment of contract attorney costs in the calculation of lodestar."[116]

Three different approaches to calculating lodestar associated with contract attorneys have emerged: (1) use class counsel's billing rate for contract attorneys; (2) use the hourly rate paid to contract attorneys; or (3) use a billing rate higher than the contract attorneys' hourly pay rate but lower than class counsel's billing rate for the contract attorneys.

Courts that have accepted class counsel's billing rate for work performed by contract attorneys recognize the realities of how all law firms—on both the plaintiffs' and defense side—generate profits, namely by billing attorneys' time at a significantly higher rate than the costs incurred by the firm to employ the attorney.[117] They also observe that the lodestar calculation is *not* a calculation of costs but rather a calculation of what the firm would bill a paying client, making the use of contract attorneys' hourly pay rates inappropriate.[118] These courts further acknowledge that contract attorneys are specialized, valuable members of a litigation team[119] who typically work under

[116] *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 U.S. Dist. LEXIS 102408, at *75 (N.D. Cal. Aug. 3, 2016).

[117] *See In re Tyco Int'l Ltd.*, 535 F. Supp. 2d 249, 272 (D.N.H. 2007) ("An attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completion of a particular document review project, is still an attorney. It is therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar."); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 410 (D. Conn. 2009) (concluding that "it is not objectionable *per se* in this case to apply a multiplier to a lodestar that includes work performed by contract attorneys, even though the profit margin for the firms employing them was greater than the profit margin the firms would have had for work done by full-time employees.").

[118] *Tyco*, 535 F. Supp. 2d at 272 ("The lodestar calculation is intended not to reflect the costs incurred by the firm, but to approximate how much the firm would bill a paying client."); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 409-410 (D. Conn. 2009) (rejecting the contention that contract attorneys' fees are an expense and noted that law firms typically bill contract attorneys' charges to clients as fees, not costs).

[119] *See, e.g., In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 175515, at *71 (N.D. Cal. Dec. 19, 2016) (explaining that "the expertise, language skills, and involvement of these

the close supervision of class counsel.[120]

Other courts have reduced the billing rates set by class counsel for contract attorneys to a rate still above cost.[121] For instance, in cases where class counsel set billing rates for contract attorneys between $300 and $500 per hour, courts have reduced those rates to $150 to $200 per hour, citing the rates at which a paying client may be billed for the services of contract attorneys.[122]

Amounts paid by class counsel to contract attorneys may be considered a cost to be reimbursed, rather than attorney time included in the fee petition. In *Dial Corp. v. News Corp.*, class counsel *voluntarily* treated amounts paid to contract attorneys as an expense. The district court noted that, "While courts in this Circuit have permitted attorneys to garnish their lodestars with marked up contract attorney fees, this Court appreciates Counsel's decision to treat these contractor fees as an expense. It saves the Court from having to determine a correct spread between the contract attorney's cost and his or her hourly rate and his or her salary."[123] While other courts have remarked at the appeal of this cost-based approach,[124] its use is limited in practice.[125]

[iii]Contributions from Opt-Out Plaintiffs

In large complex cases, certain individual litigants or class members may pursue their own individual claims, including by opting out of the class. These individual plaintiffs typically assert the same claims as the class plaintiffs but pursue their own individual recovery. Where an opt-out plaintiff's individual recovery was largely attributable to class counsel's efforts to develop and prosecute the claims, courts have ordered the opt-out plaintiffs to compensate

contract attorneys with other members of the trial team, making these attorneys more valuable than just a first-line document reviewer.").

[120] *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 409-410 (D. Conn. 2009) (citing "the training given to contract attorneys, how their work was monitored and reviewed, and how they were supervised and in some instances removed because their performance was not adequate.").

[121] *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 1008 (N.D. Ohio 2016); *In re Citigroup, Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 374 (S.D.N.Y. 2013)

[122] *Polyurethane Foam*, 168 F. Supp. 2d at 1012 (where the contract attorneys were billed out at $250-$525/hour with a blended rate of $389/hour and the rate for contract attorneys passed through by law firms to paying clients rarely exceeded $150/hour, the court reduced counsel's lodestar to address the inflated rates); *Citigroup*, 965 F. Supp. 2d at 394-395 (the court exercised its discretion to set a billing rate for contract attorneys at $200 per hour based on the rate commonly accepted in the market); *see also City of Pontiac Gen. Employees' Ret. Sys. v. Lockheed Martin Corp.*, 954 F. Supp. 2d 276, 280 (S.D.N.Y. 2013) ("[A] a sophisticated client, knowing these contract attorneys cost plaintiff's counsel considerably less than what the firm's associate attorneys cost (in terms of both salaries and benefits) would have negotiated a substantial discount in the hourly rates charged the client for these services.").

[123] 317 F.R.D. 426, 438 (S.D.N.Y. 2016).

[124] *In re Anthem Inc. Data Breach Litig.*, 2018 WL 3960068, at *18 (N.D. Cal. Aug. 17, 2018) ("[T]his court commends the practice of treating contract attorney work as a cost. Not only does that practice reap cost savings for the clients, but it also promotes judicial efficiency by avoiding judicial determination of fees.")

[125] *Id.* ("Nevertheless, the court recognizes that counsel may be entitled to a reasonable markup [on contract attorneys' hourly paid rates]. . ."). *But see Wells Fargo*, 445 F. Supp. 3d at 531 (for purposes of conducting a lodestar cross-check, imposing a blended rate of $42.50 for contract attorneys based on the "average they were actually paid").

class counsel for their work.[126] This compensation ensures that opt-out plaintiffs do not "free ride" on the work of class counsel.[127] The rationale behind setting aside a portion of the opt-out plaintiff's recovery to compensate class is the same principles of equity that undergird all fee awards—namely, that litigants should not be permitted to benefit from the fruits of counsel's labors without contributing to that counsel's compensation.[128] Further support derives from the fact that the court, which selects and appoints class counsel, has a responsibility to ensure that class counsel is properly compensated for its work.[129]

Class counsel may seek a set-aside from individual plaintiffs even before any recovery is obtained by the opt-out plaintiffs.[130] Establishing a set-aside earlier in the litigation makes sense for two reasons. First, class counsel may not be aware of settlements entered into by individual litigants,[131] and having an early set-aside procedure helps ensure that class counsel will be compensated for all individual settlements. Second, establishing a set-aside at an early stage enables parties to consider it in their settlement negotiations.[132]

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[126] *In re Lidoderm Antitrust Litig.*, 2017 WL 3478810, at *1 (N.D. Cal. Aug. 14, 2017) (finding a set-aside was appropriate "where lead plaintiffs' counsel are responsible for pushing the cases forward, marshalling the evidence and discovery, and at least initial rounds of motion practice").

[127] *In re Bextra & Celebrex Marketing Sales Practices & Prod. Liab. Litig.*, 2006 WL 471782, at *1 (N.D. Cal. Feb. 28, 2006) ("This order is entered to provide for the fair and equitable sharing among plaintiffs of the cost of special services performed and expenses incurred by attorneys acting for MDL administration and common benefit of all plaintiffs in this complex litigation."); *Lidoderm*, 2017 WL 3478810, at *1 (N.D. Cal. Aug. 14, 2017) (explaining that a set-aside was appropriate to "resolve the equitable 'free rider' problem" where class counsel "performed the same tasks here for the benefit of *all* of the [claimants]").

[128] *Bextra & Celebrex*, 2006 WL 471782, at *1 (explaining that the court's authority to order a set aside "derives from the Supreme Court common benefit doctrine, as established in *Trustees v. Greenough*, 105 U.S. 527 (1881)). . .); *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 130 (2d Cir. 2010) (reasoning that "foreclosing those recoveries [by individual litigants] as a source of funding for the common benefit work would enrich the non-contributing individual plaintiffs unjustly at the expense of. . .lead counsel"); *In re Genetically Modified Rice Litig.*, 2010 WL 716190, at *4 ("An MDL court's authority to establish a trust and to order contribution to compensate leadership counsel derives from its 'managerial' power over the consolidated litigation, and, to some extent, from its inherent equitable powers."); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977) ("The power of the court to order compensation, and payment of it. . .is reinforced by the body of law concerning the inherent equitable power of a trial court to allow counsel fees and litigation expenses out of the proceeds of a fund that has been created, increased or protected by successful litigation.").

[129] *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 653 (E.D. Pa. 2003).

[130] *Turner v. Murphy Oil USA, Inc.*, 422 F. Supp. 2d 676, 681 (E.D. La. 2006) ("the fact that there is no 'common fund' at this stage of the litigation is of no moment. . .The set-asides would be imposed to ensure that there will be adequate funds if plaintiffs are successful."); *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 266 (E.D.N.Y. 2006) ("Even if no common benefit compensation had yet been earned, there would be a need to put a holdback method into place promptly."); *Lidoderm*, 2017 WL 3478810, at *2 (rejecting an argument that a set-aside was premature because no funds had been recovered).

[131] *Lidoderm*, 2017 WL 3478810, at *2 (observing that class counsel may no be aware when opt-outs settle).

[132] *Lidoderm*, 2017 WL 3478810, at *2 ("Establishing a set maximum percentage from the outset (e.g., prior to settlement negotiations) will provide clarity and certainty to the negotiating parties as to

The set-aside level is a "fact-dependent determination."[133] That being said, set-aside percentages are typically lower than fee award percentages, often in the range of 3-10%.[134] In determining the set-aside percentage, courts assess whether the set-aside will be sufficient to compensate class counsel for the work that generated a common benefit.[135]

To effectuate a payment to class counsel from a settlement obtained by opt-out plaintiffs, class counsel may make a motion seeking to set aside a portion of the opt-out plaintiff's settlement in an escrow account. To be clear, a set-aside is not an award of attorneys' fees, and the court need not decide whether a fee award is appropriate at the time it determines a set-aside percentage.[136] Class counsel must make a separate application for payment for the value of their common benefit work from the set aside funds. The court determines what portion of the set aside funds is properly paid to class counsel; any remaining funds are returned to the opt-out plaintiff.

[3]Apportioning of Fees Among Counsel

[a]Initial Apportioning by Lead Counsel

Once the court has approved the total award of attorneys' fees from the common fund, courts typically permit lead counsel to apportion the fees among all plaintiffs' counsel firm who worked to benefit the class.[137] The reasoning for permitting lead counsel to apportion fees is that lead counsel is best positioned to assess the relative contributions of all counsel to ultimate result of the litigation.[138] Permitting lead counsel to apportion fees among plaintiffs'

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the most EPP class counsel can seek from any opt-out settlements or judgments.").

[133] *Genetically Modified Rice*, 2010 WL 716190, at *6.

[134] *Bextra & Celebrex*, 2006 WL 47182, at *1 (4% set-aside); *In re Protegen Sling & Vesica Sys. Prods. Liab. Litig.*, 2002 WL 31834446, at *1 (D. Md. Apr. 12, 2002) (9% set-aside); *Lidoderm*, 2017 WL 3478810, at *2 (establishing a 10% set-aside); *but see In re Generically Modified Rice Litig.*, 2010 WL 716190, at *1 (E.D. Mo. Feb. 24, 2010) (ordering a set-aside of 9-11%).

[135] *Genetically Modified Rice*, 2010 WL 716190, at *7.

[136] *Genetically Modified Rice*, 2010 WL 716190, at *7 ("The order establishing a contribution amount is not an award of attorneys' fees and, as such, it is unnecessary at this time to determine whether the leadership group has earned the entirety of the proposed contribution. Indeed, the order I enter allows any plaintiff's attorney to petition for a distribution, and the amounts of any distributions will be made a later time.").

[137] *In re Initial Public Offering Secs. Litig.*, 2011 WL 2732563, at *7 (S.D.N.Y. July 8, 2011) ("District courts routinely give lead counsel the initial responsibility of devising a fee allocation proposal. . ."); *In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 224 (D.D.C. 2005) ("In some class action cases, courts have established the standards by which an aggregate award of attorneys' fees to class counsel shall be apportioned. These cases have directed lead counsel to apportion the attorneys' fees awards as they deem appropriate, based on their assessments of class counsel's relative contributions.") (collecting cases).

[138] *Initial Public Offering*, 2011 WL 2732563, at *7 ("District courts similarly acknowledge that, by working together and communicating daily, often from the case's inception, class counsel is best positioned to determine the weight and merit of each other's contributions.") (citation omitted); *Vitamins*, 398 F. Supp. 2d at 224 ("In deciding that lead counsel should have the initial responsibility for allocating fees from an aggregate award, these courts noted that, because lead counsel had led the cases from their inception, they were 'better able to describe the weight and merit of each counsel's contribution.'") (quoting *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *18 (E.D. Pa. June 2, 2004)); *In re Copley Pharma., Inc.*, 50 F. Supp. 2d 1141, 1147 (D. Wyo. 1999) ("Class counsel are better able to decide the weight and merit of each other's contributions.").

counsel also spares the court of a burdensome task of reviewing time records and making individual fee determinations.[139]

Some courts may require lead counsel to submit the proposed apportioning fees for approval. [140] Even where the court reviews class counsel's proposed fee allocation, the court affords class counsel's proposal a significant degree of deference given class counsel's knowledge of each firm's contribution.[141] But, courts have also cautioned that careful scrutiny of lead counsel's fee apportioning proposal is required because lead counsel may have an incentive to undercompensate non-lead counsel and correspondingly bolster its own compensation.[142] However, this minority approach fails to recognize that plaintiff firms are often repeat co-counsel across different litigations, and a firm that may be in a lead position in one case may have a lesser role in another case. In other words, a firm that underpays its co-counsel in one case risks becoming underpaid co-counsel in another case. This reality of the plaintiffs'-side practice helps ensure that lead counsel will treat all firms fairly in the fee apportioning process and diminishes concerns about self-dealing by lead counsel.

[b]Disputes and Court Supervision

Where certain firms object to lead counsel's apportionment of fees, courts resolve disputes between lead counsel and other firms who performed work on behalf of the class.[143]

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[139] *Vitamins*, 398 F. Supp. 2d at 224 ("Indeed, one court noted that, 'from the standpoint of judicial economy, leaving allocation to such counsel makes sense because it relieves the court of the difficult task of assessing counsel's relative contributions.'") (quoting *Linerboard*, 2004 WL 1221350, at *18); *Copley Pharma*, 50 F. Supp. 2d at 1147 ("Attorney fee allocation is an unenviable task for any court. It is a difficult matter that, frankly, even the trial court is often not in the best position to decide. This is especially true in complex class actions. . .").

[140] *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008) ("In a class action settlement, the district court has an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel.". *See also In re General Motors LLC Ignition Switch Litig.*, 2021 WL 2012478, at *1 (S.D.N.Y. May 19, 2021) (explaining that the court "deferred the question of how to allocate these funds among the many law firms involved in litigating the class members' claims pending a proposal from Class Counsel" and ruling on "Class Counsel's request for approval of a proposed allocation that assigns the fifty-three relevant law firms to one of three tiers and awards the firms in each tier a specified percentage of its lodestar").

[141] *General Motors Ignition Switch*, 2021 WL 2012478, at *5 ("Lead counsel's proposals are often afforded substantial deference. That is because lead counsel is typically well-positioned to weigh the relative merit of other counsel's contributions.") (citations omitted); *Initial Public Offering*, 2011 WL 2732563, at *7 ("Based on lead counsel's familiarity with the underlying litigation, fee allocation proposals are often afforded substantial deference.") (citation omitted).

[142] *General Motors Ignition Switch*, 2021 WL 2012478, at *5 ("At the same time, the court must still engage in a reasonable analysis of the fee request, mindful of the fact that lead counsel has an incentive to undercompensate non-lead counsel, as such compensation typically decreases lead counsel's own recovery."); *High Sulfur Content Gasoline*, 517 F.3d at 234 ("[O]ur precedents do not permit courts simply to defer to a fee allocation proposed by a select committee of attorneys, in no small part, because 'counsel have inherent conflicts.'") (quoting *In re Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143, 173 (3d Cir. 2005) (Ambro, J. concurring).

[143] *See Copley Pharma.*, 50 F. Supp. 2d at 1148 ("To the extent a stipulation is not possible, allocation

Court review of disputed fee apportionment is appropriate even though the exact division of fees among plaintiffs' counsel firms does not have an impact on the class.[144] Courts may give significant deference to class counsel's apportioning of fees,[145] although class counsel must explain how it arrived at its apportioning.[146]

As an initial matter, courts should provide sufficient transparency regarding lead counsel's proposed fee awards to all counsel in the litigation. Such transparency permits other counsel to compare their awards to other firms in the litigation, and, if necessary, formulate an objection.[147]

In determining whether a firm has been awarded an appropriate fee, courts look to whether the fees awarded are in proportion to the benefit received by the class from the firm's work.[148] Reduced fees, in proportion to those received by other counsel, may be appropriate for a firm whose work may have negatively impacted the class.[149]

[c]Inapplicability of Ordinary Ethical Rule on Fee Sharing

In non-class cases, attorneys may only agree to split fees under certain circumstances. Specifically, Model Rule of Professional Conduct 1.5(e) provides that "a division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable."

Model Rule of Professional Conduct 1.5(e) was not intended to apply to appor-

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of attorneys' fees is left to the discretion of the district court.").

[144] *In re FPI/Agretech Secs. Litig.*, 105 F.3d 469, 473 (9th Cir. 1997) ("[A] court may reject a fee allocation agreement where it finds that the agreement rewards an attorney in disproportion to the benefits that attorney conferred upon the class—even if the allocation in fact has no impact on the class.").

[145] *Initial Public Offering*, 2011 WL 2732563, at *8 ("[F]ee disputes do not limit a district court's ability to substantially defer to lead counsel's fee allocation proposal, so long as the ditrict court reasonably analyzed the reasonableness of the proposed fee distribution."); *see also Copley Pharma.*, 50 F. Supp. 2d at 1150 (finding that lead counsel's fee allocation "procedure was fair, and in the end, wise").

[146] *General Motors Ignition Switch*, 2021 WL 2012478, at * (requiring counsel to submit additional information about lodestar adjustments in its fee apportionment).

[147] *See High Sulfur Content Gasoline*, 517 F.3d at 232 (the Fifth Circuit criticized the district court where it "sealed the fee allocation list and placed a gag order on plaintiffs' attorneys" because counsel "could not compare their awards to those of other attorneys"); *id.* ("One cannot even compare apples to oranges without knowing what the oranges are.").

[148] *Copley Pharma.*, 50 F. Supp. 2d at 1149 ("The Court's research reveals that courts unanimously make allocations based upon the quantity and quality of effort expended by the attorneys in obtaining the attorney in obtaining the common fund."). *See also General Motors Ignition Switch*, 2021 WL 2012478, at *5 (rejecting a firm's argument in support of additional fees where "the primary intended beneficiaries of the objector's work were not the class members generally, but their individual clients").

[149] *Copley Pharma.*, 50 F. Supp. 2d at 1154 (approving a reduced proportional fee as reasonable where counsel attempted to decertify the class).

tionment of attorneys' fees awarded from a common fund.[150] First, application of Model Rule 1.5(e) is unnecessary because different ethical safeguards are in place for attorney fee awards in class cases. To wit, Federal Rule of Civil Procedure 23(h) establishes, "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." When assessing the reasonableness of a fee award, the court serves in the "role of protector of the rights of the class."[151] The court's responsibilities under Rule 23 extend to overseeing the division of fees among plaintiffs' counsel.[152] Second, compliance with the requirements of Rule 1.5(e) would be "impractical, if not impossible." [153] In a large class action case, obtaining written agreement to a fee apportioning agreement from every class member would be incredibly onerous. Indeed, some states have clarified that their rules on fee splitting apply to "a single billing client."[154]

[4]Objections to Fee Awards

§ 7 contains a more complete discussion of the ethical considerations concerning objections to class action settlements, including objections to a fee award. Here, we briefly address some of the mechanics concerning objections to fee awards, including who may object to a fee award, the timing for such objections, the provision of notice concerning fee awards, and deterrence of superfluous objections concerning fee awards.

Rule 23(h)(2) provides that "a class member, or a party from whom payment is sought, may object to the motion" for attorneys' fees. In other words, only those with a monetary stake in the fee award, including class members and the defendants who created the common fund may assert an objection to the fee petition. Non-settling defendants, for instance, may not object to the fee award.

Ruel 23(h)(1) provides that notice of the motion for attorneys' fees must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner. Constitutional due process requires that class members receive notice that is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[155] With respect to the fee petition, the notice must enable class members to make informed decisions but need not provide all detail concerning the fee award nor precisely identify the fee

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[150] *In re Sygenta AG MIR 162 Corn Litig.*, 2023 WL 2809929, at *3 (D. Kan. Apr. 6, 2023). *See also Hall v. AT&T Mobility LLC*, 2010 WL 4053547, at *17 (D.N.J. Oct. 13. 2010) (rejecting an objection to a fee award premised on violation of the ethical rule against fee splitting).

[151] *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 222 (2d Cir. 1987).

[152] *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008) ("In a class action settlement, the district court has an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys' fees are. . .divided up fairly among plaintiffs' counsel.")

[153] *Sygenta AG MIR 162 Corn Litig.*, 2023 WL 2809929, at *3.

[154] *See, e.g.* comments to Illinois Rule of Professional Conduct 1.5(e), Pennsylvania Rule of Professional Conduct 1.5(e).

[155] *Mullane*, 339 U.S. at 314.

being sought.[156] Due process does not require that objectors be provided access to class counsel's detailed billing records.[157]

The deadline for asserting objections is set by the court. The deadline for objections is typically set after class counsel's motion for a fee award, and any supporting documents, have been filed.[158] The reasoning for requiring that class counsel file its fee petition *prior to* the deadline for class members to object is two-fold. First, "it ensures that class members have full information when considering—and, should they choose to do so, objecting to—a fee request."[159] Second, during the fee award process, the district court assumes a role as fiduciary to the class. Requiring class counsel to file its fee petition prior to the objection deadline "ensures that the district court is presented with a fee petition that has been tested by the adversarial process."[160]

Class counsel may receive payment of fees prior to resolution of objections. Class action settlement agreements often contain "quick pay" provisions, which permit class counsel to receive fees upon approval of the fee award. However, the "quick pay" provision typically requires class counsel to repay the fee award, often with interest, if it is later vacated or reduced.[161] Federal courts "routinely approve settlements that provide for payment of attorneys' fees

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[156] *See In re National Football League Players Concussion Injury Litig.*, 821 F. 3d 410, 446 (3d Cir. 2016) (notice was sufficient where a class member "could ballpark the size of class counsel's eventual fee request") (notice was sufficient even though it did not contain information about "the number of hours class counsel worked and the terms of any contingency fee arrangements class counsel have with particular retired players); *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 500 (3d Cir. 2017) (finding that a notice that advised class members that counsel would seek a 25% fee award was sufficient where class counsel was awarded 28% of the fund after deduction of costs because "the class received notice of the critical information—the amount of the attorneys' fees sought—even if the percentage stated in the class notice was slightly less than the percentage of the fund after deduction of costs").

[157] *In re Flint Water Cases*, 63 F.4th 486, 500 (6th Cir. 2023) (finding objectors "fail to offer any legal support for the idea that due process affords them the right to review the detailed billing and costs records they seek"); *ResCap Liquidating Trust v. Primary Residential Mortgage, Inc.*,59 F.4th 905, 920-21 (8th Cir. 2023) (rejecting an objector's claim that due process required access to class counsel's timesheets); *ResCap*, 59 F.4th at 921 (declining to interpret *Yamada* as categorically requiring that objectors must have access to class counsel's timesheets as a matter of due process).

[158] *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010); *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1252 (11th Cir. 2020) ("We hold that Rule 23(h)'s plain language requires a district court to sequence filings such that class counsel file and serve their attorneys' fee motion *before* any objection pertaining to fees is due.").

[159] *Johnson*, 975 F.3d at 1252; *Mercury*, 618 F.3d at 994-95 (explaining that the objector deadlines should also afford potential objectors an adequate opportunity to review class counsel's fee petition and formulate objections).

[160] *Johnson*, 975 F.3d at 1252; *Mercury*, 618 F.3d at 994-95 (ensuring that objectors have an adequate opportunity to be heard is part of the court's fiduciary responsibilities to the class).

[161] *In re Whirlpool Corp. Front-loading Washer Prods. Liab. Litig.*, 2016 WL 5338012, at *20 (S.D. Ohio 2016) ("Nearly all pay clauses, including the one in the settlement agreement in this case, contain revisionary language, requiring counsel to return the fees paid if the award is reversed on appeal."); *In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Marketing, Sales Practices & Prod. Liab. Litig.*, 952 F.3d 471, 487 (4th Cir. 2020) (approving a settlement containing a quick pay provision where "Class Counsel have promised to refund (with interest) the fees awarded pursuant to the quick pay provision if the Attorneys' Fee Order is vacated").

prior to final disposition in complex class actions."[162]

Courts reason that quick pay provisions do not affect the funds available for recovery by the class[163] and may deter baseless objections.[164] As one court explained, "In nearly every class action settlement today, professional objectors file objections (often frivolous ones) simply in order to obtain standing to appeal the district court's final approval order. The professional objector hopes that class counsel, in order to settle the appeal and gain access to the fee award, will pay the objector to go away. Quick-pay clauses substantially reduce the leverage a professional objector can wield."[165] Courts have also established a high bar for obtaining access to a fee award, holding that objectors' counsel should only be awarded a fee if the objection enhanced the benefits to the class.[166]

§ 5.03Court Awarded Costs

Rule 23(h) permits the court to award nontaxable costs that are authorized by law or by the parties' agreement. An award of costs may encompass "any reasonable expenses that would typically be billed to paying clients in non-contingency matters."[167] Such expenses may include, *inter alia*, filing fees, costs associated with effectuating service, expenses incurred in connection with document productions and document reviews, expert fees, investigator fees, mediator fees, legal research costs, costs of providing court-ordered notice, postage, copying, hotel bills, meals, and messenger services.[168] Where a defendant pays for costs associated with notice of the settlement, the payment is included as part of the common fund for purposes of calculating attorneys' fees.[169]

Reimbursement of costs—like an award of attorneys' fees—reduces the portion of the common fund available to distribute to the members of the class. As such, courts conduct a review of costs to ensure their reasonableness.[170] Class

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162 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004 (N.D. Cal. Dec. 27, 2011) (collecting cases).

163 *Pelzer v. Vassalle*, 655 F. Appx. 352, 365 (6th Cir. 2016) ("The quick pay provision does not harm the class members in any discernible way, as the size of the settlement fund available to the class will be the same regardless of when the attorneys et paid.")

164 *Whirlpool*, 2016 WL 5338012, at *21 ("The essential purpose of a quick-pay clause is to disincentive lawyers who are 'professional objectors.'").

165 *Id.*

166 *Vizcaino*, 290 F.3d at 1051 ("In the absence of a showing that objectors substantially enhanced the benefits to the class under the settlement, as a matter of law they were not entitled to fees. . ."). *See also McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 658, 661 (E.D. Pa. 2015) (stating that objectors are "not generally entitled to an award of counsel fees" and "courts rarely award attorneys' fees to objectors").

167 *Flores v. ADT LLC*, 2018 WL 1062854, at *16 (E.D. Cal. Feb. 27, 2018).

168 *See, e.g., Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *Leverage v. Traeger Pellet Grills, LLC*, 2017 WL 6405619, at *7 (N.D. Cal. Dec. 15, 2017); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003)

169 *Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003).

170 *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 497 (3d Cir. 2017).

counsel frequently submits an affidavit setting forth information about the expenses incurred. The court determines whether the costs are "the type routinely billed by attorneys to paying clients in similar cases."[171] The "amount of itemization and detail" required should be commensurate with the detail typically provided to paying clients.[172] Courts properly focus on litigation costs in the private market rather than their own sense of what costs should be.[173]

§ 5.04Service Awards

[1]What Are Service Awards and What Purpose Do They Serve?

Service awards are payments to class representatives from a common fund. Service awards are separate from any recovery the class representatives may receive through the claims process.

Service awards are rooted in equity principles. Class representatives have obligations that absent class members do not. They must respond to written discovery, including document requests and interrogatories. They often sit for depositions. Service awards are a way to offset these discovery burdens.[174]

Service awards also further litigation with societal benefits. Class action cases allow claimants with claims that would be too small to pursue individually to aggregate their claims and hold defendants accountable.[175] Providing service awards to class representatives helps encourage people and companies to serve in that role.[176]

[2]Are Service Awards to Named Plaintiffs Permitted?

Service awards to named plaintiffs are a long-standing feature of class action practice that is entrenched in the goals of Rule 23 to facilitate cases

[171] *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003)

[172] *In re Synthroid Marketing Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) ("Likewise the amount of itemization and detail required is a question for the market. If counsel submit bills with the level of detail that paying clients find satisfactory, a federal court should not require more.").

[173] *In re Synthroid Marketing Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) ("Reducing litigation expenses because they are higher than the private market would permit is fine; reducing them because the district judge thinks costs are too high in general is not.").

[174] *Murray v. Grocery Delivery E-Services USA, Inc.*, 55 F.4th 340, 352 (1st Cir.2022) (observing that "Rule 23 class actions still require named plaintiffs to bear the brunt of litigation (document collection, depositions, trial testimony, etc.), which is a burden that could guarantee a net loss for the named plaintiffs unless somehow fairly shifted to those whose interests they advance."); *Moses v. New York Times Co.*, 2023 WL 5281139, at *13 (2d Cir. Aug. 17, 2023) ("Such incentive awards often level the playing field and treat differently situated class representatives equitably relative to the class members who simply sit back until they are alerted to a settlement.").

[175] *Smilow v. Sw. Bell Mobile Sys. Inc.*, 323 F.3d 32, 41 (1st Cir. 2003) ("The core purpose of Rule 23(b)(3) is to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation.").

[176] *Moses v. New York Times Co.*, 2023 WL 5281139, at *13 (2d Cir. Aug. 17, 2023) ("Incentive awards encourage class representatives to participate in class action lawsuits, which are designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and seek redress for their injuries.") (citation omitted); *Murray*, 55 F.4th at 354 ("[I]ncentive payments remove an impediment to bringing meritorious class actions. . .").

aggregating small claims. An "overwhelming majority" of circuits permit district courts to provide service awards to class representatives.[177] Providing a service award to named plaintiffs is recognition that "a named plaintiff is an essential ingredient of any class action" and that service awards encourage participation in the lawsuit.[178]

The Eleventh Circuit is a lone exception. In *Johnson v. NPAS Solutions LLC*, the Eleventh Circuit held that two Supreme Court cases from the 1800s—*Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527 (1881) and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885)—prohibited awards to class representatives that "compensate[] a class representative for his time and reward[] him for bringing a lawsuit." 975 F.3d at 1260. *Greenough* and *Pettus* denied compensation to a private litigant for "personal services and private expenses." The Eleventh Circuit held that, although *Greenough* and *Pettis* were decided before the advent of class actions and establishment of the role of a class representative, "it seems to us that the modern-day incentive award for a class representative is roughly analogous to a salary." *Id.* at 1258. The Eleventh Circuit acknowledged "that such awards are commonplace in modern class-action litigation" but noted "that doesn't make them lawful." *Id.*

Other courts have declined to follow *Johnson*. These courts have articulated several reasons for rejecting *Johnson.* First, *Johnson* is premised on two cases from the late 1800s—nearly a century before the advent of modern class actions. As the First Circuit explained, "late-19th-century cases regarding creditor lawsuits over mismanagement of a fund" are not "sufficiently analogous" to "modern-day class actions under Rule 23."[179] Second, *Johnson* is at odds with decades of well-established practice premised on the goals of Rule 23.[180] Third, *Johnson* creates a brightline prohibition that does not permit courts to consider the specific facts of each case.[181]

[3]Factors Considered In Providing Service Awards

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[177] *Moses v. New York Times Co.*, 2023 WL 5281139, at *13 (2d Cir. Aug. 17, 2023) ("[A]n overwhelming majority of our sister circuits have concluded that district courts are permitted to grant incentive awards.") (collecting cases); *Murray v. Grocery Delivery E-Services USA, Inc.*, 55 F.4th 340, 352 (1st Cir.2022) ("Courts have blessed incentive payments for named plaintiffs in class actions for nearly a half century."); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785 (9th Cir. 2022) ("We have repeatedly held that reasonable incentive awards to class representatives are permitted.") (citation omitted).

[178] *Camp Drug Store, Inc. v. Cochran Wholesale Pharmaceutical Inc.*, 897 F.3d 825, 834 (7th Cir. 2018) (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)). *See also Chieftan Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 467 (10th Cir. 2017).

[179] *Murray v. Grocery Delivery E-Services USA, Inc.*, 55 F.4th 340, 352 (1st Cir.2022). *See also Apple Inc.*, 50 F.4th at 785 ("To the contrary, we have previously considered this nineteenth century caselaw in the context of incentive awards and found nothing discordant."); *Moses*, 2023 WL 5281139, at *15 ("Given historical developments, the Supreme Court appears to have left *Greenough* and *Pettus* in the rear view.") (citing *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811, n.7 (2018)).

[180] *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 721 (2d Cir. 2023); *Murray*, 55 F.4th at 353 ("[W]e choose to follow the collective wisdom of courts over the past several decades that have permitted these sorts of incentive payments. . .") *Moses.*, 2023 WL 5281139, at *15 (citing the "long history of incentive awards post-*Greenough* and *Pettus*).

[181] *Murray*, 55 F.4th at 353 (declining to "create a categorical rule that refuses to consider the facts

Courts consider various factors in determining whether to designate a service award and, if so, the size of the award, including: the time and effort expended by the plaintiff in assisting in the prosecution of the litigation, the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from the actions taken by the plaintiff, any special value or expertise brought to the litigation by the plaintiff, the existence of special circumstances such as personal risk incurred by the plaintiff.[182] Plaintiffs should only receive service awards for work that was done to benefit the class.[183] However, these considerations are less salient where class counsel has agreed to deduct the service award from its own fees as the service awards have no impact on the other recipients of the fund.[184]

Service awards do not create conflicts of interest between class representatives and absent class members as long as they are reasonable.[185] Service awards that are contingent on the class representative supporting the settlement are not permitted.[186]

§ 5.05Cy Pres Distribution

When money remains in a common fund after distribution to claimants, class counsel may seek a cy pres distribution.[187] Those are payments to charitable

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of each case"); *Apple Inc.*, 50 F.4th at 786 ("The point is that incentive awards cannot categorically be rejected or approved.").

[182] *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 721 (2d Cir. 2023) (quoting *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 439 (S.D.N.Y. 2016)); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)

[183] *Fikes*, 62 F.4th at 723 ("The class should not pay for time spent lobbying for changes in law that do not benefit the class.").

[184] *Wells Fargo*, 445 F. Supp. 3d at 534 (explaining that a service award paid out of the fee award "need not be subject to intensive scrutiny" given the lack of impact of the payment on other parties).

[185] *In re Online DVD Rental Antitrust Litig.*, 779 F.3d at 943 ("Incentive payments to class representatives do not, by themselves, create an impermissible conflict between class members and their representatives."); *Apple Inc.*, 50 F.4th at 786 (finding that an incentive award creates a conflict with absent class members only when "the award exceeds the amount necessary to serve its purpose"); *Murray*, 55 F.4th at 353-354 (rejecting an objector's argument that incentive awards to class representatives create a conflict with absent class members). *But see Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 957 (9th Cir.) (a conflict between class representatives and absent class members existed where class representatives' retainer agreements with class counsel required class counsel to seek incentive payments on a sliding scale based on the value of the settlement).

[186] *Radcliffe v. Experian Information Solutions, Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013). *See also Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014) ("Although the judge rightly made incentive awards to the class representatives who had opposed the settlement as well as those who had approved it, the settlement agreement itself had provided for incentive awards only to the representatives who supported the settlement. This created a conflict of interest: any class representative who opposed the settlement would expect to find himself without any compensation for his services as representative.").

[187] *In re Lupron Marketing & Sales Practices Litig.*, 677 F.3d 21, 30 (1st Cir. 2012) ("When class actions are resolved by settlement, unclaimed money may remain in the settlement fund after initial distributions to class members because some class members cannot be located, some decline to file a claim, or some have died."); *In re Easysaver Rewards Litig.*, 906 F.3d 747, 761 (9th Cir. 2018) ("The availability of cy pres as a mechanism to distribute unclaimed funds rests on the premis that class action settlements will sometimes have just that—unclaimed funds. A settlement is not fatally flawed solely because class members did not deplete the entirety of the settlement fund. If it were, cy pres would not exist.").

organizations.

Cy pres is an equitable doctrine rooted in trust law, which has been adapted and applied in the context of class action settlements.[188] In the trust context, the cy pres doctrine "allows courts to take trust money previously designated for a defunct purpose and reallocate that money to some other purpose consonant with the purpose for which the trust was originally created."[189]

In the class action context, cy pres is appropriate where distribution of the funds to the class is not feasible.[190] Distribution is not feasible where the distribution would be *de minimis.*[191] Distribution also is not feasible where class members cannot be identified.[192] While cy pres distributions typically involve residual funds after distribution to claimants, in some instances an entire settlement may be distributed cy pres. In cases alleging violations of privacy laws, for example, courts have approved settlement consistent solely of cy pres distributions.[193]

Courts have identified factors supporting the appropriateness of cy pres distribution, including: where the settlement was negotiated at arm's length by the parties; where the cy pres distribution helped facilitate settlement of a hard-fought complex case; and where the cy pres payment will benefit class members.[194] Cy pres distribution may also be appropriate where the claimants have already been fully compensated for the harms suffered, further distribution to claimants may create an unfair windfall.[195]

Once the court determines that a cy pres distribution is appropriate, it must assess whether the proposed cy pres recipient has some nexus to the class.[196] In assessing the appropriateness of a recipient of a cy pres distribution, courts

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[188] *Lupron*, 677 F.3d at 30 ("Cy pres is an equitable doctrine that has been imported into the very different class-action context from the field of trusts and estates law."); *In re Citigroup Inc. Secs. Litig.*, 199 F. Supp. 3d 845, 848 (S.D.N.Y. 2016) (noting the origins of cy pres in "Roman and English trust law").

[189] *Citigroup*, 199 F. Supp. 3d at 848.

[190] *Id.*

[191] *Easysaver*, 906 F.3d at 761 (finding that further recovery would be *de minimis* where $3 million remained in a common fund for approximately $1 million claimants and affirming a cy pres distribution); *In re Google Inc Street View Electronic Communications Litig.*, 21 F. 4th 1102, 1114 (9th Cir. 2021) (finding that a cy pres distribution was appropriate in a class of 60 million people with a $13 million settlement fund).

[192] *Google Inc Street View*, 21 F. 4th at 1114 (observing that an objector to a cy pres distribution could not "identify a viable way for a claims administrator to verify any claimant's entitlement to settlement funds").

[193] *Lane v. Facebook, Inc.*, 696 F.3d 811, 820-21 (9th Cir. 2012); *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 326 (3d Cir. 2019) (noting "[i]n some cases a cy pres-only settlement may be proper").

[194] *Lupron*, 677 F.3d at 30 (discussing the factors that led to approval of the cy pres distribution in *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 33-36 (1st Cir. 2009)).

[195] *Lupron*, 677 F.3d at 36; *Easysaver*, 906 F.3d at 761 (observing that distributing remaining funds to existing claimants "might overcompensate claimants, all of whom will already be fully reimbursed for the money they lost through the rewards program").

[196] *Citigroup*, 199 F. Supp. 3d at 848.

often use the reasonable approximation test. The reasonable approximation test considers various factors, including the purpose of the underlying statutes claimed to have been violated in the litigation, the nature of the injury to class members, the characteristics and interests of the class members, the geographical scope of the class, the reasons why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the cy pres recipient.[197]

Under the reasonable approximation test, class counsel "should be entitled to a certain amount of leeway" in selecting a cy pres recipient, assuming that class counsel has no actual or apparent conflict of interest.[198] As the *Citigroup* court explained, "When the cy pres designation are made—at the tail end of the litigation—class counsel has presumably already proved worthy of the court's trust. They have survived the crucible of the class counsel appointment inquiry by virtue of their experience, diligence, and fairness. They have also withstood a district court's continuing scrutiny and ongoing obligation to police a settlement's implementation. Even if courts should be concerned that class counsel generally may be incentivized to use their cy pres authority to throw money at their personally favorite organizations, the trust that counsel has earned mitigates that danger."[199] Indeed, best practice is for the parties to the settlement agreement to designate a cy pres recipient and have the court assess the propriety of that selection, rather than asking the court to select a cy pres recipient.[200]

The Ninth Circuit, however, has used the more stringent "next-best" test to assess the propriety of a propose cy pres recipient.[201] The Ninth Circuit reasoned: "When the selection of cy pres beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self-interests of the parties, their counsel, or the court."[202] To assess whether a cy pres recipient meets the next-best standard, the Ninth Circuit considers whether the cy pres award would: (1) address the objectives of the underlying class; (2) target the plaintiff class; or (3) provide reasonable certainty that any member of the class will benefit from the award.[203] In *Naschin*, the Ninth Circuit reversed the district court's approval of a cy pres award to the Legal Aid Foundation, the Boys and Girls Clubs of Santa Monica and Los Angeles, and the Federal Judicial Center Foundation in a privacy class action. It found that these cy pres recipients did "not account

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197 *Lupron*, 677 F.3d at 33. *See also Citigroup*, 199 F. Supp. 3d at 850.

198 *Citigroup*, 199 F. Supp. 3d at 851.

199 *Citigroup*, 199 F. Supp. 3d at 851 (internal citations omitted).

200 *Lupron*, 677 F.3d at 38 ("It is one thing for the district court to exercise its traditional judicial function to approve class action settlement agreements. It is quite another for the parties to abandon the task of agreement over the assignment of residual funds and just hand that task to the court.").

201 *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011).

202 *Id.* at 1039.

203 *Id.* at 1040.

for the broad geographic distribution of the class."[204] Further, none of the cy pres recipients had any relation to the objectives of the statutes underlying the litigation, including Electronic Communications Privacy Act.[205]

The next-best test has been eschewed by other courts, which find it to be unnecessarily rigid and time-consuming.[206] These courts have noted that the analogy between trust and estates law and class actions is imprecise. When applied to a trust, cy pres requires the funds to be transferred in a way that honors the purpose of the original trust.[207] But, in a class action context, the vast majority of the common fund has typically been distributed by the class at the time of a proposed cy pres distribution. Once the common fund has been distributed to class members to the extent feasible, the purpose of the common fund has been achieved.[208] Thus, the nexus between the purpose of the common fund and the cy pres recipient need not be as "snug" as it would be in the trust context.[209]

[204] *Id.* (noting that the class "includes more than 66 million AOL subscribers throughout the United States").

[205] *Id.*

[206] *Citigroup*, 199 F. Supp. 3d at 849. ("[T]his court has concluded that the 'next-best' rule is not only impractical but would also tax judicial resources and require courts to opine on matters over which they have little cognizance. The lower costs and greater benefits of the reasonable-approximation test render it superior."); *Capsolas v. Pasta Resources, Inc.* 505 F. Supp. 3d 255, 259 (S.D.N.Y. 2020) ("This court finds Judge Stein's analysis in *In re Citigroup* persuasive and will approve a cy pres designee that reasonably approximates the interests of the class.").

[207] *Citigroup*, 199 F. Supp. 3d at 850 ("Because cy pres in trust law is designed to honor as much as possible the original purpose of the trust, the nexus between the cy pres awardee and the trust's original beneficiary should be very snug.").

[208] *Id.*

[209] *Id.*

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