Court Of Appeals Affirms Business Court Award Of $1 Million In Fees To Class Counsel

posted on: Monday, September 21, 2015

It seems like forever ago that the then venerable North Carolina institution, Wachovia Bank, failed and was acquired by Wells Fargo. (This was actually seven years ago). But just last week came what might be the final closure in the battle by the lawyers representing the class which challenged that acquisition to be paid their "well-deserved fees." If you don't detect the sarcasm in that last sentence, I'm not a fan.

But putting aside my venom, last week the NC Court of Appeals, in Ehrenhaus v. Baker, affirmed Judge Murphy's March 2014 Order awarding class counsel slightly over $1 million in fees and expenses. The COA didn't assess the reasonableness of that fat fee, it said that Judge Murphy had properly assessed it in his 2014 Order.

The value in the decision from the Court of Appeals is for lawyers representing class plaintiffs in future class action settlements. North Carolina, in this ruling, has embraced the concept that class action settlements can include an agreement for the defendant to pay attorneys' fees.

Perhaps you are thinking that there is nothing unusual about a settling party agreeing to pay the opposing party's legal fees. Defendants often agree to pay the plaintiff's attorneys' fees as a part of a settlement. But in the class action context, the creation of a common fund was the only exception previously recognized in North Carolina to the "American Rule." The American Rule provides that "a successful litigant may not recover attorneys' fees . . . unless such a recovery is expressly authorized by statute." Op. at 17.

Some other jurisdictions recognize the "common benefit" doctrine as a second exception to the American Rule when a class action is involved. North Carolina rejected that basis for fees -- which allows an award when the class plaintiff "confers a common monetary benefit on the class" -- in In re Wachovia Shareholders Litig., 168 N.C. App. 135, 139, 607 S.E.2d 48, 50-51, disc. rev. denied, 359 N.C. 411, 613 S.E.2d 25 (2005).

The COA approved the award of fees to the Ehrenhaus class' lawyers by recognizing a third exception to the American Rule. Judge Davis wrote:

we hold that the parties to a class action may agree to a fee-shifting provision in a negotiated settlement that is -- like all other aspects of the settlement -- subject to the trial court's approval in a fairness hearing. During the fairness hearing, the trial court must carefully assess the award of attorneys' fees to ensure that it is fair and reasonable.

Op. at 22 (emphasis added).

This decision isn't big news to the Business Court. The Court has been assessing the reasonableness of fees paid to class counsel via a negotiated settlement for a long time, at least since its
decision in In re Harris-Teeter Merger Litig., 2014 NCBC 44, in which Chief Judge Gale thoroughly examined the Court's power to award fees as the result of a class action settlement (in ¶¶51-57).

I'm not sure if this is the final chapter in the effort by the class' attorneys to obtain the fees that they requested. You might remember that Judge Murphy denied any award of fees to the North Carolina attorney co--lawyering with Mr. Ehrenhaus' New York counsel. The Business Court awarded nothing to him even though there was a valid fee sharing agreement between him and Ehrenhaus' out of state counsel which specified that local counsel would receive five percent of the total fee. Since local counsel offered no evidence of the time expended or his hourly rate the Court could not determine whether the five percent (which would have been more than $50,000) was reasonable.

Judge Davis dropped a footnote in the COA decision saying that "[w]hile we express no opinion on this issue, we note that Judge Murphy's Order does not contain language foreclosing the possibility of [NC counsel] ultimately being deemed entitled to receive some portion of the attorneys' fees at issue." Op. at 26 & n.3.

Even so, it's probably a little bit late in the day for Mr. Ehrenhaus' local counsel to apply to the Business Court for fees.

Copyright © 2015, Brooks, Pierce, McLendon, Humphrey & Leonard LLP