

CLASS ACTION BLOG

# Lodestar Multiplier Disallowed Where the Class Action Settlement Provided for Fee Shifting, Not a Common Fund Attorney Fees Award

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Home Depot had a data breach which led to the theft of information “for tens of millions of credit cards” resulting in a class of banks, the credit card issuers, to sue Home Depot. That litigation was settled on a classwide basis. After the general terms for the class settlement were agreed upon, the parties agreed that class counsel would be paid “reasonable attorney’s fees” for an undetermined amount which “would be paid separate from and in addition to the class fund.” The District Court awarded class counsel \$15.3 million using a lodestar method and, after finding the hours to be reasonable, applied a multiplier of 1.3 “to account for the risk the case presented.” The Court also did a cross-check using the percentage method.

Home Depot appealed arguing the District Court abused its discretion by applying a multiplier and by improperly compensating class counsel for time spent on certain actions it did not believe were worthy of compensation. Class counsel cross-appealed conditionally “taking issue with how the District Court conducted the percentage cross-check.” The Eleventh Circuit stated that the “main issue underlying the appeal was whether the fee arrangement outlined in the settlement should be characterized as a constructive common fund or as a fee-shifting contract. We hold that this is a contractual fee-shifting case, and the constructive common-fund doctrine does not apply.” Accordingly, the Eleventh Circuit affirmed all rulings except the District Court’s decision “to use a multiplier to account for risk in a fee-shifting case” which the court found was an abuse of discretion.

Unlike the Second Circuit's ruling in *Fresno County Employees' Retirement Association, v. Isaacson/Weaver Family Trust*, 925 F.3d 63 (2nd Cir. 2019) (see September 13, 2019 post), the fee shifting in the Home Depot case was based upon an agreement and was therefore contractually, rather than statutorily, required. After class counsel advised the District Court that it was the court's decision whether to use the lodestar or percentage method, the District Court chose the lodestar approach, rejected class counsel's request for \$18 million in fees, and rejected Home Depot's suggestion that the appropriate fee was \$5.6 million. After adopting the lodestar method, the District Court accepted class counsel's lodestar of \$11.7 million and added a multiplier of 1.3 ("the same multiplier used in the consumer track settlement") and arrived at a fee of \$15.3 million.

After a general discussion of the American rule, the Eleventh Circuit found that the fee shifting in this case was required by the settlement agreement. According to the Court,

- the agreement goes on to state '[a]ny award of attorneys' fees, costs, and expenses shall be paid separate from and in addition to the Settlement Fund.' That sounds like fee shifting. Indeed, it is hard to imagine how the settlement agreement could be any clearer that Home Depot will pay the attorney's fees, and that payment will not come out of the class fund. A settlement agreement is a contract, which we construe 'to effectuate the intent of the parties,'...and the parties' intent seemed to be for the fees to be paid separately by Home Depot—i.e., a fee-shifting arrangement."

The Court then rejected class counsel's argument that the agreement was really a "constructive common fund" arrangement. The Eleventh Circuit explained that the "rationale for the constructive common fund is that the defendant negotiated the payment to the class and the payment to counsel as a 'package deal.'" The Court rejected the "package-deal reasoning because "there was no package." "Home Depot did not negotiate the attorney's fees simultaneously with the settlement fund. The fees were left entirely to the District Court's discretion. The parties did not even agree to a cap, often referred to as a 'clear-sailing agreement.'" The Court then held that "the constructive common fund does not apply when the agreement provides that attorneys will be paid by the defendant separately from the settlement fund, and the amount of those fees is left completely undetermined. We construe the settlement agreement here as a fee-shifting arrangement."

The Eleventh Circuit then proceeded to review the Supreme Court precedent concerning fee-shifting cases. The Supreme Court had declared in 1992 that in fee-shifting cases the lower courts should apply the lodestar method. Because no fee-shifting statute was involved, the Court had to determine whether Supreme Court precedent barring the use of multipliers in statutory fee shifting cases controlled the outcome. In *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010), the Supreme Court had ruled there "is a strong presumption that the lodestar yields a reasonable fee" in statutory fee-shifting cases. In order for a multiplier to be warranted, "the fee applicant must produce 'specific evidence' that that an enhancement is necessary to provide a reasonable fee." After discussing multiple Supreme Court cases outlining the factors to consider in determining whether a multiplier enhancement to the lodestar is warranted, the court stated if those Supreme Court precedents apply

- it was an abuse of discretion for the District Court to apply a multiplier. The District Court's only stated reason for using a multiplier was the exceptional risk taken by counsel in litigating the case. And risk, according to the Supreme Court, is not an appropriate basis for enhancing an attorney's fee in statutory fee-shifting cases.

Although that statutory fee-shifting precedent was not binding authority, the Eleventh Circuit found that the contractual fee-shifting case was "closely related to the Supreme Court precedent governing fee-shifting statutes. And just because precedent is not technically binding does not mean we should blithely disregard it. To promote consistency in the law, we should adhere to precedent where its reasoning applies." Based upon Supreme Court precedent, the Eleventh Circuit held that it was "inappropriate to enhance a lodestar in a fee-shifting case to account for risk" before ruling that applying a multiplier in this case was an abuse of discretion.

The Eleventh Circuit also reviewed Home Depot's attacks on whether the District Court abused its discretion by awarding attorney's fees based on time spent, which Home Depot declared was an unsuccessful effort and also for time spent "soliciting class representatives." The Eleventh Circuit ruled Home Depot was wrong on both accounts. Furthermore, it overruled Home Depot's argument that the District Court's order did not allow for meaningful review. The Eleventh Circuit further rejected class counsel's conditional cross-appeal regarding the method by which the District Court had conducted its cross-check.

The *Home Depot* case is beneficial to class litigators because of its detailed description of the common fund doctrine, the constructive common fund doctrine, the lodestar method, and fee shifting precedents. It is a must read for attorneys litigating in the Eleventh Circuit, and it is a helpful read for all other class action litigators. The Eleventh Circuit relied heavily upon United States Supreme Court precedent as well as the Fifth Edition of *Newberg on Class Action*.

Case citation: *In re Home Depot Inc.*, 2019 WL 3330867 (11th Cir. 2019)