Is Greed Good? Mega-Fees in Securities Fraud Class Action Mega-Settlements

Author : Linda S. Mullenix

Date : October 30, 2019

Stephen J. Choi, Jessica Erickson, and Adam C. Pritchard, *Working Hard or Making Work? Plaintiffs' Attorneys Fees in Securities Fraud Class Actions*, NYU Law and Economics Research Paper No. 19-31 (July 15, 2019), available at SSRN.

Stephen J. Choi, Jessica Erickson, and Adam C. Pritchard have authored a provocative empirical study of attorney fee awards in securities fraud class actions. Complementing an existing array of studies, they focus on the subset of mega-settlements—those in excess of $100 million dollars—such as the $186.5 million fee award in a securities action against Petroleo Brasileiro SA, in which the plaintiffs' attorneys claimed to have worked 324,307 hours on the litigation to obtain a $3 billion settlement. Their conclusions are certain to provoke discussion, if not strenuous dissent: namely, that the lure of mega-fees in certain securities cases induces many lead counsel to make work, rather than to work hard.

The authors situate their study in the reforms Congress envisioned in enacting the Private Securities Litigation Reform Act of 1995 ("PSLRA"). This legislation limited fee awards in securities class actions to a "reasonable" percentage of the settlement. The study included every securities class action filed in federal court between 2005 and 2016, a total of 1719 cases, comparing fee requests and awards in the highest-stakes cases with those in other securities class actions. The authors wanted to test whether attorneys were investing more time in high-stakes cases and if the needs of these cases drove the expenditure of additional time or merely rove the desire to justify a higher fee award.

The authors investigated five hypotheses. First, courts rarely reject fee awards, but are more likely to reject fee awards in higher-stakes litigation than in low settlement values. Second, plaintiffs' attorneys work significantly more hours in the top decile of settlements and receive significantly higher fees. Third, defendants mount more aggressive defenses in higher-stakes litigation, thereby raising the marginal benefit of more work by plaintiffs' attorneys (the "work hard" hypothesis). Fourth, high-stakes litigation encourages plaintiffs' attorneys to inflate their hours by doing work that is not necessary (the "make work" hypothesis). Finally, the authors posited that fee award multipliers would not track litigation risk.

Mega-settlements are not the norm: 90% of the actions resulted in a settlement under $50 million and attorneys' fees under $10 million. The top decile however, differed considerably. The mean top decile settlement was $295.5 million and the mean attorney fee award was $39.5 million. The top decile of mega-settlements had the highest attorney hourly fee, at $938.30.

The authors reach a number of interesting–if not remarkable–conclusions. Plaintiffs' attorneys put in far more hours in the top decile of settlements and are rewarded with higher fees. Some of the increased hours may have resulted from attorneys doing work that was not necessary, especially in cases with multiple lead counsel. For example, attorneys may engage in unnecessary or duplicative discovery and motion practice across numerous law firms, especially where the defendant's egregious conduct was patently evident. The authors found evidence that attorneys may work less efficiently in cases with the largest stakes.

With regard to control of attorney fee awards, the judicial system assigns oversight to two actors: the class representative and the court. The PSLRA introduced the requirement that the largest institutional investor represent the class of shareholder claimants. The authors express skepticism–documented in previous studies—that institutional shareholders are the consistent, active watchdogs that Congress envisioned when enacting the PSLRA. But the authors conclude that judges do not serve as a meaningful check on fee awards, more often than not willing to sign off on mega-fee requests. If the plaintiffs' attorneys accompanied their fee requests with a lodestar check, courts were less likely to reject the fee award. Generally, courts do not use a multiplier to reward plaintiffs' attorneys for taking on riskier cases., although they do use a multiplier to reward attorneys for litigating more egregious securities violations, even though these cases pose less, not more, risk for them.

This study is worth reading because it carves out high-stakes, high-settlement cases from the universe of all securities settlements. As such, it seeks to identify and explain the agency costs entailed in these significant cases, ultimately with implications for shareholder claimants. Their general conclusions seem certain to provoke protests from the plaintiffs' bar, as well as the judges who approve the fee requests. It additionally presents the tantalizing question whether mega-fees in other types of mega-settlements—mass tort litigation, for example—experience the same hydraulic forces that induce attorneys to "make work" for higher fees.

Cite as: Linda S. Mullenix, *Is Greed Good? Mega-Fees in Securities Fraud Class Action Mega-Settlements*, JOTWELL (October 30, 2019) (reviewing Stephen J. Choi, Jessica Erickson, and Adam C. Pritchard, *Working Hard or Making Work? Plaintiffs' Attorneys Fees in Securities Fraud Class Actions*, NYU Law and Economics Research Paper No. 19-31 (July 15, 2019), available at SSRN), https://courtslaw.jotwell.com/is-greed-good-mega-fees-in-securities-fraud-class-action-mega-settlements/.