REPORT OF THE CLASS ACTION COMMITTEE ON THE RULINGS IN *KLEIN V. ROBERT'S AMERICAN GOURMET FOOD, INC.*

In *Klein v. Robert's American Gourmet Food, Inc.*, 28 A.D.3d 63 (2d Dep't 2006), a New York appeals court reversed the approval of a class settlement consisting of coupons redeemable upon purchase of defendants' goods in the amount of $3.5 million and an award of $790,000 in attorneys' fees. The Second Department held that the record provided no indication of whether the trial court had adequately considered (1) the factors set forth in Article 9 of the C.P.L.R. in certifying the settlement class, or (2) whether either the settlement or the fee request was reasonable. As such, the court remanded the case to the trial court for further consideration.

The Class Action Committee (the "Committee") makes note of this appellate decision because it touches upon a number of class action issues, citing in its ruling certain decisional law from the federal courts. As to two of the court's holdings, the Committee concludes that, while its decisions were correct, its reasoning was based on an erroneous application of precedent. In particular, the Second Department failed to: (1) follow the teachings of the United States Supreme Court as to the relevance of the settlement context when considering certain of the class certification factors, and (2) consider more recent law, both at the federal level and as articulated by New York State courts, preferring the percentage method over the lodestar method when calculating a reasonable class action fee in a common fund case.

Summary of Claims and Holding Below

Klein involved state common law claims of fraud, negligent misrepresentation, and breach of express warranties, as well as alleged violations of New York General Business Law §§ 349 and 350. *Id.* at 65. The defendant, Robert's American Gourmet Food, Inc. ("Robert's"), was a creator and distributor of certain snack foods, sold under the brands of Pirate's Booty,

Fruity Booty, and Veggie Booty. *See id.* The class action lawsuit arose out of Robert's advertisements that these snacks contained substantially lower amounts of fat and calories than their actual fat and caloric content. *See id.* The Supreme Court of New York conditionally certified a class under C.P.L.R. 901(a)(1)-(5) and 902 for settlement purposes only. That court defined the class as "all persons in the United States who, between January 1, 1999 and October 1, 2002…purchased at retail any of the following products distributed by Robert's American Gourmet Food, Inc.[:] Pirate's Booty™, Fruity Booty™, or Veggie Booty™ snack foods." *Id*. at 66 (alterations in original).

The proposed settlement required Robert's to issue and redeem a total of $3.5 million in coupons for retail purchases of Robert's products. The coupons were to be redeemed at the point of purchase, and each was to be in an amount equaling approximately 20% of the retail price of the product purchased. *Id.*[1] The settlement also authorized the payment of attorneys' fees to plaintiffs' attorneys in an amount up to $790,000. *Id.*

The appellant was a plaintiff who had originally filed a separate individual action against Robert's, asserting similar claims to those alleged in the class action. Once the class was certified, the appellant became a member of the class in this action because she had been a retail purchaser of at least one of Robert's products. As such, to the extent she remained in the class, the appellant faced release of her individual claims in exchange for the settlement consideration. The appellant filed an objection to the settlement, claiming, among other things, that the

[1] In addition, the products were to be tested at varying intervals for fat and caloric content, with the results reported to class counsel for a period of four years. *Id.* The Second Department made no further reference to this provision of the settlement in its decision.

settlement of $3.5 million in coupons provided insufficient value to class members, the proposed notice was inadequate, and that the proposed attorneys' fees were excessive. [2]

The Nassau County Supreme Court approved the substance of the proposed settlement as "fair, reasonable, adequate, and in the best interests of the Class members," dismissed the complaint, enjoined class members from bringing further complaints against Robert's, and awarded $790,000 in attorneys' fees. *See id.* at 67.

The Second Department's Various Rulings

The Appellate Division began with the threshold issue of whether the appellant had standing to assert her objection, specifically considering the question of whether a class member who has elected to be excluded from the class may "opt back in." In *Klein,* the appellant, after initially "opting out" of the class, submitted a written request to be included again in the class before the final deadline for the submission of requests for exclusion.[3] Citing certain federal court precedents, the Second Department held that if, prior to the end of the opt-out period, "an individual who has opted out clearly and unequivocally makes known to the court a desire to opt back into the class, he or she 'should be able to rescind any prior contrary communication to the Court asking to be excluded from the class.'" *Id.* at 69 *(*quoting *Bailey v. Cost Control Mktg. &*

---

[2] The appellant subsequently filed a second objection, which involved a concern that the settlement could be discharged in a subsequent bankruptcy proceeding. However, by that time the Supreme Court had already issued a final order and judgment and, therefore, had not considered the objection. The appellant does not seem to have incorporated this objection as part of her appeal and the Second Department did not consider it.

[3] The above description is an abridged version of what had happened. As a result of an agreement with another objector, there were two separate, court-ordered opt-out periods, separated by 21 days. *Id.* at 67-68. The objector's request for exclusion occurred during the interim period, after the first period had expired and before the second period began. As such, the request was arguably untimely. It was also arguably defective because it omitted certain required information. *Id.* at 68. The court's ruling, however, was based on the issue of whether the subsequent request for re-inclusion in the class, prior to the end of the second opt-out period, should have been honored.

Sales Mgmt. of Va., Inc., 132 F.R.D. 435, 437 (W.D. Va. 1990)). As such, the Appellate Division permitted the objector to pursue the appeal.

Skipping over the Appellate Division's consideration of the trial court's certification ruling, which is discussed below, the court then considered the adequacy of the settlement. The Second Department articulated the attributes necessary for a distribution of coupons to form the basis of an acceptable class action settlement. The court held that "[s]ettlements that include fully assignable and transferable discount coupons that can be aggregated and are distributed directly to class members have been approved because such coupons have been found to provide 'real and quantifiable value to the class members.'" *Id.* at 73 *(*quoting *Shaw v. Toshiba Am. Info. Sys. Inc.*, 91 F. Supp. 2d 942, 960-61 (E.D. Tex. 2000)). Such attributes provide the basis for the development of a market in the coupons and thus, as the court noted, provide them with "intrinsic cash value." *Id.*[4] The court concluded, however, that there was nothing in the record below in *Klein* showing that "the discount coupons have any intrinsic cash value, or that they may be assigned, aggregated, or transferred in any way." *Klein*, 28 A.D.3d at 73.

The Second Department also noted that the settlement did not direct distribution of the coupons to class members, but, rather, provided that they would be available to the public at large. Again, the court carefully explained that such a provision, by itself, did not warrant rejection of the settlement. Indeed, quoting a respected commentator, 4 Alba Conte & Herbert B.

---

[4] The Committee believes that this analysis is far more appropriate than the treatment of coupon settlements provided in the recently enacted federal Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, and 1711-15 ("CAFA"). In CAFA, the amount of attorneys fees permitted to be awarded is tied to the value of the coupons actually redeemed by class members, 28 U.S.C. § 1712(a), notwithstanding that class members may obtain significant value by selling, rather than redeeming, coupons that are provided with features that facilitate marketability. Although the coupon settlement provisions of CAFA also expressly permit consideration of expert testimony as to the value of the coupons, 28 U.S.C. § 1712(d), it does not permit for exceptions to the redemption requirement. Thus, irrespective of the court's finding of value as to a particular proposed coupon distribution, only those coupons redeemed can be considered with the award of attorneys' fees.

Newberg, Newberg on Class Actions § 11:20 (4th ed. 2002), and federal authority, *In re Mexico Money Transfer Litigation*, 164 F. Supp. 2d 1002, 1031 (N.D. Ill. 2000), *aff'd*, 267 F.3d 743 (7th Cir. 2001), *cert. denied*, 535 U.S. 1018 (2002), the Appellate Division further explained that indirect compensation arrangements, known as "cy pres or fluid class recovery distributions," have been approved under certain circumstances. *Klein*, 28 A.D.3d at 73. In particular, "[i]n cases where it is difficult to locate class members or to distribute funds directly to them, a cy pres distribution may prove a useful complement to more traditional distribution formulas." *Id.* at 73-74. However, the Appellate Division noted that the record below was barren of any evidence that the trial court considered "the possibility or appropriateness of a cy pres distribution." Indeed, the Appellate Division concluded, a distribution of such coupons to the general public would unlikely provide even an indirect benefit to class members, given that "they would be the least likely to purchase the Products again now that their higher fat and caloric content has been revealed." *Id.* at 74.

The Appellate Division also concluded that the lower court's approval of the settlement lacked consideration of certain additional necessary factors, including the cost to the defendants of the settlement and an effort to weigh the value of the settlement with the likely recovery at trial, including a consideration of the obstacles to litigation of individual claims. *Id.*

The Court's Ruling on the Supreme Court's Holding on Class Certification

Relying on the United States Supreme Court's holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Second Department held that even where settlement and not litigation is contemplated, the criteria for class certification must still be satisfied. Indeed, to protect absent class members, those factors "demand undiluted, even heightened, attention."

Klein, 28 A.D.3d at 70, quoting *Amchem*, 521 U.S. at 620.[5] The court then went on to list the significant certification issues as to which it found no record of consideration by the trial court.

First, the court noted that class actions cannot be defined so broadly as to include individuals who have not been harmed by the defendants' conduct. *Klein*, 28 A.D.3d at 71, citing, *inter alia*, *Levitan v. McCoy*, No. 00 C 5096, 2003 WL 1720047, at *7-8 (N.D. Ill. Mar. 31, 2003). In *Klein*, the class was defined to include all purchasers of Robert's products during the class period. As the Second Department noted, however, "[o]f all the persons in the nation who purchased the Products over that nearly four-year period, there were certainly some, and perhaps many, who did so for reasons wholly unrelated to the Products' advertised fat and caloric content. Those individuals would not have suffered any injury as a result of the defendants' alleged misrepresentations, and therefore their inclusion in the Class suggests that the definition is too broad." *Id.* at 71. The court then stated that, "[t]he Supreme Court apparently did not consider or address that issue." *Id.*

The Appellate Division also noted, as to the predominance requirement, that each of the causes of action -- save the claim under General Business Law § 349 -- required proof of reliance, an individual issue that could not be resolved in a manner common to the class. The facts in *Klein*, however, were quite unlike those in *Amchem*, in which the United States Supreme Court stated the "[n]o settlement class called to our attention is as sprawling as this one." 521 U.S. at 624. Indeed, the greatest conflicts within the class in *Amchem* involved those between individuals who were presently injured by asbestos and those who were merely exposed to that substance and as to whom it was "unclear whether they will contract asbestos-related disease

---

[5] The relevant class certification factors considered in *Klein* are those contained in New York C.P.L.R. 901(a). Those factors are analogous to those contained in Federal Rule of Civil Procedure 23(a) and (b). *See Huebner v. Caldwell & Cook, Inc.*, 139 Misc. 2d 288, 292 (N.Y. Sup. Ct. Monroe County 1988).

and, if so, what disease each will suffer." *Id.*[6] By contrast, the court in *Amchem* held that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Id.* at 625. Indeed, citing case law within New York, the Appellate Division in *Klein* also explained that the existence of individual issues, including reliance, did not necessarily mean that the predominance element could not be met. *See, inter alia, Weinberg v. Hertz Corp.,* 116 A.D.2d 1 (1st Dep't 1986), *aff'd,* 69 N.Y.2d 652 (1987). Also, as noted, at least one of the causes of action alleged in *Klein* did not require proof of reliance.[7] Thus, the reliance issue in *Klein* likely presented more of a manageability issue than one of predominance. However, the court stated, as was true as to all other issues, the "barren record does not provide the basis for the Supreme Court's conclusion that common issues of law and fact predominate over issues affecting only individual members of the Class as defined." *Klein,* 28 A.D.3d at 72.

The Second Department noted that while one of the causes of action was for violation of General Business Law § 349, that statute is "strictly limited in its territorial reach to purchases made in New York." *Klein,* 28 A.D.3d at 72, citing *Goshen v. Mut. Life Ins. Co. of N.Y.,* 98 N.Y.2d 314, 324-25 (2002). Given that the class proposed for certification was national in scope and therefore included individuals "whose available rights and remedies may differ slightly or significantly from those afforded New York purchasers under New York law," the

---

[6] A related problem was that not all exposure –only members of the class knew they had been exposed and may contract a disease, making it difficult to identify all class members. As Judge Scheindlin has held, there is an implied requirement that the class members be identifiable by reference to objective criteria. *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.,* 209 F.R.D. 323, 337 (S.D.N.Y. 2002).

[7] *See also Grunewald v. Kasperbauer,* 235 F.R.D. 599, 606 (E.D. Pa. 2006) (in considering proposed settlement, "[t]he Court finds that, in light of the additional allegations which do not require a showing of detrimental reliance, the common issues of the class predominate over the individual issues of reliance.").

court held that the Supreme Court should have taken "those differences into account." *Klein*, 28 A.D.3d at 72.

The Committee believes that the Appellate Division failed to properly apply the ruling in *Amchem*. The potential differences between state laws, the reliance element of plaintiffs' claims (at least in the context of the facts in *Klein*), and whether all class members possess a compensable claim are all matters that implicate the manageability requirement that must be satisfied as to a litigation class. The United States Supreme Court expressly held that "[s]ettlement is relevant to class certification" and that, in particular, a trial court "need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial." *Amchem*, 521 U.S. at 619-20 (citation omitted). As applied to the issue of dealing with variations in state laws, "the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those variations are irrelevant to certification of a settlement class." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004). That defendants may seek to offer greater consideration to settle potential claims of all class members, whether individual proof at trial would have been required to prove those claims or defendants could have asserted individual defenses to some class members that would have, in the litigation class context, potentially rendered the action unmanageable, does not impugn the certification of the settlement class. In considering that proposed certification, the court would have been required to assume the merits of the claims of the class members, as required under *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 157-58 (1974). Thus, the *Klein* court's remand to the trial court for further development of a factual record on this issue is unsupported by prior precedent and authority.

The Court's Ruling on the Application for Attorneys' Fees

The Appellate Division held that the plaintiff attorneys submitted insufficient information to the trial court to support its approval of their application for fees, and, therefore, remanded that portion of the matter as well for reconsideration. In particular, the court held that while the plaintiff firms had submitted firm resumes, the identity of, and information concerning, all attorneys who worked on the matter, the total number of hours devoted to the case, and a general description of the work performed, they did not provide a detailed description of the tasks performed by each attorney. *Klein*, 28 A.D.3d at 75. In support of its decision, it cited *Matter of Karp*, 145 A.D.2d 208 (1st Dep't 1989), a case involving an award of attorneys' fees under a fee-shifting provision of the New York Mental Hygiene Law, *id.* at 214; and two class action cases decided over twenty-five years ago, *Washington Federal Savings & Loan Ass'n v. Village Mall Townhouses, Inc.*, 90 Misc. 2d 227 (N.Y. Sup. Ct. Queens County 1977), and *Sheridan v. Police Pension Fund*, 76 A.D.2d 800 (1st Dep't 1980).

However, the additional information the Second Department sought could only be used as part of a lodestar approach in awarding fees, based upon a detailed analysis of the work performed in the action, rather than using a percentage of the benefit obtained for the class. Indeed, both of the class action holdings cited by the court noted that, at the time they were decided, the trend had been toward the lodestar analysis in place of using the percentage of the benefit method. *Wash. Fed.*, 90 Misc. 2d at 230 ("[t]his practice of awarding a percentage of the settlement has now been changed."); *Sheridan*, 76 A.D.2d at 801 (rejecting using a percentage of the benefit obtained and using the lodestar method, "the modern Federal formula with respect to awarding attorneys' fees in class actions").

The Appellate Division failed to recognize that since the time of those decisions, the strong trend among all courts in class actions in which a fee is based upon the "common fund doctrine,"[8] as opposed to upon a fee-shifting statute, has returned to the use of the percentage of the benefit approach. Indeed, the United States Supreme Court, in *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), while holding that the lodestar approach was proper when attorneys fees were sought pursuant to a fee-shifting statute, stated that, in contra-distinction, "under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class."

Since the holding in *Blum*, most courts have returned to use of the percentage method.[9] In *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 48-49 (2d Cir. 2002), the Second Circuit stated that the use of the "lodestar" method was within the district court's discretion, but also observed that "the lodestar method proved vexing" and has resulted in "an inevitable waste of judicial resources." *See also In re Sterling Foster & Co. Sec. Litig.*, 238 F. Supp. 2d 480, 487 (E.D.N.Y. 2002) ("Courts favor the percentage of the fund method because lodestar 'created an

---

8 The Supreme Court has recognized that "a lawyer who recovers a common fund for the benefit of persons other than . . . his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This rule, known as the common fund doctrine, is firmly rooted in American case law. *See, e.g., Trustees v. Greenough*, 105 U.S. 527 (1881); *Cent. R.R.. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

9 Two federal circuits have ruled that the percentage method is mandatory in common fund cases. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991). Other circuits have expressly approved the use of the percentage method. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 48-9 (2d Cir. 2000); *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (citing footnote 16 of *Blum* recognizing both "implicitly" and "explicitly" that a percentage recovery is reasonable in common fund cases); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir. 1989); *In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *In re Rite Aid Corp. Sec. Litig.*, No. 03-2914, 2005 U.S. App. LEXIS 1269, at *13 (3d Cir. Jan. 26, 2005); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996). Even the judges of the Third Circuit, where the lodestar/multiplier approach was first developed, have strongly criticized the lodestar method and recommended return to the percentage of the recovery method. *See* Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237, 254 (Oct. 8, 1985).

unanticipated disincentive to early settlements,' tempted lawyers to run up their hours, and 'compell[ed] district courts to engage in a gimlet-eyed review of line-item fee audits.") (quoting *Goldberger*, 209 F.3d at 48-49). Indeed, the type of information that the Appellate Division apparently believed the trial court should have considered could only have been used for the sort of analysis -- *i.e.* what tasks did each lawyer perform, was the lawyer who performed such task the appropriate one given that lawyer's experience and the level of difficulty of the task, did the lawyer spend too much time on the task? -- that critics of the lodestar approach note wastes judicial resources on an exercise that often amounts to an imprecise hindsight review of staffing decisions and gives insufficient value to what was achieved by the efforts of the attorneys.

The preference for the percentage of the benefit method is also evident in decisions by New York State courts. Thus, in *Willson v. New York Life Insurance Co.*, No. 94-127804, 1995 N.Y. Misc. LEXIS 652 (Sup. Ct. N.Y. County Nov. 8, 1995), Justice Schackman, in applying that method, held that "the Court notes that federal courts around the country, including federal district courts in New York, appear to be turning away from the lodestar/multiplier approach, and are returning to the more traditional percentage of the recovery approach," at *90, citing cases and other authorities taking up almost half a page. *See also Michels v. Phoenix Home Life Mut. Ins. Co.*, No. 95/5318, 1997 WL 1161145, at *31 (Sup. Ct. N.Y. County Jan. 7, 1997) ("In testing the reasonableness of the negotiated fee, the Court first looks to the percentage of the recovery approach.").

To be sure, courts employing the percentage method often also engage in an abbreviated lodestar analysis as a cross-check on the reasonableness of the fee that would result from a particular percentage of recovery, including benchmark percentages some courts employ, focusing on the amount of law firm resources that were expended in obtaining that recovery, but

without engaging in the sort of tedious forensic audit review required by a full lodestar approach. *See, e.g., Goldberger,* 209 F.3d at 50. However, the Second Department in *Klein* noted that the trial court had within its possession the type of information that would be necessary to perform that cross-check; *i.e.* the total number of hours expended on the case by each law firm applicant, relevant information as to the standing of the firms and individual attorneys who worked on the case, and general descriptions of the work performed by each firm. Thus, the Committee believes that the Second Department's holding that the trial court abused its discretion by failing to obtain information that could only have been useful to a full lodestar analysis, and to remand the case to that court to obtain such information, without any guidance as to factors it should consider in determining whether such an analysis was proper in the circumstances of the case before it, was an error.

This is not to say that the court was not correct in holding that the trial court's decision to approve the award was based on insufficient facts. In *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir. 1995) ("*GM I*"), the United States Court of Appeals for the Third Circuit analyzed an award of attorneys' fees in a class action settlement by comparing the amount of attorneys' fees awarded with the value of a proposed settlement that, like here, consisted of coupons. The Third Circuit in *GM I* concluded that the proposed coupon settlement was not fair and adequate because: (1) the coupons provided no cash value; (2) the coupon settlements benefited different class members differently; and (3) the settlement was not valuable relative to the relief requested, in that the coupons did not address the safety defect that was at the heart of the allegations of the class action. *See id.* at 812-15. This conclusion is similar to that of the court in *Klein* as to the lack of any "indication"

that the coupons that formed the basis of the settlement in that case had any "intrinsic value." 28 A.D.3d at 73.

Reversing the trial court's determination that the proposed $9.5 million of attorneys' fees was reasonable, the *GM I* court concluded that, because it was skeptical of the proposed settlement and the valuation of that settlement, it was also skeptical that $9.5 million was an appropriate portion of that settlement for attorneys' fees. Accordingly, it remanded the determination of attorneys' fees to the District Court, and directed that the court make a valuation of the settlement as a whole, and then calculate an appropriate percentage of attorneys' fees relative to that valuation. *See id.* at 822. The Committee believes that this would have been an appropriate direction in *Klein.*

In conclusion, the Committee believes that the decision in *Klein* provides a useful primer on many class action issues but, on at least two issues, is a significant departure from both federal and New York precedent.