

Rice v. Lafarge North America, Inc. et al., Sheldon and Esther Schwartz, On behalf of Themselves and All Others Similarly Situated v. Lafarge North America, Inc. et al. (motion for attorneys' fees and reimbursement of expenses)

In *Rice v. Lafarge North America, Inc. et al.*¹, the Circuit Court for Montgomery County considered the plaintiffs' motion for attorneys' fees and reimbursement of expenses following the settlement of claims alleging that a tender offer made by defendant Lafarge SA for all of the outstanding shares of defendant Lafarge North America, in which it was the majority shareholder, was inadequate and unfair.

Plaintiffs asserted that they were entitled to an award of fees under the common fund doctrine, whereby Maryland courts have recognized that when a representative plaintiff successfully establishes a common fund in which others have a beneficial interest, plaintiffs' counsel is entitled to an award of attorneys' fees out of a common fund. Specifically, plaintiffs argued that their litigation efforts on behalf of the class conferred a monetary benefit on that class, thus entitling plaintiffs' counsel to the fee award. In further support of their arguments, plaintiffs urged the Court to follow other jurisdictions, including Delaware, which recognize a rebuttable presumption that there is a causal link between a lawsuit and the benefit conferred upon the class when defendants take the action resulting in the benefit after the start of the litigation. In this case, plaintiffs cited the filing of their motion for a restraining order, among other things, as the cause of the initial tender offer increase. Citing *In re Infinity Broad Corp. Shareholders Litigation*², plaintiffs asserted that the presumption of causation was not negated because their actions were not the sole cause of the tender offer price increase. The effect of the plaintiffs' actions on the tender offer was also acknowledged by the defendants in its stipulation of settlement.

In addition to claiming entitlement to a fee award, plaintiffs argued that the fee requested was reasonable based upon a percentage of the benefit conferred with a Lodestar cross-check. The fees requested by plaintiffs were approximately five times the Lodestar amount, a multiplier the plaintiffs asserted was typical in cases such as theirs and appropriate in light of the benefit achieved and fees typically awarded in similar cases. The defendants opposed the fee award claim with several arguments. The defendants argued that for the common fund doctrine to apply, plaintiffs had to establish (i) the existence of a fund; (ii) that their claims were meritorious when filed; and (iii) that their efforts were a cause of a benefit to the members of the class, in this case the creation of the fund. Here, the defendants questioned whether a fund existed, asserted that none of plaintiffs' claims were meritorious when filed and argued that plaintiffs actions were not a cause in fact of the tender offer increase. The defendants noted that the special committee created to consider the tender offer had already recommended against the earlier lower tender offer price before any plaintiff action and that plaintiffs' motion to enjoin the lower offer was never ruled on. The defendants further argued that its stipulation of settlement does not entitle

¹ Maryland Business and Technology Case Management Program, Civil No. 268974-V (Consolidated with Case Nos. 269216-V, 270403-V, 270404-V, 270405-V, 270406-V, 240407-V, 240408-V and 270409-V) and Civil No. 270410-V (4/2007, Mason, J.), available at http://www.courts.state.md.us/businesstech/opinions/mdbt2_07.pdf.

² 802 A.2d 285 (Del. 2002).

plaintiffs to any fee award, and that even if the right to an award was established, the award requested was unreasonable. The defendants asserted that a pure Lodestar methodology was the appropriate one for determining the fee, not a “percentage of the fund” approach, and that regardless of the methodology chosen the Court had to determine the reasonableness of the fee under Rule 1.5(a) of the Maryland Rules of Professional Conduct.

The Court disagreed with the defendants assertion that there was no fund established, noting that unlike cases the defendants offered in support of their arguments, the defendants had entered into a settlement agreement whereby they agreed to be responsible for any fees the Court might award. The Court also disagreed with the defendants’ assertion that none of the plaintiffs’ claims were meritorious when filed, stating that most of plaintiffs’ claims for relief were pending before the Court at the time that the parties entered the settlement agreement. According to the Court, while Maryland law required a losing plaintiff to establish that their suit was meritorious when filed prior to an award of fees may be made, it did not require that standard to be applied to a plaintiff who dismissed its claim pursuant to a settlement agreement, as was the case here. Ultimately, the Court held that it would not require the plaintiffs to prove what the defendants had already conceded in the settlement agreement, mainly that plaintiffs’ actions were a factor in arriving at the final tender offer price. With respect to causation, the Court held that there was no evidence with which it could conclude that plaintiffs’ actions had any effect on the defendants’ decision to make the initial increase to the tender offer price. However, the Court did find that the plaintiffs were entitled to the presumption under Delaware law that their efforts were a cause of the later increase to the final tender offer price and that plaintiffs were entitled to recover attorneys’ fees as a result of the benefit created for members of the class resulting from the increase in the share price from \$82 to \$85.50 per share, an aggregate increase of \$128 million dollars.

Finally, the Court also disagreed with the defendants that a pure Lodestar approach was appropriate in determining the reasonableness of the fee award. Rather, in order to determine reasonable of the fee award, the Court decided to apply the 12 factor test set forth in *Barber v. Kimbrell’s Inc.*³, which tracks Maryland Rule 1.5(a) and considers such things as time and labor expended, novelty and difficulty of the questions raised, skill required to perform the legal services and attorney’s opportunity costs in pressing the litigation. Applying the Barber factors, the Court held that the fee requested by the plaintiffs was excessive. Instead of a Lodestar multiplier of five, the Court held that using a multiplier of two resulted in a fee award that fell within the range of fees awarded by courts in large common fund cases previously analyzed by the Third Circuit and reviewed by the Court in this case. Ultimately, the Court awarded attorneys’ fees in the amount of \$4,716,408 instead of the requested \$12,000,000 amount.

³ 577 F.2d 216 (4th Cir. 1978).