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Class Action Attorney Fees:
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CLASS ACTION ATTORNEY FEES:
THE KEY ROLE OF THE FEDERAL DISTRICT JUDGE IN FASHIONING & MONITORING MASS-TORT COMMON FUND DISTRIBUTIONS TO ASSURE A SETTLEMENT DEEMED EQUITABLE BY BOTH REPRESENTED & UNREPRESENTED CLASS MEMBERS, & BOTH PRIVATE & CLASS COUNSEL.

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I. THE COMMON FUND - AN EXCEPTION TO THE AMERICAN RULE.

Pursuant to the standard "American rule" practice, each litigant pays his own attorneys' fees. Those individuals not in an attorney-client relationships have no duty to pay attorneys' fees. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245, 95 S.Ct. 1612, 1615 (1975). In the context of class actions, however, strict adherence to the American rule would create a problem of "free-riding," whereby individuals who benefit from the litigation efforts of others, without contributing equally to their litigation expense, become unjustly enriched. *Catullo v. Metzner*, 834 F.2d 1075, 1083 (1st Cir.1987); See *also In Re Nineteen Appeals Arising Out Of The San Juan Dupont Plaza Hotel Fire Litigation*, 982 F.2d 603, 606 (1st Cir. 1992), citing, generally, Mancur Olson, The Logic of Collective Action (1971) ("If a court hews woodenly to the American rule under such circumstances, each attorney, rather than toiling for the common good and bearing the cost alone, will have an incentive to rely on others to do the needed work, letting those others bear all the costs of attaining the parties' congruent goals.")

Recognizing this potential inequity, more than a century ago, the United States Supreme Court declared that where the litigation efforts of a private individual or his attorney create, discover, increase or preserve a *common fund*, all who benefit from that fund must contribute *proportionately* to the costs of that litigation. *Trustees v. Greenough*, 105 U.S. 527, 535 (1881). In *Greenough*, the plaintiff was a large shareholder of bonds of the Florida Railroad Company who brought suit on behalf of himself and other bond holders against trustees of the Internal Improvement Fund of Florida. *Id*. at 528. The trustees had been responsible for protecting valuable assets (*i.e.*, over ten million acres of state-owned land). *Id*.. The plaintiff successfully charged that the trustees were wasting and destroying the fund available to them by selling the land at nominal prices. *Id*. at 529. As a result, the conveyances were set aside and a large amount of the trust fund was secured and saved. *Id*. at 531. When the plaintiff sought to recover attorneys' fees, the U.S. Supreme Court recognized that he had borne the entire burden of the litigation and had personally advanced most of the expenses necessary to render the litigation effective and successful. *Id*. at 529. The Court reasoned that he acted the part of a trustee in relation to the common interest. *Id*. at 532. Furthermore, the Court found that the plaintiff was due attorneys' fees because if he did not receive them:

> [i]t would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.

Id. This "common fund" doctrine was employed in order to prevent unjust enrichment - "[spreading] litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone and the 'stranger' beneficiaries do not receive their benefits at no cost to themselves." *Vincent v. Hughes Air West, Inc*., 557 F.2d 759, 769 (9th Cir. 1977), *citing* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation.* 84 Harv. L. Rev. 849, (1975).

Since *Greenough*, the United States Supreme Court has reinforced the common fund doctrine and, indeed, even broadened its application. *See, e.g., Central R.R. & Banking Co. of Georgia v. Pettus,* 113 U.S. 116, 125, S.Ct. 387, 391 (1885) (attorneys who brought suit on behalf of particular, unsecured creditors benefited all unsecured creditors and thus, were entitled to a fee from the common fund); *Sprague v. Ticonic*, 307 U.S. 161, 166-167 , 59 S.Ct. 777 (1939) (attorney's success in securing a lien on the bonds that had been earmarked for his client was entitled to recover fees from the 14 other individuals who would benefit as a result of *stare decisis*); *Mills v. Electric Auto-Lite*, 396 U.S. 375, 392-3, 90 S.Ct. 616 (1970) (ultimate monetary recovery, i.e. a traditional "fund," is unnecessary where "substantial benefit"[1] is bestowed upon an ascertainable class); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (attorneys' fees in common fund cases could be charged to the unclaimed portion of the fund).[2]

II. EQUITABLY SPREADING THE COSTS (AND BENEFITS) ASSOCIATED WITH MASS TORT LITIGATION: APPLICATION OF THE COMMON FUND DOCTRINE IN A SAMPLE OF CASES.

Typically, beneficiaries of a common fund share equally in the cost of the litigation by a *pro rata* reduction in their recovery from the fund, so that apportionment among counsel is generally accomplished through the fee award itself, even if the beneficiaries are not fully identified. *Id*. Appropriate apportionment, however, becomes more complicated in the context of class actions and mass torts. Derfner MF, Wolf AD. *Court Awarded Attorney Fees*. (Lexis Nexis Matthew Bender 2004) at Section 17.03[3]. In these cases, because of a litany of competing interests, courts must more actively intervene. The goal is a dual one. It is to ensure: 1) that benefits among similarly situated class members are substantially equal and 2) that the allocation of fees among counsel is reasonable and proportionate to their respective contributions to the creation of the fund.

A. Courts Have Broad Equitable Power To Supervise The Collection Of Attorneys' Fees.

Courts have broad equitable power to supervise the collection of attorneys' fees and to refuse to enforce contracts (whether contingent or otherwise) that award fees which are excessive and unreasonable. *Green v. Nevers*, 111 F.3d 1295, 1302 (6th Cir. 1997); *McKenzie Const., Inc. v. Maynard*, 758 F.2d 97, 100 (3rd Cir.1985); *Dean v. Holiday Inns, Inc*., 860 F.2d 670, 673 (6th Cir.1988). Where an attorney recovers a fund in a suit under a contract with a client, the court, having jurisdiction of the subject matter of the suit has the power to determine the attorney's compensation and to direct its payment out of the fund, notwithstanding any contingency fee agreement. *Garrett v. McRee*, 201 F.2d 250, 253 (10th Cir.1953); *Cappel v. Adams*, 434 F.2d 1278, 1279 (5th Cir.1970). Further, "[t]he sum determined to be a reasonable attorney's fee is within the discretion of the district court; before a reviewing court should disturb the holding, there should be a clear showing that the trial judge abused his discretion." *Id*. at 1280. *See also United States ex rel. Taxpayers Against Fraud v. General Electric,* 41 F.3d 1032, 1047 (6th Cir.1994) ("an attorney's right to contract for a contingent fee is not completely beyond judicial control."); *Kalyawongsa v. Moffett,* 105 F.3d 283, 286 (6th Cir.1997) ("federal district judges have broad equity power to supervise the collection of attorneys' fees under contingent fee contracts.")

In the context of class actions and mass torts, the deference afforded to courts to approve, reject or limit fees is even greater, and ought to be. *In re Joint E. and S. Dists. Asbestos Litig.,* 878 F.Supp. 473, 558-59 (E.D.N.Y.1995), *citing*, 7B Charles Alan Wright, Arthur R. Miller & Mary Kay

1 This doctrine is sometimes referred to as the "substantial benefit" doctrine.

2 The anti-"free rider" principle is found in other areas of the law as well. *See, e.g., Abood v. Detroit Board of Education,* 431 U.S. 209 (1977) (The Court found no first amendment violation in requiring a non-union public employee to pay a fee for "non-ideological" collective bargaining activities given the resultant benefits to him.)

Kane, Federal Practice and Procedure Section 1803 (1986 & 1994 Supp.); *In re "Agent Orange" Prod. Liability Litig.,* 611 F.Supp. 1296, 1303-04 (E.D.N.Y.1985), *aff'd in part, rev'd in part,* 818 F.2d 226 (2d Cir.1987); Lester Brickman, Michael J. Horowitz & Jeffrey O'Connell, *Rethinking Contingency Fees* (Manhattan Institute 1993); Lu CP. *Procedural Solutions to the Attorneys' Fee Problem in Complex Litigation*. 26 U.Rich.L.Rev. 41 (1991); *In Design v. K-Mart Apparel Corp.,* 13 F.3d 559, 568-69 (2nd Cir.1994).

In determining what fund apportionment is fair and reasonable in the context of class actions or mass torts, courts must consider a number of competing concerns: 1) whether absent class members are being unjustly enriched at the expense of class representatives;[3] 2) whether absent or putative class members are being unjustly enriched at the expense of the attorneys working on behalf of the class;[4] 3) whether attorneys are being reasonably compensated for their efforts to advance the common interests (taking into account their skill, investment of resources, risk, as well as the need to provide incentives so that able counsel are available in the future); 4) whether attorneys are being reasonably compensated for their efforts to advance the interests of their individual clients;[5] 5) whether certain lawyers are being unjustly enriched by the efforts of other counsel; 6) whether the parties are agreeable to the settlement terms (or, alternatively, whether there is a substantial risk that a prohibitive number of claimants will opt-out of the settlement); 7) whether the community will perceive the settlement allocations among class members as fair; and 8) whether the community will perceive the settlement allocations among counsel as reasonable and proportionate to their particular contributions to the creation of the common fund.

B. Courts Have Employed Various Approaches In An Attempt To Ensure That Class Members Are Allocated Common Benefits Equitably And That Attorney Fees Are Reasonable And Substantially Proportionate To Counsel's Contributions To The Creation Of The Common Fund.

Over the past three decades, courts have sought to balance the above interests using a variety of approaches. Given the differing circumstances in each case, no single approach should serve as a definitive guide. Indeed, as the following will illustrate, despite the courts' valiant efforts, some inequity is inevitable whatever approach or combination of approaches is used. This is so given the complexities present - the diverse nature of injuries and the multitude and different subclasses of beneficiaries and of counsel.

Approach One: Each beneficiary pays his proportionate share of the common benefit fees. Those with private counsel deduct that amount from what is owed to their private counsel.

Approach One requires unrepresented and represented class members to pay proportionate shares of the common benefit fees. The courts have generally recognized, however, that 1) represented class members are already required to pay attorney fees, and that 2) their private attorneys were required to do less work, due to the contributions of common benefit attorneys. These courts have required that the represented class members' shares be deducted from the amount that would otherwise be payable to their privately retained lawyers. *See, e.g., In re Orthopedic Bone Screw Litig.* 1996 WL 900349 (E.D. Pa. 1996); 2000 WL 1622741 (E.D.Pa. 2000); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation.* MDL Docket No. 1203. *Sheila Brown v. American Home Products Corporation*. Civil Action No. 99-20593. Memorandum and Pretrial Order No. 2622. In the *Bone Screw* litigation, all claimants were ordered to contribute 12% of their settlement benefits for common benefit fees and 5% of their settlement benefits for common benefit costs. This 17% sum was deducted from the amount that was owed to private

3 Newberg on Class Actions, Section 14 at 505, 547 (4th ed. 2002); *see also Brytus v. Spang & Co.,* 203 F.3d 238, 242 (3d Cir. 200). *Sketlton v. General Motors Corp.,* 860 F.2d 250, 252 (7th Cir. 1988).

4 Newberg, *supra*., at 546 (Counsel "who has created a benefit [through their particular efforts], for third parties,[e.g., absent class members], such as a common fund for the benefit of a class, [are entitled] to recover reasonable fees and expenses as awarded by the court from the common fund created.")

5 *See In re Joint E. and S. Dists. Asbestos Litig.,* 878 F.Supp. 473, 558-59 (E.D.N.Y.1995) ("In any mass tort case, there is an opportunity for a small number of attorneys, each individually representing large numbers of potential claimants, to secure for themselves huge attorneys' fees under individual contingency contracts that bear little or no relation to the actual work to be done or the risks in the case. The problem is particularly acute in the context of a stipulated settlements, where subsequent legal work on behalf of most individual claimants will be relatively routine, mechanical and almost certain to result in recovery.")

lawyers. *Also see In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation.* MDL Docket No. 1203. *Sheila Brown v. American Home Products Corporation.* Civil Action No. 99-20593. Memorandum and Pretrial Order No. 2622. In the *Diet Drugs* litigation, claimants were required to pay common benefit attorneys (defined as those attorneys who actually contributed to the creation of the settlement funds through work devoted to the "common benefit" of class members - including any attorney who actually conferred benefits upon the class through state court litigation) 9% of every matrix compensation benefit awarded. As in the *Bone Screw*, where a class member had private counsel, that 9% was deducted from the individual's private attorney's fee.[6]

Although this approach helps to balance the burden of litigation costs, not surprisingly, it is imperfect - at times substantially so - as are the other approaches discussed below. In the *Diet Drugs* litigation, for example, were a class member to receive a $100,000 matrix award and have a 33 1/3% contingency fee contract with a private attorney, her attorney would receive approximately $24,000 ($33,333 - $9,000) and the class member would receive approximately $67,000 - the same as if there had been no assessment at all. An unrepresented class member, however, who likely never filed a lawsuit, never conducted discovery and had little or no influence in motivating the defendant to settle, would receive $91,000 - 26% more than the class member with privately retained counsel. This disparity was only somewhat mitigated by the tasks that the unrepresented was required to do for herself (e.g., order medical records, understand and prepare claim forms, challenge a claims administrator's negative determination.)

Approach Two: Each beneficiary pays his proportionate share of the common benefit fees. Privately retained counsel are not entitled to collect any fees - even those under their contingency fee agreements - because they made little or no contribution.

To protect against a disparity in the benefits received by unrepresented and represented class members, another court eliminated private attorneys' fees altogether. *In re Agent Orange Product Liability Litigation,* 611 F.Supp. 1296, 1317 (E.D.N.Y. 1985), *Rev'd. in part on other grounds by In re Agent Orange Product Liability Litigation,* 818 F.2d 226 (2nd Cir. 1987) In *Agent Orange,* the court determined that the amount of fees to be paid to class counsel would come off the top of the common fund and ordered that all remaining funds be proportionately dispersed to the class. While private attorneys were entitled to reimbursement for out-of-pocket litigation expenses, they were prohibited from enforcing private fee agreements where their efforts "at best contributed less than marginally toward any recovery ultimately to be received by [their class member-client] from the fund." The district court determined that any fee paid to privately retained counsel would be unreasonable.

While this approach eliminates any inequity as between represented and unrepresented class members, it is an imperfect one. Even if, as observed by the court, privately retained counsel only minimally advanced the interests of settlement, it seems both unreasonable and unfair that they would be entitled to no fee at all. This approach, not surprisingly, is surely likely to discourage attorneys from participating in future class action litigation.

Approach Three: Each beneficiary pays his proportionate share of all fees that are distributed from the common fund among common benefit and privately retained counsel.

Usually, common benefit attorneys in a class action deserve and receive a premium share of the common fund fees (premised on the theory that their efforts are more important and time consuming than those of the privately retained counsel). Such an award, however, may be deemed unwarranted in certain circumstances. *See, e.g., In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.,* 56 F.3d 295, 305 (1st. Cir. 1995). In *Dupont Plaza*, both common benefit and privately retained counsel received their fees off the top of the common fund. While the trial court initially allocated a larger percentage of fees to the common benefit attorneys, the appellate

6 Common Benefit Attorneys were also awarded fees from a fund created by the Defendant for individuals who did not have matrix injuries.

court challenged the award as improperly minimizing the value of services provided by private counsel. The court stated:

> In a securities class action many of the victims do not participate in the lawsuit, and are aware of their loss dimly, if at all. . . . The mass tort context supplies a stunning contrast. In a **mass tort** action, the victims' losses (whether of life, limb, or loved ones) are almost always keenly felt, and are usually not amenable to computation by a simple arithmetic formula. As a result, the individual plaintiffs typically require a multitude of services, many of which cannot be satisfied by an impersonal steering committee. In such circumstances, the attention of the individually retained attorneys becomes crucial to the success of the overall enterprise. That important contribution demands appropriate recognition.
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> * * * *
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> One [privately retained lawyer], now deceased, made this point in a submission to the district court: "In the course of representing these clients, the attorneys and staff did hundreds of hours of work that was not separately billed but that is a part of the work of competent and dedicated [private counsel]. For example we helped to arrange the shipping of bodies from Puerto Rico to their homes, counseled families ... to help them function as witnesses, obtained [hard to locate] records, investigated possible criminal activity, searched for heirs, negotiated with creditors, and with law enforcement agencies, and researched legal issues such as the rights to awards from the State insurance fund."

Id. at 311 n.13.

Even though Approach Three balances the interests of common benefit and privately retained counsel, it too is imperfect. However invaluable many of the described tasks performed by private counsel were, such work did nothing to directly advance the interests of the mass. Compensating these private lawyers for such work from the common fund could only be equitable where all of the claimants had retained private counsel, had required such attention from them, and where their contingency fee agreements called for similar fees.

> Approach Four: All class members pay their proportionate share of fees awarded to attorneys (both class and privately retained) who contributed to the common benefit. Counsel who are awarded such common benefit fees are to reduce accordingly the amounts they are entitled to receive in private contingency fees. Beneficiaries who retained private counsel that did nothing to contribute to the creation of the common fund, however, must still pay their lawyers the full amount owed under their private contingency fee agreement.

In the case of *In re Telectronics Pacing System, Inc.* 137 F.Supp.2d 985 (S.D. Ohio 2001), the court decided on a total amount to be awarded to those attorneys (both class and privately retained) who had advanced the interests of the class. Class counsel were given the responsibility of appropriately dispersing the fees (with supervision from the court, if necessary). The court further ordered that whatever compensation arrangements the attorneys had with individual clients be reduced by the amounts they received from the common fund fee and expense awards.

Like its predecessors, Approach Four also is an imperfect one. First, it may be unrealistic to expect that common benefit attorneys would carry out the court's admonition to adjust private contingency fee agreements conscientiously and appropriately. Second, Approach Two enables private attorneys who did nothing to advance the interests of the class to be unjustly enriched at the expense of the common-benefit attorneys who created the benefit.

Approach Five: Common benefit attorneys receive a percentage of the fees owed to privately retained counsel. Unrepresented claimants need not contribute.

To the extent that privately retained counsel have fewer responsibilities as a result of the efforts of those working to advance the interests of the mass, it is appropriate that the fees of the former be reduced to support the fees of common benefit attorneys. A few courts, though, have made this private attorney fee reduction the *only* source of funds to support common benefit attorneys, requiring unrepresented claimants to contribute nothing. *See, e.g., In re Air Crash Disaster at Florida Everglades,* 549 F.2d 1006 (5th Cir. 1977); *Smiley v. Sincoff,* 958 F.2d 498, 501 (2nd Cir. 1992); *In re MGM Grand Hotel Fire Litig.,* 660 F. Supp. 522 (D. Nev. 1987). In the first two of these cases involving airplane crashes, the courts ordered that individuals who had retained private lawyers (who had not furthered the common benefit) pay 8% of all settlements into a fund created to pay common benefit attorneys. This amount was to be deducted from each plaintiffs' lawyers' privately retained fee. Those who had not retained private counsel (or, in the case of *Smiley*, even those who refused to compensate their private counsel) were exempted from having to pay any common benefit fees (as were those, in the case of *Smiley*, who settled prior to a particular date or for less than $75,000). In the *MGM Grand* case, in addition to awarding common benefit lawyers 7% of each private lawyer's fee, the court capped private contingency fees at 33 1/3 %.

Although there were likely relatively few, if any, claimants who were unrepresented, to the extent that there were any, they were unjustly enriched by not having to pay their share of the costs of litigation.

Approach Six: Common benefit fees are deducted only from benefits to be paid to unrepresented claimants. Represented claimants receive "immunity," given their fee obligations under private agreements.

Other courts have conversely placed the entire burden of supporting the common benefit attorneys on the unrepresented claimants, 'immunizing' those claimants who had retained private counsel. *See, e.g., Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp.,* 341 F.Supp. 1077 (E.D.Pa. 1972) *opinion vacated by Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp.,* 487 F.2d 161, 169 (3rd Cir. 1973); on remand to *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.,* 382 F.Supp. 999 (E.D.Pa. 1974); *opinion vacated by Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102 (3rd Cir.(Pa.) 1976). In *Lindy*, the court determined the amount of fees that common benefit attorneys should be awarded - regardless of source (*i.e.,* whether from monies due under private contingency agreements or from the common fund). Unrepresented claimants were required to contribute a percentage of that total amount, proportionate to the percentage of the common fund that they were entitled to (in that case 28.6%). Claimants who had privately retained counsel were not required to pay common benefit attorney fees. Rather, they paid their private counsel those amounts owed pursuant to attorney-client contracts.

The *Lindy* court offered this common benefit fee "immunity" even to those claimants who retained an attorney that only contributed indirectly to the common benefit. The court observed that some lawyers benefited the class merely by filing many individual suits against the defendants, the multiple filings "necessarily help[ing] bring about the settlement agreement which produced the substantial settlement fund." 341 F.Supp. at 1085-86. Other courts have offered such immunity more conservatively - requiring private lawyers to be active in the litigation in order to secure a client's exemption from paying his share of the common benefit fees. Derfner MF, Wolf AD. *Court Awarded Attorney Fees.* (Lexis Nexis Matthew Bender 2004) at Section 17.03[3][c]. *See also In re Fine Paper Antitrust Litigation,* 98 F.R.D. 48, 234-35 (E.D.Pa.1983) (immunity rule applies only to those class members "who had filed suit and participated in the litigation," *rev'd. on other grounds,* 751 F.2d 562 (3rd Cir.1984); *Vincent v. Hughes Air West, Inc.,* 557 F.2d 759, 772 (9th Cir. 1977) (Litigants may not engage in "coattailing" to escape fee liability.); *In re Agent Orange Prod. Liability Litig.,* 611 F. Supp. 1296 (E.D.N.Y. 1985), *aff'd in part and rev'd in part on other grounds,* 818 F.2d 226 (2nd Cir. 1987)

(Lead or liaison counsel who "achieve the beneficial result" are entitled to receive compensation from claimants who are only "nominally represented by counsel."); *In re Air Crash Disaster at Florida Everglades,* 549 F.2d at 1019-21 (Inactive counsel must contribute from their fee receipts).

III. *IN RE SULZER ORTHOPEDICS INC. HIP PROSTHESIS AND KNEE PROSTHESIS PRODUCTS LIABILITY LITIGATION* - A NOVEL BUT STILL IMPERFECT APPROACH.

In *In Re Sulzer Orthopedics Inc. Hip Prosthesis and Knee Prosthesis Products Liability Litigation* (MDL 1401) 268 F.Supp.2d 907, the district court judge employed a creative combination of approaches to address concerns of equity. The resultant product, although imperfect, was perceived as fair by parties and clients alike.

A. A Flood Of Litigation Exposed The Defendants To Liability That Far Exceeded Their Assets.

By April 2002, more than 2,000 cases were pending (some filed on behalf of individuals, others filed on behalf of a class) against Sulzer Orthopedics *et al.* arising out of the manufacturer of defective hip and knee prosthetics. In just one of those lawsuits, *Helen I. Rupp and Bernard Rupp, Naomi B. Bonorden, Lillian Sallinger and Carl Sallinger v. Sulzer Orthopedics, Inc.*(Nueces Cty., Texas, August 30, 2001) Case No. 01-60581-4, a jury awarded compensatory and punitive damages that exceeded $15.5 million to 3 plaintiffs. As tens of thousands of individuals had been implanted with one of the subject devices, the companies' liabilities far exceeded their available assets. Thus, bankruptcy loomed and injured members of the class risked receiving little or no compensation; indeed, *any* compensation could have been substantially delayed.

After the United States Supreme Court decided *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 846 (1999) and *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997), it was not possible to approve a mandatory (i.e. non-opt out) limited fund settlement under the circumstances of the case. The company was understandably unwilling to fully fund the $1.1 Billion settlement only to be exposed to a large number of opt-out suits. Accordingly, it was imperative that the settlement was attractive to both class members and their attorneys, who would undeniably influence the formers' decisions to opt-in.

B. The Court Balanced The Equities Between Represented And Unrepresented Class Members.

The Court couldn't risk offending private counsel having influence over potentially thousands of claimants who could be persuaded to opt-out by reducing their contingency fees dramatically. At the same time, payment by their clients of private attorney fees in full would create a dramatic disparity in the benefits received by their clients as contrasted with the unrepresented. To address these concerns, one provision of the court-approved settlement established a fee-subsidy program. *Sulzer*, 268 F.Supp.2d at 927. Class members who had retained private counsel received not only their *pro-rata* share of the fund, but also received from the common fund a fee subsidy of up to 23% of an awarded benefit multiplied by 1.25, covering, in large part, the amount they owed to their private counsel.

> The partial payment by the Settlement Trust of contingent fees owed by certain class members to their attorneys is not only a benefit to those class members, it is also a monetary recognition that the attorneys' general litigation efforts, and/or advice to their clients to participate in the settlement agreement, provided a common benefit to the entire class.

Id.

This fee subsidy totally eliminated the disparity between represented and unrepresented class members (where an attorney was willing to accept the subsidy as payment in full) and substantially lessened the disparity where private counsel rejected that compromise. The fee subsidy program can be illustrated is as follows:

> Where an individual was required to undergo a surgery during which physicians would remove and replace a defective prosthetic, pursuant to the Settlement, h/she would recover a base amount of $160,000. If that individual was not represented by a private attorney, h/she would collect that entire amount. Were it not for the subsidy, a claimant represented by private counsel would receive, in most instances, one third less than the $160,000 or $106,666 - a disparity that was understandably unacceptable to those attorneys who had actively litigated on their clients' behalf.
>
> Pursuant to the court-approved Settlement, however, the unrepresented claimant received $160,000. The represented claimant received $160,000 plus a fee subsidy of 23% of $160,000 x 1.25 [i.e. $200,000] = $46,000. Private counsel were entitled to take a fee [e.g. 33.333%] on 160,000 x 1.25 = $66,660. After subtracting the fee subsidy - paid directly out of the settlement, the client would owe much less (*i.e.,* $20,660).

While, admittedly, in some cases, there remained that disparity, it was somewhat mitigated by the receipt of ongoing representation by private counsel who, for example, collected medical records, prepared claim forms, and appealed determinations made by the Claims Administrator.

C. The Court Balanced The Equities Between Privately Represented Class Members And Their Attorneys By Limiting Contingency Fees.

First, the judge, pursuant to her authority under the Settlement Agreement, allowed enforcement only of those contingency fee contracts entered into prior to February 2, 2002:

> Specifically, any contingent fee agreement between an attorney and a plaintiff class member in this case, which was completed after February 2, 2002 and was intended to allow the attorney to recover contingent fees in this case, is neither ethical nor permissible, and may not to be enforced. No person may take any steps to enforce any such agreement, and any attorney who has obtained contingent fees pursuant to such a contract shall return those fees to the plaintiff class member.

D.C. Docket No. 1268 (October 31, 2003) at 1-2.(emphasis added).

Second, privately retained counsel were encouraged to accept the above described 23% subsidy as payment in full.

Third, the court-approved settlement established various funds that were not subject to contingent fees. Specifically, privately retained counsel were not entitled to collect fees on their clients' *pro-rata* share of the Medical Research and Monitoring Fund ($1 Million); Unrevised Affected Product Recipient Fund ($28 Million); or the Subrogation and Uninsured Expenses Sub-Fund ($60 Million).

D. The Court Balanced The Equities Between Some Common Benefit Attorneys And Members Of The Class

Where an attorney served as private counsel (entitling the attorney to a fee subsidy from the common fund) and worked to further the interests of the class (entitling the attorney to a common benefit fee), that dual benefit was a factor considered by the court in determining the appropriate amount of his common benefit fee. The court reasoned as follows:

> [A]n attorney's receipt of contingent fee payments out of the settlement trust, rather than out of an award to his individual client, must be a factor in the assessment of that attorney's common benefit fee award.

E. Despite The Court's Best Efforts, There Remained Imperfection.

Given the circumstances described in Section IIIA, *supra*., and subject to the restrictions described in Section IIIC, the court found it appropriate to permit privately retained counsel to fully enforce their contingency fees, regardless of the attorneys' contribution to the creation of the common fund. In this respect, some privately retained lawyers were unjustly enriched by their clients and by the efforts of other counsel.

IV. CONCLUSION

In these complex cases, there will inevitably be risks of inequity between privately represented and unrepresented claimants, and among the differing counsel - common benefit attorneys, private counsel and hybrids (*i.e.*, attorneys serving in both capacities.). The district judge should consider his or her options in attempting to eliminate or substantially mitigate these potential inequities, given the circumstances. Choosing the right combination of allocation approaches will be central to achieving the goal of equity among beneficiaries and, secondarily, among counsel.