

**Having Your Cake And Eating It Too,
Or Recovering Costs and Expenses Incurred While Serving As Lead Plaintiff**

By Steven B. Singer

It is a fundamental principle of class action litigation that a class representative may not recover more than his or her fair share of a settlement. While this is in accord with the notion that the class representative is a fiduciary to the absent class members, and cannot put his or her interests ahead of the class, it still seems a bit unfair. After all, class representatives are the ones who have come forward to carry the flag, so to speak, and to vindicate the rights of the class. Without them, there would be no class, and no one would recover. Moreover, there is no question that, in many instances, class representatives make substantial sacrifices in pursuit of litigation on behalf of the class. In addition to monitoring the litigation, class representatives might have to respond to document requests and interrogatories, and to have their depositions taken. They will surely participate in settlement negotiations and discussions about litigation strategy, and may even be called to testify at trial.

Further, class representatives frequently provide invaluable assistance to their attorneys. In an employment discrimination class action, for example, class representatives may provide counsel with extensive knowledge about their employer's organization, workforce and employment practices. Similarly, in an antitrust class action, the named plaintiffs may be able to provide counsel with detailed information about how a product is marketed or used. In sum, contrary to the notion that named plaintiffs in class actions are mere "figureheads," named plaintiffs often play an extremely valuable role in the litigation.

As a result, while prohibited from receiving a greater share of the recovery than the class,

courts frequently awarded named plaintiffs in class actions “incentive awards.” The rationale for these awards was twofold: courts wanted to encourage people to come forward and act as “private attorneys general” in meritorious cases, and courts wanted to recognize the sacrifices which the plaintiffs had made to pursue the litigation – and to compensate them for those sacrifices. See, e.g., In re Catfish Antitrust Litigation, 939 F. Supp. 493, 504 (N.D. Miss. 1996); Gaskill v. Gordon, 942 F. Supp. 382, 384 (N.D. Ill. 1996); White v. National Football League, 822 F. Supp. 1389, 1406 (D. Minn. 1993).

The Private Securities Litigation Reform Act (“PSLRA”) provides a mechanism by which named plaintiffs -- including institutions -- can recover the costs and expenses that they incur while serving as class representatives. Specifically, the PSLRA provides that while the share of any final judgment or settlement that is awarded to a lead plaintiff shall be equal, on a per share basis, to the portion of the judgment or settlement awarded to the other members of the class, “nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class.”

This provision is particularly useful for institutional investors, who, encouraged by the PSLRA’s call to arms, have begun to take an extremely active role in the prosecution of securities class actions. Indeed, while plaintiffs’ counsel typically agree to advance the costs of the litigation (such as court reporters and expert fees), institutions themselves undoubtedly incur costs of their own – not to mention the significant amount of time that personnel must devote to the litigation. While there is little case law addressing exactly what constitutes “reasonable costs and expenses,” it is crystal clear that institutions can recover many of their expenses -- including

expenses of which they may not even be aware. For example, institutions can undoubtedly recover the costs of telephone calls which they make to their counsel, and can also recover photocopying and postage costs. Similarly, institutions who incur travel costs -- such as when they attend court hearings, settlement negotiations or meetings in connection with the case -- will certainly be allowed to recover these costs.

While the PSLRA clearly provides that lead plaintiffs may be awarded their out-of-pocket costs which directly relate to the litigation, many institutions considering moving for appointment as lead plaintiff probably ask themselves if the substantial benefits of serving as lead plaintiff are worth the “burdens.” Indeed, while the facts demonstrate that securities fraud class actions typically settle for a significantly greater percentage of the loss when institutions serve as lead plaintiff, institutions inevitably will need to devote a fair amount of time to the litigation. For example, institutional personnel might have to respond to discovery requests, produce documents, and be deposed. Can institutions be reimbursed for the time they spend on the litigation? The PSLRA says “yes.”

The PSLRA specifically includes “lost wages” as costs which are recoverable. While no institution serving as lead plaintiff has yet to submit its costs and expenses incurred on behalf of representing a class under the PSLRA, we believe that, if proper record-keeping is maintained, wages paid to personnel involved in the litigation may be reimbursed. For example, if an employee who earns an annual salary of \$1,000 per week is forced to devote two days to helping counsel respond to discovery requests, then we believe that the institution may submit \$400 as reimbursable lost wages. This is obviously true if the institution was forced to pay the employee overtime; in such case, all of the overtime paid would be reimbursable costs. Indeed, if an

individual was serving as lead plaintiff and was forced to take off from work to be deposed or otherwise participate in discovery, and was forced to take a vacation day or was docked a day's pay, there is no doubt that the individual would be entitled to reimbursement for those "lost wages." There is simply no reason or basis to treat the institution any differently.

The legislative history of the PSLRA supports this interpretation. As an initial matter, the PSLRA evinces a clear Congressional mandate in support of institutions serving as lead plaintiffs. Moreover, the "Statement of Managers" to the PSLRA states that "[t]he Conference Committee recognizes that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages." Thus, we believe that the PSLRA provides strong support for the proposition that institutions can and should be reimbursed for the wages paid to their personnel for time devoted to the litigation.

Institutions serving as lead plaintiffs should maintain proper record-keeping procedures designed to keep track of their costs. With respect to their personnel costs, institutions should consider designating certain individuals who will have a primary role in the litigation, and use those individuals to perform whatever tasks are required. This will not only make it easier to keep track of the amount of time these individuals spend on matters relating to the litigation, but will also ensure that the tasks are performed economically and efficiently, by individuals who are familiar with the litigation. Institutions should also have their personnel document the tasks they have performed (such as searching for responsive documents or participating in settlement negotiations) and to record the amount of time they have spent on such tasks. If such records are maintained, they will go a long way toward convincing a court that the expenses were "reasonable" and "directly related" to the litigation.

Steven B. Singer may be reached at steven@blbglaw.com.