[Cite as *Wilken v. Wachovia Bank of Delaware, N.A.*, 2013-Ohio-2132.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

John Wilken and Andrea Wilken
as class representatives

Appellants

v.

Wachovia Bank of Delaware, N.A.

Appellee

Court of Appeals No. H-12-006

Trial Court No. CVE-2002-4321

DECISION AND JUDGMENT

Decided: May 24, 2013

* * * * *

John T. Murray, Leslie O. Murray, Michael J. Stewart, James J. Martin and Robert W. Gentzel, for appellants.

James S. Wertheim, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellants, John and Andrea Wilken, as class representatives, appeal from concurrent judgments of the Huron County Court of Common Pleas, approving a class

action settlement and limiting the amount of attorney fees awarded to class counsel. We affirm.

A. Facts and Procedural Background

{¶ 2} After years of litigation, and months of negotiations, the parties to this class action lawsuit entered into a settlement agreement. The agreement identified five separate sub-classes that were permitted to submit claims, which, if qualified, entitled the claimants to compensation from defendant-appellee, Wachovia Bank of Delaware, N.A. ("Wachovia"). The specific terms of the settlement agreement are not relevant to the present appeal, except for those provisions regarding attorney fees. To that end, the settlement agreement provides that each claimant's award would be "reduced by the percentage of attorneys' fees and costs approved by the Court under paragraph 38." Paragraphs 38 and 39, in turn, provide,

> 38. Class Counsel shall petition the Court for attorneys' fees and costs in the amount of 33% of the value of this Class Settlement. The value of this Class Settlement has been determined to be approximately $5.6 million, based upon the volume of potential claims that could be filed by Class Members.
>
> 39. The sum set forth in paragraph 38 is subject to final approval of the Court. Upon approval by the Court, Wachovia shall disburse the fees and expenses of Class Counsel in accordance with the directions to be

issued by Class Counsel, after this Agreement shall become final under paragraph 45 below.

{¶ 3} Following preliminary approval by the trial court, the parties sent out the first round of notices of the proposed settlement to the class members. Relative to attorney fees, the notice stated,

> Class counsel will apply to the Court for an award of fees and expenses of 33.33% of the value of the settlement, which has been valued by the parties as $5.6 million dollars. If the Court approves Class counsel's fee and expense application you will not be required to pay the attorneys directly. The fees and expenses will be deducted from the total settlement value and will proportionately reduce the net disbursement check you receive.

{¶ 4} On October 6, 2011, the parties filed a joint motion for final approval of the settlement agreement. At that time, approximately 10,000 notices had been sent out, but only 1,500 claims had been received. Also on October 6, 2011, the parties jointly submitted a letter to the trial court in response to a perceived ambiguity in how the requested attorney fee award would be deducted from the disbursements to those class members who had submitted claims. In the letter, counsel indicated that the parties agreed that Wachovia "will supplement and guarantee the fee approved so the class

members will incur a deduction not to exceed 33.3% of their cash benefit." Notably, the letter was not filed in the record, but was later entered as an exhibit.[1]

{¶ 5} On October 7, 2011, the trial court held a fairness hearing on the proposed settlement. At the hearing, the court expressed concern with the adequacy of the response from the class members. It was then agreed that a second round of notices would be sent. This second notice included a letter from the trial court judge in an effort to encourage participation in the settlement, and to reassure the class members that the settlement was not a scam. The second notice did not contain any clarification regarding attorney fees or the agreement that Wachovia would supplement and guarantee the approved fee.

{¶ 6} The fairness hearing recommenced on January 5, 2012. At that time, a total of approximately 2,300 claims had been submitted. During the hearing, the trial court, having already received expert testimony that the requested attorney fee was reasonable, heard testimony from the attorneys themselves regarding the amount of work done in this litigation. The court also entertained a discussion on how the total value of the litigation was determined to be $5.6 million based on the expected number of class members who would file a claim. The parties indicated it was the result of negotiations, with Wachovia initially valuing the settlement at $4.5 million and appellants valuing the settlement at

[1] Appellants indicate that the October 6, 2011 letter does not provide any information that is not included in class counsel's fee petition that was filed with the trial court on October 6, 2011. However, although the record contains the affidavits of class counsel pertaining to fees, the fee petition itself is not in the record.

$6.3 million. However, based on the number of claims submitted at the time of the hearing, class counsel estimated that the actual disbursements would approach only $3 million.

{¶ 7} Near the end of the hearing, the court articulated its concerns with the settlement agreement. Recognizing that the fee agreement between class counsel and appellants provided for 33 1/3 percent of "the value of any recoveries or benefits Attorneys obtain for the client," the court indicated that it was satisfied with class counsel receiving 1/3 as attorney fees based on the estimated actual disbursement of $3 million. The court noted that if the attorney fees were calculated based on an hourly rate, class counsel would be entitled to approximately $500,000. However, given the complexity of the litigation, the court accepted $1 million in fees as reasonable. Where the court was concerned though, was the additional $867,000 that Wachovia agreed to pay class counsel (1/3 of the $5.6 million estimated settlement value is $1.867 million).

{¶ 8} The court viewed the value of the recovery to the class as the amount actually disbursed. It then inquired why class counsel should be entitled to receive $867,000 more in fees than they were contractually entitled to under the fee agreement with their clients. The court wondered, if Wachovia was willing to pay that additional amount, why should it not pay the money to the class members. Responding to that question, Wachovia noted that at the time the proposed 1/3 of $5.6 million was negotiated, the parties did not know what the actual claim response rate would be. The court, however, believed that the perception would be that Wachovia was willing to pay

an additional amount to class counsel as incentive to settle. In light of its role in determining whether class counsel has obtained a fair settlement for the class, the court found this "disturbing."

{¶ 9} Following a short recess, the court propounded a suggestion. The court stated it would be

> willing to approve the settlement as described, with the provision for the supplementation of payment to plaintiff's counsel that has been agreed upon in [the October 6, 2011] letter, provided that claimants' counsel will issue a supplemental payment to the [sub-]class A and B claimants of two-thirds of the supplement that they receive. They could retain one-third of the underlying amounts in that fashion.

After discussing the matter briefly, the parties requested an opportunity to examine and brief the issues raised by the court's suggestion. The court agreed, and the hearing was continued until January 31, 2012.

{¶ 10} The parties jointly submitted a letter to the trial court on January 23, 2012, which, although not filed in the record, was entered later as an exhibit.[2] In the letter, the parties identified several concerns with the trial court's proposal. First, the proposal deviates from the notice that was provided to the class members, resulting in some class members receiving more than they were previously told, and others missing out on a larger payment of which they were never informed. Further, the proposal would raise

[2] The trial court approved of communication by letter.

issues regarding whether the notice to class members satisfied due process. Second, the trial court lacks authority to impose alternative settlement terms on the parties. *See Heath v. Wood*, 811 F.2d 606 (6th Cir.1986) ("Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, *but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed*." (Emphasis sic.)) Third, the distribution of additional funds only to class members who have submitted a claim would create a conflict among class members. Finally, setting the fee award based on the amount claimed fails to account for the total benefit conferred on the class. Moreover, it is common in class action lawsuits to determine the attorneys' fees based on the entire amount of the fund, not merely the claimed amount. *See, e.g., Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir.2007).

{¶ 11} The parties discussed these issues with the court at the January 31, 2012 fairness hearing. At that time, the claim period had officially closed and approximately 2,600 class members had submitted claims totaling roughly $1.8 million. In the discussion, the court focused on two overarching concerns. First, the supplemental payment by Wachovia amounted to a third-party payment of attorney fees, but without the informed consent of the class members. Second, the negotiated estimated settlement value of $5.6 million was grossly disproportionate to the actual disbursement value of $1.8 million.

{¶ 12} Regarding the first concern, class counsel responded that Wachovia's payment of attorney fees had no bearing on its representation of the class members because fees were not discussed until after the settlement terms were reached. Therefore, the class members' informed consent was not necessary because there was no danger of Wachovia controlling the attorney-client relationship.

{¶ 13} As to the second concern, class counsel argued that the value to the class is not limited solely to the amount disbursed. Further, awarding attorney fees on the basis of the entire estimated settlement value instead of the disbursed amount incentivizes counsel to provide representation for these small claims that otherwise could not be economically pursued in court. Wachovia, for its part, argued that this case is effectively a common fund case with the unclaimed funds reverting back to it, and therefore the court should apply the prevalent rule that attorney fees are based on the entire amount of the fund.

{¶ 14} Following the hearing, the trial court entered its final judgment on January 31, 2012, approving the settlement agreement. Contemporaneously, the trial court entered a second judgment, which incorporated the first, and determined class counsel's legal fees and expenses. The court stated that class counsel applied for a fee award of 33 percent of the "value of the Class Settlement," which the settlement agreement defined as $5.6 million. Further, the settlement agreement provided that this amount would be deducted proportionately from the disbursements to class members. The court found that if the requested $1.848 million (33 percent of $5.6 million) was

deducted proportionately from the approximately $1.85 million in actual disbursements, it would exhaust virtually all of the payments to the class members and would be unfair.

{¶ 15} The court then noted that class counsel and Wachovia have agreed to "supplement and guarantee the fee approved so the class members will incur a deduction not to exceed 33.3% of their cash benefit. Wachovia will supplement any amount that exceeds the sum of those deductions." The court also noted that class counsel did not intend to share any part of the resulting payment—nearly $1.2 million—with the class members. The trial court declined to approve the special arrangement because

> (a) the Settlement Agreement did not report or approve it; (b) the court approved Notice of Pending Class Action Settlement did not report it; (c) the court has no reason to believe that the Class Members have been made aware of it; (d) that relatively large payment by the adverse party may affect or have the appearance of affecting Class Counsel's independent judgment on behalf of the Class Members; (e) the Class Members have not approved that payment; and (f) the total fees would then exceed 60% of the total funds paid for this settlement.

{¶ 16} The trial court then awarded fees of one-third of each payment for any class member's claim as fair and reasonable compensation. The court reasoned that the resulting payment exceeds the time charges that class counsel reasonably expended on behalf of the class members, and is consistent with the written contingent fee arrangement to accept one-third of all funds received as full payment for their services.

B. Assignment of Error

{¶ 17} Appellants have timely appealed the January 31, 2012 judgments, asserting the following single assignment of error:

> The trial court erred when it approved a class action settlement agreement as fair, reasonable and adequate, while rejecting the fee [sic] attorneys' fee agreement that was incorporated therein.

II. Analysis

{¶ 18} Appellants view the fee arrangement in this case as "a fairly run-of-the-mill resolution to a complicated class action." They characterize the fee arrangement in the settlement agreement as class counsel "request[ing] approximately $1.8 million in fees, to be paid directly by the defendant." Further, they contend that the requested fee award is reasonable in light of the value of the settlement, which the parties have established in the settlement agreement as $5.6 million. Thus, they present two arguments as to why the trial court abused its discretion. First, they argue that the trial court abused its discretion by modifying the fee arrangement in the settlement agreement when it only had discretion to approve or reject the agreement. Second, invoking principles associated with the "common-fund" doctrine, they argue that the trial court abused its discretion by establishing the value of the benefit conferred on the class as the amount of those claims that actually were filed, instead of the amount of claims that potentially could have been filed.

{¶ 19} We disagree with appellants, however, that the fee arrangement in this case is "run-of-the-mill." As an initial matter, appellants contend that the settlement agreement provides for Wachovia to pay the attorney fees directly. Although it is true that Wachovia, not the class members, will literally pass the funds to class counsel, this does not mean that Wachovia is *liable* for the payment of attorney fees. The general rule—commonly referred to as the "American Rule"—is that litigants pay their own attorneys' fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). But, liability can be imposed on the defendant to pay class counsel's attorney fees where statute provides, where the defendant has engaged in sanctionable behavior, or where an enforceable contract so provides. *Id.* at 257-259. Here, the parties do not identify a statute that shifts the fee burden, nor is there any allegation of sanctionable conduct on the part of Wachovia. Thus, liability for the fees rests on the terms of the settlement agreement.

{¶ 20} It is clear from the settlement agreement that the class members, not Wachovia, are liable for the payment of attorney fees, in that the class members' awards will be "reduced by the percentage of attorneys' fees and costs approved by the Court under paragraph 38." Further, paragraph 39 of the settlement agreement states that Wachovia "shall *disburse* the fees and expenses;" it does not say that Wachovia shall *be liable for* the fees and expenses. (Emphasis added.) Further still, the notice sent to class members informed them, "If the Court approves Class counsel's fee and expense application you will not be required to pay the attorneys directly. The fees and expenses

will be deducted from the total settlement value and will proportionately reduce the net disbursement check you receive." Indeed, to conclude that Wachovia was liable for the payment of attorney fees based on the settlement agreement would require a tortured interpretation that the class members' awards would be reduced to reflect attorney fees that they did not have to pay. We decline to so interpret the settlement agreement. Consequently, we determine that the settlement agreement did not circumvent the American Rule, and the class members are the party responsible for paying class counsel's attorney fees.

{¶ 21} The impact of this determination is reflected in appellants' argument that the trial court abused its discretion by modifying the settlement agreement as opposed to simply approving or disapproving it. We accept the rule that Civ.R. 23(E) "requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed." *Evans v. Jeff D.*, 475 U.S. 717, 726, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986). Nevertheless, appellants' argument fails because the settlement agreement does not contain a provision whereby Wachovia agrees to pay one-third of $5.6 million to class counsel as attorney fees. Notably, since Wachovia is not the party responsible for the fees, it has no role in an agreement between class members and class counsel as to the amount of attorney fees, and its assent to such an amount is inconsequential. Furthermore, the settlement agreement itself does not set a definite amount of attorney fees, but rather states that class

counsel "shall petition the Court for attorneys' fees and costs in the amount of 33% of the value of this Class Settlement," and that the sum is "subject to final approval of the Court." Therefore, the trial court's reduction of the requested fee amount is not a modification of the fee agreement contained in the settlement between Wachovia and the class members, because no such agreement could exist. Instead, it is the execution of the process contemplated by the settlement agreement, and required by Civ.R. 23. *See Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61, 74 (S.D.Texas 1977) ("courts have recognized that the special nature of class litigation and the possibility for abuse * * * necessitate and warrant close judicial scrutiny of plaintiff's counsel's fee, even if it is based on a contingent fee contract with the named plaintiff and/or individual class members.")

{¶ 22} Appellants also argue that the trial court's reduction of attorney fees was an abuse of discretion in light of the October 6, 2011 letter—wherein Wachovia agreed to supplement and guarantee the fee approved—which they contend evinces the parties' intention regarding the payment of attorney fees. We disagree. The October 6, 2011 letter does not merely explain an ambiguous provision in the settlement agreement. Rather, it attempts to alter the agreement by shifting the liability for the payment of attorney fees from the class members to Wachovia. Moreover, we cannot conclude that the trial court should have enforced the October 6, 2011 letter as a separate agreement between the parties because it was never disclosed to the class members. At best, it was an agreement between class counsel and Wachovia. Finally, we cannot say that the trial

court abused its discretion in declining to enforce the October 6, 2011 letter because it is of no benefit to the class as it only shifts the burden to the extent that the class members do not pay the attorney fees. Therefore, we hold that the trial court's reduction of the requested amount of attorney fees was not a modification of the settlement agreement, and that the trial court did not abuse its discretion when it declined to enforce the separate agreement found in the October 6, 2011 letter.

{¶ 23} Accordingly, appellants' first argument is without merit.

{¶ 24} Appellants next contend that the trial court abused its discretion when it approved attorney fees based only on the amount of the submitted claims, and not on the estimated total value of the settlement. Appellants' argument is premised on the settlement in this case being treated as a "common fund." In "common fund" cases, liability is imposed on the defendant for a certain amount, out of which class members are paid when they submit a valid claim. Oftentimes, the fund exceeds the amount of claims actually made, and the remaining amount either reverts back to the defendant, is donated to charity, or is disposed of in some other manner. The United States Supreme Court has held that, in common fund cases, the class attorneys are entitled to payment *by the class members* from the fund based on the entire amount of the fund, not just the claimed amount. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). The justification for this "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. * * * [T]o prevent this inequity * * * attorney's fees [are assessed]

against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.* at 478.

{¶ 25} Notably, common fund cases are distinguishable from those in which the defendant separately agrees to pay attorney fees and the pool of money available to the class members is not reduced. The difficulty in the present case comes from the parties' attempt to combine the two. Distilled to its core, the fee arrangement in this case is class counsel attempting to have its cake and eat it too.

{¶ 26} Here, the parties did not structure the settlement as a common fund. The settlement agreement does not provide for a defined judgment amount against Wachovia. Instead, it provides for contingent liability based upon the presentation of individual claims.[3] Thus, there is no fund to which class members are entitled, *and from which class counsel's fees could be paid*. Insulating themselves from the risk that they may not be paid a sufficient amount if the response rate is low, class counsel essentially negotiated for Wachovia to pay the attorney fees on behalf of the non-participating class members. The result, however, is inequitable. Under this regime, the participating class members are liable for their share of the attorney fees based on the benefit to them. The non-participating class members, on the other hand, are receiving a benefit, which the parties estimate to be $3.8 million ($5.6 million less the $1.8 million claimed), without

[3] This is precisely the scenario recognized, but not decided, by the United States Supreme Court in *Boeing*. *Boeing* at 479, fn. 5 ("[W]e need not decide whether a class-action judgment that simply requires the defendant to give security against all potential claims would support a recovery of attorney's fees under the common-fund doctrine.")

the concomitant burden to compensate class counsel. This unjust enrichment is precisely the inequity that the common fund doctrine sought to avoid. Therefore, we hold that the trial court did not abuse its discretion when it based its determination of attorney fees on the amount of the submitted claims, and not on the estimated total settlement value.

{¶ 27} The remaining issue, then, is whether the trial court abused its discretion in determining that one-third of the total amount of submitted claims constitutes reasonable attorney fees. *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6th Cir.1996) ("We review a district court's award or denial of attorneys' fees for an abuse of discretion."). We hold that it did not.

{¶ 28} Appellants argue that a determination of whether attorney fees in a class action settlement are reasonable should take into consideration the factors identified in Prof.Cond.R. 1.5(a). Similarly, federal courts, when reviewing the reasonableness of an attorney fee award, consider factors such as,

> (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *Moulton v. United States Steel Corp.*, 581 F.3d 344, 352 (6th Cir.2009), quoting *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir.1996).

{¶ 29} Here, appellants' argument that the fee is unreasonably low is largely not based on the one-third percentage, but rather on the amount to which the one-third is applied. Having already determined that the trial court did not abuse its discretion in setting the amount of attorney fees based on the submitted claims, we are left with the argument that class counsel's contingent fee agreement with the named class members provided for 40 percent of any recovery or benefit obtained in the event of an appeal. Appellants submit that because an appeal was taken relative to class certification and prior to the settlement agreement, the trial court abused its discretion by misconstruing the contingent fee agreement to only entitle class counsel to one-third of the recovery. However, as alluded to in both Prof.Cond.R. 1.5(a)(8) and *Moulton*, the contingent fee agreement is merely a factor to be considered when determining whether a fee is reasonable. Further, the trial court was presented with a situation where the settlement agreement and the notice to the class members indicated that any payment would be reduced by one-third for attorney fees. In light of that, and in light of the trial court's finding that the resulting fee amount would exceed the time charges that class counsel reasonably expended on behalf of the class members, we cannot say that the trial court abused its discretion in ordering the amount of fees that it did. Therefore, we find appellant's second argument to be without merit.

III. Conclusion

{¶ 30} In conclusion, had class counsel negotiated for Wachovia to be liable for all of the attorney fees as part of the settlement agreement and thus not deduct that amount

from class members' claims, or had class counsel negotiated for a common fund from which the attorney fees could have been paid, we may have reached a different result. However, because they did not, we find appellants' assignment of error not well-taken.

{¶ 31} For the foregoing reasons, the judgment of the Huron County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE