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COMPETITIVE BIDDING IN THE COURTHOUSE: IN RE ORACLE SECURITIES LITIGATION*

*"How would you feel if you were on top of a thing built by the lowest bidder on the government contract?"*¹

INTRODUCTION

When confronted with numerous shareholders filing suit against the Oracle Systems Corporation, a district court judge in the Northern District of California brought down the gavel upon the litigants in total disgust at what the court perceived to be an unethical feeding frenzy. In *In re Oracle Securities Litigation*,² Judge Vaughn Walker refused to accept a nomination made by the shareholders' attorneys to appoint two of the firms as co-lead counsel. Instead, Judge Walker ordered firms interested in acting as lead counsel to bid for the position.³ With that seemingly simple order, Judge Walker banished the familiar system of attorney compensation in common fund litigation and instituted a contractual bidding war.

The issue of attorney compensation is taken very seriously by the legal profession. The public is suspicious of lawyers generally and jealous of the fees they command specifically. This suspicion is partially exacerbated by the development of class action suits litigated on a contingency fee basis. As one court phrased it, "A lawsuit is a fruit tree planted in a lawyer's garden."⁴ But Rule 23 of the Federal Rules of Civil Procedure

* This Comment discusses four published opinions arising out of the Oracle Systems Corporation shareholders' litigation: 131 F.R.D. 688 (N.D. Cal. 1990) [hereinafter *Oracle I*]; 132 F.R.D. 538 (N.D. Cal. 1990) [hereinafter *Oracle II*]; 136 F.R.D. 639 (N.D. Cal. 1991) [hereinafter *Oracle III*]; 829 F. Supp. 1176 (N.D. Cal. 1993) [hereinafter *Oracle IV*].

¹ John Noble Wilford, *Space Exploration from Chapter One*, N.Y. TIMES, May 5, 1985, at 25 (quoting John Glenn's remarks on his experience as an astronaut in *Spaceflight* (PBS television documentary, May 8, 1985)).

² *Oracle I*, 131 F.R.D. 688 (N.D. Cal. 1990).

³ *Id.* at 691.

⁴ *City of Detroit v. Grinnell*, 495 F.2d 448, 469 (2d Cir. 1974) (quoting an

expressly grants a court authority to certify large classes,⁵ and large classes often receive large awards from guilty defendants. In turn, a large fee is earned by the attorney representing the class. In reality, however, class actions constitute less than .6% of all cases filed in the federal court system and, on the average, class action plaintiffs' attorneys received only 14.7% of the 6.4 billion dollars that plaintiffs recovered in class action suits over the past twenty years.⁶

The negative attitude toward class action suits is more prevalent in securities-related litigation like *Oracle Securities Litigation*. Since the stock market crash of 1987, class action suits brought by corporate shareholders have been on the rise.⁷ Less tolerant of a corporation's faulty predictions, investors no longer wait for the tide to turn. Instead, they allege that a hopeful, but mistaken, prediction about the way stock will perform is a false and misleading statement of material fact in violation of federal securities law.⁸ These apparently

Italian proverb); see also *In re Rospatch Sec. Litig.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,160, 90,870-82 n.6 (W.D. Mich. Mar. 13, 1990) (noting rising concern among courts and commentators over attorney fees in class action suits); Richard M. Birnholz, Comment, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. REV. 949 (1990) (owing to the concern that lawyers charge too much, some states like California have proposed legislation to limit the percentage of an award that lawyers can earn in a tort claim brought on a contingency fee basis); Kurt Eichenwald, *Millions for Us, Pennies for You*, N.Y. TIMES, Dec. 19, 1993, § 3, at 1, 12 (discussing disillusionment of limited partnership investors who discovered the "troubling truth" that in litigating their claims of fraud against the partnership, lawyers were the only winners).

⁵ FED. R. CIV. P. 23(c).

⁶ Beverly C. Moore, *Going Once, Going Twice: Bidding for Work*, LEGAL TIMES, Dec. 15, 1990, at 27.

⁷ In 1987, 108 securities class actions were filed. William S. Lerach, *Securities Class Actions and Derivative Litigation Involving Public Companies*, in SECURITIES LITIGATION 1990, at 106 (PLI Litig. & Admin. Practice Course Handbook Series No. 399, 1990). This number rose to 315 filings in 1990. Moore, *supra*, note 6 at 27; see also Ross Kerber, *Shareholder Suits Prompt Reform Push*, WASH. POST, Aug. 8, 1993, at H1 (citing Securities and Exchange Commission ("SEC") as authority for statistic that shareholder suits have tripled since 1988).

⁸ In a recent hearing before a Senate subcommittee, corporate executives claimed that any 10% drop in the price of their stock results in the filing of a lawsuit. *Senate Panel Hears Views on Reducing Number of Frivolous 10b-5 Actions*, DAILY REP. FOR EXECUTIVES, June 18, 1993, at A116; see also Christopher Byron, *House of Cards: The Fall of American Express's James D. Robinson III*, NEW YORK, Feb. 15, 1993, at 30 (quoting Joseph Flom, a mergers and acquisitions attorney at Skadden, Arps, Slate, Meagher & Flom, who predicted an increase in suits brought by unhappy investors).

vexatious suits, or "strike suits," are naturally disfavored by courts as a "particularly repugnant series of blackmail" in which shareholders mask vying for corporate control in drawn-out lawsuits that waste the resources of courts and corporations and usually result in settlements.⁹ As then-Justice Rehnquist noted, the "mere existence of an unresolved lawsuit" is potentially of great value to plaintiff-shareholders since the threat of such suits disturbs day-to-day corporate affairs at great expense to the company.¹⁰ Despite the bias against securities litigation, a countervailing policy forces courts to take such litigation seriously. An over-worked Securities and Exchange Commission ("SEC") does not possess the resources to police every violation of its rules.¹¹ Shareholders were granted the right to bring private actions for damages under the securities laws not so much to compensate the shareholder, but rather "to promote enforcement of the Act and to deter negligence by providing a penalty for those who fail in their duties."¹² Therefore, shareholders are encouraged to bring suit when a violation of the securities laws has occurred.

In securities litigation, attorneys representing the class receive part of the total award as compensation for their efforts. That plaintiffs do not reimburse their attorneys out of their own pockets is not due to a congressional fee-shifting statute designed to promote private attorneys-general who assist the government in prosecuting securities violators.¹³

⁹ *Brown v. Hart, Schaffner & Marx*, 96 F.R.D. 64, 67 (N.D. Ill. 1982).

¹⁰ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741-43 (1975); see also *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371 (discussing the intent that Federal Rule of Civil Procedure 23(b) operate as a bar to "strike suits" by requiring a complaint to be verified under oath).

¹¹ See, e.g., *Watchdog Woes, Up Against It at the SEC*, BUS. WK., Oct. 10, 1988, at 120 (SEC declined to investigate controversial case due to lack of resources); *Inundated Agency: Busy SEC Must Let Many Cases and Filings Go Uninvestigated*, WALL ST. J., Dec. 16, 1985, at 1 (quoting Chairman of SEC as noting that the agency is not the only recourse against serious violations).

¹² *Globas v. Law Research Serv.*, 418 F.2d 1276, 1287 (2d Cir. 1969). Courts acknowledge that the function of securities-related lawsuits and corresponding fee awards is to promote enforcement of federal securities law. See *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969); *In re Public Serv. Co. of New Mexico*, No. 91-0536M, 1992 WL 278452, at *4 (S.D. Cal. July 28, 1992). See generally *Cort v. Ash*, 422 U.S. 66 (1975) (establishing four factors to determine implied right of action under federal statutes); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) (recognizing implied right of action under section 14(a) of the 1934 Act).

¹³ In fee shifting statutes, Congress "explicit[ly] provi[des] for the allowance of

Rather, the compensation scheme is a function of an equitable doctrine called the "common fund" theory. The common fund theory embraces the principle that one who has created a benefit for a class of persons should be reimbursed for her efforts. Although individual shareholder-plaintiffs may contract with counsel for the amount of compensation before the litigation, after a class is certified, most retainer agreements provide that any reference to fees in the contract will be void since the court will set the fee at the end of litigation.¹⁴ A court will then compute compensation on the basis of a "lodestar" calculation¹⁵ or simply award counsel a percentage of the award.

The Northern District of California and the Ninth Circuit are particularly plagued by securities litigation, as they serve litigants from "Silicon Valley," the Northern California home to numerous computer software companies.¹⁶ Indeed, it is quite

attorneys' fees under selected statutes granting or protecting various federal rights" on the theory that an attorney who pursues these actions has acted as a private attorney general. Thus, the obligation to pay for the services of plaintiff's counsel is "shifted" from plaintiff to defendant. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 210, 260-61 n.33 (1975) (listing federal legislation that permits fee shifting). Alternatively, the common fund theory is a judicially created doctrine under which attorneys' fees come directly out of the plaintiff's award. For further discussion of common fund theory, see *infra* notes 24-34 and accompanying text.

¹⁴ See *infra* text accompanying note 19.

¹⁵ The lodestar approach is a method by which attorneys in class action suits are awarded their fees at the termination of the litigation. An hourly fee figure (either the attorney's normal fee or a fee based on community standards) is multiplied by the number of reasonable hours the attorney spent on the litigation. The resulting sum is then often subject to increase (or "enhancement") or decrease in the form of a multiplier which depends, among other factors, on the risky nature of the lawsuit. For example, if a court determined that an hourly fee award was \$200 and that counsel reasonably spent 200 hours on a case, the sum of \$40,000 may be multiplied by 1.8 if that case were particularly risky, resulting in a fee award of \$72,000. For further discussion of the lodestar approach, see *infra* notes 35-47 and accompanying text.

¹⁶ Silicon Valley, the popular name for Santa Clara County, California, is the "hotbed" of American entrepreneurial technology. Now the "center of the technology world," many recently have predicted its demise. Scott Brown, *How Gray is My Valley*, TIME, Nov. 18, 1991, at 90, 91; Peter Dworkin, *The Graying of Silicon Valley*, U.S. NEWS & WORLD REP., Oct. 2, 1989, at 44 (arguing that despite Silicon Valley's lead in innovative systems, it is in decline due to mergers and Wall Street disenchantment); Michelle Quinn, *Job Crunch: The Slamming Doors of Silicon Valley*, N.Y. TIMES, Jan. 23, 1994, at F5 (noting the elimination of jobs by the Silicon Valley computer industry due to decline of defense contracts and general cautious atmosphere); see also Tom Bethel, *California, Here I Come*, NAT'L REV., Feb. 27, 1987, at 33, 34-35 (explaining that Silicon Valley extends from Stanford

apparent from recent cases that Ninth Circuit courts are disgruntled by the predictably wasteful type of lawsuit that typically arises there. In 1989, Judge Patel of the Northern District of California described the "all too familiar path of large securities cases"¹⁷ in the Ninth Circuit:

[The case] was filed as a class action by a number of well-recognized lawyers who specialize in plaintiffs' securities litigation. The complaint named the usual cast of defendants—the corporation . . . ; the officers and directors; the underwriters [and] the corporation's accountants. . . . Various defendants moved to dismiss and the case moved lugubriously through the pleadings phase. Discovery assumed its usual massive proportions, and finally, as the case wound down toward trial, settlement negotiations became serious and were aggressively pursued. On the eve of trial, after the parties had expended significant attorneys' time and hence, accumulated the routinely anticipated hours and fees, the case was settled.¹⁸

Given this setting, it is hardly surprising that Judge Walker reacted with such vehemence to yet another fee petition.

This Comment examines the competitive bid approach that Judge Walker fashioned in *In re Oracle Securities Litigation* to respond to the dissatisfaction with the current methods of attorney compensation. In an effort to place Judge Walker's decision in context, Part I of this Comment first gives an overview of a securities class action and the manner in which lead counsel typically is chosen. Next, it addresses the common fund doctrine, the method that permits attorneys to have their fees deducted from the plaintiffs' award in securities class-

to San Jose and that some of its computer companies, including Apple, are slowly moving to less expensive quarters); Manieet Kripalani, *The Decline of Silicon Valley*, FORBES, May 25, 1992, at 114 (explaining area's loss of young entrepreneurs to Colorado due to high cost of living in Santa Clara County); The SEC has even targeted the area's companies, since, as SEC director of the San Francisco office, Gladwyn Goins, explained, young corporations may succumb to the "temptation to misstate" their financial prospects in an effort to secure market positions. *New SEC Head Targets Silicon Valley's Freewheeling Ways*, PC WK., Feb. 27, 1989, at 64. *But see* Kerber, *supra*, note 7, at H1 (former director of SEC, district judge Stanley Sporkin, noted before Senate subcommittee that while many companies deserve litigation, high-tech companies are particularly vulnerable to litigation due to stock prices fluctuating in response to scientific developments).

¹⁷ *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374 (N.D. Cal. 1989).

¹⁸ *Id.* Ken Siegmann, *Apple Verdict Stuns Lawyers*, SAN FRAN. CHRON., June 1, 1991, at B1 (quoting attorney for Apple Computer Inc. as claiming that "[e]verytime there's an earnings disappointment in Silicon Valley, someone claims they've been defrauded").

action litigation. Part I then discusses the two methods by which counsel is compensated under the common fund doctrine. Judge Walker eschewed those traditional methods—lodestar and benchmark percentages—in favor of a third method: competitive bidding. Part II next describes the *Oracle* court's three opinions concerning the bidding method—the order for bids, the review and selection of the bids received and an order denying a motion to set aside the winning bid. Finally, Part III analyzes the *Oracle* approach and similar approaches proposed by commentators to determine the efficacy of these approaches. This Comment concludes that while bidding may not be the perfect solution, it is indeed a viable option that, with some tinkering, should be considered by other courts in future common fund cases.

I. BACKGROUND

A. *An Overview of a Securities Class Action*

Typically, a securities class action suit like *Oracle* begins once a shareholder has filed suit in federal court claiming that the corporation in which she holds stock, its individual directors and its accountants have violated federal securities law. Most likely, that shareholder has retained an attorney to prepare this claim. The shareholder and attorney probably have signed a retainer agreement in which the attorney agrees to forego compensation until the end of the litigation, or takes a small fee in exchange for a promise by the shareholder that the attorney will receive a certain portion of the shareholder's award. This retainer contract is called a contingency fee agreement.¹⁹

This shareholder probably is not the only one filing suit.

¹⁹ Many retainer contracts provide such a provision:

The CLIENT understands that the LAW FIRM will file a suit on his behalf and on behalf of all other similarly situated persons against the Defendants. If a court determines that the client's case should proceed as a class action, the LAW FIRM's fee for professional services rendered will be set by the court hearing the case. In no event, however, will the fee charged for the CLIENT exceed thirty-three and one-third (33 1/3%) per cent of the amount recovered on CLIENT's behalf.

In re Financial Partners Class Action Litig., No. 82C5910, 1986 WL 8037, at *1 (N.D. Ill. July 5, 1986).

There are usually several plaintiffs represented by several attorneys filing exactly the same claim in the same courthouse. For reasons of expediency, both the court and the parties will want to consolidate these suits into one action. If the parties consist of shareholders all claiming the same injury, the court will receive and grant a motion to certify a class. The single plaintiff-shareholder's individual lawsuit has now become part of a larger class action suit.²⁰

At this point, the court and the parties will likely agree that one firm be assigned the role of lead counsel, as it would be ludicrous to permit all the individual shareholders' attorneys to speak with anything but one voice before the court. That one voice is embodied in the lead or a team of co-lead counsel. Lead counsel is commonly nominated at a meeting of the shareholder-plaintiffs' attorneys. The court then formally appoints the nominated firm.²¹

²⁰ See, e.g., *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 762-63 (9th Cir. 1977) (describing the manner in which the various plaintiffs' suits were filed, consolidated and certified for a class action).

²¹ There are no federal procedural rules that directly pertain to the manner in which lead counsel should be chosen out of a group of plaintiffs' attorneys. Nonetheless, the process is common and usually conducted by the attorneys themselves. The Manual for Complex Litigation is generally referred to during this process. It notes that "[i]n complex . . . litigation . . . lead counsel . . . ha[s] proven to be unusually efficient in pretrial proceedings" and is "usually chosen by the groups of parties having a common interest." MANUAL FOR COMPLEX LITIGATION § 1.92 (5th ed. 1982). It further suggests that "the court should not, in the absence of extraordinary circumstances, select and appoint lead counsel" itself. Rather, the court should encourage and request the use of lead counsel. If the attorneys fail to follow the request, according to the Manual, then the court may take it upon itself to appoint lead counsel of its choice. *Id.*

The issue of lead counsel first appeared in *MacAlister v. Guterman*, 263 F.2d 65, 69 (2d Cir. 1958). In that case, a district court questioned its own authority to appoint general counsel for plaintiffs at the request of the defendant. While agreeing with the lower court that such an appointment would be inappropriate in this case, the Second Circuit found that it is within a court's discretion. *Id.* at 70. Because a court has inherent authority to control its docket, and under Federal Rule of Civil Procedure 42(a) a court may consolidate actions and "make such orders . . . as may tend to avoid unnecessary costs or delays," a ruling that limits duplicative practice by the parties was within the authority of the court. *Id.* at 69; *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 773-74 (9th Cir. 1977) (citing both *MacAlister* and the MANUAL FOR COMPLEX LITIGATION as authority for court's power to appoint lead counsel and to restrict the role of non-lead counsel); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1013-14 (5th Cir. 1977) (Federal Rule of Civil Procedure 42(a) is liberally applied to endow the court with "strong" and "flexible" managerial powers); 2 HERBERT B. NEWBURG, NEWBURG ON CLASS ACTIONS §§ 9.34, 9.35 (2d ed. 1985) (citing the *Manual* as authority for

Motions, discovery and trial or settlement then ensue. If the case results in any benefit to the class of shareholders, the judgment amount is deposited with the court,²² which will have to address the method of compensating the attorneys who litigated the action. Counsel will be entitled to reimbursement under the common fund doctrine, by which they will take their fees out of the plaintiffs' award. The court will determine the amount of fees to which counsel are entitled according to the lodestar or percentage methods. Usually, these approaches will not conflict with the retainer agreements signed by the plaintiffs and their attorneys because those contracts contain clauses by which the parties agree that if the case proceeds as a class action, the court hearing the case will set the fee for services rendered.²³

B. *The Common Fund Doctrine*

Although the "American rule" generally prohibits the winning attorney in a lawsuit from recovering an attorney's fee from the defendant or award, one exception to this is when a common fund is created in the court.²⁴ The Supreme Court delineated this exception as early as 1881 in *Trustees v. Greenough*.²⁵ A bondholder, Vose, had diligently pursued an action against a group of trustees for waste in their control

court's power to appoint lead counsel, but acknowledging that power only in extraordinary circumstances, such as the parties' failure to do so themselves); see also *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1364 (2d Cir. 1991) (holding that lead counsel has broad authority which includes power to negotiate settlements).

²² In *Boeing Co. v. Van Gemert*, 444 U.S. 472, 476 (1980), for example, the lower court ordered the defendant to deposit the judgment into an escrow account and appointed a Special Master to administer the funds. No such appointment has been made in the *Oracle* litigation.

²³ See *supra* note 19 and accompanying text. If the parties have failed to use this clause, the court will assess the fee for lead counsel out of the plaintiffs' portion. *In re Air Crash*, 549 F.2d at 1019 (noting that the court failed to have the award paid into the court and assessing reimbursements for lead counsel against the retained lawyers).

²⁴ A fund created in the court may take many forms: a trust administered by a court, a decedent's estate or a judgment award paid by defendants that passes through the court to be distributed to plaintiffs. *In re Air Crash*, 549 F.2d at 1018; Edmund Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1618 (1974).

²⁵ 105 U.S. 527 (1881).

over property in which the plaintiff and other bondholders held equity interests. The suit was decided in favor of the bondholders, and Vose, who had borne most of the expense of the litigation, petitioned the trial court for reimbursement.²⁶ The Court affirmed the granting of the petition, holding that one who acts as a trustee in relation to the common interest is entitled to reimbursement from those who receive the benefits of the fund created in court. The Court found that charging the fund is the most expedient and equitable way of insuring contribution from all those who benefit therefrom.²⁷

In *Central Railroad & Banking Co. of Georgia v. Pettus*, the Supreme Court in 1884 expanded this doctrine. It permitted the attorney who had counseled a plaintiff in an action that created a common fund to bring a motion for reimbursement, thereby eliminating the need for involvement of the plaintiff at that stage.²⁸ The Supreme Court reaffirmed the vitality of the common fund doctrine in 1939, finding that a plaintiff need not even bring suit as a class representative for an attorney to receive payment from a common fund.²⁹ All that need occur is the establishment of a common fund that benefits a group due to the efforts of the complainant.

In 1970, the Supreme Court applied the common fund principle to award attorneys' fees to successful shareholders suing under section 14(a) of the Securities and Exchange Act of 1934 ("1934 Act") and SEC Rule 14a-9 in *Mills v. Electric Auto Lite Co.*³⁰ The *Mills* court found nothing in the 1934 Act to "deny[] courts the power to award" fees, even though the 1934 Act did not expressly authorize fees.³¹ The Court also acknowledged the plaintiffs' right to reimbursement even if the

²⁶ *Id.* at 529.

²⁷ *Id.* at 532.

²⁸ *Central R.R. & Banking Co. of Georgia v. Pettus*, 113 U.S. 116 (1884).

²⁹ *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939).

³⁰ 396 U.S. 375 (1970). The *Mills* case is more commonly known for another aspect of its holding, that a sufficient causal relationship exists between a materially misleading proxy statement and merger merely by virtue of the fact that the merger was accomplished through the deficient proxy statement. The holding dispensed with a requirement that a shareholder-plaintiff claiming fraud has a burden of proving that she actually relied on the misleading proxy in approving the merger.

³¹ *Id.* at 390 (citing *Smolowe v. Delendo Corp.*, 136 F.2d 231, 241 (2d Cir. 1943)).

suit produced no monetary recovery. As long as the class was benefitted by the suit—for example, if the market value of their shares increased—a court could assess fees against the defendant.³²

Similarly, the *Oracle* litigation involved assertions of injury to the class due to violations of federal securities law. Accordingly, under the common fund theory, Judge Walker faced the probability that the attorneys before the court would be entitled to fees out of their clients' award. In any common fund case, compensation to the attorneys must be reasonable.³³ Before the *Oracle* decisions, lodestar and percentage calculations were the only two methods by which courts computed that reasonable fee.³⁴

C. Lodestar

The lodestar approach was first formulated in the Third Circuit upon a petition for attorneys' fees in an antitrust litigation settlement.³⁵ The court in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*³⁶ set forth the principle that a court, in order to "compensate the attorney for the reasonable value of services," must begin by ascertaining the number of hours spent on the case.³⁷ The court then must value the services by fixing a reasonable hourly rate for the attorney's time. That hourly rate is multiplied by the number of hours to arrive at a basis for the valuation, which is the "lodestar" of the court's fee determination.³⁸ The court can

³² Thus, in a suit such as *Oracle*, attorneys would still receive their fees even if the plaintiffs did not receive a monetary award.

³³ See, e.g., *Brown v. Phillips Petroleum Co.*, 838 F.2d 452, 545 (10th Cir. 1988) (requiring that the lower courts "articulate specific reasons for fee awards").

³⁴ *In re Capital Underwriters, Inc. Sec. Litig.*, 519 F. Supp. 92, 98 (9th Cir. 1981) (noting that "several approaches" are used to calculate attorneys' fees in common fund cases, but these include variations on the lodestar method in addition to the percentage approach).

³⁵ *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). The attorneys in *Lindy* were not entitled to fees under the Clayton Act (by which the plaintiffs were entitled to relief), but rather, as in the *Oracle* litigation, under a common fund doctrine. See *id.* at 164-65.

³⁶ *Id.*

³⁷ *Id.* at 167.

³⁸ A "lodestar," by definition, is a guiding light or principle. AMERICAN HERITAGE DICTIONARY 739 (2d ed. 1991).

then adjust the lodestar after considering the contingent nature of success (as it appeared at the onset of the litigation) and the quality of the work performed.³⁹

The Supreme Court, however, made the practice of adjusting the lodestar questionable in two recent decisions. In *Blum v. Stenson*, the Court addressed the fee petitions of three attorneys from the Legal Aid Society of New York, who had represented a class of Medicaid recipients.⁴⁰ Counsel was entitled to fees under 42 U.S.C. section 1988, but the Department of Social Services opposed the fee petitions, because plaintiffs' counsel had requested a fifty percent increase above a "pure" lodestar calculation.⁴¹ Justice Powell made clear that no enhancement could be awarded in statutory fee-shifting cases on the basis of attorney skill or the complexity or novelty of the issues, because the latter was reflected in the number of billable hours and the former in the hourly rate.⁴²

³⁹ 487 F.2d at 167-69. Although the *Lindy* court did not prescribe a specific method by which to adjust the lodestar, it is commonly adjusted by multiplying the lodestar by some figure (a "multiplier" or an "enhancer") meant to represent the corresponding risk and quality of skill or the lack of these elements. Multipliers are "notoriously inconsistent, ranging anywhere from zero to four." Monique Lapointe, Note, *Attorney's Fees*, 59 *FORDHAM L. REV.* 843, 858 (1991). For instance, in *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 234 (2d Cir. 1987), the district court awarded multipliers of 1.5 to most of the various attorneys requesting fees, but enhanced six attorneys' fees by a multiplier of 1.75 for their exceptional skill.

A typical lodestar computation can be found in *Feuerstein v. Burns*, 569 F. Supp. 268 (S.D. Cal. 1983). In *Feuerstein*, the court was presented with a fee petition requesting payment for 3850 hours of work valued by the firm at \$423,000.00 including a multiplier of 1.09 to account for risk. *Id.* at 270. The court refigured the computation, using the firm's average billing rate to arrive at a lodestar of \$224,500.00, which it then multiplied by 1.09 to arrive at a total compensation to the firm of \$244,705.00. *Id.* at 275-76.

A variant of the *Lindy* lodestar method was adopted by the Fifth and Ninth circuits pursuant to the Fifth circuit decision in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). The factors articulated by the *Johnson* court, like the *Lindy* considerations, include time and reasonableness of the fee, in addition to other factors: novelty and difficulty of issues; necessary skill; counsel's inability to accept other employment; whether the fee is fixed or contingent; whether the suit had to be given priority over other work; the relief granted; the experience and reputation of counsel; the undesirability of handling the case; counsel's relationship with the client; and awards in similar litigation. *Id.* at 717-19. The Ninth Circuit adopted the *Johnson* factors in *Kerr v. Screen Extras Guild*, 526 F.2d 67, 70 (9th Cir. 1975).

⁴⁰ 465 U.S. 886, 889 (1984).

⁴¹ *Id.* at 890-91. A "pure" lodestar calculation is simply the amount of hours worked multiplied by the firm's billing rate.

⁴² *Blum* was not the first time a federal court had questioned the propriety of

In a plurality decision three years later, the Court further questioned the practice of enhancing a lodestar calculation in a statutory fee-shifting case in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* ("Delaware Valley II").⁴³ A majority of the Court agreed that risk was an unacceptable factor to consider when determining the applicability of enhancement in a case where attorneys' fees were awarded on the basis of a fee-shifting statute. The Court noted the many undesirable effects of adjusting the lodestar upwards: since it awards parties with the least chance of success, such an adjustment penalizes the defendant with the strongest defense; enhancement figures or "multipliers" have no genuine mathematical base; the promise of enhancement creates a "conflict of interest" between the attorney and client by forcing the attorney to divulge the weakness of the case while obliging a losing defendant to address the strengths of plaintiff's case to debate the fee award; adjustments force the court to assess the risks of the case under the fiction that the outcome is unknown; and enhancement cannot serve its purported purpose of inducing competent counsel to take cases since counsel cannot predict whether one will be used or not.⁴⁴ Neither *Blum* nor *Delaware Valley II* explicitly provide a bar to the use of multipliers in common fund suits that do not involve compensation under fee-shifting statutes. Nonetheless, these decisions have caused many to question whether the Supreme Court would dismiss the use of a multiplier under any circumstance.⁴⁵

a multiplier. Three years earlier, the Northern District of California had refused to increase a lodestar calculation for quality of performance because it felt that when a limited fund was involved, as in any common fund action, a court should raise the lodestar only when attorney performance is extraordinary. *In re Capital Underwriters, Inc. Sec. Litig.*, 519 F. Supp. 92, 102 (N.D. Cal. 1981).

⁴³ 483 U.S. 711 (1987) (overturning district court award of fee petition that doubled the lodestar for three phases of counsel's work because case presented novel issues and had highly contingent nature of success) [hereinafter *Delaware Valley II*].

⁴⁴ *Id.* at 719-21.

⁴⁵ See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 234-36 (2d Cir. 1987) (finding that *Blum* and *Delaware Valley II* severely restrict instances in which district courts may apply a multiplier and declining to apply a "risk multiplier," but applying multiplier for quality of counsel's work); *In re Bolar Pharmaceutical Co.*, 800 F. Supp. 1091, 1094 (E.D.N.Y. 1992) (acknowledging that Supreme Court has not yet addressed common fund cases, but found the prohibition relevant to common fund cases, thus rescinding the lower court's enhancement of lodestar since it "double-count[ed] the value of the counsel's work"); *In re Washing-*

Notwithstanding *Blum* and *Delaware Valley II*, however, courts, including those in the Ninth Circuit, continue to employ a straightforward lodestar approach.⁴⁶ At the same time, both commentators and courts have criticized the approach primarily because it can award attorneys for drawing out litigation.⁴⁷

ton Pub. Power Supply Sys. Sec. Litig., 779 F. Supp. 1056, 1061 (D. Ariz. 1991) (noting that the Ninth Circuit has not yet addressed multiplier issue); Rothfarb v. Hambrecht, 649 F. Supp. 183, 199-200 (N.D. Cal. 1986) (applying multiplier for contingent nature of suit, but not for quality of representation); see also Eddie Correia, *Antitrust Policy after the Reagan Administration*, 76 GEO. L.J. 329, 344, n.50 (acknowledging that the threat of no multiplier is "of great concern to the plaintiff's bar" and although the defense bar may argue that multipliers are unnecessary, "most likely few of them have ever invested several years in a complex case with the risk that they might never be paid"); Deborah A. Klar, *Attorney's Fees in Securities Class Actions: Recent Developments under the Common Fund Doctrine*, in SECURITIES LITIGATION 1991: STRATEGIES AND CURRENT DEVELOPMENTS, at 153 (PLI Litig. & Admin. Practice Course Handbook Series No. 417, 1991) (noting that recent Supreme Court decisions prohibiting multipliers in fee-shifting cases have caused some to question the viability of a multiplier in common fund cases and correspondingly have caused some courts to switch to a percentage approach); Charles Silver, *A Restitutory Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656, 656 (1992) (noting that *Delaware Valley II* asks whether courts can enhance fee awards to reflect risk of non-payment in any kind of class action suit).

⁴⁶ See *infra* notes 48-54 and accompanying text.

⁴⁷ See, e.g., John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 703 (1986) (finding that under the lodestar approach, defendants can manipulate litigation since they know that plaintiff's attorneys become more vulnerable to settling for less as time passes); Christopher P. Lu, *Procedural Solutions to the Attorney's Fee Problem in Complex Litigation*, 26 U. RICH. L. REV. 41 (1992) (attempting to resolve the abuses of the system as evidenced by outrageous legal fees); Bennet A. McConaughy, *Back to the Future: Use of Percentage Fee Arrangements in Common Fund Litigation*, 12 U. PUGET SOUND L. REV. 43, 44 (1992) (noting general dissatisfaction with methods that measure hours expended); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 51 (1991) (noting that time sheets can be prepared imaginatively after the fact); Moore, *supra*, note 6, at 27 (noting that attorneys can pad time sheets and engage in "wasteful projects to inflate" their fee award); *Report of the Third Circuit Task Force: Court Awarded Attorney Fees*, 108 F.R.D. 237, 247-48 (1985) (finding that lodestar method encourages lawyers to work unnecessarily, to overstate their rates and to inflate their hours in anticipation of the court awarding less than the requested fee).

Even when a court is cognizant of this problem, it is ill-prepared to question the accuracy of time sheets and the necessity of certain tasks. Macey & Miller, *supra*, at 50-51. Thus, it is impossible ever to come to a fair assessment of the reasonable value of the reasonable hours spent in litigating a particular case. Even when counsel supplies the court with documentation supporting its requested fee in comparison, for example, to practicing attorneys in counsel's locale, the court is

It is for this reason, among others, that many courts, including the Ninth Circuit, turned to the percentage method of computing fees under the common fund doctrine.

D. Benchmark Percentage Approach in the Ninth Circuit

Courts have attempted to circumvent the lodestar problem by awarding fees to the class that are a percentage of its total recovery, similar to a personal injury case taken on a contingency fee basis. Recent cases have championed a "benchmark" percentage (where the "bench" sets the rate) in the wake of two major statements from the judiciary.⁴⁸ One, a report by a task force created by the Third Circuit, explored the problems of lodestar⁴⁹ and concluded with a forceful recommendation that a percentage approach was preferable to lodestar and that courts should set the fee as early in the suit as possible. In addition, the report preferred the use of a sliding scale with a bonus if early settlement is achieved.⁵⁰ The second was a seemingly minor comment by the Supreme Court in *Blum v. Stenson*.⁵¹ In a footnote, the Court distinguished the method

unable to determine whether this particular attorney merits similar fees. *See id.* at 52. This problem is highlighted by the fact that only the court monitors the attorneys. Defendants, once their liability is determined, justifiably are not concerned with what percentage of the total award money is allocated to the class rather than to the lawyers. Similarly, plaintiffs in a class action suit are not in any position to step forward to fight the fee petition since they commonly are far removed from the entire litigation process. *Cf. id.* at 46-47 ("[S]ettlement hearings are typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel.").

⁴⁸ These recent cases include: *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (noting that "a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery" and citing footnote 16 of the *Blum* decision as support for this assertion); *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268, 272 (9th Cir. 1989) (while leaving the calculation of the fee to the lower court, taking note of both the Third Circuit Task Force's recommendation of a percentage approach and the *Blum* Court's approval of a percentage approach as reasonable); *In re Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989) (noting that the Supreme Court in *Blum* approved a percentage approach and the Third Circuit's recommendation of the same).

⁴⁹ The Third Circuit appointed the task force to investigate and report on the problems surrounding compensation of attorneys in common fund litigation. Courts in the Third Circuit had been using the lodestar approach as the Third Circuit prescribed in *Lindy*. *See generally Report of the Third Circuit Task Force, supra* note 47.

⁵⁰ *Id.* at 255-56.

⁵¹ 465 U.S. 886 (1984). For a discussion of the *Blum* decision regarding to the

of awarding attorneys' fees in statutory fee-shifting cases, which use a lodestar analysis, from the "calculation of attorneys' fees under the 'common fund doctrine,' where a reasonable fee is based on a *percentage of the fund* bestowed on the class."⁵²

The Ninth Circuit noted both the task force report and the *Blum* footnote in *Paul, Johnson, Alston & Hunt v. Graultry*.⁵³ That case involved attorneys who, while representing a trustee of an estate in bankruptcy with whom they had a thirty percent contingency fee agreement, had also served to settle claims that affected a class of investors in the bankrupt estate. The attorneys petitioned for and received from the district court a similar contingency fee out of the personal claims.⁵⁴ The court found that a percentage approach, especially an adjustable, twenty-five-percent benchmark percentage, was preferable to a lodestar approach because it would be impossible to distinguish the number of hours the firm had spent in regard to the benefit accrued to the class as opposed to the other claims.⁵⁵ Although the court declined to hold that the percentage approach was inherently better than the lodestar method, it found that the circumstances of this particular case favored a percentage methodology.

Indeed, the practice of awarding a benchmark percentage has been attacked for the same reasons that it has been embraced. Early settlements, many claim, are also "cheap settlements," dispensing only a small award to the class while simultaneously providing a windfall for the attorneys who have not had to demonstrate hard work to obtain their fee.⁵⁶ This

use of multipliers in lodestar calculations, see *supra* text accompanying note 42.

⁵² *Blum*, 465 U.S. at 901. (emphasis added); see *Brown v. Phillips Petroleum Co.*, 838 F.2d 451 (10th Cir. 1988) (using the *Blum* footnote as rationale for holding that a percentage fee is a reasonable fee); *In Re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) (holding that absent extraordinary circumstances, court will employ 30% benchmark). *But cf. In re Wicat Sec.*, 671 F. Supp. 726, 731 (D. Utah 1987) (noting that some courts view *Blum* as endorsing a percentage method, while other courts believe the Court was merely noting that the method serves as a "useful gauge"); *Rothfarb v. Hambrecht*, 649 F. Supp. 843, 185, n.1 (N.D. Cal. 1986) (noting that footnote 16 of *Blum* seems to indicate only that a percentage of recovery is permissible, not required).

⁵³ 836 F.2d 268, 272 (9th Cir. 1989).

⁵⁴ *Id.* at 270.

⁵⁵ *Id.* at 272.

⁵⁶ Moore, *supra* note 6, at 27; see also Macey & Miller, *supra* note 47, at 59-61

very criticism was, in fact, the motivation for the development of lodestar.⁵⁷

In the Ninth Circuit, then, the decision to use a lodestar or percentage computation was a matter of judicial discretion at the time of the *Oracle* decisions. In *Six Mexican Workers v. Arizona Citrus Growers*,⁵⁸ for example, decided one month after *Oracle I*, the Ninth Circuit affirmed the district court's award of twenty-five percent of recovery, noting that the benchmark could be modified if "special circumstances" demonstrated that the award was too small or large based on the hours expended.⁵⁹ One year later, another jurist in the Northern District of California noted that "either the lodestar or the percentage-of-the-fund approach may . . . have its place in determining what would be reasonable compensation for creating a common fund" in a securities-related class action suit.⁶⁰ Given such flexibility, no one could have expected that the *Oracle* litigation would result in an entirely new method of compensating common fund attorneys.

(noting that, despite promise of ease in calculating fees and fairness of a bright-line rule, the percentage approach nonetheless results in surplus profits to plaintiffs' attorneys since they will be forced to litigate cases only when, at a minimum, they will be assured of recouping their costs).

⁵⁷ See, e.g., *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977) ("For the sake of their own integrity, the integrity of the legal profession and the integrity of Rule 23, it is important that the courts should avoid awarding 'wind-fall fees'" (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d. 448, 469 (2d Cir. 1974)). See also *supra* note 47.

⁵⁸ 904 F.2d 1301, 1311 (9th Cir. 1990).

⁵⁹ *Id.* at 1311. *Six Mexican Workers* did not involve a securities violation, but rather violations of the Farm Labor Contractor Registration Act, which regulates agricultural employment and bookkeeping methods. As with securities laws, the Act does not provide for fee-shifting; the attorneys in this case applied for fees under the common fund doctrine. *Id.* at 1310-11.

⁶⁰ *In re Businessland Sec. Litig.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,059 (N.D. Cal. June 14, 1991); see also *In re Public Service Co. of New Mexico*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,988 (S.D. Cal. July 28, 1992) (using both lodestar and percentage approach to insure reasonable fee); *In re Washington Public Power Supply Sys. Sec. Litig.*, 779 F. Supp. 1056, 1059 (D. Ariz. 1991) (noting that Ninth Circuit recognizes both procedures); *Antonopoulos v. North Am. Thoroughbreds, Inc.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,058 (S.D. Cal. June 24, 1991) (granting fees equivalent to 30% of recovery or lodestar plus 1.11 multiplier); cf. *Morganstein v. Esber*, 768 F. Supp. 725, 726 (C.D. Cal. 1991) (citing *Paul, Johnson and Alston & Hunt* for the assertion that the Ninth Circuit adopted a benchmark percentage approach).

II. IN RE ORACLE SECURITIES LITIGATION

The litigation brought by the shareholders of Oracle Software Systems has not yet come to a close.⁶¹ Nonetheless, a district court in the Northern District of California has issued four written opinions.⁶² This Comment discusses the first three opinions, in which the court addressed the issues of attorney compensation and choice of lead counsel. The last opinion was written in response to a settlement proposal.⁶³

A. Oracle I: *The Order for Competitive Bids*⁶⁴

Within two weeks of March 27, 1990, report of unsatisfactory earnings by the Oracle Systems Corporation ("Oracle"), a Silicon Valley software manufacturer, and a subsequent drop in the price of Oracle stock, nineteen separate class action complaints by Oracle's shareholders and several derivative actions on behalf of the corporation had been filed in the Northern District of California.⁶⁵ The court received motions

⁶¹ The parties brought a settlement agreement to the court on April 22, 1993. *Oracle IV*, 829 F. Supp. 1176, 1178 (N.D. Cal. 1993).

⁶² *In re Oracle Sec. Litig.*, 131 F.R.D. 688 (N.D. Cal. 1990) (*Oracle I*); 132 F.R.D. 538 (N.D. Cal. 1990) (*Oracle II*); 136 F.R.D. 639 (N.D. Cal. 1991) (*Oracle III*); 829 F. Supp. 1176 (N.D. Cal. 1993) (*Oracle IV*).

⁶³ This Comment will not analyze this last opinion in which Judge Walker discussed at length the substantive inadequacies of the suits (class action and derivative) and the substantial recovery to the class (\$23.25 million from Oracle and \$1.75 million from Arthur Andersen & Co.), which the settlement agreement had proposed. The court nonetheless rejected the agreement because it was contingent upon a dismissal of the derivative suit without any benefits paid to the derivative class, save payment of up to \$250,000 from Oracle to derivative counsel for costs and fees. *Oracle IV*, 829 F. Supp. at 1178, 1190.

⁶⁴ *Oracle I*, 131 F.R.D. at 690.

⁶⁵ The plaintiffs alleged that Oracle Systems undertook to deceive investors by making false reports concerning the corporation's financial status and business prospects. Specifically, the plaintiffs alleged that certain officers:

- (1) ke[pt] the software company's books and records open for additional business days after the close of the last day of the quarter;
- (2) backdat[ed] licensing and other agreements;
- (3) "fill[ed] the pipeline" by postponing recognition of revenues and net income from one quarter to another;
- (4) recogniz[ed] revenue upon execution of sales contracts when the product was not in production or was unavailable; and
- (5) improperly recogni[z]ed the entire amount of potential income called for in an agreement immediately upon the signing of the contract.

John C. Yates, *COMPUTER LAW*, Jan. 1992, at 12 n.6. The intentionally misleading accounting procedures, the plaintiffs claimed, caused the inflation of Oracle stocks

to certify the class and to appoint lead counsel.⁶⁶

Before the court had ruled on the issue of lead counsel, however, two plaintiff firms—Berger & Montague and Milberg, Weiss, Bershad, Specthrie & Lerach—jointly decided to hold a meeting on April 12, 1990, and invited all firms representing the shareholders to attend. The purpose of the meeting was to discuss and vote on the appointment of lead counsel.⁶⁷ A few firms refused to attend.⁶⁸ The meeting resulted in the nomination of the Berger and Milberg firms to serve as co-lead counsel. On May 4, 1990, these firms sought the court's confirmation of their nomination.

Two plaintiff firms that had not attended the meeting—David B. Gold and Kaufman, Malchman, Kaufman & Kirby—opposed the motion, seeking the same appointment for themselves. The two camps of attorneys “squared off, sending volleys of disparagement at one another.”⁶⁹ This “contest” was

to artificial levels and deceived the shareholders in violation of §§ 10(b), 20 and 29(a) of the Securities Exchange Act of 1934. *Oracle I*, 131 F.R.D. at 691; Oracle Systems Corp., 10-Q Filing, at 14 (SEC Online, Jan. 8, 1993) [hereinafter “10-Q Filing”]. The plaintiffs sought compensatory damages, as well as a return of profits and a new election of directors under the derivative suit claim of insider trading. 10-Q Filing, *supra*, at 14.

⁶⁶ *Oracle I*, 131 F.R.D. at 690. The class was certified by three orders entered on February 18, 1991, November 26, 1991 and February 12, 1992. The class consists of purchasers of Oracle common stock and purchasers of call options for common stock from July 11, 1989, through September 26, 1990. 10-Q Filing, *supra* note 65, at 14.

⁶⁷ *Oracle I*, 131 F.R.D. at 690. Their method of meeting to plan and choose lead counsel was not unusual. In *In re Fine Paper Antitrust Litig.*, 751 F.2d 562 (3d Cir. 1984), the law firms that had filed the initial complaints similarly met to plan a common strategy at which point they elected an executive committee and a co-lead counsel team to steer and litigate the action. The court approved the selections. *See supra* note 21 and accompanying text.

⁶⁸ *Oracle I*, 131 F.R.D. at 690. Only fifteen of the twenty-nine firms representing shareholders who had filed class action complaints attended this meeting. The court suggested that the others, especially those of the David B. Gold and Kaufman, Malchman, Kaufman & Kirby firms, had not attended because they “sens[ed] that they would have been outvoted on any decisions.” *Id.* Similarly, in *In re Dunkin Donuts Litig.*, [1990-91 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,725 (Del. Ch. Nov. 27, 1990), counsel for class plaintiffs met and selected lead counsel. Certain law firms were dissatisfied with the selection and proceeded to work on their own. They were penalized for this dissidence when, at the close of litigation, the court disallowed reimbursement for the work they had done that appeared to duplicate the work completed by the court-appointed groups.

⁶⁹ *Oracle I*, 131 F.R.D. at 690. The Berger-Milberg firms described David B. Gold as a “chronic dissident” and “obnoxiously old fashioned.” He responded by accusing the Berger-Milberg partnership of conducting “Mayor Daley electoral pro-

put to an end by the court, which ruled that it would choose lead counsel on the basis of budgets to be submitted to it by the interested firms.⁷⁰ When the deadline for budget submission arrived, the court was presented with only one budget, submitted by the newly formed association of the Berger and Gold firms.⁷¹ Disgruntled by the reluctance of the attorneys to compete for the position, the court rejected the proposal outright.⁷²

Instead, Judge Walker began his opinion in *Oracle I* by quoting Judge Patel, a colleague in the Northern District of California, in her lamentation of the "all too familiar path of large [class action] securities cases,"⁷³ "[a]t the end of [which] are plaintiffs' applications for attorneys fees."⁷⁴ Characterizing Judge Patel's opinion as "a call for future courts to rely on new

cesses." *Id.*

⁷⁰ *Id.* at 690.

⁷¹ The court conjectured that "[t]he prospect of competition . . . had whistled an end to the shouting match." *Id.* at 691. The Berger and Gold proposal called for the award of a benchmark percentage fee of 30%, as in *In re Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989). Additionally, the proposal projected costs at \$400,000 to \$780,000 if the case settled before trial, and an additional \$400,000 to \$600,000 in the event of trial. *Oracle I*, 131 F.R.D. at 691.

⁷² The usual procedure for determining lead counsel is a vote by the attorneys themselves, as was attempted in the *Oracle* litigation. See *supra* note 21 and accompanying text. As far as can be determined, never before has a court objected to this procedure with a written order. Judge Walker, however, innovatively combined both the method of payment, with which he was dissatisfied, and the method of choosing class counsel. Even though the Berger-Gold team responded to the court's request for budgets by proposing to receive a percentage fee of 30%, the court, annoyed with counsel, took the opportunity to criticize the lodestar approach and, thus, to justify a new bidding process.

⁷³ *Activision*, 723 F. Supp. at 1374. Judge Patel, distressed over the theatrics of large securities cases, accepted the decision of a special master to grant fees on the basis of a lodestar determination, but promised in the future to grant fees only on the basis of a benchmark percentage. *Id.* at 1378-79. Judge Patel found that, by and large, the lodestar figure typically amounts to approximately 30% of the fund, rendering unproductive the complicated analysis that lodestar requires. *Id.* at 1375. A "benchmark" percentage, on the other hand, "provide[s] predictability for attorneys and class members and reduce[s] the time consumed by counsel and court in dealing with voluminous fee petitions." *Id.* at 1378-79. The court pointed to *Blum v. Stenson*, the *Report of the Third Circuit Task Force* and *Paul, Johnson, Alston & Hunt v. Graulty* (which had been decided one week earlier) to justify its decision. *Id.* at 1375-77. See *supra* notes 18 & 48-60 and accompanying text.

⁷⁴ *Oracle I*, 131 F.R.D. at 689. Both Judge Walker's and Judge Patel's disgust seems to be endemic to the Ninth Circuit. See *supra* notes 16-18 and accompanying text.

methods," Judge Walker plunged into a scathing review of the lodestar approach.⁷⁵

As the court noted, although the plaintiffs' causes of action were based on sections 10(b), 20, and 29(a) of the Securities Exchange Act of 1934 and, as such, did not give rise to an award of attorney fees, such claims can lead to the creation of a common fund through which counsel may be reimbursed.⁷⁶ Typically, at the resolution of litigation, plaintiffs' attorneys apply to the court to award their fee out of this fund through either the lodestar method or as a percentage of the award.

Post-litigation applications, according to Judge Walker, thwart the adversarial process.⁷⁷ In particular, lodestar has been "discredited by experience" and is "unworkable because . . . it abandons the adversarial process upon which our judicial system is based."⁷⁸ By requiring the court to review the performance of counsel once the litigation has terminated, the court forgoes its position as a neutral adjudicator and is forced to act as a fiduciary to the class by challenging the fee petition *sua sponte*.⁷⁹

Judge Walker additionally claimed that awarding fees with hindsight is problematic in itself. For example, even with a large settlement, a judge may be tempted to give a smaller fee to counsel who conducted less discovery than to one who had conducted more discovery in a case where the award was substantially less. Moreover, since early resolution of a case

⁷⁵ *Oracle I*, 131 F.R.D. at 689. Judge Walker was not obliged to explain his refusal to use lodestar calculations since the Ninth Circuit permits its courts to use either lodestar or percentage approaches. See *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); see *supra* notes 58-60 and accompanying text.

⁷⁶ *Oracle I*, 131 F.R.D. at 691; see *Mills v. Electric Auto-Lite*, 396 U.S. 375 (1970) ("The absence of express statutory authority does not preclude an award of attorney's fees in suits of this type."); see *supra* notes 24-34 and accompanying text.

⁷⁷ *Oracle I*, 131 F.R.D. at 689. When a statute provides for the award of fees, noted the court, the fee claim may be contested in an adversary proceeding. *Id.* at 691. With the exception of one case, *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 568 (3d Cir. 1984), plaintiffs are rarely involved in this application process. *Id.*

⁷⁸ *Id.* Both the lodestar and percentage approaches have been severely criticized as "anti-plaintiff" methods of compensation, since there is no adversarial contest over the fee. See *supra* note 47 and accompanying text.

⁷⁹ See *In re Capital Underwriters, Inc. Sec. Litig.*, 519 F. Supp. 92, 97-98 (N.D. Cal. 1981).

would lead to a smaller fee, attorneys have an incentive to prolong the litigation; the system thereby rewards "litigiousness."⁸⁰

Competitive bidding, Judge Walker held, was a natural resolution of this problem. Since experienced counsel should be able to assess the risks and, therefore, the costs of litigation, it could propose low fees without bidding below its actual cost and causing injury to itself in an effort to win the competition.⁸¹ Furthermore, bidding compensates for the loss of competition inherent in the other two methods of compensation by ensuring the court's impartiality and simulating the manner in which a class member herself would choose counsel—finding the best attorney for the best price.⁸² Since Rule 23(d) of the Federal Rules of Civil Procedure permits the court to take steps to insure the "protection of the members of the class" and provides for notification of the class to determine "whether they consider the representation fair and adequate," Judge Walker surmised that it was the "class members' standard of fairness and adequacy, not that of the court, which should govern the court's protection of the interests of the class."⁸³ Thus, the court should approximate the manner in which the class members would choose counsel if they could.

The court then examined the ways in which lawyers are typically compensated: either by the hourly fee, the fixed fee or the contingent fee.⁸⁴ Judge Walker found the contingent fee most suitable for the common fund, class action suit because members of the class typically will not monitor their attorney's hourly claims and because a pre-determined fixed fee creates a disincentive for hard work.⁸⁵ The contingent fee, paying an

⁸⁰ *Oracle I*, 131 F.R.D. at 692.

⁸¹ *Id.* at 693. Judge Walker deduced the capability to assess the risk from the "Law of Large Numbers," which states that the greater the number of variables involved, the greater the ability to predict an outcome. *Id.* at 693, n.11.

⁸² *Id.* at 690-92. For a different approach by which this goal is actually accomplished, see *infra* notes 152-157 and accompanying text.

⁸³ *Oracle I*, 131 F.R.D. at 691-92 (quoting FED. R. CIV. P. 23(d)).

⁸⁴ *Id.* at 694. Fixed fees, according to the court, are appropriate only when the tasks of the attorney are clear and the client can readily monitor counsel's work. Payment by hourly fees generally occurs with "sophisticated clients," like large corporations. This class of clientele has the means and ability to monitor the attorney, and the "stakes are [generally] high." *Id.*

⁸⁵ *Id.* at 694.

attorney out of the plaintiff's award, permits the realization of cases otherwise impracticable for plaintiffs and links the fee to the success of the case, thereby providing incentive for lawyers to litigate zealously.⁸⁶

Yet, when the court examined the manner in which other courts had settled on the percentage of the contingent fee, Judge Walker found that no matter what a court arrived at, it was only an expression of one single judge's belief of what constituted "fair and reasonable" compensation.⁸⁷ Judge Walker pointed out that the Ninth Circuit had resolved this problem by approving a permanent contingency percentage of twenty-five percent—the "benchmark" percentage—which could be adjusted upwards or downwards to reflect the unique characteristics of a given case.⁸⁸ This method, claimed Judge Walker, is little better than lodestar because it, too, leaves the amount of the fee uncertain until after the litigation comes to a close.⁸⁹ Moreover, since the bench may not be in a position to assess what may be a reasonable fee, a bidding process would naturally create a reasonable fee by emulating market forces.⁹⁰

Additionally, Judge Walker discussed three other possible results that could occur from using predetermined benchmark percentages. First, the fixed percentage places a rigid value on time. Since the fee remains constant and necessarily increases with the award, delays in litigation could go unpunished under such a system, while other cases may never be initiated if the

⁸⁶ The *Model Code of Professional Responsibility* provides that "[a] lawyer should represent a client zealously within the bounds of the law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981). Similarly, the *Model Rules* mandate that "a lawyer shall act with reasonable diligence and promptness in representing a client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1992).

⁸⁷ *Oracle I*, 131 F.R.D. at 695.

⁸⁸ *Id.* (citing Paul, Johnson, Alston & Hunt v. Gaulty, 886 F.2d 268, 272 (9th Cir. 1989)); see *supra* notes 48-60 and accompanying text.

⁸⁹ *Oracle I*, 131 F.R.D. at 695.

⁹⁰ Judge Walker noted that few judges ever have first-hand knowledge of the rates charged by counsel appearing before them. Many judges come to the bench having never been in private practice, or not having been in practice for a long time. *Id.* Those who believe that they have such expertise, claims Judge Walker, are probably only "fooling themselves." *Id.* at 696. Judge Walker himself, however, presumably had that expertise, having been a securities litigator before his appointment to the bench. Anne M. Rossheim, *Fee Bidding in Common Fund Cases: New Approach Sparks Controversy*, OF COUNSEL, Jan. 21, 1991, at 10.

percentage rate is improperly low. Second, when cases could be, but are not, brought for less than the twenty-five percentage, the use of a benchmark percentage constitutes a disservice to the class, thereby undermining the court's fiduciary duty in a class action. Third, using a predetermined percentage eliminates the competitive price factor that the bidding process necessarily engenders, leaving the court to choose counsel based upon counsel's own "self-serving descriptions."⁹¹

Thus, Judge Walker rejected the use of a benchmark percentage. Instead, he decided to choose lead counsel and assess its compensation through the process of competitive bidding. This process, Judge Walker claimed, would be based on the benefits to the class (not self-serving descriptions) and would result in lower bids than that of a benchmark percentage approach.⁹² *Oracle I* ended with a call for *in camera* bids specifying qualifications and percentage of recovery that the firm would seek.

B. Oracle II: *The Order Appointing Class Counsel*⁹³

Only four out of twenty-nine possible firms responded to Judge Walker's call for competitive bids.⁹⁴ In this order, after describing each of the four bids at length, Judge Walker settled on the bid by Lowey, Dannenberg, Bemporad, Brachtl & Selinger, P.C. to serve as lead counsel.⁹⁵ In doing so, he focused primarily upon the structure of the bids, rather than the qualifications of counsel.

Judge Walker first discussed the bid of Abbey & Ellis, noting its location (New York), size (ten lawyers) and experi-

⁹¹ *Oracle I*, 131 F.R.D. at 696. Judge Walker asserted that this self-adulation led to "rhetorical sparring match[es]." However, such sparring matches are not surprising in light of the fact that lead counsel commands a higher award than other counsel. NEWBURG, *supra* note 21, § 9.35.

⁹² *Oracle I*, 131 F.R.D. at 697. Ironically, the process resulted in bids that Judge Walker later pronounced as remarkably similar to those that would have been awarded under a lodestar regime. *Oracle III*, 136 F.R.D. 639, 650 (N.D. Cal. 1991).

⁹³ 132 F.R.D. 538 (N.D. Cal. 1990).

⁹⁴ The four firms were: Abbey & Ellis; Berger & Montague, P.C.; David B. Gold, PLC; and Lowey, Dannenberg, Bemporad, Brachtl & Selinger, P.C. *Id.* at 539.

⁹⁵ *Id.* at 548.

ence in similar matters. The firm bid a straight contingency fee, twenty-two and one-half percent (after a request by the court for modification of its original twenty-four-percent bid to cover both fees and expenses).

Next, Judge Walker examined the bid submitted by Berger & Montague, P.C., a Philadelphia firm of forty-two lawyers, apparently experienced in securities litigation.⁹⁶ The bid ranged from twenty-five percent for early settlement to a thirty-seven percent fee if the case was appealed. Within this range of contingency, their fee would fluctuate further depending on the amount of recovery to the class.⁹⁷

The David B. Gold firm, next addressed by Judge Walker, was located in San Francisco, consisted of twelve attorneys and was quite experienced in complex class litigation, especially in technology-related areas.⁹⁸ The firm even had extensive experience in litigating against defense counsel in this case. Its bid proposed a range of fees from ten percent to thirty percent, but rather than increasing with the award as did the Berger bid, fees for counsel under this structure would decrease as the award to the class increased and would also decrease with time.⁹⁹

⁹⁶ The court noted that Berger & Montague had a relationship with a San Jose, California firm which warranted a mention on its stationary. Its proposal, however, neglected to mention how this would effect the firm in litigation in the Northern District of California. *Id.* at 540.

⁹⁷ The court provided a chart of the Berger & Montague bid:

	Early Settlement	Document Stage	Deposition Stage	Trial	Appeal
Recovery					
Up to \$10M	27%	26%	27%	32%	37%
\$10M-\$20M	25%	24%	25%	30%	35%
\$20M-\$50M	25%	24%	24%	30%	32%
\$50M plus	25%	24%	24%	29%	30%

Id. at 540.

⁹⁸ *Id.* at 541.

⁹⁹ The court believed the Gold bid thus could be viewed in the following manner:

	Time for Resolution (months)				
Recovery	0-12	13-18	19-24	25-30	30
Up to \$30M	30%	29%	28%	26%	25%
\$30M-\$60M	27%	26%	25%	23%	22%
\$60M-\$100M	25%	24%	23%	21%	20%
\$100M-\$130M	22%	21%	20%	18%	17%
\$130M-\$160M	19%	18%	17%	15%	14%
\$160M-\$200M	17%	16%	15%	13%	12%
\$200M or more	15%	14%	13%	11%	10%

Lowey, Dannenberg, Bemporad, Brachtl & Selinger submitted the fourth bid. Judge Walker noted that this New York firm had a staff of eleven attorneys and specialized in securities litigation.¹⁰⁰ The Lowey bid was simpler than the Berger and Gold bids, ranging from a twelve or fifteen percent fee award if the settlement to the class exceeded fifteen million dollars to twenty-four or thirty percent if the settlement was one million dollars or less; the lower percentage figure in each instance would be awarded if the litigation were resolved within one year. The bid also included an expense cap of \$325,000.¹⁰¹

Judge Walker then discussed the portion of the bids wherein the bidders discussed their qualifications. Finding them to be unhelpful "celebrity endorsements," Judge Walker dismissed these "judicial bouquets" as "subjective and contextual . . . puffer[y]" which is "immaterial in selecting class counsel" in this type of litigation where an attorney has little or no client contact.¹⁰² "None of the bidders," observed Judge Walker, "demonstrated qualitative distinctions sufficient to outweigh price considerations."¹⁰³ The only distinctive difference in quality, asserted the Judge, was that the Gold and Lowey bids suggested control over litigation costs. In the case of the Gold firm, it was its proximity to the area that would keep costs down. The Lowey bid, as mentioned above, contained an expense cap.

Turning to fees, Judge Walker then praised the competitive bidding system for saving money for the class through a declining percentage recovery.¹⁰⁴ The attorneys, according to

Id. at 541.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* The Lowey bid, as constructed by the court, was presented as follows:

	Time for resolution (months)	
Recovery	0-12	13 or more
Up to \$1M	24%	30%
\$1M-\$5M	20%	25%
\$5M-\$15M	16%	20%
\$15M or more	12%	15%

¹⁰² *Id.* at 542 & n.9. In *Oracle III*, Judge Walker noted that the Lowey firm was "adequately qualified to represent a class of Oracle shareholders." 136 F.R.D. 639, 649 (N.D. Cal. 1991). However, the court based this judgment on observing the Lowey firm at work *after* it had been awarded the position as lead counsel.

¹⁰³ *Oracle II*, 132 F.R.D. at 542 n.10.

¹⁰⁴ The court also noted a suggestion by derivative counsel that the percentage

Judge Walker, recognized that a higher award to the class is not necessarily attributable to harder work."¹⁰⁵ Judge Walker then embarked on a detailed comparison of the savings to the class within the varying structures of the four bids. He rejected the Gold bid, which included a decrease with the passage of time, as it would heighten the possibility of a "sell-out settlement."¹⁰⁶ The Abbey bid, although similar in average fee level to the Lowey bid, failed to provide contingencies for early settlement and "runaway litigation expenses," thus exposing it to the possibility of an "attorney windfall."¹⁰⁷ Only the Berger and Lowey bids, noted Judge Walker, corresponded to the competitive market by providing for an increase in the award with time, although the Lowey fee would decrease if settled in under one year.¹⁰⁸ In the level of fees, then, "Lowey trump[ed] Berger."¹⁰⁹

Judge Walker thus settled on the Lowey bid. He found that since Lowey was a "repeat player," it would not be tempted to "sell-out" and injure its professional reputation.¹¹⁰ Additionally, Judge Walker maintained that the bid was in keeping with Judge Patel's suggestion in the *Activision* opinion that thirty percent was an appropriate benchmark figure.¹¹¹

should not decrease, but should increase because of the incentive of "percentage contingency lawyers . . . 'to settle prematurely and cheaply.'" *Id.* at 543. However, Judge Walker described such a system as substituting "amount of recovery" for "amount of effort." *Id.* at 544.

¹⁰⁵ *Id.* at 543. Judge Walker noted that this economizing does not occur when a benchmark percentage system of payment is employed. *Id.* at 542.

¹⁰⁶ *Id.* at 546.

¹⁰⁷ *Id.* The Abbey bid used a straight percentage approach.

¹⁰⁸ In this way, the bids compensate for the absence of monitoring by a "sophisticated" client. *Id.* at 547 (quoting Coffee, *supra* note 47, at 697).

¹⁰⁹ *Oracle II*, 132 F.R.D. at 547. The main distinguishing feature of the Lowey bid is that it set an expense cap. The attractiveness of this feature is addressed in *Oracle III*.

¹¹⁰ *Id.*

¹¹¹ *Id.* Judge Walker's comparison of the bid to a typical benchmark figure may lead one to question why the court bothered to seek competitive bids, inasmuch as it acknowledged that the outcome of bidding is similar to an outcome under both the percentage and lodestar approaches. Judge Walker most likely made this assertion to dispel those critics who would assail deviating from those systems.

C. Oracle III: *The Order Denying Motion for Rehearing*¹¹²

The Gold firm motioned the court to set aside its ruling, alleging that the competitive bid selection process was illegal and the Lowey bid itself was unethical. Gold argued first that given the low expense cap with which Lowey had constrained itself, a conflict of interest was bound to occur when the firm was faced with rising litigation costs. At such a point, argued the Gold firm, Lowey would be forced to cut corners. According to Gold, the ABA *Model Rules of Professional Conduct* section 1.7(b), which mirrored the *California Rules of Professional Conduct*,¹¹³ prohibits a lawyer from representing a client "if the representation . . . may be materially limited by . . . the lawyer's own interests."¹¹⁴ Second, the Gold firm claimed that public disclosure of the bids prejudiced the class by revealing plaintiffs' evaluation of the suit to the defendants.¹¹⁵ In the *Oracle III* opinion, Judge Walker refused to reconsider the ruling. He believed that the process was successful; bids were submitted to the court within three weeks, and he felt that once the process came to be used with more frequency, the type of reargument that the court now had before it would "fall away."¹¹⁶

The court also rejected the conflict of interest argument. Judge Walker claimed that the firm would harm itself if, at some point, it ceased to make outlays for necessary expenditures (such as expert witnesses). On the other hand, when such expenditures strengthen a case, they necessarily increase the amount of the firm's fee award.¹¹⁷ Similarly, Judge Walk-

¹¹² 136 F.R.D. 639 (N.D. Cal. 1991).

¹¹³ *Id.* at 642 n.6.

¹¹⁴ *Id.* at 642. Under Rule 1.8(j), an attorney is not permitted to have a "proprietary interest in the litigation." CALIFORNIA RULES OF PROFESSIONAL CONDUCT 1.8(j) (1993).

¹¹⁵ *Oracle III*, 136 F.R.D. at 644-45. In *Oracle I* the court had requested *in camera* bids and did not advise counsel that the results would appear in a published opinion. *Oracle I*, 131 F.R.D. 688, 697 (N.D. Cal. 1990).

¹¹⁶ *Oracle I*, 131 F.R.D. at 641 n.4. In fact, Judge Walker's assumption is naive. Since attorneys vie for the position of lead counsel to secure more money for their firms, there is no reason to believe that they would stop litigating such types of rulings at any point. See NEWBURG, *supra* note 21, § 9.35.

¹¹⁷ *Oracle III*, 136 F.R.D. at 642-44. Judge Walker also claimed that full reimbursement of expenses would lead to extravagant use of "non-attorney litigation input," encouraging dependency on computer use and non-legal staff. Full reim-

er found no merit to Gold's interpretation of the ABA Model Rules. According to Gold, Lowey's expense cap violated these rules by "giving the Lowey firm an 'interest in the litigation' . . . by requiring an 'investment' which will not be paid back."¹¹⁸ Judge Walker found that the ABA Model Rules do not suggest that a lawyer must be repaid fully.¹¹⁹ Further, Judge Walker noted that repayment of litigation expenses by the class in a class action suit is impractical and unrealistic.¹²⁰

Finally, Judge Walker dismissed the disclosure argument under which Gold had asserted that the defense now had important information from Lowey's valuation of the case. This information, according to Gold, would permit the defendants to "squeeze" the plaintiffs by prolonging litigation until the firm's expense cap had been depleted. Judge Walker, however, found no legal grounds for this argument. He noted that attorneys' fees are, as a matter of law, not privileged information.¹²¹ Moreover, according to Judge Walker, unlike the use of lodestar and benchmark percentage approaches, this method of submitting competitive bids to the court provides a surrogate for the absent plaintiff class that is unable to monitor its attor-

bursement, he felt, also "encourages a form of cheating." *Id.* at 644.

¹¹⁸ *Id.* at 642. Attorneys are not permitted to buy interests in litigation even though some commentators have suggested that this archaic rule against champerty be abolished. *See, e.g.,* Dawn S. Garrett, *Lending a Helping Hand: Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 DAYTON L. REV. 221 (1990) (arguing that attorneys should be permitted to advance subsistence loans to clients); Mark P. Gergen, *The Use of Open Terms in Contract*, 92 COLUM. L. REV. 997, 1028 (1989). Champerty is defined as a "bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving any part of the judgment proceeds." BLACK'S LAW DICTIONARY 231 (6th ed. 1990). It is a form of maintenance, "supporting, or promoting the litigation of another." *Id.* In cases taken on a contingency basis, law firms are, in essence, forwarding money to their clients in the form of services. *See* Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 31-39 (1989).

¹¹⁹ In fact, under ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.8(e)(1), "a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."

¹²⁰ *Oracle III*, 136 F.R.D. at 643. While repayment by the class is impracticable, in a lodestar regime a court typically reviews expense data and arranges for reimbursement. *See, e.g., In re Wicat Sec. Litig.*, 671 F. Supp. 726, 742 (D. Utah 1987) (allowing for expenses but deducting expenses already included in hourly rate).

¹²¹ *Oracle III*, 136 F.R.D. at 645 (citing *Tornay v. United States*, 840 F.2d 1424 (9th Cir. 1988) and *In re Michaelson*, 511 F.2d 882 (9th Cir. 1975)).

neys.

The *Oracle III* order ended with yet another call for bids, this time to select counsel to litigate against an added defendant (the Arthur Anderson accounting firm), which the Lowey firm had refused to include under the former arrangement.¹²² The order makes clear, however, that it was not designating *lead* counsel, but rather the *only* counsel to proceed against this defendant.¹²³

III. ANALYSIS OF THE ORACLE TRILOGY

A. *The Opinions*

Judge Walker's decision to employ a competitive bidding system is commendable for several reasons. First, the court acted in a way hoped for by most scholars, but rarely ever seen, by affirmatively responding to distress in the legal community over a serious and complex problem.¹²⁴ Second, the court intelligently identified and attempted to address the inherent problems of lodestar and an award system that expects its participants to evaluate themselves retroactively and neutrally. The court, however, failed to recognize that many of the problems remain or are simply substituted by others in its alternative approach. Therefore, the *Oracle* system fails to go far enough in fashioning a new method of computing fees in common fund securities litigation.

In *Oracle I*, Judge Walker expressed his desire to emulate the free-market system by soliciting bids. Specifically, the court requested that any law firm interested in obtaining the

¹²² *Oracle III*, 136 F.R.D. at 651.

¹²³ *Id.* Although this Comment does not address any issues concerning this last call for bids, it is questionable whether the court's demand that only one attorney litigate against this defendant is in violation of any retainer contracts between shareholders and counsel that already may have given certain attorneys the right to litigate this claim for the contracting shareholders.

¹²⁴ As noted, Judge Walker claimed to be responding specifically to Judge Patel's call for change in the compensation system for attorneys in class action suits. *Oracle I*, 131 F.R.D. at 689. Notwithstanding Judge Patel's clear dissatisfaction with lodestar, it is clear that in *Activision*, the court was not calling for solutions. On the contrary, the court had found it—Judge Patel firmly advocated the use of an adjustable *benchmark* percentage. *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989).

appointment as lead counsel should deliver to the court an application setting forth the firm's *qualifications* as well as fees to be charged (in the event of recovery).¹²⁵ Once the bids were in, however, the court chose not to address the qualifications of the firms, finding it "impossible to distinguish among the[m] in terms of their background, experience and legal abilities."¹²⁶ The court did find some distinctions, noting that the Gold firm could minimize litigation expenses due to its California location and that the Lowey firm had proposed an expense cap.¹²⁷ In this respect, the court was merely making another cost-saving decision and not addressing the quality of the firms at all. Similarly, Judge Walker noted that the Gold firm had often litigated against defense counsel. This point was not discussed at any length, leaving the reader unaware of whether Gold had been successful or unsuccessful in litigating those claims.

A process that seeks to emulate the "free market" would have to consider quality as well as cost: no consumer wants "a thing built by the lowest bidder."¹²⁸ Likewise, even the most savvy client with great monitoring capability will not choose an attorney on the basis of cost alone. Indeed, attorneys are commonly chosen only because of their reputation and recommendations. Even the Supreme Court has recognized that experience and skill may lead to higher rates for counsel.¹²⁹ As one commentator noted, an attorney "may have such a low opportunity cost because of a correspondingly low ability."¹³⁰ One would suspect that an attorney working for low fees is probably just "starting out" and a complex class action is hardly the place for a new attorney to start. Yet, when confronted with materials submitted in response to the request for the bid pro-

¹²⁵ *Oracle I*, 131 F.R.D. at 697.

¹²⁶ *Oracle II*, 132 F.R.D. at 542.

¹²⁷ *Id.* at 542.

¹²⁸ Wilford, *supra* note 1, at 25.

¹²⁹ *Blum v. Stenson*, 465 U.S. 886, 898 (1984) ("[T]he special skill and experience of counsel should be reflected in the . . . rate[.].").

¹³⁰ John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 288 n.142 (1983). *But cf.* John E. Morris, *Federal Judge Orders Counsel to Bid for Case*, LEGAL TIMES, Aug. 20, 1990, at 10 (law school professor approvingly notes that *Oracle* bidding system substitutes market forces for retroactive assessment of fair fee).

posals to describe the firm's qualifications, Judge Walker surprisingly dismissed the matter as "flattering remarks of judges before whom the bidders have litigated . . . subjective, contextual, basically pufferies" which were worthless to the court.¹³¹

Judge Walker's solution also does not escape some of the substantive problems that the lodestar method faces. By setting a fixed cap on expenses for the litigation, competitive bidding creates the real possibility to induce the winning bidder to settle early when costs begin to mount.¹³² Judge Walker dismissed this problem vis-à-vis the Lowey firm by claiming that, as a repeat player, Lowey would not succumb to such a temptation. But most firms that litigate securities class action suits presumably are repeat players in the complex securities arena. Thus, Judge Walker's distinction is puzzling in this respect as well. Judge Walker rather blithely ignores Gold's powerful argument that defense counsel now has an important piece of information. It is unrealistic to imagine that Lowey would continue to pursue the action vigorously when it has quadrupled its expense cap.¹³³

Another issue that the court failed to address is that many suits alleging violations of securities laws result in equitable relief.¹³⁴ If a case ended with an injunction, but no cash award, the court would have difficulty doling out a fee based on a predetermined percentage of the award. Such a result would confound any incentive for employing a competitive bid, unless a court could be certain beforehand that such relief would not be granted or would be willing to place a monetary value on the relief (and then demand the cash from the defendant).

Additionally, in purporting to rescue courts from the drawn-out reviews of documentation and contests inherent in computing a fee under the lodestar formula, Judge Walker's order propelled the court into a series of time-consuming appearances and orders.¹³⁵ While Judge Walker believed that

¹³¹ *Oracle II*, 132 F.R.D. at 542.

¹³² Macey & Miller, *supra* note 47, at 113.

¹³³ In fact, in the settlement agreement presented to the court, Judge Walker rejected a clause that purported to give counsel an additional \$200,000. *Oracle IV*, 829 F. Supp. 1176, 1178 (N.D. Cal. 1993).

¹³⁴ Cf. *City of Burlington v. Dague*, 112 S. Ct. 2638, 2642 (1992) (noting that vast proportion of contingency-fee cases seek injunctive relief).

¹³⁵ One commentator thought a similar approach would dispense with the need

the rearguments were merely due to the innovation of his order, one cannot help but wonder if that optimism is wishful thinking.¹³⁶ Attorneys have their livelihood at stake when litigating unfavorable fee awards. Unless at some point in the future courts would decline to hear motions for reargument, the requests for reconsideration would likely continue well into the litigation.

Finally, Judge Walker's system interferes with the plaintiffs' choice of counsel. Although there is no constitutional right to counsel in civil trials such as *Oracle*, the case law and complex litigation manuals all strongly presume that the parties-in-interest, through their attorneys, are best suited to make the decision about who should lead their battle.¹³⁷ Judge Walker ignored this important policy consideration in his attempt to fashion a bidding approach, but there is no reason why this aspect of the bidding system cannot be remedied. The proposed alternative that follows addresses the problem of choice of counsel and the other shortcomings of the *Oracle* approach.

B. *Alternative Approaches*

1. The Suggestions of Other Scholarly Commentators

Judge Walker relied heavily upon the writings of John Coffee Jr., a professor of law at Columbia University, who has written extensively on legal representation in securities litigation. In one article, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*,¹³⁸ Professor Coffee explores alternatives to the lodestar system of compensation. An economic response, according to Professor Coffee,

for judicial review, since "no absent parties . . . could be prejudiced by the litigation." Macey & Miller, *supra* note 47, at 109. *But see Report of the Third Circuit Task Force*, *supra* note 47, at 258 (cautioning against the system developing into an "illusory" solution when it "becomes protracted, hypertechical, and a battlefield for the participants").

¹³⁶ "With greater experience . . . rearguard [sic] maneuvers . . . will fall away." *Oracle III*, 136 F.R.D. at 641, n.4.

¹³⁷ *In re Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989).

¹³⁸ Coffee, *supra* note 47.

would be to permit counsel to purchase the shareholder's rights in the litigation through an auction. Even though such a system would create incentive for a suit to be pursued appropriately it also removes any incentive to detect violations in the first instance, as one could not be assured of success in bidding and of recouping the expense of detection and filing. Giving the right to the first party to file a claim would only lead to "underresearched, hastily pleaded actions."¹³⁹ Professor Coffee notes that the creation of law-firm franchises to monitor the system for specified violations of law could solve the problem of his proposed auction system, but at the same time, it would create other problems: without knowledge of the violations, appropriate compensation would be impossible to compute; lower output would stem from the eradication of competition; and, corruption of the system could be widespread if defendants themselves began to purchase franchises covertly.

Professor Coffee thus rejects the auction method, turning to "second best" alternatives.¹⁴⁰ One approach would be the use of multiple damages. If an attorney were receiving compensation as a fraction of the recovery and the recovery was tripled, then the attorney would receive the sum at which a jury fixed plaintiff's injury. Thus, the attorney would be as inspired to pursue the claim as the client herself. Other approaches include increasing the percentage of the award to the attorney to as much as fifty percent of the recovery. This would have the effect, asserts Professor Coffee, of inducing attorneys to seek out violations, thus promoting deterrence. In setting the benchmark percentage, a court should look to the market and determine what private parties are willing to pay for the same services. Professor Coffee acknowledges that some combination of the second best alternatives may induce nuisance suits and extortion of defendants to settle early, but notes that defendants may be required to litigate by their insurers and, in any event, they can prolong a lawsuit so as to debase the value of class recovery and to defeat the typically small firm that litigates class action suits.¹⁴¹

An article written after Judge Walker's initial opinion on

¹³⁹ *Id.* at 692.

¹⁴⁰ *Id.* at 693.

¹⁴¹ *Id.* at 701-08.

the *Oracle* litigation by Professors Jonathan R. Macey and Geoffrey P. Miller of the University of Chicago Law School, like Professor Coffee's, proposes an auctioning of the claims.¹⁴² A court would determine whether the case is appropriate for an auction by looking to whether many filings have occurred, whether many claimants of individually small claims exist and whether the claims are sufficiently concrete. A call for sealed bids would ensue.¹⁴³ The court would accept the highest bidder and compensate the attorneys who filed the claim but lost the auction.¹⁴⁴ The court then would distribute the funds to the class. Litigation by the winning bidder against the defendant would follow.

Professors Macey and Miller admit that their approach is not without difficulties.¹⁴⁵ For one thing, in order to sell the claim, it is important for it to be sufficiently defined at the time of the auction. A second problem would occur if the bidders conspired to keep the bids as low as possible. Not only is that likely considering how small the plaintiffs' bar is, but as Professor Coffee also noted, the ability of defendants to participate in the auction exacerbates this possibility. The approach would face another obstacle should there be too few bidders, unless parties could conceive of a way to finance litigation creatively. Other problems that must be considered with the auction approach are insuring that the plaintiffs cooperate in the litigation once their monetary interest in the claim is satisfied; compensating those who were the first to note the existence of the claim; problems with the jurisdictional reach of the court if claims were filed in more than one district; and the fact that the price of the suit would be brought out at trial by the defendants. As did Professor Coffee, these authors admit that their method may be unworkable and that the best reform may come from retooling the system instead of drastically altering it.¹⁴⁶

The current system also could benefit from an increase in the use of court advisors, suggest Professors Macey and Miller.

¹⁴² Macey & Miller, *supra* note 47, at 106-16.

¹⁴³ The bidders need not be law firms. *Id.* at 107.

¹⁴⁴ The authors assert that this solves the problems with the approach as described by Professor Coffee. *Id.* at 106 n.324.

¹⁴⁵ *Id.* at 110-16.

¹⁴⁶ *Id.* at 110 n.330.

In order to compensate for the inability of the court and the class to evaluate properly the fee award, the court could select a guardian to monitor settlement negotiations.¹⁴⁷ The authors note that, while a guardian may be manipulated by a bench eager for settlement, the position nonetheless would be valuable because it would insure that the absent class was accounted for and that the class receives fair recovery.¹⁴⁸ To solve the problem of the court's need to scrutinize fee petitions under a lodestar regime, Professors Macey and Miller suggest using either experts to determine their worth or special masters to make controlling findings as to the reasonableness of the fee.¹⁴⁹ A percentage method, notes the authors, eliminates the need to calculate a fee, and is preferable to the lodestar system, but does over-compensate plaintiffs' attorneys and has the effect of discouraging suits of merit when counsel could not expect to achieve recompense.¹⁵⁰

In taking note of Judge Walker's efforts, Professors Macey and Miller note that his formulation of the auction procedure has the effect of "opening up the market for plaintiffs' attorneys and reducing the systematic overcompensation feature of the percentage-of-the-recovery approach."¹⁵¹ According to these authors, however, the *Oracle* method may induce early settlement by rewarding an earlier settlement with a higher fee and disregards the skills and financial ability of the winning bidder.

2. A Proposal

Taking together the suggestions of Professors Coffee, Macey and Miller, as well as the above discussion of the *Oracle* opinion, the direction of attorney compensation systems choice is unclear: either courts will continue to use the lodestar or

¹⁴⁷ *Id.* at 47-48; see *supra* notes 77-80 & 90 and accompanying text.

¹⁴⁸ However, the authors also note that compensation of guardians may also be problematic, as one might imagine, if their fees were connected to the award. Macey & Miller, *supra* note 47, at 48.

¹⁴⁹ *Id.* at 57-58. The authors note that neither experts nor masters have been regularly employed for this service. One drawback with the use of the master would be her need to be fully acquainted with the litigation.

¹⁵⁰ Counsel would not be compensated, if for instance, the expenses of litigation were high, but recovery to the class low. *Id.* at 60; see *supra* notes 48-60.

¹⁵¹ Macey & Miller, *supra* note 47, at 113.

percentage methods with modifications or they will employ some kind of auction, which, in the end, runs into many of the same problems as the other methods. Thus, the only alternative is to develop a system that addresses the problems raised by the *Oracle* bidding method.

The following solutions are required for a successful and fair operation of the *Oracle* bidding method. The court must: (1) insure that the position of lead counsel is awarded to qualified counsel; (2) demand bids fashioned on a sliding scale percentage that would decrease if the recovery to the class exceeded a certain limit and that would increase in proportion to the amount of work envisioned, without any bonus for early settlement;¹⁵² (3) prohibit expense caps in order for conflict with the class to be truly avoided; and (4) consider plaintiffs' choice of counsel.

In order for the auction approach to meet the second and third suggestions, the court need only set guidelines for the auction. On a certain level, when one considers that the *Oracle* bidding procedure was the first of its kind, it seems unfair that certain firms lost position of lead counsel in the *Oracle* litigation simply because their bids were not fashioned in accordance with a preconceived notion of the court. Moreover, it may be difficult for the auction approach to produce the most qualified attorney as the winning bidder; after all, auctions are a creature of the business world and, in that context, the success of an auction bid is dependent only upon price. In addition, a winning bidder typically has a safety net in knowing that she may breach the resulting contract if it is efficient to do so.¹⁵³

¹⁵² The winning bid in *Oracle*, therefore, would have been a combination of the Berger & Montague and Lowey bids. See *supra* notes 97 and 101 and accompanying text. This method was suggested by the Third Circuit task force in its effort to find solutions to the lodestar dilemma. See *supra* note 48. The task force also advocated a bonus for early settlement, but this feature creates a conflict between counsel and the class by making settlement too attractive.

¹⁵³ For a discussion of the auction and its problems, see generally E. ALLAN FARNSWORTH, *CONTRACTS* (2d ed. 1990). See also Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629 (1988) (discussing theory of efficient breach in terms of *ex post* renegotiation); Daniel F. Spulber, *Auctions and Contract Enforcement*, 1990 J.L. ECON. & ORG. 325, 326 (noting that "the [a]uction may unravel by failing to select the most qualified firm" when a firm bids low, but finding that other incentives can prevent breach).

Similarly, it is hard to imagine that the auction approach could ever consider the plaintiffs' choice of counsel. It is surprising that neither Judge Walker nor the commentators discuss this issue, but perhaps their omission is due to their belief that the class, which does not exist before the court's certification, simply has no preference. However, aside from the fact that some shareholders cared enough to seek out a particular attorney and file a claim against the corporation, one can draw the strong inference from the rise of shareholder activism in recent years that today's shareholder also would care a great deal about representation in a class suit.¹⁵⁴ In the form of auction implemented by Judge Walker in *Oracle*, the court must consider plaintiffs' choice in choosing the best bid as evidenced by the vote for lead counsel taken at a meeting of the attorneys who represent the filing plaintiffs. This suggestion, however, cannot work if the court accepts bids for the position of *sole* counsel for the class, as Judge Walker did in seeking bids in connection with the claim against Oracle's accountant, Arthur Andersen & Co. In such a situation, the court ignores the retainer contracts that the named plaintiffs have with their counsel.¹⁵⁵ If any named plaintiff wishes to be included in the class, she will have to forego her agreement with her attorney, since that attorney will not be entitled to participate in the class action at all.¹⁵⁶ That choice is no

Nonetheless, the commentators' suggestion that an auction be open to any buyer, including non-attorneys, would eliminate the dilemma of unqualified counsel winning the bid, because once a party owns the lawsuit, it would be incumbent upon her to choose the best attorney to represent her interests. See *supra*, notes 127-130. Under that system, the class is not a party to the litigation, thus the court would have no obligation to monitor counsel quality.

¹⁵⁴ The bulk of shareholders holding the majority of securities in public companies are large institutional investors, such as bank trust departments, mutual funds and insurance companies. WILLIAM L. CARY & MELVIN ARON EISENBERG, *CORPORATIONS* 194-96 (6th ed. 1988). These investors long have fought for recognition as corporate owners, which has not only resulted in widespread acceptance of that fact, but in favorable rulings from the SEC giving them greater power and more access to information. Leslie Wayne, *Have Shareholder Activists Lost Their Edge?*, N.Y. TIMES, Jan. 30, 1994, at F7.

¹⁵⁵ See *supra* notes 19 & 123 and accompanying text.

¹⁵⁶ Under the *Oracle* auction method, if a named plaintiff's attorney was any firm other than Lowey, Dannenberg, Bemporad & Seliger, the firm who had successfully bid for the position of lead counsel, plaintiff's firm still would have represented plaintiff by participating in the litigation under the supervision of lead counsel. See *supra* notes 19-23 and accompanying text.

choice at all for a sophisticated investor who has carefully chosen counsel for litigation.

CONCLUSION

It may be too soon to predict whether Judge Walker's daring decision ultimately will change the current status of compensating attorneys in common fund litigation. But the time for fee competition in the courts has arrived. The country is no longer in the spending mode of the 1980s, and disgruntled courts like those in the Ninth Circuit may demand that parties engage in less expensive alternatives. Plaintiffs' attorneys may even begin to seek bidding procedures as more courts become reluctant to enhance their fees under a lodestar regime. As shareholders increasingly file claims of securities laws violations, they, too, are apt to become involved in the litigation to monitor their ever-decreasing investments.

While no other court has yet to follow Judge Walker's lead, at least three have taken note of his innovation. In Oregon, a corporate defendant in a shareholder class-action suit opposed plaintiffs' motion to establish lead counsel and petitioned the district court judge to employ the competitive bidding process to select lead counsel and predetermine their fees to defray costs.¹⁵⁷ In addition, two district judges in Illinois have championed the approach. When faced with the prospect of computing yet another complex lodestar calculation, District Judge Shadur, in *In re Telesphere International Securities Litigation*,¹⁵⁸ made it clear that, were the court ever again faced with a multiple class action suit, "as the sincerest form of flattery," it would "give serious consideration indeed to follow Judge Walker's lead."¹⁵⁹ Similarly, District Judge Grady noted that the auction method is desirable in instances where plaintiffs' counsel has bitterly fought for the position of lead counsel because the court is then in a position to drive down

¹⁵⁷ *Cooperman v. Powell*, Nos. 91-37-FR, 91-42-FR, 91-54-FR, 1991 U.S. Dist. LEXIS 4941 (D. Or. Apr. 9, 1991).

¹⁵⁸ 753 F. Supp. 716 (N.D. Ill. 1990).

¹⁵⁹ *Id.* at 721 n.12. Judge Shadur reiterated support for the method in *Davis v. Coopers & Lybrand*, [1991-92 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,461 (N.D. Ill. July 25, 1991).

their fees.¹⁶⁰

While many are disillusioned by the current system, the intricacy of awarding fees to counsel cannot be avoided in complex class action suits. Indeed, the real problem that courts and commentators have with the system is not the complexity of the fees systems currently in use, but rather their belief that lawyers are reaping windfalls under these regimes. The public is in agreement. When a judgment is high, as they tend to be in securities litigation, coupled with relatively small awards to the numerous individual plaintiffs, criticism of plaintiffs' attorneys is especially fashionable. While auctioning off the position of lead counsel has many problems, it will create competition among firms through which the best firms should emerge and, accordingly, dissipate concerns over giving the contract to the "lowest bidder."¹⁶¹

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¹⁶⁰ *In re Continental Sec. Litig.*, 813 F. Supp. 633, 638-39 (N.D. Ill. 1993).

¹⁶¹ Wilford, *supra* note 1, at 25.

