Michael Ferry For Legal Services Of Eastern Missouri

Q: Why do courts allow class actions where the consumer members of the class get only a small recovery while the lawyers make millions?

That doesn’t seem fair.

A: Your question raises two issues that should be looked at separately.

First, let’s look at the small-recovery issue. It’s quite true that in some kinds of cases, especially consumer cases, the individual recovery will be small. But that’s exactly the kind of case in which a class action makes sense.

Suppose a dishonest computer expert working at a bank figured out how to steal $1 from each one of the bank’s 1 million account holders (it’s a big bank). The expert gets caught. What should he be charged with? 1 million counts of petty theft? Or one count of grand larceny?

Which choice most closely reflects the true nature of his scheme and the scope of his actions? Which one makes more sense in terms of court resources?

Some consumer class actions involve claims that are individually small, but when aggregated together, involve millions of dollars. If you make each of those consumers pursue his own claim for $1, or even $100, most of them won’t. By the time they get done paying a lawyer and the court costs, they’ll lose money and clog up the courts. So most of those cases never will be brought. The result: justice will not be done.

But if all of those small claims can be combined into one big case, then pursuing that case may make economic sense. The benefit to each individual class member may be small. But the benefit to the class as a whole may be large. The effect on the wrongdoer also may be large. The message will be made clear: cheating people in small ways is just as bad as cheating them in large ways.

Now to your second issue. When you ask whether lawyers for the class should make millions while individual class members get little, it seems to me you’re comparing apples and oranges. The class lawyers aren’t representing each individual, they’re representing the class as a whole. So in looking at whether their fees are excessive, you should be looking at what they did for the class as a whole, or in appropriate cases, what they did for the marketplace. It would be absurd to say that a lawyer should get to charge someone $10,000 to pursue that person’s claim for $10. But if a lawyer represents a class of 3 million people and gets them $10 each, the lawyer has recovered $30 million for the class. Is a fee of millions fair in that case? The answer will depend on a lot of things: how much time was spent, how much risk was taken, how hard was the work and many others. I don’t think anyone can say the answer is clearly no.

Like any legal device, class actions can be abused. The abuse can come from plaintiff’s lawyers willing to sell out the class for personal gain. It also can come from defendants who try to undercut cases brought against them by recruiting phony plaintiffs to sue them on behalf of a class, settling with the phony plaintiffs on easy terms and then arguing that the settlement has made the other cases moot.

But that doesn’t mean we should stop allowing class actions. After all, we don’t stop using contracts just because some businesses misuse them.

Instead, we should look at each case on its own merits. If a particular settlement is unfair, class members should object, and courts should act independently to prevent abuse. A public-interest law firm called Trial Lawyers for Public Justice (202-797-8600) has opposed class-action settlements it believed to be against the public interest, while at the same time vigorously supporting the responsible use of class actions as an important way of protecting consumers.