IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

JACQUELINE DOTSON et al.	:	
	:	
Plaintiffs	:	
	:	
v.	:	Case No. CAL 99-21004
	:	
	:	
BELL ATLANTIC-MARYLAND, INC. et al.	:	
	:	
Defendants	:	
**********		Consolidated With
FAUSTO SCROCCO et al.	:	
	:	
Plaintiffs	:	
	:	Case No. CAL 00-09962
v.	:	
	:	
BELL ATLANTIC-MARYLAND, INC. et al.	:	
	:	
Defendants	:	
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OPINION AND ORDER OF COURT

> **"I suspect there are great numbers of contracts that may be rendered usurious by the majority opinion, and class action lawyers will have vast new vistas to explore."**
>
> **Judge Howard Chasanow, Dissenting, *United Cable Television of Baltimore Limited Partnership v. Louis Burch et al.*, 354 Md. 658, 694, 732 A.2d 887, 906 (1999).**

As predicted, class actions lawyers have, in fact, been roaming this State as paladins for the putative classes of oppressed late fee payers. Indeed, they appear to be surveying virtually every commercial enterprise in Maryland which may finance the payment for whatever product or service they sell in order to determine if the financing formula utilized

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by the industry violates the 6% per annum cap that the Maryland Court of Appeals says Article III, § 57 of the Maryland Constitution proscribes universally in this State. Following these determinations, it appears that suits on behalf of named late fee paying customers are filed by those law firms and lawyers who specialize in the filing and litigating of class action suits. Those lawsuits are accompanied by Requests for Class Certification of those customers who have and/or are paying those usurious charges and fees, albeit, of necessity in most cases for comparatively small amounts varying from $5.00 to $50.00 for each customer. In the Circuit Court for Prince George's County alone, in addition to the cable companies which started the class action ball rolling, such suits have been filed against, among others, equipment rental companies, automobile financing companies, car dealers, telephone companies, utilities, tire centers, healthcare companies, and health insurance companies. These unfolding legal scenarios render Judge Chasanow's Dissenting Opinion in *Burch* at a minimum prescient, if not prophetic.

More importantly, the issue Judge Chasanow's Dissent raises ominously hovers over the consideration by this Court of the Class Plaintiffs' Motion for Final Approval of Class Action Settlement, Award of Attorneys' Fees and Expenses to Class Counsel and Entry of Final Judgment, as well as the Objections to Stipulation of Settlement by Objecting Class Members known as the "Boyd Objectors." That issue is whether this Court and other circuit courts in Maryland wish to encourage lawyers, who specialize in class action litigation, whether they be Class Counsel in the instant case or any lawyers who specialize in class action litigation, to continue filing class action suits to recover small, but fair amounts of compensation for every late fee paying customer in the State. Incentives to do so are provided by awarding substantial attorney's fees for filing and litigating these claims.

This Court is mindful that the purpose of a class action lawsuit is to "provide a mechanism for litigation of small claims that no individual plaintiff would have the incentive to bring." *In Re Microsoft Corp. Antitrust Litigation*, 214 F.R.D. 371, 378 (2003). Nevertheless, this Court does not believe that this purpose justifies litigation as a class action of every small claim that an individual plaintiff would otherwise not have an incentive to assert. There is, therefore, a serious issue which perhaps the Legislature or the Judiciary by Rule should address as to whether the multitude of cases and ensuing large amounts of time and money allocated to the costs of this litigation to correct, and perhaps deter, the illegal overcharging of late fees is the most efficient way to ensure fairness to those persons who have paid usurious late fees, particularly in light of the fact that for the most part the recovery is between $5.00 and $50.00 per customer.

These "late fee cases" are not like product liability, securities fraud, or anti-trust cases. Neither the individual citizens, who have been damaged, nor the larger economy have been substantially affected. There are no life threatening or economically impoverishing damages caused by the payment of usurious late charges.

It goes without saying that the commercial enterprises in Maryland, who are the targeted defendants in these cases, including Bell Atlantic-Maryland, Inc. in the instant case, should not feel free to charge constitutionally usurious late fees, nor should they be legally immune if they do so. There is no question that they should be held accountable for this practice once the highest court in this State says they have been operating illegally as the Maryland Court of Appeals has done in *Burch*. This Court does not, in any way, condemn or even criticize Class Counsel in this case or any other lawyers specializing in class action litigation for playing on the fertile field planted by the Judiciary. They are entitled to identify

emerging and lucrative areas of practice, including those generated by appellate court decisions, and then pursue them as legal entrepreneurs. But, particularly in this and other cases, the benefit received by the affected individuals and by society should be weighed against the costs of obtaining it before the legal system, *i.e.* the courts provide powerful incentives in the form of large awards of attorney's fees to further file and pursue litigation of late fee cases.

This Court, in the instant case, has weighed the potential benefits received by the individual and business customers of Bell Atlantic in these consolidated cases against the costs, particularly the proposed attorneys' fees, and found them disproportionate. The Class Motion for Final Approval of Class Action Settlement, Award of Attorneys' Fees and Expenses to Class Counsel and Entry of Final Judgment will therefore be denied for the reasons that follow:

FACTS

This consolidated case began as two class action suits filed in 1999 and brought on behalf of certain Bell Atlantic-Maryland, Inc. telephone service subscribers who were charged late fees in violation of Article III, § 57 of the Maryland Constitution. *United Cable Television of Baltimore Limited Partnership v. Louis Burch et al.*, 354 Md. 658, 732 A.2d 887 (1999). The Plaintiffs in *Dotson* consist of a class of individuals who purchased Bell Atlantic's residential telephone services. The Plaintiffs in *Scrocco* consist of businesses that purchased Bell Atlantic's services. The cases were consolidated on December 12, 2002 by this Court's Order as a result of Joint Motion for Consolidation, Recertification and Preliminary Approval without opposition.

The Plaintiffs alleged that Bell Atlantic charged late paying customers a $5.00 monthly fee that exceeded the 6% per annum cap that Article III, § 57 of the Maryland Constitution placed on interest rates that are not specifically authorized by statute. The Plaintiffs asserted claims for restitution of all illegal late fees paid, plus prejudgment interest, and for the disgorgement of all profits that Bell Atlantic had realized as a result of assessing these late fee charges. The Plaintiffs moved for class certification in November, 1999. The class definition was certified by this Court (McKee, C.J.) on January 31, 2000, and included "all persons (excluding the Trial Court Judge and members of his or her immediate family) who are current and/or former residential subscribers of telephone services provided by Bell Atlantic-Maryland, Inc. in the State of Maryland who have paid to Bell Atlantic-Maryland, Inc. a late payment charge that exceeds six percent (6%) per annum, and who have made such payments within the applicable limitations period."

In December 1999, Bell Atlantic moved to dismiss the Plaintiffs' Amended Complaint on the grounds that the Maryland Public Service Commission ("PSC") had authorized the subject late fees, the Plaintiffs had not exhausted their administrative remedies through the PSC, and therefore, the claims for Restitution and Unjust Enrichment failed to state a cause of action as a matter of law. The Plaintiffs filed a Second Amended Class Action Complaint on December 27, 1999 and moved for summary judgment on January 31, 2000. By Order of Court May 16, 2000, the Court (McKee, C.J.) granted Bell Atlantic's Motion to Dismiss in part by dismissing the Plaintiffs' cause of action for Restitution, Count 1, but allowed Plaintiffs to go forward on Count II, the Unjust Enrichment theory. The Court (McKee, C.J.) on that same date also granted the Plaintiffs' Motion for Summary Judgment as to liability only on Count II – Unjust Enrichment.

On July 18, 2000, Bell Atlantic filed a Motion for a Stay of All Proceedings on the grounds that the Maryland Court of Appeals was considering the constitutionality of the provisions of Chapter 59 of the Acts of 2000, which retroactively authorized the late fees at issue in this case for the entire class period. On August 9, 2000, Judge McKee granted Bell Atlantic's Motion to Stay all proceedings.

On August 29, 2002, in the case of *Dua v. Comcast Cable of Maryland, Inc., et al.*, 370 Md. 604, 805 A.2d 1061 (2002), the Court of Appeals held that the retroactive provisions of Ch. 59 and 569 violated Articles 19 and 24 of the Maryland Declaration of Rights and Article III, § 40 of the Maryland Constitution. Thereafter, on September 17, 2002, Judge McKee lifted the previously imposed Stay of these proceedings.

On December 9, 2002, the Class Plaintiffs and the Defendant Bell Atlantic submitted a Stipulation of Settlement to this Court and moved for preliminary approval. The Maryland Public Service Commission also a party, while previously on record taking the position that the Court lacked jurisdiction over the subject matter as it had been pled in the Complaint in its current form, nevertheless filed no opposition to the proposed settlement on jurisdictional, procedural, or substantive grounds, and later at the hearing on May 5, 2003, where this Court considered the final approval of the settlement stated on the record that it had "no objection" to the Court's approving the settlement.

On December 12, 2002, the Court (McKee C.J.) granted Preliminary Approval of the Settlement. Notices were then sent out pursuant to this Court's Order. On April 11, 2003, certain objecting Class Members, the "Boyd Objectors", filed Objections to Stipulation of Settlement and on April 18, 2003, filed a Motion to Intervene with Authorities.

The Notice of Class Certification, Proposed Settlement and Hearing was mailed as a billing insert to all of Bell Atlantic's current customers between February 3, 2003 and March 7, 2003. The Notice was published in a single edition of USA Today on January 2, 2003. The notice was made available on a website entitled http://md.latefeesettlement.com/ from December 22, 2002 until June 21, 2003. The law firm of O'Melveny & Meyers created and maintained the website in-house. (Plaintiff's Motion, Exhibit 5, Affidavit of Ira H. Raphaelson, pg.2, ¶ 8).

Of note, all forms of the notice contained the typographical error that the opt out date was April 11, 2002, instead of 2003. The Website Notice was the only notice form where the error was corrected. That was done on February 19, 2003, with the following statement "The opt out date is April 11, 2003 (NOT 2002)." (Plaintiff's Motion, Exhibit 5, Affidavit of Ira H. Raphaelson, pg.3, ¶10).

The Settlement Agreement

The Settlement Agreement submitted by counsel for the two classes in this consolidated action for approval by this Court in substance proposes to release all claims that could have been asserted by Class Members that arise out of or relate to the billing and collection of late fees by Bell Atlantic. In exchange for the release from liability, a reversionary fund of $51,900,000 is reserved from which claims properly made and documented by Class Members will be paid. Under Option (1), Class members who submitted a Proof of Claim by June 21, 2003, would receive a payment of $6.00 from Bell Atlantic without any further documentation. Former customers would receive a check and current customers would receive a credit to their bill. The Settlement also alternatively

would permit Class Members to claim sixty percent (60%) of the late fees they actually paid, *provided they submit a Claim Form, a Proof of Payment in the form of either a sworn statement made under the penalty of perjury, identifying the total amount of late fees paid between 1996 and 1999 (for claims up to $50) or documentary evidence of paid late fees for claims in excess of $50.* Under the Agreement, Bell Atlantic would reserve the right to verify all Proof of Claims submitted. Under the terms of this Settlement Agreement, Bell Atlantics' potential liability to Class Members is capped at $51,900,000. There is no minimum dollar value set that Bell Atlantic is required to pay out in direct relief to the Class Members or in indirect relief via a cy pres fund.[1] Rather, all unclaimed funds revert back to Bell Atlantic. Each of the Named Plaintiffs will receive an Incentive Award of $500, payable by check.

The Plaintiff's Class Counsel have asked this Court to approve an award of $13 Million Dollars in Attorneys' Fees, which Bell Atlantic, as part of the Settlement Agreement, has agreed not to oppose in consideration of the other provisions of the total Agreement between the Class and Bell Atlantic. Plaintiff's Class Counsel contends that the $13 million dollars constitutes approximately 20% of $64,900,000, the total award, including Attorneys' Fees, sequestered by Bell Atlantic under the terms of this proposed settlement. That calculation is mathematically correct and, in and of itself, not remarkable.

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[1] Cy-pres " As near as (possible). The rule of *cy-pres* is a rule for the construction of instruments in equity, by which the intention of the party is carried out as near as may be, when it would be impossible or illegal to give it literal effect." Black's Law Dictionary, Fifth Edition. "The cy pres approach is most frequently used for the purpose of distributing the residue of a class settlement fund." *In re Microsoft Antitrust Litig.*, 185 F.Supp.2d 519, 523 (2002) citing *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703 (8th Cir. 1997); *In re Motorsports Merch. Antitrust Litig.*, 160 F.Supp. 2d 1392 (N.D. Ga. 2001); *Jones v. Nat'l Distillers*, 56 F.Supp. 2d 355 (S.D.N.Y 1999). "It has also been utilized as a means for distributing the entirety of a class fund where the proceeds cannot be economically distributed to class members." *In re Microsoft Antitrust Litig.*, 185 F.Supp.2d 519, 523 (2002) citing *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347 (E.D.N.Y. 2000); *New York v. Reebok Int'l Ltd.*, 903 F.Supp. 532 (S.D.N.Y. 1995), aff'd, 96 F.3d 44 (2d Cir. 1996); 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 11-20 (3d ed. 1992); 7B Charles Alan Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1784, at 84 (2d ed. 1986)."

STANDARDS FOR SETTLEMENT APPROVAL

Maryland Rule 2-231(h) does not express, or even reference, any standards against which a circuit court may measure, and ultimately approve or disapprove, a proposed settlement agreement in a class action suit. Nor have circuit courts in Maryland had any experience or cases to develop such standards, which have then been tested by appellate review. This Court therefore must look for guidance to the Federal Courts, particularly the U.S. District Court for the District of Maryland to assist it in deciding whether the Settlement Agreement in the instant case is fair, adequate and reasonable under the circumstances

Maryland Federal District Courts have taken an approach where fairness and adequacy are considered as two categories. In *In Re Montgomery County Real Estate Antitrust Litigation*, 83 F.R.D. 305, 316–317 (D. Md. 1979), Judge Stanley Blair conducted a bifurcated analysis whereby separate inquiries were made regarding fairness and adequacy. As to fairness, Judge Blair stated:

> "The factors tending to reveal the fairness of a settlement are those which indicate the presence or absence of collusion among the parties. Because of the danger of counsel's compromising a suit for an inadequate amount for the sake of insuring a fee, the court is obligated to ascertain that the settlement was reached as a result of good faith bargaining at arm's length. The good faith of the parties is reflected in such factors as the posture of the case at the time settlement is proposed, the extent of discovery that has been conducted, the circumstances surrounding the negotiations and the experience of counsel."

Id. at 315.

As for the adequacy element, Judge Blair enumerated the following factors:

> "In evaluating the adequacy of a proposed settlement, the court must weigh the likelihood of the plaintiff's recovery on the merits against the amount offered in settlement. This necessarily requires the court to make a careful assessment of all the facts and a thorough analysis of the applicable law. It is not, of course, necessary or desirable to try the case to determine whether a settlement is adequate since the very purpose of settlement is to avoid the trial

> of sharply disputed issues and to dispense with wasteful litigation. In assessing adequacy of the proposed settlement, courts should weigh the amount tendered to the plaintiffs against such factors as (1) the relative strength of the plaintiff's case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; (5) the degree of opposition to the settlement.

Id. at 315-316.

Federal courts in Maryland have followed the bifurcated approach established by Judge Blair. *See In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F.Supp. 1379, 1383 (D.Md. 1983), *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 158-159 (D.Md. 1991). Additionally, the MANUAL FOR COMPLEX LITIGATION, THIRD § 30.42 at 238 (1995) describes the role of the court during settlement:

> "In determining whether a settlement should be approved, the court must decide whether it is fair, reasonable, and adequate under the circumstances and whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued. Although settlement is favored, court review must not be perfunctory; the dynamics of class action settlement may lead the negotiating parties – even those with the best intentions – to give insufficient weight to the interests of at least some class members."

This Court may not rewrite a settlement agreement, if it is unacceptable. The Court must disprove it. *Evans v. Jeff D.*, 475 U.S. 717, 727 (1986). However, proponents may revise their agreement to overcome the court's objections and resubmit it. If the changes are substantial, it may be necessary to begin the notice and review process anew. MANUAL FOR COMPLEX LITIGATION, THIRD. § 23.14 at 172.

This court finds the Settlement Agreement unacceptable on several grounds and will explain below.

NOTICE

Although rigid standards do not govern the contents of settlement notice to Class Members, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652, (1950), notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *In re Mid-Atlantic Toyota Antitrust Litigation*, 585 F.Supp. 1553, 1563, (D.Md. 1984), *citing Grunin v. International House of Pancakes*, 513 F.2d 114, 122, (8th Cir. 1975). Class Plaintiff's Counsel reports that the direct mail notice was sent to approximately 2.5 million households and businesses, that publication in USA Today reached an additional 2.2 to 2.5 million persons across the country, and that notice was available 24 hours a day on the "md.latefeesettlement.com" Website. (Class Plaintiffs' Motion, pg. 30, *citing* Exhibit 5 Affidavit of Ira H. Raphaelson). Additionally, Class Plaintiff's Counsel states that only 2 Class Members chose to opt out by the April 11, 2003 deadline, and the sole objection was filed by the Boyd Objectors.

This Court's reservations about the Notice of the Proposed Settlement in this case are neither driven by the means of delivering the Notice itself nor the by the method that the Members of the Class have to utilize to access it, *i.e.* the Website. Nor does the number of households and individuals who actually saw the Notice concern this Court. Rather, the Court's refusal to approve this Settlement results from Notice's content and format.

Specifically, the Direct Mail Notice itself did not contain information regarding the $13 million in Attorneys' Fees. Instead, the Direct Mail Notice cited a website address where the information regarding Attorneys' Fees could be obtained. This format is contrary

to guidance provided in several cases, including *Goldenberg v. Marriott*, 33 F.Supp.2d 434 (D.Md. 1998). In *Goldenberg*, Judge Messitte stated:

> "Notice of the potential extent of attorneys fee awards is deemed essential because it allows class members to determine the possible influence of the fees on the settlement and to make informed decisions about their right to challenge the fee award." Id. at 441.

Judge Messitte also noted "Some courts, in fact, have invalidated class action settlements because of class counsel's failure to notify the Class Members of the potential extent of their fee award." Id. *citing In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1130 (7th Cir. 1979); *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980).

The MANUAL FOR COMPLEX LITIGATION, THIRD § 30.212 at 228 recommends that notice of a proposed settlement should provide information regarding attorney's fees. Moreover, this Court takes judicial notice of the United States Supreme Court's recent approval of an amendment to the Federal Rules of Civil Procedure, Rule 23(e) Settlement, Voluntary Dismissal, or Compromise. The amendment is under Rule 23 (e)(2) and requires that "The parties seeking approval of settlement, voluntary dismissal or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal or compromise." (U.S. Supreme Court Endorses Package of Federal Rule Amendments, 71 U.S.L.W. 2615, 2615 (Apr. 1,2003). Unless Congress alters the proposed rule, the amended version of Rule 23 will take effect December 1, 2003. *Id.*

The Supreme Court's approval of this amendment has been described as a "fortunate" change in legal commentary on clear sailing agreements (addressed *infra*), given that currently there is no rule requiring that settlement notices containing clear sailing agreements include the information on the compensation that will be paid directly to class counsel.

William D. Henderson, "*Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements,* 77 Tul. L. Rev. 813, 815 and n.5 (2003). Thus, should the rule be approved in its current form, agreements regarding attorneys fees will have to be identified in a statement, even if they are unaddressed in the notice to the class, which was not done in this case.

ATTORNEYS' FEES

This Court finds itself squarely in the middle of the exploration of one of the "new vistas" predicted so presciently by Judge Chasanow in *United Cable.* This Court is not, however, without guidance in this new territory, since the last quarter century has seen a wealth of commentary from courts and legal commentators regarding the need for judicial scrutiny of attorneys' fee awards in the class action environment.

A particular concern cited by courts and commentators alike is that "class actions will prove less beneficial to class members than to their attorneys." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 519, 520 (1st Cir. 1991) *citing Piambino v. Bailey (Piambino II)*, 757 F.2d 1112, 1143-44 (11th Cir. 1985), *cert. denied.*, 476 U.S. 1169, 106 S. Ct. 2889, 90 L. 2d Ed. 976 (1986).

In support of their Petition for $13 million in Attorneys' Fees, Counsel for Class Plaintiffs make extensive arguments citing their long hard hours and derring-do in the hallowed committee rooms and corridors of the General Assembly of Maryland, as well as the busy courtrooms of the Circuit Court for Baltimore County and the more solemn and imposing courtroom of the Court of Appeals of Maryland while waging a "hard fought battle" against the forces of evil "arrayed against" them in the battle over House Bill 251, Chapter 59 of the Acts of 2000. Indeed, the level of heroics in this litigation, described by

Class Counsel as, *i.e.* "hard fought," "hotly" and "bitterly" contested, "full court press," and "surmounted myriad novel questions of law and fact," rivals those contained in Homer's great classics the Iliad and the Odyssey.

With respect to basing an award of Attorneys' Fees based on lobbying work on legislation being considered by the General Assembly, while this Court has no doubt that the work cited was performed and the hours spent as class counsel has claimed, I am not persuaded that it was directed, or even authorized, by either the Class itself or even the named Members of the Class. Maryland Rule of Professional Conduct 1.2. Scope of Representation, provides: "(a) A lawyer shall abide by the client's decisions concerning the objectives of representation, subject to paragraphs (c) (d) and (e), and, *when appropriate, shall consult with the client as to the means by which they are to be pursued.*" The record is devoid of any indication that Class Counsel consulted or even communicated with the Named Plaintiff's, or in some way the Class itself, regarding their extensive lobbying efforts in Annapolis.

This Court is of the opinion that Class Counsel's retention of "two professional lobbyists to fight the retroactive legislation" (Class Plaintiff's Motion, pg. 3) "on behalf of the class" (Affidavit of Paul D. Gleiberman, pg. 7, at 12.) would certainly have been an appropriate issue to discuss or in some way communicate with the Class, or at least its Representative Plaintiffs pursuant to Rule 1.2. I am also not persuaded that this lobbying was not undertaken primarily to preserve potential fees earned in this and other cases, as well as future fees which might be earned, exploring the vistas Judge Chasanow foresaw rather than to protect individual recoveries by each Member of the Class in this case, which would

largely range between $6.00 and $50.00 per person. This Court, therefore, rejects this lobbying activity as a basis for Attorneys' Fees or an enhancement thereof in this case.

Class Counsel states that under the Percentage of Fund Theory or the Lodestar Method, cross-checked against Maryland Rule 1.5(e), their award of $13 million is justified. Class Counsel asserts, "The standard for reviewing a petition for attorneys fees in the class action context was settled by the Court of Appeals in *United Cable v. Burch*." (Class Plaintiff's Motion, pg. 60). However, no such "standard" was announced and the law on this subject was not settled by the Court of Appeals in *United Cable v. Burch*, 354 Md. 658, 732 A.2d 887 (1999). Rather, in discussing the issue of attorney's fees, in *Burch*, the Court of Appeals stated:

> "There is no need in the present case for this Court to mandate a particular methodology. As the circuit court described its process, it determined the award basically as a percentage of the fund, and then checked that result against the factors in Model rule of Professional Conduct 1.5(a). This is a blend of the approaches advocated by the parties, and as a methodology, it was within the discretion of the circuit court."

Id. at 687.

The Court of Appeals in *Burch* therefore simply reiterated what it and the Court of Special Appeals have noted on prior occasions, which is that a circuit court has wide discretion to consider Class Counsel's request for fees based either on the Lodestar Method, Percentage of Fund Method, or a blend of both. *Id.* A trial court enjoys a large measure of discretion in fixing the reasonable value of legal services. *Head v. Head*, 66 Md. App. 655, 669, 505 A.2d 868 (1986). That amount will not be disturbed unless it is clearly an abuse of discretion. *Head*, at 669.

In *Friolo v. Frankel*, 373 Md. 501, 515, 819 A.2d 354, 370 (2003), Judge Wilner, writing for a unanimous Court of Appeals, directed that a circuit court when considering attorneys fees with the:

> "lodestar approach, or, indeed any other, we must be mindful of Rule 1.5 of the Maryland Rules of Professional Conduct, which also requires that a lawyer's fee be reasonable and which sets our factors to be considered in determining the reasonableness of the fee. Most of them are identical or similar to the factors enumerated in *Johnson v. Georgia Highway Express*...which the *Hensley* Court indicated were relevant even in a lodestar analysis."

The Court noted the importance of the Rule because "it puts a limit on what a lawyer may charge his or her own client." *Id.* at 515. This court takes particular judicial notice of the factor listed in Rule 1.5(a)(4), "the amount involved and the results obtained," which is to be considered in determining the reasonableness of an attorneys' fee. In *Friolo*, the Court of Appeals also cited their conclusion in *Attorney Griev. Com'n v. Korotki*, 318 Md. 646, 665, 569 A.2d 1224, 1233 (1990) that "it is generally a violation of the rule for an attorney's stake in the result to exceed the client's stake."

In order for Counsel for Class Plaintiff's fee not to violate Rule 1.5, or the prohibition on an attorney's stake exceeding the client's stake, this court would have to accept Class Counsels assertion that the true settlement value to the class of the proposal before the Court is $64,900,000.00. Class Counsel arrives at this valuation by adding the $51,900,000.00 settlement fund and the $13,000,000.00 award of attorneys' fees together, citing *Petruzzi's Inc. v. Darling-Delaware Company, Inc.*, 983 F.Supp. 595, 604 (D. Pa. 1996) for the proposition that "Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery." In further support of their theory, Counsel cites a host of cases, many from the 9th Circuit, which this court does not find persuasive. Counsel

states that they have spent "more than 12,000 hours of professional time (for an aggregate lodestar of $5,434,000)." Counsel states "[t]ime is both retrospective and prospective, including any future work required to be done to support this settlement." In addition, this court notes that the description of time expended and the activities of counsel in both this Motion and in the Affidavit by Paul Gleiberman is far too general to base approval of an award using the Lodestar Method.

Class Counsel also requests a "risk multiplier" of 2.4 under the Lodestar Method. The use of risk enhancements or risk multipliers in common fund cases is unsettled. However, in *Blum v. Stenson*, 465 U.S. 886, 898, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984), the United States Supreme Court established a "strong presumption" that the Lodestar represents the "reasonable" fee, and placed the burden upon the fee applicant who seeks more than that of showing that such an adjustment is necessary to the determination of a reasonable fee and in *Burlington v. Dague*, 505 U.S. 557, 120 L.Ed. 2d 449, 112 S.Ct. 2638 (1992) invalidated the use of multipliers in Lodestar awards under fee shifting statutes.

Very simply put, this court is not persuaded that the value to the Class is $64,900,000 of the Settlement proposed in this case, and therefore, a fee of $13 million cannot be approved based thereon. Instead, this Court holds that like the settlement value advocated by Class Counsel in *Strong v. Bellsouth*, 173 F.R.D. 167, 172 (W.D. La 1997), the $64,900,000 figure is "a phantom."

The *Strong* court noted that while a Lodestar equation is a useful starting point, *a valuation of the results achieved in a class action settlement is essential to a final determination of attorney's fees. Strong,* 173 F.R.D. at 172. In *Strong*, Class Counsel argued that the potential maximum value of the settlement was $66 million if all Class Members

eligible for a credit returned a claim form. *Id.* However, when all the settlement claim forms were returned by Class Members, the actual value of the credit requests only totaled $1,718,594.40. *Id.* The court adjusted the valuation to $2 million, noting that there "may have been intangible benefits to the class," but refused to approve the additional request of $1.5 million in attorneys' fees, stating, "A request for $6 million in attorneys' fees where counsel has provided no more than $2 million in benefits to the class is astonishing. It is a sad day when lawyers transmogrify from counselors into grifters. Suffice it to say that we find the request unreasonable." *Id.*

This Court, therefore, declines to approve a Settlement that includes an award of Attorneys' Fees based on phantom numbers and calculations based thereon, including a partial foundation of lobbying hours found by this Court to be not client directed or even authorized.

In disapproving the settlement as structured, this court recommends the solution followed by numerous courts faced with requests for attorneys' fee based on estimated values of a settlement funds. The practical solution to this problem is to make sure the fee awarded is appropriate to the value actually received by the Class Members. *Duhaime et al. v. John Hancock Mutual Life Insurance Company, et al.*, 989 F.Supp. 375, 378 (1997), *citing Bowling v. Pfizer, Inc.*, 922 F.Supp. 1261, 1283-84 (S.D. Ohio), *aff'd*, 102 F.3d 777 (6th Cir. 1996)(holding back large proportion of fee award until additional "future" benefits to class were actually paid into class fund); *Strong v. BellSouth Telecommunications, Inc.*, 173 F.R.D. 167, 172 (W.D. La 1997)(Denying fee petition in its entirety because actual value of settlement fund based on credits sought by Class Members was $2 million, whereas class counsel had estimated its value at $64.5 million); *Voege v. Ackerman*, 70 F.R.D. 693, 695

(S.D.N.Y. 1976)(plaintiff's counsel awarded smaller fee than requested because shareholder participation in settlement had been minimal and actual financial benefit to them was "almost zero"); *Voege v. Ackerman*, 67 F.R.D. 432, 436-37 (S.D.N.Y. 1975)(reserving fee determination until all claims of shareholder entitled to participate in settlement had been filled and adjudged because extent of settlement's benefit to class could not be determined with any degree of exactitude beforehand.).

The *Duhaime* court also thought it of moment to note that in securities class actions, Congress has required that attorney fees "shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." *Duhaime*, 989 F.Supp. at 379 *citing* 15 U.S.C. § 78u-4(6)(1997). One method of ensuring that the fee award is appropriate to the actual value received by Class Members is by "staging" the payment of the attorneys' fee award. *Duhaime et al. v. John Hancock Mutual Life Insurance Company, et al.*, 989 F.Supp. 375, 378 (1997),

This Court agrees with the reasoning of the court in *Duhaime*, that the "proportionality of the attorneys' fee award to the relief actually accruing to the class is an important consideration in assessing the reasonableness of the fee award in the present case because it is that relationship that litigants in future cases will look to in structuring their own arrangements regarding attorneys' fees. Any fee approved by this Court is not only a matter of public record, it becomes part of the great body of our law." *Duhaime*, 989 F.Supp. at 379.

Citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745 (1980), Class Counsel assert that the value of the settlement should not be based on the claims actually made because even if remaining funds from the settlement revert back to the Defendant, the Class

Members are the "equitable owners" of their respective shares of recovery, whether or not they assert their right. *Boeing*, at 481, 482. Counsel for Class Plaintiff's also cite the Eleventh Circuit case of *Waters et al. v. International Precious Metals Corporation*, 190 F.3d 1291 (1999), *cert denied*, 530 U.S. 1223 (2000), for the proposition that "no case has held that a district court must consider only the actual payout in determining attorneys fees." *Waters*, 190 F.3d at 1295.

Interestingly, Counsel for Class Plaintiffs' overlook the Concurring Opinion of Justice Sandra Day O'Connor issued with the Supreme Court's denial of the Petition for Writ of Certiorari in *International Precious Metals Corporation, et al. v. Waters* et al., 530 U.S. 1223, 120 S.Ct. 2237 (2000). In her Opinion, Justice O'Connor discussed the court's decision in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) to uphold the award of attorney's fees where the award was based on the total fund made available to the class, rather than the amount actually recovered. Justice O'Connor noted that in *Boeing*, the Court did not address "whether there must be at least some rational connection between the fee award and the amount of the actual distribution to the class," and continued:

> "The approval of attorney's fees absent any such inquiry could have several troubling consequences. Arrangements such as that at issue here decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiff's recovery. They potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits where, because of the value of each class member's individual claim is small compared to the transactions costs in obtaining recovery, the actual distribution to the class will inevitably be minimal."

Justice O'Connor noted that the federal Court of Appeals have differed in their approaches to this problem, comparing *Strong v. Bellsouth Telecommunications, Inc.*, 137 F.3d 844, 852 (5th Cir. 1998)(where District court did not abuse its discretion in basing the attorneys' fee

award on the actual payout rather than on the reversionary fund) and *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (where the District Court abused its discretion in basing award on actual distribution to the class). In noting that she agreed with the Court's denial of the writ of certiorari, as the petitioners appeared to have waived the issue, Justice O'Connor stated, " I believe this issue warrants the Court's attention" and "the importance of the issue counsels in favor of granting review in an appropriate case." *International Precious Metals Corporation*, 530 U.S. at 1224-1225.

Finally, the "vigilance of the court is not diminished by the lack of opposition to the fee application by the Defendants" *Goldenberg*, 33 F.Supp.2d at 440, and the need for careful judicial review is not eliminated by the fact that the fee award does not come out of the common fund. Rather, this court is concerned about the presence of what is termed a "clear sailing" agreement between Counsel for Class Plaintiffs and Defendant Bell Atlantic.

In *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 519, 520 (1st Cir. 1991) the United States Court of Appeals for the First Circuit defined a "clear sailing" agreement as "one where the party paying the fees agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling." In *Great Northern Nekoosa*, the U.S. Court of Appeals for the First Circuit noted that the potential for conflict exists between a class and its attorneys when both the common fund is reduced by the attorney fee and when fees are paid directly to the attorneys, because a danger exists that "lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *Great Northern Nekoosa*, 925 F.2d at 524 (emphasis added). (*See also In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995)(recognizing that even when fees do not come

directly from the settlement fund, judicial scrutiny is required because "a defendant is interested only in disposing of the total claim asserted against it; ... allocation between the class payment and attorney's fees is of little or no interest to the defense.")(quoting *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3d Cir. 1977)).

This Court believes that this Proposed Settlement Agreement in the instant case contains, and indeed may result from, just the kind of "clear sailing" agreement that caused the U.S. Court of Appeals for the First Circuit in *Great Northern Nekoosa* concern. This Court shares that concern and applies it to the circumstances of this case as they relate to the request for $13 Million Dollars in Attorneys' Fees, as well as the lack of *clear* Notice to the Class of the amount and certainty of those fees and, therefore, by Order following this Opinion, denies the Class Plaintiffs' Motion for Final Approval of Class Action Settlement Award of Attorneys' Fees and Expenses to Class Counsel and Entry of Final Judgment.

In doing so, this Court does not hold that the actual terms of the payment proposed in this Agreement, *i.e.* the payment of $6.00 from Bell Atlantic without any further documentation, or the return of sixty percent (60%) of the late fees actually paid with further documentation, are either inadequate or unfair. They are not. In this Court's opinion, the individual and business Members of the Classes in each of these cases are fairly and adequately compensated for their undeniably small losses under the terms of the Proposed Settlement. This Court also does not hold that requiring a claim to be made in order to collect even the small recovery that the Class Members deserve, by itself causes this Agreement or any other Settlement to be either unfair or inadequate. Finally, this Court finds no evidence that there was conscious collusion between the Class Plaintiffs' Counsel and the Defendants. Indeed, this Court finds that they not only were "arms length," but until they

realized the confluence of their interests with this Agreement, they were locked in lengthy and at times legislative and litigation conflict.

No, this Court declines to approve this Settlement Agreement in this case for the reasons cited, *supra*, improper format of Notice of the Award of Attorneys' Fees and the Award of Attorneys' Fees itself because to do otherwise would make a reality the potential cited by Justice O'Connor in *Waters et al. v. International Precious Metals Corporation* that, unless the Court requires that there must be a rational connection between the fee award and the amount of the actual distribution of the Class, the underlying purpose of class actions will be undermined. *International Precious Metals Corporation, et al. v. Waters* et al., 530 U.S. 1223, 120 S.Ct. 2237 (2000).

A purpose of the class action lawsuit is to "provide a mechanism for litigation of small claims that no individual plaintiff would have the incentive to bring." *In re Microsoft Corp. Antitrust Litig.*, 214 F.R.D. 371, 378 (2003). This purpose is undermined by what the economical Ronald Coase refers to as "transaction costs" or "social costs," if they are disproportionate to the benefit received by society. As Coase notes in his seminal work "*The Problem of Social Cost.*" 3 JOURNAL OF LAW AND ECONOMICS at p. 27-28 (1960).

> "In a world where there are costs of rearranging the rights established by the legal system, the courts ... are, in effect, making a decision on the economic problem and determining how resources are to be employed.... The Courts are conscious of this and they often make, although not in a very explicit fashion, a comparison between what would be gained and what lost by preventing actions which have harmful effects."

In the instant case, this Court will speak explicitly. The transaction costs of the proposed recovery, particularly the component of those costs which totals $13 Million Dollars in Attorneys' Fees, for restoring moneys illegally charged and collected as "late fees" ranging from $6.00 to $50.00 by Bell Atlantic from individual and business customers are

not justified by the small benefit received by the Members of the Classes of customers affected, certainly not individually nor this Court holds even collectively. Accordingly, it is this 12th day of November, 2003, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Class Plaintiffs' Motion for Final Approval of Class Action Settlement, Award of Attorneys' Fees and Expenses to Class Counsel, and Entry of Final Judgment is hereby **DENIED**; and it is further

ORDERED, that this Opinion and Order of Court is without prejudice to the right of the parties through counsel to resubmit an Amended Proposed Settlement Agreement not inconsistent with this Opinion and Order of Court; and it is further

ORDERED, that the Office of Calendar Management set a further Scheduling Conference before this Member of the Court at the earliest convenience of the Court and counsel.

/s/
Judge Steven I. Platt

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