STATEMENT OF STUART H. SAVETT
TO THE THIRD CIRCUIT TASK FORCE
ON THE SELECTION OF CLASS COUNSEL

By way of background, I am a 1963 graduate of the Villanova University School of Law, where I was a member of both the editorial board of its Law Review and Order of the Coif. I am presently a member of the J. Willard O'Brien Inns of Court, as well as a member of the Board of Consultors to Villanova Law School, where I was a recent past president of the Alumni Association.

I am opposed to the Selection of Class Counsel based on a Bidding Process for the following reasons:

1. It is contrary to the Private Securities Litigation Reform Act of 1995 ("PSLRA"):

(a) The PSLRA established a presumption that the plaintiff with the largest financial relief at stake in the litigation is the "most adequate plaintiff" to represent the class. This presumptive lead plaintiff is charged with the responsibility of finding and retaining class counsel.

(b) The PSLRA refers to a "percentage award."

> "Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."

2. If a firm wins a bidding contest, thereby capping the fee award, there are still no assurances on the ultimate fee. According to the Third Circuit, the district court should (or must) cross-check the percentage award against the lodestar method, as well as considering seven factors. See Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195, n.1 (3rd Cir. 2000) ("Gunter"). In short, the fee can come down but not up.

The new recent Third Circuit opinion, In re Cendant Prides, 243 F.3d 722, 741 (2001) ("Prides"), might be construed to hold that no multiplier should exceed four times the lodestar, which could penalize counsel.

3. The bidding process requires the district judges to get more involved in both the beginning of the case and at the end of the case, pursuant to Prides, when judicial resources are scarce.

4. Some firms have been capping expenses in their bids. This puts all firms, particularly small ones, at risk, and causes problems in expending enough on resources in a given case. I am reminded of Judge Aldisert's observation in Kramer v. Scientific Control Corp., 534 F.2d 1085, 1092 (3rd Cir. 1976) that counsel would not take into consideration the amount of expense for which there may not be any reimbursement "is to argue against reality and against the vagaries of human nature. . . ."

5. Two factors which should be considered when appointing lead counsel should be whether the firm takes the effort and expense to investigate a case and drafts an exceptional complaint.

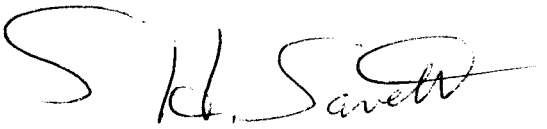
6. The Third Circuit should have a benchmark of 25% like the 9th Circuit. See Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989). If a judge wants to award more or less than that percentage, the district court just needs to explain its reasons. See Ferland v. Conrad Credit Corp., No. 99-56625 (9th Cir. April 5, 2001); and Powers V. Eichen, 299 F. 3d 1249 (9th Cir. 2000).

After 37 years of practice, most of which have been in the class action field on behalf of plaintiffs, I am concerned by the Third Circuit's guidance on the issue of a reasonable counsel fee.

Prior to Lindy, a reasonable percentage was awarded. Lindy forced the district courts into utilizing the lodestar process. During that period, however, many judges would work backwards, that is utilizing a percentage and then translating it into a multiplier exercise. Next came the Court Awarded Attorneys Fees, Reports of the Third Circuit Task Force ("Task Force Report"), 108 F.R.D. 237, 242 (1986). The Task Force Report recognized that the question of a reasonable fee could easily be converted into a mini trial, wasting the time and effort of the district court, recommending, inter alia, a percentage of recovery approach. Now after Gunter, the district court is still substantially involved in the fee process. The Task Force Report also recognized that "the lodestar calucation 'is subject to manipulation by judges who . . . first determine what they wish to award, either in percentage or dollar amount terms, and then massage the major variables in the [lodestar] fee-setting procedure.'" In Re: Prudential Insurance Company America Sales Practice Litigation Agent Actions, 148 F.3d 283, 340 (3rd Cir. 1998).

I also note that Gunter suggests that the district court could determine the fee arrangement in advance through competitive bidding. 223 F.3d at 201, n. 6. Prides seems to hold that no matter what the process is, the trial court must conduct an analysis under Gunter to include the seven factors, notwithstanding that Prides included such a process.

Respectfully submitted,



Stuart H. Savett

Dated: April 27, 2001

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