Dotson v. Bell Atlantic-Maryland, Inc., (Case No. CAL 99-21004) consolidated with *Scrocco v. Bell Atlantic-Maryland, Inc.*, Case No. CAL 00-09962, 2003 MDBT 11 (Circuit Court for Prince George's County) (November 11, 2003) (per Steven I. Platt)

Facts: In these consolidated cases, class certification was given to a class defined as "all persons" (excluding the Trial Judge and members of his immediate family) who are current and/or former residential subscribers of telephone services provided by Bell Atlantic-Maryland . . . for a late payment charge that exceeds six percent (6%) per annum and who have made such payments within the applicable limitations period."

The class plaintiffs and Bell Atlantic subsequently submitted a Stipulation of Settlement and moved for preliminary approval. On December 12, 2002, the Circuit Court for Prince George's County (McKee, C.J.) granted preliminary approval. Notices were then sent out pursuant to the Court's order. On April 11, 2003, certain objecting class members offered objections to Stipulation of Settlement.

The issue in this Opinion was whether the proposed settlement, in particular the part relating to attorneys' fees, would be approved.

Synposis: Judge Chasanow, in his dissenting opinion in *United Cable Television of Baltimore v. Louis Burch et al.*, 354 Md. 658, 694 (1999), predicted that the Court of Appeals' decision in that case would have repercussions for class action litigation. This case fell into that "new vista. In *United Cable*, the Court held that Article III, '57 of the Maryland Constitution imposed a 6% per annum cap on late fees. That section provides, "The Legal Rate of Interest shall be *Six per cent. per annum;* unless otherwise provided by the General Assembly."

The Court stated that while it is not proper for a Court to rewrite a proposed settlement, the proponents of the settlement may revise their agreements to overcome the Court=s objections. If changes are substantial, it may be necessary to begin anew the notice and review process.

The Settlement Agreement as proposed was unacceptable on several grounds. The proposed notice to class members was inadequate as to form and content. The Direct Mail notice was silent regarding the $13 million in attorneys' fees; instead, it gave a website address where information regarding attorneys' fees could be obtained. The Court stated that potential class members should be notified by counsel of the potential extent of the fee award.

With respect to the $13 million amount itself, the Court found the relatively small benefit received by the class members did not justify the transaction costs of the recovery, in particular the $13 million in attorneys' fees. There must be a rational connection between the fee award and the amount of the actual distribution of the class. The lobbying fees incurred by the class attorneys for lobbyists' services in the General Assembly on legislation which would have undone the *United*

Cable decision, while perhaps signifying an 'heroic' effort, was not communicated to the class. The battle instead was undertaken primarily to preserve potential legal fees which might be earned, rather than to protect individual recoveries by each member of the class.

The Court rejected class counsel's argument that the percentage of fund theory or the lodestar method, cross-checked against Maryland Rule 1.5(e), justified the award under *United Cable*. Rather, under *United Cable* a circuit court "has wide discretion to consider class counsel's requests for fees based on the Lodestar Method, Percentage of Fund method, or a blend of both." 354 Md. at 687. *See also Friolo v. Frankel*, 373 Md. 501, 515 (2003) (in assessing attorneys' fees, under the lodestar or any other approach, the fee must be reasonable).

The Court was not persuaded that the $64.9 million settlement was justified; instead the Court held it was a "phantom." The award of attorneys' fees was based on phantom numbers and calculations based thereon. Instead, the Court recommended the "practical solution," which is to make sure the fee awarded is appropriate to the value actually received by the class members. There must be a "rational connection."

The lack of a defendant's opposition should not diminish a court's vigilance. Defendants are interested in the bottom line amount, not the relative distribution. Rather, the Court here was concerned by the "clear sailing" agreement between counsel. A clear sailing agreement is 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 below a negotiated ceiling. Such agreements are of concern because a potential for conflict exists between a class and its attorneys when both the common fund is reduced by the attorneys' fees and when fees are paid directly to attorneys. The danger exists for class attorneys to urge a class settlement at a low figure in exchange for "red-carpet treatment" on fees.

The instant case contained just a clear sailing agreement. That fact, and the concern it raises, coupled with the lack of clear notice to the class of the amount and certainty of the fees, caused the Court to deny the "Motion for Final Approval of Class Action Settlement Award of Attorneys' Fees and Expenses to Class Counsel and Entry of Final Judgment."

Counsel

F. Paul Bland, Jr., Esquire
Michael J. Quirk, Esquire
1717 Massachusetts Avenue, N. W., Suite 800
Washington, D. C. 20036

Bruce L. Marcus, Esquire
Marcus & Bonsib

Capital Office Park
6411 Ivy Lane, Suite 116
Greenbelt, Maryland 20770

Ira H. Raphaelson, Esquire
Brian P. Brooks, Esquire
Charles F. Connolly, Esquire
O'Melveny & Myers, LLP
555 13th Street, N. W.
Washington, D. C. 20004

Seth D. Goldberg, Esquire
John J. Beins, Esquire
Paul Gleiberman, Esquire
5335 Wisconsin Avenue, N. W.
Suite 910
Washington, D. C. 20015

Connie Kratovil Lavelle, Esquire
Frank Kratovil, Esquire
Kratovil & Kratovil
P. O. Box 522
Stevensville, Maryland 21666

Susan Stevens Miller, Esquire
Valerie Green, Esquire
Maryland Public Service Commission
William Donald Schaeffer Tower
6 St. Paul Street, 16th Floor
Baltimore, Maryland 21202

Kieron F. Quinn, Esquire
Richard S. Gordon, Esquire
Quinn Gordon & Wolf, LLP
40 West Chesapeake Avenue, Suite 408
Towson, Maryland 21204-4803

Philip S. Friedman, Esquire
Friedman Law Offices, PLLC
2401 Pennsylvania Avenue, Suite 410
Washington, D. C. 20037

Philip O. Foard, Esquire
Foard, Gisriel, O'Brien & Ward, LLC
29 West Susquehanna Avenue, Suite 302
Towson, Maryland 21204

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