



incurred must be paid out of the damages fund awarded to the class, if at all. Such fees and expenses may not be assessed separately against the defendants.

“The American Rule states that a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties or some other established exception. In Pennsylvania, the American Rule is embodied in 42 Pa. C. S. § 1726(a)(1), which provides that attorneys’ fees are not an item of taxable costs except as permitted by 42 Pa. C. S. § 2503 (relating to right of participants to receive counsel fees).”<sup>2</sup> In support of their claim for additional attorneys fees and costs, plaintiffs point to a provision of the latter statute as authority.

Under the statute, “[t]he following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter: . . . Any participant who is awarded counsel fees out of a fund within the jurisdiction of the court pursuant to any general rule relating to an award of counsel fees from a fund within the jurisdiction of the court.”<sup>3</sup> This “common fund” exception to the prohibition on a litigant’s recovery of attorneys’ fees has long been one of the common law’s established exceptions to the American Rule.<sup>4</sup>

It is beyond the power of the court in the ordinary adversary proceedings to warrant the payment as costs in the case of fees of counsel for professional services. It would be a usurpation of legislative function to allow, as between party and party, charges to which no statute has given the character of costs. There are well recognized exceptions to this rule. Where the services protect a

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In settling the case, plaintiffs reserved their right to appeal “the issue of whether or not the Court has properly ruled that Plaintiff Class Counsel are permitted to seek attorneys fees and litigation expenses solely from a portion of the settlement amount and may not seek Excess Fees.” *Id.* ¶ 8. This appeal is to be pursued against defendant Bene-Marc, Inc. only. *Id.*

<sup>2</sup> *Mosaica Academy Charter School v. Commonwealth Dept. of Education*, 572 Pa.191, 206-7, 813 A.2d 813, 822 (2002).

<sup>3</sup> 42 Pa. C. S. § 2503(8).

<sup>4</sup> *See Jones v. Muir*, 511 Pa. 535, 541, 515 A.2d 855, 858 (1986).

common fund for administration or distribution under the direction of the court, or where such fund has been raised for like purpose, it<sup>5</sup> is liable for costs and expenses, including counsel fees incurred. This is the case even though the protection given or the raising of a fund results from what may be properly termed adversary litigation.<sup>6</sup>

In an early case, the Pennsylvania Supreme Court reviewed several “common fund” cases from other jurisdictions and found:

Generally these cases have held that where many persons have a common interest in a trust property or fund, and one of them, for the benefit of all, at his own cost and expense, brings suit for its preservation or administration, the court of equity in which suit is brought will order plaintiff to be reimbursed his costs and expenses, including counsel fees, from the property of the trust, or order those benefited to contribute proportionately toward that expense. Our cases, as they relate to a fund raised or to the protection of one, are in accord with these authorities.<sup>7</sup>

The same court in a subsequent decision further refined the exception:

The “common fund” exception has traditionally been narrowly applied, and most often invoked where the attorney’s efforts have protected or preserved an estate or fund from waste, dissipation or fraudulent claims. The doctrine has also been applied where the services created a fund or augmented it by new assets. Compensation for the services is then recovered from the fund itself, thereby spreading the costs amongst the beneficiaries.<sup>8</sup>

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<sup>5</sup> In their opposition to defendants’ Preliminary Objections, plaintiffs mangled this quote by interpreting “it” to mean “defendant.” Clearly “it” is intended to mean the “common fund.” In the case from which plaintiffs took this quotation, the counsel fees were awarded out of the common fund:

Counsel for the plaintiff are entitled to a counsel fee of \$900 and counsel for the defendants are entitled to the cost of notices directed to be sent by order of this court, to wit, the sum of \$10.88. These amounts have been deducted from the total amount for distribution, to wit, \$12,113.79, leaving the net amount for distribution \$11,202.91.

Miller v. Myers, 300 Pa. 192, 150 A. 588 (1930).

<sup>6</sup> Hempstead v. Meadville Theological School, 286 Pa 493, 495-6, 134 A. 103 (1926) (court reversed order directing defendant to pay plaintiff’s attorneys’ fees).

<sup>7</sup> Id., 263 Pa. at 497-8, 134 A. at 104.

<sup>8</sup> Jones, 511 Pa. at 542, 515 A.2d at 859.

In this case, the named plaintiffs prosecuted this action for the benefit of all the members of the class, so they are entitled to collect their counsel fees and costs from the damages fund they created through the settlement with defendants. Nothing in the “common fund” exception to the American Rule permits the court to direct defendants to pay plaintiffs’ attorneys’ fees in addition to any damages that the defendants may owe.<sup>9</sup>

For all the foregoing reasons, the court respectfully requests that its dismissal of plaintiffs’ request for additional attorneys’ fees and litigation costs be affirmed on appeal.

Dated: August 10, 2007

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**HOWLAND W. ABRAMSON, J.**

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<sup>9</sup> The cases cited by plaintiffs in opposition to defendants’ Preliminary Objections make clear that, in a class action, the class’ attorneys fees are to be paid out of the common fund awarded to the class, if any; such fees are not assessed against the defendants. Like the plaintiff in Fitzgerald, plaintiffs in this case cited to

Nagle v. Pennsylvania Insurance Department, 46 Pa. Commonwealth Ct. 621, 406 A.2d 1229 (1979) [which was reversed in part] for the broad proposition that a class action representative may recover attorney fees from his opponent whenever the benefited class’ recovery is insufficient to reimburse him. When read in context and with reference to the authorities it cites, however, Nagle is plainly limited to the “common fund” exception, which applies when an action by one beneficiary of a pre-existing fund protects the interests of the other beneficiaries, thus justifying an award of attorney fees from the fund.

Fitzgerald v. Philadelphia, 87 Pa. Commw. 482, 489, 487 A.2d 485, 489 (1985).