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## **Mclendon v Continental group Inc**

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McLendon v. Continental Group, Inc., 872 F.Supp. 142 (1994)



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Distinguished by [Drazin v. Horizon Blue Cross Blue Shield of New Jersey, Inc.](#), D.N.J., December 28, 2011

872 F.Supp. 142

United States District Court, D. New Jersey.

Cecil McLENDON, et al., Plaintiffs,

v.

The CONTINENTAL GROUP, INC., et al., Defendants.

Albert J. JAKUB, et al., Plaintiffs,

v.

The CONTINENTAL GROUP, INC., et al., Defendants.

Robert GAVALIK, et al., Plaintiffs,

v.

The CONTINENTAL GROUP, INC., et al., Defendants.

Civ. Nos. 83–1340 (SA) (HLS), 89–  
4009 (HLS) and 89–4066 (HLS).

|

Dec. 16, 1994.

### Synopsis

Attorneys for prevailing plaintiffs in complex class action litigation brought petitions for attorney fees awards. The District Court, Sarokin, Circuit Judge, sitting by designation, held that: (1) notes from telephone conversation outlining conditions of representation did not prove that conditions were understood and accepted by attorney to support clients' claim that attorney agreed not to seek compensation based on percentage of recovery; (2) terms of alleged agreement would not be enforced under estoppel theory; (3) settlement achieved in litigation extinguished any liability defendants might have had under statutes for plaintiffs' attorney fees, converting litigation into common fund case; (4) lodestar may be enhanced in common fund case; (5) public interest attorneys would be compensated using average of hourly fees for each year charged by lead attorneys and associates in case; (6) interest on award before settlement would be figured according to prime interest rate at time, compounded annually; (7) fee petition time would not be included in award; (8) some enhancement for risk was appropriate; (9) lodestar would not be enhanced based on quality of attorneys' skills; but (10) multiplier of 1.5 would be used on grounds of exceptional results obtained in common fund case.

So ordered.

West Headnotes (22)

[1] **Federal Civil Procedure** 🔑 Clear error in general

170A Federal Civil Procedure

170AXIII Reference

170Ak1896 Report, Findings and Conclusions

170Ak1901 Clear error in general

Under Federal Rules of Civil Procedure, special master's factual findings are entitled to deference and will be accepted unless they are clearly erroneous. [Fed.Rules Civ.Proc.Rule 53\(e\)\(2\)](#), 28 U.S.C.A.

[2] **Attorneys and Legal Services** 🔑 Contracts for compensation; retainers

46H Attorneys and Legal Services

46HVII Compensation of Attorney

46HVII(E) Actions and Proceedings

46Hk342 Evidence

46Hk347 Weight and Sufficiency

46Hk347(4) Contracts for compensation; retainers

(Formerly 45k166(1) Attorney and Client)

Client did not prove that it had express contract with attorney in advance not to seek compensation on basis of percentage of any recovery in nationwide class action litigation; client's notes from telephone conversation purportedly outlining conditions of representation did not prove that conditions were in fact understood and accepted by attorney.

[3] **Estoppel** 🔑 Relying and acting on representations

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k82 Representations

156k87 Relying and acting on representations

Terms of alleged agreement of attorneys not to seek compensation on basis of percentage of any recovery in nationwide class action representation would not be enforced under estoppel theory, where services performed, reliance if any, and change in position were all on part of attorneys, not client seeking to enforce agreement.

**[4] Attorneys and Legal Services** 🔑 Labor and employment

- 46H Attorneys and Legal Services
- 46HVII Compensation of Attorney
- 46HVII(D) Compensation from Funds in Court; Common Fund
- 46Hk308 Specific Services and Particular Cases
- 46Hk315 Labor and employment  
(Formerly 45k155 Attorney and Client)

Settlement of class action suit against employers for operating “liability avoidance plan” that prevented employees from becoming eligible for employee benefits in violation of ERISA and Racketeer Influenced and Corrupt Organizations Act (RICO) through payment of over \$400 million to settlement fund, extinguishing all liability for all claims, converted litigation into common fund case for purposes of attorney fee award, notwithstanding that causes of action arose under fee-shifting statutes. 🚩 18 U.S.C.A. § 1961 et seq.; Employee Retirement Income Security Act of 1974, § 510, as amended, 29 U.S.C.A. § 1140.

10 Cases that cite this headnote

**[5] Attorneys and Legal Services** 🔑 Reasonableness in general

- 46H Attorneys and Legal Services
- 46HVII Compensation of Attorney
- 46HVII(D) Compensation from Funds in Court; Common Fund
- 46Hk302 Measure and Amount of Compensation in General
- 46Hk304 Reasonableness in general  
(Formerly 45k155 Attorney and Client)

Prohibition on enhancement of attorney fee award for contingency risk does not apply in case begun under fee-shifting statute that concluded with common fund settlement; attorneys would be unlikely to find sufficient incentive to bring even highly meritorious suits that are also complex, innovative, and lengthy if they will recover only their regular hourly rates if they prevail, and nothing if they do not, and paradox of disproportionately penalizing defendants with best cases in enhancing awards for contingency in fee-shifting cases does not arise in common fund cases when plaintiffs rather than defendants pay fees.

7 Cases that cite this headnote

**[6] Costs, Fees, and Sanctions** 🔑 Statutory or contractual authorization

- 102 Costs, Fees, and Sanctions
- 102III Awards of Costs and Fees
- 102III(A) In General; Grounds and Factors Considered
- 102III(A)1 In General
- 102k542 Necessity of Authorization for Award; “American Rule”
- 102k544 Statutory or contractual authorization  
(Formerly 170Ak2737.1)

In statutory fee-shifting cases, defendant bears burden of compensating plaintiff’s counsel.

**[7] Costs, Fees, and Sanctions** 🔑 Particular Subjects of Litigation

- 102 Costs, Fees, and Sanctions
- 102III Awards of Costs and Fees
- 102III(A) In General; Grounds and Factors Considered
- 102III(A)2 Particular Subjects of Litigation
- 102k561 In general  
(Formerly 170Ak2726.1)

Defendants who have violated plaintiffs’ rights are compelled to pay plaintiffs’ reasonable costs in enforcing those rights so that plaintiffs will be able to obtain counsel and not have their awards diminished by expense of obtaining them.

[8] **Attorneys and Legal**

**Services** 🔑 Compensation from Funds in Court; Common Fund

- 46H Attorneys and Legal Services
- 46HVII Compensation of Attorney
- 46HVII(D) Compensation from Funds in Court; Common Fund
- 46Hk301 In general  
(Formerly 45k155 Attorney and Client)

Common fund awards are based on equitable notion that those who have benefitted from litigation should share in its costs.

[9] **Attorneys and Legal**

**Services** 🔑 Compensation from Funds in Court; Common Fund

**Costs, Fees, and Sanctions** 🔑 Result of Litigation; Prevailing Party

- 46H Attorneys and Legal Services
- 46HVII Compensation of Attorney
- 46HVII(D) Compensation from Funds in Court; Common Fund
- 46Hk301 In general  
(Formerly 45k155 Attorney and Client)
- 102 Costs, Fees, and Sanctions
- 102III Awards of Costs and Fees
- 102III(A) In General; Grounds and Factors Considered
- 102III(A)1 In General
- 102k547 Result of Litigation; Prevailing Party
- 102k548 In general  
(Formerly 170Ak2737.1)

In fee-shifting cases, right to fees belongs to successful plaintiff, whereas in common fund cases, it is attorney who has right to claim portion of fund.

[2 Cases that cite this headnote](#)

[10] **Attorneys and Legal Services** 🔑 Labor and employment

- 46H Attorneys and Legal Services
- 46HVII Compensation of Attorney
- 46HVII(D) Compensation from Funds in Court; Common Fund

- 46Hk308 Specific Services and Particular Cases
- 46Hk315 Labor and employment

(Formerly 45k155 Attorney and Client)

Settlement of class action litigation under ERISA through payment into settlement fund extinguished plaintiffs' statutory claim against defendant for reasonable attorney fees, and replaced it with attorneys' equitable claim against fund. Employee Retirement Income Security Act of 1974, § 510, as amended, [29 U.S.C.A. § 1140](#).

[11] **Attorneys and Legal Services** 🔑 Specific Services and Particular Cases

- 46H Attorneys and Legal Services
- 46HVII Compensation of Attorney
- 46HVII(D) Compensation from Funds in Court; Common Fund
- 46Hk308 Specific Services and Particular Cases
- 46Hk309 In general

(Formerly 45k155 Attorney and Client)

Attorney fees based on lodestar calculation would be figured using attorneys' historic hourly rates, rather than their current hourly rates, and any delay in payment would be compensated by awarding interest separately.

[12] **Attorneys and Legal**

**Services** 🔑 Reasonableness in general

- 46H Attorneys and Legal Services
- 46HVII Compensation of Attorney
- 46HVII(D) Compensation from Funds in Court; Common Fund
- 46Hk302 Measure and Amount of Compensation in General
- 46Hk304 Reasonableness in general

(Formerly 45k155 Attorney and Client)

To accomplish equalization of rates for three principal attorneys in class action suit despite difference in prevailing rates in their different legal communities, court would derive annual average rate, equal for each of three attorneys, weighted according to historic hourly rates and reasonable attorney fees.

**[13] Attorneys and Legal Services** 🔑 Specific Services and Particular Cases

46H Attorneys and Legal Services  
 46HVII Compensation of Attorney  
 46HVII(D) Compensation from Funds in Court; Common Fund  
 46Hk308 Specific Services and Particular Cases  
 46Hk309 In general  
 (Formerly 45k155 Attorney and Client)

Public interest attorneys entitled to recover attorney fees under settlement of complex class action litigation would be compensated at prevailing market rates; court would calculate lodestar amounts for these attorneys using average of hourly fees for each year charged by lead attorneys and associates in case.

**[14] Attorneys and Legal Services** 🔑 Measure and Amount of Compensation in General

46H Attorneys and Legal Services  
 46HVII Compensation of Attorney  
 46HVII(D) Compensation from Funds in Court; Common Fund  
 46Hk302 Measure and Amount of Compensation in General  
 46Hk303 In general  
 (Formerly 45k155 Attorney and Client)

Before settlement of class action litigation, interest on attorney fee award to compensate for delay in receiving payment would be figured according to prime interest rate at time, compounded annually, and, after settlement, interest rate would be based on rate actually earned by settlement fund.

1 Cases that cite this headnote

**[15] Costs, Fees, and Sanctions** 🔑 Nature, extent, and necessity of services performed

102 Costs, Fees, and Sanctions  
 102III Awards of Costs and Fees  
 102III(B) Amount and Computation of Award  
 102III(B)6 Legal Expenses; Attorney Fees  
 102k764 Factors Considered

102k769 Nature, extent, and necessity of services performed

(Formerly 170Ak2737.4)

Attorney fee awards in straight fee-shifting cases include compensation for time spent preparing fee petition.

**[16] Attorneys and Legal Services** 🔑 Compensation from Funds in Court; Common Fund

46H Attorneys and Legal Services  
 46HVII Compensation of Attorney  
 46HVII(D) Compensation from Funds in Court; Common Fund  
 46Hk301 In general  
 (Formerly 45k155 Attorney and Client)

In common fund settlement cases, attorney fee award is based upon efforts expended on behalf of plaintiff class, so that time spent preparing fee petition may not be compensated in award.

**[17] Attorneys and Legal Services** 🔑 Compensation from Funds in Court; Common Fund

46H Attorneys and Legal Services  
 46HVII Compensation of Attorney  
 46HVII(D) Compensation from Funds in Court; Common Fund  
 46Hk301 In general  
 (Formerly 45k155 Attorney and Client)

Attorneys would not be compensated for time spent preparing attorney fee petitions in common fund case, despite fact that cause of action arose under fee-shifting statutes.

3 Cases that cite this headnote

**[18] Attorneys and Legal Services** 🔑 Compensation from Funds in Court; Common Fund

46H Attorneys and Legal Services  
 46HVII Compensation of Attorney  
 46HVII(D) Compensation from Funds in Court; Common Fund  
 46Hk301 In general

(Formerly 45k155 Attorney and Client)

Enhancement for risk was appropriate in determining attorney fees award for common fund case; attorneys should not forced to accept usual hourly rate on contingent basis, even when fees are being paid by clients, rather than defendants.

**[19] Costs, Fees, and Sanctions** 🔑 Contingency or certainty of compensation; effect of fee agreement

102 Costs, Fees, and Sanctions  
102III Awards of Costs and Fees  
102III(B) Amount and Computation of Award  
102III(B)6 Legal Expenses; Attorney Fees  
102k781 Contingency or certainty of compensation; effect of fee agreement  
(Formerly 170Ak2737.4)

Contingency risk for attorney fee award is properly evaluated at outset of litigation.

**[20] Attorneys and Legal Services** 🔑 Specific Services and Particular Cases

46H Attorneys and Legal Services  
46HVII Compensation of Attorney  
46HVII(D) Compensation from Funds in Court; Common Fund  
46Hk308 Specific Services and Particular Cases  
46Hk309 In general

(Formerly 45k155 Attorney and Client)

Enhancer to lodestar on basis of quality of attorneys' skills would not be applied in attorney fee award; such enhancer would reflect type of performance expected of all attorneys and it would involve subjective inquiry susceptible to discriminatory application.

**[21] Attorneys and Legal Services** 🔑 Measure and Amount of Compensation in General

46H Attorneys and Legal Services  
46HVII Compensation of Attorney  
46HVII(D) Compensation from Funds in Court; Common Fund  
46Hk302 Measure and Amount of Compensation in General  
46Hk303 In general

(Formerly 45k155 Attorney and Client)

Multiplier of 1.5 would be applied as enhancement to attorney fees award on ground of exceptional results obtained in common fund case, despite difficulty in selecting precise multiplier; payment of such bonus would be deemed fair in marketplace.

2 Cases that cite this headnote

**[22] Attorneys and Legal Services** 🔑 Measure and Amount of Compensation in General

46H Attorneys and Legal Services  
46HVII Compensation of Attorney  
46HVII(D) Compensation from Funds in Court; Common Fund  
46Hk302 Measure and Amount of Compensation in General  
46Hk303 In general

(Formerly 45k155 Attorney and Client)

Enhancement of attorney fees on ground of exceptional results obtained should be permitted in common fund cases, since it will align interests of lawyers and their clients in seeking best possible results.

**All Citations**

872 F.Supp. 142