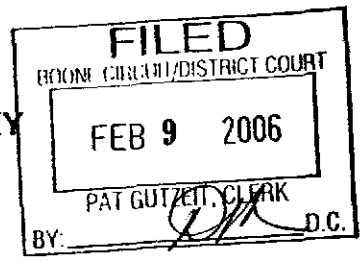
COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO: 03-CI-181
JUDGE: JOHN POTTER



JOHN DOE, et al., PLAINTIFFS

vs.

ROMAN CATHOLIC DIOCESE OF COVINGTON, et al., DEFENDANTS

MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND ENHANCEMENT OF CLASS REPRESENTATIVES' SETTLEMENTS

I. INTRODUCTION

On January 31, 2006, this Court approved a comprehensive class action settlement.[1] The settlement creates a common fund of approximately $85 million to compensate victims who suffered abuse.[2] The Court ruled that Class Counsel's decision to assume the risk to bring the litigation as a class action created the unique opportunity for many victims to pursue claims that otherwise would be lost: "The class action procedure has encouraged a large number of people to come forward who would otherwise never have done so had they been left to their individual devices."[3]

In approving the settlement, the Court further found that while Class Counsel was experienced, they nonetheless faced many obstacles, including

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[1] *See* Order approving Settlement at 14. ("The Court finds that the proposed settlement is fair, reasonable and adequate."
[2] Order approving Settlement at 7
[3] Order approving Settlement at 10.

extensive discovery and experienced and aggressive opposing counsel who engaged in difficult and hard fought negotiations. "It cannot be overlooked that the parties have taken extensive discovery and that experienced class counsel on both sides have bargained hard and at arms length."[4]

The Court's perceptive observations are correct. Class Counsel undertook the professional, financial, and legal responsibility to prosecute this action in the best interest of the class, which members were sexually abused as minors by trusted adults. In doing so, Class Counsel assumed a substantial risk of non-recovery. The history of the litigation establishes that Class Counsel admirably fulfilled their responsibility.

II. HISTORY OF THE LITIGATION[5]

The relationship between Class Counsel and the class members in this case has lasted more than three years and likely will continue for years into the future until all claims are resolved and the two special funds are exhausted. That relationship began in the late fall of 2002, when investigation into the facts relating to this case began. Initially, on December 20, 2002, an individual complaint was filed with this Court, which was later consolidated with this case.[6] Through this initial filing, the Court ordered the Diocese to produce its secret archives subject to a protective order.

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[4] Order Approving Settlement at 10.

[5] In addition to the exhibits attached to this Memorandum, Class Counsel incorporates by reference all materials, all testimony, and all statements of counsel submitted in connection with the January 9, 2006 Final Approval Hearing this Court conducted. *See* Ex. 5, DVD containing the official video tape record of the Final Approval Hearing.

[6] *Fischer v. Roman Catholic Diocese of Covington*, Case No. 02-CI-01797, Boone County, Kentucky Circuit Court.

Class Counsel also instituted an extensive independent investigation that resulted in counsel obtaining evidence supporting the claims made in this litigation. Class Counsel quickly retained psychiatric experts with special experience in child sexual abuse to educate them and help them in communicating with potential class members, because many of them are in fragile emotional states.

Based on their extensive class action and complex litigation experience, Class Counsel determined that a class action lawsuit was the proper vehicle to preserve and pursue the class members' claims. A class action would allow the Court to focus on the decades-long pattern of conduct by the Diocese that permitted and encouraged such sexual abuse of minor boys and girls while at the same time it would allow the class members' identities to remain confidential. Therefore, the instant case was filed on February 3, 2003. The Defendants were represented by Deters, Benzinger & LaVelle, P.S.C., one of the largest and most respected firms in Kentucky. In the summer of 2003, the Defendants retained an additional law firm to aid in its defense, Mayer, Brown, Rowe & Maw, LLP of Chicago, Illinois, one of the largest and most respected firms in the country.

The prosecution of this case required a tremendous investment of time and expenses, as outlined at the Final Approval Hearing held on January 9, 2006.[7] Counsel from the three firms literally spent thousands of hours investigating, reviewing documents, taking depositions, issuing subpoenas, litigating, preparing for trial, and negotiating the settlement of this case.

[7] *See* Ex. 5, DVD of video taped record of the January 9, 2006 Final Approval Hearing.

Despite the great difficulty encountered by abuse victims in coming forward, many hundreds of potential class members contacted Class Counsel. Class Counsel conducted personal interviews of hundreds of potential class members. Many of these individuals were interviewed two or more times. Interviews were followed by intensive investigation of class Members' circumstances, including verification of events, collecting documentation, issuing subpoenas where necessary, arranging for professional investigations where necessary, and obtaining expert evidence. Additionally, Class Counsel sponsored and conducted numerous confidential group meetings of class members during the last three years. Currently, Class Counsel and their staffs receive and respond to numerous contacts per day from victims; these contacts are expected to continue throughout the claims process.

During the litigation phase of this case WSBC attorneys Stanley Chesley, Robert Steinberg, Fay Stilz, James Cummins, Louise Roselle, Paul DeMarco, Terrence Goodman, and Renee Infante, along with Class Counsel Michael O'Hara, performed a variety of legal work, including legal research, discovery, interviews of potential class members, financial investigations, and drafting legal briefs. All told, WSBC organized the services of 26 attorneys and legal experts to perform work on this case. Numerous law clerks and attorneys in each of the Class Counsel law firms were assigned legal research projects relating to this case.

To properly prepare this case for an anticipated trial, Class Counsel cataloged and copied over 50,000 documents (including 16,886 documents of

the Diocese of Covington and the Diocese of Lexington), Class Counsel created several complex searchable computer databases using specialized computer software programs. The Official Catholic Directory, published by P.J. Kenedy & Sons, 890 Mountain Ave., Suite 4, New Providence, N.J. 07974, was examined for the histories of all priests, churches, and schools within the Diocese of Covington for each year from 1950 forward. In addition, the assignment history of each priest known to be accused of sexual abuse was obtained from the Official Catholic Directory. These data were optically coded by computer experts into a searchable database, which can be accessed by appropriate computer queries. All information received from each victim was also coded into a searchable computer database so that it can be cross-referenced with the priest information. The extensive computer data files can be searched to find common patterns and similar conduct by priests toward victims who have no connection with each other. Documents and other evidence submitted by victims are used to corroborate information provided by other victims. WSBC staff was specially trained by expert consultants to enter and retrieve information from the computer databases.

Chronologies of each accused priest were individually prepared by WSBC staff. A detailed sexual abuse history of each identified abuser is being prepared for the claims process. Thousands of documents obtained from victims, including school records, yearbooks, photographs, letters, cards, and other documents were catalogued and filed for ready retrieval. Medical authorization

forms were sent to each victim who has received mental health care. These forms were processed by WSBC paralegals.

Many hours were spent in consultation with experts on Canon Law and internal Catholic Church procedures.

Many hours were spent on analyzing all of the many annual insurance policies issued by the Defendants' insurers over decades and consulting with insurance coverage experts on legal issues relating to insurance coverage.

Class Counsel retained, on behalf of the class, a legal expert with a Master's Degree in taxation, to provide a formal written opinion to each Class Member regarding the taxability of a settlement award in this case.

Class Counsel retained highly qualified statistical analysis experts to estimate the number of victims who were potential class members in this case. In the year 2004, they estimated that several thousand class members might exist in the Covington Diocese.

Class Counsel retained highly qualified real estate appraisal experts to examine and appraise each property belonging to the Defendants as well as real estate title attorneys to conduct examinations to be certain all properties were disclosed.

Class counsel thoroughly examined the financial records of the Covington Diocese and of the Catholic Mutual Insurance Company.

Class Counsel's extensive discovery also included:

- investigation and document review that preceded the drafting the of the Complaint and the Amended Complaints;

- Contacts with, including private interviews and formal subpoenas, all local and state police agencies and the Kentucky Cabinet for Families & Children to locate abuse complaints against priest and other affiliates of the Covington Diocese;

- drafting and issuing 8 sets of extensive formal Document Requests and 5 sets of extensive Interrogatories to the Defendants;

- legal research, briefing and drafting motions to compel the Diocese to produce information;

- reviewing and cataloguing Defendants' answers to the Document Requests and Interrogatories;

- obtaining and reviewing the deposition testimony of Covington Diocese representatives in earlier sexual abuse cases in Kentucky and other states, including New Mexico;

- reviewing the entire record of the 1993 Secter trial against the Diocese, including the testimony of all Diocesan officials

- legal research, briefing and drafting motions to issue Commissions for out-of-state depositions;

- retaining experienced investigators to dig out information, including former FBI agents, former Kentucky State police detectives, and local police officers;

- issuing numerous subpoenas to individuals, organizations, and governmental agencies to assist in gathering the facts necessary to prosecute this case;

- conducting and videotaping numerous confidential depositions of priests accused of child sexual abuse;

- Conducting over 700 interviews of witnesses, victims, and public officials;

- Obtaining supporting documentation for Class Member's claims, where available, including school, church, orphanage, and medical records.

- Preparing for two-phase class trials, including the drafting and filing of three detailed trial briefs;
- arguing a wide variety of legal issues;
- interview of experts, and study of expert reports;
- extensive communications with class members in person, via mail, via email, via telephone, and via Internet site;
- creation and maintenance of an Internet website for the litigation phase of the case and for the settlement phase of the case;
- creation and maintenance of a toll-free telephone service that continues to this date;
- drafting, organizing, and publishing national, regional, and local notice of the class action certification;
- drafting, organizing and publishing national, regional, and local notice of the class action settlement;
- distributing, collecting and processing two phases of Opt Out Forms;
- distributing, collecting and processing all Census Forms; and
- distributing and assisting class members in the completion of all Claim Forms.

In addition, much of the work occurred in a contentious environment. As the Court noted in its Order approving the Settlement, the parties engaged in hard-fought settlement negotiations. These negotiations began in June 2004 and lasted more than one year. However, prior to entering into settlement negotiations, the parties engaged in difficult and contentious motion and discovery practice. On several occasions, the Court ruled that trial would proceed and instructed the parties to file trial briefs. Class Counsel filed detailed trial briefs on February 25, 2004, March 31, 2004, and February 16, 2005. During most of 2003, 2004, and part of 2005, Class Counsel engaged in active

trial preparation as well as in mediation negotiations.

Mediation proceedings in this case began in June 2004. The parties selected Kenneth Feinberg. managing partner and founder of The Feinberg Group, Washington, D.C. as mediator. Mr. Feinberg, an attorney, is one of the nation's leading experts in mediation and alternative dispute resolution. Among his many excellent qualifications is his appointment by the Attorney General of the United States to serve as the Special Master of the Federal September 11th Victim Compensation Fund of 2001. *See* Ex. 6, Kenneth Feinberg Biography.

Numerous meetings of the principals as well as representatives of Catholic Mutual Relief Society of America (Catholic Mutual)[8] took place during the mediation period. The meetings were often contentious and negotiations were hard-fought. During this process, Class Counsel performed due diligence examinations of the financials of the Covington Diocese and of Catholic Mutual. All pertinent Catholic Mutual insurance policies were turned over to Class Counsel and examined by insurance experts retained by Class Counsel. Class Counsel also retained highly qualified professional appraisers and title attorneys to locate, catalogue, and value real estate owned by the Diocese.

This difficult, lengthy, and careful process resulted in a settlement on May 17, 2005.[9] Following meetings with the Court, the settlement was supplemented by the parties on July 18, 2005.[10] The heart of the settlement is a carefully

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[8] The Covington Diocese also carried insurance for a 12-month period in 1966-67 from the American Insurance Company.

[9] *See* Memorandum In Support Of Joint Motion For Preliminary Approval Of Class Action Settlement, Settlement Notice, and Publication Method, filed June 6, 2005.

[10] *See* Supplement To Joint Motion For Preliminary Approval Of Class Action Settlement, filed July 19, 2005.

designed matrix containing four categories of injuries and a range of payment for each category. As this Court observed, the use of categories based on the abuse suffered "is the only feasible method" to compensate class members.[11] These categories and payment amounts were arrived at by examining verdicts and settlements made in similar individual cases in Kentucky and throughout the country. In connection with the highest two categories, there are is an additional fund available for those who have extraordinary injuries. The parties, with the Court's approval and guidance, also created two special funds: one to pay the costs of mental health treatment and medication of any victim of sexual abuse by a person employed by or under the supervision of the Diocese, whether or not that person is eligible to participate in the settlement; the second to allow persons born after October 21, 1985, who were abused as minors, to file a claim by their 23rd birthday, in order to account for their inability to come forward at this time.

The settlement, however, did not mark the end of difficult settlement negotiations. Because the contribution of the Diocese insurers was insufficient, it became necessary for the Diocese to file a declaratory judgment lawsuit against them. This lawsuit was filed on May 26, 2005 in this Court and subsequently removed to the United States District Court for the Eastern District of Kentucky.[12] Class Counsel promptly filed a Motion To Intervene and a Complaint In Intervention to protect the rights of the class.[13] Thereafter, a second series of contentious, hard-fought settlement negotiations began with the two insurers,

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[11] See Order Approving Settlement, p. 13.

[12] *The Roman Catholic Diocese of Covington et al. v. The American Insurance Company, et al.*, U.S. Dist. Ct., E.D. Ky., Case No. 05-115. *See* Ex. 7, Complaint

[13] Ex. 8, Class Counsel's Complaint in Intervention.

Catholic Mutual and American Insurance. These negotiations lasted through the end of 2005 and continued up through the day of the Final Approval Hearing on January 9, 2006. Accord was finally reached when the parties and Catholic Mutual signed a Memorandum Of Understanding at 9:45 a.m. on January 9, 2006. This document and the summary agreement with American Insurance were presented to the Court at the January 9, 2006 hearing.

As noted by the Court in its Final Approval Order of January 31, 2006, the settlements with the insurers provide assets of approximately $85 million to be placed in an escrow fund for the benefit of the class members to fund the parties' settlement agreement and settlement matrix.

Very extensive due process notices were designed, drafted, and published by class counsel pursuant to court order. The first notice was of the class certification and of the right of class members to opt out by the deadline of January 31, 2004. This notice was published numerous times nationally, regionally, and locally between October 31, 2003 and December 19, 2003. It was published in the major newspapers in Lexington, Ky., Louisville, Ky., Covington, Ky., and Cincinnati, Oh., as well as in the national newspaper USA Today. It was also published in 20 daily and 90 weekly Kentucky newspapers in all 118 counties in Kentucky. An opt out form was available in the newspaper notices as well as on the class litigation website. Class counsel financed the cost of this publication notice, which was $234,574.

Following the Court's preliminary approval of the settlement, Class counsel followed and exceeded the Court's specific notice requirements. The notice publications included:

- 141 separate publications of the newspaper notice nationally, regionally, and locally beginning July 22, 2005 and ending August 25, 2005;

- 213 publications of the television notice beginning August 15, 2005 and ending August 28, 2005 on major television stations in Bowling Green, Ky., Lexington, Ky., Louisville, Ky., and Cincinnati, Ohio;

- 523 publications of the radio notice beginning October 10, 2005 and ending October 30, 2005 on radio stations in Bowling Green, Ky., Lexington, Ky., Louisville, Ky., and Cincinnati, Ohio;

- Additional newspaper publications in the Sunday edition of eight regional newspapers on October 30, 2005.

Class counsel financed the cost of this settlement notice publication notice, which was $244,018.

In addition to the personal communication with class members set forth above, Class Counsel made a great effort to provide further lines of communication with potential class members and to keep them informed. Beginning in January 2004 and continuing through January 28, 2005, Class Counsel have hosted numerous confidential group meetings for class members at various locations. Class Counsel have also conducted confidential meetings with class members at the Boone Circuit Court after hearings. To the credit of the class members, none of them have breached the confidentiality of these meetings.

Class Counsel also maintained a litigation website dedicated only to this case for the benefit of class members, which contained detailed information

about the case, copies of pleadings, answers to questions, and updates on the latest events in the case; 31,288 individual visitor sessions were made to this website between December 19, 2003 and July 21, 2005, an average of 53 visitor sessions per day.

Class Counsel continue to maintain a settlement website that publishes questions and answers covering all subjects in the Long Form Notice, as well as Latest Updates on the case. It enables a visitor to download a copy of the Court's Preliminary Approval Order, the Memorandum of Understanding, the Long Form Notice, and the Confidential Census Form. From July 22, 2005 to February 5, 2005, there have been 9,476 individual visitor sessions on the website, an average of 47 visitor sessions per day.

Beginning in July 2005, Class Counsel maintained and monitored a confidential toll-free telephone service dedicated only to this case. Class Counsel personally responded to all callers who identified themselves. Class Counsel sent them copies of the Long Form Notice advising them of their rights and a Census Form. In addition, there were numerous calls made directly to the WSBC switchboard.

Class Counsel also mailed Long Form Notices to every person who left contact information with the toll-free service and to every person who filed a Census Form. In addition, Class Counsel provided the Diocesan Chancellor with Long Form Notices and envelopes to mail to those calling the Diocese. The Long Form Notices, approved by the Court, provided all necessary information

on this case. They also referred the recipient to the settlement website maintained by Class Counsel for the benefit of class members.

Although the Court approved the settlement, Class Counsel's involvement in the litigation is far from over. The settlement requires Class Counsel to remain actively involved in the claims process. Indeed, Class Counsel currently are devoting hundreds of hours to assisting the class members in preparing, documenting, and submitting their claims.

Aside from the thousands of hours that Class Counsel have devoted to the case, they advanced over one million dollars to the litigation. Ex. 1, Affidavit of Stanley Chesley. The out-of-pocket costs include: costs related to experts, discovery, depositions, and class notice. Id. Class Counsel assumed the cost of issuing a due process notice to the class twice, which alone totaled $478,592.00.

Class Counsel achieved its result pursuant to the deadlines set by the Court and within the time limitations imposed by the Court. A detailed description of Class Counsel's work is contained in Exhibit 2, Affidavit of Robert A. Steinberg.

Unlike the typical common fund case where the Court is requested to issue an order permitting Class Counsel to immediately receive fees, Class Counsel is requesting that they receive fees related to individual claims only when members of the class receive their award. Class Counsel do, however, request immediate payment of fees earned from making the two special funds available.

III. LEGAL STANDARD FOR AWARDING ATTORNEY'S FEES[14]

Because the Court correctly has held that this is not a limited fund case,[15] the legal authorities for common fund cases apply to the award of attorney's fees. Voluminous authority supports Class Counsel's request for an aware of a percentage of this fund in the amount of 30%.

A. THE APPROPRIATE ATTORNEY'S FEE CALCULATION IS A PERCENTAGE OF THE COMMON FUND

It is well established that where class counsel have, through their efforts, created a common fund for, or conferred a substantial benefit upon an identifiable class, they are entitled to an allowance of attorneys' fees relative to the benefit obtained. *See, e.g., Michael J. Turner, et al. vs. Roman Catholic Bishop of Louisville, et al.*, No. 02-CI-02903 Division Fifteen Consolidated For Discovery In Division Two (2), Jefferson Circuit Court, Jefferson County, Kentucky; *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Electric Auto-Life Co.*, 396 U.S. 375 (1970); *Smillie v. Park Chem. Co.*, 710 F.2d 271 (6th Cir. 1983); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974), *cert. denied*, 422 U.S. 1048 (1975). A common fund involves the concept of equitable "fee spreading" - attorneys' fees are spread out among the beneficiaries of the common fund by applying a percentage reduction for fees to each Class Member's recovery, so that no beneficiary forced to pay the attorneys, to the unjust enrichment of another beneficiary. *See Boeing Co.*, 444 U.S. at 472 (Class Counsel in a common fund case is entitled to an award based on the

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[14] Kentucky courts generally follow the Federal Rules of Civil Procedure and Federal case law applying the Federal Rules. *Sexton v. Bates*, 41 S.W.2d 452, 456 (Ky. App. 2001).

[15] *See* Order Approving Settlement, filed January 31, 2006, p. 8.

entire amount of the common fund and the entire benefit that their efforts created).

The standard for awarding fees in common fund cases has come full circle from the traditional "percentage of recovery" approach, to a "lodestar and multiplier"[16] approach, and back to the percentage method. Historically, fees in actions resulting in a common fund benefit for an identifiable class are awarded as a percentage of the recovery obtained. Every United States Supreme Court opinion that addresses the computation of a common fund fee award has calculated fees on a percentage-of-the-fund basis.[17]

The United States Court of Appeals for the Sixth Circuit has approved the award of fees in a common fund case using the percentage of the fund approach. In *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516-17 (6th Cir.1993), the Sixth Circuit observed that the trend has been to apply a percentage-of-the-fund method for determining attorney's fees in common fund class action cases. Courts within the Sixth Circuit have also indicated their preference for the percentage-of-the-fund method in common fund cases. *See, e.g., In re F & M Distributors, Inc. Sec. Litig.*, Case No. 95-CV-71778-DT, 1999 U.S. Dist. LEXIS 11090 (E.D. Mich. June 29, 1999); *In re Rio Hair Naturalizer*

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[16] The "lodestar and multiplier" approach consists of the Court determining the reasonable number of hours and the hourly rate for each attorney, law clerk, and paralegal performing work for plaintiffs, then applying a multiplier to the total fee in order to account for factors such as risk, loss of opportunity, et. *See* below, pp. 32-35.

[17] *See Breiterman v. Roper Corp.*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) 94,885 (S.D.N.Y. Jan. 12, 1990); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 736 F. Supp. 1007, 1012 (E.D. Mo. 1990); *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679 (M.D. Ala. 1988) ("[E]very Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund bases.") Jerold S. Solovy & Robert M. Mendillo, Calculating Class Action Awards; Is it Time to Unload the Lodestar, NAT'L L.J. May 2, 1983, at 2.

Prods. Liab. Litig., MDL No. 1055, 1996 WL 780512, *16 (E.D.Mich. Dec.20, 1996) (observing that "more commonly, fee awards in common fund cases are calculated as a percentage of the fund created, typically ranging from 20 to 50 percent of the fund"); *Fournier v. PFS Invs., Inc.*, 997 F.Supp. 828, 832- 33 (E.D. Mich.1998).

The United States Supreme Court has held that the percentage method of computing attorneys' fees is proper where the fees are paid from a common fund recovered for the benefit of the class, because ***in a common fund case, ". . . a reasonable fee is based on a percentage of the fund bestowed on the class . . ."*** *Id.* In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), (emphasis added). *See, e.g., Camden 1 Condominium Ass'n v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991) (citing as examples *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), *Central R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885), and *Trustees v. Greenough*, 105 U.S. 527 (1881).

> . . . [W]hen deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.
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> . . . [T]he district court must estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed). The best time to determine this rate is the beginning of the case, not the end (when hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets. Individual clients and their lawyers *never* wait until after recovery is secured to contract for fees. They strike their bargains before work begins. ... The greater the risk of loss, the greater the incentive compensation required.

In re Synthroid Marketing Litigation, 264 F. 3d 712, 718 (7th Cir. 2001). The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case. *Id.* at 721. The market rate for individual cases, which are far less complex than the instant case, is a contingency rate that ranges between 33 1/3% and 45%. *See* Exhibit 4, Affidavit of Ann Oldfather, Esq.; testimony of Alex Rose. As regards the contingency fee market rate, the Supreme Court has held that even a 40% contingent fee agreement does not place a ceiling upon fees recoverable by a prevailing plaintiff. *Blanchard v. Bergeron*, 489 U.S. 87, 95-96 (1989).[18] Applying those factors to this case underscores that the requested award is reasonable and fair:

B. THE PERCENTAGE AWARDED IN COMMON FUND CASES TYPICALLY EXCEEDS 30%

Common fund class action cases typically result in awards of more than 30% of the total settlement funds. *See, e.g., Michael J. Turner, et al. vs. Roman Catholic Bishop of Louisville, et al.,* No. 02-CI-02903 Division Fifteen Consolidated For Discovery In Division Two (2), Jefferson Circuit Court, Jefferson County, Kentucky (40% fee awarded in settlement of 243 claims); *In re Ampicillin Antitrust Litigation*, 526 F.Supp. 494 (D.D.C. 1981) (45% fee awarded); *Beech Cinema, Inc. v. 20th Century Fox Film Corp.*, 480 F.Supp 1195 (S.D.N.Y.

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[18] This holding was made in a case involving statutory fees under the Civil Rights Attorney's Fees Award Act; however the Court stated that "[I]t is clear that Congress 'intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation . . . and not be reduced because the rights involved may be non-pecuniary in nature,'" citing S.Rep. No. 94-1011, at 6, U.S. Code Cong. & Admin. News 1976, p. 5913.

1979) (53% fee awarded); *Greene v. Emerson's Ltd.*, CCH Fed.Sec.L.Rep. 93,263 (S.D.N.Y. 1987) (46.2% fee awarded); *Mister v. Illinois Central Gulf Railroad Company*, No. 81-3006 (S.D. Ill. August 5, 1993) (40% fee awarded); *Howes v. Atkins*, 668 F.Supp 1029 (E.D. Ky. 1987) (40% fee awarded): *In re: Combustion*, 968 F. Supp. 1116 (W.D. La. 1997) (awarding 36% fee from $127 million fund plus 6% for costs); *In re: Vitamins Antitrust Litigation*, 2001 U.S. Dist. LEXIS 12114 (D.C. 2001) (awarding 33.3% from $365 million fund); *In re Gibson Greetings Sec. Litig.*, No. C-1-95-265 (S.D. Ohio 1997 (33% awarded plus expenses); *see also, Griffin v. Medpartners, Inc.*, Civil Action No. CV98-297 (Cir. Ct. Ala. July 10, 1999) (awarding 33% of $56 million common fund, plus expenses); *Lachance v. Harrington*, 965 F. Supp. 630, 648-49 (E.D. Pa. 1997) (awarding 30% fee). *In re: Crazy Eddie Securities Litigation*, 824 F. Supp. 320, 327 (S.D.N.Y. 1993) (awarding 33.8% from $42 million fund, plus $2 million in expenses); *In re: Activision Securities Litigation*, 723 F. Supp. 1373 at 1378-79 (W.D. Cal. 1989) (awarding 32.8% of settlement fund for fees and expenses); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 198 (E.D. Pa. 2000) (awarding 32.4% from $111 million fund as fees and expenses); *In re Procter & Gamble Company*, Civil Action No. C-1-00-190, (S.D. Ohio December 2001) (Weber, J.) (award of 30% of $49 million Settlement Fund.

In the recent sexual abuse class action settlement involving 243 individually filed legal complaints of priest sexual abuse in Jefferson County, Kentucky, the court rejected the lodestar approach and approved a percentage

fee of forty percent of the common fund.[19] The risk factors involved in mass tort cases such as the Louisville Archdiocese case and the instant case, including the extreme difficulty in obtaining class certification, arguably make these cases even more deserving of a percentage award than cases involving securities issues or antitrust violations.

C. OTHER FACTORS DEMONSTRATE THAT THE REQUESTED AWARD IS REASONABLE, FAIR, AND APPROPRIATE.

The analysis used by the federal courts for awarding fees in a class action cases, including courts in the Sixth Circuit[20] implicitly, if not explicitly, is included in Rule 1.5 of The KENTUCKY RULES OF PROFESSIONAL CONDUCT [21] (KRPC). The KRPC sets out a non-exclusive list of factors for the Court to consider in determining the reasonableness of a fee:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) The fee customarily charged in the locality for similar legal services;
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> (4) The amount involved and the results obtained;
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> (5) The time limitations imposed by the client or by the circumstances;

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[19] *Michael J. Turner, et al. vs. Roman Catholic Bishop of Louisville, et al.*, No. 02-CI-02903Division Fifteen (Consolidated For Discovery In Division Two (2)) Jefferson Circuit Court, Jefferson County, Kentucky (sometimes referred to as "In re: Roman Catholic Bishop Of Louisville, Inc.").

[20] Courts in the Sixth Circuit evaluate the reasonableness of a requested fee percentage award using six factors: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. See *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 533 (E.D.Mich., 2003).

[21] The KENTUCKY RULES OF PROFESSIONAL CONDUCT are contained in SCR 3.130. For convenience and clarity, this memorandum will cite only to the individual rule number.

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

In determining what percentage rate is reasonable, courts have considered the above factors as well as additional related factors. *See, e.g., Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974); *In re MicroStrategy Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 786-87 (E.D. Va. 2001). The additional factors include:

(1) Counsel's expectations and fee awards in similar cases;

(2) Counsel's lost opportunity costs; and

(3) Undesirability of the case;

The United States Supreme Court identified all of the above Kentucky and federal factors in *Blanchard*, 489 U.S. at 92, citing *Johnson*, 488 F.2d at 717-19. Applying those factors to this case underscores that the requested award is reasonable and fair:

1. The Nature And Length Of Attorney-Client Relationship, The Time And Labor Expended, And The Time Limitations Imposed.

Class counsel incorporate by reference the detailed discussion of this subject set forth above on pages 2-14, and in Exhibit. 2, Affidavit of Robert Steinberg. At the fairness hearing, the Court heard from three members of the class. The statements from those three class members regarding the representation that Class Counsel provided, as well as the testimony of additional class members at the February 14, 2006 hearing, demonstrates the

quality of the relationship between Class Counsel and class members.

This case has been hard fought for over three years. Class Counsel has devoted thousands of hours to the case and advanced in excess of one million dollars and has made a commitment to continue their work on this case in future months and years. Despite this impressive commitment, Class Counsel has not received any compensation or any reimbursement of expenses.

Class Counsel will not complete their representation until the entire claims process and any potential appeals are complete. In connection with the claims process, Class counsel has met and continues to meet with and interview in detail virtually every Class Member who has submitted a claim. The purpose of these meetings is to assist each class member complete the claim forms, to assist those who need to be appointed legal representatives for deceased victims by processing their appointments through the appropriate probate courts, and to provide them with advice on taxation of their claim proceeds from a legal tax expert retained by Class Counsel. Unlike this case, individual contact with every class member is very unusual in the typical class action case, where class members are both literally and figuratively absent.

In addition to the work detailed above on pages 4-15, perhaps more importantly, Class Counsel has developed a close professional relationship with each Class Member that has met with Class Counsel. Based on the extensive experience that Class Counsel has in personal injury and complex class action litigation, the professional bond created in this case between class members and Class Counsel is unique and extraordinary satisfying.

Most class members have expressed their gratitude to Class Counsel for creating a forum where they could come forward without being identified and discuss one of the most sensitive issues of their lives. The Court, when it approved the settlement, implicitly recognized this relationship:

> The class action procedure has encouraged a large number of people to come forward who would otherwise never have done so had they been left to their individual devices.[22]

The reaction of the class to Class Counsel's fee request further establishes the trust and respect that members of the class have for class counsel. The Court-approved Long Form Notice informed class members that Class Counsel would request a fee of 30% of the common fund. Members of the class have not objected to the request. This lack of objection is a tacit recognition by class members of the quality of work that Class Counsel performed and Class Counsel's entitlement to the requested fee.

2. The Undesirability Of The Case, And The Novelty And Difficulty Of The Questions Raised

This case involved substantial risk and the very real possibility that Class Counsel would not achieve success in obtaining a favorable outcome. In its Order approving the Settlement, the Court underscored the risk that Class Counsel assumed in bringing this action. It observed that Plaintiffs faced a severe uphill battle in securing success.[23] The difficulties and risks associated with this case would, and in fact did, dissuade most lawyers from expending the time and resources necessary to achieve the amazing result that Class Counsel earned. Courts historically have labeled the risk of success as "perhaps the

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22 Order approving Settlement at 10.

23 See Order approving Settlement at 3, fn. 3.

foremost" factor to be considered in determining a fee award. *In re Agent Orange Product Liability Litigation,* 818 F.2d 226, 236 (2nd. Cir. 1987); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 54 (2d Cir. 2000) (citation and internal quotation omitted).

This was a complex case that involved not only difficult factual issues of establishing a common pattern or practice and difficult legal issues, including the possibility that the court may find that the time to bring many claims had expired and the possibility that the class would fail to establish that the Diocese had knowledge of the abuse. The case also included the very real risk of advancing significant costs and the substantial risk of nonpayment. Opposing counsel included one of the largest and most respected law firms in the United States, headquartered in Chicago, IL, and one of the largest and most respected law firms in the Commonwealth of Kentucky. Because the vast majority of victims are unable to personally afford the legal fees needed to prosecute this action, Class Counsel had to be prepared to advance and did, in fact, advance all of the costs and carried all the risk of failure.

This case was extremely undesirable to most attorneys. Only a handful of plaintiff's attorneys have accepted such cases in Kentucky and elsewhere. Class members who did seek representation prior to class certification frequently failed to find an attorney willing to accept the case. Often, the attorney told the victims that the case was too risky because the statute of limitations prevented their case from going forward.

There are undesirable characteristics (from Class Counsel's perspective) inherent in a mass tort case, including the fact that the risks of failure and nonpayment in these cases are extremely high. *See, e.g., In re American Medical Sys., Inc.*, 75 F.3d 1069, 1084 (6th Cir. 1996). Unlike the highly skilled counsel representing Defendants, who are paid on a timely basis for each hour worked, Class Counsel are paid only if they win, and only after years of work with no remuneration. "Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result." *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981).

Success before a jury in complex litigation is unpredictable. A trial necessarily involves the risk that the Class would obtain little or no recovery. *See In re Diet Drugs Prods. Liab. Litig.*, Nos. 1203, 99-20593, 2000 WL 1222042, at *61 (E.D. Pa. Aug. 28, 2000) ("the risks surrounding a trial on the merits are always considerable") (citation omitted).

Thus, the risks were extreme and, as the Court observed, the chances of success were not outstanding. The many major difficulties included: whether a class could be certified despite the unique personal situations and individualized losses of each victim; whether liability could be premised against the Defendants where there was no direct evidence that they knew of a particular priest's abusive activities; and whether the statute of limitations prevented this action from going forward. These issues were discussed in detail at the Final Approval Hearing and in Plaintiffs' Detailed Trial Briefs.

This litigation is also unquestionably unique, complex, and challenging. It includes difficult legal and evidentiary issues, as well as formidable defenses. Of the many sexual abuse cases filed against religious organizations throughout the United States, to the best knowledge of Class Counsel this case is the only true certified class action.[24] Class Counsel developed a unique legal theory of liability based on the United States Supreme Court's holdings in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (authorizing pattern and practice employment discrimination actions consisting of two-phase trials based upon the conduct of numerous geographically separated supervisory personnel); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 752-757 (1976) (authorizing class action procedure and two-phase trials in pattern or practice employment discrimination cases); the Sixth Circuit Court of Appeals holding in *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (authorizing class action procedure and two-phase trials in mass tort cases) and the MANUAL FOR COMPLEX LITIGATION (3rd Edition) § 33.54, p. 354 (1995) and cases cited therein.

3. The Skill Requisite To Perform The Legal Service Properly and The Experience, Reputation, And Ability Of The Lawyers Performing The Service

Class Counsel include nationally recognized members of the complex civil litigation bar that have been involved significantly in major leadership positions in complex mass tort, personal injury, and antitrust class actions. Stanley Chesley has 45 years of legal experience. Mr. Chesley is President of WSBC, one of the country's leading class action law firms. Throughout his career, Stanley Chesley

[24] The Louisville Archdiocese case was actually a group of 243 individually filed complaints that were combined in a "class settlement." This was not a true class, because there were no absent class members to be notified and it did not cut off rights of absent victims.

has been recognized as a preeminent attorney and, since his involvement in the landmark Beverley Hills Fire Litigation in northern Kentucky during the early 1980's,[25] Mr. Chesley has gained national recognition for his innovative approach to complex litigation. Robert Steinberg has 38 years of legal experience, including 10 years as a federal prosecutor specializing in organized crime and tax evasion cases; 18 years as a United States Magistrate Judge presiding over federal civil trials in the U.S. District Court for the Southern District of Ohio; and 10 years as a member of WSBC handling complex class action litigation. Ex. 2. Michael O'Hara has 31 years of legal experience, including numerous cases involving class actions and complex litigation and the original individual Kentucky case litigated successfully against the Covington Diocese. Ex. 3. Ann Oldfather has 30 years of legal experience, including numerous cases involving complex litigation. Ex. 4 She was a lead attorney in what is now the second largest priest abuse litigation case in the Commonwealth of Kentucky,[26], where she secured a settlement fund for 243 victims. For detailed information about Class Counsels' experience, *see* Exs. 1-4, affidavits of Stanley Chesley, Robert Steinberg, Michael O'Hara, and Ann Oldfather. Professor Arthur Miller, renown expert in civil procedure, testified on January 9, 2006 that he was familiar with Class Counsel and that the class members in this case had the services of "the best of the best." Professor Miller will opine at the February 14, 2006 hearing on the qualifications of Class Counsel.

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[25] Mr. Chesley's work in *In re Beverly Hills Fire Litig.*, 639 F. Supp. 915, 924 (E.D. Ky. 1986) was so outstanding that, under the then-current lodestar approach, presiding Judge Henry R. Wilhoit, Jr. awarded him a fee multiplier of 5.

[26] See footnote 17.

4. The Amount In Controversy And The Results Obtained.

At least one United States Court of Appeals has recognized that the single most important factor in awarding attorney fees is the result obtained for the plaintiff. *McDonnell v. Miller Oil Co., Inc.*, 134 F.3d 638, 641 (4th Cir. 1998). *See also Teague v. Bakker*, 213 F. Supp. 2d 571, 583 (W.D.N.C. 2002). In the instant case, the Settlement Fund is sizeable: an $85 million package, combining the Diocese's $40 million contribution and the Diocese's insurers' $45 million contribution. The news media has reported that it is the second largest settlement in similar cases in the United States. A detailed matrix based upon the nature of class members' injuries will determine the amount each victim receives. Depending on their injuries, some class members will receive up to one million dollars. Because Class Counsel structured this case as a class action based on a novel pattern or practice theory, every person who was victimized as a minor by a religious person or other person acting under the authority of the Defendants will be able to participate equally in recovery according to the nature of abuse that person suffered.

The unique legal skills of Class Counsel, who were able to bring this matter as a class action, resulted in a substantial economic benefit to victims who would not otherwise have come forward,[27] and also served to enhance their recoveries. By sharing all expenses, victims experience the benefit of economies of scale.[28] Accordingly, the cost of proceeding as a class is proportionately less than the cost of individually pursuing the case. Furthermore, Class Counsel

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[27] *See* expert testimony of Fr. Thomas Doyle at the January 9, 2006 hearing, contained in Ex. 5.

[28]

understands that attorneys that have pursued individual sexual abuse cases involving priests have demanded and received a 40% contingency fee. The Court should consider these costs savings when it evaluates the result obtained for the benefit of class members.

5. Class Counsel's Expectations, Customary Fee For Like Work, And Fee Awards In Similar Cases.

Prior to the start of this litigation, Class Counsel were familiar with the awards in other mass tort cases and complex class actions, the customary 30% benchmark in common fund cases, and the general rule that a one-third contingency fee is standard in typical individual cases, *see In re Copley Pharma., Inc.*, 1 F. Supp. 2d 1407, 1412-13 (D. Wyo. 1998) and often higher in personal injury actions given the substantial risks of non-recovery. *See In re Shell Oil Refinery*, 155 F.R.D. 552, 571 (E.D. La. 1993) (customary contingency fee in personal injury cases ranges from 33 1/3% to 40%); *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (Posner, J.) ("We know that in personal-injury suits, the usual range for contingent fees is between 33 and 50 percent."). The requested award is well within these ranges.

The natural expectation of an attorney who undertakes a matter on a contingent fee basis is that the client will pay one third of the award as fee. In complex matters, moreover, the negotiated fee easily may exceed 40%. Here, Class Counsel only is seeking a fee of 30%. The requested fee, therefore, is less than the fee typically earned by counsel in contingent personal injury litigation.

6. The Fee In This Case Is Contingent, And The Requested Fee Is Less Than The Market Rate In Other Complex Contingent Litigation.

Because Class Counsel did not charge an hourly rate, they performed all of their work on this case on a contingency basis, relying on the Court to award reasonable fees from the common fund. The percentage of the fund method is consistent with and intended to emulate what attorneys would receive if they negotiated fees privately with their clients. Attorney Alex Rose, a highly respected attorney in the Commonwealth, will testify that the typical rate for personal injury litigation in Kentucky ranges from 33 1/3% to 45%. "[W]hen deciding on appropriate fee levels in common fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). "The object . . . is to give the lawyer what he would have gotten in the way of a fee in an arms' length negotiation." *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). "What should govern [fee] awards is . . . what the market pays in similar cases." *In re RJR Nabisco Sec. Litig,,* 1992 WL 210138, at *7 (S.D.N.Y. August 24, 1992). The Court should thus look to the private market in assessing the reasonableness of a percentage fee.

As discussed above, the general rule is that a one-third contingency fee is standard in individual cases, and the fee is often higher in personal injury actions. Testimony of Attorney Alex Rose; *Copley,* 1 F. Supp. 2d at 412-13,. *Shell Oil,* 155 F.R.D. at 571 (range is from 33 1/3% to 40%); *Continental Illinois,* 962 F.2d at 572 (range is between 33% and 50%). The requested fee is well below the benchmark.

7. Counsel's Lost Opportunity Costs.

The lost opportunity to pursue other matters is an important factor the Court should consider. It is a serious consideration for counsel in each class action case accepted for litigation. Class Counsel knew when they committed to this case that it would be fraught with risks and challenges that would not have been encountered in less complex cases, which each Class Counsel was prepared to turn down in order to devote their time and resources to this case. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) (forgoing other work is relevant fact in determining appropriate percentage). The cases rejected by Class Counsel in order to perform the many thousands of hours of work on this case were all cases where the fees ranged from 33 1/3% to 40% contingency fees. In addition, Class Counsel lost the earning potential of the money advanced for out-of-pocket expenses and will not receive the present value of the awarded fees because Class Counsel will receive payment at the same time members of the class receive payment.

Courts have found that class counsel's reasonable expectations are a significant factor to consider, especially given the common practice for courts to recognize forgone opportunities when awarding fees in common fund cases. *See, e.g., In re Activision Sec. Litig.*, 723 F.Supp. 1373, 1377-78 (N.D.Cal.1989).

D. THE HISTORIC DEMISE OF THE LODESTAR METHOD IN COMMON FUND CASES FURTHER DEMONSTRATES THAT THE COURT SHOULD BASE ITS FEE AWARD ON THE PERCENTAGE OF THE COMMON FUND THAT CLASS COUNSEL CREATED

1. After Using The Percentage Of The Fund Method In Common Fund Cases For More Than A Century, The Courts Briefly Applied A Lodestar Analysis.

From the time the Supreme Court decided *Central R.R. & Banking Co. v. Pettus,* 113 U.S. 116 (1885) in 1885 until 1973, courts typically based fee awards in common benefit cases on a "reasonable percentage of the fund." *See Court Awarded Attorney Fees*, Report of the Third Circuit Task Force, October 8, 1985 (Arthur Miller, Reporter), reprinted in 108 F.R.D. 237, 242 (1986) ("1985 Task Force Report"). In 1973, however, a pair of cases in the Third Circuit briefly abandoned the percentage of recovery method in favor of the more complex lodestar calculation for awarding counsel fees. *See Lindy Bros. Builders, Inc. of Phila. v. American radiator & Standard Sanitary Corp.,* 487 F.2d 161 (3d Cir. 1973) (*Lindy I*); *Lindy Bros. Builders, Inc. of Phila. v. American radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) (*Lindy II*). *See also MicroStrategy,* 172 F. Supp. 2d at 786 n.22 (observing that the lodestar method was pioneered in *Lindy I* and followed by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which used a twelve-factor test for arriving at and adjusting a lodestar figure to determine a reasonable award). Other federal circuit courts of appeal, including the Fourth Circuit, then also experimented with the lodestar approach. *See Barber v. Kimbrell's, Inc.,*

577 F.2d 216, 226 (4th Cir. 1978) (adopting a version of the Fifth Circuit's *Johnson* factors to be used when applying the lodestar method).

2. In Practice, The Lodestar Method Proved To Be Burdensome And Subjective And Did Not Always Properly Compensate Attorneys In Common Fund Cases.

The predominance of the lodestar method as the preferred method for calculating fees was short-lived. Less than a dozen years after it was pioneered in *Lindy I*, the lodestar methodology lost its vitality as a rule of decision for awarding fees in common fund cases, and the percentage method regained approval as the prevailing template for attorney fee awards. *See Strang*, 890 F. Supp. at 502. The Jefferson Circuit Court, when ruling on the attorney's fee award in connection with the settlement of 243 claims in *Turner v. Roman Catholic Bishop of Louisville*, No. 02-CI-02903, specifically rejected the request of objectors that it base the fee on the "Lindy lodestar" method of calculation. Ex. 4, ¶¶ 2-4. Part of the rationale for the rejection of the lodestar approach is that percentage fee awards are less complicated to determine and conserve judicial resources:

- "The lodestar method makes considerable demands on judicial resources since it can be exceptionally difficult for a court to review attorney billing information."
- The time spent gleaning attorney time records to determine lodestar causes delay in other cases on the court's docket.
- Determination of hourly rates is difficult where counsel come from different parts of the country.
- Application of lodestar would probably not result in a "more reasonable award."

In re Catfish Antitrust Litigation, 939 F. Supp. 493, 500-01 (N.D. Miss. 1996).

Two additional developments further explain the demise of the lodestar. First, the Supreme Court in *Blum v. Stenson*, 465 U.S. 886 (1984), indicated that "under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class." *Id.* at 900, n.16. *Blum* implicitly recognized that the "primary rationale for the lodestar approach in fee-shifting cases does not apply in common fund cases." *Awarding Attorneys' Fees and Managing Fee Litigation* (Federal Judicial Center 1994), at 65. Second, a decade of experience with the lodestar method led courts to realize that it did more harm than good. In 1985, the Third Circuit Task Force on attorney fees concluded that lodestar had a wide range of inequities in common fund matters and recommended the percentage fee approach. *See* 1985 Task Force Report, (Arthur Miller, Reporter), 108 F.R.D. at 255-56.

Courts and commentators have leveled a broad array of other criticisms against the judicial-labor intensive lodestar approach. For example, it compensates lawyers based on the hours worked rather than results achieved and thus triggers conflict between counsel and the class by creating incentives for counsel to "decline beneficial settlement offers that are made early in the litigation." *In re Cendant Corp. Litig.*, 264 F.3d 201, 256 (3d Cir. 2001).

In 2002, the Third Circuit convened a task force on the selection of class counsel, which also examined fee award practice and reevaluated the recommendations made by the 1985 Task Force. Seventeen years after the 1985 report, the 2002 Task Force concurred with its predecessor, concluding that

"[e]xperienced practitioners know that a highly qualified and dedicated attorney may do more for a class in one hour than another attorney could do in ten." 2002 Task Force Report at 422.[29] "The lodestar can end up prejudicing lawyers who are more effective with a lesser expenditure of time." *Id.* The 2002 Task Force concluded, "[t]he lodestar remains difficult and burdensome to apply, and it positively encourages counsel to run up the bill, expending hours that are of no benefit to the class." *Id.* The 2002 Task Force was also "highly skeptical about the use of the lodestar even as a cross-check when awarding a percentage of the common fund." *Id.*

One of the most vocal criticisms leveled against the lodestar by the bench has been that it requires the court to scrutinize thousands of individual time entries, requiring a tremendous investment of judicial resources and preventing the court from spending that time on other cases in its docket. 2002 Task Force Report, 208 F.R.D. at 357.

In this case, application of the lodestar would require this Court to consider appropriate billing rates for three law firms in two states, and analyze thousands of hours of billable time for 17 attorneys plus numerous law clerks and paralegals. Ex. 2, Steinberg Affidavit. Furthermore, it would not account for the tremendous amount of future work Class Counsel anticipate relating to processing claims and distribution of awards and possible appeals.

[29] The Task Force was composed of judges, academics and practicing attorneys. The report is also available on the Third Circuit's website at http://www.ca3.uscourts.gov.

3. This Court Should Apply The Percentage Of The Fund Method Used In Common Fund Cases.

Percentage awards in common fund cases are based upon the equitable notion that those who benefit from the creation of the fund should share the recovery with the lawyers whose skill and effort helped create it. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980). As the Seventh Circuit observed in *Skelton v. General Motors Corp.*, 860 F.2d 250, 254 (7th Cir.1988), "in the common fund context, attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose," cited with approval in *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1301 (9th Cir. 1994).

After more than a decade of experimenting with the burdensome lodestar method, courts around the nation moved away from it in common fund cases, returning to the percentage of recovery method, both to conserve judicial resources and because the goals of awarding attorney fees in common fund cases are better served by the percentage method. The *Manual for Complex Litigation* notes that "the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases." *Manual* § 14.121. The same is true in the state courts. *Turner v. Roman Catholic Bishop of Louisville*, No. 02-CI-02903, Jefferson Circuit Court, Kentucky.

For all of the above reasons, the percentage approach outlined above is the proper method for awarding attorney fees in this case.

E. REIMBURSEMENT OF LITIGATION AND SETTLEMENT EXPENSES IS APPROPRIATE.

Class Counsel request reimbursement of $1,068,350.42 in out-of-pocket expenses as of December 31, 2005. *See* Ex. 1, Chesley Affidavit at ¶ 7; Ex. 3, O'Hara affidavit at ¶ 6; Ex. 4, Oldfather affidavit at ¶ 7. A large component of this amount consists of the notice and publication costs and fees paid to experts and consultants who were instrumental in, among other things, helping Class Counsel evaluate and develop the case, and obtain insurance funding of the settlement. These expert expenses, as well as other expenses routinely charged to hourly-fee-paying clients, such as copying charges, computerized legal research costs, and travel expenses, were reasonable and appropriate.

"[L]awyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax." *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999). "There is no doubt that costs, if reasonable in nature and amount, may appropriately be reimbursed from the common fund." *MicroStrategy,* 172 F. Supp. 2d at 791. The expenses advanced by Class Counsel were reasonable and necessary to the prosecution of this case and therefore should be reimbursed.

F. THE SERVICES RENDERED BY THE CLASS REPRESENTATIVES ENTITLE THEM TO INCENTIVE COMPENSATION

Class Counsel request an enhancement to the settlement awards of the ten Class Representatives named by pseudonym in the Fourth Amended

Complaint to account for the special efforts they have expended that redound to the benefit of absent class members. Courts throughout the country readily approve such incentive compensation awards. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001), *quoting In Re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997) (citations omitted). As another district court concurred, courts "routinely approve such awards for

Courts often have recognized that payments to class representatives are permitted by and further the goals of enforcement of civil laws. As one district court explained:

> [T]he Court agrees that special awards to the class representatives are appropriate. First, they have rendered a public service by contributing to the vitality of the federal Securities Acts. Private litigation aids effective enforcement of the securities laws because private plaintiffs prosecute violations that might otherwise go undetected due to the SEC's limited resources .... Second, the named plaintiffs, thorough their vigilance, have conferred a monetary benefit on a large class of purchasers of SmithKline common stock.

The same result should obtain here, where the Class Representatives have helped to enforce Kentucky civil laws that apply to sexual abuse of minors by those entrusted with their care. Simply put, without the sustained involvement of the Class Representatives, state laws would have gone unenforced and many persons victimized as children would not have been compensated.

The use of incentive awards for Class Representatives has been approved by numerous courts. *See Thornton v. East Tex. Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974); *Cook v. Niedert*, 142 F.3d 1004 (7th Cir. 1998); *In*

re U.S. Bancorp Litig., 276 F.3d 1008 (8th Cir. 2002); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000). *Roberts v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1977); *Hughes v. Microsoft Corp.*, No. C98-1646C, No. C93-0178C, 2001 U.S. Dist. LEXIS 5976 (W.D. Wash. Mar. 21, 2001); *Lachance v. Harrington*, 965 F. Supp. 630 (E.D. Pa. 1997); *In re Chambers Dev. Secs. Litig.*, 912 F. Supp. 852, 863 (W.D. Pa. 1995); *In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 503-04 (M.D. Miss. 1996); *In re Immunex Sec. Litig.*, 864 F. Supp. 142, 145 (W.D. Wash. 1994); *Spicer v. Chicago Bd. Options Exch.*, 844 F. Supp. 1226, 1266-68 (N.D. Ill. 1993) *Cimarran Pipeline Construction, Inc. v. National Council on Compensation Ins.*, 1993-2 Trade Cas. (CCH) ¶70,310 (W.D. Okla. 1993); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 710 (E.D. Mich. 1985); *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525 (E.D. Pa. 1990); *In re First Jersey Securities, Inc. Sec. Litig.*, MDL No. 681, 1989 WL 69901 (E.D. Pa. June 23, 1989); *Golden v. Shulman*, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,060 (E.D.N.Y. 1988); *In re Granada Partnership Sec. Litig.*, 803 F. Supp. 1236 (S.D. Tex. 1992); *Malanka v. de Castro*, Fed. Sec. L. Rep. (CCH) ¶95,657, (D. Mass. 1990); *In re Avon Products Inc. Sec. Litig.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,061 (S.D.N.Y. 1992); *In re REVCO Sec. Litig., Arsam Co. v. Saloman Bros., Inc.* Fed. Sec. L. Rep. (CCH) ¶96,956 (N.D. Ohio 1992); *In re Ashland Oil Spill Litig.*, U. S. Dist. LEXIS 20866 at *6 (W.D. Pa. 1990); *McGuinness v. Parnes*, 1989 U. S. Dist. LEXIS 3579 at *4 (D.D.C. Mar. 22, 1989); *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 640 F. Supp. 697, 702 (D. Ohio 1986); *In re Continental/Midlantic Shareholders Litig.*, Civil Action No. 86-6872, 1987 U.S. Dist. LEXIS 8070 at * 12-13 (E.D. Pa. Aug. 29, 1987); *Huguley v. General Motors Corp.*, 128 F.R.D. 81 (E.D. Mich. 1989), *aff'd*, 925 F.2d 1464 (6th Cir. 1991); *In re GNC Shareholder Litig.*, 668 F. Supp. 450 (W.D. Pa. 1987); *Troncelliti v. Minolta Corp.*, 666 F. Supp. 750 (D. Md. 1987);

League of Martin v. Milwaukee, 588 F. Supp. 1004 (E.D. Wis. 1984); *Kyriazi v. Western Elec. Co.*, 527 F. Supp. 18 (D.N.J. 1981).

The special efforts expended by the Class Representatives include: meetings with Class Counsel; permitting the details of their child sexual abuse to be published in the series of Complaints and Amended Complaints filed in this case; submitting to video taped examination by Class Counsel and permitting distribution of the videos to the Mediator Kenneth Feinberg to explain the circumstances and the plight of all class members; appearing in Court at hearings to represent the Class; testifying at the public Final Approval Hearing on January 9, 2006 and at the instant hearing; and providing advice and counsel on victims' issues.

Class Counsel respectfully request that the Class Representatives' awards be enhanced in the amount of $25,000.

CONCLUSION

For all the reasons above, Class Counsel respectfully request the Court to approve their request for a 30% percentage fee award, for $1,068,350.42 in out-of-pocket expenses, and for an enhancement of the settlement awards to the Class Representatives to reflect the work they performed on behalf of the class.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served by express mail or hand delivery to: Mark D. Guilfoyle, Esq., Deters, Benzinger & LaVelle, P.S.C., 2701 Turkeyfoot Road, Crestview Hills, KY 41017, and Carrie K. Huff, Esq., Mayer, Brown, Rowe & Maw, LLP, 190 South LaSalle Street, Chicago, IL 60603.

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