COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO. 03-CI- 00181

JOHN DOE et al. PLAINTIFFS

VS.

ROMAN CATHOLIC DIOCESE
OF COVINGTON, et al. DEFENDANTS

ORDER SETTING ATTORNEYS FEES

Issue:

The case is before the Court on the motion of the Plaintiff's attorneys for the Court to approve their fee as set out in the settlement agreement or, in the alternative, to set a different fee.[1] They have requested a fee equal to thirty percent of the net amount distributed to the class. This request would be totally appropriate, and might even be slightly on the modest side, if it were a private fee arrangement with a single claimant. Therefore, the only real issue is whether the Court should take into account that, by representing approximately 350 class members, there have been substantial economies of scale, and if the Court takes this into consideration, what the fee should be.

Background:

On October 21, 2003, ten months after this case was filed, the Court (Judge Bamberger sitting) certified it as a class action. A year and a half later, on May 17, 2005, the parties reached a tentative settlement of all claims. On January 31, 2006 the settlement was approved by the Court as "fair, reasonable and adequate."

A general description of this action and of the settlement was set out in the order approving the settlement and will not be repeated here.

[1] "[When a class action lawyer secures a recovery and proceeds to file a fee petition seeking compensation from that recovery], the plaintiff's attorney role changes from one of a fiduciary for the clients to that of a claimant against the fund created for the clients' benefit." REPORT OF THE THIRD CIRCUIT TASK FORCE, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 255 (1985). [Reporter: Professor Arthur R. Miller].

The method to be employed in setting a fee:

The attorney's fee that the Court sets in a class action must be reasonable. There are two generally accepted methods for determining such a fee, the lodestar approach and the percentage-of-the-fund method. The Court has discretion to use either method.

The loadstar approach is the older of the two methods and according to one authority the "more common of the two methods." [2] Using this method a court first determines the hours counsel reasonably expended on the case and multiplies that number by an appropriate hourly rate to obtain the "lodestar." This lodestar amount can then be adjusted upwards or downwards using twelve so-called *Johnson* factors, named for a case in which they were enumerated.[3] Obviously, since the lodestar approach is grounded on the time and effort expended by counsel, any economies of scale flow primarily to the class members.

Counsel for the class does not wish to have their fee determined using the lodestar method.[4] In fact, counsel for the class introduced no evidence of the specific hours expended on behalf of the class. The Plaintiffs' expert testified that one difficulty with the lodestar method was that class counsel seeking fees had frequently not been able to withstand the temptation to inflate the description of their effort. The trend is now to use the percentage fee method in common fund cases such as this one. However, Federal Courts often use the lodestar method as a check. Because the Court has no evidence whatsoever regarding the actual hours devoted to the case by counsel it will not be able to use the lodestar method as a check. Therefore, the Court will use only the percentage-of-the-fund method.

Factors that courts have considered in deciding an attorney fee in a class action include:[5]

The size of the fund created and the number of people benefited
The skill and efficiency of the attorneys involved
Whether the litigation was complex or novel
The risk that the attorneys will not be paid
The amount of time counsel devoted to the case
Whether there was injunctive or other non-monetary relief
Whether there were objections to the fee

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[2] 5 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 23.124[5][b][ii] (3rd ed. 2006)
[3] *Id.* at § 23.124 [6][b][ii]: 4 ALBA CONTE AND HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS, § 14.5 (4th Ed. 2002).
[4] The Court assumes that use of the lodestar method would foreshadow a lower fee than the percentage-of-the-fee method.
[5] Johnson v. Georgia Hwy Exp., Inc., 888 F.2d 714, 717-719 (5th Cir. 1974) (twelve factors); Goldberger v. Integrated Resources, Inc. 209 F3d 43 (2nd Cir. 2000) (six factors). *See generally* 7B CHARLES M. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE, § 1803.1 (3rd ed. 2005); 5 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE, §§ 23.124 [5]-[6] (2006); 4 ALBA CONTE AND HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS§§ 14:5-8 (4th ed. 2002); 2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 6.04 (2004).

Public policy considerations
The amount of awards in similar cases

The Factors Considered in Setting the Fee:

The size of the fund created and the number of people benefited

In summary, the settlement makes $84 million available to satisfy the claims of approximately 350 class members. The class members will share the proceeds of the settlement primarily based upon the nature of the abuse they sustained, with those who sustained more severe abuse receiving greater awards than those who sustained less severe abuse. It is possible, but not likely, that not all of the $84 million will be distributed. In that event the remainder will revert to the Diocese or its insurance carrier.

Although the Court has not done an exhaustive investigation it feels comfortable in saying that compared with other cases around the country the settlement here is not the largest total settlement nor is it the smallest; it is not the largest per capita settlement nor is it the smallest. Claimants in other cases have gotten injunctive relief in addition to monetary relief, and none was sought or obtained here. Undoubtedly there are explanations for many of the variances. Some dioceses had insurance; some did not. Some dioceses had a strong statute of limitations defense; some did not. Some dioceses were wealthy; some were not. Some diocese wished to make financial amends; some did not. Some cases that have been settled were settled as part of a group; some were not. Some were settled as part of a bankruptcy proceeding; some were not.

The Court does not think it would be helpful to try to in some way "rank" this settlement against others around the country. It will set the fee based upon the fact that Plaintiffs were represented by very skilled and experienced attorneys who advanced a million dollars of their own funds and expended a great deal of effort over nearly three years to prosecute their case diligently to a successful conclusion and obtained a fair, reasonable and adequate settlement.

The skill and efficiency of the attorneys involved

The settlement was achieved by very skilled and experienced attorneys who, as the Court has noted, advanced nearly a million dollars of their own funds, expended a great deal of effort over three years and prosecuted their case diligently to a successful conclusion. In their motion Class Counsel argue that they have devoted thousands of hours to the case, and although it is not supported by any documentation, the Court does not question this assertion.

Whether the litigation was complex or novel

While the claims here might have been difficult to establish at trial in part because the Diocese had a strong statute of limitations defense, this type of claim is not new, unique or novel. Unfortunately, these claims are part of what has become a well

established gendre. In recent years similar claims have been brought in large numbers locally, regionally and nationally. The Diocese has sporadically settled individual claims for decades. In 1993, in a trailblazing case, a jury returned a verdict containing $700,000 in punitive damages against the Diocese, and it was upheld on appeal.[6] More recently the Diocese has settled 58 cases by paying out over $11 million. Another Kentucky diocese settled over 200 claims for $24 million[7]. Nationally, many similar claims have been asserted and either settled or tried. A recent Associated Press article states that the Catholic Church has so far paid out over $1.5 billion to settle abuse claims and that the church reported there were 783 "new credible allegations" in 2005[8].

While the nature of the case prevents it from being classified as complex or novel, it does involve many different individual claims that have many unrelated aspects requiring significant effort by counsel to just manage the information associated with the claims. In addition the claims are themselves of a sensitive nature, requiring extra effort in communicating with the class.

Class Counsel argues that this is a complicated case because they overcame "the extreme difficulty in obtaining class certification, arguably [making] these cases more deserving..."[9] Assuming that obtaining class certification required alchemy, the Court does not believe that this achievement, while undoubtedly important to prospective class counsel, should be considered in setting the fee.

The risk that the attorneys will not be paid

In any contingency case there is always the real possibility that the attorneys will not be paid. This is no less true in class actions, and it is no less true here. As noted above, the claims asserted here are a portion of many similar claims being asserted throughout the country. The overwhelming majority of these claims have been settled. From the beginning the Diocese expressed a desire to settle the claims in what it conceived as an equitable manner. In fact, the parties were able to settle before any depositions were taken.

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The amount of time counsel devoted to the case

There is no evidence concerning the actual amount of time devoted to the case by counsel. In their memorandum they assert that they have devoted thousands of hours to different parts of the case. The Court has no reason to question this assertion.

Whether there was injunctive or other non-monetary relief

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[6] Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286 (Ky. App. 1998).
[7] That case involved numerous individual actions that were themselves certified as a class only for settlement purposes. Therefore, when it settled with the class the diocese involved did not get any additional protection from the future claims as the diocese here did. Significantly, the defense granted by a true class action does not involve a messy exploration of the Diocese's past conduct as does the statute of limitations defense.
[8] Rachel Zoll, *Clergy Targeting Sex-Abuse Lawyers*, LOUISVILLE COURIER-JOURNAL, May 9, 2006 at A3.
[9] Motion at 20.

No injunctive or other non-monetary relief was sought by the class. In addition, as part of the settlement, the class waived the right to seek injunctive relief in the future.

Whether there were objections to the fee

At the two hearings on the fees there were no oral objections to the requested fee and only a few members filed written objections. Most of the ten class representatives testified at the first hearing and an absent class member testified at the second hearing. All supported the requested fee.

All of the class members were sexually abused as children and few, if any, had access to outside counsel who might advise them on fees. One of the benefits of the Court allowing the class representatives to use pseudonyms and of settlement instead of trial was that it allowed class members to remain anonymous. As Class Counsel has pointed out this encouraged people to come forward that might not have otherwise done so. Even under this claimant-friendly process the expert testimony was that less than half the claimants came forward. It is not realistic to expect those same people to come forward and question a fee in an effort to increase their award by perhaps ten percent when many were reluctant to come forward for one hundred percent.

Public policy considerations

Some courts have held that it is important to encourage private litigants to vindicate public wrongs by awarding "particularly generous [fees] in those situations."[10]

Here while addressing a significant private wrong, Class Counsel is not acting as a "private attorneys general." On the contrary, the settlement specifically bars future injunctive relief.

Similarly, courts have suggested that fees should be more generous where "the diminutive size of the individual claims requires the prosecution of the action on a class or representative basis."[11]

Although the Court has ruled a class action proper, it must be noted that, with the possible exception of some of the smaller claims, the class members' claims are not the type that absolutely require class action status to be viable. In fact, in so far as the Court is aware, all of the other abuse claims around the country were initiated as individual claims[12].

Here, all class members were sexually abused as children. Many have significant

[10] 7B CHARLES B. WRIGHT, ET. AL, FEDERAL PRACTICE AND PROCEDURE § 1803.1 at 357 (3ed. 2005).
[11] Id. at § 1803.1 at 369.
[12] Since some Dioceses have sought the protection of the Bankruptcy Court, these cases constitute *defacto* class actions.

claims, some of which under the schedule of payments in the settlement could approach a value of a million dollars. This not a tax refund case, interest penalty case, car warranty case or any other case in which the aggregate recovery is large but the individual claims are small or in which the loss is a solely economic. In many of those cases the recovery is basically found-money for the class members. This is not a case where the primary benefit to society is punishment of the defendant. The primary object here is reparations to the class. Every class member, whether the amount due under the schedule of payments is small or large, sustained signifigant personal injury.

The amount of awards in similar cases

In their motion Class Counsel make the following assertion as a major justification for their fee request:

> "The percentage awarded in Common Fund Cases Typically exceeds 30"[13]

The Court's research indicates that this assertion is simply not accurate. Although Class Counsel cites numerous cases where fees in excess of 30% have been allowed, these cases do not represent the norm.

A 1996 study by the federal Judicial Center looking at the cases in four district courts found:

> "The fee-recovery rate infrequently exceeded the traditional 33.3% contingency fee rate. Median rates ranged from 27% to 30%.[14]

A later report done by a Third Circuit task force concluded:

> "But this assumption [that fees awarded in the traditional manner generally adhere to a 25-33% benchmark], if ever accurate, is probably no longer correct-especially in the kind of large recovery cases.... In large recovery cases, percentage recoveries in traditional appointment class actions have often been well below 25%.[15]

A very recent study which analyzed all published state and federal class actions from 1993 to 2002 (370 cases) and 630 cases reported in Class Action Reports (CAR) covering the period 1993 to 2002 concluded in part:

> The fee as a percent of client recovery is noticeably below the widely quoted one-third level, ranging from about 30 percent in the smallest cases down to about 10 percent in the largest cases in the published opinion data

[13] Motion at page 18 heading B.
[14] THOMAS E. WILLGING, ET AL., EMPERICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (Fed. Judicial Ctr. 1996).
[15] THIRD CIRCUIT TASK FORCE ON THE SELECTION OF CLASS COUNSEL. FINAL REPORT (January 2002) at 42-3.

set. Fee as a percent of recovery in the *CAR* data was also below the one third level, but was higher than in the published opinion data.[16]

Numerous courts have come to a like conclusion:

> "The majority of common fund fee awards fall between 20% [and] 30% of the fund"[17]

> "Ordinarily, however, such fee awards range from 20 percent to 30 percent of the fund created. We note with approval that one court has concluded that the 'bench mark' percentage for the fee award should be 25 percent. (Citation omitted) That percentage amount can then be adjusted upward or downward to account for any unusual circumstances..."[18]

> "We are of the opinion that the District Court acted within its discretion in setting the percentage of the fund at twenty percent. The twenty percent figure is well within the range of reasonable fees in common fund cases. As suggested in our discussion above, a review of similar cases reveals that a majority of common fund class action fee awards fall between twenty and thirty percent."[19]

Every case is to be decided on its own merits. However, one cannot say, as Class Counsel does, that the award in common fund cases "typically exceeds" thirty percent.

Decision:

The primary expert called by the Class Counsel, Arthur Miller of the Harvard Law School, felt that the savings brought about by the use of the class action mechanism should flow entirely to the attorneys because to do otherwise would discourage attorneys from bringing class actions. In his opinion since the thirty percent fee was appropriate for a case involving a single claim or small group of claims it was appropriate for a case involving 350 claims. He was of the opinion that a percentage fee that would be appropriate in, for example, an airline crash involving a class composed of the plane's 200 passengers would also be appropriate for an identical crash where the plane carried 400 passengers.

The Court respectfully disagrees with the learned professor.

There are undoubtedly advantages and disadvantages to resolving the current situation through a class action. One of those advantages, and one Judge Bamburger considered in certifying the class, is the savings in time and resources that flow from

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[16] Theodore Eisenberg and Geoffery P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. OF EMPIRICAL LEGAL STUDIES, 27, 77 (March 2004). Available at http://www.omm.com/omm_distribution/newsletters/client_alert_class_action/pdf/class_action_study.pdf.
[17] Camden I Condo. Assn., Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991).
[18] Paul, Johnson, Alston& hunt v. Graulty, 886 F2d 268,272 (9th Cir. 1989).
[19] Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1272 (D.C. Cir. 1993).

handling the claims as a group. For example, counsel for Plaintiffs estimated that it might cost hundreds of thousands of dollars in out-of-pocket expenses to properly prepare one case. Here, the funds advanced averaged $2-3 thousand dollars per case. Similar savings were undoubtedly experienced in the expenditure of attorney time. For example, where a single priest abused multiple class members, preparing the case against that priest for one claimant would go a long way towards the preparation of the case for a second victim.

To this Court, it is inequitable to allow this saving to inure solely to the benefit of class counsel. Virtually wherever one looks, in class actions as the recovery increases the attorneys fee declines as a percentage of the recovery.

For example, the most extensive study the Court was able to locate concluded:

> "[A]ll three data sets reveal a scale effect. As client recovery increases, the fee percent decreases..."[20]

Other studies of class action settlements agree:

> [The recommended method for setting fees in common fund cases] and the procedure for arriving at it, should be left to the court's discretion. In most instances, it will involve a sliding scale dependent upon the ultimate recovery, the expectation being that, absent unusual circumstances, the percentage will decrease as the size of the fund increases. [Footnote to this sentence- In a case in which a large settlement is anticipated, the negotiated contingency range may include relatively small percentages][21]

> "[A]bsent unusual justification such as uncommon performance, it is generally accepted that as the size of the class settlement increases, the percentage of the fee award decreases"[22]

One court categorized the range as follows:

> "This sliding scale...is explained in part by economies of scale....
> Thus where fund recoveries range from $51-75 million, fee awards usually fall in the 13-20% range....in megafund cases...wherein a class recovers $75-200 million (or more), courts most stringently weigh the economies of scale inherent in class actions in fixing a percentage yielding a recovery of reasonable fees....Accordingly, fees in the range of 6-10% and even lower are common in mega-common fund cases."[23]

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[20] Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. OF EMPIRICAL LEGAL STUDIES, 27, 77 (MARCH 2004).
[21] REPORT OF THE THIRD CIRCUIT TASK FORCE, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 239, 256, 274 (1985) [Reporter: Professor Arthur R. Miller].
[22] 2 ALBA CONTE AND HERBERT NEWBERG, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE, § 6.04 at 6-88-9 (2004).
[23] In re Copley Pharmaceutical, Inc. 1 F.Supp2d 1407, 1413 (D. Wyo. 1998).

Based upon the factors considered above and the belief that class members as well as their attorneys should share the savings of the economies of scale of a class action, the Court will set the fee at cost claimed ($1,068,350.42) plus twenty-two percent of the recovery to be paid to the class members under the matrix or from the counseling fund.

The costs claimed are to be paid in a manner so that they are effectively apportioned among the various funds in proportion to the amount of the various funds. The percentage payments are to be made as set out in the agreement for payments made under the matrix from the various funds, i.e. deducted and paid to counsel at the time of distribution. The Court is concerned that deducting the percentage from claims made from the counseling fund would discourage use of the fund by in effect creating a twenty-two percent co-pay. The Court is also concerned that paying the full fee in addition to the amount claimed might encourage abuse of the fund. Therefore, as to payments from the counseling fund a payment from the fund shall be handled as follows. The amount claimed shall be multiplied by 1.22, with twenty two percent of that amount distributed to Class Counsel and the remainder to the claimant. This will produce what is in effect a modest co-pay for the claimant of five percent ((claim amount)x1.22x.78=.9516 (claim amount)). No other terms of the settlement agreement are effected.

The Court would emphasize that setting the fee percentage at less than that requested by Class Counsel is not an adverse reflection on Class Counsel or their request. The Court has based the fee on a finding that Class Counsel is highly qualified, worked hard for the class, and achieved a good result. The change comes about due to facts beyond the control of counsel (primarily, the nature of the case) and a difference in philosophy (primarily, whether the class members should share in the economies of scale flowing from the use of the class action procedure).

In making this fee award it is the Court's goal to set a reasonable fee and to thereby "recognize the sacrifice and commitment plaintiff's counsel made to its clients while preserving as much as possible for those who were injured."[24]

[24] Wal-Mart Stores, Inc. v. Visa U.S.A., Inc. 396 F.3d 96, 124 (2nd Cir. 2005).

For the above reasons **IT IS HEREBY ORDERED:**

1. The reasonable fee to Class Counsel shall be:
    a. $1,068,350.42 to be paid as soon a practical and paid proportionately from all funds
    b. as to distributions to class members other than distributions from the counseling fund, an amount equal to 22% of the amount paid to class members from funds to be paid at the time the distribution is made to the class member or on behalf of the class member and deducted from the amount distributed to the class member
    c. As to distributions from the counseling fund, the payment shall be made as follows:
        i) To the claimant an amount equal to the claim times 1.22 times .78
        ii) To Class Counsel an amount equal to the claim times 1.22 times .22
2. Pursuant to CR 54.02 (1) this is a final judgment, there being no just reason for delay.

JOHN W. POTTER, SENIOR JUDGE
BOONE CIRCUIT COURT

Cc: Robert Steinberg, Esq.
Stan Chesley, Esq.

Mark Guilfoyle, Esq.

Carrie Huff, Esq.

Michael O'Hara, Esq.

Ann Oldfather, Esq.

Judge Thomas Lambros

Judge John Potter