IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY D. KOLTON, S. DAVID GOLDBERG, JEFFREY S. SCULLEY, and HENRY C. KRASNOW, individually and on behalf of classes of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**No. 16-cv-3792**
	)	**Hon. Charles P. Kocoras**
MICHAEL W. FRERICHS, Treasurer of the State of Illinois,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES AND PLAINTIFFS' REQUEST FOR COMPENSATION

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INTRODUCTION

The Settlement agreed to in this litigation provides, at a minimum, approximately $47 million and potentially more than $70 million, to the two Classes that Class Counsel represents, and millions more to Future Claimants identified in the Agreement. These sums are just compensation for the state's taking of monies belonging to the Classes and money the state would have continued to take from Future Claimants but for this lawsuit. Under the Settlement, Class Members and Future Claimants will receive the greater of the interest that the Treasurer earns on their money or the CPI, calculated monthly. The average amount of this interest for the past several years has exceeded 2 percent, a return that is more than the Illinois Treasurer or U.S. Treasury Bonds have earned during the same period. For their efforts, Class Counsel request a fee of 20.3 percent of the $47 million benefit created for the Classes, or $9.5 million, inclusive of costs and expenses.

This lawsuit was filed to change a longstanding and widely accepted unconstitutional State policy. The State of Illinois has been taking into custody the "unclaimed property" Class Members own for decades. When the owners of that property have filed claims for their property, the State has returned the face value of the property it took but has refused to pay any interest for the period that it had "custody" of and earned interest on the property. The result of that policy has been the accumulation of hundreds of millions of dollars of interest, owned by the members of the Classes that Counsel represent, but used by the State to fund its governmental obligations or operations. And, from every indication, the State had no intention of changing its policy and returning this money to its rightful owners.

As a result of Class Counsel's initiative and persistence, the unconstitutionality of this arrangement has been exposed and this money is being returned to its owners. If the Settlement is approved, approximately $15.8 million will be immediately returned to unclaimed property

owners whose claims were paid or approved between August 22, 2017 and July 20, 2021 (the "Rule 23(b)(3) Class"); and, according to a conservative estimate made by Defendant's expert, $30.8 million more will be returned to those who owned unclaimed property as of July 20, 2021 (the "Rule 23(b)(2) Class"). Plaintiffs' expert estimates more. See Expert Declaration of Professor Emeritus Sam Peltzman. (Professor Peltzman's Declaration is attached as Exhibit B and referred to as "Peltzman Decl. at ___").

Class Counsel are seeking $9.5 million, or 20.3 percent of this $47 million as a fee and for reimbursement of expenses to compensate them for the risks they took and the efforts they expended in prosecuting this case on a contingent basis, the skill that they displayed and the results achieved. The parties have agreed that Class Counsel's fees would be paid out of the Unclaimed Property Trust Fund (the "UPTF") – the Fund that holds the money owned by Class Members.

Class Counsel's fee request is well supported by established legal precedent and well within established market rates as recognized by the Seventh Circuit. As set forth in the detailed accompanying Report of Professor Charles Silver, one of the leading experts on class action attorney's fees, Class Counsel's fee request is reasonable and should be granted. (Professor Silver's Report is attached as Exhibit A and referred to as "Silver Rep. at ___").

BACKGROUND

I. CLASS COUNSEL BROUGHT A RISKY CASE TO MAKE NEW LAW

Contingent fee cases that present novel theories and challenge widely accepted public policies are inherently risky. When Class Counsel filed this lawsuit, they knew they faced substantial risk and would have to make new law to upset a longstanding state policy. See Declarations of Terry Rose Saunders, Arthur T. Susman and Thomas A. Doyle (attached as

Exhibits C, D and E). Establishing that earnings on the UPTF, like the Fund itself, belonged to Class members and requiring the State to return tens of millions of dollars it had long relied on to finance the State would not be easy. No federal court had ruled in favor of a plaintiff on the issues involved here before this case, and no state court had recognized a right to compensation for the state's refusal to pay interest on unclaimed property under the Takings Clause of the U.S. Constitution.[1]

In challenging the Illinois statute, Class Counsel faced an adverse decision by the Illinois Supreme Court, which had previously rejected the claims Plaintiffs were making in this case. The Illinois Supreme Court had held that unclaimed money property was to be treated as abandoned and, therefore, the state owed no interest for the time the state held and invested the money. *Cwik v. Giannoulias*, 237 Ill. 2d 409, 930 N.E. 2d 990 (Ill. 2010).

Because this decision had never been questioned and because Plaintiffs sought to vindicate federal constitutional rights, Plaintiffs filed their complaint in federal court. Plaintiffs recognized the benefits of judicial efficiency if the claims of both Classes were resolved in one proceeding. This strategy, however, meant that federal jurisdiction was less assured. The litigation involved state revenues, and the state could raise the Eleventh Amendment as a defense to any claim for monetary relief as damages for takings that had already occurred. Class Counsel believed that they had a valid argument to support their damages claim, and this was a risk worth taking.

Moreover, there was precedent in the Seventh Circuit, which, if followed, would have

[1] Lawsuits challenging refusals by states to pay interest on unclaimed property had been filed without success in: Alabama, California, Florida, Illinois, Louisiana, North Carolina, Pennsylvania, and Texas. One state court, the Supreme Court of Ohio, had held that its state's statute that denied interest to unclaimed property owners violated that state's constitution. *Sogg v. Zurz*, 121 Ohio St. 3d 449, 905 N.E. 2d 187 (Ohio 2009).

severely limited the benefits available to both classes and the number of property owners who could benefit from the litigation. In *Cerajeski v. Zoeller*, 735 F. 3d 577 (7th Cir. 2013), the court had held that Indiana's failure to compensate an unclaimed property owner for the interest his interest-bearing account had been earning prior to the time it was delivered into state custody was a taking. That holding was limited to the facts of the case but could be, and indeed was in this case, construed in a way that defeated Plaintiffs' claims. See also *Hall v. State*, 908 N.W.2d 345 (2018 Minn.) (Limiting takings claim to state's failure to compensate owner for interest on interest-bearing account).

Another risk that materialized was that the Treasurer would move to dismiss the Complaint on the ground that Plaintiffs' claim was not ripe because they had not exhausted their state court and administrative remedies as required by *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). Class Counsel believed that *Williamson* was not applicable because the state statute that had been upheld by the Illinois Supreme Court eliminated any state remedy, but the Complaint was dismissed based on *Williamson.*

In sum, this was an extremely risky case for Class Counsel to take on a wholly contingent basis against a Defendant that had extensive resources at its disposal. It was settled only after two appeals to the Seventh Circuit Court of Appeals that made new law and lengthy arms-length settlement negotiations.

II. THIS CASE REQUIRED GREAT EFFORT AND SKILL

In bringing this case on behalf of two classes and seeking injunctive and monetary relief, Plaintiffs sought to establish the right to just compensation for all unclaimed property owners, none of whom were being compensated for the interest the state was earning on their money, as well as the measure of that compensation. If Plaintiffs prevailed, members of both Classes –

regardless of whether their property had been earning interest before it was delivered to the state – would be paid a predetermined amount of compensation. The issues relating to claims of past, present and future owners would be resolved in one final judgment, thus furthering judicial efficiency.

Plaintiffs did not initially succeed in their attempt to have claims of both Classes resolved in the federal court proceeding. On appeal from the dismissal of the Complaint for lack of subject matter jurisdiction, the Seventh Circuit reversed the dismissal of the claim for declaratory and injunctive relief and held that the state must allow the owner of unclaimed property the benefit of the property's earnings while in state custody; but the court dismissed the damages class on the grounds that they could not sue the state under §1983. *Kolton v. Frerichs,* 869 F.3d 532 (7th Cir. 2017) (*Kolton I*).[2]

Class Counsel proceeded to litigate the case on behalf of a Rule 23(b)(2) Class and sought class certification on behalf of all owners of unclaimed property. Defendant, however, opposed class certification on the ground that the proposed class included unclaimed property owners whose property had been earning interest before it was delivered to the state and property owners whose property had previously been non-interest-bearing. Class certification was denied and the claims of non-interest-bearing property owners were dismissed.

Class Counsel continued to press their claims on behalf of both types of property owners. They sought and were granted leave to immediately appeal whether the Seventh Circuit's prior ruling in *Kolton I* pertained to both interest-bearing and non-interest-bearing property. The Seventh Circuit confirmed its prior holding in *Kolton I* that an owner of unclaimed property is entitled to income that the property earns while in state custody regardless of whether the

[2] The Seventh Circuit did not decide whether the damages claim against the state could be brought in federal court as a direct action under the Fifth Amendment.

property had previously been earning income in the owner's hands: a property owner's right to interest "does not depend on what the … [property] earned in the owner's hands." *Goldberg v. Frerichs*, 912 F.3d 1009, 1011 (7th Cir. 2019) (*Kolton II*). This decision greatly increased the risk of litigation for Defendant.

In the same opinion, the Seventh Circuit limited the properties entitled to just compensation to those large enough to earn "'net interest' – in other words, when administrative expenses exceed the return on investment," no interest is due, citing *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 224 (2003). This ruling increased the uncertainty and likelihood of delay in obtaining relief for Plaintiffs because the task of determining which parcels of unclaimed property could earn net interest would have required extensive fact and expert discovery and analysis, and most likely extensive briefing or a hearing or both on this issue.

After the decision in *Kolton II* and certification of the Rule 23(b)(2) Class, and given the posture of the case, Class Counsel concluded that it would be in the best interests of Class Members to conduct necessary discovery and explore the possibility of settlement with Defendant. Defendant agreed and the parties entered into focused discovery and settlement discussions.

III. CLASS COUNSEL'S EFFORTS ACHIEVED A SIGNIFICANT RESULT

The Settlement provides a substantial monetary recovery to Class Members. The total benefit has been conservatively estimated by Defendant's expert to be $46.6 million[3]. Of this amount, $15.8 million will be immediately payable to Rule 23(b)(3) Class Members if the

[3] Professor Peltzman's Declaration explains why Defendant's expert's estimate of the return rate and years that property will be held by the state is too low and interest payable could be more than twice as much. Peltzman Decl. at ¶¶4-10.

settlement is approved. The balance will be payable as the claims of Rule 23(b)(2) Class Members are approved for payment by the Treasurer.

Class Members will receive at least as much as the Treasurer earns in any given month, and more when the CPI is greater than the Treasurer's actual return. When the settlement was negotiated, its measure of compensation exceeded the Treasurer's actual earnings in each of the prior five years. Today, at current rates, the settlement provides for an average of more than 2 percent interest to be paid on the Classes' money, a rate far and away above the present market. See Doc. 114-3, 538. This measure of compensation will continue to be paid for ten years or until the property is returned to its owner.

The settlement also ensures that "Future Claimants," those unclaimed property owners whose money is delivered to the Treasurer after July 20, 2021, benefit. Class Counsel estimate that this group will recover in excess of $3 million each year for up to a ten-year period, based on Defendant's expert's calculations for the Rule 23(b)(3) Class and assuming there is no increase in interest or CPI figures. Even if the Illinois legislature should change the measure of just compensation with respect to Future Claimants, these owners will not be bound by the release in the Settlement and could challenge any such action. Importantly, the permanent change in Illinois law confers substantial benefits on the public by requiring the Treasurer to eliminate a longstanding unconstitutional policy and operate in a constitutionally proper manner by paying interest to all qualified owners of unclaimed property.

The Settlement also promotes the judicial efficiency that Plaintiffs initially sought. It resolves in one proceeding the claims of both the Rule 23(b)(2) and Rule 23(b)(3) Classes and avoids the possibility of duplicative litigation in state court. And it assures that unclaimed property owners in the future will share in the significant benefits conferred by this Settlement.

ARGUMENT

I. CLASS COUNSEL IS ENTITLED TO A PERCENTAGE OF THE BENEFIT THEY CREATED FOR THE CLASSES.

A. Class Counsel are Entitled to Fees Under the Common Fund Doctrine

Plaintiffs brought this lawsuit to force the state to return to the owners of unclaimed property the earnings on that property the state had been keeping for itself. Plaintiffs succeeded in their efforts and have created a valuable and measurable monetary benefit for all Class Members. Class Counsel's fee request falls squarely under the common fund doctrine, and they are entitled to an award based on the benefit they created. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970); *Trustees v. Greenough*, 105 U.S. (15 Otto) 527 (1881). As explained in the Report of Plaintiffs' expert Professor Charles Silver:

> Class Counsel have applied to the Court for a common fund fee award. These awards are appropriate when a lawyer's efforts create or augment a fund for the benefit of passive recipients (here, non-party owners of unclaimed property), all of whom are entitled to share the gain and would be enriched unjustly if payment to their lawyers were withheld.

Silver Rep. at ¶25.

The value of the fund in this case has been conservatively estimated to be $47 million, $15.8 million of which will be immediately payable to Rule 23(b)(3) Class Members upon the Settlement's approval. The payment to 23(b)(2) Class Members will be paid over time. The Court can determine the value of the fund based on the estimated present value of the payments members of the Rule 23(b)(2) class will receive, as is done, for example, in ERISA cases where fee awards have been made based on the present value of future payments that can only be estimated. See *Williams v. Rohm & Haas Pension Plan*, 2010 WL 1490350, at *1 (S.D. Ind. April. 12, 2010, *aff'd,* 658 F.3d 629, 635 (7th Cir. 2011) (Fee award based on settlement's

expected value even though outstanding data and the unknown amount of future payouts to class members created uncertainty). As Professor Silver explains, *Williams* establishes that:

> [A] settlement can produce a common fund recovery by requiring a defendant to make payments…in the future to persons who are not yet eligible to receive them… and a court can properly… grant a common fund fee award on an estimate on the present value on a stream of payments.

(Silver Rep. at ¶¶ 45, 46).

In this case, Plaintiffs value the Settlement at the low end of what Rule 23(b)(2) Class Members can reasonably expect to receive based on an estimate made by Defendant's expert. Mr. Wagers is familiar with unclaimed property data and systems, and his calculations for the Rule 23(b)(2) Class are based on actual numbers.[4] (See "Kolton LiabilityAnalysis 13May21") It is unlikely that he would overestimate the potential return to Rule 23(b)(2) Class Members. If either the return rate or the length of time the state holds property turn out to be low, then the amount of interest returned to Rule 23(b)(2) Class Members will increase, and if both are low, there will be a cumulative effect.[5] Any underestimate will not, however, affect the interest due to Class Members. It only reduces the percentage of the benefit Class Counsel are seeking in fees.

B. The Fee Award Should be a Percentage of the Value of the Settlement

Under established Seventh Circuit precedent, fee awards in common fund cases are to be based on the market price for legal services. Courts "must do their best to award counsel the

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[4] Mr. Wagers's letter to Defendant containing his credentials and explaining his methodology and a summary of his calculations of interest due to Rule 23(b)(3) Class Members were attached as Exhibit A to Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Proposed Class Action Settlement. See Doc. 114-2, 533-535. Mr. Wagers's updated calculations of interest due to Rule 23(b)(3) Class Members through July 20, 2021 are attached as Exhibit F.

[5] Professor Peltzman concludes that the understatement of estimates is material and interest payable to Rule 23(b)(2) Class Members could be double Mr. Wagers's estimate (or $61.6 million). Peltzman Decl. at ¶10. This would increase the total value of the settlement to $77 million.

market price for legal services in light of the risk of non-payment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig. (Synthroid I)*, 264 F.3d 712, 718 (7th Cir. 2001); *accord Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011) ("[T]he district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys."). The *Synthroid* Court explained that courts must consider factors such as actual fee contracts that were privately negotiated in similar litigation and information from other cases and that the market price for legal fees "depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of the performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Id.* at 719, 721.

Although courts in this Circuit have the discretion to use either a percentage of the fund or lodestar methodology in awarding fees, *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994), the percentage method is the one that most closely reflects what lawyers taking on a risky class action case would negotiate at the outset. See *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 600 (7th Cir. 2005) (Fee awards in analogous class action settlements shed light on the market rate for legal services in similar cases). As the court explained in *Charvat v. Valente*, 2019 U.S. Dist. LEXIS 187225, 2019 WL 5576932 *36 (N.D. Ill. Oct. 28, 2019):

> The Court agrees with Class Counsel that using the percentage-of-recovery method is preferable to the lodestar method in this instance. The "normal practice in consumer class actions" is to negotiate a fee arrangement based on a percentage of recovery. *In re Capital One*, 80 F. Supp. 3d at 795. See also *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 501 (7th Cir. 2015) (noting a large class of lightly-injured plaintiffs would be unlikely "to monitor counsel and ensure that counsel are working efficiently on an hourly basis" as required by the lodestar model).[6]

[6] Judge Wood's decision approving the settlement was appealed, but the appeal was dropped after the settlement was amended. *Charvat v. Valente*, 19-3280, 2020 U.S. App. LEXIS 36986 (granting joint motion to remand filed by counsel for all parties).

Thus, where, as here, "the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate.' *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (emphasis in original).

C. Class Counsel's Fee Request of 20.3 Percent is Appropriate

Class Counsel's request of 20.3 percent is well within the percentage range common in risky and complex class actions such as this. The fee awards courts have made in contingent fee class actions in this Circuit and studies of fees paid by sophisticated clients in contingent cases show that fees in the range of 33-1/3 percent or higher are not unusual. See *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 201 (N.D. Ill. 2018).[7] In his report, Professor Silver surveys attorney's fee awards in numerous class actions and other contingent fee cases in this Circuit and elsewhere and concludes that the market rate for contingent fee lawyers "generally ranges from 30 to 40 percent of clients' recoveries, with 33 percent being especially common." Silver Rep. at ¶73. His survey includes cases involving sophisticated named plaintiffs, Seventh Circuit fee awards in ERISA cases and fee awards in cases with comparable recoveries. Silver Rep. at ¶¶75-97.

The fee requested is also justified given the risk of non-payment. *Synthroid I*, 264 F.3d at 721. (The market rate must account for the "risk of non-payment a firm agrees to bear"). *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (Recognizing that "[t]he greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel," in approving a fee award of 27.5 percent for a $200 million settlement.)

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[7] See also *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 862 (N.D. Ill. 2015) (After surveying empirical studies and fee awards in this Circuit, court awarded one third plus expenses of $46 million common fund); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 601 (N.D. Ill. 2011) (awarding one third of common fund).

As previously discussed, this case was risky and Class Counsel were aware of that risk when they brought this case. Susman Dec. at ¶¶9-16; Saunders Dec. at ¶¶8-15. Neither Illinois law nor federal law established a way forward. Even after Class Counsel's success on their first appeal to the Seventh Circuit, had that court determined that *Cerajeski* meant that a property owner's right to interest depends on what the property had earned in the owner's hands (*Kolton II*), this case would have been of little value to most Class Members.[8] Perhaps one sign of the obvious risk involved in this case was that no other lawyers appeared to take up the cause.

The other factor to be considered in determining an appropriate fee is Class Counsel's performance and the result. *Synthroid* I at 719; *Taubenfeld* at 600. The quality of Class Counsel's performance and the result achieved through their efforts as described above also justify the fee requested.

Something needs to be said in this context about the "amount of work necessary to resolve the litigation." *Synthroid I* at 721. This case was difficult, and success in establishing the principle established here was a long time in coming and required a lot of work. Class Counsel Arthur Susman has been working on the constitutional issue in this case for 15 years. Both he and Ms. Saunders have previously been involved in litigation to try to persuade courts that unclaimed property owners were entitled to just compensation for the state's taking of the time value of their property. Susman Dec. at ¶¶6-8 and App. 1; Saunders Dec. at ¶¶6-7 and App. 1. It should not, therefore, be surprising that they succeeded in this case efficiently and without accumulating unnecessary time. Their lodestar in this case is not a measure of the work or effort

[8] The revised Illinois Revised Uniform Unclaimed Property Act, 765 ILCS 1026/15 (RUUPA) provides for the payment of interest on interest-bearing demand, savings or time deposits and only at the lesser of what the property previously earned or the CPI. 765 ILCS 1026/15-607 (b)-(c). According to the Treasurer, the state paid approximately $3,560 during the first year interest was paid.

involved in achieving the result.[9] This is a case in which the Seventh Circuit's criticism of a lodestar cross check is particularly apt: "the client cares about the outcome alone" and class counsel's efficiency should not be used "to reduce class counsel's percentage of the fund that their work produced." *Synthroid Mktg. Litig.*, 325 F3d 974, 979-980 (7th Cir., 2003); see also *Will v. General Dynamics Corp.* 2010 U.S. Dist. LEXIS 123349, 2010 WL 4818174, at *3 (S.D.Ill. Nov. 22, 2010); *In re Comdisco Sec. Litig.*, 150 F.Supp.2d 943, 948 n. 10 (N.D.Ill 2001) ("To view the matter through the lens of free market principles, [lodestar analysis] (with or without a multiplier) is truly unjustified as a matter of logical analysis."). See also Silver Rep. at ¶¶98-102.

D. The Settlement Supports an Award of Fees Under the Common Fund Doctrine

A fee award under the common fund doctrine is appropriate in this case for two reasons. First, the Settlement reinstates the damages claims of Rule 23(b)(3) Class Members. These claims have been brought as a direct action under the Fifth Amendment to the U.S. Constitution. They are not brought under any federal statute, and no statutory fee award is available for prevailing on these claims.

Second, the terms of the Settlement Agreement rule out an award of fees under a fee-shifting statute. Rule 23(b)(2) Class claims, brought under 42 U.S.C. §1983, are subject to the fee-shifting provision of 42 U.S.C. §1988, which entitles prevailing parties to recover attorney's fees from the losing party, in this case the Treasurer of the State. The Settlement Agreement, however, by its terms relieves the state from any obligation to pay fees or costs. Paragraph 3.2.5 of the Settlement Agreement provides that "[a]ny award of attorneys' fees or reimbursement of

[9] As of August 31, 2020, Plaintiffs' Counsel's lodestar was approximately $1.3 million on this case. The categories of work that each of them performed are set forth in their respective Declarations. Saunders Decl. at ¶7; Susman Decl. at ¶8; Doyle Decl. at ¶7.

expenses shall be paid from the Unclaimed Property Trust Fund." Because the state owns none of the money in the UPTF and merely holds it in trust for unclaimed property owners, that is the Class Members in this case, the state is no longer obligated to pay fees, and fee-shifting is not available. *Florin v. Nationsbank of Georgia, NA*, 34 F3d at 563 (The court approved a common fund award in an ERISA case, recognizing that "when a settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorney's fees, equitable fund principles must govern the court's award of the attorney's fees.") [10]

II. THE NAMED PLAINTIFFS' COMPENSATION REQUESTS ARE REASONABLE.

Plaintiffs request compensation of $2,500 for each of the four Class Representatives: Anthony D. Kolton, S. David Goldberg[11], Jeffery S. Sculley, and Henry C. Krasnow, as an award for their service in this case. Messrs. Kolton, Goldberg, and Sculley have served as named Plaintiffs and Class Representatives for a number of years and at all times have been willing, able and ready to perform the duties and obligations of a Class Representative. Mr. Krasnow more recently agreed to serve as Representative of the Rule 23(b)(3) Settlement Class and since

[10] Under Section 3.2.5, just compensation also is to be paid from the UPTF. According to Mr. Wagers's Liability Analysis Spreadsheet ("Kolton LiabilityAnalysis 13May21"), the UPTF includes approximately $900 million in assets classified as "unknown/aggregates" that are not expected to be reclaimed, and, under any estimate, there will be a sufficient balance of the UPTF that will not be claimed to cover payments. That does not change the fact that none of this money belongs to the state. It remains the custodian of Class Members' money. *Cerajeski v. Zoeller*, 735 F.3d 580, 582 (Noting that unclaimed property acts are not escheat statutes, "the state does not acquire title to the property. It is merely a custodian. The owner can reclaim his property at any time…. And a state may not escheat property without a judicial or administrative determination that the property has been abandoned or is otherwise subject to escheat.")

[11] On July 1, 2021, Class Counsel were advised of the death of Class Representative S. David Goldberg. Mr. Goldberg had by that time provided the services for which he is now seeking compensation. Any compensation awarded by the Court will be paid to the Sherwin David Goldberg Declaration of Trust.

that time has been willing, able and ready to perform all the duties and obligations of a Class Representative, as well. As set forth in each of their Declarations: each of them reviewed the Complaint in this case and has been kept apprised of the progress of the litigation; each of them has read the Settlement Agreement, including Exhibits, and signed the Agreement after having made an independent judgment that the Settlement is fair and in the interest of the Class he represents. See Docs. 112-6 at 490, 112-7 at 492, 112-8 at 494 and 112-9 at 495. Under these circumstances, a service award of $2,500 to each Representative is reasonable and appropriate.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion in its entirety, award attorneys' fees, including costs and expenses, in the amount requested, and grant Plaintiffs' request for compensation.

Respectfully submitted,

Dated: September 22, 2021

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Counsel for Plaintiffs and the Rule 23(b)(2) Class and the Rule 23(b)(3) Settlement Class

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY D. KOLTON, *et al*.,	)	
	)	
Plaintiffs,	)	
v.	)	**No. 16-cv-3792**
	)	**Hon. Charles P. Kocoras**
MICHAEL W. FRERICHS,	)	
Treasurer of the State of Illinois,	)	
	)	
Defendant.	)	

EXPERT REPORT OF PROFESSOR CHARLES SILVER ON THE REASONABLENESS OF CLASS COUNSELS' REQUEST FOR AN AWARD OF ATTORNEYS' FEES

CONTENTS

I, CHARLES SILVER, declare as follows:

I. SUMMARY OF OPINIONS

1. The proposed settlement will create a common fund from which Class Counsel are entitled to be paid. This is true even though some Class Members will be paid in the future rather than immediately.

2. Class Counsel's fee should be set as a percentage of the fund because percentage-based compensation arrangements dominate the market for legal services obtained on contingency.

3. The percentage should be set in light of market rates, which typically range from one-third to 40 percent of the recovery. For this purpose, the Court can estimate the present value of the stream of payments that Class Members will receive.

4. Because Class Counsel have requested a fee equal to about 20.3 percent, their request is reasonable and should be granted.

II. CREDENTIALS

5. I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law. I joined the Texas faculty in 1987, after receiving an M.A. in political science at the University of Chicago and a J.D. at the Yale Law School. I received tenure in 1991. Since then, I have been a Visiting Professor at University of Michigan School of Law (twice), the Vanderbilt University Law School, and the Harvard Law School.

6. The study of attorneys' fees has been a principal focus of my academic career. I published my first article on the subject shortly after I joined the law faculty at the University of Texas at Austin. See Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991). Since then, I have published about a dozen more articles, two of which are empirical studies of fee awards in class actions. Lynn A. Baker, Michael A. Perino, and Charles Silver, *Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment*, 66

Vanderbilt L. Rev. 1677 (2013); and Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371 (2015) ("*Is the Price Right?*"). The CORPORATE PRACTICE COMMENTATOR chose *Is the Price Right?* as one of the ten best in the field of corporate and securities law in 2016. In his concurring opinion in in *Laffitte v. Robert Half Internat. Inc.*, 1 Cal. 5th 480, 376 P.3d 672 (2016), Justice Goodwin Liu cited *Is The Price Right?* nine times. He also cited two of my other works.

7. My writings are also cited and discussed in leading treatises and other authorities, including the MANUAL FOR COMPLEX LITIGATION, THIRD (1996), the MANUAL FOR COMPLEX LITIGATION, FOURTH (2004), the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, and the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT.

8. From 2003 through 2010, I served as an Associate Reporter on the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). Many courts have cited the PRINCIPLES with approval, including the U.S. Supreme Court.

9. I have testified as an expert on attorneys' fees many times. Judges have cited or relied upon my opinions when awarding fees in many class actions, including *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 2019 WL 6888488 (E.D.N.Y. 2019), *In re Enron Corp. Securities, Derivative & "ERISA" Litig*., 586 F. Supp. 2d 732 (S.D. Tex. 2008), and *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006), all of which settled for amounts exceeding $1 billion.

10. Finally, because awards of attorneys' fees may be thought to raise issues relating to the professional responsibilities of attorneys, I note that I have an extensive background, publication record, and experience as an expert witness testifying on matters relating to this field. I also served as the Invited Academic Member of the Task Force on the Contingent Fee created by

the Tort Trial and Insurance Practice Section of the American Bar Association. In 2009, the Tort Trial and Insurance Practice Section of the American Bar Association gave me the Robert B. McKay Award in recognition of my scholarship in the areas of tort and insurance law.

11. I have attached a copy of my resume as Appendix 1 to this declaration.

III. DOCUMENTS REVIEWED

12. When preparing this report, I reviewed the items listed below which, unless noted otherwise, were generated in connection with this case. I may also have reviewed other items including, without limitation, cases, studies, and published scholarly works.

- Second Amended and Supplemental Class Action Complaint
- Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Proposed Class Action Settlement
- Liability Analysis (Excel Spreadsheet)
- Interest Summary (Excel Spreadsheet)
- Notice of Certification of Class Action, Proposed Settlement of Class Action, and Hearing on the Proposed Settlement and Attorneys' Fee Petition
- Agreement of Settlement
- Order Preliminarily Approving Proposed Settlement, Directing the Issuance of Notices to the Classes, and Setting a Fairness Hearing
- Summary Notice of Proposed Class Action Settlement
- Judgment Approving Settlement and Dismissing Action (Draft)
- Declaration of Anthony Kolton
- Declaration of David Goldberg
- Declaration of Jeffrey Sculley
- Declaration of Henry C. Krasnow
- Declaration of Sam Peltzman (draft)
- Letter from Ken Wagers to G. Allen Mayer dated July 4, 2021
- Treasurer's Monthly Rate of Return, 6/1/2020-5/3/2021
- Minute Order, Doc. 121 (granting motion for preliminary approval of proposed settlement)

IV. FACTS

13. Having won a substantial recovery by means of a settlement for the owners of unclaimed property in Illinois, Class Counsel have applied for an award of attorneys' fees and reimbursement of expenses equal to the lesser of 25 percent of the recovery or $9.5 million. In this Report, I focus upon the fee application.

14. The settlement includes two classes: a settlement class to be certified under Rule 23(b)(3) of the Federal Rules of Civil Procedure and a litigation class that the Court previously certified under Rule 23(b)(2).

15. The (b)(3) class contains all property owners "whose claims were paid or approved for payment during the period between August 22, 2017 and continuing through the date of the entry of the Preliminary Approval Order" (July 20, 2021). *Agreement of Settlement*, ¶ 2.1.1.

16. The (b)(2) class contains owners whose property was in the possession of the State of Illinois as of the date of the Preliminary approval order (July 20, 2021) and whose claims are approved for payment after that date. *Id*.

17. A third group of property owners falls outside both classes but also benefits from the settlement. This group contains all persons whose property is delivered to the State after July 20, 2021. The *Agreement of Settlement* refers to these individuals as "Future Claimants." *Id*. ¶ 1.14

18. The settlement entitles members of both classes to monetary relief in the form of interest payments calculated in the manner specified in ¶ 2.3 of the *Agreement of Settlement*. It also obligates the Treasurer to use the same method when returning funds to Future Claimants, unless and until the Illinois General Assembly passes a statute providing for a different method. *Id*., ¶ 2.3. See also *id*., ¶ 2.4.1 (reiterating requirement).

19. The settlement allows the Treasurer to deduct a $5 administrative fee from the interest paid on each property. *Id*., ¶ 2.6.

20. Turning to the value of the settlement, the *Notice of Certification of Class Action, Proposed Settlement of Class Action and Hearing on the Proposed Settlement and Attorneys' Fee Petition* ("*Settlement Notice*") states that

> The Treasurer has calculated that, as of March 31, 2021, the net interest payable to Rule 23(b)(3) Settlement Class Members is $13,563,730.89. Net interest payable to Rule 23(b)(2) Class Members can only be estimated because those claims have not yet been made. However, based on historical averages relating to holding periods and return rates of the Unclaimed Property Trust Fund [UPTF], recent interest rates, and calculations of interest payable to the Rule 23(b)(3) Class, the Treasurer has estimated that the present value of interest payable to the Rule 23(b)(2) Class will be approximately $30,851,391.

Class Counsel has informed me that the Treasurer subsequently updated the present value of the interest payable to the (b)(3) class. As of July 20, 2021, it was $15,878,236.

21. Class Counsel believe that the Treasurer has understated the value of the settlement for the members of the (b)(2) class. According to their expert, who based his estimates on properties in the UPTF as of March 31, 2021, the interest payable to this class could turn out to be twice as much as the Treasurer predicts. *Declaration of Sam Peltzman*, p. 5..

22. The *Settlement Notice* does not indicate the present value of the settlement for Future Claimants but based upon the Treasurer's expert's calculation for the (b)(3) class, Class Counsel estimates that it will be $3.5-$4 million per year.

23. Taking the Treasurer's estimates included in the settlement notice and considering only the (b)(3) and (b)(2) classes (that is, ignoring payments to Future Claimants), the value of the settlement is $44,415,121.89. Using the Treasurer's updated figure for the (b)(3) class, the figure increases to $46,729,627. Below, I will refer to $46.7 million as the "conservative estimate" of the settlement's value.

24. As mentioned, Class Counsel have applied to the Court for a fee award equal to 25 percent of the recovery or $9.5 million, whichever is less. Applying 25 percent to the conservative estimate of $46.7 million yields a fee of about $11.7 million. The cap at $9.5 million therefore applies, so Class Counsel's request is for that amount, which equals 20.3 percent of the recovery.

V. CLASS COUNSEL ARE ENTITLED TO A FEE AWARD UNDER THE COMMON FUND DOCTRINE

25. Class Counsel have applied to the Court for a common fund fee award. These awards are appropriate when a lawyer's efforts create or augment a fund for the benefit of passive recipients (here, non-party owners of unclaimed property), all of whom are entitled to share the gain and would be enriched unjustly if payment to their lawyers were withheld. As it happens, I wrote a foundational article on fee awards from common funds decades ago. *See* Charles Silver, *A Restitutionary Theory of Fee Awards in Class Actions*, 76 CORNELL L. REV. 656 (1991). My position on these awards was thus developed long before I had any involvement in this case.

26. In restitutionary parlance, a lawyer who requests an award from a common fund is known as a "claimant" and the persons who stand to gain by sharing the fund are "beneficiaries." *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 (2011). By paying a lawyer-claimant from a common fund, a court cures unjust enrichment by spreading the cost of legal services across the beneficiaries in proportion to their gains.

27. The Restatement provides an illustration.

> Plaintiffs sue Utility, asserting the illegality of rates charged to a particular class of customers. The statutes and regulations on which the action is based contain no provision for the recovery of attorney's fees by a successful litigant. Plaintiffs obtain a judgment requiring Utility to refund $5 million in excess charges to Plaintiffs and all customers within the affected rate class. Attorneys for Plaintiffs seek an award of fees and expenses. Although the claimants are not entitled to fees from Utility, an adverse party, they may require the beneficiaries of their intervention to contribute ratably to the expense of the litigation, including reasonable attorneys' fees. The court approves an award to Attorneys of $500,000,

> payable from the amount of the judgment, thereby reducing to $4.5 million the aggregate refunds distributed to customers.

Id., § 29, Illus. 1. Although the illustration differs from this case in that there the Utility is refunding money while here the Treasurer is restoring property to its rightful owners, the parallels between the two are many.

28. First, as in the illustration, the proposed settlement obligates an entity—there, the Utility; here, the Treasurer—to return money that, but for the litigation, it would have retained. Before Class Counsel filed suit, the Treasurer had been keeping all the interest earned on unclaimed money property, as required under a state statute. Now, if the proposed settlement is approved, the Treasurer will have to return the interest to an identified group of prior claimants and pay the interest going forward to a second set of beneficiaries who will claim their property in the future.[1]

29. Second, in both the illustration and this lawsuit, the beneficiaries have identical interests because successful litigation would entitle all to payments. The object of creating the fund—and of making it as large as possible—ensures that the beneficiaries' interests harmonize.

30. Third, in both instances, the creation of the fund requires the resolution of a legal question which, when decided, enables the amounts to be paid to be calculated formulaically. No individual issues of any substance need be considered, and the use of a formula ensures that the common fund is allocated among the beneficiaries in an appropriate manner.

31. Fourth, and again both here and in the illustration, the persons who stand to gain have individual claims to payments. The fund is a common one because the claims can be resolved by means of a single judgment or settlement that encompasses all individuals, not because the

[1] The Treasurer can charge members of both groups a one-time administrative fee of $5 for each property claimed.

beneficiaries own the fund jointly as, for example, two or more people may jointly own a piece of land or a house.

32. Fifth, both groups of beneficiaries are enriched monetarily by ascertainable amounts after fees are paid. In the illustration, they net 90 percent of the gross recovery ($4.5 million out of $5 million). Here, per ¶ 3.2.5 of the Agreement of Settlement, fees are to be paid out of the UPTF, and, if the Court grants Class Counsel's fee request to award fees from monies that remain in the UPTF after Class Members are paid, Class Members will net 100 percent because, per ¶3.2.5 of the Agreement of Settlement, fees are to be paid out of the UPTF.[2]

33. Sixth, in both instances the fee award distributes the cost of legal services across the beneficiaries in an equitable manner by requiring pro rata contributions. Owners whose assets generate more interest pay more than others but also receive larger payments.

34. Seventh, in both cases the beneficiaries are passive. In the illustration, the only beneficiaries who hired counsel and sought to vindicate the refund claim were those in whose names the lawsuit was filed. Here, the same is true. All owners with unclaimed assets were passive, except the class representatives.

35. Eighth, although the illustration does not address the matter explicitly, one imagines that both there and here beneficiaries need not take special steps to benefit from the fund. In the example, the Utility could refund the overcharges for most or all ratepayers by discounting future bills. Here, the Treasurer can pay the interest required to all owners who request their property. Owners need not do anything extra to receive it.

[2] Paragraph 3.2.5 says nothing about deducting fees from Class Members' payments. If the Court grants the fee request for 20.3 percent but does order that fees be deducted, Class Members will net 79.7 percent of the interest payments.

36. Abstracting from the illustration, the Restatement sets out the general requirements for common fund fee awards as follows.

> (2) A claimant may require those beneficiaries for whom the claimant is not acting by agreement to contribute to the reasonable and necessary expense of securing the common fund for their benefit, in proportion to their respective interests therein, as necessary to prevent unjust enrichment.
>
> (3) A beneficiary is liable in restitution only if:
>
> (a) liability will not oblige the beneficiary to make a net payment in cash;
>
> (b) the measurable value added to the beneficiary's interest in the common fund by the claimant's intervention exceeds the beneficiary's liability to the claimant;
>
> (c) the claimant has neither acted gratuitously nor received full compensation from others; and
>
> (d) liability will not impose an obligation that should properly have been the subject of contract between the claimant and the beneficiary.

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 (2011).

37. Here, it is apparent that these conditions are met.

- Re condition (2): Class Counsel neither had nor could have had retainer agreements with absent property owners because their whereabouts are unknown. This is why the numerosity requirement for class certification is met. Paying Class Counsel out of the fund will also spread the burden across class members in proportion to their gains, thereby preventing unjust enrichment in an equitable way.
- Re condition (3)(a): Withdrawing the fee from the fund will not require any class member to make a net payment in cash. All class members will be better off than they would otherwise have been even after Class Counsel's fees are paid.
- Re condition (3)(b): The value to each owner of the increase in the common fund can be calculated with precision and will always exceed the owner's liability for fees.

- Re condition (3)(c): Class Counsel have neither acted gratuitously nor received payment from anyone. They have provided professional services for which they normally charge and for which they hoped to be compensated in this case if they prevailed.
- Re condition (3)(d): Class Counsel's compensation could not have been handled contractually, as previously explained.

VI. THE MARKET RATE DETERMINES THE SIZE OF THE COMMON FUND FEE AWARD

38. Seventh Circuit case law requires judges to "mimic the market" when awarding fees from common funds, as Judge Andrea R. Wood of the Northern District of Illinois recently explained in *Charvat v. Valente*, No. 12-CV-05746, 2019 WL 5576932 (N.D. Ill. Oct. 28, 2019), a case brought under the Telephone Consumer Protection Act that produced a $12.5 million settlement.[3] In the course of approving a fee award equal to 33.99 percent of the recovery, Judge Wood made the following observations.

- In a common fund case, "the Court should '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.'" *Id.*, at *11 (quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001);
- "[T]he percentage-of-recovery method is preferable to the lodestar method in this instance." *Id.*;

[3] Judge Wood's decision approving the settlement was appealed, but the appeal was dropped after the settlement was amended. *Charvat v. Valente*, No. 19-3280, 2020 WL 6819148, at *1 (7th Cir. Mar. 20, 2020) (granting joint motion to remand filed by counsel for all parties).

- "[Class Counsel's] request for a 33.99% award comports with the attorneys' fees awards granted in similar cases." *Id.*; and
- "Class Counsel faced a real risk of nonpayment." *Id.*, at *12.

These observations apply with equal force here, the only exception being that Class Counsel's request for a 20.3 percent fee is considerably lower than the request that Judge Wood approved.

39. Because Seventh Circuit case law is utterly clear, I do not expect the Treasurer to disagree about the dependency of common fund awards on market rates and will not belabor the point. Instead, I will show below that the market rate for legal services normally ranges from 33.33 percent to 40 percent of the recovery, with lower fees and higher fees occasionally being charged.

VII. THE COURT CAN BASE THE DOLLAR AMOUNT OF THE FEE AWARD ON THE PRESENT VALUE OF FUTURE PAYMENTS

40. I mentioned above that Judge Wood handled fees correctly in *Charvat v. Valente*, 2019 WL 5576932. Her analysis applies straightforwardly to the (b)(3) class, whose members will be paid in short order. But as regards the (b)(2) class, it is only suggestive because she did not have to address how fees should be measured when class members will be paid amounts that can only be estimated and will receive their benefits over time. Can the Court base the size of the fee award on the estimated present value of the stream of payments members of the (b)(2) class will receive? Or must Class Counsel be paid in dribs and drabs as class members file claims?

41. It is hardly unusual for class members to receive benefits over time. This often occurs in ERISA cases involving pension funds. The complaints in these cases frequently assert that benefits were calculated incorrectly, with the result that pensioners were underpaid in the past and that benefits should be more generous in the future. When the plaintiffs' position is vindicated,

benefits that were wrongly withheld can be calculated with precision and paid immediately, but the present value of future payment increases can only be estimated.

42. The Seventh Circuit considered a settlement involving payments of past and future benefits in *Williams v. Rohm & Haas Pension Plan*, No. 404-CV-0078-SEB, 2010 WL 1490350, at *1 (S.D. Ind. Apr. 12, 2010), *aff'd*, 658 F.3d 629 (7th Cir. 2011). There, the plaintiffs argued that they were wrongly denied cost of living adjustments when they opted for lump-sum payouts of their pension benefits. One subclass contained beneficiaries who received or elected to receive lump sum distributions on or before December 31, 2009. The other contained all other pensioners who would become eligible for lump sum payments after that date. Under the settlement, the members of the first subclass would receive payments in two installments dated one year apart. The members of the second subclass would be paid in the future, as they became eligible for benefits under the pension plan. *Joint Motion for Preliminary Approval of Class Action Settlement*, Doc. 234, ¶¶ 27 & 28, *Williams v. Rohm & Haas Pension Plan*, No. 404-CV-0078-SEB (S.D. Ind. Nov. 18, 2009).

43. In *Williams*, the parties estimated the settlement payments would have a total value between $176 million and $180 million. *Id*., ¶ 14. Some of the uncertainty existed because data relating to pension payments to members of the first subclass were still being collected when the settlement was approved. Some also reflected the fact that the size of the increments added to future lump-sum payouts would be determined on the basis of factors whose actual values could not be known until beneficiaries retired.

44. Neither the uncertainty nor the fact that benefits would be paid in the future prevented the trial court from awarding fees based on the settlement's expected value, which it pegged at $180 million for this purpose. Applying the Seventh Circuit's mimic-the-market

methodology, the district court ordered the pension plan to pay $43,500,000 in fees, 24.2 percent of the gross recovery. Pursuant to the settlement agreement, fees would be paid in installments on the same dates that the members of the first subclass were slated to receive their payments. When objectors challenged the award, the Seventh Circuit affirmed.

45. *Williams* establishes several important points, the first being that a settlement can produce a common fund recovery by requiring a defendant to make payments to individual class members, including payments in the future to persons who are not yet eligible to receive them. The district court judge described the *Williams* settlement as a "common fund," *Williams*, 2010 WL 1490350 at *1, and the Seventh Circuit embraced this characterization by applying the common fund methodology and affirming the trial court's fee award. The settlement submitted for the Court's approval here, which also requires individual payments and payments to be made in the future, is a common fund too. Consequently, when sizing the (b)(3) and (b)(2) classes' fee obligations, the Court can apply the common fund methodology and set the fee as a market-based percentage of the aggregate recovery.

46. *Williams* also shows that a court can properly base a decision approving a settlement and granting a common fund fee award on an estimate of the present value of a stream of payments. When doing so, of course, a court must demand evidence supporting the accuracy of an estimate and guard against inflated estimates whose purpose is to gain approval of a settlement or increase class counsel's compensation. And when a good-faith disagreement exists regarding the likely value of a proposal, a court must address the dispute.

47. Finally, *Williams* establishes that a court can properly order fees to be paid upfront, before many class members receive the benefits that a settlement confers. As mentioned, the *Williams* settlement agreement provided for the payment of fees in two installments made in

consecutive years, 2010 and 2011. The structure may seem novel because it entitled class counsel to be paid before some class members were compensated and, consequently, required that the fee award be based on an estimate of the present value of future benefits. But when time must inevitably pass before class members become eligible for benefits, the structure is natural, not odd. The entitlement to a future payment, which springs into existence when a settlement is approved, has a present value. It is something that, in theory at least, a class member could sell. Awarding fees payable in the present (or, as in *Williams*, the near future) recognizes this fact and cures the problem of unjust enrichment concurrently.

48. In *Williams*, the parties agreed that the pension plan would pay up to $43.5 million in attorneys' fees and would bill the expense as a reasonable cost of administration. Here, however, the Treasurer has not agreed to pay fees in any amount. The question therefore arises as to whether the Court can require the payment of fees upfront even though owners will receive their benefits in later years.

49. The law of restitution and unjust enrichment permits the Court to do this. Because unjust enrichment often occurs in contexts where a simple transfer of money from defendant to plaintiff will either leave the problem uncured or create new difficulties that should be avoided, this body of law encourages the use of creativity to achieve the desired, equitable result.

50. A relevant example of appropriate creativity can be found in *Bowles v. Washington Dep't of Ret. Sys.*, 121 Wash. 2d 52, 847 P.2d 440 (1993), another pension fund case in which benefits were to be paid out in the future.[4] After finding that "the estimated present value of the

[4] Unsurprisingly, I have not found another case in which, like *Bowles*, an entity was required to pay attorneys' fees in the present and to recoup the cost from payments to be made to class members in the future. Few class actions are tried to judgments and parties usually provide for the payment of fees by agreement when these cases settle. This litigation is one of the few in which

class recovery was approximately $18.8 million," the trial judge "awarded $1.5 million in attorney fees to the plaintiffs' attorneys under the equitable 'common fund/common benefit' theory." *Id.*,121 Wash. 2d at 60-61, 847 P.2d at 444. The judge also "required the [defendant] to immediately pay the attorney fees" and to recoup the cost from class members by applying pro rata deductions to their benefit increases. *Id.* By this means, the cost of legal services would be spread across all class members in proportion to their gains, and the defendant would merely be a conduit through which dollars were routed from the beneficiaries to their attorneys.

51. On appeal, the Supreme Court of Washington affirmed. It found that the trial judge properly used the percentage method when setting the fee; that, at 8 percent of the recovery, the fee was far from excessive; and that the order to pay the fees upfront was proper even though the valuation of the recovery at $18.8 million was only an estimate. *Id.*, 121 Wash. 2d at 73-74, 847 P.2d at 451-52. The court found no reason to doubt the accuracy of the estimate, which "was performed by the Office of the State Actuary." *Id.*, 121 Wash.2d at 74, 847 P.2d at 452.[5]

52. Here, as mentioned, the present value of the settlement is disputed. The Treasurer has offered the estimate of $47.6 million, an amount that Class Counsel believe is overly conservative. Class Counsel argue that the value is considerably higher: as much as $27 million more because the estimate for the 23(b)(2) class is likely understated by that amount. As an expert, I cannot take a position on a disputed fact but I can say two things.

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the parties have settled the merits portion of the case while continuing to dispute the amount and manner of paying the class's attorneys.

[5] The holding in *Bowles* was subsequently applied in *Lyzanchuk v. Yakima Ranches Owners Ass'n, Phase II, Inc.*, 73 Wash. App. 1, 8, 866 P.2d 695, 699 (1994) ("Whether th[e] fund was immediately available or will be available at a reasonable future time is immaterial to the award of attorney fees based on the common fund theory.") (citing *Bowles*, 121 Wash.2d at 70-71, 847 P.2d at 440).

53. First, the Treasurer is not at risk of being prejudiced by an estimate that turns out to be too high because fees are to be paid out of the UPTF, the money in which is owned by the Class Members, not the Treasurer. Paying the fees out of the UPTF will achieve the restitutionary objective, which is to spread litigation costs across the pool of beneficiaries, which, I note here, includes Future Claimants as well as Class Members.[6]

54. Second, any harm that Class Members may suffer if the estimated value of the recovery turns out to be too high will be *de minimis*. For example, suppose that the estimated sum of interest payments exceeds the actual sum by $500,000 and that the Court awards a 20 percent contingent fee. The fee award would then be off by $100,000. Given the number of properties in the UPTF, which Class Counsel informed me was 27,310,863 in June of 2019, the overpayment per property would be less than a penny ($100,000/27,310,863 = 0.004). An error this trivial can safely be ignored.

VIII. THE PROPOSED SETTLEMENT ELIMINATES THE TREASURER'S LIABILITY FOR A STATUTORY AWARD OF ATTORNEYS' FEES

55. When plaintiffs sue under 42 U.S.C. § 1983 and prevail, 42 U.S.C. § 1988 entitles them to recover attorneys' fees. Because courts use the lodestar method, not the market-based approach, when sizing statutory fee awards, these awards tend to be smaller than common fund awards. Consequently, a question arises: Can class counsel receive a common fund award that exceeds a statutory award in size? (This question concerns only the (b)(2) class, as the (b)(3) class has no claim for damages under § 1983 and, therefore, no right to a fee award under § 1988.)

[6] Future Claimants will benefit on the same terms as Class Members unless and until the State adopts a less generous interest rate formula. Even then, however, they will still benefit from the litigation because the Treasurer will pay some amount of interest per property.

56. The Seventh Circuit answered this question affirmatively in *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560 (7th Cir. 1994). *Florin* was an ERISA case the settlement of which created a common fund. Because ERISA contains a fee-shifting provision, the question concerning class counsel's entitlement arose straightforwardly. Quoting *Skelton v. General Motors Corp*., 860 F.2d 250, 257 (7th Cir.1988), *cert. denied*, 493 U.S. 810 (1989), the court ruled that "'when a settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorney's fees, equitable fund principles must govern the court's award of the attorney's fees.'" *Florin*, 34 F.3d at 563. The supporting reason was that "an award of fees from the settlement fund comports with the fee-shifting policy of enabling meritorious plaintiffs who would not otherwise be able to afford to bring a lawsuit under ERISA, to pursue their claims." *Id*., at 564.

57. As in *Florin*, no statutory fee is available here because the settlement agreement precludes one. To see why, one must know two things. First, losing parties, including settling defendants, fund statutory awards. Second, the Agreement of Settlement frees the Treasurer from having to spend the State's money. Paragraph 3.2.5 provides that "[a]ny award of attorneys' fees or reimbursement of expenses shall be paid from the Unclaimed Property Trust Fund." Because, as the Court knows, the State owns *none* of the money in the UPTF but merely holds it in trust for the property owners, State funds are no longer at risk and the possibility of shifting costs to Defendant is closed.[7] The settlement thus satisfies *Florin*'s requirement that a settlement release a defendant's liability for both damages and statutory fees.

[7] Defendant's Liability Analysis Spreadsheet indicates that the UPTF includes approximately $900 million in assets classified as "unknown/aggregates."

58. Under the settlement, then, a common fund award is the only option. There is nothing unusual about this. Many settlements include fee-waiver provisions, the use of which the Supreme Court approved in *Evans v. Jeff D.*, 475 U.S. 717 (1986). The limitation imposed by ¶ 3.2.5 also makes sense. The object of a common fund award is to spread costs across beneficiaries in proportion to their gains. Charging fees against the Fund will accomplish this.[8]

59. The only real question here, then, is how much Class Counsel should be paid, there being no option other than to charge fees against the common fund. The answer to that question is the market rate, as previously explained.

IX. THE MARKET RATE FOR LEGAL SERVICES RANGES FROM ONE-THIRD TO 40 PERCENT OF THE RECOVERY

A. Market Rates Increasingly Dominate the Fee-Setting Process

60. In both scholarly works and expert reports written over decades, I have urged judges to take guidance from the market for legal services when sizing fee awards. As mentioned, more and more judges are embracing the "mimic the market" approach. They increasingly understand "market rates, where available, are the ideal proxy for [class action lawyers'] compensation." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). It is hard to do better than "ideal."

61. Although only the Seventh Circuit currently mandates the exclusive use of market rates, federal judges across the country recognize the superiority of this approach and use it often.

[8] To understand this point, one must first recognize that when bargaining over terms the Treasurer, like any defendant, cared about the total cost of settling, not the division of the total between the Class and its attorneys—a matter in which the Treasurer has no financial stake. For example, the Treasurer would rationally be indifferent between paying $1 million to the Class and $200,000 to Class Counsel—with both payments coming out of the UPTF—and $1.2 million to the Class from which $200,000 would be withheld to pay Class Counsel's fees. The Treasurer's loss is the same in either event. Under both arrangements, fees are spread across Class Members pro rata too. Either $200,000 in fees is deducted from their payments or their payments are reduced by $200,000 (because the agreed interest rate is lower) and fees come out of the UPTF.

Examples include *Guevoura Fund Ltd. v. Sillerman*, No. 1:15-CV-07192-CM, 2019 WL 6889901, at *21 (S.D.N.Y. Dec. 18, 2019); *In re TRS Recovery Servs., Inc. & Telecheck Servs., Inc., Fair Debt Collection Practices Act (FDCPA) Litig.*, No. 2:13-MD-2426-DBH, 2016 WL 543137, at *9 (D. Me. Feb. 10, 2016); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 788 (N.D. Ill. 2015); *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, No. 3:10-CV-30163-MAP, 2014 WL 6968424, at *6 (D. Mass. Dec. 9, 2014); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 842 F. Supp. 2d 346 (D. Me. 2012); *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *9 (N.D. Ill. Dec. 9, 2009), *order modified and remanded*, 629 F.3d 741 (7th Cir. 2011); *In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 40 (D.N.H. 2006).

62. When awarding fees from the enormous settlement in *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1203 (S.D. Fla. 2006), which exceeded $1 billion, the federal district court judge "conclude[d] that the most appropriate way to establish a benchmark is by reference to the market rate for a contingent fee in private commercial cases tried to judgment and reviewed on appeal." Anchoring the fee to the market rate avoids arbitrariness by providing an objective basis for awarding a particular amount and also creates desirable incentives. It also "create[s] incentives for the lawyer to get the most recovery for the class by the most efficient manner (and penalize[s] the lawyer who fails to do so)." *Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 277–78 (D. Me. 2005) . See also *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir.1995) (observing that the percentage-of-fund method eliminates incentive to be inefficient, as inefficiency just reduces the lawyer's own recovery); and *Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.*,396 F.3d 96, 121 (2d Cir.2005) (the percentage method "directly aligns the interests of the class and its counsel" and provides a powerful incentive for efficiency and early resolution).

63. State court judges see the wisdom of mimicking the market too. For example, in *Laffitte v. Robert Half Internat. Inc.*, 1 Cal. 5th 480, 376 P.3d 672 (2016), the Supreme Court of California cited the desirability of approximating the market as a reason for permitting judges to grant percentage-based fee awards from common funds.

> We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, ***a better approximation of market conditions in a contingency case***, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation … convince us the percentage method is a valuable tool that should not be denied our trial courts.

Laffitte, 1 Cal. 5th at 503, 376 P.3d at 686, (emphasis added) (citations omitted).

64. Judges use the market-based approach and methods that approximate market conditions because they appreciate the importance of incentivizing lawyers properly and because they want an objective basis for deciding how much lawyers will be paid. The two considerations–incentives and objectivity–are linked. By taking guidance from the market, judges constrain their discretion and thereby make lawyers' incentives clearer and more reliable.

B. In Contingent Fee Litigation, Percentage-Based Compensation Predominates

65. Having established that market rates are "ideal" proxies, it remains to consider how the market compensates plaintiffs' attorneys. In this section and the next, I explain what I know about this issue.

66. I start by noting that when clients hire lawyers to handle lawsuits on straight contingency, the market sets lawyers' compensation as percentages of claimants' recoveries. Even sophisticated business clients with complex, high-dollar legal matters use the percentage approach.

67. Abundant evidence supports this contention. When two co-authors and I studied hundreds of settled securities fraud class actions specifically looking for terms included in fee agreements between lawyers and investors seeking to serve as lead plaintiffs, all the agreements we found provided for contingent percentage fees. *Is the Price Right*, *supra*. No lead plaintiff agreed to pay its lawyers by the hour; nor did any retain counsel on a lodestar-multiplier basis. Contracting practices are the same in antitrust cases, as discussed below.

68. The finding that sophisticated businesses use contingent fee arrangements when hiring lawyers to handle securities class actions was expected. Over the course of my academic career, I have studied or participated in hundreds of class actions, many of which were led by sophisticated business clients. To the best of my recollection, I have encountered only one in which a lead plaintiff paid class counsel out of pocket; that case is more than 100 years old and was decided before the common fund doctrine was well established. Even wealthy named plaintiffs like prescription drug wholesalers and public pension funds that, in theory, could pay lawyers by the hour have used contingent, percentage-based compensation arrangements instead. Because percentage-based compensation arrangements dominate the market, courts should also use them when awarding fees from common funds.

69. The market also favors fee percentages that are flat or that rise as recoveries increase. Scales with percentages that decline at the margin are rarely employed. Professor John C. Coffee, Jr., the country's leading authority on class actions, made this point in a report filed in the antitrust litigation relating to high fructose corn syrup.

> I am aware that "declining" percentage of the recovery fee formulas are used by some public pension funds, serving as lead plaintiffs in the securities class action context. However, I have never seen such a fee contract used in the antitrust context; nor, in any context, have I seen a large corporation negotiate such a contract (they have instead typically used straight percentage of the recovery formulas).

Declaration of John C. Coffee, Jr., submitted in *In re High Fructose Corn Syrup Antitrust Litigation*, M.D.L. 1087 (C.D. Ill. Oct. 7, 2004), ECF No. 1421, ¶ 22. My experience is similar to Professor Coffee's. I know of few instances in which large corporations used scales with declining percentages when hiring attorneys.

70. In view of the rarity with which declining scales are used, the "mimic the market" approach suggests that flat percentages and scales with percentages that rise at the margin create better incentives. There is a sound economic rationale for this. Flat percentages and rising scales reward plaintiffs' attorneys for recovering higher dollars that are harder to obtain because they demand a willingness on the part of counsel to proceed ever closer to trial, thereby increasing their costs and exposing them to greater risk of loss. Flat percentages and percentages that increase with the recovery encourage plaintiffs' attorneys to shoulder the costs and risks that must be borne when lawyers encourage clients to turn down inadequate settlements.

C. Sophisticated Clients Normally Pay Fees of 30 Percent to 40 Percent When Hiring Lawyers to Handle Commercial Lawsuits on Straight Contingency

71. Countless plaintiffs have hired lawyers on contingency to handle cases of diverse types. Consequently, the market for legal services is a rich source of information about lawyers' fees. In this section, I survey this evidence.

72. Before doing so, I wish to note that there is broad agreement that in most types of plaintiff representations contingent fees range from 30 percent to 40 percent of the recovery, and that higher fees prevail in litigation areas like medical malpractice and patents where costs and risks are unusually great. *See, e.g., George v. Acad. Mortg. Corp. (UT)*, 369 F. Supp. 3d 1356, 1382 (N.D. Ga. 2019) ("Plaintiffs request for approval of Class Counsel's 33% fee falls within the range of the private marketplace, where contingency-fee arrangements are often between 30 and 40 percent of any recovery"); and *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 201 (N.D. Ill.

2018) ("a typical contingency agreement in this circuit might range from 33% to 40% of recovery"). The same range is known to prevail in high-dollar, non-class, commercial cases. *See, e.g., Kapolka v. Anchor Drilling Fluids USA, LLC*, No. 2:18-CV-01007-NR, 2019 WL 5394751, at *10 (W.D. Pa. Oct. 22, 2019); and *Cook v. Rockwell Int'l Corp.*, No. 90-CV-00181-JLK, 2017 WL 5076498, at *2 (D. Colo. Apr. 28, 2017).

73. The point of surveying the evidence, then, is not to establish something new. It is to show that what everyone already knows is correct. The market rate for contingent fee lawyers generally ranges from 30 to 40 percent of clients' recoveries, with 33 percent being especially common.

74. We do not know as much about fees paid in large commercial lawsuits as we might.[9] No publicly available database collects information about this sector of the market, and businesses that sue as plaintiffs rarely reveal their fee agreements. Consequently, most of what is known is drawn from anecdotal reports.[10] That said, the evidence available on the use of contingent fees by sophisticated clients shows that marginal percentages tend to be high.

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[9] I have studied the costs insurance companies incur when *defending* liability suits. *See* Bernard Black, David A. Hyman, Charles Silver and William M. Sage, *Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004*, 10 AM. L, & ECON, REV. 185 (2008). Unfortunately, this information sheds no light on the amounts that businesses pay when acting as plaintiffs.

[10] Businesses sometimes use hybrid arrangements that combine guaranteed payments with contingent bonuses. For example, when representing Caldera International, Inc. in a dispute with IBM, Boies, Schiller & Flexner LLP billed two-thirds of its lawyers' standard hourly rates and stood to receive a contingent fee equal to 20 percent of the recovery. Letter from David Boies and Stephen N. Zack to Darl McBride dated Feb. 26, 2003, available at https://www.sec.gov/Archives/edgar/data/1102542/000110465903028046/a03-6084_1ex99d1.htm (visited Aug. 23, 2020). According to Wikipedia, the damages sought in the lawsuit initially totaled $1 billion, but were later increased to $3 billion, and then to $5 billion. Wikipedia, *SCO Group, Inc. v. International Business Machines Corp.*, https://en.wikipedia.org/wiki/SCO_Group,_Inc._v._International_Business_Machines_Corp. (visited Aug. 23 , 2020).

1. Sophisticated Named Plaintiffs In Class Actions

75. Sophisticated business clients commonly agree to pay fees of 33 percent or greater when serving as lead plaintiffs in class actions. Here are a few examples.

- In *San Allen, Inc. v. Buehrer*, Case No. CV-07-644950 (Ohio – Court of Common Pleas), which settled for $420 million, seven businesses serving as named plaintiffs signed retainer contracts in which they agreed to pay 33.3 percent of the gross recovery obtained by settlement as fees, with a bump to 35 percent in the event of an appeal. Expenses were to be reimbursed separately.
- In *In re U.S. Foodservice, Inc. Pricing Litigation*, Case No. 3:07-md-1894 (AWT) (D. Ct.), a RICO class action that produced a $297 million settlement, both of the businesses that served as named plaintiffs were represented by counsel in their fee negotiations and both agreed that the fee award might be as high as 40 percent.
- In *In re International Textile Group Merger Litigation*, C.A. No. 2009-CP-23-3346 (Court of Common Pleas, Greenville County, South Carolina), which settled in 2013 for relief valued at about $81 million, five sophisticated investors serving as named plaintiffs agreed to pay 35 percent of the gross class-wide recovery as fees, with expenses to be separately reimbursed. (The fee was initially set at over 40 percent but was later bargained down to 35 percent.)

76. Similar rates prevail in antitrust class actions in which businesses participate as plaintiffs. For example, I studied and prepared expert reports in a series of pharmaceutical cases bought against manufacturers that engaged in pay-for-delay settlements to patent challenges. The named plaintiffs in these cases were drug wholesalers. All were large companies, and several were of Fortune 500 size or bigger. All also had in-house or outside counsel monitoring the litigations.

The potential damages were enormous. In one case, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa. Oct. 8, 2015), the plaintiffs recovered over $500 million. In the series as a whole, they won more than $2 billion. In most of the cases, these sophisticated businesses supported fees equal to one-third of the recovery. In one case, they endorsed a fee of 30 percent and in another of 27.5 percent.

77. These cases were not exceptional. Professor Brian Fitzpatrick gathered information on an even larger number of pharmaceutical antitrust cases—33 in all—that were resolved between 2003 and 2020. According to his forthcoming article, "the fee requests ranged from a fixed percentage of 27.5% to a fixed percentage of one-third"; "one-third *heavily* dominated" the sample"; and "the average was 32.85%." And "in the vast majority of cases, one or more of these corporate class members—often the biggest class members—came forward to voice affirmative support for the fee request, and not a single one of these corporate class members objected to the fee request in any of the 33 cases." Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151 (March 2021). Professor Fitzpatrick's table of cases appears in Appendix II.

78. In sum, when sophisticated business clients seek to recover money in risky commercial lawsuits involving large stakes, they typically pay contingent fees ranging from 30 percent to 40 percent, with fees of 33 percent or more being promised in most cases. As well, there is little variation in fee percentages across cases of different sizes.

2. Patent Cases

79. Now consider patent infringement cases, another context in which sophisticated business clients often hire law firms on contingency. There are many anecdotal reports of high percentages in this area. The most famous one relates to the dispute between NTP Inc. and Research In Motion Ltd., the company that manufactures the Blackberry. NTP, the plaintiff,

promised its law firm, Wiley Rein & Fielding ("WRF"), a 33⅓ percent contingent fee. When the case settled for $612.5 million, WRF received more than $200 million in fees. Yuki Noguchi, D.C. *Law Firm's Big BlackBerry Payday: Case Fees of More Than $200 Million Are Said to Exceed Its 2004 Revenue*, WASHINGTON POST, March 18, 2006, D03.

80. The fee percentage that WRF received is typical, as Professor David L. Schwartz found when he interviewed 44 experienced patent lawyers and reviewed 42 contingent fee agreements.

> There are two main ways of setting the fees for the contingent fee lawyer [in patent cases]: a graduated rate and a flat rate. Of the agreements using a flat fee reviewed for this Article, the mean rate was 38.6% of the recovery. The graduated rates typically set milestones such as "through close of fact discovery," "through trial," and "through appeal," and tied rates to recovery dates. As the case continued, the lawyer's percentage increased. Of the agreements reviewed for this Article that used graduated rates, the average percentage upon filing was 28% and the average through appeal was 40.2%.

David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 360 (2012). In a case like this one that required the lawyers to bear significant litigation and trial preparation hours and expenses with no guarantee of payment or reimbursement, a high fixed percentage would apply.[11]

[11] Professor Schwartz's findings are consistent with reports found in patent blogs, one of which stated as follows.

> *Contingent Fee Arrangements*: In a contingent fee arrangement, the client does not pay any legal fees for the representation. Instead, the law firm only gets paid from damages obtained in a verdict or settlement. Typically, the law firm will receive between 33-50% of the recovered damages, depending on several factors. This is strictly a results-based system.

Matthew L. Cutler, *Contingent Fee and Other Alternative Fee Arrangements for Patent Litigation*, HARNESS DICKEY, (JUNE 8, 2020), https://www.hdp.com/blog/2020/06/08/contingent-fee-and-other-alternative-fee-arrangements-for-patent-litigation/.

81. Clearly, in the segment of the market where sophisticated business clients hire lawyers to litigate patent cases on contingency, successful lawyers earn sizeable premiums over their normal hourly rates. The reason is obvious. When waging patent cases on contingency, lawyers must incur large risks and high costs, so clients must promise them hefty returns. Patent plaintiffs have the option of paying lawyers to represent them on an hourly basis, but still prefer a contingency arrangement, even at 30-40 percent, to bearing the risks and costs of litigation themselves.

3. Other Large Commercial Cases

82. Turning from patent lawsuits to business representations more generally, many examples show that compensation tends to be a significant percentage of the recovery. A famous case from the 1980's involved the Texas law firm of Vinson & Elkins ("V&E"). ETSI Pipeline Project ("EPP") hired V&E to sue Burlington Northern Railroad and other defendants, alleging a conspiracy on their part to prevent EPP from constructing a $3 billion coal slurry pipeline. V&E took the case on contingency, "meaning that if it won, it would receive one-third of the settlement and, if it lost, it would get nothing." David Maraniss, *Texas Law firm Passes Out $100 Million in Bonuses*, WASHINGTON POST, Aug. 22, 1990, https://www.washingtonpost.com/archive/politics/1990/08/22/texas-law-firm-passes-out-100-million-in-bonuses/8714563b-10b8-4f85-b74a-1e918d030144/. After many years of litigation, a series of settlements and a $1 billion judgment against a remaining defendant yielded a gross recovery of $635 million, of which the firm received around $212 million in fees. Patricia M. Hynes, *Plaintiffs' Class Action Attorneys Earn What They Get*, 2 JOURNAL OF THE INSTITUTE FOR THE STUDY OF LEGAL ETHICS, 243, 245 (1991). It bears emphasizing that the clients who made up the plaintiffs' consortium, Panhandle Eastern Corp., the Bechtel Group, Enron Corp., and K N

Energy Inc., were sophisticated businesses with access to the best lawyers in the country. No claim of undue influence by V&E can possibly be made.

83. The National Credit Union Administration's ("NCUA") experience in litigation against securities underwriters provides a more recent example of contingent-fee terms that were used successfully in large, related litigations. After placing 5 corporate credit unions into liquidation in 2010, NCUA filed 26 complaints in federal courts in New York, Kansas, and California against 32 Wall Street securities firms and banks. To prosecute the complaints, which centered on sales of investments in faulty residential mortgage-backed securities, NCUA retained two outside law firms, Korein Tillery LLP and Kellogg, Hansen, Todd, Figel, & Frederick PLLC, on a straight contingency basis. The original contract entitled the firms to 25 percent of the recovery, net of expenses. As of June 30, 2017, the lawsuits had generated more than $5.1 billion in recoveries on which NCUA had paid $1,214,634,208 in fees.[12]

84. When it retained outside counsel on contingency, NCUA knew that billions of dollars were at stake. The failed corporate credit unions had sustained $16 billion in losses, and NCUA's objective was to recover as much of that amount as possible. It also knew that dozens of defendants would be sued and that multiple settlements were possible. Even so, NCUA agreed to pay a straight contingent percentage fee in the standard market range on all the recoveries. It neither reduced the fees that were payable in later settlements in light of fees earned in earlier ones,

[12]The following documents provide information about NCUA's fee arrangement and the recoveries obtained in the litigations: Legal Services Agreement dated Sept. 1, 2009, https://www.ncua.gov/services/Pages/freedom-of-information-act/legal-services-agreement.pdf; National Credit Union Administration, Legal Recoveries from the Corporate Crisis, https://www.ncua.gov/regulation-supervision/Pages/corporate-system-resolution/legal-recoveries.aspx; Letter from the Office of the Inspector General, National Credit Union Administration to the Hon. Darrell E. Issa, Feb. 6, 2013, https://www.ncua.gov/About/leadership/CO/OIG/Documents/OIG20130206IssaResponse.pdf.

nor bargained for a percentage that declined as additional dollars flowed in, nor tied the lawyers' compensation to the number of hours they expended.

85. In *In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327 (D. Md. 2000), the bankruptcy trustee wanted to assert claims against Ernst & Young. He looked for counsel willing to accept a declining scale of fee percentages, found no takers, and ultimately agreed to pay a law firm a straight 40 percent of the recovery. Ernst & Young subsequently settled for $185 million, at which point the law firm applied for $71.2 million in fees, 21 times its lodestar. The bankruptcy judge granted the request, writing: "[v]iewed at the outset of this representation, with special counsel advancing expenses on a contingency basis and facing the uncertainties and risks posed by this representation, the 40% contingent fee was reasonable, necessary, and within a market range." *Id.* at 335.

86. Based on what lawyers who write about fee arrangements in business cases have said, contingent fees of 33⅓ percent or more remain common. In 2011, The Advocate, a journal produced by the Litigation Section of the State Bar of Texas, published a symposium entitled "Commercial Law Developments and Doctrine." It included an article on alternative fee arrangements, which reported typical contingent fee rates of 33 percent to 40 percent.

> A pure contingency fee arrangement is the most traditional alternative fee arrangement. In this scenario, a firm receives a fixed or scaled percentage of any recoveries in a lawsuit brought on behalf of the client as a plaintiff. Typically, the contingency is approximately 33%, with the client covering litigation expenses; however, firms can also share part or all of the expense risk with clients. Pure contingency fees, which are usually negotiated at approximately 40%, can be useful structures in cases where the plaintiff is seeking monetary or monetizable damages. They are also often appropriate when the client is an individual, start up, or corporation with limited resources to finance its litigation. Even large clients, however, appreciate the budget certainty and risk-sharing inherent in a contingent fee arrangement.

Trey Cox, *Alternative Fee Arrangements: Partnering with Clients through Legal Risk Sharing*, 66 THE ADVOCATE (TEXAS) 20 (2011).

87. In sum, when seeking to recover money in class actions involving large stakes and in commercial lawsuits, sophisticated business clients typically pay contingent fees ranging from 30 percent to 40 percent, with fees of 33 percent or more being promised in most cases.

X. FEE AWARDS IN COMPARABLE CASES

88. In my experience, judges want to know how other courts have handled fees in similar cases. Being familiar with empirical studies of fee awards, I can confidently report that Class Counsel's request for a fee equal to 20.3 percent of the monetary recovery falls below the range that courts typically award.

A. ERISA Cases

89. When discussing the permissibility of basing a fee award on the estimated present value of a payment stream, I analogized this lawsuit to ERISA cases in which benefits are also often paid in the future. I therefore begin this discussion by focusing on fee awards in ERISA class actions.

90. To show that judges have often awarded fees greatly in excess of 20.3 percent, I begin by presenting a table of cases that resolved between 2010 and 2020 with fee awards equal to one-third of the recovery.

TABLE 1. ERISA CLASS ACTIONS WITH FEE AWARDS EQUAL TO ONE-THIRD OF THE RECOVERY	
CASE	**FEE %**
Cassell v. Vanderbilt Univ., No. 16-2086, Doc. 174 (M.D. Tenn. Oct. 22, 2019)	33.33
Tussey v. ABB, Inc., No. 06-4305-NKL, Doc. 870 (W.D. Mo. August 16, 2019)	33.33
Sims v. BB&T Corp., No. 15-1705, 2019 WL 1993519 (M.D. N.C. May 6, 2019)	33.33
Clark v. Duke, No. 16-1044, 2019 WL 2579201 (M.D. N.C. June 24, 2019)	33.33
Ramsey v. Philips N.A., No. 18-1099, Doc. 27 (S.D. Ill. Oct. 15, 2018)	33.33
In re Northrop Grumman Corp. ERISA Litig., No. 06-6213, 2017 WL 9614818 (C.D. Cal. Oct. 24, 2017)	33.33
Gordan v. Mass. Mut. Life Ins. Co., No. 13-30184, 2016 WL 11272044 (D. Mass. Nov. 3, 2016)	33.33
Kruger v. Novant Health, Inc., No. 14-208, 2016 WL 6769066 (M.D.N.C. Sept. 29, 2016)	33.33
Spano v. Boeing Co., No. 06-743, 2016 WL 3791123 (S.D. Ill. Mar. 31, 2016)	33.33
Abbott v Lockheed Martin Corp., No. 06-701, 2015 WL 4398475 (S.D. Ill. July 17, 2015)	33.33
Krueger v. Ameriprise Fin., Inc., No. 11-2781, 2015 WL 4246879 (D. Minn. July 13, 2015)	33.33
Beesley v. Int'l Paper Co., No. 06-703, 2014 WL 375432 (S.D. Ill. Jan. 31, 2014)	33.33
Nolte v. Cigna Corp., No. 07-2046, 2013 WL 12242015 (C.D. Ill. Oct. 15, 2013)	33.33
George v. Kraft Foods Global, Inc., Nos. 08-3899, 07-1713, 2012 WL 13089487 (N.D. Ill. June 26, 2012)	33.33
Will v. Gen. Dynamics Corp., No. 06-698, 2010 WL 4818174 (S.D. Ill. Nov. 22, 2010)	33.33
Martin v. Caterpillar Inc., No. 07-1009, 2010 WL 11614985 (C.D. Ill. Sept. 10, 2010)	33.33

91. Although their datasets tend to contain few ERISA cases, empirical studies of class actions also support the conclusion that fee awards in excess of the one sought here are common. The table below is reproduced from a study of class actions that settled from 2009 to 2013. As the highlighted line shows, the mean and median fee awards were both 26 percent of the recovery.

TABLE 4. FEE AND CLASS RECOVERIES, BY CASE CATEGORY, 2009–2013

Case Category	N	Recoveries		Fees		Fee Percentages	
		Mean (millions of dollars)	Median (millions of dollars)	Mean (millions of dollars)	Median (millions of dollars)	Mean (%)	Median (%)
Antitrust	19	501.09	37.3	64.1	10.25	27	30
Civil Rights	21	6.51	3	1.66	0.91	28	30
Consumer	52	18.8	8.75	4.81	2.21	26	25
Corporate	9	19.47	16	5.01	2.2	27	29
Derivative	6	18.68	2.88	5.61	0.77	29	31
Employment	25	5.6	0.67	1.63	0.17	28	30
ERISA	22	25.75	6.6	4.92	1.75	26	26
FCRA	4	1.34	1.41	0.34	0.36	29	29
FDCPA	2	0.41	0.41	0.1	0.1	26	26
FLSA	108	4.15	1.03	1.19	0.3	30	33
Health Care	5	72.08	4	14.64	1.21	28	30
Labor	23	9.44	1	2.17	0.33	29	30
Mass Tort	13	23.34	4.2	5.5	1.11	27	28
Other	60	13.27	4.14	3.11	1.04	25	25
Products Liability	10	24.99	16.2	7.47	4.56	28	30
Securities	74	106.45	22.25	18.75	5.16	23	25
TILA	2	168.4	168.4	25.75	25.75	23	23
Unknown	3	0.86	1	0.22	0.18	27	30

Source: Theodore Eisenberg, Geoffrey P. Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N. Y.U. L. REV. 937 (2017).

92. The table below is from an exhaustive study of federal class actions that settled 2006-2007. It reports similar mean and median fee percentages for ERISA cases.

Table 8: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Subject Matter	*Mean*	*Median*
Securities ($n = 233$)	24.7	25.0
Labor and employment ($n = 61$)	28.0	29.0
Consumer ($n = 39$)	23.5	24.6
Employee benefits ($n = 37$)	26.0	28.0
Civil rights ($n = 20$)	29.0	30.3
Debt collection ($n = 5$)	24.2	25.0
Antitrust ($n = 23$)	25.4	25.0
Commercial ($n = 7$)	23.3	25.0
Other ($n = 19$)	24.9	26.0
All ($N = 444$)	25.7	25.0

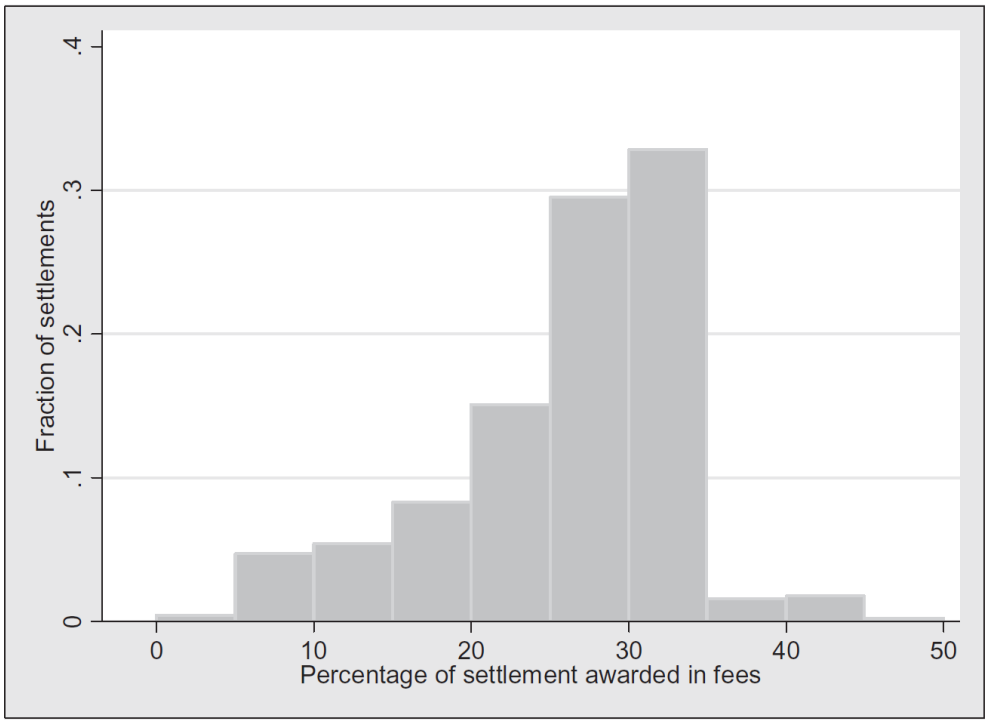
Source: Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 820 (2010).

93. The preceding figures also show that, in percentage terms, fee awards in ERISA cases are on par with those made in class actions of other types. Taking this as true, one can infer that awards equal to or below 20.3 percent are exceedingly uncommon.

94. The figure below shows that distribution of awards by size of fee percentage Professor Brian Fitzpatrick's study of federal class actions. As is visually apparent, the awards cluster in the 25 percent to 35 percent range. Cases with awards of 15 percent or less are

uncommon. Because fee percentages are often smaller in cases with enormous recoveries, mega-fund settlements likely dominate this group.

Figure 4: The distribution of 2006–2007 federal class action fee awards using the percentage-of-the-settlement method with or without lodestar cross-check.

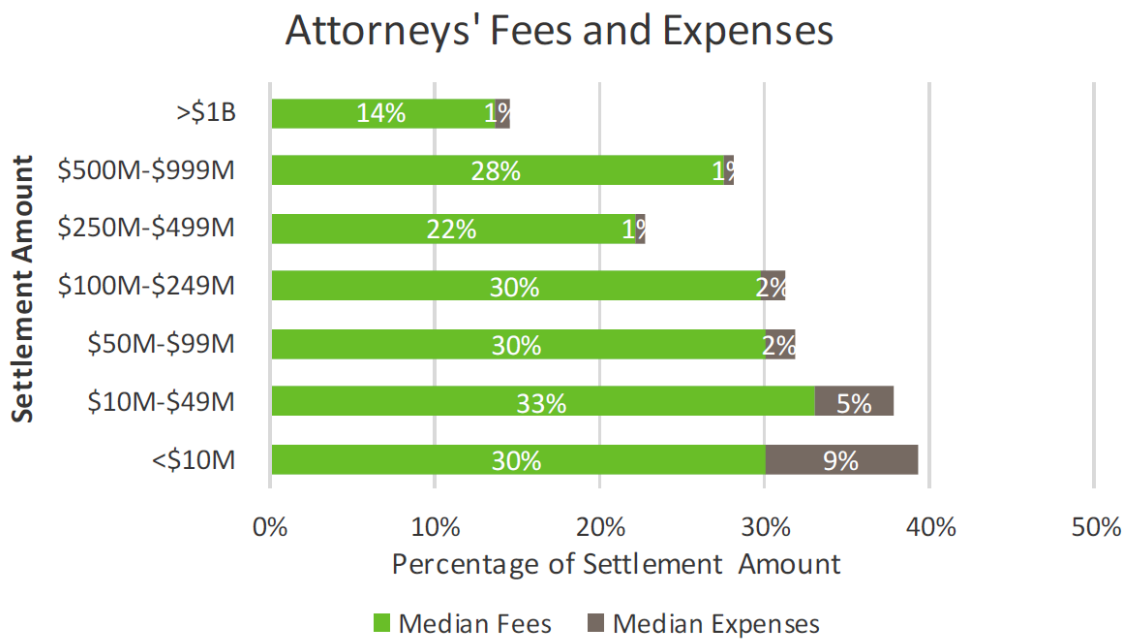


Source: Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 820 (2010).

B. Cases with Comparable Recoveries

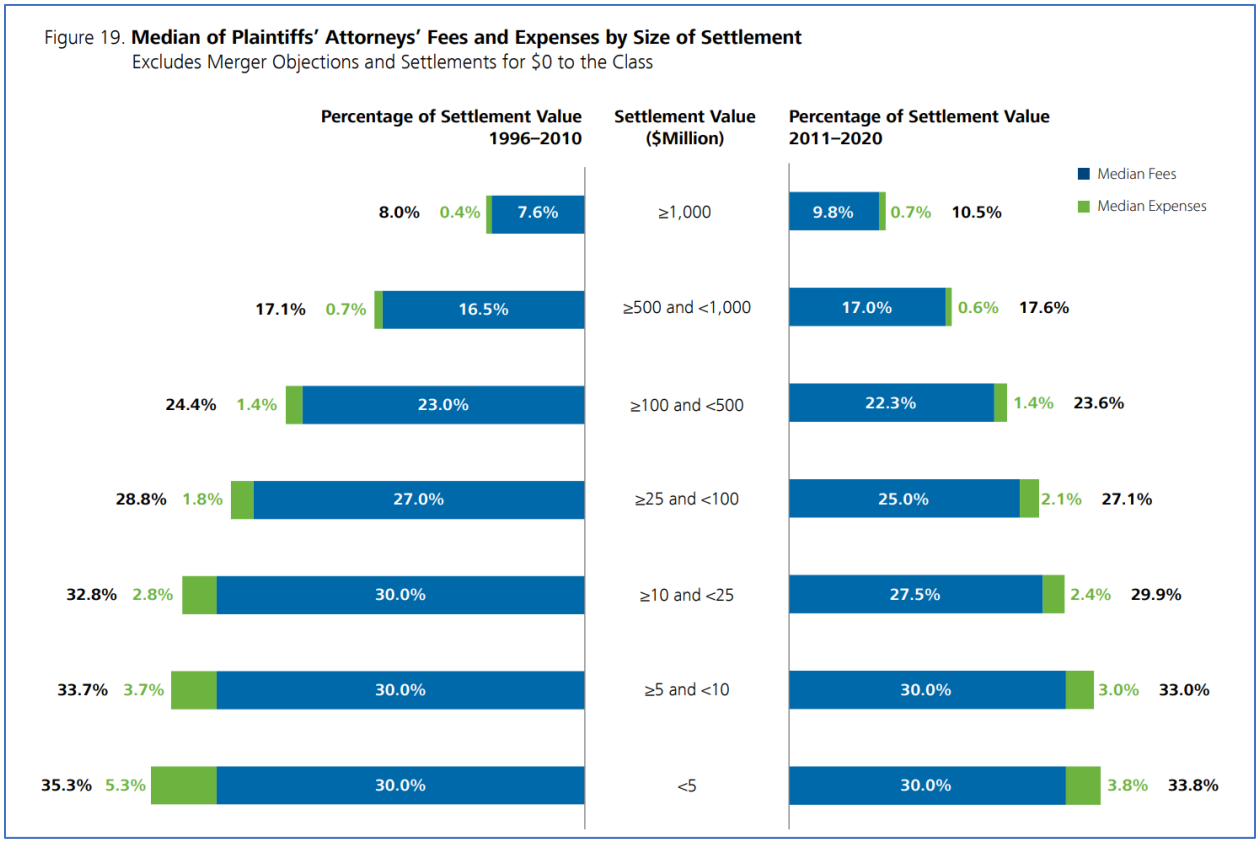
95. When one switches from subject matter to recovery size, the datasets become larger and the finding that awards rarely fall at or below 20.3 percent becomes more robust. The figure below, which reports results for antitrust class actions, comes from the 2018 Antitrust Annual Report. Only when recoveries exceed $1 billion does the median fee award become comparable to the percentage sought here. At all lower recovery levels, median awards are considerably higher.

Figure 12: **Attorneys' Fees and Expenses**
2013 - 2018



Source: 2018 ANTITRUST ANNUAL REPORT, p.13, Fig. 12.

96. The same pattern of fee percentages is found in securities class actions. The figure below appears in the 2020 edition of an annual report on class actions of this type produced by NERA Economic Consulting. The relevant finding is that, for class actions with recoveries ranging from 25 million to $100 million, the median fee award was 25 percent during the 2011-2020 period.



Source: Janeen McIntosh and Svetlana Starykh, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2020 FULL-YEAR REVIEW (NERA 2021).

97. I know of no dataset that surveys fee awards in unclaimed property cases. But the many studies I have reviewed all report that fee awards commonly exceed 20.4 percent in cases of other types with similarly sized recoveries. I therefore infer that, by comparison to awards made in other cases, Class Counsel's request for 20.3 percent of the recovery is reasonable.

XI. NO LODESTAR CROSS-CHECK IS ADVISABLE OR REQUIRED

98. Courts in other circuits sometimes sneak the lodestar method in the back door by "crosschecking" the fee percentage they are inclined to award against class counsel's lodestar. See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 820, 833 (2010) (finding that 49 percent of courts consider the lodestar when awarding fees with the percentage method); Theodore Eisenberg, Geoffrey Miller, and Roy

Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 945 (2017) (finding that courts used the percentage method with a lodestar crosscheck in 38 percent of the cases and used the percentage method alone in 54 percent of them).

99. The additional effort that lodestar cross-checks entail may not be worth the bother, however. Studying securities class actions, two coauthors and I found that "cross-checked fee awards [did] not differ statistically from those based on the percentage method alone." Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1417 (2015).

100. By applying cross-checks, judges also depart from the Seventh Circuit's mandate to mimic the market. To my knowledge, sophisticated clients *never* use the lodestar method—as the primary fee formula or a cross-check—when they hire lawyers on contingency. They use the percentage method alone. Consequently, courts wanting to mimic the market should do so too.

101. The Seventh Circuit upheld reliance on the percentage method in *Williams*. After repeating the point it made years ago that "'[p]rivate parties would never contract for [] an arrangement [like the lodestar method with a capped multiplier], because it would eliminate counsel's incentive to press for" a higher settlement, the court upheld the district judge's finding "that a pure percentage fee approach best replicated the market for ERISA class action attorneys." *Williams v. Rohm & Haas Pension Plan*, 658 F.3d at 636 (quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001)). The district court judge considered the lawyers' time and rates but gave their lodestar minimal weight.

102. In *Synthroid*, the Seventh Circuit identified one of the lodestar method's perverse incentives: it can discourage lawyers from holding out for higher recoveries. It also causes settlement delays, as lawyers engage in make-work so as to increase their hours, and encourages

fraud, as lawyers report more hours than they actually expended. Both effects make judges' jobs harder. The contingent percentage method lends credibility to a lawyer's opinion that a settlement is reasonable because it encourages attorneys to maximize the value of class members' claims. The lodestar method has the opposite effect. Consequently, judges must examine settlements more closely to fulfill their responsibilities under Federal Rule of Civil Procedure 23(e), which permits them to approve only settlements that are reasonable. The lodestar method also turns judges into bill auditors because lawyers statements may be unreliable. In my opinion, judges have more valuable things to do with their time than review lawyers' bill.

103. I could opine about the lodestar's shortcomings at greater length, but I hope the point has already been made. It is an inferior compensation arrangement. That is why clients never use it. The market's verdict is clear.

XII. COMPENSATION

104. I have been compensated for the time I spent preparing this report.

XIII. CONCLUSION

105. Class Counsel's request for a fee award in the amount of $9.5 million, which equals 20.3 percent of the conservative estimate of the value of the recovery, is reasonable because it is below the market rate and compares favorably to awards in other cases.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 17th day of September 2021, at Austin, Texas.

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School of Law, University of Texas at Austin, 1987-2015
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- Robert W. Calvert Faculty Fellow
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University of Michigan Law School, Fall 2018
- Visiting Professor

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- Visiting Professor

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University of Chicago, 1983-1984
- Managing Editor, *Ethics: A Journal of Social, Political and Legal Philosophy*

EDUCATION

Yale Law School, JD (1987)
University of Chicago, MA (Political Science) (1981)
University of Florida BA (Political Science) (1979)

PUBLICATIONS

SPECIAL PROJECTS

PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (with Samuel Issacharoff, Reporter, and Robert Klonoff and Richard Nagareda, Associate Reporters) (American Law Institute 2010).

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Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Class Action Litigation," 25 Rev. Litig. 459 (2006).

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3. "Pricing and Paying for Cancer Drugs: Policy Options for Fixing A Broken System," 26:4 The Cancer Journal 298-303 (2020) (with David A. Hyman).*

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17. "Justice Has (Almost) Nothing to Do With It: Medical Malpractice and Tort Reform," in Rosamond Rhodes, Margaret P. Battin, and Anita Silvers, eds., MEDICINE AND SOCIAL JUSTICE, Oxford University Press 531-542 (2012) (with David A. Hyman).*

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42. "Access to Justice in a World without Lawyers: Evidence from Texas Bodily Injury Claims," 37 Fordham Urb. L. J. 357 (2010) (with David A. Hyman) (invited symposium).

43. "Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004," 10 Amer. Law & Econ. Rev. 185 (2008) (with Bernard S. Black, David A. Hyman, and William M. Sage).*

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65. "Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers," 4 Conn. Ins. L. J. 205 (1998) (invited symposium).

66. "The Lost World: Of Politics and Getting the Law Right," 26 Hofstra L. Rev. 773 (1998) (invited symposium).

67. "Professional Liability Insurance as Insurance and as Lawyer Regulation: A Comment on Davis, Institutional Choices in the Regulation of Lawyers," 65 Fordham L. Rev. 233 (1996) (invited symposium).

68. "All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and Wolfram," 6 Coverage 47 (1996) (with Michael Sean Quinn).

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69. "Are Liability Carriers Second-Class Clients? No, But They May Be Soon-A Call to Arms against the Restatement of the Law Governing Lawyers," 6 Coverage 21 (1996) (with Michael Sean Quinn).

70. "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L. J. 255 (1995) (with Kent D. Syverud); reprinted in IX INS. L. ANTHOL. (1996) and 64 Def. L. J. 1 (Spring 1997).

71. "Wrong Turns on the Three Way Street: Dispelling Nonsense about Insurance Defense Lawyers," 5-6 Coverage 1 (Nov./Dec.1995) (with Michael Sean Quinn).

72. "Introduction to the Symposium on Bad Faith in the Law of Contract and Insurance," 72 Tex. L. Rev. 1203 (1994) (with Ellen Smith Pryor).

73. "Does Insurance Defense Counsel Represent the Company or the Insured?" 72 Tex. L. Rev. 1583 (1994); reprinted in Practicing Law Institute, INSURANCE LAW: WHAT EVERY LAWYER AND BUSINESSPERSON NEEDS TO KNOW (1998).

74. "A Missed Misalignment of Interests: A Comment on *Syverud, The Duty to Settle*," 77 Va. L. Rev. 1585 (1991); reprinted in VI INS. L. ANTHOL. 857 (1992).

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75. "In Defense of Private Claim Resolution Facilities," 84 J. of L. and Contemporary Problems 45 (2021) (with Lynn A. Baker)*

76. "What Can We Learn by Studying Lawyers' Involvement in Multidistrict Litigation? A Comment on *Williams, Lee, and Borden, Repeat Players in Federal Multidistrict Litigation*," 5 J. of Tort L. 181 (2014), DOI: 10.1515/jtl-2014-0010 (invited symposium).

77. "The Responsibilities of Lead Lawyers and Judges in Multi-District Litigations," 79 Fordham L. Rev. 1985 (2011) (invited symposium).

78. "The Allocation Problem in Multiple-Claimant Representations," 14 S. Ct. Econ. Rev. 95 (2006) (with Paul Edelman and Richard Nagareda).*

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83. "Representative Lawsuits & Class Actions," in B. Bouckaert & G. De Geest, eds., INT'L ENCY. OF L. & ECON. (1999).*

84. "I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds," 84 Va. L. Rev. 1465 (1998) (with Lynn A. Baker) (invited symposium).

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93. "Ethics and Innovation," 79 George Washington L. Rev. 754 (2011) (invited symposium).

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95. "Introduction: Civil Justice Fact and Fiction," 80 Tex. L. Rev. 1537 (2002) (with Lynn A. Baker).

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98. "What's Not To Like About Being A Lawyer?" 109 Yale L. J. 1443 (2000) (with Frank B. Cross) (review essay).

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Papers on SSRN at: http://ssrn.com/author=164490

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Miscellaneous

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PERSONAL

Married to Cynthia Eppolito, PA; Daughter, Katherine; Step-son, Mabon.

Consults with attorneys and serves as an expert witness on subjects in his areas of expertise.

First generation of family to attend college.

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY D. KOLTON, S. DAVID GOLDBERG, JEFFREY S. SCULLEY, and HENRY C. KRASNOW, individually and on behalf of classes of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**No. 16-cv-3792**
	)	**Hon. Charles P. Kocoras**
MICHAEL W. FRERICHS, Treasurer of the State of Illinois,	)	
Defendant.	)	

EXPERT DECLARATION OF SAM PELTZMAN,
PROFESSOR EMERITUS OF ECONOMICS,
UNIVERSITY OF CHICAGO BOOTH SCHOOL OF BUSINESS
REGARDING THE WAGERS LIABILITY CALCULATION

---

1. My name is Sam Peltzman. I am Professor Emeritus of Economics at the University of Chicago Booth School of Business. I served on the Booth School faculty from 1973 until my retirement in 2005. A copy of my curriculum vitae and a Short Bio are attached to this Declaration as Appendix 1.

2. I was retained by plaintiffs to advise on certain aspects of defendant's estimates of payouts arising from settlement of the litigation. Specifically, I advised on the defendant's estimate of amounts that will be paid to future claimants of funds currently held by the state (as of 10/31/2020) as interest on their funds during the time those funds were held by the state ("estimated

future interest"). This declaration will summarize my opinion on the adequacy of those estimates as updated by defendant to show funds held by the state as of December 31, 2020.

3. I have not been asked to provide nor have I attempted to make an alternative estimate. Every specific reference I shall make to the historical experience of funds held and paid out by the state takes at face value the data in the defendant's spreadsheet under the tab "LiabilityCalc," columns A through F in the Excel spreadsheet "Kolton LiabilityAnalysis 13May21."

4. My understanding is that but for the litigation and any settlement thereof, future interest would have been zero. Future interest resulting from this litigation will therefore be the product of three elements of any claim:

A. The amount returned to the claimant;

B. The length of time the state held this amount;

C. The annual interest rates applied to the holding during the holding period.

None of these three elements can be known today since they will occur in the future. Therefore, each element needs to be estimated. For the total funds now held by the state, the elements to be estimated are:

A. The percentage of those funds that will be claimed and paid out. These funds paid out are "returns" and the percentage of state holdings paid is the "return rate" in defendant's nomenclature. I adopt defendant's nomenclature subsequently wherever possible, as indicated by quote marks (").

B. The length of time those funds were held until claimed ("estimated years' interest").

C. The interest rates that will be applied to those funds.

5. Defendant's methodology for calculating estimated future interest is to obtain an estimate of A. from the return rates prevailing in the recent past and then use the average length of time those returned funds were held as an estimate of B. For C., defendant uses an average of recent interest rates as defined in the settlement. The estimated future interest is then reduced to account for certain expenses and to convert it to a net present value. I will comment only on the defendant's estimate of A. and B. This does not imply any opinion on the other parts of the defendant's calculations.

6. As an example of the calculation of A. and B. and how these are used to calculate "estimated future interest," suppose that the "amount remitted" to the state in a recent year is $1 million, that 5 percent of those funds (i.e., $50,000) are returned in each of the next 10 years, that there are no returns thereafter and that the interest rate in 4C. is 2 percent per annum. In this case the annual return rate of 5 percent cumulates to a total of 50 percent. This is 4A. If the returns occur evenly over any year, the state would have held each dollar returned for an average of 5 years. This is 4B. The estimated interest payable by the state on $1million remitted today would then be calculated as $1 million x 50 percent (the "return rate") x 5 years ("estimated years interest") x 2% = $50,000.

7. It is clear from this example that if recent experience yields a higher return rate and/or a longer estimated years interest than those assumed in this example then the bottom-line estimate of $50,000 interest payable by the state is too low and would have to be increased. For example, suppose that there are in fact some returns after the tenth year: say the return rate in years 11 through 20 is 2 percent, instead of 0 as assumed in 6. Then both 4A. and 4B. would have to be increased. In this case, the cumulative return rate is 70 percent (the 5 percent returned in each of the first 10 years + the 2 percent returned in each of the next 10 years). Also, these returns have

been held longer by the state than in the example in 6., because some returns occur in years 11 through 20 (4B. works out to 7.88 years in this new example). The estimated interest payable by the state on $1 million remitted today would then be $1 million x 70 percent x 7.87 years x 2 percent = $110,000, which is more than double the amount in 6. The doubling represents a compounding effect: 4A. and 4B. have each increased around 40 to 50 percent, but when multiplied together the estimated amount of interest payable doubles.

8. The defendant's estimate of 4A. is 46.75 percent, which means that all future returns will total to 46.75 percent of any amount remitted today. There are two estimates of 4B. (3.28 or 4.67), depending on the year used for the estimate. It is sufficiently accurate to say that the defendant's estimate of 4B. is 3 and a half years. In my opinion both of these estimates are too low in the same way that the estimate in example 6. above is too low.

9. The reasons for my opinion can be seen in the attached Figure 1, which is taken from defendant's data. It shows the return rate, as of 2021, for funds remitted to the state in each year from 1962 onward. For example, the return rate shown for 1962 is around 10 percent. This means that of all funds remitted to the state in that year, only 10 percent have been returned over the next 58 years. Figure 1 shows that this percentage generally increases over the next 30 years or so. This means that for funds remitted to the state in more recent years than the 1960s a greater percentage has been returned by 2021. This is not surprising given advances in communication and computer technology, which make it easier for more contemporary owners of funds and the state to connect. The peak percentages in the chart occur in the mid-1990s at around 60 percent. This means that by 2021 about 60 percent of funds remitted to the state in a year from the mid-1990s had been returned. For subsequent years' remittances the return rate steadily declines, reaching near zero in 2021. This means that a smaller percentage of funds remitted to the state in

years after the mid-1990s has been returned as of 2021, and this percentage is smaller the less time has elapsed between the date of the remittance and 2021. Almost none of the funds remitted in 2021 have been returned so far this year.

10. In my opinion, the following conclusions may be drawn from Figure 1:

A. It takes time for funds to be claimed and returned. This time can stretch to 25 years or so. This is the meaning of the long downward slope in the Figure from the 1990s to 2021. This says that the return rate is higher for funds that the state has been holding for 25 years than it is for funds held for 15 or 10 or 5 years.

B. Based on recent experience, it is reasonable to estimate that return rates for funds remitted to the state today will be at least 60 percent. I say "at least" because the Figure shows return rates as of 2021. These rates can only go up as more time passes and new claims are made. But we have no basis for saying how much higher return rates for past years will go.

C. Based on the same recent experience, it is reasonable to estimate that the state will be holding significant sums for two or more decades. Perhaps continued technological progress combined with efforts by the state to find claimants will shorten the state's holding period. But this is speculative and, if it comes to pass, the return rate will also likely go above 60 percent. What we do know is that the technology available since the mid-1990s has produced return rates that cumulate to around 60 percent over two or more decades.

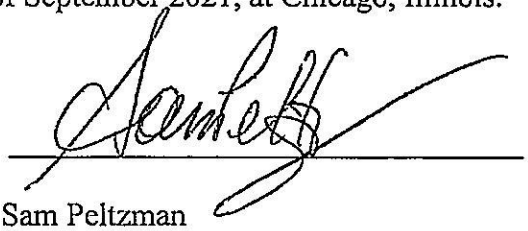
D. Based on recent experience it is, in my opinion, unreasonable to estimate an ultimate return rate of under 50 percent, as the defendant has done. As seen in Figure 1, this estimate comes from the return rates typical of funds remitted in the mid-2000s, but,

as is also evident in the Figure, significantly higher percentages have been returned from remittances in the preceding decade.

E. Based on recent experience it is unreasonable to estimate years of interest on the order of 3 or 4 years, as the defendant has done. This follows from D. above: the defendant's estimate of years interest assumes that all funds returned will be held for no more than 15 or so years, which is too low, as we can see.

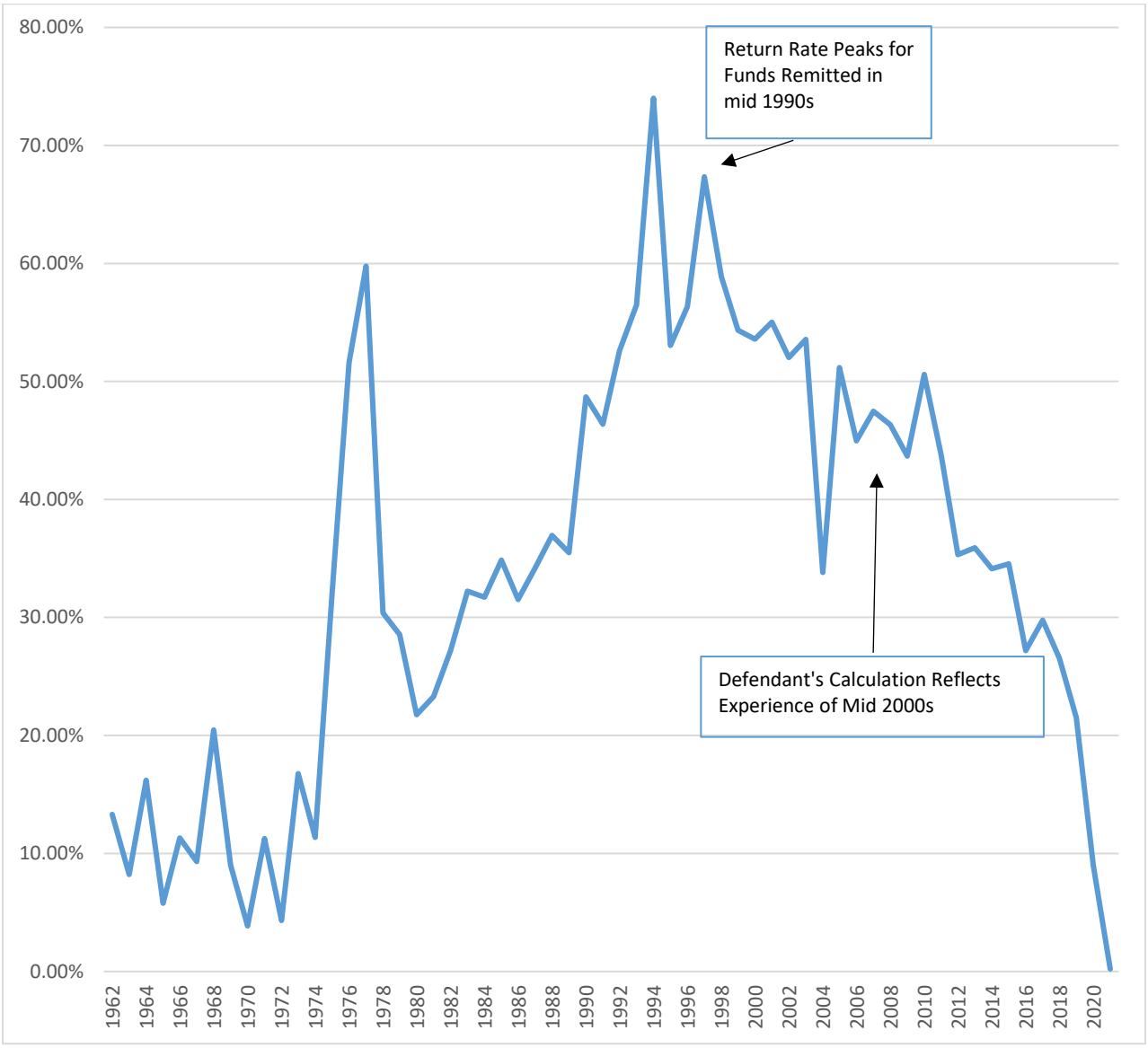
F. These underestimates of both the return rate and the holding period are likely to result in material understatement of estimates of the state's future interest payouts. As seen in the examples in 6. and 7. above, the twin understatements have a multiplicative effect on estimated payouts. For example, if the right estimate of 4A. (the return rate) is 60 percent instead of 46.75 and the right estimate of 4B. (the years interest holding period) is 6 years instead of 3.5, interest payable would be more than twice the defendant's estimate.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 19th day of September 2021, at Chicago, Illinois.



Sam Peltzman

Figure 1. Percentage paid to Date. 1962-2021.
Actual Return Rate as of 2021 for Funds Remitted to State in Each Year from 1962-2021



Appendix 1

Sam Peltzman

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Home Address: 5743 S. Harper Avenue
Chicago, Illinois 60637

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Education

Ph.D., 1965 University of Chicago (Economics)

B.B.A., 1960 City College of New York

Current Positions

Ralph and Dorothy Keller Distinguished Service Professor Emeritus of Economics, Graduate School of Business, University of Chicago

Director Emeritus, George J. Stigler Center for the Study of the Economy and State, University of Chicago.

Positions Held

UNIVERSITY OF CHICAGO

Ralph and Dorothy Keller Distinguished Service Professor of Economics, Graduate School of Business, University of Chicago, 2001-2005

Director, George J. Stigler Center for the Study of the Economy and State, University of Chicago, 1991-2005

Sears, Roebuck Professor of Economics and Financial Services, Graduate School of Business, 1986-2001

Professor, Graduate School of Business, 1974-86 Ford Foundation Visiting Research Professor, Graduate School of Business, 1973-74.

Visiting Associate Professor, Graduate School of Business, 1968-69.

HEBREW UNIVERSITY OF JERUSALEM

Research Fellow, Institute for Advanced Study, 1978.

NATIONAL BUREAU OF ECONOMIC RESEARCH, INC.

Research Associate, 1974-77.

Faculty Research Fellow, 1966.

UNIVERSITY OF CALIFORNIA, LOS ANGELES
Assistant, Associate Professor, Professor, 1964-73.

COUNCIL OF ECONOMIC ADVISERS, EXECUTIVE OFFICE OF THE PRESIDENT
Senior Staff Economist, 1970-1971.

Editorial and Advisory Positions

Editor, *Journal of Political Economy*, 1974-89.

Editor, *Journal of Law and Economics*, 1989-present.

AMERICAN ENTERPRISE INSTITUTE,
Adjunct Scholar, 1975-1988. Member, Council of Academic Advisers, 1990-present.

Editorial Advisory Board, *CATO Journal, Journal of Regulatory Economics, Regulation, Public Choice, International Journal of the Economics of Business, European Journal of Political Economy*.

COMMITTEE FOR ECONOMIC DEVELOPMENT
Member, Research Advisory Board, 1989-93.

Directorships

CMP Industries L.L.C., 1995-2010

Publications

"The Relative Importance of Unionization and Productivity in Increasing Wages," *Labor Law Journal*, August, 1961.

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Short Bio: Sam Peltzman

Sam Peltzman is the Ralph and Dorothy Keller Distinguished Service Professor Emeritus of Economics at the Booth School of Business, University of Chicago. He received his Ph.D. in Economics from the University of Chicago in 1965, and he has previously taught at the University of California, Los Angeles. He also served as Senior Staff Economist for the President's Council of Economic Advisers. He has been on the faculty of the University of Chicago's School of Business since 1973.

Professor Peltzman's research has focused on issues related to the interface between the public sector and the private economy. His published work includes numerous articles in academic journals. These encompass many issues in the general areas of the Economics of Government Regulation and Industrial Organization, including the regulation of banking, automobile safety and pharmaceutical innovation, the growth of government, the political economy of public education, and the economic analysis of voters and legislators. He is the author or an editor of several books, including *Political Participation and Government Regulation* and *The Deregulation of Network Industries: What's Next.*

Professor Peltzman is currently an editor of the *Journal of Law and Economics* and is the Director Emeritus of the George J. Stigler Center for the Study of the Economy and the State at the University of Chicago. He served as Director of the Stigler Center from 1991-2005. He serves on the editorial boards of several academic journals and on the Council of Academic Advisers of the American Enterprise Institute.

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Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY D. KOLTON, S. DAVID GOLDBERG, JEFFREY S. SCULLEY, and HENRY C. KRASNOW, individually and on behalf of classes of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**No. 16-cv-3792**
	)	**Hon. Charles P. Kocoras**
MICHAEL W. FRERICHS, Treasurer of the State of Illinois,	)	
Defendant.	)	

DECLARATION OF TERRY ROSE SAUNDERS IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

I, Terry Rose Saunders, declare as follows:

1. I am one of Plaintiffs' Counsel in the above-captioned matter. My firm is The Saunders Law Firm, 120 N. LaSalle Street, Suite 2000, Chicago, IL 60602.

2. I have been personally involved in all aspects of this litigation since the pre-suit investigation. I make this Declaration based on personal knowledge and am competent to testify to the matters set out herein. It is submitted in support of the above-captioned motion brought by Plaintiff.

3. I am a 1973 graduate of New York University School of Law, where I was a member of the Order of the Coif. I am licensed to practice in Illinois and was licensed to practice in the District of Columbia and have been admitted to practice in numerous other jurisdictions, including the United States Supreme Court, United States District Court for the Northern District of Illinois, United States District Court for the Southern District of Indiana, and the United States Court of Appeals for the Seventh Circuit.

4. Since my admission to the Bar in the District of Columbia in 1973, I have practiced continuously in the complex litigation field and have been involved in the prosecution and defense of large, multi-party cases, including class-action cases, in state and federal trial and appellate courts.

5. By reason of my experience in complex, class, and corporate derivative actions in state and federal courts across the country, I am generally knowledgeable about attorney's fee awards and the standards used by courts in making such awards. I am familiar with contingent and hourly fees and hourly rates charged by attorneys in complex litigation in the national legal market.

6. As set forth in my resume attached as Appendix 1 to this Declaration, I have had a particular focus on class actions in securities and shareholder litigation, employee-benefits litigation, consumer protection and the constitutional aspects of Unclaimed Property Act matters, among others, in state courts (primarily Illinois and Delaware) and federal courts throughout the nation.

7. The services that my firm provided in litigating this case include: (1) investigation, legal and factual research before and after the filing of the Complaint; (2) preparation of the pleadings, briefing in support of and opposition to contested motions, and legal research; (3) briefing of two appeals to the Seventh Circuit Court of Appeals and oral argument of one appeal; (4) preparing informal written discovery requests; (5) preparation for and conducting interviews of Defendant's representatives; (6) review and analysis of discovery documents produced by Defendant; (7) litigation strategy and analysis; (8) expert analysis and opinions and related proceedings; (9) preparation for and court appearances; (10) settlement negotiations and preparation of related motions and supporting briefs.

8. When Plaintiffs' Counsel initiated this case on behalf of Mr. Kolton, et al., seeking

declaratory and injunctive relief for owners of unclaimed property as the result of the State of Illinois's failure to pay interest on unclaimed funds in violation of constitutional rights, I believed the case would be a very risky proposition. This case, brought as a class action, had the potential to vindicate the constitutional rights of many more than the named Plaintiffs and had to be brought as a class action. As a general matter, class and derivative actions are always time-consuming and expensive, and this one was not expected to be an exception. I knew, based on my experience in other class action cases, including other unclaimed-property litigation, that litigating this case could require paying out many thousands of dollars in litigation costs (including costs of personnel and experts) with no guarantee of repayment. Further, I knew that the state, with vast sums and many personnel at its disposal, would be a staunch adversary.

9. Large investments of time and money are always risky. There is no such thing as a risk-free action potentially benefiting many. At many junctures in the litigation, an action can fail. For example, a court can dismiss the claim at the pleadings stage, as occurred in this case. And, as in all litigation, summary judgment can be awarded against plaintiff, the court can find no liability at trial, a post-trial motion can be granted in the defendant's favor, or a favorable trial result can be reversed or modified on appeal. Similarly, damages can be awarded in a lesser amount than requested, denied altogether, or reversed on appeal. The defendant needs to win at only one of these junctures to make a case like this a poor investment of time and resources. The plaintiff needs to win every significant motion and issue to make the case a success; a loss of even one issue or motion can doom the case.

10. In a case like this one, there are other risks as well. One is delay. Cases like this usually take years to resolve. It has been more than five years since our work first began on this case. The facts can develop differently than expected, the law can change before the case is resolved, or a court can apply what is, in our view, the wrong law or apply the law incorrectly, and to top

it all there is the risk that a below-market fee will be awarded by the court.

11. This case also presented certain practical or "business" risks, including the mismatch between the resources of the parties. Defendant was represented by the Illinois Attorney General, with effectively unlimited resources. Defendant could afford to, and did, litigate this case aggressively. Unlike many cases, Plaintiffs did not have an objective statement or finding from an outside agency or party finding fault with Defendant's conduct before filing suit. To the contrary, the Illinois Supreme Court had previously rejected the claims Plaintiffs were making in this case. Although a prior ruling of the Seventh Circuit Court of Appeals had held that Indiana's failure to compensate an unclaimed property owner for the interest his account had been earning was a taking, that holding was limited to its facts, and, as it turned out, resulted in an unfavorable ruling and further delay and litigation in this case.

12. Because of the risks presented, the large investment of time and money that would likely be required, and the relatively small stakes the named Plaintiffs had in the litigation, I would not and could not have represented individual Plaintiffs on a contingent fee basis to pursue merely their individual losses in this litigation. Nor could such Plaintiffs afford to pay by the hour.

13. Had I been in a position to negotiate a contingent fee with those who benefited from our work, I would not have accepted this representation for a contingent fee of less than 33-1/3 percent and that was the fee negotiated with the four Plaintiffs in this litigation. In my judgment, only a contingent fee in this range would provide the necessary inducement to take this particular case.

14. Based on my experience and my knowledge of the risks faced by counsel going into this case and the market for legal services of the type required here, it is my opinion that Plaintiffs would have been unable to find an attorney with the requisite experience and,

importantly, the financial resources, to undertake this case on anything but a contingent basis. It is also my opinion that Plaintiffs likely would not have been able to find a competent attorney able to finance this case for a contingent fee of less than 25 to 33-1/2 percent. In my opinion, and based on my experience, that range represents the fee necessary to induce counsel to undertake this case, with its attendant risk of loss and delay.

15. I make the foregoing statements based on my experience in this case and as a litigation attorney for the last 48-plus years, participation in the presentation, drafting and defending of fee petitions in such cases, the setting of my and my prior firm's rates over the years, and conferring with other attorneys who practice in the relevant legal areas. By virtue of the foregoing, I am familiar with contingent fee rates charged in legal markets in major metropolitan areas by qualified complex case litigators.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing facts are true and correct to the best of my knowledge and belief.

Dated: September 22, 2021

/s/ Terry Rose Saunders
Terry Rose Saunders

Appendix 1

THE SAUNDERS LAW FIRM
120 North LaSalle Street, Suite 2000
Chicago, IL 60602
(312) 444-9656 (ph)
(312) 277-5205 (fax)
www.saunders-lawfirm.com

Resume of Terry Rose Saunders
tsaunders@saunders-lawfirm.com

Ms. Saunders has concentrated her law practice in the areas of securities, class action, antitrust and other complex business litigation in state and federal courts throughout the country. For thirteen years, Ms. Saunders represented a broad range of individuals, small businesses and public corporations in securities fraud, antitrust, breach of contract and other complex business litigation as an associate and then partner of Jenner & Block in Chicago (1975-1986), and an associate at Williams & Connolly in Washington, D.C. (1973-1975). Since 1987, Ms. Saunders has primarily represented plaintiffs in individual and class actions involving securities fraud, breach of fiduciary duty, antitrust, breach of contract, and business tort litigation.

Ms. Saunders has been lead trial counsel in both the state and federal courts of Illinois and the Delaware Court of Chancery and has argued numerous appeals in the Illinois Appellate Court and the United States Court of Appeals for the Seventh Circuit. She has also testified as an expert witness on issues relating to securities law, class actions and attorney's fees.

Ms. Saunders is the co-author of *Securities Fraud: Litigating Under Rule 10b-5* (Lexis-Nexis), a practical guide to securities litigation published in 1989 and updated annually through 2001. She has participated in seminars and teaching programs on securities class actions, fiduciary duties and trial practice, including participation as a panelist in the Ray Garrett, Jr., Corporate and Securities Law Institute, Northwestern University School of Law April 1997; as an instructor at the Edwin F. Mandel Clinic of The University of Chicago Law School, Intensive Trial Practice Workshop; and as a panelist and moderator of ABA programs on class actions, fiduciary duty law of Delaware business entities, securities litigation and trial practice. Ms.Saunders served as co-Chair of the ABA Litigation Section's Consumer and Personal Rights Litigation Committee (2000-02), and the Class Action and Derivative Suits Committee (1992- 95). She chaired the Chicago Bar Association's Class Litigation Committee (1987-88).

Ms. Saunders is a member of the Bar of the State of Illinois and was an active member of the Bar of the District of Columbia. She has served as lead trial counsel and liaison counsel in a number of class actions and shareholder derivative actions, including:

- *Cerajeski v. Zoeller, et al.,* No. 12-3766 (S.D. In.). Lead Appellate Counsel in an Indiana unclaimed property takings case. The court of appeals reversed the judgment of the district court and entered judgment for Plaintiff. The case is reported at 735 F.3d 577 (7th Cir. 2013).

- *Norman v. Salomon Smith Barney,* No. 03 C 4391 (S.D.N.Y.). Co-Lead Counsel in a nationwide class action on behalf of accountholders at Salomon Smith Barney alleging that the firm breached its contract and its fiduciary duties in its investment of client funds. The case settled on favorable terms. The case is reported at 350 F. Supp. 2d 382 (S.D.N.Y. 2004)

- *Brand Name Prescription Drugs Litigation,* No. 94 C 897 (N.D. Ill.). Liaison counsel nationwide and Illinois counsel for pharmacist opt-outs in case brought under Sherman Act and Robinson-Patman Act. After the Sherman Act claims settled, the Robinson- Patman Act claims were transferred to the Eastern District of New York. The case is reported at 472 F. Supp. 2d 385 (E.D.N.Y.)

- *Loventhal v. Silverman et. al.,* No. CA 306-N (Del. Ch.). Co-Lead Counsel representing shareholders in a derivative lawsuit that challenged the executive compensation at Cendant Corporation. The case settled on favorable terms.

- *In re Trans Union Corp. Privacy Litigation,* No. 00 C 4729 (N.D. Ill.). Plaintiffs' Liaison Counsel in a Multi-District Litigation proceeding involving claims under the Fair Credit Reporting Act. The case settled on favorable terms. The case is reported at 2005 U.S. Dist. LEXIS 17548 (N.D. Ill. Aug. 17, 2005).

- *In re Abbott Laboratories Derivative Shareholder Litigation,* No. 92 C 7246 (N.D. Ill.). Co-Liaison Counsel in shareholder derivative action against directors. The decision of the court on the appeal from the district court's order dismissing the case is reported at 325 F.2d 795 (7th Cir. 2003). The case settled on favorable terms.

- *Felzen v. Andreas et. al.,* 95 CV 2279 (C.D. Ill.). Co-lead counsel in shareholders derivative action against directors of Archer Daniels Midland for breach of fiduciary duty. The case was settled in 1997 for nonmonetary and monetary relief.

- *Endo v. Albertine,* 88 C 1815 (N.D. Ill.). Lead counsel in securities class action against corporation and its underwriters and accountants. The case settled on the eve of trial in October 1997 for approximately $8 million.

- *Barbieri v. Swing-N-Slide Corp. et. al.,* No. 14239 (Del. Ch.). Co-lead counsel in shareholder class action against corporation's directors for breach of fiduciary duty. The case was settled in 1998.

- *In re Triangle Industries, Inc. Shareholder Litigation,* No. 10466 (Del.Ch.). Co-lead counsel in class shareholder litigation. The case was settled for $75 million.

Among other matters, Ms. Saunders has recently appeared on behalf of plaintiffs in:

- *In re TFT- LCD (Flat Panel) Antitrust Litigation*, 3:07-md-1827 (N.D. Cal.) (case settled for more than $1 billion).
- *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 3:07-cv-5944 (N.D. Cal.).
- *In re Automotive Parts Litigation*, 2:12-md-2311 (E.D. Mich.).
- *In re Peregrine Financial Group Customer Litigation*, 12-cv-5546 (N.D. Ill.).
- *In re Broiler Chicken Antitrust Litig*., 16-C-8637 (N.D. Ill.).
- *Margaret Richek Goldberg v. Bank of America, N.A*., 846 F.3d 913 (7th Cir. 2017) (Argued Appeal).

Practice Areas
Antitrust Litigation
Appellate Practice
Class Actions
Complex Business Litigation
Securities Litigation

Education
J.D., New York University School of Law, 1973
Honors: Cum Laude, Order of the Coif, Arthur Garfield Hays Fellow

B.A., Barnard College, 1964

Admitted to Practice
United States Supreme Court (1983)
United States District Court for the Northern District of Illinois (1976)
United States Court of Appeals for the Seventh Circuit (1976)
Illinois (1976)
District of Columbia (1973)
United States District Court for the Southern District of Indiana (2014)

Publications and Presentations
Co-Author (with Thomas E. Patton), *Securities Fraud: Litigating Under Rule 10b-5* (Aspen Publishers, 1989), updated annually through 2001

Faculty, Ray Garrett, Jr. Corporate and Securities Law Institute, Northwestern University School of Law, April 1997

Instructor, Intensive Trial Practice Workshop, Edwin F. Mandel Clinic, University of Chicago Law School

Panelist and Moderator, American and Chicago Bar Association programs on class actions, fiduciary duty law, securities litigation and trial practice

Honors and Awards

Robert B. McKay Award, New York University School of Law, 1994

Marquis Who's Who in America, Who's Who in American Law, Who's Who Among Women in the Law

Martindale-Hubbell AV-rated

Past Employment
Private Practice, Chicago, 1987 – to date
Jenner & Block, 1975-1986
Williams & Connolly, 1973-197

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY D. KOLTON, S. DAVID GOLDBERG, JEFFREY S. SCULLEY, and HENRY C. KRASNOW, individually and on behalf of classes of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**No. 16-cv-3792**
	)	**Hon. Charles P. Kocoras**
MICHAEL W. FRERICHS, Treasurer of the State of Illinois,	)	
Defendant.	)	

DECLARATION OF ARTHUR T. SUSMAN IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

I, Arthur T. Susman, declare the following:

1. I am one of Plaintiffs' Counsel in the above-captioned matter. My present firm is Law Offices of Arthur Susman, 55 W. Wacker Drive, Chicago, IL 60601.

2. I have been personally involved in all aspects of this litigation since the pre-suit investigation. I make this Declaration based on personal knowledge and am competent to testify to the matters set out herein. It is submitted in support of the above-captioned motion brought by Plaintiffs.

3. I am a 1958 graduate of Northwestern University Law School, where I was a member of the Law Review and a member of the Order of the Coif. I graduated in 1955 from the University of Illinois, Champaign-Urbana with All University Honors (the Bronze Plaque), which I believe is the highest undergraduate honor awarded. I am licensed to practice in Illinois and have been admitted to practice in numerous other jurisdictions, including the

Courts of Appeals for the Seventh Circuit, Eighth Circuit, and Tenth Circuit, as well as the United States Supreme Court.

4. Since my admission to the Bar in Illinois in 1958, I have practiced continuously in the complex litigation field and have been involved in the prosecution and defense of class-action cases in state and federal courts.

5. By reason of my experience in complex, class, and corporate derivative actions in state and federal courts across the country, I am generally knowledgeable about attorney's fee awards and the standards used by courts in making such awards. I am familiar with contingent and hourly fees and hourly rates charged by attorneys in complex litigation in the national legal market.

6. As set forth in my resume attached as Appendix 1 to this Declaration, I have had a particular focus on class actions in securities and shareholder litigation, employee-benefits litigation, consumer protection and the constitutional aspects of Unclaimed Property Act matters, among others, in state courts (primarily Illinois and Delaware) and federal courts throughout the nation.

7. I have been involved in constitutional cases involving the unclaimed property programs set up by several states for fifteen years. Early on, I became fascinated with these cases because they seem so simple to me and yet I have a difficult time convincing a court to do what I believe is correct. That is to hold that, because interest follows principal, once you take the principal, a piece of unclaimed property, you take with it the interest or other earnings on that principal that is constitutionally protected by the Fifth Amendment. For years I have read every article I could find about this problem and related takings law issues, and I have repeatedly been open to an opportunity to change the law. Much of the work has been done without my being involved in any case presenting the issue.

8. The services that my firm provided in litigating this case include: (1) investigation, legal and factual research before and after the filing of the Complaint; (2) preparation of the pleadings, briefing in support of and opposition to contested motions, and legal research; (3) briefing of two appeals to the Seventh Circuit Court of Appeals; (4) preparing informal written discovery requests; (5) preparation for and conducting interviews of Defendant's representatives; (6) review and analysis of discovery documents produced by Defendant; (7) litigation strategy and analysis; (8) expert analysis and opinions and related proceedings; (9) preparation for and court appearances; (10) settlement negotiations and preparation of related motions and supporting briefs.

9. When Plaintiffs' Counsel initiated this case on behalf of Mr. Kolton, et al., seeking declaratory and injunctive relief for owners of unclaimed property as the result of the State of Illinois's failure to pay interest on unclaimed funds in violation of constitutional rights, I believed the case would be a very risky proposition. This case, brought as a class action, had the potential to vindicate the constitutional rights of many more than the named Plaintiffs and had to be brought as a class action. As a general matter, class and derivative actions are always time-consuming and expensive, and this one was not expected to be an exception. I knew, based on my experience in other class action cases, including other unclaimed-property litigation, that litigating this case could require paying out many thousands of dollars in litigation costs (including costs of personnel and experts) with no guarantee of repayment. Further, I knew that the state, with vast sums and many personnel at its disposal, would be a staunch adversary.

10. Large investments of time and money are always risky. There is no such thing as a risk-free action potentially benefiting many. At many junctures in the litigation, an action can fail. For example, a court can dismiss the claim at the pleadings stage, as occurred in this case. And, as in all litigation, summary judgment can be awarded against plaintiff, the court can find no

liability at trial, a post-trial motion can be granted in the defendant's favor, or a favorable trial result can be reversed or modified on appeal. Similarly, damages can be awarded in a lesser amount than requested, denied altogether, or reversed on appeal. The defendant needs to win at only one of these junctures to make a case like this a poor investment of time and resources. The plaintiff needs to win every significant motion and issue to make the case a success; a loss of even one issue or motion can doom the case.

11. In a case like this one, there are other risks as well. One is delay. Cases like this usually take years to resolve. It has been more than five years since our work first began on this case. The facts can develop differently than expected, the law can change before the case is resolved, or a court can apply what is, in our view, the wrong law or apply the law incorrectly, and to top it all there is the risk that a below-market fee will be awarded by the court.

12. This case also presented certain practical or "business" risks, including the mismatch between the resources of the parties. Defendant was represented by the Illinois Attorney General, with effectively unlimited resources. Defendant could afford to, and did, litigate this case aggressively. Unlike many cases, Plaintiffs did not have an objective statement or finding from an outside agency or party finding fault with Defendant's conduct before filing suit. To the contrary, the Illinois Supreme Court had previously rejected the claims Plaintiffs were making in this case. Although a prior ruling of the Seventh Circuit Court of Appeals had held that Indiana's failure to compensate an unclaimed property owner for the interest his account had been earning was a taking, that holding was limited to its facts, and, as it turned out, resulted in an unfavorable ruling and further delay and litigation in this case.

13. Because of the risks presented, the large investment of time and money that would likely be required, and the relatively small stakes the named Plaintiffs had in the litigation, I would not and could not have represented individual Plaintiffs on a contingent fee basis to

pursue merely their individual losses in this litigation. Nor could such Plaintiffs afford to pay by the hour.

14. Had I been in a position to negotiate a contingent fee with those who benefited from our work, I would not have accepted this representation for a contingent fee of less than 33-1/3 percent and did so with the four Plaintiffs in this litigation. In my judgment, only a contingent fee in this range would provide the necessary inducement to take this particular case.

15. Based on my experience and my knowledge of the risks faced by counsel going into this case and the market for legal services of the type required here, it is my opinion that Plaintiffs would have been unable to find an attorney with the requisite experience and, importantly, the financial resources, to undertake this case on anything but a contingent basis. It is also my opinion that Plaintiffs likely would not have been able to find a competent attorney able to finance this case for a contingent fee of less than 25 to 33-1/2 percent. In my opinion, and based on my experience, that range represents the fee necessary to induce counsel to undertake this case, with its attendant risk of loss and delay.

16. I make the foregoing statements based on my experience in this case and as a litigation attorney for the last 60-plus years, participation in the presentation, drafting and defending of fee petitions in such cases, the setting of my and my prior firm's rates over the years, and conferring with other attorneys who practice in the relevant legal areas. By virtue of the foregoing, I am familiar with contingent fee rates charged in legal markets in major metropolitan areas by qualified complex case litigators.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing facts are true and correct to the best of my knowledge and belief.

Dated: September 22, 2021

/s/ Arthur T. Susman
Arthur T. Susman

Appendix 1

RESUME FOR ARTHUR T. SUSMAN

Arthur T. Susman has more than 60 years of trial and appellate experience. Mr. Susman has been active in the Securities Committee of the Chicago Bar Association and was Chairman of the Rule 10b-5 Subcommittee. One of his early published articles appears in the ABA Selected Articles on Closely Held Enterprises collection, and he lectures and has had numerous articles published in the securities law field. He has participated in over 70 lawsuits involving derivative, corporate, and securities matters and Chapter X corporate reorganizations and has achieved a reputation as a specialist in the field of minority shareholder representation. Mr. Susman's extensive litigation career includes:

Securities Litigation

- *In re Bank One Secs. Litig.*, No. 00-2100 (N.D. Ill.) (Andersen, J.). Lead counsel for former shareholders of First Chicago NBD challenging Bank One Corporation's1998 acquisition of First Chicago NBD under Sections 11 and 12 of the Securities Act of 1933 and Section 14 of the Securities Exchange Act of 1934. Class includes some 300 hundred million shares. After defeating motion to dismiss, obtaining class certification, *see* 2002 WL 989454, at *9, and concluding fact and expert discovery, defendants settled for $120 million, the second-largest securities settlement in the Seventh Circuit.
- *Endo v. Albertine*, No. 88-1815 (N.D. Ill.). Lead counsel in securities class action settled for $8 million on eve of trial in January 1998.
- *In re W.R. Grace Sec. Litig.*, No. 95-9003 (S.D.N.Y.). Co-lead counsel in $28 million settlement of securities class action in January 1998.
- *In re Phar-Mor, Inc., Sec. Litig.*, No. MDL 959 (W.D. Pa.). Represented institutional investors, including the Northern Trust, Kemper Securities, and Sumitomo Bank, in multi-district case involving federal and state claims arising out of massive accounting fraud. Favorable settlement in 1996 under seal.
- *In re Triangle Indus., Inc., S'holder Litig.*, No. 10466 (Del. Ch. 1990). Co-lead counsel in shareholder litigation settled for $75 million.
- *Siegman v. Tri-Star Pictures*, No. 9477 (Del. Ch. 1993). Co-lead counsel in class and derivative action challenging Coca-Cola's sale of Columbia Pictures to Tri-Star. Judgment for defendants reversed on appeal to Delaware Supreme Court and remanded for trial. Settled eve of trial for $22.5 million.

ERISA Litigation

- *Kiefer v. Ceridian Corp.*, 976 F. Supp. 2d 829 (D. Minn.). Lead counsel in $51 million settlement of ERISA class action reached in October 1997, three weeks before trial.
- *In re Sears Retiree Group Life Ins. Litig.*, No. 97-7453 (N.D. Ill.). Co-lead counsel in ERISA class action on behalf of 80,000 Sears retirees. Settlement conferring up to $200 million in benefits approved March 5, 2002.
- *Carter v. Ret. Plan of Texaco, Inc.*, No. 99-0114 (S.D.N.Y.). Lead counsel in $10 million settlement of ERISA class action on behalf of 10,000 plan participants. Settled October 10, 2000.

- *Steiner v. Control Data Sys., Inc.*, No. 98-1489 (D. Minn). Lead counsel in $4.25 million ERISA class action settlement affecting some 700 plan members in July 1999.

Corporate Governance & Fiduciary Duty Litigation

- *O'Malley v. Boris*, 742 A.2d 845 (Del. Supr. 1999). Lead counsel in class action involving breach of investment broker's fiduciary duties to 269,000 clients. Case settled on day of trial following Delaware Supreme Court's reversal of Chancery Court's dismissal of suit and Chancery Court's subsequent grant of summary judgment on liability in favor of plaintiffs. *See* 2002 WL 453928 (Del. Ch.) (granting summary judgment); 2001 WL 50204 (Del. Ch.) (granting class certification).
- *Canel v. Lincoln Nat'l Bank*, 1998 WL 1760544 (N.D. Ill. 1998). Squeeze-out merger class action involving bank acquisition. Settled in 2000.
- *Schelly v. Mfrs. Nat'l Corp.*, No. 99-00820 (Cir. Ct. Cook County, Ch. Div.). Breach of fiduciary duty action on behalf of minority shareholders in bank. Settled in 2000.
- *Siegman v. Columbia Pictures*, No. 11152 (Del. Ch. 1994). Co-lead counsel in class action challenging the sale of Columbia Pictures to Sony under Section 203 of the Delaware General Corporate Law. Settled for $3 million.
- *Malone v. Brincat*, 722 A.2d 5 (Del. Supr. 1998). Co-lead counsel in landmark decision allowing class of non-purchaser stockholders of Mercury Finance Company to bring action for breach of fiduciary duty of disclosure.

In addition to the cases noted above and unreported litigation, Mr. Susman has participated in the following reported cases:

- *Cerajeski v. Zoeller*, 735 F.3 577 (7th Cir. 2013) (Unclaimed property taken case).
- *Sogg v. Zurz*, 121 Ohio 3d449, 2009-Ohio-1526 (Ohio Supreme Court holding just compensation due on Unclaimed Property).
- *Smith v. Sprint*, (N.D. Ill, Eastern Division) (landowner easement class action).
- *Cwik v. Giannoulias*, (U.S. 2010) 237 IL 2d 409, 930 N.E. 2d 990 (2010) (Takings case).
- *Canel* v. *Topinka*, 212 IL 2d 311, 818 N.E. 2d 311 (2004) (Takings case).
- *DiLeo v. Ernst & Young*, 901 F.2d 624 (7th Cir. 1990).
- *Lister v. Stark*, 890 F.2d 941 (7th Cir. 1989).
- *Alexander v. Centrafarm Group, N.V.*, 124 F.R.D. 178 (N.D. Ill. 1988).
- *Colan v. Cutler-Hammer, Inc.*, 812 F.2d 357 (7th Cir. 1987).
- *Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir. 1981).
- *In re Republic Nat'l Life Ins. Co.*, 73 F.R.D. 658 (S.D.N.Y. 1977).
- *Winokur v. Bell Federal Sav. & Loan Assoc.*, 560 F.2d 271, *reh'g denied*, 562 F.2d 1034 (7th Cir. 1977).
- *Adams v. Jewel*, 63 Ill.2d 336 (Ill. 1976).
- *Mathews Fund, Inc. v. Colwell Co.*, 564 F.2d 780 (7th Cir. 1977).
- *In re TransOcean Tender Offer Sec. Litig.*, 427 F. Supp. 1208 (N.D. Ill. 1977), 427 F. Supp. 1211 (N.D. Ill. 1977), 455. F. Supp. 999 (N.D. Ill. 1978), 415 F. Supp. 382 (J.P.M.L. 1976), and 78 F.R.D. 682 (N.D. Ill. 1978).

- *King v. Kansas City Southern Indus., Inc.*, 519 F.2d 20 (7th Cir. 1975), *aff'g* 56 F.R.D. 96 (N.D. Ill. 1976).
- *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), *rev'g* 64 F.R.D. 86 (E.D. Pa. 1974).
- *Swanson v. Am. Consumers Indus., Inc.*, 415 F.2d 1326 (7th Cir. 1969), 475 F.2d 516 (7th Cir. 1973), and 517 F.2d 555 (7th Cir. 1975).

Among Mr. Susman's unreported cases are:

- *Brody v. Occidental Petroleum Corp.*, No. 1-823 (Del. Ch. 1990) (challenging corporate donation to art museum).
- *Windsor Indus. Sec. Litig.*, No. 85-4196 (N.D. Ill. 1990) (reaching $2.5 million settlement as lead counsel).
- *Atlanta West Hosp. Bondholders Litig.*, No. 76-388 (S.D. Ohio 1983) (winning $19.3 million jury award as co-lead counsel).

Mr. Susman is a 1958 graduate of Northwestern Law School, where he was a member of the Law Review and a member of the Order of the Coif, and a 1955 graduate of the University of Illinois and a recipient of All University Honors (the Bronze Plaque).

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY D. KOLTON, S. DAVID GOLDBERG, JEFFREY S. SCULLEY, and **HENRY C. KRASNOW,** individually and on behalf of all others similarly situated, Plaintiffs,	)	
v.	)	No. 16-cv-3792
	)	Honorable Charles P. Kocoras
MICHAEL W. FRERICHS, Treasurer of the State of Illinois, Defendant.	)	

DECLARATION OF THOMAS A. DOYLE
IN SUPPORT OF
PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES
AND REIMBURSEMENT OF EXPENSES

I, Thomas A. Doyle, declare as follows:

1. Between 2016 (when this litigation was first filed) and September 16, 2019, I served as one of Plaintiffs' Counsel in this matter. During those years, I worked at Wexler Wallace LLP, 55 W. Monroe Street, 33rd Floor, Chicago, IL 60603. (In 2019, I withdrew my appearance as Counsel in this case. On September 18, 2019, I became Senior Assistant General Counsel at the Board of Education for the City of Chicago. Since then, I have served as the Board's principal appellate lawyer. Since September of 2019, I have not worked on this litigation.)

2. While I worked on this litigation, I was personally involved in all aspects of the litigation, including the pre-suit investigation. I make this Declaration based on personal knowledge and am competent to testify to the matters set out herein.

3. I am a 1990 graduate of the University of Illinois College of Law. I am licensed to

practice in Illinois. I have been admitted to practice in several jurisdictions, including the United States Supreme Court, the United States Court of Appeals for the Seventh Circuit, and the United States District Court for the Northern District of Illinois.

4. Between 1990 and 2019, I practiced continuously in complex litigation. During those years, I was involved in the prosecution and defense of large, multi-party cases, including class actions. I practiced in state and federal courts. I also worked on matters on appeal.

5. Because of my experience in class actions in state and federal courts across the country, I am generally knowledgeable about attorneys' fee awards and the standards that courts use when making such awards. I am familiar with contingent fees, hourly fees, and hourly rates that lawyers charge in complex litigation in Chicago and in the national legal market.

6. As set forth in my resume (attached to this Declaration as Appendix 1), most of my career has focused on class actions in civil rights, employment, antitrust, and consumer protection. I also have an extensive practice in prosecuting and defending appeals in state and federal courts.

7. During my work on this case – up until September of 2019 – I provided the following services in this case: (1) investigating and researching the law and the facts before and after the filing of the Complaint; (2) preparing the pleadings; (3) briefing in support of and opposition to contested motions, and researching in connection with those projects; (4) assisting with briefing two appeals to the Seventh Circuit; (5) preparing informal written discovery requests; (6) participating in interviews of Defendant's representatives; (7) reviewing and analyzing materials that the Defendant produced in discovery; (8) conferring with co-counsel on litigation strategy and analysis; (9) preparing for and attending court appearances; and (10) participating in the early stages of the negotiations that led to the settlement in this case.

8. When this case began, I recognized that this case involved substantial risk. Class litigation is often lengthy, complicated, difficult, and expensive. From the outset of this case, it was plain that the State of Illinois would be a vigorous and committed adversary. Accordingly, this lawsuit was always going to require a substantial investment of labor and resources. Also, at the outset of this case, it was clear to me that this lawsuit would face many hurdles, including difficult work in motions and (quite possible) on appeal. And even from the beginning, I believed that prosecuting this case would require many years, from start to finish, if this case was going to be successful.

9. As an additional complicating factor, I believed that the people who had been impacted by the State's conduct would each have relatively small amounts of money at stake. That is, for each individual claimant, the amount at stake could not justify an individual lawsuit.

10. Because of the risks and stakes involved, I could not have represented individual Plaintiffs to pursue only their individual losses. And I do not believe that any Plaintiff could have afforded to pay for this litigation on an hourly basis. Accordingly, I always anticipated that this case would involve a petition for a court-approved award of attorneys' fees.

11. If I had been able to negotiate a class-wide contingent fee at the outset of this litigation, this case would have required a contingent fee of at least one-third of any recovery. I base that judgment on the risk, complexity, and difficulty of this matter. Based on my experience in similarly-complex cases – in Chicago and around the country – I do not know of any group of lawyers who would have undertaken this work on any lesser basis.

12. I make the foregoing statements based on my experience in this case and in other cases over the last thirty years. Because of my work, I am familiar with the hourly and contingent fee rates charged in legal markets in Chicago and other major metropolitan areas by

qualified complex case litigators.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing facts are true and correct to the best of my knowledge and belief.

September 16, 2021 /s/ Thomas A. Doyle

Appendix 1

Thomas A. Doyle

850 S. Clark Street
Chicago, IL 60605
(312) 479-5732 (cell)
tadoyle231@gmail.com

PROFESSIONAL EXPERIENCE

Thirty years of complex civil litigation experience, mostly in federal courts. Significant appellate practice in the Seventh Circuit. Claims have involved employment, civil rights, torts, and other statutory causes of action. Recent and representative work includes:

- Principal Appellate Lawyer for the Board of Education of the City of Chicago (CPS), handling the Board's appeals in the Illinois Appellate Court, the Illinois Supreme Court, and the Seventh Circuit
- Liaison Counsel in an MDL class action, representing restaurants in private antitrust litigation alleging collusion in the poultry market
- Co-Counsel for the City of Chicago in a claim against drug manufacturers for damages from improper marketing of prescription opioids
- Co-Counsel in a § 1983 lawsuit challenging the Constitutionality of a state unclaimed property statute as a violation of the Takings Clause
- Appointed Counsel in two cases for inmates bringing § 1983 claims for excessive force during arrest (N.D. Illinois Settlement Assistance Program)
- Counsel in several employment discrimination lawsuits, including litigation against a pharmacy (retaliation claim), a restaurant chain (national origin claim), a drug manufacturer (gender claim), and a publisher (disability claim)
- Lead Counsel in a certified class action seeking overtime pay from a retail bank

RECENT NOTEWORTHY DECISIONS

Graham v. Bd. of Ed., 2021 U.S. App. LEXIS 23727 (7th Cir. Aug. 10, 2021)
Chatman v. Bd. of Ed., 5 F.3d 738 (7th Cir. 2021)
Bd. of Ed. v. Moore, 2021 IL 125785
Brown v. Bd. of Ed., 2021 IL App (1st) 2000727-U
Williams v. Bd. of Educ., 982 F.3d 495 (7th Cir. 2020)
Goldberg v. Frerichs, 912 F.3d 1009 (7th Cir. 2019)
Kolton v. Frerichs, 869 F.3d 532 (7th Cir. 2017)
Goldberg v. Bank of America, 846 F.3d 913 (7th Cir. 2017)
Bell v. PNC Bank, 800 F.3d 360 (7th Cir. 2015)
Marion v. Columbia Correctional Inst., 559 F.3d 693 (7th Cir. 2009)

PROFESSIONAL EMPLOYMENT HISTORY

Board of the Education of the City of Chicago (2019- present)
Wexler Wallace LLP, Chicago (2012-2019)
Thomas A. Doyle Ltd., Chicago (2011-2019)
Futterman Howard, Chicago (2011)
Saunders & Doyle, Chicago (2002-2011)
Lovells, Chicago (2000-2002)
Saunders & Monroe, Chicago (1990-2000)

RECENT PUBLICATIONS, PRESENTATIONS, & COURSEWORK

Author, "Book Review: In Hoffa's Shadow (Jack Goldsmith)," The Federal Lawyer , Nov-Dec. 2020

Mediator Trainee, "Forty-Hour Mediation Skills Training," Center for Conflict Resolution, Chicago, Nov.-Dec. 2018

Panelist, "Med-Arb: Can We Do Better Than Everyone Walks Away Unhappy?" 11th Annual Conference on Labor & Employment Law (ABA Sec. of Labor & Empl. Law), Washington, DC, Nov. 2017

Panelist, "The Design and Implementation of Workplace Civility and Workplace Bullying Policies," Committee on ADR's Mid-Winter Mtg. (ABA Sec. of Labor & Empl. Law), Ft. Lauderdale, FL, Feb. 2014

Author, "Competing Concerns in Employment Litigation: How Courts Are Managing Discovery of an Employee's Immigration Status," 28 ABA J.Lab. & Emp.L. 405 (2013), available at SSRN: http://ssrn.com/abstract=2324555

Author and Speaker, "Who is the Client," 29th Annual Labor & Employment Law Inst., Univ. of Louisville's Brandeis School of Law, June 2012

Author, "Residual Funds in Class Action Settlements: Using *Cy Pres* Awards to Promote Access to Justice," The Federal Lawyer, (July 2010), available at SSRN: http://ssrn.com/abstract=1586500

Author, "Protecting Nonparty Class Members in Class Arbitrations," 25 ABA J.Lab. & Emp.L. 25 (2009), available at SSRN: http://ssrn.com/abstract=1586500

PROFESSIONAL ACTIVITIES AND COMMUNITY INVOLVEMENT

Chicago Bar Foundation
Alumni Council (2015-2019); Board of Directors (2006-2012); Grants Committee (2010-2012)

Chicago Bar Association (2000-present)

The American Society of Legal Writers (Scribes) (2017-present)

Seventh Circuit Bar Association (2019-present)

Appellate Lawyers Association (2019-present)

American Bar Association (2001-2021)
Co-Chair of the Committee on ADR, Sec. of Labor & Empl. Law (2010-2013)

EDUCATION

University of Illinois College of Law, J.D., 1990

Bradley University, B.S., *cum laude*, 1987

ADMITTED TO PRACTICE

State of Illinois (1990)

Northern District of Illinois (General Bar, 1990, and Trial Bar, 1998); Central District of Illinois (2004)

Court of Appeals for the Seventh Circuit (1991)

United States Supreme Court (1996)

Exhibit F

Updated summary of the interest due to the 23(b)(3) Class

For the Period 8/22/2017 Through 7/20/2021

AddressState	StateName	ClaimedProperties	TotalCashPaid	MonthlyCompoundInterest	PayableInterest	PropertiesPayable
Alabama	Alabama	1,635	865,979.61	25,894.90	22,440.35	401
Alaska	Alaska	184	222,119.41	11,554.71	11,182.93	34
APO	APO	130	65,529.19	1,699.97	1,459.73	23
Arizona	Arizona	13,764	6,411,913.10	207,430.47	181,365.74	2,697
Arkansas	Arkansas	1,989	747,996.64	19,332.30	15,947.49	332
California	California	18,861	13,696,901.73	394,590.64	356,315.35	4,417
Colorado	Colorado	7,934	5,067,909.63	197,804.65	182,431.59	1,695
Connecticut	Connecticut	3,271	2,828,563.55	92,285.16	84,343.78	1,027
Delaware	Delaware	331	207,175.80	7,256.50	6,533.30	91
District of Columbia	District of Columbia	1,134	782,862.18	24,601.28	22,167.00	292
Florida	Florida	24,633	15,377,195.01	467,817.29	419,527.62	5,433
Georgia	Georgia	8,030	3,429,894.37	116,900.05	100,935.77	1,780
Guam	Guam	5	331.83	18.10	5.63	1
Hawaii	Hawaii	577	300,176.39	10,172.99	9,006.85	136
Idaho	Idaho	459	323,673.54	6,830.69	5,890.80	102
Illinois	Illinois	1,094,802	472,396,733.08	13,334,789.72	11,548,778.34	179,728
Indiana	Indiana	16,828	9,160,845.02	267,704.22	235,780.78	3,432
Iowa	Iowa	4,595	1,819,322.60	51,847.27	43,864.17	804
Kansas	Kansas	1,858	1,768,073.11	52,284.60	48,027.64	508
Kentucky	Kentucky	2,958	1,399,982.43	38,666.73	33,219.64	611
Louisiana	Louisiana	1,567	1,071,996.83	31,995.46	28,606.57	370
Maine	Maine	345	632,087.59	14,057.09	13,367.59	79
Maryland	Maryland	2,061	1,614,252.67	56,627.42	51,930.93	558
Massachusetts	Massachusetts	2,943	4,497,610.85	152,155.20	145,072.78	829
Michigan	Michigan	9,682	5,508,895.56	169,182.62	148,779.35	2,378
Minnesota	Minnesota	6,384	3,726,749.63	103,595.14	91,173.29	1,398
Mississippi	Mississippi	1,030	241,922.61	6,265.00	4,515.45	177
Missouri	Missouri	10,349	6,110,006.60	155,719.64	136,379.57	2,046
Montana	Montana	600	451,470.67	17,732.71	16,347.67	166
Nebraska	Nebraska	840	317,262.38	8,318.85	6,636.36	182
Nevada	Nevada	3,964	1,626,853.97	42,641.39	35,495.88	752
New Hampshire	New Hampshire	530	441,504.62	13,473.81	11,963.08	207
New Jersey	New Jersey	6,062	6,222,338.76	193,733.51	179,865.40	1,760
New Mexico	New Mexico	960	457,953.55	10,747.02	8,808.83	213
New York	New York	8,218	14,627,967.82	254,762.75	236,088.24	2,278
North Carolina	North Carolina	6,375	4,522,806.11	100,814.48	89,131.07	1,252
North Dakota	North Dakota	280	83,207.59	2,078.75	1,573.79	60

Northern Mariana Islands	Northern Mariana Islands	1	283.33	4.81	-	-
Ohio	Ohio	6,377	4,022,011.11	139,232.96	126,327.72	1,443
Oklahoma	Oklahoma	1,195	452,395.57	12,082.76	10,044.74	216
Oregon	Oregon	2,308	1,636,416.04	70,152.55	65,270.24	570
Pennsylvania	Pennsylvania	3,705	2,876,283.04	65,445.64	57,627.72	888
Puerto Rico	Puerto Rico	63	278,782.03	23,986.67	23,916.64	9
Rhode Island	Rhode Island	1,359	278,915.34	13,431.86	11,932.60	110
South Carolina	South Carolina	2,684	1,176,743.48	32,199.64	27,248.40	518
South Dakota	South Dakota	362	115,976.38	2,327.84	1,712.53	61
Tennessee	Tennessee	6,850	4,331,414.17	131,804.90	118,804.81	1,408
Texas	Texas	20,737	17,242,846.85	467,889.89	426,833.44	4,589
U.S. Virgin Islands	U.S. Virgin Islands	29	8,550.98	276.52	230.44	5
Utah	Utah	967	341,241.13	9,814.57	7,994.01	201
Vermont	Vermont	196	43,527.37	1,229.08	942.17	27
Virginia	Virginia	4,311	2,646,366.46	63,547.77	54,822.72	995
Washington	Washington	4,024	2,004,026.81	82,078.96	73,823.86	937
West Virginia	West Virginia	196	107,011.98	4,058.12	3,666.66	40
Wisconsin	Wisconsin	14,992	6,572,279.52	193,685.85	167,410.60	2,866
Wyoming	Wyoming	339	290,532.16	7,957.62	7,309.94	72
zFor	Foreign	2,479	4,837,872.11	162,888.51	157,357.40	729
		1,339,342	638,291,541.89	18,147,479.60	15,878,236.99	233,933