

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

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

**PLAINTIFFS’ REPLY IN SUPPORT OF MOTION FOR  
AWARD OF ATTORNEYS’ FEES AND OTHER RELIEF**

Plaintiffs request a percentage fee award to be paid out of the Unclaimed Property Trust Fund (“UPTF” or the “Fund”) – an award that would not reduce the compensation paid to Class Members, the owners of the money in the Fund, or late-claiming Rule 23(b)(2) Class Members or Future claimants. The Treasurer, however, contends the fee should be based on counsel’s lodestar and, in any event, should be paid by the owners of the money and should not reduce the amount of money the State can use for its purposes while held in custody for non-claimant owners.

To accept Defendant’s argument, the Court would have to accept that:

- (a) the Treasurer has a greater right to the money in the UPTF than Members of the Classes, who are the owners of the money;
- (b) Class Counsel’s request that fees be charged to the \$3.5 billion UPTF, plus the interest earned (which also belongs to the Classes), might result in the Fund’s bankruptcy;

- (c) the Court should not rely on its familiarity with the litigation to assess the risk of non-payment, the quality of Class Counsel's performance, the result achieved or fee awards in other common fund cases;
- (d) the Court should ignore Seventh Circuit precedent that fee awards in a common fund class action should be based on the market price for the legal services provided; and
- (e) there is no place in this case for expert testimony concerning the market price for legal services.

Each of these propositions is plainly wrong. The truth is that the Treasurer is concerned that it may lose control over its use of other peoples' money, which until now the State has been able to use without going through the due process requirements necessary to transfer title.

**I. The Settlement Provides that Attorneys' Fees Shall be Paid from the UPTF**

The Settlement Agreement at Section 3.2.5 provides in part: "Any award of attorneys' fees or reimbursement of expenses shall be paid from the Unclaimed Property Trust Fund." Nonetheless, purporting to represent the people of Illinois, including late-claiming Class Members and Future Claimants, the Treasurer contends that attorneys' fees cannot be charged to the UPTF but rather must be paid by past, current or soon-to-be claimants. The position is at odds with the manner in which the Treasurer treats the money in the UPTF when it serves its purposes. The Treasurer has no problem using the money in the UPTF to pay expenses, including class notice, and to pay the interest that the State owes class members as just

compensation for earnings on Class Members' property it has been keeping for itself.<sup>1</sup>

The Treasurer asserts that the fee requested is not "fair or appropriate," but does not say to whom. Defendant's Reply at 5 (hereinafter "Def. Rep. at \_\_\_"). Certainly, any fee awarded from the UPTF is fairer to the Classes than the Treasurer's proposal, which would reduce the compensation paid to Rule 23(b)(3) Class Members and initial Rule 23(b)(2) Class Members until the Fund recouped the fee amount. Presumably, the compensation of subsequent claimants would not be reduced, unless the Treasurer continued to deduct some portion of their compensation in the cause of "equity." If fees are charged to the Fund, the only party that stands to lose anything is the Treasurer, a result that is appropriate for a wrongdoer.

## **II. The Market Rate is a Percentage of the Value of the Settlement**

The Treasurer asserts in conclusory fashion that a lodestar-based fee is required because this is not a "typical" common fund case and the fee sought is too high in comparison to the lodestar. Def. Rep. at 4, 5, 9. Neither of these assertions is grounds for abandoning the "mimic" the market approach favored by the Seventh Circuit Court of Appeals and the vast majority of district courts in this circuit in common fund cases. Rather than explain why this Court should adopt the lodestar approach, ignore the market and not assess the risk, result and quality of the representation in this case, Defendant simply argues that Class Counsel seeks a "windfall." Def. Rep. at 11, 12. In this case, however, it is the Treasurer who seeks the "windfall."

## **III. Plaintiffs' Expert's Report is Appropriate**

Defendant does not challenge Professor Silver's expertise or acknowledge his vast experience studying and writing about how attorneys' fees are awarded or negotiated. Defendant

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<sup>1</sup> The Treasurer fails to mention that the UPTF includes \$900 million in assets classified as "unknown aggregates" and, according to Defendant's expert and Plaintiffs' expert, the claims paid will not approach the interest actually earned on the property of identifiable Class Members and presumably Future Claimants. There will thus be ample money in the Fund to cover the just compensation payments to late-coming Class Members and Future Claimants.

simply argues that the Court should disregard his Report. The Court will undoubtedly consider what it deems useful and appropriate in exercising its discretion in awarding fees. But statements such as “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,” Doc. 126-1 at. 39, ¶ 100 (emphasis in original), is hardly a legal conclusion, any more than the numerous surveys and studies in the Silver Report that summarize fees that have been awarded by courts or agreed to by parties in other contingent fee cases. Doc. 126-1 at 22-38.

#### **IV. No Class Member is Unjustly Enriched or Treated Unfairly**

Contrary to Defendant’s assertion, Def. Rep. at 12-13, there is no inequity in the proposed fee award. No absent Class Member is unjustly enriched at a litigant’s expense. Nor is the fee award at the expense of any Class Member. Fees are being sought from the Fund as a whole, out of the remaining balance of unclaimed cash and interest on that cash. Using the Fund as the source of a fee simply eliminates an administrative burden of determining the proportionate fee of each class member who owns property in the Fund and has benefitted from the Settlement. In fact, the fee would be at the expense only of the Treasurer who would no longer have the “windfall” of continued use of the Classes’ money.

#### **CONCLUSION**

For the reasons set forth above and in Plaintiffs’ Memorandum in Support of Motion for Award of Attorneys’ Fees and Reimbursement of Expenses and Plaintiffs’ Request for

Compensation, Doc. 126, 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: October 20, 2021

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Class and the Rule 23(b)(3) Settlement Class*