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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

SETH KONECKY and JENNIFER KONECKY, husband and wife, FLATHEAD VALLEY DIST. INC., a Montana Corporation, individually, and on behalf all others similarly situated, Plaintiffs, vs. ALLSTATE FIRE & CAS. INS. CO., ALLSTATE INDEM. CO., ALLSTATE PROP. & CAS. INS. CO., ALLSTATE INS. CO., and ALLSTATE INS. CO., Defendants	Case No. CV-17-10-M-DWM **BRIEF IN SUPPORT OF UNOPPOSED MOTION FOR ASSESSMENT OF FEES AND COSTS AGAINST THE COMMON FUND AND APPROVAL OF CLASS REPRESENTATIVE INCENTIVE AWARD**

COME NOW, Class Counsel for Plaintiffs and class representatives, and presents the following rationale and authorities in support assessment of common fund fees.

Rationale and Authorities

1. A Twenty Five Percent Common Fund Fee on the Class Recovery Typically Satisfies the Purpose and Rationale of the Common Fund Rule.

Class counsel requests of an assessment of common fund fees in the amount of twenty five percent of the $2,673,500 fund created for the class, which is $668,375 together with a reimbursement of costs in the approximate amount of 8,545.69.

a. The goals of common fund fee assessment are fairness and compensatory incentive.

When assessing fees under the common fund doctrine, the court should follow the substantive law of the state because the settled class claims are state law claims. *Mangold v. California Public Utilities Com'n* 67 F.3d 1470 (9th Cir. 1995) ("Ninth Circuit precedent has applied state law in determining not only the right to fees, but also in the method of calculating the fees." citing *Kern Oil and Refining Co. v. Tenneco Oil Co*., 792 F.2d 1380 (9th Cir. 1986), cert. denied, 480 U.S. 906, 107 S.Ct. 1349, 94 L.Ed.2d 520 (1987*). Shakey's Inc. v. Covalt*, 704 F.2d 426 (9th Cir.1983)); *Klein v. City of Laguna Beach* (9th Cir. 2016) --- F.3d ----2016 WL 158600 at page 6 ("federal courts apply state law for attorneys' fees to state claims

because of the Erie doctrine," citing Erie *R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)).

Under Montana law, the common fund fee rule is a mechanism for assessing fees to be paid by non-litigating individuals who directly and financially benefit from the results of litigation. The assessment of fees is an exercise of Court discretion to assure fairness to absent class members and to assure fairness to class counsel for their undertaking. The common fund doctrine applies to assure that absent beneficiaries do not receive a windfall, and to assure the cost of litigation is not unfairly placed on those who do the work:

> The "common fund" concept provides that when a party through active litigation creates, reserves or increases a fund, others sharing in the fund must bear a portion of the litigation costs including reasonable attorney fees. The doctrine is employed to spread the cost of litigation among all beneficiaries so that the active beneficiary is not forced to bear the burden alone and the "stranger" (i.e., passive) beneficiaries do not receive their benefits at no cost to themselves.

Means v. Montana Power Co. (1981), 191 Mont. 395, 403, 625 P.2d 32, 37; *see also Flynn v. State Compensation Ins. Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397, ¶ 15 ("We enforce this doctrine because equity demands that all parties receiving a benefit from the common fund share in the cost of its creation.")

A second principal arises in certain consumer rights litigation where small individual recoveries are at issue. Class litigation is "especially appropriate" where "individual damage from an institutional wrong may not be sufficient from an economic

viewpoint to justify the legal expense necessary to challenge that wrong." *Murer v. State Comp. Mut. Ins. Fund*, 283 Mont. 210, 222-23, 942 P.2d 69, 76 (1997) (*Murer III*); *see also Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 161, (1974) ("economic reality dictates that petitioner's suit proceed as a class action or not at all"). In such circumstances, the common fund fee must be sufficient to reward and incent the time effort and risk undertaken by class counsel, lest institutional wrongs of this type go entirely without remedy. The Montana Supreme Court has recognized that a nearly identical class action over subrogation recoveries presents precisely that type of class litigation:

> [I]n this case, the efficient remedy of class-wide declaratory relief is appropriate because the size of the average claim is so small that relief for the average class member is not economically available outside class litigation.

Ferguson v. Safeco Ins. Co. of Am., 2008 MT 109 at ¶ 41, 342 Mont. 380, 391 180 P.3d 1164, 1171.

b. The amount of common fund fee assessment should be guided by a twenty-five percent "benchmark," analysis of the economics of contingent fee litigation and the benefit to the class.

The primary approach to assessing common fund fees is based on and corresponds to the economic realities of contingent litigation. It is guided by the "market value" for contingent litigation. *Wight v. Hughes Livestock Co*., 204 Mont. 98, 114, 664 P.2d 303, 312 (1983).

In the Ninth Circuit it is recognized that twenty-five percent is the benchmark for a common fund fee in class actions:

> Because the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar. Applying this calculation method, courts typically calculate 25% of the fund as the "benchmark" for a reasonable fee award, providing adequate explanation in the record of any "special circumstances" justifying a departure.

In re Bluetooth Headset Products Liability Litigation, 654 F.3d 935, 942 (9th Cir. 2011).[1]

The use of the percentage approach in common fund cases is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery. *In re Cont'l Ill. Sec. Litig*., 962 F.2d 566, 572 (7th Cir. 1992) ("The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client."); *In re Activision Sec. Litig*., 723 F. Supp. 1373 (N.D. Cal. 1989) (noting that in the marketplace, attorneys and their clients routinely negotiate 25% to 40%

[1] The exceptions typically are in very large cases (in the 50 to 200 million dollar range) where the majority of fee assessments are "clustered in the 20–30% range." *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1050, at fn4 (9th Cir. 2002), citing Alba Conte, *Attorney Fee Awards* §§ 2.09, 2.33 and 2.34 (2d ed.1993and Nov. 2001 Supp.);In *In re Rite Aid Corp. Sec. Litig*., 146 F.Supp.2d 706, 735 (E.D.Pa.2001), the court noted a study of 287 settlements ranging from less than $1 million to $450 million wherein "[t]he average attorney's fees percentage is shown as 31.71%, and the median turns out to be one-third").

percentage fees).

The percentage methodology also benefits the class by closely aligning the lawyers' economic interest with the interest of the class in achieving the maximum possible recovery. *Kirchoff v. Flynn*, 786 F.2d 320, 325-26 (7th Cir. 1986) ("The lawyer gains only to the extent his client gains[,] ...ensur[ing] a reasonable proportion between the recovery and the fees assessed to the defendant .. . reward[ing] exceptional success . . . penaliz[ing] failure . . . [and] automatically handl[ing] compensation for the uncertainty of litigation.").

The vast majority of litigation work contracted for on a contingency basis is pursued with a negotiated fee rate between 25 and 40 percent of the recovery. Where appellate procedure is required, the usual fee percentage under a contingent fee agreement increases to between 40 and 50%. The contingent fee structure is a market-based reflection of the value to a litigant of the retention of an attorney who will not charge any fee if there is no recovery, and who will bear the often prohibitive out of pocket expenses of expert witnesses, depositions, etc.

As in the case of arms-length negotiation of attorney compensation, under the common fund approach, "the district court must consider how much compensation class counsel should receive for incurring the risk of nonpayment when it took the suit." *Florin v. Nationsbank of Georgia, N.A.,* 34 F.3d 560, 566 (7th Cir. 1994). *In re Continental Illinois Sec. Litig.,* 962 F.2d 566 (7th Cir. 1992) (holding that when a

common fund case has been prosecuted on a contingent basis, plaintiff's counsel must be compensated adequately for the risk of non-payment); *Ressler v. Jacobsen*, 149 F.R.D. 651, 654 (M.D. Fla. 1992) ("Numerous cases recognize that the attorney's contingent fee risk is an important factor in determining the fee award.").

Starting with the "benchmark" amount, a "market value" analysis considers factors that might indicate an adjustment for peculiarities of a given case. A good yardstick, for assessing fees for beneficiaries of litigation who did not hire and negotiate a fee with the attorney, is what would likely have been the arms-length negotiation of a fee structure between a contracting litigant and her attorney. Considerations in such arms-length negotiations would obviously include the experience, skill, and reputation of the attorney, the ranges of amounts of the anticipated relief, the risk of no recovery, the fees customarily charged in the locality, the inability of the client to pay on an hourly basis (or because the size of his recovery would not merit the expense), etc.

In the following discussion, class counsel will demonstrate that, for the instant case, (a) a twenty-five percent recovery is consistent with typical attorney compensation in the market place of contingent fees in cases of this type, (b) the class received good value from the services by the attorneys, (c) that little burden is borne by the class because the class recovery reimburses the class for most of its fee expense, and (d) that a twenty-five percent fee is appropriate to incent and reward this litigation since individuals could not economically pursue it on an individual basis.

2. In the instant case, a twenty-five percent common fund fee assessment meets the goals and rationale of common fund fee assessments.

a. A twenty-five percent fee in this case fits the economic realities of contingency-based litigation.

In the instant case, a twenty-five percent fee appropriately reflects the risks, the market, and a fair contingent recovery for the following reasons:

1. The Class representatives signed a 40% contingency agreement for the fee on their individual claims.
2. The attorneys are reputable and skilled in litigating class actions and experienced in litigating cases over subrogation.
3. Class counsel bore the risk of no recovery (or extended litigation that could not be reasonably compensated by even a generous common fund fee).
4. Class counsel achieved an excellent result in the form of a $2,673,500 recovery which, after an assessment of twenty-five percent common fund fees, will leave each class member with a **net** recovery in excess of the full amount of projected wrongful subrogation plus interest.

b. The class recovery represents good value to the class for the attorneys' services.

In this case, the value of services provided is best measured by the exceptional value in the form of a well-developed case (including legal theory, legal research and briefing, expert witness development and evidence of typical rates of unrecovered

losses) arising from a series of "subrogation" cases prosecuted by the Plaintiff's counsel.[2] By reason of 4-5 thousand hours of work in this exact form of case, in multiple cases over the past 15 years, class counsel has developed a strong legal theory, tested legal authorities, statistical evidence of "unrecovered losses," and a relief schema. This experience and these well-developed case elements benefited the class with immediate case credibility and settlement value. As a result, the instant class has been peculiarly benefitted by (a) an exceptionally fast resolution, and (b) settlement that will recover, after assessment of the requested fees, the full amount of the class members' projected made-whole losses together with interest.

c. Assessment of twenty-five percent fee is especially appropriate where the class recovery includes the recovery from the defendants of the full amount of the $668,375 fee.

In the usual common fund case, the class bears the cost of litigation, including fees. In some cases, however, there are fee shifting statutes or doctrines that permit the plaintiff class to assert and litigate a claim against the defendant for litigation expenses. The United States Supreme Court's decision in *Evans v. Jeff D.*, 101 S.Ct. 1531 (1986), makes clear that a recovery under fee shifting doctrines belong to the plaintiff (here the class), and not to the plaintiff's attorney.

[2] Similar subrogation class action cases litigated by class counsel were *Steinke v. Safeco, Ferguson v. Safeco, Burton v. Kemper and, Tkachyk v. Travelers.*

In the instant case, class counsel secured a substantial recovery on the class' claim for attorney fees. The Stipulation of Settlement (as amended per November 13, 2018 Order) recite that, with respect to $3,720,000 in subrogation, the settlement will pay $2,673,500 (which represents a projected excess subrogation of 22.5% plus interest) **and an additional** $668,375 on the Class claim for its attorney fees. This fee recovery amount will be paid by the Allstate companies **to the class** as part of the $2,673,500 total recovery. The net result is a settlement that not only includes recovery of the full amount of projected unrecovered (made-whole) losses with interest, **but also** the fees that the class might recover under applicable fee-shifting doctrines.

Indeed, this recovery on the class' attorney fee claim fully offsets the effect of the common fee compensation the class would pay to class counsel if this fee application is approved. If the Court approves class counsel's fee request, the fee shifting recovery obtained for the class results in an actual **net fee burden of zero,** and the only amount borne by the class would be the actual out-of-pocket costs of the litigation and administration, such that the class receives a **net total** recovery roughly equaling each class member's wrongful subrogation plus interest.

d. Twenty-five percent fee is appropriate to incent and reward consumer litigation that would not be economically feasible on an individual basis.

In addition to the economics of attorney service "market value," this Court

should recognize that a fee assessment should be adequate to incent and reward consumer litigation which benefits class members where individual pursuit of recoveries is not economically feasible. As in the nearly identical *Ferguson* case, for the instant class "the size of the average claim is so small that relief for the average class member is not economically available outside class litigation." *Ferguson v. Safeco Ins. Co. of Am.,* 2008 MT 109 at ¶ 41, 342 Mont. 380, 391 180 P.3d 1164, 1171.

As a practical matter, even a 50% fee proposal, would not be adequate compensation for a typical class member to secure representation on an individual basis; the cost and risk of individual representation would be prohibitive. Therefore, it is appropriate to assess common fund fee of twenty-five percent to incent and reward class counsel's undertaking of consumer-protection litigation that is otherwise not economically feasible.

3. Conclusion

For the forgoing reasons, Class Counsel respectfully urges this Court to grant a common fund fee of twenty-five percent of the total common fund created for the class of the class recovery ($668,375), together with costs in the amount of approximately $8,545.69 (which is in addition to counsel's reimbursement of all advances of the class administration and adjustment costs).

Dated this 1st day of February, 2019.

By /s/ Brian M. Joos

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), it is hereby certified that the foregoing document, exclusive of index, table of authorities and caption consists of 2493 words.

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