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SUPREME COURT OF FLORIDA

DEPARTMENT OF
REVENUE, STATE OF FLORIDA,
et al.,

Appellants/Defendants,

vs. CASE NO. 85,618

DAVID KUNHLEIN and SCOTT ENOS,
BARBARA BLANCHARD, JOEL CURRAN,
and KATHERINE CURRAN, both
individually and on behalf of
all other similarly situated,

Appellees/Plaintiffs.

APPELLANTS' INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellants, Department of Revenue, State of Florida, et al., was the Defendant below and will be referred to in the Initial Brief on the Merits as "the Appellants" or "the State." Appellees, David Kunhlein, et al., were the Plaintiffs below and will be referred to in Appellants' Initial Brief on the Merits as "Class Plaintiffs."

The record on appeal will be referred to as (R.) with the appropriate page number inserted.

The Court below was the Ninth Judicial Circuit in and for Orange County, Florida, and will be referred to as "the trial court", in the Initial Brief on the Merits.

References to Transcript of the Final Hearing held on July 6 and 7, 1995, shall be prefixed in the following manner: (TR., Final Hearing, July 7, 1995, p. 117).

References to the Appendix to the Initial Brief on the Merits of Appellants' shall be prefixed in the following manner: (App. 4, para. 36, p. 16-17).

STATEMENT OF THE CASE AND FACTS

On August 6, 1992, Appellees brought an action in the Circuit Court for the Ninth Judicial Circuit Court, in and for Orange County, (the trial court), seeking a declaration that Section 319.231, Florida Statutes (1991), was unconstitutional. They sought a refund of all monies paid into the State Treasury as a result of that statute.

The trial court issued its Final Summary Judgment on November 30, 1993, holding Section 319.231, Florida Statutes, unconstitutional as violative of the Commerce Clause of the United States Constitution.

The Defendants filed their Notice of Appeal on December 2, 1993. On January 7, 1994, the Fifth District Court of Appeal issued an order certifying the question to this Court, which accepted jurisdiction on January 11, 1994.

On September 29, 1995, this Court issued its opinion in this case. Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). The Court struck Section 319.231, Florida Statutes, as violative of the Commerce Clause. Id., at 724. The Court ordered a full refund of the impact fee paid. Id., at 726.

The case was then remanded to the trial court for further proceedings. Subsequently, Appellees filed four motions.

1. Motion for Prejudgment Interest;
2. Motion for Post Judgment Interest;
3. Motion for Claims Administration; and,
4. Motion for Attorneys Fees.

A hearing was held on February 10, 1995, on the motion for pre-judgment and postjudgment interest. The trial court denied both

of Appellees' motions. Appellees appealed both motions to this Court. This Court, on June 9, 1995, affirmed the trial court's order denying Appellees prejudgment or post judgment interest. Kuhnlein v. Department of Revenue, ___ So. 2d ___, 20 Fla. L. Weekly S281 (Fla. June 9, 1995). This Court further ordered that the trial court rule within 30 days on the Appellees' motion for attorneys fees. Id, at S282.

COURSE OF THE PROCEEDINGS ON FEE AWARD

Upon remand, the trial court set a schedule of briefing on the issue of attorneys fees. A hearing on the matter was set for July 6 and 7, 1995.

Appellees requested 14% of the entire amount collected, or $26,000,000.00. Appellees filed documentation supporting their request for fees. Besides a number of self serving affidavits, the Appellees notified the trial court that the firm of Winston & Strawn had worked 3586.50 hours on the case. (Appellees Appendix #11-C, p.67). Based upon their billable hourly rate, the total legal service came to $671,382.50. (Id, at p.69) The firm of Foley & Lardner submitted a summarization claiming they worked 3144.40 hours. (Appellees' Appendix #12, p.91). The total legal services of Foley & Lardner came to $581,861.00. Id. Thus, Appellees' counsel totaled 6730 hours of work which equates to $1,253,243.00 in value based on counsel's hourly rates.

The Attorney General's objected to the request of 14%, or $26 million, as being far out of line with actual hours worked, assuming 6730 hours were appropriate to handle this case. The total hours worked by the State's attorneys was less than 1500

hours.[1] Undersigned Counsel then presented cases to the trial court indicating that there must be some relation between the amount of the total award and the lodestar factors. Furthermore, these cases demonstrated that as the common fund grew in size, the percentage of the fees award would shrink. See Defendants' Response In Opposition To Award Of Attorneys' Fees In The Requested Amount. (App. 2)

A hearing on attorneys fees was held on July 6 and 7, 1995. Class Counsel produced five expert witnesses on attorney fees including former Chief Justice Ehrlich who admitted that the case was not factually complex, discovery was minimal, and that the Attorney General's Office properly, "hotly contested" the case. (TR., Final Hearing, July 7, 1995, p. 117).

Attorney Darryl Bloodworth agreed with Ehrlich that this was not a factually complex case because, as Bloodworth understood it, most of the facts were undisputed. (TR., Final Hearing, July 7, 1995, p. 226).

Class Counsel W. Gordon Dobie testified that he knew he would face procedural hurdles in litigating his Commerce Clause claim, including standing exhaustion of administrative remedies and refund issues. (TR., Final Hearing, July 7, 1995, p. 44). This is consistent with former Chief Justice Ehrlich's recognition that when attorneys litigate against the State, the following issues are frequently raised: sovereign immunity, exhaustion of administrative remedies, standing, jurisdiction,

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[1] The State's lead counsels, who did the vast bulk of the work, both pretrial and trial, only expended 736 hours, or about 10% of Appellees' stated time.

and severability. (TR., Final Hearing, July 6, 1995, p. 154). Expert Witness, James K. Green also observed that in the cases he has handled involving the State of Florida, he has dealt with issues of sovereign immunity, exhaustion of administrative remedies, standing, jurisdiction, and severability. (TR., Final Hearing, July 6, 1995, p. 192-193).

Moreover, with regard to the size of the class, and lead plaintiffs, Mr. Dobie admitted that Mr. Kuhnlein is a friend; that as far back as 1991 he knew the amount of payment per person was $295.00, (TR., Final Hearing, July 7, 1995, p. 43); and that from a telephone discussion with the Department of Highway Safety and Motor Vehicles, he had a fairly good idea of the number of people involved. (TR., Final Hearing, July 7, 1995, p. 50). Class Counsel Christopher Kay agreed that he and Mr. Dobie had a pretty substantial notion of the size of the potetial fund from the lawsuit's inception. (TR., Final Hearing, July 7, 1995, p. 84). (In fact, Bloodworth agreed that Attorneys' Dobie and Kay had a fairly good idea of the size of the fund. (TR., Final Hearing, July 6, 1995, p. 221-222).

With regard to award of attorney's fees from a common fund, former Chief Justice Ehrlich said such an award must be based on more than the size of the fund; both the 12 Johnson factors[2] and those contained in the Florida Patients' Compensation Trust Fund, infra, case must be considered, (TR., Final Hearing, July 6, 1995, p. 137), Ehrlich pointed out that a court, is not bound

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[2] See, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)

solely by the size of the common fund created. (TR., Final Hearing, July 6, 1995, p. 138).

Ehrlich observed that in his more than 50 years experience, including 11 on the Florida Supreme Court, he has never seen a statutory challenge resolved through settlement and recognized that the State, through the Attorney General's Office, cannot adjudicate the constitutionality of a statute, as this is a purely judicial function. (TR., Final Hearing, July 6, 1995, p. 139-140). He also represented that in his experience, including dealing with statutory challenges, he has neither submitted, nor seen or adjudicated a fee petition seeking more than 6,000 hours in connection with a facial statutory challenge, (TR., Final Hearing, July 6, 1995, p.143-144), and is not aware of any case in Florida jurisprudence involving a statutory challenge where the amount of the attorneys' fees sought even approximates or comes close to the amount sought in this case. (TR., Final Hearing, July 6, 1995, p. 146-147). Ehrlich was given no records which told him that fee applicants were precluded from other employment as a result of the acceptance of this case; he could not recall whether they provided him with information as to the customary fee awards in connection with a statutory challenge where the creation of a fund is in excess of $150 million; and was given no facts indicating that this case was undesirable to fee applicants. (TR., Final Hearing, July 6, 1995, p. 152-153).

Former Judge Donald Smith agreed with the language in Newburg, Attorney Fee Awards, Section 2.09 (1986), that the higher the size of the fund, the lower the relative percentage of

fees awarded from that fund. (TR., Final Hearing, July 6, 1995, p. 257).

As to the relationship between lodestar and common fund attorney's fee award, Kay admitted that with all of the papers he filed and all the compilations that he made, he never did a comparison of the following:

1. The size of the fund created;
2. The attorneys' lodestar;
3. The amount of attorneys fees percentage requested; and,
4. The amount awarded.

Dobie recognized the State's statutory obligation to defend the validity of a statute, (TR., Final Hearing, July 7, 1995, p. 46), and conceded that the Domestic Air Transportation, infra, case discussed the number of firms in that case and the number of available hours. He did not remember that same court discussing the lodestar amount of $7.8 million and that the amount of fees awarded approximated two times the amount of the lodestar. (TR., Final Hearing, July 7, 1995, p. 41-42). Bloodworth admitted that he undertook no comparative analysis between the lodestar amount and the amount of fees awarded as a percentage from a common fund. He admits recalling the legal principle that, in attorney fee award from a common fund, as the fund increased, the percentage from that fund for fees necessarily comes down. (TR., Final Hearing, July 6, 1995, p. 218) He also admitted that the amount of fees awarded in the Domestic Air Transportation case was based on 5 3/4 percent of the common fund created of about $305 million, and that the fees awarded of about $17 million represented roughly twice the amount of the lodestar figure. (TR., Final Hearing, July 6, 1995, p. 219-220). He could not

render an opinion as to the reasonableness of the 6,700 hours expended by class plaintiffs' counsel because he has no experience participating in a fee petition in a statutory challenge. (TR., Final Hearing, July 6, 1995, p. 226)

On July 13, 1995, the trial court issued two orders relevant to this appeal. The first dealt with the attorneys fees request made by class counsel. In that order the trial court ruled that the common fund would consist of all monies collected by the State under Section 319.231, Florida Statutes, irrespective of whether all such funds were actually refunded. (App. 4, para. 36, p. 16-17). The court then awarded a flat 10% attorney's fee award against the entire amount collected by the State, $188.9 million. The attorneys fee award thus comes to $18.89 million based on 6730 hours of work or $2,806.84 per hour of claimed work!

In accordance with this court's order of June 9, 1995, the Attorney General petitioned for review of the attorney's fee order on July 19, 1995. On July 26, 1995 Class Plaintiff's Counsel filed a "Motion To Dismiss The State's Appeal." This Court issued an Order To Show Cause regarding this Motion and indicated it would be taken up with oral argument on the merits in August.

SUMMARY OF THE ARGUMENT

The question of the right to an appropriate award of fees is not before this Court. The issues before this Court are whether there is to be any relationship between the final award of fees and the amount of legal work expended on the case. The trial court ignored all factors in arriving at a lodestar figure and awarded a fee far out of proportion to the actual amount of work, the difficulty of the issues or the complexity of the case. In so doing, the trial court abused its discretion.

Had the trial court followed the well stated examples provided to it, the trial court would have established a benchmark of true complexity of the case and awarded a fee more appropriate to the true nature of this case. While this was a hard fought case, it was not "complex".

Further the court erred in applying the percentage to the entire amount collected rather than that to which is to be refunded to the claimants.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEYS FEES FAR OUT OF PROPORTION TO THE AMOUNT OF WORK DONE IN THE CASE AND THE COMPLEXITY OF THE ISSUES

The trial court's award of more than $18 million dollars in attorneys' fees is 14 times greater than Class Counsels' professed lodestar,[3] and equates to an hourly rate of over $2,600. As demonstrated herein, the award of attorneys' fees is flawed for two reasons. First, it severs the traditional linkage between the amount of the fees and the lodestar highlighted by the attorneys' labor; i.e., number of hours reasonably expended. Second, it creates a double standard under which zealous representation visits reward on class plaintiffs' counsel while penalizing the defense lawyers for equally zealous representation.

The Attorney General does not oppose the award of a reasonable award of attorneys' fees based on a percentage of a common fund created as a result of the litigation. However, the percentage and amount ultimately awarded must bear a reasonable relationship to traditional lodestar factors, most specifically

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[3] The term "lodestar" has been previously defined as a reasonable hourly rate multiplied by the hours reasonably expended in the representation of the previously party. Once those two determinations are made by the trial court, the resultant product is known as the "lodestar". See, Appalachian, Inc. v. Ackmann, 507 So. 2d 150, 152 (Fla. 2d DCA 1987)(citing, Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985)).

the hours reasonably expended in the prosecution of the case, and the complexity of the case.

A. THE TRIAL COURT'S ORDER TURNS CLASS ACTION INTO STRICTLY A CONTINGENCY FEE SITUATION

For the first time in Florida attorneys' fees jurisprudence, the amount of the award in a class action class is severed from the most fundamental of lodestar considerations, the time and labor required. Class Counsels' realization of an $18 million plus fee will result in a windfall not justified by the facts of this case.

The rationale implicit in the common fund approach to the award of attorneys' fees is that such an award is not a means of benefitting attorneys by providing them windfall awards wholly unrelated to the costs of litigation. Under the common fund approach, an award of attorneys' fees traditionally has been determined initially by taking the number of hours reasonably expended multiplied by a reasonable hourly rate.

For this reason, the unjust enrichment theory in awarding attorneys' fees based solely on percentage has been the subject of stern criticism. In Berger, Court Awarded Fees: What is "Reasonable?", 126 U. Pa. L. Rev. 281, 299 (1977), the author states:

> The enrichment is unjust, however, only to the extent that the beneficiaries have not compensated the creator for the losses he or she incurred. Beyond that, the enrichment---even though it may have been unanticipated by the beneficiaries---is not unjust at all but merely a measure of their legal injury. By

> awarding attorneys a share of the damages which exceeds the value of their time and effort expended, the courts have applied the extraordinary equitable remedy of fee awards in a way that exceeds its rationale. (Emphasis added.)

Thus, even where a fund is recovered in a class action, the court still is required to examine carefully a variety of factors on a case-by-case basis, recognizing that the purpose of awarding attorneys' fees is to compensate for the reasonable value of a lawyer's services. Meshel v. Nutri-System, Inc., 102 F.R.D. 135, 137 (E.D. Pa. 1984).

The common fund approach presupposes complex class litigation involving matters such as securities, banking, antitrust, mass tort, and products liability law wherein damages incurred, and time and resources expended to discern the extent of such damages, are significant. Where damages are significant in complex cases involving expenditure of signifiant time plus resources, the common fund approach is proper because of the relationship between the results obtained and the lawyers' efforts in obtaining those results.

However, where the case involves reimbursement of a tax where a public records request can quickly establishes the size of the class; where fact development through discovery is de minimus; and, where case complexity associated with establishing the amount of damages and possible settlement are missing; a lawyer who expends his time researching the law and filing a dispositive motion (and briefing the point on appeal) should not

reap fees wholly disproportionate to the time expended on the case. This is precisely the situation here.

In support of the 10 percent award exceeding $18 million, the trial court relied on Camden I Condominium Associates, Inc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991). However, in Camden I, 946 F.2d at 775, the Eleventh Circuit endorsed the "percentage of the fund" approach in common fund fee awards premised on an explanation of how lodestar-type factors justified the percentage awarded. In doing so, that Court relied on the report of the Third Circuit Court of Appeals Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237 (1985).[4] The Eleventh Circuit found that "(t)he majority of common fund fee awards fall between 20% to 30% of the fund(,)", 946 F.2d at 774, and found that the median, or 25%, constitutes a "benchmark" percentage "which may be adjusted in accordance with the individual circumstances of each case...." (citations omitted.) 946 F.2d at 775.

However, in In Re Domestic Air Transportation Antitrust Litigation, 148 F.R.D. 297, 350-51 (N.D. Ga. 1993), the court held that the 25% benchmark does not necessarily apply when the fund is extraordinarily large. Under that circumstance:

> the application of a normal range of fee awards may result in a fee that is unreasonably large for the benefits conferred.

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[4] The Task Force report also discusses the role of the trial "judge to act as a fiduciary for the beneficiaries . . . in a class action situation, because few, if any, of the action's beneficiaries are before the court at the time the fees are set." 108 F.R.D. at 251.

> Thus, based on empirical research covering settlements as late as 1991, Newburg notes that percentage awards tend to decline as the size of the recovery increases. (Citation omitted.) Where fund recovery range from $51 to $75 million, fee awards usually fall into the 13-20% range. (Footnote omitted.) In mega fund cases where extraordinarily large class recoveries of $75-200 million and more are recovered, courts more stringently weigh the economics of scale inherent in class actions in fixing an appropriate percent recovery for reasonable fees. (Citation omitted.)

In Domestic Air Transportation, 37 law firms served as plaintiffs' counsel with billable hours of more than $7.8 million and expenses in excess of $1.6 million. Based on the complexity of that multidistrict antitrust litigation, when weighed against the factors set out in Camden I, that court found that a reduced percentage award of fees and expenses of 5.25%, or approximately $17 million, was appropriate, given the size of the recovery (between $254 and $356 million with a median value of $305 million).

In recognizing the setting of percentages of 10% or lower, the court in Domestic Air addressed the complexity of the several cases cited in support of its 5.25% determination. As previously noted, those cases generally involved complex antitrust, securities, banking, and products liability litigation. Thus, when the recovery is between $75-%200 million or more---as is the case here where the dollar value is approximately $188 million---the percentage for attorneys fees is 6% to 10% or lower in complex cases. 148 F.R.D. at 351, ns. 76, 77, and 78). Where

the cases are not as complex, an even lower percentage is necessitated to avoid counsels' unjust enrichment.

The more than 30 cases cited by the parties---including several relied on by the trial court in its final judgment---demonstrate that there is an inverse relationship between the size of a common fund and the percentage of the fund awarded as attorneys' fees. This is so because, as the court said in TWA v. Hughes, 312 F.Supp. 478, 484-485 (S.D.N.Y. 1970), modified on other grounds, 449 F.2d 551 (2nd Cir. 1971), reversed on other grounds, 409 U.S. 363 (1973):

> A point is reached where the amount of plaintiff's recovery is unrelated to services of counsel. The large amounts involved do not add to the complexity of the problems, increases the responsibility of counsel or require greater capabilities of counsel.

Where the courts discuss lodestar factors, the award from the common fund has been shown to be no higher than four times the lodestar. The fees awarded in the case sub judice, are 14 times the amount of the lodestar.

In support of its 10% determination, the trial court cites to six cases, none of which supports the fee award:

> Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 853 (10th Cir. 1993). The court awarded $507,500 as attorneys' fees, or approximately 29% of the common fund;
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> Swedish Hospital Corporation v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993). The court awarded $2 million in fees based on a lodestar of $619,000; the court did not award the $5.6 million in fees sought. The amount of fees awarded is approximately three times the lodestar amount;

Steiner v. Hercules, Inc., 835 F.Supp. 771 (D. Del. 1990). The fees awarded were based on the determination of reasonableness of 6,326.95 hours for a lodestar of 1,221,776.50. The fees awarded were based on a 3.3 multiplier enhancement of that lodestar transferred to a percentage of the fund;

Re Activision Securities Litigation, 723 F.Supp. 1373, 1376 (N.D. Cal. 1989). The court awarded fees totalling $1,161,413 plus expenses of $398,119.00 or 32.8% of the fund;

Re Warner Communication Securities Litigation, 618 F.Supp. 735 (D.C.N.Y. 1985).-The attorneys claimed 13,108 hours for a lodestar of $1,942,521.99. The amount of the fund created by settlement was $18.4 million from which the court awarded as attorneys' fees $4.905 million. The amount of fees awarded represent 2.3 times the lodestar amount;

Bailey, Hunt, Jones & Busto, P.A. v. Langen, 632 So.2d 82 (Fla. 3d DCA 1993). The court awarded fees of 25% from a $9.2 million fund; and,

Fidelity and Casualty Company of New York v. O'Shea, 397 So. 2d 1196 (Fla. 2d DCA 1981). There was an interim attorneys' fees award of $14,500 for an alleged embezzlement of over $3.6 million.

The size of the common fund created backed against the award of fees based on a percentage of that fund, and the unmistakable relationship between the lodestar amount and the award of fees from a common fund, amply demonstrate that the authorities relied on by the trial court do not support the more than $18 million in attorneys' fees awarded in the instant case.

The relationship between lodestar and fee is further graphically demonstrated by the many cases in which the courts were called upon to justify an award of attorneys' fees from a common fund. These cases establish that there is a benchmark relationship between lodestar-type factors and the common fund which is the sine qua non of attorneys' fees awards from such

funds. The following case examples demonstrate that the greatest differential between the lodestar and the amount of fees awarded is just over a multiplier of three:[5]

> In Re Agent Orange Product Liability Litigation, 818 F.2d 226 (2nd Cir. 1987). Tens of thousands of hours by more than 100 lawyers and firms; $9.9 million awarded, or 5.5% of the common fund; lodestar multiplied by 2;
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> In Re San Juan Dupont Plaza Fire Litigation, 768 F.Supp. 912 (D. Puerto Rico 1991). Attorneys claimed more than 100,000 hours for a $16 million lodestar; court awarded $32.5 million in fees, or less than 5% of the fund; lodestar multiplied by 2;
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> In Re MGM Grand Hotel Fire Litigation, 660 F.Supp. 522 (D. Nev. 1987). Lodestar of more than $6.5 million for more than 56,000 hours of attorneys' time plus more than 20,000 hours of paralegal and clerk time; total fee awarded is $15.6 million, or 7% of the fund; lodestar multiplied by 2.2;

Additionally, in the Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 568 (7th Cir. 1992), the fee award was based on the number of hours expended -- which number, when multiplied by a reasonable hourly rate -- exceeded the amount the attorneys capped as fees by contract. In Brown v. Phillips Petroleum Company, 838 F.2d 451 (10th Cir. 1988), the court factored in the amount of time spent by each lawyer as demonstrated by evidence submitted to the court. In Fickinger v. C.I. Planning Corporation, 646 F.Supp. 622 (E.D. Pa. 1986), the fees awarded were in the same proportion as the lodestar figures submitted in support of the fee application. Finally in In Re

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[5] For further cases, see Defendants' Response in Opposition to Award of Attorneys' Fees in the Amount Requested, (App. 2, p.14-17).

King Resources Companies Securities Litigation, 420 F.Supp. 616 (D. Colo. 1976), the fees awarded were based on the number of hours expended in taking more than 50 depositions, criss crossing the country at numerous times on discovery and trial matters, intensive discovery, intensive litigation involving numerous issues, and repeated objections from 15 attorneys at one time.

These cases demonstrate that there is no basis for awarding more than $18 million in attorneys' fees as against an admitted lodestar of $1.297 million. The record is replete with instances of the Attorney General attempting to cross-examine the expert witnesses on this critical notion only to be cut off, after objection, by the court. This action was plain error. (TR., Final Hearing, July 6, 1995, p. 185-188).

An additional flaw in the attorney's fees award is it's rejection the attorney's fees standards set out in Florida Patient's Compensation Trust Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). There, this Court had squarely before it the question of attorney's fees and how to set a reasonable amount. This Court was concerned with "a perceived lack of objectivity and uniformly in court-determined reasonable attorney's fees. Id., at 1145. Quoting Baruch v. Giblin, 122 Fla. 59, 63, 164 So. 831, 833 (1935), this Court noted that:

> The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact

> it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It brings the court into disrepute and destroys its power to preform adequately the function of its creation.

Florida Patient's Compensation Fund, 472 So. 2d at 1149-1150.

This Court, then addressed the balance between the fee requested and work performed:

> To accurately assess the labor involved, the attorney fee applicant should present records detailing the amount of work performed. Counsel is expected, of course, to claim only those hours he could properly bill to his client. Inadequate documentation may result in a reduction of the number of hours claimed, as will acclaim for hours that the court finds to be excessive or unnecessary. The "novelty and difficulty of the question involved" should normally be reflected by the number of hours reasonably expended on the litigation. Id., at 1150.

The trial court's common fund approach eliminates the need for the attorneys' fees applicant to present records detailing the amount of work performed or to establish a rational relationships between the fee award and the amount of work performed and complexity of the case. The trial court held it was authorized to award attorneys' fees from a common fund, the amount of which has no reasonable bearing on the lodestar. The trial court held that the size of the fund alone that governs and controls the award of fees. As such, the measure of work required is rendered meaningless. There is no symbiotic relationship between the lodestar amount and the amount of fees from a common fund which is 14 times greater than the lodestar! Such a result is plainly erroneous under existing case law.

B. THE TRIAL COURT'S LEGAL ANALYSIS TURNS A HARD FOUGHT CASE INTO A "COMPLEX" CASE WITHOUT RECORD SUPPORT

The trial court erroneously viewed a hard fought, single issue case focused on procedural defenses as a "complex" case. There is a reason for a court to consider the complexity and novelty of a case; the more complex and novel a case, the more reward to the attorney who undertakes and prevails in such a case. This was not such a case.

This was a single issue case: Did Section 319.231, Florida Statutes, violate the Commerce Clause of the United States Constitution? This was a legal case, not a factual case. There is a plethora of cases on what does and what does not violate the Commerce Clause. The cases, cited by the Appellees, come from a long line of law on the Commerce Clause.[6] Nor is there an absence of case law on such procedural defenses of standing and exhaustion of administrative remedies. The only question was their application to the facts in the instant case.

This was not a factually "complex case." Even Plaintiff's witness, Former Chief Justice Raymond Erlich, testified that this case was not factually difficult. (TR., Final Hearing, July 6, 1995, p. 117, lines 8-9). Section 319.231, Florida Statutes, imposed a $295.00 fee; the fee was paid by the class members. Class Counsel conducted only a few depositions of state officials

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[6] A fact the Class Counsel gleefully pronounced to this Court at oral argument on the merits, suggesting at that time that one hour in the law library was all that was needed to understand the correctness of his legal theory.

and received public records - little of which had much to do with whether the imposed fee met the test of the Commerce Clause.

In support of the fees awarded, the trial court accepted class counsels' claim that this case presented complex, novel and difficult issues. However, in light of the repeated statements made by counsel during the course of litigation, their claim of complexity rings hollow. With regard to the overriding issue of Commerce Clause application, class counsel made the following representations:[7]

> Defendants' inability to support their argument is not surprising because case after case has upheld taxpayer class actions.
>
> Class Counsels' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 20

> This conclusion follows the application to §319.231 of a long line of United States Supreme Court and Florida court decisions invalidating similar statutes that facially discriminate against interstate commerce.
>
> Reply Memorandum by Class Counsel In Support of Their Motion for Summary Judgment, p. 4

Finally, in their unsuccessful efforts to obtain pre-judgment and post-judgment interest in this cause, class counsel railed against the State in their briefs before this Court, accusing State officials of knowingly violating clearly

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[7] For further statements by Class Counsel, see Defendants' response in Opposition to Award of Attorneys' Fees in the Requested Amount (App. 2, p. 20-21).

established constitutional law. Appellants' Initial Brief, p. 31-33; Appellants' Reply Brief, p. 13-15.

In support of their eleventh hour claim of complexity, class counsel represent that they were bombarded with such issues as sovereign immunity, exhaustion of administrative remedies, standing, jurisdiction, and class certification -- issues which class counsel themselves admitted they expected to face in initiating this litigation, which from its outset class counsel believed had a good chance of succeeding on the merits. In light of class counsels' representations set out above, they cannot seriously contend that this case presented a complex, novel and difficult chore thereby justifying the fees that have been awarded to them.

What we had here was not a "complex" or "novel" case but one that the State fought hard to uphold its statute and the public fisc. Even Appellees' expert witness Judge Donald Smith from North Carolina recognized that. He testified that states fight hard and, as is their duty, the State rightfully asserted all legal defenses. (TR., Final Hearing, July 6, 1995, p. 248, lines 12-19).

Complex and novel cases get special reward. Hard fought cases do not. Hard fought cases are rewarded based on the number of hours involved in a case.

Once the tiral court jettisoned the lodestar benchmark from common fund attorneys' fees awards, there was no longer any nexus between an attorney's time and effort and the amount of fees

which they claim are due. Such a drastic departure from established case law should be reversed based on this record.

C. THE TRIAL COURT'S AWARD OF FEES FROM THE ENTIRE FUND IS A RESULT OF A MISREADING OF BOEING CO. VAN GEMERT, 444 U.S. 472 (1980).

After determining that 10% was the proper percentage, the trial court applied it to "the entire common fund, consisting of the gross amount of the Vehicle Impact fees collected by the State and which is eligible for a refund." Fees Order, p. 17-18, para. 36. In making this ruling the trial court relied solely on a statement in Boeing Co. v. Van Gemert, 444 U.S. at 478.

Van Gemert discused the assessment of attorneys fees from the common fund:

> The [common fund] doctrine rests on the perception that persons who obtain the the benefit of a lawsuit without contribution to its costs are unjustly enriched at the successful litigant's expenses. See, e.g., Mills v. Electric Auto-Lite Co., 396 U.S. [375], at 392, 905 S. Ct. [616], at 625. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund thus spreading fees proportionately among those benefited by the suit. See [Mills], at 394, 90 S. Ct., at 626.

Van Gemert, 444 U.S., at 478.

Thus, the aim of the court was to avoid "inequity" and "unjust enrichment" by insuring all who "benefited by the suit" paid "proportionately" their fair share of the costs and fees. Florida case law has also followed this desire to avoid "inequity" and "unjust enrichment." This Court has required that

all those who "benefited" from class litigation pay their proportionate share of the costs and fees. Tenney v. City of Miami Beach, 152 Fla. 126, 11 So. 2d 188, 190 (1942). See also, Estate of Hampton v. Fairchild-Florida Construction Co., 341 So. 2d 759, 761 (Fla. 1976). The District Courts of Appeal have also followed this line of reasoning. See, e.g., Fidelity and Casualty Company of New York v. O'Shea, 397 So. 2d 1196 (Fla. 2d DCA 1981); City of Miami Beach v. Jacobs, 341 So. 2d 236 (Fla. 3d DCA 1976).

However, the above cases assume that every class member assessed fees and costs' received some benefit of the litigation. In Mills v. Electric Auto-Lite Co., 396 U.S. 375, 394 (1969), and Van Gemert it was shareholders of stock which increased in value as a result of the actions, and in Tenney it was property owners. However, not everyone who paid the $295.00 impact fee will benefit from the action. After September 1, 1995, the trial court's approved deadline date in which all claims must be filed, there will be some percent of those who paid the impact fee not making a claim. After that date, those not filing timely claims will be forever barred and will not receive any benefit of this litigation.

The case most on point is City of Miami Beach v. Jacobs, supra. That case also dealt with a tax refund brought as a class action. While the attorney tried to claim fees against all the taxes collected, the District Court rejected that proposal. Rather, the District Court only allowed fees to be deducted from

those who "benefited" from the action, that is, those persons who actually applied for and received a refund. Id. 341 So. 2d at 238. The court specifically held that fees were to be deducted from each refund where it was paid by the City. Id. The court recognized the fact that "[s]ome entitled there to may not seek refund, or for some reason, may not be located." Id.

Van Gemert is not inconsistent with the ruling in City of Miami Beach v. Jacobs, supra. In Van Gemert, there were absentee claimants to monies deposited in a judgment fund. The absentee claimants were to be awarded their share when they made their claim. Van Gemert, did not deal with, or address, unclaimed taxes. Taxes legally belong to the State, unless and until the person paying the tax files for a refund. By order of the trial court, all those who have paid the impact fee for the years in question have until September 1, 1995, to file their claim for a refund of those fees. After September 1, 1995, all claims for a refund of impact fees paid during the years in question shall be barred.

II. CLASS COUNSEL CANNOT RECEIVE AN ADDITIONAL AWARD OF FEES

As part of the distribution plan, the trial court has permitted some of the residual funds to go to Class Counsel. Order of Class Plaintiffs' Motion For Distribution of Residual Funds, App. 5, p.2, para. 3(a). Class counsel can receive up to 10% of the balance of the residual funds prior to the second distribution to claiming class members. Id.

The trial court gives no authority for this award, which is in addition to the award for attorney fees; provides no justification for the additional award and; does not require any additional work on counsel's part that was not already compensated for by the initial award.

This additional award, not based on law, is clearly an abuse of discretion. Counsel will already have been adequately compensated by their clients, hopefully based on the standard outline of theis brief.

Class Counsel came to the trial court and requested that the court dispose of any remaining funds left after all refunds are paid by dividing up the fund on a pro rata basis and pay those members of the class more than what they paid in taxes to the State. Class Counsels' request was unprecedented in Florida law;, moreover, it was inconsistent with the law as it ignores the statutory language and case law of this State.

In addition, the request was inconsistent and contrary to the law as established in other jurisdictions. The cases cited had nothing to do with taxes and dealt mostly with either settlements or complex litigation between private parties.

CONCLUSION

WHEREFORE, based upon the above cited legal authorities, Appellants request that this Court modify the trail court's final 9/order on attorneys fees as follows:

1. Reduce the award of attorneys fees to class counsel consistent with the non-complexity of the case, its value to the

public and a valid relationship between the lodestar factors and the amount actually awarded.

2. Rule that the attorney's fee award percentage apply only to those monies actually refunded in the first distribution and that class counsel cannot receive any additional award of fees from the residual amounts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by FEDERAL EXPRESS this 31st day of July, 1995, to: **CHRISTOPHER K. KAY, & MICHAEL J. BEAUDINE,** Esqs., P.O. Box 2193, Orlando, FL 32802-2193 and **W. GORDON DOBIE & BRUCE R. BRAUN**, Esqs., Winston & Strawn, 35 W. Wacker Dr., Chicago, IL 60601-9703.

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