

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

JAVAR CALVIN, et al.,)
)
Plaintiff,)
) No. 03 CV 3086
-vs-)
) (*Judge Kendall*)
SHERIFF OF WILL COUNTY, et al.,)
)
Defendant.)

**PLAINTIFF’S MEMORANDUM IN SUPPORT
OF APPROVAL OF PROPOSED SETTLEMENT**

More than 5000 classmembers have received notice of the proposed settlement of this case.¹ Not a single class member has objected to any portion of the settlement. For the reasons set out below, the Court should approve the proposed settlement.²

I. History of the Litigation

This action began on May 8, 2003, with the filing of a single count complaint by original plaintiff Javar Calvin. Plaintiff filed an amended complaint on August 12, 2003, adding William Moore as a plaintiff and adding allegations to challenge an alleged "strip search/shackling" policy. A third named plaintiff, Charles Davis, was added in the second amended complaint on February 12,

1. Notice was mailed to 6570 persons; 1552 notices were returned as non-deliverable by the United States Post Office.
2. As explained below at 7-8, class counsel, with the agreement of defendants, requests that the Court modify the payout schedule.

2004. This pleading refocused plaintiffs' policy allegations, and was filed contemporaneously with a motion for class certification.

On May 12, 2004, the district court granted the motion for class certification for two of the three subclasses proposed by plaintiffs.³ Plaintiffs provided notice of the pendency of the case to the class and, after completing discovery on class liability issues, moved for summary judgment. Defendants opposed this motion, but the district court granted summary judgment on liability to the plaintiff class on December 16, 2005. *Calvin v. Sheriff*, 405 F.Supp.2d 933 (N.D.Ill. 2005).

On April 14, 2006, the court granted defendant's motion to certify the order granting summary judgment for an interlocutory appeal under 28 U.S.C. §1292(b). The Seventh Circuit granted the petition for permission to appeal on May 18, 2006.

After the appeal was docketed in the Court of Appeals, the parties participated in a settlement conference with Joel N. Shapiro, Senior Conference Attorney of the United States Court of Appeals for the Seventh Circuit. With the invaluable assistance of Mr. Shapiro, which extended over several months, the parties agreed to the proposed settlement which is now before the Court for final approval.

3. The court refused to certify on numerosity grounds the third subclass proposed by plaintiffs. A claim similar to that which plaintiffs had sought to assert for this subclass was rejected by the Seventh Circuit in *Hernandez v. Sheahan*, 455 F.3d 772 (7th Cir. 2006).

II. The Proposed Settlement

The proposed settlement brings this litigation to an end. Defendants, who abandoned the challenged policies during the pendency of this case, will pay a total amount of \$2,150,000. This Fund will cover administration of the settlement, i.e., notice to the class, attempting to locate class members who are not reached by first class mail to their last known address, processing of claim forms and 1099 forms, issuance of settlement checks, and mailing (by certified mail, return reply requested) of settlement shares to class members. Class counsel has, to date, advanced \$7,192.73 towards notice; counsel expects that an additional \$35,000 will be required to process the claims.

Attorneys' fees and expenses, and incentive awards to the three named plaintiffs will also come from the Fund. The balance of the Fund will be distributed on an aliquot basis to the class.

The settlement agreement provides that, subject to the approval of the court, each of the three named plaintiff will receive an incentive award in the amount of \$25,000.⁴ This amount reflects the service that each named plaintiff provided to the class and is of comparable magnitude to incentive awards in other jail strip search cases.⁵

4. The incentive award is to paid to each named plaintiff without any deduction for attorneys' fees or costs.

5. The class representative received a \$25,000 incentive award in *Maneely v. City of Newburg*, S.D.N.Y., No. 01-cv-2600; each of the two class representatives in *Blihove v. St. Croix County*, W.D.Wis. No. 02-cv-450 received a \$35,000 incentive award, and \$300,000 was distributed to three class representatives in *Haney v. Miami Dade County*, S.D. Fl., No. 04-cv-20516.

The settlement agreement also provides that attorneys fees and reimbursed expenses will not exceed 40% of the Fund.⁶ Assuming that the Court approves the requested fee, as well as the proposed incentive awards, there will be \$1,172,800.00 available for distribution to the class after payment of administration costs.

The class notice (Exhibit 1, attached), advised members of the class that each would receive at least four hundred dollars, with a probable payout of seven hundred dollars. 765 claims forms have been returned as of November 15, 2006. Assuming that this number does not increase beyond 800 by the December 1st deadline, each class member would receive \$1,466.⁷

III. Standards for Approving the Settlement of a Class Action

The standards for approving the settlement of a class action were recently restated by the Seventh Circuit in *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.* 463 F.3d 646, 653 (7th Cir. 2006):

In order to evaluate the fairness of a settlement, a district court must consider the strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and

-
6. This percentage is set out in the notice of settlement that was mailed to each class members: "Attorneys' fees and expenses will be paid from this Settlement Fund in an amount to be set by the Court and not to exceed 40% of the Fund."
 7. As explained below at 7-8, class counsel, with the agreement of defendants, suggests that each class member receive an initial payment of \$1,000, and a second payment of any balance remaining on December 1, 2007.

the amount of discovery completed at the time of settlement. [citation omitted] The most important factor relevant to the fairness of a class action settlement is the first one listed: the strength of plaintiff's case on the merits balanced against the amount offered in the settlement. [citation omitted]

Before the Seventh Circuit granted the petition to appeal, class counsel believed that the order granting summary judgment did not involve any "contestable" legal issue, an essential element to the grant of permission to appeal under 28 U.S.C. §1292(b). *Ahrenholz v. Board of Trustees of the University of Illinois*, 219 F.3d 674, 675 (7th Cir. 2000). Class counsel vigorously argued this point in opposing the petition for permission to appeal, pointing out that each circuit which has considered the constitutionality of policies like those at issue in this case had found the policies to be unlawful. The Seventh Circuit, however, did not accept this argument when it granted permission to appeal.

Our court of appeals has not been reluctant to plow new ground in civil rights cases. For example, in *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001), *opinion on denial of rehearing*, 260 F.3d 824 (7th Cir. 2001), the Seventh Circuit overruled its long standing precedent and departed from decisions in eight circuits to hold that 42 U.S.C. §1983 does not include a cause of action analogous to a common law action of malicious prosecution. Similarly, in *Wallace v. Kato*, 440 F.3d 421 (7th Cir. 2006), *cert. granted*, June 19, 2006, No. 05-1240, the Seventh Circuit overruled two of its recent decisions to establish a categorical rule of accrual for Section 1983 cases arising from an unlawful arrest. As with its holding in *Newsome*, the categorical rule that our Court of Appeals adopted in *Wallace* is different from the rule applied in other circuits.

In light of the uncertainty that was added to the case by the grant of the petition for permission to appeal, the settlement provides a reasonable monetary

recovery to the unnamed members of the plaintiff class. If each class member in this case receive \$1,000, this would be the same as in two other jail strip search cases, *Doan v. Watson*, S.D.Ind., No. 99-4-C-B/S, *Bull v. Sacramento County*, California Superior Court, CA No. 01AS01545, and *Kahler v. Rensselaer County Jail*, N.D.N.Y., No. 3-cv-1324.

In addition to considering the strength of plaintiff's case on the merits and the monetary payment to each class member, "district judges presiding over proposed class settlements are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole because class actions are rife with potential conflicts of interest between class counsel and class members." (citations omitted) *Mirfasihi v. Fleet Mortg. Corp.* 450 F.3d 745, 748 (7th Cir. 2006). The proposed settlement in this case was negotiated with the assistance of the Seventh Circuit's Senior Settlement Attorney Joel Shapiro, and was thereby pre-screened to avoid any such conflicts.

The settlement in this case is a reasonable resolution of this class action and should be approved by the Court.

IV. The Proposed Modification of the Pay-Out Schedule

As drafted by the parties, the settlement agreement calls for a single payout to class members who returned their claim form by December 1, 2006. Class members who submit claim forms after the December 1st date but before December 1, 2007 would be paid from a "reserve fund" until that fund is exhausted.⁸

765 claims forms have been returned as of November 15, 2006. Assuming that this number does not increase beyond 800 by the December 1, 2006, each class member would receive \$1,466, and the "reserve fund" would allow payments to about another 100 class members.

The return rate (15%, 765 claim forms from 5018 presumably delivered notices), is much lower than the 20% to 30% range that class counsel had anticipated. Class counsel expects that the response rate will increase as soon as checks are mailed out.

To insure that the settlement is distributed to as many class members as possible, class counsel therefore suggests that the initial payout on December 18, 2006 be limited to \$1,000. The balance of the settlement fund, after payment of incentive payments, attorneys' fees and costs, and the costs of administration of the settlement, would be held as the "reserve fund." Class members who come forward before December 1, 2007 would receive the same \$1,000 payment, until

8. The "reserve fund" was set at 1/15 of the total settlement; any balance remaining in the "reserve fund" would be paid to class counsel as additional fees.

the reserve fund is exhausted. If money remain in the reserve fund on December 1, 2007, it will be distributed to class counsel (for additional fees not to exceed 40% of the total settlement), with any balance (after payment of the costs of a second distribution), being distributed on an aliquot basis to each class member. This revision to the payout schedule would be consistent with the class notice, which advises each class member that the likely payout "may be approximately seven hundred dollars." (A copy of the class notice is attached as Exhibit 1.)

V. Attorneys Fees

"[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This is because "persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Id.*, citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970).

The rule in this circuit is that "when deciding on appropriate fee levels in common-fund cases, courts must do their best to 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." *In re Synthroid Marketing Litigation*, 264 F.3d 712, 718 (7th Cir. 2001), *opinion following remand*, 325 F.3d 974 (7th Cir. 2003). "The object in awarding a reasonable attorney's fee . . . is to simulate the market . . . 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 Continental Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992).

Civil rights cases are typically litigated on a contingent basis, where the lawyer agrees to accept a percentage of the recovery as his (or her) fee, subject

to a credit for any statutory fees are awarded. This percentage ranges from the customary one-third, *Freeman v. Mayer*, 95 F.3d 569, 570 (7th Cir. 1996) to 40%. *Kirchoff v. Flynn*, 786 F.2d 320, 322 (7th Cir. 1986). Attorneys use the higher percentage when the claim is small and the case is likely to be resolved by settlement, without any award of statutory fees.

In accord with these principles, class counsel seeks an award (to cover fees and litigation expenses) of forty percent of the settlement fund, with one-third to be paid contemporaneously with distribution to the class, and the balance to be held in the "reserve fund," and paid on December 1, 2007, if the fund has not been exhausted by late claimants.⁹

VI. Conclusion

For the reasons above stated, plaintiffs request that the Court approve the proposed settlement, authorize incentive payments of \$25,000 to each of the named plaintiffs, and approve counsel's request for an award of fees of forty percent of the settlement fund, with fees in the amount of one-third of the settlement fund to be paid contemporaneously with distribution to the class, and the balance to be held in the "reserve fund," and paid to counsel on December 1, 2007 if the "reserve fund" has not been exhausted by late claimants.

Plaintiffs also request that the Court modify the payout schedule, so that the initial payout on December 18, 2006 is limited to \$1,000 to each class

9. Counsel also seeks reimbursement for the \$7,192.73 that he has advanced for class notice.

members who has filed a claim, with the remainder being added to the "reserve fund" and distributed to class members who submit claim forms after December 1, 2006 and before December 1, 2007, with any balance remaining in the "reserve fund," in excess of the additional attorney fees referred to above, to be distributed on a aliquot basis for each class member who has filed a claim form.

Finally, plaintiffs request that the Court authorize the reimbursement to class counsel of the \$7,192.73 that he has advanced for class notice and authorize the payment from the settlement fund to Analytics, Incorporated of its ordinary and necessary expenses in administering the settlement.

Respectfully submitted,

/s/ Kenneth N. Flaxman

KENNETH N. FLAXMAN
ARDC No. 830399
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604-2430
(312) 427-3200 (phone)
(312) 427-3930 (fax)
knf@kenlaw.com (email)
attorney for the plaintiff class

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Kevin J. Clancy, Esq., Lewis & Gellen, 200 West Adams, Ste 1900, Chicago, Illinois 60606, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: none.

/s/ Kenneth N. Flaxman

Kenneth N. Flaxman
ARDC Number 08830399
200 S Michigan Ave, Ste 1240
Chicago, IL 60604-2430
(312) 427-3200 (phone)
(312) 427-3930 (fax)
knf@kenlaw.com (email)