

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MICHAEL POWERS,	:	Case No. 1:02CV605
	:	
Plaintiff	:	(Hon. S. Arthur Spiegel)
	:	
-v-	:	
	:	
HAMILTON COUNTY PUBLIC	:	
DEFENDER COMMISSION, <i>et al.</i>	:	
	:	
Defendants	:	

MEMORANDUM ON ISSUES RELATED TO DAMAGES
SUBMITTED BY REMAINING COUNTY DEFENDANTS

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MEMORANDUM

The court by separate order (Doc. 53) granted in part Plaintiffs' Motion for Summary Judgment on Liability (Doc. 36) and modified the class definition as follows:

All persons who were in fact indigent, who, without an indigency hearing, have been incarcerated in a Hamilton County correctional facility from August 21, 2000 to present as a result of the nonpayment of a fine and or costs, including person who violated probation following a "stay to pay sentence."

In so ordering, the court stayed consideration on Plaintiffs' separate Motion for Summary Judgment on Damages (Doc. 39) and invited comment from counsel for both Plaintiffs and Defendants on how to implement this court's order. The county defendants would ask the court to focus on two issues: 1. Does the amendment to the class included within the court's order of February 7, 2006, alter the viability of this litigation as a class action? and; 2. If class relief remains appropriate, what is the best method to determine damages for the individual claimants ?

A. Appropriateness of Class Relief

This court's order of February 7, 2006, significantly and materially changed the definition of the class. The new definition focuses on the "actual indigence" of each individual class member and will require specific factual findings regarding each individual's ability to pay a small fine. Some of the factors which must be considered include:

- a. The amount of any fine assessed;
- b. Total household income of the claimant;
- c. The length of any "stay to pay" or period of "pay through" probation;
- d. The employment history of the claimant prior to the sentence and during the time period between the sentence and incarceration;

- e. Other sources of funds, including family sources not included in household income (see, *United States v. Hickey*, 917 F.2d 901 (6th Cir. 1990), citing *United States v. Fabregat*, 902 F.2d 331);
- f. Good faith efforts, or lack thereof, of the claimant to satisfy the fine;
- g. Good faith efforts, or lack thereof, of the claimant to seek employment following the imposition of the fine;
- h. The individual, family, and household assets of the claimant and the liquidity of those assets;
- i. The disposition of income by the claimant or his or her financial resources between the sentence and incarceration;
- j. The tax payment history of the claimant;
- k. The claimant's criminal history;
- l. The claimant's general health and willingness to perform community service in satisfaction of the fine; and,
- m. The claimant's education and earning capacity.

Civil Rule 23(b)(3) requires that questions common to the class predominate over any questions affecting only individual members. The predominate questions now presented in this litigation are wholly individual, extremely subjective, and will require intensive separate inquiry for each member of the class. This determination does not lend itself to any simple, formulaic approach. A class action is no longer superior to other available methods for determining the controversy.

B. Method of Damages

In the event that this matter remains a class action, an adequate method of calculating damages for the individual claimants must be established. Having determined liability and bifurcated the issue of damages, the court may establish such a method under Civ.R. 23

(c)(4)(A). *Olden v Lafarge Corp.*, 383 F.3d 495 (6th Cir. 2004). Obviously, the court could order a combined trial for all claimants and simply aggregate the individual awards a jury might give to those claimants who happen to appear for trial. Alternatively, the court could establish a process for resolving individual claims while preserving the right to a trial with respect to claims which may be disputed. Such a process could utilize a magistrate judge or a special master to resolve preliminary questions with respect the submitted claims and enter a final award in the event that the claim is undisputed.

C. Notice and Opt-Out Issues

Defendants submit that notice be sent by first class mail to the last known address of the prospective class members as listed in the jail management system of Hamilton County. Notice by publication should also be given in the Cincinnati Enquirer and the Cincinnati Post. These methods of notice are reasonably calculated to apprise the prospective class members of the existence of the lawsuit and their right to participate therein.

Defendants suggest that the opt-out period be limited to 45 days following mailing or last publication, whichever occurs later, with a 60 day period following opt-out to institute an action.

D. Certification under 28 U.S.C. 1292.

It is the intention of the remaining defendants to appeal the decision of the court with respect to their liability and the certification of the class. In the event that the court issues an order that may not be considered final and appealable the county defendants request that the court certify these issues for immediate appeal under 28 U.S.C. 1292. Delaying an appeal would subject the defendants to considerable cost and expense that would not be recoverable in the event that their appeal was successful. The issues presented by the court's rulings involve

controlling questions of law on which there is substantial ground for differences of opinion. An immediate appeal will materially advance the ultimate termination of this litigation. The defendants seek certification on the following questions:

- a. All issues relating to the liability of the remaining defendants; and,
- b. All issues related to the maintenance of this litigation as a class action.

The defendants further ask that the court stay of the implementation of its orders under the circumstances pending the resolution of any timely appeal to the Sixth Circuit Court of Appeals.

E. Attorney Fees

The County Defendants suggest that any motion related to attorney fees for class counsel be submitted within 30 days following final judgment.

Respectfully submitted,

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/s/ David T. Stevenson

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically on the 14th day of March 2006, in the courts electronic filing system which will cause service to be made to counsel for all parties of record as noted below:

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/s/ David T. Stevenson