IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

MARTIN RYAN, Plaintiff, and BERNARD McKAY, WALTER RUCINSKI, JOSEPH COGLIANESE, LOUIS EISEN and MARJORIE O'BRYNE, Intervening Plaintiffs, v. THE CITY OF CHICAGO, et al, Defendants.	)	No. 83CH 390

OPINION and ORDER
ATTORNEYS' FEE PETITION

This matter comes on for determination of Clinton A. Krislov's Petition for Attorneys' Fees and Costs incurred in this litigation through January 31, 1992. The petition seeks "an award of (a) $2.2 Million against the Firemen's Fund, plus (b) $350,000.00 against the Police, Municipal and Laborers' Funds, plus (c) an additional award against the City in the range of $455,000-$682,500 to reimburse the Firemen's Fund, plus (d) an additional fee based on an appropriate percentage of that "additional" award against the City" (Petition for Attorney's Fees & Cost page 1).

This opinion focuses almost exclusively on the Firemen's Annuity & Benefit Fund because the other city pension funds (Police, Municipal & Laborers) have settled the vast majority of their issues with petitioner Krislov.

HISTORICAL PROSPECTIVE

For years subsequent to January 1979 the Board of Trustees of the Firemen's Annuity and Benefit Fund (Firemen's Fund) sheepishly ignored or carelessly failed to note that the City of Chicago was delaying turn-over and retaining for its own use all interest and income derived from certain pension fund taxes collected and transmitted periodically by the Cook County Collector. "The city's withholding of payment to the pension fund was never due to an inability to pay but, rather, merely concerned (its own) cash flow considerations" (Ryan v City of Chicago 148 Ill. App. 3d 638, 640). Such withholding, for its own benefit, was a procedure of recent origin (Id p 645) notwithstanding the Pension Code's long-standing declaration that the City holds the proceeds "for the benefit" of the Fund (Ill. Rev. Stat. Chap 108 1/2, para 6-165).

This extravagant and willful play of the float adversely impacted on the other three city pension funds as well as the Firemen's Fund and resulted in a multi-million-dollar windfall for the City during the relevant period.

In 1983 this action was filed to halt the practice and to require the City to pay over all interest earned on pension fund tax receipts. This action, the particulars of which are set-out fully in the Appellate Court's opinion (148 Ill. App. 3d 638), was not brought by the Board of Trustees of the Firemen's Fund nor any of the other funds but rather by certain individuals represented by petitioner Krislov. This action was on-going in the trial court for two and one half years and in the Appellate Court for a comparable period without the involvement or participation of the Board of Trustees of the Firemen's Fund.

The complaint, the motions, the arguments, the orders and the appellate briefs all resonate with breach of fiduciary duty claims -- claims which are the unmistakable and universal call to arms for trustees in every setting and yet the Board of the Firemen's Fund never woke-up and never participated in the case in chief or its appeal. So apparent was the City's breach of duty and so obvious was the remedy called for that the Appellate Court kissed-off all arguments to the contrary as "unpersuasive" and "illogical" (148 Ill. App. 3d at 644) on the basis that "the statutory mandate clearly foreshadowed the outcome" (Id at 645).

So inattentive to their trust duties and so lacking in vigilance for the Fund's best interest was the Board of Trustees of the Firemen's Fund that it permitted the city's

Corporation Counsel (attorney for the very same fox who was ravishing their hen house) to represent the Fund through the Appellate Court proceedings -- a more apparent conflict of interest is difficult to imagine. Any notion that the Board of Trustees of the Firemen's Fund was unaware of the case or late in learning of its allegations is dispelled by reference to the Board's own minutes of January 26 and February 23, 1983.

The Appellate Court predictably ordered restitution "of all earnings upon withheld funds, whether retrospective or prospective" (Id p 646), which, for all four pension funds, amounted to $8.6 million and covered the periods of January 1, 1979 and October 10, 1984. The Appellate Court's additional reversal of the trial court's 30 days' grace period; computation of interest due; the addition of two years subsequent to October 1984; corrections in calculations, and the like resulted in an agreed partial judgment order for $19,334,131.38 through October 31, 1986.

It was now July 1988, the case was 5 1/2 years old, the Appellate Court opinion had been on file for 22 months and the Firemen's Fund finally ended the conflict of interest noted above by engaging lawyers to represent its interest. Instead of supplementing and assisting Krislov's efforts against the trust-breaching city administration and joining forces with him to fully implement the restitution ordered by the Appellate Court, late-arriving counsel for the Firemen's

Fund has regrettably focused their attention, skills and efforts on discrediting Krislov, belittling the significance of his results, challenging Krislov's continued involvement in the case, denying fee entitlement, and maximizing the delay and incivility in the resolution of Krislov's attorneys' fee petition.

On July 26, 1988, the plaintiffs filed for attorneys' fees and costs, the parties engaged in discovery and depositions regarding the fee petition and then the matter was continued generally for reasons unknown. This judge inherited case management responsibilities for the matter in December 1990 and the issues of compound interest and this renewed attorneys' fee petition have dominated.

The Firemen's Fund pro rata share of the agreed partial $19 million judgment is $2,882,387.30 to which must be added this Court's recent award of compound interest amounting to $3,098,839.75. Thus the fee petition relates to a Firemen's Fund recovery amounting the $5.9 million; the petition argues for an increment for what is called the "future benefits"; it advocates calculations either by the lodestar/multiplier approach or the percentage of recovery approach and it asks for an award of $2.2 million.

A MUGGING OF THE GOOD SAMARITAN

Every judge who has ever been confronted with a contentious attorneys' fee dispute knows that the U.S. Supreme Court's observation that "a request for attorney's fees should not result in a second major litigation" (Hensley v Eckerhart 461 U.S. 424) is more a fervent wish than a courthouse reality. Under the guise of protecting its annuitants and participants from a "greedy" lawyer, the Firemen's Fund has made this fee petition more than a "second major litigation", they have made it a crusade.

Having been shown to be a lap dog for a city administration which was picking the Fund's pocket in order to maintain its own favorable cash flow, the Board of the Firemen's Fund has belatedly turned into a pit-bull, not only biting the hand that fed it $6 million but willfully inflicting as much additional expense, delay and incivility as possible.

During the two years which this Court has managed the case, counsel for plaintiff has been treated more as an enemy of the Firemen's Fund than as its benefactor, more as an intruder in the case than its architect, more as a nuisance to the Fund than as its single most effective advocate. It is telling to note that none of the other three pension funds have joined the Firemen's Fund in this hard to fathom conduct.

The only plausible explanation for this degree of hostility to plaintiff's counsel, this unrelenting belittlement

of past accomplishments in the case, this heightened incivility and mindless opposition to a reasonable fee is resentment by the Board of Trustees of the Firemen's Fund that this case has exposed that Board as being inattentive and incompetent at best or disloyal and collusive at worst. Wiping one's boots on the napkin does not get egg off your face -- the Firemen's Fund Board of Trustees has egg on its face and its response to that reality is a further embarrassment.

The petitioner's efforts for and on behalf of the Firemen's Fund have now spanned nine years. His energy, persistence and legal scholarship have (1) righted a serious wrong, (2) secured restitution for past misconduct, (3) created a climate which will assure fidelity in transmitting future pension fund tax receipts, (4) delivered a handsome recovery, (5) enhanced that recovery by ferreting out auditing mistakes, (6) secured an award of compound interest, and (7) engaged in collateral litigation so as to protect the benefits gained for the Firemen's Fund. The Firemen's Fund is oblivious not only to these past achievements on its behalf but to this Court's earlier warnings as well. (See Transcript of Proceedings October 7, 1991)

In addition to a stern and public warning that such petty tactics were counterproductive (Id), and in an attempt to bring the Firemen's Fund to its senses, this Court ordered that its 1991 compound interest award (secured through the efforts of

petitioner Krislov while the Fund's additional counsel looked-on) be held in escrow. This was on the belief that the resultant financial detriment to the Fund (i.e. bank rates v Fund rates) would motivate the Trustees to put their animosity aside. Wrong!!!

For 14 months the Fund has forfeited optimum investment returns on $3 million in order to drive petitioner's cost of fee recovery up and his ultimate net recovery down. The Fund drives the petition fee recovery down by embarking on a "second major litigation" strategy confident that the time and effort spent by Krislov in pursuit of his fee is not compensable.

FEES IN PURSUIT OF FEES

When the caselaw proclaims that "there is no legal basis upon which to award fees for litigation of the fee petition" (Baksinski v Northwestern University 231 Ill. App. 3d 7, 20) it invites fee proceedings of "massive proportions" (Mills v Eltra 663 F 2d 760, 761) which take on a life of their own and become "the main event rather than the side show" (Id). I say "invites" because the same cases which respect, applaud and bestow societal significance to class-action attorneys, private attorneys general and stockholders who mount derivative suits turn suspicious of those very same vigilantes when they ask for fees. "Hours which do not benefit the class members are to be disallowed" (Fiorito v Jones 72 Ill. 2d 73, 89).

At the fee stage, we are reminded that successful counsel are now "antagonistic" to the class (In Re Armored Car Antitrust Litigation 472 F. Supp. 1357); that fee petitions which will reduce the fund created by the attorney cause a "conflict of interest" (In Re Nucorp Energy Inc. 767 F 2d 655) and that "the trial court becomes the fiduciary for the fund's beneficiaries.....in determining what is a reasonable fee"; (Purdy v Security S & L 727 F. Supp. 1266, 1269). None of these cautionary caveats should work to obscure the reality that fee petitioning counsel is merely seeking equity, i.e. "quantum meruit and the prevention of undue enrichment" (Baksinski v N.U. 231 Ill. App. 3d at 7).

None of these caveats warrant the establishment of an uneven field on which to play-out the issue of a "reasonable fee" -- a field where one side must play for free if he is to play at all. The fee petitioner is seeking equity but is being made to eat the costs involved in getting equity. The petitioner seeks quantum meruit "for the reasonable value of services benefiting the unrepresented" (Leader v Cullerton 62 Ill. 2d 483, 488) but is denied recoupment of unavoidable expenses incurred in this justifiable pursuit. Such a process fails "to keep the balance true" (Snyder v Massachusetts 291 U.S. 97, 122).

A further invitation, indeed an encouragement, to engage in this unproductive, unwarranted and mean-spirited second

level of litigation arises from cases which declare "that the objectors' motives in challenging the fee petition are entirely irrelevant" (Board of Education v County of Lake 156 Ill. App. 3d 1064, 1069). Krislov has not just "found" $6 million for the annuitants and participants of the Firemen's Fund, he has indeed been made to "foist" it on a Board of Trustees disinterested in his efforts and oblivious to its own conflict in the case. He petitioned for a fee and settled with three of the other pension funds thereby dispelling any notion that he is intractable in his fee demands.

The Firemen's Fund senses the "lose-lose" position into which Krislov, as the petitioner for fees from a common fund, is placed -- i.e. he can let the Firemen's Fund dictate his fee or be buried in non-compensable busy work. Such a rock or hardplace option can have no support in equity. "Time being the lawyer's sole expendable asset" (Mueller v Sloan 33 Ill. App. 2d 205, 207) it is the Fund's strategy to waste as much of Krislov's as possible and to give credence to the old maxim that "no good deed will go unpunished".

In Baksinski the Appellate Court rejected Krislov's argument "that failing to compensate an attorney for such (fee related) work encourages the opponent to engage in extensive "second litigation" to "wear down" attorneys into accepting less than reasonable fees" (231 Ill. App. 3d at 11). Whatever facts were deemed to be lacking in that case to

establish Krislov's argument of "inequity", those particulars have been more than adequately provided to him by the Firemen's Fund's conduct in this case. "The mere fact that no precedent can be found....is no reason for a court of chancery to shrink from action". (American Re-Insurance v MGIC Investment 73 Ill. App. 3d 316, 325)

The economics of law practice dictate that time be allocated to productive undertakings -- "fees are the lifeblood of the practice of law" (First National Bank of Chicago v Edgeworth 94 Ill. App. 3d 873, 886). Time spent on a common fund fee petition is non-productive because it cannot be compensated. This reality plays right into the hands of a common fund beneficiary who has turned on his benefactor and adopts a strategy to run-the-clock and challenge every alleged hour, task, rate, benefit and contingency. Compensation for an arduous legal victory which created a windfall should not be reduced in proportion to the time and expense it takes to secure it. (Ganey v Garrison 813 F. 2d 650, 652)

Regardless of the Illinois precedent acknowledged above the circumstances of this case are so extreme, the entitlement to a fee so apparent, the challenge by the Firemen's Fund mired so clearly in vindictiveness and the task of carrying the burden of reasonableness over 9 years so heavy and time-consuming that equity dictates Krislov be given credit for the time attributable to the fee petition. In a court of

equity even black-letter law must be made to yield its grip when it can be shown, as here, to lead to inequity and absurd results. "From its earliest origins equity was designed to avoid the rigidity of common law writs and procedures and to adjust itself to the requirements of justice". (Strom v Strom 13 Ill. App. 2d 354, 367) On September 25, 1992 this court entered a preliminary order ("no fees for fees") based on a superficial application of the recent Baksinski case and a myopic view of the Firemen's Fund strategy. Today's expanded analysis of both, and the conclusions recited above, dictate that the Order of September 25, 1992 and its subsequent "clarification" be vacated.

THE FALLING LODESTAR

Eighteen years ago the Illinois Supreme Court signaled its concern that in determining attorneys' fees "the time expended (on the case) not be relegated to a secondary or minor position" (Flynn v Kicharski 59 Ill. 2d 61, 67). Four years later Illinois, following federal caselaw, hooked on to the "lodestar" method of calculating common fund attorneys' fees (Fiorito v Jones 73 Ill. 2d 73). Between those cases the Supreme Court had discredited the computation of fees on a percentage of the recovery basis due to "criticism of the courts and the legal profession" (Leader v Cullerton 62 Ill. 2d 483, 488). The flimsy authority relied on for this alleged "criticism" undermines its probity. It is a fact that the

lodestar/multiplier technique has held sway in Illinois for the past fourteen years but the question is why?

As is the case with most shooting stars, the lodestar has been most prominent in its decline over the years since the Fiorito case. Today it has been abandoned in common fund cases by the most influential federal appeals courts (Camden I Condo Assoc. v Dunkle 946 F 2d 768, 774; Evans v City of Evanston 941 F 2d 473, 479-80; Weinberger v Great Northern 925 F 2d 518, 526; Brown v Phillips Petroleum 838 F 2d 451, 454; Bebchick v Washington Metro 805 F 2d 398, 407) ridiculed by scholars and repudiated by most commentators. (86 Columbia Law Review 669, 724-25; 42 Md. Law Rev. 215)

Contrary to the Firemen's Fund assertion that the lodestar is "alive and well" (Response to Petition p. 27), the U.S. Supreme Court's June 24, 1992 decision in City of Burlington v Dague (120 L.Ed. 2d 449, 60 L.W. 4717) makes clear that the lodestar was back in the shop for an overhaul and came limping out with its multiplier stripped of the contingency factor in cases where fee shifting statutes are involved. The explicit reason for the Supreme Court's recent tinkering with the lodestar/multiplier method is precisely the same as will be demonstrated herein; i.e. "first and foremost because we do not see how it can intelligibly be applied". (City of Burlington v Dague 60 L.W. 4717, 4719). Whatever on-going vitality lodestar has, outside of Illinois, is limited to an alternate or

optional approach to fee calculations when fee-shifting statutes (not common funds) are involved. (Florida v Dunne 915 F 2d 542, 545; Paul, Johnson, Alston & Hunt v Graultz 886 F 2d 268, 272)

The lodestar which seems eminently common-sensical on first impression, melts away, sometimes into nonsense, on closer examination. Its illusion of objectivity, which arises from the mathematics of hours times rate, is destroyed by the entirely subjective multiplier which purports to measure the degree of difficulty, the benefit which accrued to the class and the contingent nature of the undertaking. Even the Fiorito court had to acknowledge that there can be "no guidelines for determining what value should be attributed to these considerations" (72 Ill. 2d at 92). It should be no surprise that the Illinois Appellate Court has taken to calling the multiplier "curious" and "unusual" (Waters v City of Chicago 111 Ill. App. 3d 51, 60) and that Congress has explicitly prohibited the multiplier in certain instances (20 USC Sec. 1415 (e)(4)(c)).

That the lodestar method is just as obsolete as it is discredited is made manifest by the Supreme Court's admonition that a multiplier of three was to be the outer limits for this particular star (Fiorito v Jones 72 Ill. 2d at 93). In the face of awards which regularly adopt five as a multiplier, and have even trebled the once barrier three, the restraint on fees

which the Supreme Court envisioned is but a quaint reminder that the past cannot fight the future and win. Indeed, such a hocus-pocus formula has no counterpart in the law or anywhere else in the real world. Lodestar is a classic example of the advertising maxim that "the package sells the product". If, instead of its catchy and intriguing "lodestar" name, it had originally been labeled the "hours times rate method" it never would have endured this long. So much for truth in advertising.

Under the circumstances of this case, any meaningful scrutiny of the hours and the rate components of the lodestar is nigh impossible; we are here concerned with 9 years of legal efforts and more than 5700 billable hours. Neither the lawyers challenging the bona fides of Krislov's time entries nor the Court charged with valuing his efforts were involved during the first six years of the relevant nine-year period. At a minimum the court "must consider the necessity for and the quality of the time spent" and be alert to excise "wasted time or needless duplications" (Leader v Cullerton 62 Ill. 2d 483, 491). Without firsthand observations and on-the-scene experiences this type of analysis of Krislov's petition cannot be done.

The Supreme Court's concern about "sparking criticism of courts" (Leader at 488) would certainly be warranted if tea-leaves, intuition or judicial savvy were seen as the basis

to assay a $2.2 million fee petition. Courts do not countenance a coin-toss or a lottery when important rights are at stake (Kandalepas v Economou 191 Ill. App. 3d 51; Walker v State Board 65 Ill. 2d 543) -- the courts and the public would likewise look askance at a guessing game. Fees should not be the product of a pretense that the undoable has in fact been done, i.e. that Krislov's 5700 hours have been closely scrutinized, that duplication and fat has been eliminated and that only "quality" time is being compensated. It would take a major leap of faith to see credibility rather than guesswork in such a process -- fact-finding is not guesswork. "Reasonableness cannot be determined on the basis of conjecture" (Harris Trust v American National Bank 230 Ill. App. 3d 591, 603).

Some of the more apparent obstacles to a credible analysis of Krislov's 9-year-old time and labor entries are:

1) At all earlier times this case was presented by Krislov on behalf of all four city pension funds. Allocation of the myriad of entries (research, drafting, conferences, court appearances. etc.) to the Firemen's Fund alone is impossible. Caselaw, nonetheless, seemingly dictates that Krislov is required to present the trial court with evidence sufficient to establish that the hours billed to the (Firemen's Fund) were not duplications of hours billed to other (funds)" (Board of Education v County of Lake 156 Ill. App. 3d 1064, 1072).

2) The award must "be made with moderation" (Baksinsky v N.U. at 13) but "the hourly rates

should not be so low as to discourage participation in such cases by highly qualified counsel" (Leader v Cullerton at 492) Apart from the totally subjective analysis implicated by these authorities is the fact that Krislov's 1983 rate is not his 1992 rate. Does the court employ the 1992 rate for all hours approved or his historical rate plus interest for the delay-in-payment factor?? What would be the proper rate of interest and should there be an evidentiary hearing (complete with discovery, etc.) to determine it???

3) When, as here, multiple lawyers have participated, the court "must assure itself that the attorneys were not duplicating one another's efforts" (Board of Education v County of Lake at 1073). Not even the precision of hindsight makes this task doable. The arbitrariness of axing hours or tasks which appear to be duplicative is manifest in this case where a second-checking (and therefore a "duplicative review") of audit accounts uncovered a $16 million transposition of figures which netted an additional 4 million in Fund recovery.

4) A determination of skill and standing of the attorneys performing legal services may be based "on personal observation of the attorney in the underlying matter" (Harris Trust v American National Bank 230 Ill. App. 3d 591, 597) however no presently sitting judge has had any observations regarding the underlying matter here.

5) "A trial court is not limited to the evidence(???) presented in arriving at a reasonable fee but may also use knowledge it has acquired in the discharge of professional duties to value legal services rendered" (Johns v Klecan 198 Ill. App. 3d 1013, 1022) If guesswork is to be employed then this is the authority to legitimize it.

6) A "reasonable amount of research time is compensable (but) exhaustive research is not" (Board of Education v County of Lake at 1073)

An invitation, such as this, to engage in second-guessing demonstrates that even the facial objectivity of the lodestar's hours times rate is subject to subjective manipulation. Is the lawyer who revisits in 1991 that which he looked-up or checked-out in 1983 engaged in duplicative research??

7) "Without a ruling on each billing entry.... there can be no way of determining what a reasonable fee might be" (Fitzgerald v Lake Shore Animal Hospital 183 Ill. App. 3d 655, 662). Other cases make clear that a "billing entry" is adequate only when it quantifies "what amount of time was expended on each task....on a given day" (Mass v Priester 205 Ill. App. 3d 1060, 1065). Mindless authorities such as these can be dispatched by reference to the U.S. Supreme Court's observation that "a trial judge's job is difficult enough without senseless make-work" (Wainwright v Witt 469 U.S. 412, 430). Contrast the "each task" and every "billing entry" directive above with the U.S. Supreme Court's common sense acknowledgment that "much of counsel's time will be devoted generally to the litigation as a whole.... Such a lawsuit cannot be viewed as a series of discrete claims". (Hemsley v Eckerhart 461 U.S. 424, 435)

The point is not that a lodestar analysis of 5700 hours is impossible (indeed other courts have done it) but rather that, in this setting, it would be folly because the results of such an undertaking can never hope to achieve credibility. Regardless of the care and diligence committed to the task, the findings could never be based on anything other than conjecture, surmise, intuition or gut feelings. Judge Posner notes that a fee adjustment based on the judge's "gestalt reaction" just "isn't good enough" (In the Matter of

Continental Illinois Securities Litigation 962 F 2d 566, 570). Indeed, the Illinois Supreme Court has "recognized that the lodestar-computation method is hardly suited" to every case. (Lurie v Canadian Javelin Ltd. 93 Ill. 2d 231, 239)

AN ALTERNATIVE TO LODESTAR

Because lodestar findings would be inherently suspect, the need here is to adopt a fee-setting technique best suited to the necessities of these unusual circumstances and to the goal of arriving at a reasonable fee. Such a task has been described as "the essence of equity jurisdiction (where) flexibility rather than rigidity has distinguished it". (Hecht Co. v Bowles 321 U.S. 321, 329)

It cannot be disputed that Krislov's undertaking of this cause was highly contingent. He brought it as a class action and prosecuted it throughout as a derivative suit on behalf of the four city pension funds. He received no support from the Funds themselves. His adversary was a city administration which maintains a law department staffed by over 200 lawyers not known for early cave-ins or generous settlements. The total hard cash benefit from the litigation is approximating $33 million -- a benefit which has been "won" rather than capitulated in by settlement. The plaintiffs are retired annuitants in the respective funds which left Krislov in the unenviable position of carrying or financing the litigation himself over all these years. Seldom does an attorney need to

engage in satellite litigation, as did Krislov in City v Korchak (87CH 10134), in order to protect the monetary benefit from collateral attack and from being erased as a mere accounting set-off.

These are the kind of relevant considerations which courts have in mind when they acknowledge that "time and labor required in a particular case is not the sole factor to be considered in the quantum meruit equation" (Lee v Ingalls Memorial Hospital 232 Ill. App. 3d 475, 479).

The search for an alternative to the lodestar requires no deep-thinking conceptualizers because it already surrounds us -- indeed it is the engine which powers most of society's risky litigation, i.e. the contingent fee agreement. The public generally, and those in the legal marketplace particularly, are familiar with and have accepted the concept of percentage contingency fee arrangements. From "1885 until 1973 fee awards granted pursuant to a common fund exception were computed as a percentage of the fund" (Camden I Condo Assoc. v Dunkle 946 F 2d 768, 771). Such arrangements are not viewed as the tawdy excesses of a profession's self-interest but rather as the commonplace compensation formula for lawyers who deliver a broad spectrum of today's legal services.

A reasonable fee in equity must represent the "market rate" for attorneys' services. (Beverly Bank v Board of Review 193 Ill. App. 3d 130, 138; Blum v Stenson 465 U.S. 886).

In determining the "market rate" it's appropriate to use a contingency fee as a benchmark. Indeed a contingency fee has a far greater claim to the "market" than could ever be made for the lodestar -- who has ever seen an American contract which set the fee by the lodestar/multiplier method??

In Kirchoff v Flynn (786 F.2d 320) the court ruled:

> "A court's objective is to find the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. When the prevailing method of compensating lawyers for similar services is the contingent fee, then the contingent fee is the market rate". (786 F 2d at 324)

The judge who arrives at a percent of recovery fee is engaged in no higher degree of mysticism than the judge who satisfies the lodestar by guessing his way through the time and labor component and then subjectively justifies his multiplier. Both must guard against avarice depleting the common fund, both must reward the attorney for excellence, both must be concerned with the credibility of the award and both must be perceived as having achieved a just result.

> "The judicial task might be simplified if the judge and the lawyers bent their efforts on finding out what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character. This was a contingent fee suit that yielded a recovery for the

> (Firemen's Fund) of ($6) million. 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 the Matter of Continental Illinois Securities Litigation 962 F 2d 566, 572).

As I have gone to pains to explain, this Court selects the percentage fee method not so that "the judicial task might be simplified" (Id) but because the lodestar is unworkable in this case. There is nothing in Justice Ryan's opinion in Leader v Cullerton 62 Ill. 2d 483) to warrant the conclusion that he was exorcising percentage fee awards out of Illinois law. On the contrary, he specifically acknowledges that "some situations may of necessity involve the use of a percentage computation" (Id at 489). This is one of those "situations". Percentage fees remain today as a simple, straight-forward, widely-utilized, easily-understood formula for compensating lawyers who, like Krislow here, take nothing unless they win. This is the case where the lodestar is "hardly suited" (Lurie 93 Ill. 2d 231, 239); where it cannot "intelligibly be applied" (City of Burlington v Dague U.S. Sup. Ct. 6/24/92 60 L.W. 4717, 4719) and where the percentage fee award is demonstrably preferable.

WHAT PERCENTAGE IS REASONABLE?

The Firemen's Fund is not prejudiced or otherwise disadvantaged by the Court's departure from the lodestar/multiplier method and its adoption of a percent of recovery calculation for attorneys' fees. This is not the traditional fee-from-a-common-fund case where the beneficiaries of the common fund are unrepresented, thus making it "incumbent upon the trial court to become the fiduciary for the funds' beneficiaries" (Purdy v Security S & L 727 F. Supp. 1266, 1269). Krislov's role change from the fiduciary who represented the class and created the common fund to a claimant against the common fund has not left him without an adversary. He had the City as an adversary throughout the case in chief, the appeal and the compound interest issue and now he has the Firemen Fund's lawyers as an adversary on the fee issue. Thus there is no need for the judge to "step in and play surrogate client" (In the Matter of Continental Illinois Securities Litigation 962 F 2d at 572) or to force the square lodestar peg into the circular facts of this case.

Krislov is entitled to the fee he would have received had he "handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client" (Id). In simulating the legal marketplace for a case such as this the Court is aided by its knowledge that the fee range is between 33% and 50% in personal-injury suits, always above 35% in condemnation

matters, regularly at 50% for litigating patent infringement claims and between 25% and 50% for collection matters. (Murdy v Edgar 103 Ill. 2d 384, 394 "court may take judicial notice of matters which are commonly known"). These are not the "artificial markets" that the Supreme Court recently found suspect for fee-setting purposes. (City of Burlington v Dague U.S. Sup. Ct. 6/24/92 60 L.W. 4717, 4719).

Those courts which have squarely addressed the question are in agreement that the "benchmark" percentage for a common fund fee award should be 25%; with a low range of 20% (Paul, Johnson, Alston & Hunt v Graultz 886 F 2d 268, 272) and "an upper limit of 50% of the fund" (Camden I Condo. Assoc. v Dunkle 946 F. 2d 768, 774). The standard for a reasonable fee is that it be such as would "attract competent counsel" (Delaware Valley II 483 U.S. 711, 737). It would defy reality to suggest that any lawyer would take-on a case such as this with its array of foreseeable obstacles for less than one-third of the recovery:

1) a suit against the City of Chicago challenging its revenue collecting or disbursement procedures is virtually guaranteed to require a "career" commitment. In addition to the subject case, see also Kinzer v City of Chicago 128 Ill. 2d 437 and Niles v City of Chicago 201 Ill. App. 3d 651 both of which are a decade old and "still going, and going, and going".

2) a suit where the necessary but inflammatory "breach of trust" allegations will make settlement impossible.

3) a suit where development of the facts requires identification and tracing of the movement of funds on a daily basis within the labyrinth of City accounts and the calculation, over many years, of the time delay between receipt and actual payment into four separate Funds.

4) a suit where the Funds on whose behalf the action is brought withhold both pro forma support and superficial encouragement.

5) a suit when the necessary accountants, auditors and number-crunchers will not defer billing until after judgment.

"The percentage basis method is grounded in tradition" (Paul, Johnson, Alston & Hunt v Graultz 886 F. 2d 268, 272) and when the "market" acknowledges that 33 1/3 percent is the "prevailing" rate for a contingent undertaking the courts do not hesitate to affirm (Bandura v Orken 865 F. 2d 816, 823).

A society which deals uncritically with 33 1/3 percent fee awards from the results of risky and uncertain litigation will have no difficulty in accepting such a rate where the total fees (i.e. today's fees added to the fee settlement with the other three Funds) will approximate 13%. (Brown v Phillips Petroleum 838 F 2d 451, 455 "cases demonstrate that 16.5% is clearly within the range deemed reasonable"). Nor can the Firemen's Fund be heard to protest that the other Funds (Municipal Employees, Laborers, Police), which settled the fee issue, paid proportionally less.

The Firemen's Fund's brief reminds the court that Krislov has already been paid handsomely ($2.2 million) for his efforts by reason of the fee settlement he worked-out with the other three funds. The notion that the fee due from the Firemen's Fund, after an adversary blood-letting, should somehow be correlated to what Krislov accepted after negotiations with three other funds more than two years ago a pure whimsy.

That earlier settlement stands only as evidence that Krislov has always been ready to compromise his claims. Those hassle-free dollars and the percentage they bear to the total benefit achieved are irrelevant to the "market value" of Krislov's efforts or to any judicial determination of a "reasonable" fee. The Firemen's Fund cannot sit on the sidelines, watch the other three funds haggle and bargain Krislov down and then use that result as some kind of exposure-ceiling while they challenge and litigate every other component of the fee. As in poker, the Firemen's Fund can only play its own hand; the fact that others have folded merely narrows the game but does not change the rules.

Equally unwarranted, for purposes of fee entitlement, is the Firemen's Fund's contention that this Court is somehow bound by the 14.96% which the four Funds agreed among themselves was the Firemen's Fund's entitlement to any benefit conferred. How the Funds decide to cut-up their windfall, of course, has no application to the issue of fees and the fact

that three of the four Funds have settled this issue negates any need to factor-in proportionality among the Funds.

The rule of proportionality between the fee and the award is discussed extensively in Riverside, Calif. v Rivera (477 U.S. 561) and rejected in all situations by four justices (See also Di Filippo v Morizio 759 F. 2d 231; Cowan v Prudential Ins. Co. CA 2 6/12/91 60 L.W. 2002). If, however, proportionality were to be given utility in this fee-setting undertaking (and the Firemen's Fund expert apparently believes it should) it is useful in demonstrating that the $2.2 million fee received heretofore is a modest 6.8% of the total $32 million benefit conferred.

A 33 1/3 percent fee (i.e. $1,993,742.35) from the $5,981,227.05 benefit conferred on the Firemen's Fund is warranted and well within the range established both by caselaw and local custom. For comparative purposes only, this result approximates the following lodestar/multiplier calculations: 5000 hours (no credit for Mr. Cusak and 10% time disallowance) x $175.00 rate (as proposed by the Firemen's Fund expert p 37 & 38) x a 2.1 multiplier. Each of these components is amply supported by this record. With such an award for "excellent results" (Hensley v Eckerhart 461 U.S. 424, 435) on behalf of a class of over 82,000 fund members, Krislov's total fee becomes knowable ($4,193,742.35) and by every standard that total sum

is not extravagant -- it is a modest 13% of his $32 million victory.

FEES MUST RELATE TO BENEFIT

The wildly divergent and subjective fee possibilities which can be justified by applying the Illinois authorities, ridiculed at pages 16, 17 & 18 above, is sufficient cause for a trial court to seek a more rational approach. The Federal caselaw authority on the subject of fees from a common fund is vast, enlightening and still developing. The Illinois Supreme Court did not discover the lodestar; it merely adopted it from federal jurisprudence (Lindy Brothers Builders v American Radiator 487 F. 2d 161). The Lindy case was already five years old before Fiorito brought Illinois under its influence. In the years since Fiorito, while Illinois has walked lockstep in lodestar's footprints, the federal courts have recognized lodestar's severe limitations, its oft-times unworkable analysis and the vast "second level" of litigation it has generated. The Third Circuit's Task Force Report recommends "that district courts.....should attempt to establish a percentage fee" (108 FRD 237, 246-9) so as to "avoid the deficiencies of the (lodestar) process" (Id at 256). Other federal circuits have cited the Task Force Report with approval and have adopted its findings in common fund cases. In

contrast, the Illinois Supreme Court has not revisited the issue for fourteen years.

In a unified court-system the law need not always flow down from courts of appellate review. Indeed, when warranted the trial court is duty bound to exercise initiative, explore innovation and articulate a new direction (People ex rel Hartigan v ICC 148 Ill. 2d 348, 404 "the circuit court laid the groundwork for the type of equitable refund which we later validated"). It is the trial court's superior vantage point which justifies the deference accorded to its fact-finding responsibilities (In Re Clarence T.B. 215 Ill. App. 3d 85, 100) So also, when the trial court is called upon to apply a formula conceived in the sterile laboratory of appellate review, the judge, operating in the real-world, must be free to demonstrate its shortcomings and advocate change. The system must be open and receptive to his experiences and frustrations in trying to work his way through a formula demonstrably unworkable.

In common-fund cases it is the "benefit conferred" by the lawyer and not the hours he spent which should primarily drive the fee-setting mechanism -- "the monetary results achieved predominate over all other criteria" (Camden I Condo Assoc. v Dunkle 946 F. 2d 768, 771). Common fund cases are always contingent so there can never be a fee without a benefit -- the lawyers know that going-in.

If the benefit to the unrepresented class is great it should be of secondary consideration whether it was produced as a result of weeks, months or years of legal effort. If the benefit is great it should be irrelevant whether the lawyer is experienced and highly regarded locally or one whose rate of compensation reflects his/her recent law school graduation. If the benefit is great the task of indexing hours spent on research, conferences, drafting and court appearances is mere busy-work because no one cares -- especially the class members, none of whom took the initiative for themselves and all of whom have reaped that which otherwise would never have come their way.

On the other hand, if the "benefit conferred" is small then that disappointing result should similarly dictate the attorneys' fee potential regardless of the time spent or degree of difficulty involved in generating the result. A court whose focus is on the benefit conferred is far better positioned to address the fee issue in those cases where the class recovery is in terms of cents-off-coupons redeemable at the grocery store or other token, non-monetary recoveries.

In the result-oriented world of class actions and common fund litigation the lawyer who wins-nothing gets nothing, and no one sheds a tear about his hours, rate, contingency factor or selfless advocacy of the claims of others. So also when the lawyer's victory is measurable in terms of a token recovery it

should win for him a return commensurate with the benefit bestowed and not one related to the time and effort devoted to generating that inconsequential outcome. The elephant who gives birth to an ant has little to trumpet about and most will agree that both the courts and the profession are made to look foolish and self-serving when the class members get coupons and the lawyer gets rich. A meaningless class benefit which is rewarded with a paltry fee will send a clear message that some suits ought not be litigated (In Re Hotel Telephone Charges 500 F. 2d 86, 91); such a therapeutic result is unattainable from the hours-times-rate formula of lodestar.

FUTURE BENEFITS DISALLOWED

It may be open to debate as to whether Krislov's legal advocacy was dazzling or dull; whether his hours are extravagant or modest; whether his 1983 rate, his 1991 rate or some blended rate should be applied; whether the issues in the case were complex or simple, but it is not open to debate that the benefactors of his labor have been enriched by $32 million and that the Firemen's Fund has $6 million it otherwise would never have seen.

This is the measure of the benefit with which we are dealing for purposes of this fee petition. Krislov argues that his victory has embedded long-range and favorable monetary consequences for each of the Funds and that those consequences can be calculated and should be rewarded as "future" benefits.

Exhibit E to the Fee Petition calculates the present value of future benefits at an additional $42.6 million.

It is true that

1) Every wrong that is righted has a ripple effect for good into the future.

2) Every money-fetching scam that is halted buys time until another is perpetrated.

3) Every fiduciary whose loyalty is rehabilitated serves thereafter with heightened fidelity.

4) Every dollar not misappropriated today has theoretical earning power in perpetuity.

These are but some of the intangible "future benefits" a litigation victory may generate, but these "feel good, be happy" consequences are not the stuff out of which attorney's fees may be drawn. Nor is the fact that the City's play of the float would likely have continued for additional years cause to add an enhancer to a benefit now defined by hard cash. The "future benefit" component proposed in the Fee Petition is denied.

PUNITIVE AWARD AGAINST THE CITY DISALLOWED

Notwithstanding the hostile position which the Firemen's Fund has taken as to his Fee Petition, Krislov nonetheless demonstrates his continuing fidelity to the Fund's best interest by petitioning for a "breach of fiduciary duty" award of not less than $455,000 against the City of Chicago. If such

an award were to be granted to the Fund it would serve as a set-off against the Fund's fee obligation to Krislov. It is telling to note that the Firemen's Fund's brief does not join or adopt Krislov's pursuit of such an award against the City. Apparently the Fund cannot bring itself to join Krislov even when the Fund itself would be the beneficiary.

As discussed earlier, the City not only held the Funds' money but invested it for its own benefit. Under customary trust law such a self-serving breach of duty would clearly warrant judicial removal of the trustee. However, the City's status as trustee is imposed by statute and thus customary sanctions/safeguards are unavailable.

A breach of trust award here would be without a statutory predicate and would assume all of the indicia of punitive damages because caselaw makes clear that "attorney's fees cannot be awarded as a separate entity distinct from punitive damages". (Glass v Burkett 64 Ill. App. 3d 676, 683) The City, of course, has immunity from punitive damages (Ill. Rev. Stat. Ch. 85 Para. 2-102) and therefore, at oral argument, Krislov characterized this as a "surcharge" necessary to achieve the goal of full restitution and not a penalty of any kind. The goal of full restitution has been satisfied by this Court's October 31, 1991 Order which granted the Fund all of the dollars it could have earned rather than merely the dollars the City had in fact earned. Any further amount would clearly

be a penalty. (George v CTA 58 Ill. App. 3d 692, 693) This element of the Fee Petition is denied.

FEES AGAINST THE OTHER THREE FUNDS

Krislov has petitioned for $286,229.00 against the Municipal Employees, Laborers and Police Pension funds ("the other three Funds") for services performed on their behalf subsequent to the $2.2 million attorney's fee settlement.

The settlement (November 30, 1990) was part of a larger stipulation whereby the City and the other three funds resolved pending issues in exchange for $10,383,122.60; which, of course, was in addition to the $19,324,131.38 judgment of February 15, 1989. In that Stipulation Krislov agreed "not to petition for any additional attorney's fee against the settling funds for work performed in this case prior to May 22, 1990" (Stipulation p 5 para (b)).

As a common fund case all of Krislov's fees must be drawn from funds "brought into the court" through counsel's efforts. (Hamer v Kirk 64 Ill. 2d 434). There is no evidence, nor even a claim, that any additional funds have been brought into court for the benefit of the other three Funds subsequent to May 22, 1990. The stipulation did not convert Krislov's status into an hourly-rate attorney whose "efforts" were to be reimbursed regardless of whether or not they generated more "benefit".

The petition for fees against the Municipal Employees, Laborers and Police Pension Funds is denied.

FIREMEN'S FUND'S RESPONSE

In addition to a full briefing schedule, the parties stipulated on November 30, 1992 to present the testimony of their respective experts by affidavit and/or deposition transcripts and to argue their positions orally on the hearing date. I have reviewed the material submitted, acknowledge that some of the deposition testimony would not be admissible and rely on the established rule that a judge acting without a jury is presumed to consider only competent and relevant evidence. (People v Puhl 211 Ill. App. 3d 457, 472; People v Robinson 197 Ill. App. 3d 1012, 1016).

The Firemen's Fund's response to the fee petition, and the affidavit and deposition testimony of its fee expert, posits as its initial premise that Krislov is entitled to no fee whatsoever. Having lost the "no common fund" argument years ago before Judge Shields and having heard this court declare repeatedly that there would be a fee award it is hard to view this position as anything but a "for the record" tongue in cheek exercise.

Alternatively, the Fund argues that if a fee is to be awarded to Krislov it should not exceed $163,616.72. The Fund's expert acknowledges that 3683 hours were of benefit to the Firemen's Fund (Affidavit p 26 & 41) which, given the fee proposed, would calculate out to a rate of $44.42 per hour.

Such a figure may speak eloquently as to the Fund's lack of regard for Krislov but it has no foundation in reality.

The Fund continues its flight of fantasy by ignoring the $3.1 million compound interest awarded herein by earlier order. Instead it limits its focus "to the $2.8 million the Firemen's Fund actually received" (Response p 16 & Affidavit p 20). Such a position is entirely inconsistent with the Fund's earlier opposition to the City's motion to certify the compound interest award order. The avoidance of piecemeal appeals was the express basis for that Rule 304 (a) denial; consistent therewith the compound interest benefit of $3.1 million must be considered within the scope of this attorneys fee exercise.

The affidavit of the Firemen's Fund's fee expert is greatly impeached by reason of his own fee petitions in other cases. In those filings, and in his deposition testimony regarding the same, it can be seen that he engages in all or most of the practices for which he now faults Krislov and has made argument to the court which is diametrically opposed to the legal guidance he purports to give herein. The expert's affidavit and testimony is entitled to scant weight.

This not to say that there is no redeeming value to be found in the firemen's Fund's response. On the contrary, the fee expert's 46 page affidavit graphically demonstrates all of the lodestar flaws I have tried to expose herein -- its total dependence on second guessing, hindsight, quirky logic,

condescension and subjectivity. It makes clear that the lodestar is really a UFO -- completely untrackable and credible only in the eyes of those with a lively imagination.

CONCLUSION

Prior to 1974 (Flynn v Kucharski 59 Ill. 2d 61) Illinois courts "had customarily adopted the practice of considering the fee as a percentage of the amount recovered" (Leader v Cullerton 62 Ill. 2d 483, 488). In 1978 Illinois was brought into the lodestar camp by reason of the Fiorito holdings (72 Ill. 2d 73). A simple reading of those cases make clear that the change from percentage fees to lodestar fees was not the product of our Supreme Court's scholarly analysis, innovation or legal trail-blazing but rather the result of aping that which was going-on in the federal system. (Fiorito v Jones 72 Ill. 2d at 89)

The Federal jurisprudence of common fund attorneys' fees began in 1885 (Central Railroad v Pettur 113 U.S. 116, 127-8) and for the next eighty-eight years such fees were set by the percentage of recovery method. In 1973 the lodestar was first adopted in Lindy I (487 F 2d 161, 167-8).

> "the U.S. Supreme Court has never formally adopted or authorized the Lindy lodestar in the context of a common fund fee award. Indeed every Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund basis

(citations)". (Camden I Condo. Assoc. 946 F 2d 768, 773)

For our purposes, it is critical to understand that the Lindy lodestar was the product of the Third Circuit Court of Appeals and that a Task Force of that same Third Circuit, twelve-years later (1985), specifically and emphatically rejected the lodestar in common fund cases. That Report (108 FRD 237) fully exposed the great distinction between policies and rationale supporting common fund fee awards versus statutory fee-shifting awards. It concluded by finding that the lodestar approach was not suited to common fund cases and recommended a return to the percentage of award method (108 FRD 259). Thus, except for twelve-years, percentage fee awards have been the law of the land since 1885. (Blum v Stenson 465 U.S. 886, 900 N 16).

When the author disavows the legitimacy of his own work and confesses error it is patently absurd for the bystander to pay it any further allegiance. Illinois has no reason to continue its adherence to lodestar, no blame to shoulder, no pride of authorship to defend, no apology for an experiment gone sour, no justification to delay a return to the fee-setting process utilized in this State for all but the last twelve-years of our history. Illinois should belatedly follow its own precedent which demonstrates clearly that in this area of the law we have always followed the federal rule; today at

the federal level "the tendency (is) to jettison the lodestar" (Weinberger v Great Northern 925 F 2d 518, 526 n 10).

"It is not the function of judges in fee litigation to determine the equivalent of the medieval just price". (In the Matter of Continental Illinois Securities Litigation 962 F 2d at 568) Even in its purest form fee-setting can never be seen as anything but a subjective evaluation -- it is a "succession of necessarily judgmental decisions" (Evans v Jeff D. 475 U.S. 717, 736). It does not advance the integrity of the Court to engage in a time-consuming lodestar charade which portends objectivity and slide-rule precision when everyone knows that it is merely an exercise in sophistry.

"This Court can no longer ignore the fact that Illinois is currently out of step with the majority" (Alvis v Rebar 85 Ill. 2d 1, 24) nor accept the caprice that the tenets of stare decisis are so rigid as to incapacitate a court in its duty to define the law. (Molitor v Kaneland Community 18 Ill. 2d 11, 26)

For all of the reasons stated above:

IT IS HEREBY ORDERED:

1) That portion of this Court's September 25, 1992 Order relating to a disallowance of hours attributable to the pursuit of fees is Vacated.

2) Judgment is entered on the Petition for Attorneys' Fees in favor of the petitioner Clinton A. Krislov and against the Firemen's Annuity and Benefit Fund in the amount of $1,993,742.35.

3) Petitioner's prayer for reimbursement of the costs and expenses of the litigation is Granted. Judgment is entered against the Firemen's Annuity and Benefit Fund in the amount of $26,793.56.

4) Petitioner's prayer for an award of fees attributable to the "present value of future benefits" is Denied.

5) Petitioner's prayer for a "breach of fiduciary duty" penalty award against the City of Chicago and in favor of the Firemen's Fund is Denied.

6) Petitioner's prayer for attorneys' fees for post May 21, 1990 services to the Police Annuity & Benefit Fund, the Municipal Employees Annuity & Benefit Fund and the Laborers Annuity & Benefit Fund is Denied.

7) Petitioner's prayer for interest on the fee award and additional incentive awards to the plaintiffs based on the earlier settlement with the Police, Municipal and Laborer Funds is Denied.

8) There is no just cause or reason to delay the enforcement or appeal of this Order.

ENTERED
DEC 14 1992
R. CURRY 108

ENTER: Richard Curry
JUDGE
12/14/92