

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

MYRNA ZIDEK,)	
successor to DR. DENNIS ZIDEK,)	
and DR. WILLIAM P. GRESS,)	
on behalf of plaintiffs and)	
the class members defined herein,)	
)	
Plaintiffs,)	13 C 7742
)	
v.)	Judge Leinenweber
)	
ANALGESIC HEALTHCARE, INC.,)	
and JOHN DOES 1-10,)	
)	
Defendants.)	

PETITION FOR ATTORNEY’S FEES

Pursuant to the parties’ settlement agreement in this case, Class Counsel respectfully requests approval of payment of attorney’s fees of \$179,195.03, which represents 1/3 of the Settlement Fund less notice and administrative expenses (\$550,000 (Settlement Fund) - \$12,414.90¹ (Notice and Administrative Expenses) = \$537,585.10 x 1/3 = \$179,195.03). Counsel for Plaintiffs, Myrna Zidek, successor to Dr. Dennis Zidek, and Dr. William P. Gress, includes experienced class action attorneys, all of whom contributed their skills and expended their resources in a coordinated effort that resulted in the settlement of this matter.

I. THE ATTORNEY’S FEES ARE REASONABLE.

The Seventh Circuit has specifically authorized the district courts to award attorney’s

¹ The Settlement Agreement provided that notice and administrative expenses are not to exceed \$20,000. The notice and administrative expenses in this case are \$12,414.90. (*Dkt. No.* 85)

fees using the lodestar method or the percentage of fund method. *Cook v. Niedert*, 142 F.3d 1004, 1010 (7th Cir. 1998); *In re Synthroid Mktg. Litig.*, 264 F.3d 712 (7th Cir. 2001);

Americana Art

China Co., Inc. v. Foxfire Printing and Packaging, Inc., 743 F.3d 243, 247 (7th Cir. 2014)(quoting *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994), “[W]e are of the opinion that both the lodestar approach and the percentage approach may be appropriate in determining attorney’s fee awards, depending on the circumstances. . . . [T]he decision whether to use a percentage method or a lodestar method remains in the discretion of the district court.”). While a district court may use the lodestar method, the percentage of recovery method, or some combination of the two, *Florin v. Nationsbank of Georgia, N.A.*, 60 F.3d 1245, 1247 n. 2 (7th Cir. 1995) “[t]he approach favored in the Seventh Circuit is to compute attorney’s fees as a percentage of the benefit conferred upon the class especially where the percentage accurately reflects the market.” *In re Kentucky Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 280 F.R.D. 364, 379 (N.D. Ill. 2011) (“*Kentucky Chicken*”) (internal quotations omitted) (holding that a fee request which represented approximately 32.7% of the fund created by the settlement was both “reasonable” and “arguably below the norm” of market rate for contingency fee cases of 33 1/3-40% plus the cost of litigation). “Where the market for legal services in a class action is only for contingency fee agreements, and there is a substantial risk of nonpayment for the attorneys, the normal rate of compensation in the market” is “33.33% of the common fund recovered.” *Kentucky Chicken*, 280 F.R.D. at 381 (Internal quotation omitted), is consistent with the 33.33% that Class Counsel is seeking here.

A. The Common Fund Method.

It has been well established in the Seventh Circuit, and elsewhere, that fee awards based upon a percentage of a recovery are fair and reflect what could have been contracted for in the marketplace. Consumer protection cases, where counsel is retained on a contingent fee basis, are certainly no different. It is well established that when a representative party has created a “common fund” for, or has conferred a “substantial benefit” upon, an identifiable class, counsel for that party is entitled to an award of attorneys’ fees from the fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *In re: Synthroid Marketing Litigation*, 264 F.3d 712, 717 (7th Cir. 2001). When deciding on appropriate attorney compensation in a common-fund case, a court must endeavor to award “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 at 718.

The Seventh Circuit in *Synthroid* explained that determination of the market rate for the legal fees should be based in part on the following factors:

The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case.

Id. at 721.

Plaintiffs’ counsel took this case on a contingent fee basis over 1 ½ years ago, and thus was faced with a significant risk of non-payment. A fee request of 1/3 of the Settlement Fund less notice and administrative expenses is also consistent with the marketplace. The market rate for contingent fees in consumer cases such as this is in the 25% to 40% range, depending on various facts and circumstances. *Gaskill v. Gordon*, 942 F. Supp. 382 (N.D. Ill. 1996), *aff’d*, 160

F.3d 361 (7th Cir. 1998) (38% awarded); *Spicer v. Board of Options Exchange*, 844 F. Supp. 1226 (N.D. Ill. 1993) (29% awarded); *Family L.P. v. Price Waterhouse LLP*, 2001 WL 1568856 (N.D. Ill. 2001) (33 1/3 % awarded); *Gilbert v. First Alert, Inc.*, 1998 WL 14206 (N.D. Ill. 1998); (30% awarded); *Goldsmith v. Technology Solutions Co.*, 1995 U.S. Dist. LEXIS 15093 (N.D. Ill. 1995) (33 1/3 % awarded); *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399 (7th Cir. 2000) (25% awarded).

Under the common fund approach, “the district court must consider how much compensation class counsel should receive for incurring the risk of nonpayment when it took the suit.” *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994). This case was prosecuted by Plaintiffs’ counsel on a contingent fee basis with no assurance of any fee. Numerous cases recognize that the contingent fee risk is an important factor in determining the fee award. *See In re Continental Illinois Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992) (holding that when a common fund case has been prosecuted on a contingent basis, plaintiff’s counsel must be compensated adequately for the risk of non-payment); *Ressler v. Jacobsen*, 149 F.R.D. 651, 654 (M.D. Fla. 1992) (“Numerous cases recognize that the attorney’s contingent fee risk is an important factor in determining the fee award.”).

Class Counsel filed a well researched complaint, which was subsequently amended, alleging claims for relief under federal and state law. Class Counsel successfully opposed a motion to dismiss by defendant Analgesic Healthcare, Inc. The parties conducted discovery, and engaged in settlement meetings both in person and telephonically, which ultimately resulted in this settlement. At the time of the settlement, the parties’ respective theories of the case were known and well-developed. Settlement Class Members who submit valid claims may expect to recover a pro rata

share of the Distributable Settlement Fund per unique fax number. No Settlement Class Member will receive payment for more than 20 facsimiles. This degree of success has been acknowledged by this Court in its preliminary approval of the settlement. In light of the work performed in this matter, Class Counsel's request for \$179,195.03, which represents 1/3 of the Settlement Fund, less notice and administrative expenses, is reasonable.

Due to the fact that Class Counsel's compensation is entirely contingent, the fees being requested are within the typical market range in such contingency fee cases, the risk counsel faced recovering on the claims alleged, and the substantial recovery negotiated for the class, the Court should award the \$179,195.03 attorney's fees requested from the Settlement Fund.

II. CONCLUSION.

For all the reasons set forth above, Class Counsel respectfully requests that this Court grant the fee petition at the time of final approval of the class action settlement.

Respectfully submitted,

s/ Heather Kolbus
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CERTIFICATE OF SERVICE

I, Heather Kolbus, certify that on May 15, 2015, I caused a true and accurate copy of the foregoing document to be filed via the Court's CM/ECF system, which will cause notification of such filing to be served upon the following:

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In addition, I certify that on May 15, 2015, I caused a true and accurate copy of the foregoing document to be served, via email and US Mail, on the following parties:

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