

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

MARVIN FIELDER, DEBORAH)
WILLIAMS, LUCY HENDERSON,)
JEROME HENDERSON, KIMBERLEY R.)
WILLIAMS, AND JERRY DAU,)
individually and on behalf of)
a class of similarly situated)
individuals,)
Plaintiffs,)
vs.)
CREDIT ACCEPTANCE CORPORATION, et al.,)
Defendants.)

Case No. CV96-24285

Division One



FILED CIRCUIT COURT
JACKSON CO. MO-NC
07 MAY 31 PM 2:45

**SUGGESTIONS IN SUPPORT OF MOTION FOR ORDER
CONDITIONALLY APPROVING ATTORNEY FEES AND LITIGATION EXPENSES**

I. INTRODUCTION

Missouri Supreme Court Rule 52.08 requires court approval of class action settlements and requires that notice of the proposed settlement be given to the class members. Accordingly, by separate motion, the parties have jointly requested that this Court enter an Order conditionally approving the Proposed Settlement and directing that notice of the settlement be sent to class members. The purpose of the instant "Motion For Order Conditionally Approving Attorney Fees And Litigation Expenses Suggestions" is to request that the Court similarly give its preliminary approval to class counsel's motion for an award of fees and litigation expenses. Class counsel consist of the law firms of Slough, Connealy, Irwin & Madden, LLC, 1627 Main Street, Suite 900, Kansas City, Missouri, 64108, and The Brown Law Firm, 4350 Shawnee Mission Parkway, Suite 250, Fairway, Kansas 66205-2513. The Settlement Agreement provides that class counsel may petition for payment of their fees, as well as reimbursement of litigation costs.

Through this motion, class counsel seek conditional approval of an award of attorney fees of a total of six million dollars (\$6,000,000.00) from the Settlement Fund, which fee amount

would be under 30% -- probably far under 30% -- of the realistic value of the financial benefit obtained for the classes through class counsel's efforts, as explained below. Class counsel also seek conditional approval for payment from the Settlement Fund of their litigation costs. As of April 16, 2007, class counsel's costs total slightly in excess of \$25,000. The litigation expenses include travel and deposition costs, court costs, copying costs, and other costs incidental to the litigation. Summaries and partial itemizations of these costs are included in the Affidavits of Dale K. Irwin and Bernard E. Brown, attached as Exhibits A and B, respectively. Litigation expenses may increase slightly between now and the final hearing; therefore, at the time of the final hearing class counsel will request the then-current costs in addition to costs that will be incurred in finalizing the class settlement and distribution of all payments.

II. PROCEDURAL BACKGROUND AND LITIGATION SUMMARY

The lengthy and contentious history of this litigation is set out in detail in the Suggestions in Support of the Parties' Joint Motion for Order Conditionally Approving Class Settlement and Setting Hearing for Final Approval of Class Settlement. That history need not be repeated here. Class counsel will, however, supplement it here with references to certain matters that highlight the complex nature and attendant risk they faced in undertaking this litigation.

This case had its genesis in a lawsuit Credit Acceptance Corporation ("CAC") filed on June 21, 1996, against Marvin Fielder and Deborah Williams ("Fielder/Williams") following CAC's repossession and sale of their car.¹ Fielder/Williams retained the undersigned counsel to defend them. Upon discovering what appeared to be overcharges for official fees and interest in apparent violation of various consumer protection laws, both on the face of the Fielder/Williams' installment purchase contract and in CAC's notice of sale following the repossession, counsel

¹ Credit Acceptance Corporation v. Marvin Fielder, et al., No 16CV96-14729, Circuit Court of Jackson County, Missouri, Associate Circuit Division.

moved for leave to file a class action counterclaim. Before that motion was ruled, CAC dismissed its deficiency suit.

Fielder/Williams then, on October 15, 1996, filed this class action against CAC, both on their own behalf and on behalf of all other similarly situated CAC debtors. CAC removed the matter to federal court on November 25, 1996. The case was heavily litigated there, resulting in five published decisions, including one certifying it as a class action,² another denying CAC's motion seeking dismissal and summary judgment,³ and another awarding partial summary judgment to the plaintiffs.⁴ The latter decision was reversed on jurisdictional grounds,⁵ resulting in a remand to this Court following disposal of the remaining federal claim.⁶

The amount of time expended by class counsel through April 16, 2007, is in excess of 6,000 hours, the decided majority of which was expended an average of approximately ten years ago, between 1996 and 1998. At the outset, prior to filing suit, class counsel performed months of due diligence. Class counsel met with Marvin Fielder and Deborah Williams and examined their documents and CAC's pleadings in its suit against them, searched through court files of other CAC cases against debtors, performed legal research and researched CAC's status, through the use of financial and corporate profiles, review of SEC records and state agency records and other investigative measures. With the knowledge obtained from this extensive due diligence, class counsel crafted the Petition, performed extensive research, checked facts, and met with Mr.

² *Fielder v. Credit Acceptance Corporation*, 175 F.R.D. 313 (W.D.Mo. 1997).

³ *Fielder v. Credit Acceptance Corporation*, 10 F.Supp.2d 1101 (W.D.Mo. 1998).

⁴ *Fielder v. Credit Acceptance Corporation*, 19 F.Supp.2d 966 (W.D.Mo. 1998).

⁵ *Fielder v. Credit Acceptance Corporation*, 188 F.3d 1021 (8th Cir. 1999).

⁶ *Fielder v. Credit Acceptance Corp.*, 98 F.Supp.2d 1104 (W.D.Mo. May 25, 2000).

Fielder and Ms. Williams to review the allegations in the Petition, to obtain their input and approval, and to prepare for the litigation. This due diligence provided a solid foundation for prosecuting the classes' claims.

Claims were initially asserted against CAC for "official fee" overcharges in its car finance contracts and for interest overcharges. After initial discovery claims were added relating to failure to send adequate and proper notices of sale following repossession of its debtors' cars. These claims were advanced under multiple legal theories. Plaintiffs claimed, *inter alia*, that CAC had violated several Missouri consumer protection statutes, among them the Motor Vehicle Time Sales Act, §§ 365.010 RSMo *et seq.*; the Merchandising Practices Act, §§ 407.010 RSMo *et seq.*; the statutes governing defaults concerning consumer contracts, §§ 409.551 RSMo *et seq.*; and the post-repossession pre-sale notice requirements of the Uniform Commercial Code, §§ 400.9 RSMo *et seq.* The remedies sought were varied and in some respects novel, including class-wide relief from thousands of default judgments CAC had already obtained against class members. CAC's first response to the suit when it was filed in this Court was to promptly remove the case to federal court. CAC then staunchly opposed the plaintiffs' lawsuit every step of the way. Such is obvious from the voluminous record of the federal court proceedings filed with this Court following remand.

Over the course of the litigation, plaintiffs served multiple sets of interrogatories and document production requests on CAC. Counsel for plaintiffs, on multiple occasions, traveled to Southfield, Michigan, where CAC is headquartered. Counsel combed through boxes of records there and took the depositions of several key CAC clerical and management personnel. Plaintiffs' counsel also took the deposition of CAC's local collection attorney in Kansas City and examined many boxes of collection suit records from courts around the state that were produced

by CAC. Plaintiffs sought through this discovery to obtain the necessary information to put documents in context and characterize and elucidate CAC's procedures, policies and course of conduct relevant to class certification and to the class members' claims. Counsel have accordingly gone through and analyzed many thousands of documents in pursuit of the class members' claims. This process included such complexity that class counsel's efforts included the construction of a relational database program specifically for the analysis of these documents. There were numerous heated battles over discovery throughout the course of the case and plaintiffs obtained discovery in many instances only after responses were ordered by the court.

As a result of the plaintiffs' persistence, and armed with the knowledge provided by the beginnings of this lengthy discovery process, plaintiffs were able to successfully pursue class certification and partial summary judgment in the federal trial court. When the summary judgment ruling was subsequently reversed on jurisdictional grounds, the Eighth Circuit ordered the case back to this Court. In doing so, the Eighth Circuit took specific note of the district court's recognition "that it was addressing many complex substantive and remedial issues of first impression". Significantly, the Eighth Circuit of its own accord recognized that this case involves "novel, complex, and important issues of state law". *Fielder v. Credit Acceptance Corporation*, 188 F.3d 1021, 1037-8 (8th Cir. 1999). It also opined that the effort expended in the case in federal court would "no doubt be usable" in state court. *Id.* at 1038.

Following remand to this Court, plaintiffs filed their Fourth Amended Petition, survived CAC's motion to dismiss it, and overcame CAC's attempts to block the case from going forward as a class action. After this Court ruled on class certification on November 16, 2005, and issued an order on the contents of the class notice the following May, CAC sought to appeal the class

certification issue to the Missouri Court of Appeals, Western District. After thorough briefing by the parties, permission to appeal was denied by that Court on August 31, 2006.⁷

During the course of this litigation, class counsel have maintained contact with the class representatives.⁸ The class representatives have had to aid class counsel in establishing the facts of their individual transactions with CAC and have had to submit to depositions by CAC, with class counsel preparing them for, and then defending them at, the depositions. The class representatives have remained in contact with class counsel to stay abreast of the proceedings. In addition to contact with the class representatives, class counsel have had ongoing contact with numerous putative class members in counsel's continuing efforts to monitor CAC's collection practices. Class counsel have also been contacted by many putative class members whose attempts to finance home purchases were being blocked by adverse CAC account information on their credit reports. In such instances, class counsel contacted counsel for CAC, resulting in removal of the adverse matter from the person's credit report an enabling her to go forward toward purchasing a home.

Class counsel also attempted multiple times to settle this case with efforts ranging from mediations to protracted correspondence and conversations. An unsuccessful mediation was held by Kent Snapp of the federal court's Early Assessment Program on July 10, 1997. Another mediation, presided over by former federal court magistrate judge Richard Ralston in January of 1998, resulted in no settlement. Additional settlement efforts continued in later months in 1998. Ultimately, following multiple meetings and teleconferences with Judge Russell in the fall of 2006, the parties were able to reach agreement in post-mediation discussions leading to

⁷ *Marvin Fielder, et al. v Credit Acceptance Corporation*, No. WD67001.

⁸ With the exception of plaintiff Kimberley Williams, who has not been heard from for some time.

execution of the Memorandum of Understanding, setting forth the terms of the proposed settlement currently under consideration by the Court.

During the course of the litigation, class counsel regularly monitored CAC's financial filings with the SEC and tracked CAC's stock price. The stock was trading in the mid-twenties at the outset of the litigation. However, at one point in late 1999 to early 2000, it dropped into the low single digits. Also during this litigation CAC was the target of a securities class action in Michigan and two other consumer protection class actions, one in Connecticut and the other in California. In short, class counsel undertook a substantial risk of time and resources on behalf of the classes, pursuing largely untested, complex and novel legal theories, involving issues of first impression, against an entity whose solvency was by no means assured, so far as class counsel were concerned.

As the ultimate result of class counsel's efforts to this point in the case, class counsel have successfully negotiated a settlement which they believe is fair, reasonable and adequate, and in the best interests of the Class Members. Class counsel expect to spend a large amount of additional time participating in and overseeing the administration of this case through its conclusion, preparing for and handling the final approval hearing, speaking to class members who contact class counsel after Notice is sent, and possibly gearing up for and addressing objections or other problems. Class counsel now request preliminary approval of their fees and expenses.

III. CLASS COUNSEL'S FEE AND LITIGATION EXPENSE REQUEST.

The general rule is that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys fee from the fund as a whole." *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980). An award of attorney

fees is a matter within the circuit court's sound discretion. *In re Alcolac, Inc., Litigation*, 945 S.W.2d 459, 461 (Mo. App. W.D. 1997). An award of attorney's fees will not be disturbed on appeal absent a clear abuse of discretion, and will be reversed only "if it is so arbitrary or unreasonable that it indicates indifference or lack of proper judicial discretion." *Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175, 185 (Mo. App. W.D. 2002). "The circuit court is an expert on the question of attorney fees. Because the circuit court knows all of a case's issues, it may set a fee award without the aid of evidence." *Alcolac*, 945 S.W.2d at 462.

At this time, class counsel are requesting a percentage-of-the-fund fee award of under 30% of the realistic value of the financial benefit obtained for the classes, to be paid from the cash Settlement Fund. In common fund cases, attorney fees are generally awarded on a percentage of the fund basis. *Manual for Complex Litigation*, § 24.121 at 188 (3rd ed. 1985). Courts have approved the percentage-of-the-recovery methodology to evaluate attorneys' fees in a common-fund settlement. *In re U.S. Bancorp Litigation*, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving 36% fee award from common fund). Missouri courts have held that awarding fees in a class action suit calculated on a percentage-of-the-fund basis is proper. *Alcolac*, 945 S.W.2d at 461.

The financial benefits to the classes directly resulting from class counsel's work these past ten years, which collectively are the "fund" for purposes of calculation of a "percentage of the fund", include 1) the \$12,500,000 cash Settlement Fund; plus 2) the value of the outstanding indebtedness CAC is currently carrying on its books for the class members that is being written off as a result of this settlement; plus 3) the value of the write-offs/partial satisfactions that CAC posted on thousands of class members' accounts in the late 1990s in reaction to the federal court's rulings; plus 4) the value of the interest charges that would have accumulated by this time

on such previously written-off amounts; plus 5) the value of the interest savings on those same thousands of accounts for which CAC in the late 1990s wrote the post-maturity interest rate down typically from 23%. As stated in the Memorandum of Understanding, in paragraph 16:

CAC represents that, as a result of this Settlement, the total amount that would have been carried on CAC's books as either paid by or due and owing from the class members after the Effective Date would have been approximately \$39,000,000 greater than the total that will be carried on CAC's books as due from the class members after the Effective Date. CAC represents that over the course of this litigation, it has posted credits, settled and filed partial satisfaction of judgments to some class member accounts and that no calculation has been made, in connection with this settlement, to measure the positive financial impact these adjustments have had to the affected class members' accounts.

Accurate calculation of this additional "positive financial impact" on class members' accounts referenced by CAC from the combination of the late 1990s write-offs/partial satisfactions, plus the interest savings over the next nine years on those written-off amounts, plus the interest savings over the next nine years on those accounts because of the lowering of the interest rates, turns out to be a surprisingly complex matter. CAC did these write-offs/partial satisfactions and interest rate adjustments on several thousand accounts, and while the exact amounts of the write-offs and the exact interest rate adjustment on each of the accounts are not known to class counsel, they are known in general approximation and by the nature of the items written off. In addition, after the write-offs and interest rate adjustments, payments subsequently received by class members would increasingly have been credits toward payment of principal rather than interest, so that yet additional savings have accrued for class members because of the write-offs. All told, a fair approximation of the additional "positive financial impact" on the class members' accounts would appear to be in the neighborhood of between \$35,000,000 and \$40,000,000. This gives a total value from the write-offs/satisfactions as a result of this case of approximately a little over \$75,000,000.

However, the realistic value of \$75,000,000 in indebtedness of the class members would not be the full \$75,000,000. Using a ratio of 15 cents on the dollar, the realistic value would be a little over \$11,250,000. That, plus the \$12,500,000 cash settlement fund, would yield a realistic financial benefit to the classes from class counsel's efforts of a little over \$23,750,000. Even if one used 10 cents on the dollar for the realistic value of the indebtedness, the financial benefit to the classes would be a little over \$20,000,000.

Thus, class counsel's request for \$6,000,000 in fees amounts to under 30% of the realistic value of the "fund" of financial benefits to the class members, and probably amounts to closer to 25% of the value of the "fund".

In addition, the settlement provides for relief in the form of CAC correcting class members' credit reports, filing satisfactions of judgment, refraining from conduct similar to that alleged to have occurred in this case, and providing sample documents to class counsel each year for the next three years for checking on CAC's compliance with the agreement, all ultimately enforceable by the Court under its continuing jurisdiction. The fact that class counsel has obtained such additional non-monetary relief is "a relevant circumstance to consider in determining what percentage of the fund is reasonable as fees", and clearly would tend to support allocating a higher percentage of the fund as fees. See *Staton v. Boeing Co.*, 327 F.3d 938, 973-74 (9th Cir. 2003).

Further, a number of other factors support class counsel's request for fees. Class counsel's work was done entirely on a contingent basis, as noted in the affidavits of class counsel, Exhibits A and B. In this case, as noted above, the risk of nonpayment was severe, especially because of the possibility, in the opinion of class counsel, for CAC to become insolvent. Also, since the decided majority of class counsel's work was done in the period of

1996 to 1998, there has been a delay of approximately ten years in the payment of most of the fees. It is appropriate to provide compensation to counsel for that delay in payment, see *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989).

Moreover, in determining the reasonable value of legal services, the court should also consider the time spent, nature and character of services rendered, the nature and importance of the subject matter, the degree of responsibility imposed on the attorneys, the value of property or money involved, degree of professional ability required, and the result. *Alcolac*, 945 S.W.2d at 461. Each of these criteria also support class counsel's fee request.

The most critical of these factors in determining a reasonable fee is the degree of success obtained in the litigation. *Hensley v. Eckerhart*, 461 U.S. 436 (1983); *O'Brien v. B.L.C. Insurance Company*, 768 S.W.2d 64, 71 (Mo. 1989). Here, class counsel obtained both federal and state court class certification orders, obtained a significant partial summary judgment on class members' claims, even though it was later reversed on jurisdictional grounds, obtained major concessions and partial satisfactions on thousands of accounts from CAC in the late 1990s because of this litigation, and are obtaining extensive relief for all class members who alleged that they were overcharged official fees or interest or whose cars were repossessed by CAC. By any standard this should be viewed as a high degree of success.

The nature and importance of the subject matter, the degree of responsibility imposed on the attorneys, and the value of property or money involved, all similarly support class counsel's request for fees. The issue of coping with, and ultimately eliminating, thousands of existing judgments against the class members, sets this case apart from almost all others. The property involved is obviously great for each of these less-well-off class members, and collectively it is a large amount indeed. Class counsel bore entire responsibility for this entire matter, and had to

deal with opposition from three major law firms and numerous opposition counsel over the life of this case.

Similarly, class counsel spent over 6,000 hours to date in litigating this case, most of which work was done approximately ten years ago. Class counsel would simply defer to the Court's judgment as to the degree of the professional ability required for the handling of this case, and for the overall evaluation of the nature and character of the services rendered.

While class counsel have requested a percentage of the fund award, which is favored under Missouri law (see *Alcolac, supra*, 945 S.W.2d at 461), some courts still consider an enhanced "lodestar" method, which is calculated by multiplying the number of hours by the hourly rate. An upward multiplier is then added to compensate counsel; "enhancement of the lodestar figure, to reflect the contingent nature of the fee, or other factors by use of 'multipliers' is common in common fund cases", National Consumer Law Center, *Consumer Class Actions* (6th. ed. 2006), § 15.2.5.5. Multipliers between 1 and 4 are the norm in common fund cases, see *Vizcaino v. Microsoft*, 290 F.3d 1043 (9th Cir. 2000) (surveying cases awarding multipliers). The upward multiplier is applied based upon such factors as the delay in payment, the contingent nature of the case, and the results achieved. *Harris v. Republic Airlines, Inc.*, 1991 WL 238992 * 2 (D. Minn.). In *Harris*, the court enhanced the fee award based, in part, on the expenses incurred by counsel and by the length of the case. The court noted that enhancement was appropriate where, as there, counsel had handled the case as a contingent matter for over five years. *Id.* at *3, n. 5. The court also cited cases awarding 33% to 35% where the case had been in litigation for more than three years. *Id.* at *3, n. 6.

In this case, class counsel's affidavits support a reasonable hourly rate of \$400 per hour for their services. If this figure is multiplied by 6,000 hours, and is adjusted by a multiplier of

2.5 to compensate for everything from the ten years of delay in payment, to the contingent nature of the services, to the degree of success, and to all other relevant factors, this similarly yields a total of \$6,000,000. Or, in the alternative, if this figure multiplied by 6,000 hours is adjusted by a smaller multiplier, but interest for ten years is added, again the figure of \$6,000,000 emerges.

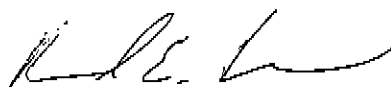
Further, the work on the case is not yet complete. In a case like this, class counsel have found that they will expend a large amount of time handling matters relating to the administration and wind-up of the case.

Class counsel's request for \$6,000,000 in fees from the \$12,500,000 cash settlement fund, amounting to under 30% of the realistic financial benefits obtained for the classes, is therefore reasonable and well-supported.

CONCLUSION


Over the course of this litigation, the Court has had opportunity to observe and interact with class counsel. Class counsel believe that they have acted in the best interest of the class and have reached a respectable settlement. Having reviewed the criteria for an award, class counsel respectfully request this Court to preliminarily approve their request for fees from the cash settlement fund in the amount of \$6,000,000, under 30% of the realistic financial benefits obtained for the classes.

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