

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002050-MR

COLLEGE RETIREMENT
EQUITIES FUND, CORP.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 07-CI-010761

RICHARD DONALD RINK,
INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY
SITUATED; STITES & HARBISON,
PLLC; JOSEPH L. HAMILTON;
MARJORIE A. FARRIS;
CLARK C. JOHNSON;
AMY K. JAY; CASSANDRA
WIEMKEN; MICHAEL K. KIM;
VONDA KIRBY; CHADWICK A.
MCTIGHE; FOLEY, BRYANT,
HOLLOWAY & RALUY, PLLC;
IRVIN D. FOLEY; ANTHONY
RALUY; STEWART & IRWIN, P.C.;
DONN H. WRAY; BRADLEY
SKOLNICK; NICK GAHL;
MARK MENKVELD; RAY
BIEDERMAN; M. SCOTT BARRETT;
AND BARRETT & ASSOCIATES

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: College Retirement Equities Fund appeals from the Jefferson Circuit Court's award of \$7.5 million in attorneys' fees to class counsel in the underlying class action litigation. After careful review, we affirm.

College Retirement Equities Fund (CREF) is a New York corporation organized in 1952 as an investment company to allow its participants (largely school teachers) to purchase retirement annuities through investments in common stock. Dr. Richard Rink is a professor who, during his employment with the University of Louisville, maintained a retirement account administered through CREF at the University.

On October 30, 2006, Rink requested CREF to liquidate his account and transfer the proceeds to a broker. On that date, the value of the securities in Rink's account was \$688,951.15. While certain CREF investment documents state that funds will be distributed within seven days of a liquidation request, the funds in Rink's account were not distributed until December 15, 2006, at which time CREF transferred \$690,052.13 to his broker. This amount represented \$688,951.15, the account value on October 30, 2006, plus \$1,100.98 in interest. However, Rink contended that during the delay in receiving his funds, his account

appreciated by \$19,082.28, and he should have received \$709,134.00, which he claims was the account value on December 15, 2006.

The delay in transfer of Rink's funds was due to problems that started in 2005 when CREF began to replace its obsolete computerized record-keeping system with a new system. Due to these problems, the transfer requests of other CREF investors were similarly delayed from 2005 to 2008. When CREF became aware of the issue, it implemented a program to compensate all participants who experienced such delays, which included interest payments and other compensation.

Instead of accepting CREF's compensation, Rink filed a class action complaint against CREF, alleging that it breached its fiduciary duties and contractual obligations by retaining the amount his and other class members' accounts appreciated during distribution delays exceeding the seven day limit set forth in CREF's form contract. Discovery eventually revealed that CREF used gains from appreciated accounts to offset losses from other participants' accounts that depreciated during the delays, which during the three-year duration of CREF's computer glitch was substantial.

After five years of contentious litigation, the parties executed a settlement agreement on May 10, 2012. The circuit court entered an order giving final approval to the settlement agreement on September 6, 2012. The agreement did not create a specified or fixed sum of money to distribute to class members. Instead, the agreement provided that each settlement class member who submitted

a valid claim form during a ninety-day claim period would receive the difference between the amount actually received and that which would have been received if the securities had been priced as of the date of actual distribution (plus 4% interest per annum). The settlement provided that CREF would pay the costs of class notice and claims administration, as well as any reasonable attorneys' fees and expenses the circuit court might award. Any fees that CREF paid would be in addition to the payment of claims and did not reduce the amount any class member received for his or her claim.

During the claims period, it was estimated that approximately 28,000 class members were eligible to file a claim and that if 100% did so, CREF would pay about \$22.4 million in claims. These numbers were estimates; however, under the settlement, there was no limit on what CREF was required to pay any individual class member or the settlement class as a group. During the claim period, the settlement class members submitted \$16.15 million in claims, which CREF has paid.

On July 2, 2012, class counsel filed a motion requesting that the circuit court award them \$8.5 million in attorneys' fees and up to \$150,000 in expenses. During briefing on the issue, class counsel reduced their fee request to \$7.5 million. Counsel based their motion on a "percentage of fund" method, arguing that \$7.5 million in fees was a reasonable percentage (one-third) of what counsel contended was a \$22.4 million "common fund" that the settlement

allegedly created for the class. CREF opposed the motion on the ground that the fee sought was excessive.

On September 6, 2012, the circuit court held a fairness hearing to address the motion for attorneys' fees. The circuit court entered an order on September 25, 2012, awarding class counsel \$7.5 million in attorneys' fees and up to \$150,000.00 in costs and expenses. The court stated that the fee award was warranted under the "common fund doctrine" as codified in Kentucky Revised Statutes (KRS) 412.070 and was determined based on a percentage of the fund, plus reasonable expenses. The court found that "[a] fee award of approximately one-third of the total fund available for a payment to the settlement class is well-within the range of appropriate percentage fees in an action of this nature."

In October 2012, CREF moved the circuit court to make additional findings with respect to its September 25, 2012, order. The circuit court denied that motion on November 1, and on November 16, 2012, CREF filed a notice of appeal seeking review of the September 25, 2012, and November 1, 2012, orders.

On appeal, CREF argues that the circuit court's award of attorneys' fees is erroneous and excessive for several reasons. First, CREF argues that the settlement in the underlying class action did not create a common fund but instead created a "claims-made" settlement with no cap, under which CREF paid the aggregate amount of all individual valid claims. Since the ultimate amount payable was not known at the time of the fee motion and fairness hearing and was not in a set/fixed amount against which claims were made and paid, CREF argues

the circuit court should have used the lodestar method (multiply attorney hours by a reasonable hourly rate) to set the fees, under which a reasonable fee would be, at most, \$5.06 million.

Next, CREF alleges that the circuit court failed to conduct a lodestar crosscheck to ensure that its percentage award did not produce an excessive effective hourly rate. CREF contends that this crosscheck shows that the \$7.5 million in fees, when divided by class counsel's 5,074 hours in the case, produces an exorbitant hourly rate of almost \$1,500 for each hour of time recorded by each partner, associate, and paralegal of class counsel's three separate law firms.

CREF argues that the circuit court misapplied the percentage-of-fund method and KRS 412.070, since the rule is that the fee should have been based on a percentage of the \$16.1 million in claims actually paid to class members, and not, as the court's fee was, on a theoretical \$22.4 million "phantom fund" that only would have been paid if 100% of the members had filed claims.

Finally, CREF argues that even if the percentage-of-fund method had been the proper method to apply, the circuit court's one-third (33%) percentage is excessive, because it is significantly higher than recently awarded percentages.

Kentucky Rules of Civil Procedure (CR) 23.08 governs the award of attorneys' fees in a certified class action. CR 23.08(3) states that when a trial court awards fees in a class action, it must find the facts and state its legal conclusion under CR 52.01. Furthermore, when awarding fees in class actions, the trial court

must also explain its “reasons for adopting a particular methodology.” *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009) (internal citation omitted).

CREF initially argues that the circuit court’s September 25, 2012, fee order does not specifically find facts and does not state separately any conclusions of law. Further, CREF argues that the circuit court did not explain its reasons for adopting the percentage method to award a fee, and that it instead simply stated in a conclusory fashion that “a proper award would be one based on a percentage of the fund.” CREF argues that the circuit court then summarily denied its motion to make additional fact findings as to what factors the court used to determine the fee awarded and whether a lodestar crosscheck was used to award fees. CREF urges this Court to conclude that the circuit court’s ruling was arbitrary and vacate it.

A review of the record indicates that the circuit court did adequately state its findings of fact and conclusions of law supporting the attorneys’ fees awarded to class counsel in its September 25, 2012, order. In fact, in its order, the circuit court indicated that it found the results obtained for the settlement class by class counsel to be exceptional. The court noted that any attorneys’ fees awarded would be on top of the payments to the settlement class and thus that any award of fees would not reduce the recovery to the settlement class.

The circuit court also explained that class counsel was competent and experienced in class action litigation and that they were diligent and competent in prosecuting the action. The court described the underlying class action as “hard-fought litigation in which CREF raised numerous challenges to the claims

presented and to the class certification efforts and in which CREF's objections and actions additionally necessitated a number of discovery disputes.”

The circuit court held that this was a case in which an award of attorneys' fees and expenses was warranted under the common fund doctrine, as codified in KRS 412.070, and a proper award would be one based on a percentage of the fund, plus reasonable expenses. The circuit court then held that an award of \$7.5 million plus actual costs incurred up to a limit of \$150,000.00 was reasonable. The court noted that a fee award of approximately one-third of the total fund available for payment to the settlement class was well within the range of appropriate percentage fees in an action of this nature.

A review of the court's order awarding attorneys' fees indicates that the circuit court did support its award with written findings of fact and conclusions of law supporting its award of fees to class counsel. Additionally, the court did explain its reasons for adopting a particular methodology. Therefore, we find CREF's argument that the order awarding attorneys' fees was arbitrary or was clear error to be without merit. We find no error in this regard.

CREF next argues that the circuit court's use of the percentage method to award fees was arbitrary since the settlement in this case was a claims-made settlement that did not create a common fund.

In order to address this argument and CREF's remaining arguments on appeal, a brief background about attorneys' fees in class action cases is helpful. Under CR 23.08, the trial court in a certified class action is to approve or award

“reasonable attorneys’ fees and nontaxable costs that are authorized by law or by the parties’ agreement.” When doing so, the court’s primary concern should be to attract competent counsel but not produce windfalls to attorneys. *See Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999). Even when fees are authorized by the parties’ agreement, courts have an independent obligation to ensure that the award is reasonable. *In re Bluetooth Headset Products Liability Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

While no Kentucky appellate court has addressed how a trial court is to determine a reasonable fee under CR 23.08, federal courts awarding fees in class actions use two methods, lodestar and percentage-of-fund. The lodestar method sets a fee by multiplying the reasonable hours expended by the reasonable hourly rate. In the percentage-of-fund method, the fee is expressed as a percentage of a set or fixed “common fund,” whether the fund is obtained by judgment or settlement.

CREF contends that some courts express preference for the percentage method in class actions with a true common fund, while other courts hold that lodestar must be used. *See Longden v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992). CREF argues that a majority of courts hold that either method is acceptable in any case, even when a settlement creates a common fund. *See Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Johnston v. Comerica Mort. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) (either method proper). CREF contends that the more appropriate method should be used in light

of the unique circumstances of each case. CREF argues that even if the percentage-of-fund method is used, a trial court should use the lodestar method as a cross-check to ensure a percentage-of-fund award is not excessive and does not produce an effective hourly rate that is unreasonably high, citing *Goldberger v. Integrated Resources, Inc.* 209 F.3d 43, 50 (2nd Cir. 2000).

In support of its argument that the settlement award in this case did not create a common fund, CREF contends that the circuit court referred to a “total fund available for payment to the settlement class,” referring to the \$22.4 million CREF would have paid if 100% of the class members filed a claim, and awarded a fee of 1/3 of that amount (\$7.5 million). CREF posits that the circuit court’s order was based on a finding that this hypothetical \$22.4 million “phantom fund,” which was never paid because only \$16.1 million in claims were filed during the claim period, was a common fund out of which a percentage-of-fund fee award could be made. CREF contends that this is clearly erroneous because a common fund exists only when a settlement specifies a specific or defined sum of money, which it argues is not the case here because the settlement is a claims-made agreement in which CREF’s total money obligation was not specified and in fact was unlimited since every class member was to be paid the amount of their filed claim.

CREF explains that the only “fund” ever created and explicitly named as such under the agreement was the money it deposited into an escrow account for distribution to class members. The amount to be deposited was not specified and not known until after the ninety-day claim period, at which time claims

administrator BMC Group informed CREF of the total amount of the individually-approved claims. On the “funding date,” (seven days after the final order approving the settlement became final), CREF deposited the total amount of the individually-approved claims (\$16.1 million) into the escrow account of the claims administrator, which then issued a check to each claimant.

CREF contends that the \$22.4 million “phantom fund” referred to by the circuit court was not a common fund, as it never actually existed. However, CREF argues the \$16.1 million in escrow money also was not a common fund since the amount deposited was an aggregation of many previously-approved and individually-earmarked monies, which the claims administrator paid to each class member. Claims were not distributed from a set fund; rather, the escrow account was the accumulation of many individually-approved claims. CREF argues that such claims-based settlement funds are not considered by courts to be common funds.

The Appellees counter that the circuit court properly applied the percentage-of-fund method in determining the fee award. In support of this, the Appellees argue that in awarding attorneys’ fees in class action litigation, courts have long recognized that 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 Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). The Appellees posit that this common fund doctrine is codified under KRS 412.070(1). That statute states:

(1) In actions for the settlement of estates, or for the recovery of money or property held in joint tenancy, coparcenary, or as tenants in common, or for the recovery of money or property which has been illegally or improperly collected, withheld or converted, if one (1) or more of the legatees, devisees, distributees or parties in interest has prosecuted for the benefit of others interested with him, and has been to trouble and expense in that connection, the court shall allow him his necessary expenses, and his attorney reasonable compensation for his services, in addition to the costs. This allowance shall be paid out of the funds recovered before distribution. The persons interested shall be given notice of the application for the allowance, provided, however, that if the court before whom the action is pending should determine that it is impracticable and too expensive to notify all of the parties individually, then by order of said court, personal notice may be dispensed with and in lieu thereof, notice of the application shall be given by an advertisement pursuant to KRS Chapter 424.

The Appellees contend that courts that have considered class settlements like the one at issue in this case have referred to them as “constructive common fund” cases and analyze fee entitlement as a percentage-of-fund created by the labors of counsel, citing *Guschausky v. Am. Family Life Assur. Co. of Columbus*, 851 F.Supp.2d 1252, 1257 (D. Mont. 2012).¹

The Appellees note that even though the exact amount available to settlement class members can be quantified to the penny and was fully known to the circuit court at the time it entered the fee award, CREF contends that it was a “hypothetical phantom fund.” The Appellees argue that there was no hypothetical

¹ *Guschausky* was later vacated based on AFLAC’s motion for relief under Federal Rule of Civil Procedure (FRCP) 60.02(b)(6), which showed that the common fund amount was erroneous. However, the court did not retract its analysis on the constructive common fund.

phantom fund, as the fund was easily ascertainable. In support of this, the Appellees note that prior to the hearing in this case, the court was presented with the affidavit of CREF's own employee, Sandra Kong, who verified that the total amount available for settlement class members was \$22,406,753.27, which they contend is hardly "hypothetical" or "phantom." The court expressly stated in the fee award, "[t]he total value of the settlement for the approximately 26,188 settlement class members currently identified is approximately \$18 million, before accounting for at least four years of interest which would increase that total to \$22.4 million." The Appellees argue that although CREF's own witness verified the creation of this \$22.4 million fund, CREF mistakenly asserts that a common fund only exists when a settlement specifies a specified or defined sum of money.

The Appellees contend that CREF ignores the fact that the full amount available to settlement class members was readily ascertainable and known to the circuit court at the time it entered the fee award and misstates the law in its brief. They argue that courts *do* recognize the use of the percentage-of-fund methodology in awarding attorneys' fees in a class action *even if no formal fund is created*, so long as the court can reasonably determine the settlement value, citing *Shaffer v. Continental Cas. Co.*, 362 Fed.Appx. 627, 631 (9th Cir. 2010). The Appellees argue that the fact that the settlement is uncapped or the fact that every class member will be paid upon filing a claim does not change the character of a settlement. What is important is that the value of the settlement can be ascertained.

If so, the Appellees argue, it is appropriate to base a fee award upon a percentage of the benefits available to settlement class members.

The Appellees further argue that the constructive common fund doctrine was created to address the economic benefit conferred on settlement class members when attorneys' fees are paid separately. "The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class recovery." *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996). The Appellees contend that since each settlement class member receives a higher net recovery than if assessed a portion of the attorneys' fee from a "traditional" common fund, each settlement class member receives a quantifiable benefit. Accordingly, the attorneys' fees and class settlement proceeds are aggregated for determining the value of the constructive common fund. *Guschausky*, 851 F.Supp.2d at 1257 ("When attorneys' fees are paid independently, the aggregate amount of attorneys' fees and class settlement payments may be viewed as a 'constructive common fund'").

We agree with the Appellees that CREF attempts to exalt form over substance in asking this Court to find that the circuit court abused its discretion in awarding the attorneys' fees as a percentage-of-fund. The reality is that in the underlying settlement, the class members received a benefit that was far better than it would have been had a cap been established. The settlement in this case insured that the class members did not have their recovery reduced in any way to pay for

the services provided by class counsel. Therefore, we find no error in the circuit court treating the settlement in this case as a constructive common fund.

A review of the record indicates that the constructive common fund in this settlement included the total amount available to settlement class members (\$22,406,753.27), plus the \$7,500,000.00 fee, plus expenses in the amount of \$114,922.09, for a total constructive common fund of \$30,021,675.36. The \$7.5 million fee represents 25% of the constructive common fund. Federal Courts within Kentucky and the Sixth Circuit universally recognize that “the percentages awarded in common fund cases typically range from 20 to 50 percent of the common fund awarded.” *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D. Ky. 2006). *See also Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 249 (S.D. Ohio 1991).

CREF also argues that the fee award in the instant case is not compatible with KRS 412.070, because it is based on the amount available to settlement class members, instead of the amounts actually claimed by settlement class members. It is not disputed that the labors of class counsel created the \$22,406,753.23 pool available for distribution to settlement class members. KRS 412.070 provides that attorneys’ fees are to be paid “out of the funds recovered *before distribution.*” (Emphasis added). “The words of [a] statute are to be given their usual, ordinary, and everyday meaning.” *Gateway Construction Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962) (internal citation omitted). We agree with the Appellees that

the statute recognizes the practical reality that a common fund attorney fee under KRS 412.070 should be measured *before* determining payment to individual claimants. Indeed, this interpretation of KRS 412.070 is entirely consistent with United States Supreme Court precedent.

In *Boeing, supra*, the United Supreme Court held that attorneys' fees were appropriately determined as a percentage of the entire amount obtained for the class even though some class members failed to make claims for their individual damages. "[Absentee class members'] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel." *Boeing*, 444 U.S. at 480-81. Because all class members receive a benefit with this type of settlement (including class members who choose not to take advantage of it) a majority of courts have awarded attorneys' fees based upon the amount that would be recovered if every class member makes a claim, regardless of whether the claims are filed. *See, e.g., Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2nd Cir. 2007); *Williams v. MGM-Pathe Commun. Co.*, 129 F.3d 1026 (9th Cir. 1997).

Based on the above, we cannot say that the circuit court's decision to utilize a percentage-of-fund method based upon a constructive common fund was arbitrary or an abuse of discretion. A review of the applicable case law from the various jurisdictions indicates that either method was appropriate, as long as the circuit court based its decision on the facts presented by the underlying settlement

and the benefits the class members received as a result of the efforts of class counsel, which was clearly the case here.

Next, CREF argues that the percentage awarded by the circuit court was too high. CREF argues that regardless of what the proper size of the fund was, the circuit court's use of one-third (33%) as the proper percentage was erroneous. In support of this, CREF argues that in securities class actions that awarded fees based off the percentage-of-fund method, the recent trend is for courts to award less than 20% of a common fund. CREF contends that even courts that award slightly more than 20% consider 25% as the benchmark percentage in securities cases, citing *City of Pontiac General Employees Retirement Systems*, 2013 WL 3796658 (S.D.N.Y.). There, the court reduced a fee request of 33% of \$19.5 million to a "fee award at the increasingly used benchmark of 25%." CREF contends that the \$7.5 million awarded as fees in this case is 46% of the \$16.1 million that class members received under the settlement, which is excessive.

Again we agree with the Appellees that the attorneys' fees awarded by the circuit court were reasonable under the circumstances and were supported by the record in this case. Given the varying amounts of attorneys' fees awarded in similar types of class action litigation, we cannot say that an award of one-third of the constructive common fund was erroneous. Had the circuit court determined that the circumstances of this litigation warranted fees of only 25% of the settlement amount, it would have been in its discretion to do so. Awarding 25-

30% of the settlement amount was not arbitrary and was supported by the evidence in this case.

Finally, CREF argues that the circuit court should have checked the award of attorneys' fees by comparing it to an award of fees calculated using the lodestar method. CREF alleges that its failure to compare the two methods in its written order renders the circuit court's order arbitrary and therefore an abuse of discretion.

In support of this argument, CREF contends that a lodestar fee is determined by multiplying the reasonable attorney hours expended by a reasonable hourly rate. CREF notes that the base lodestar for the three law firms comprising class counsel is \$1.685 million for 5,073.9 hours time, giving a blended hourly rate of \$332.00. In this case, the circuit court awarded a percentage fee of \$7.5 million, which is 4.45 times the base lodestar fee (\$7.5 million divided by 1.685 million). The 4.45 figure is known as a "multiplier" because the lodestar of \$1.65 million is "multiplied" by 4.45 to reach the \$7.5 million fee awarded by the circuit court. In effect, this means the circuit court awarded a fee that is 4.45 times what class counsel's legal services are worth in the legal market. CREF contends that even if a modest lodestar multiplier was appropriate, the 4.45 multiplier that the circuit court's \$7.5 million fee produces results in an effective hourly rate of \$1,500.00.

CREF urges this Court to consider the court's analysis in *Hall v. Children's Place Retail Stores*, 669 F.Supp.2d 399 (S.D.N.Y. 2009), where the court awarded a fee of 15% (instead of the requested 27% herein) of a \$12 million settlement

fund. The awarded fee produced a lodestar multiplier of 2.08, while the requested fee would have produced a 3.75 multiplier. The court noted that “more recent cases reveal[] a trend toward awarding more modest fees” and that “an award of one-third of the settlement fund is not always justified where that percentage amounts to a lodestar multiplier of substantially more than 2.0.” *Id.* at 403-404.

CREF contends that this action was a typical securities and breach of contract case and did not present any difficult or complex issues. Therefore, any multiplier of more than 2.0 over lodestar is difficult to justify since it would still produce a base lodestar fee of \$3.3 million (2.0 x \$1.685 million) and an effective hourly rate of \$650 (\$3.3 million divided by 5,074 hours).

CREF argues that because the \$7.5 million fee awarded produces an unreasonable \$1,500.00 hourly rate, the circuit court’s refusal to use the lodestar method, at least as a cross-check to avoid that outcome, is arbitrary and should be reversed.

The record in this case indicates that CREF presented the lodestar method to the circuit court in its arguments below. Furthermore, CREF presented its argument that the circuit court should utilize the lodestar at least as a cross-check to the court below. Accordingly, the circuit court considered CREF’s arguments regarding the reasonableness of the attorneys’ fees and awarded the fee it thought reasonable, given the complexity of the case and the effectiveness of class counsel. The circuit court specifically detailed this reasoning in its written order, which it

was required to do. Because the circuit court supported its conclusions of law with substantial findings of fact, we cannot say that its reasoning was arbitrary.

It is well-settled that the circuit court has discretion to determine the “appropriate method for calculating attorneys’ fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them.” *Rawlings*, 9 F.3d at 516. This Court reviews an award of attorneys’ fees for an abuse of discretion. *Id.* This highly deferential standard of review recognizes the trial court’s superior understanding of the litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Absent a clear abuse of discretion that is not supported by the record and the facts of the underlying litigation, we will not disturb a circuit court’s award of attorneys’ fees in a complex class action.

Finding no abuse of discretion, we affirm the circuit court’s September 25, 2012, order.

STUMBO, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Richard M. Sullivan
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Edward F. Busch
M. Tyler Reynolds
Louisville, Kentucky

BRIEF FOR APPELLEES
RICHARD DONALD RINK AND
ALL OTHERS SIMILARLY
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