

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

FILED IN OFFICE

AUG 01 2001

ANNE-MARIE ADAMS
Clerk

JASON RICHARDS,
Plaintiff,

v.

JEFFERSON COUNTY,
Defendant.

) CIVIL ACTION NO. CV 92-3191
)
)
)
)

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

PHILLIP A. TRIANTOS, M.D.,
individually and on behalf of
all others similarly situated,
Plaintiffs,

v.

JEFFERSON COUNTY,
Defendant.

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) CIVIL ACTION NO. CV 99-4812
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ORDER

Pursuant to the Supreme Court of Alabama's Order of Remand of June 22, 2001 in the *Richards* action, this Court held a hearing ("the Hearing") on August 1, 2001 to implement the instructions given to this Court by the Supreme Court, and to consider any further matters. The Court's rulings with respect to those matters are set forth below and/or are addressed by separate order.

I. Procedure For Issuing Refunds

Pursuant to this Court's June, 1999 Order in the *Richards* action, the County was directed to deposit all Occupational Taxes collected from Licensed Professionals into an interest-bearing escrow account. The County created and maintained an escrow account (the "Account") and deposited

Occupational Taxes collected from Licensed Professionals and their employers into the Account. The Account currently contains about \$9 million of principal and interest.

On June 22, 2001, the Supreme Court of Alabama released its consolidated opinion in the appeals from these actions, holding that the Licensed Professionals comprising the class of persons represented by Dr. Phillip A. Triantos are exempt from the Jefferson County Occupational Tax ("the Occupational Tax"). The Supreme Court affirmed the injunction entered in the *Triantos* case, which prohibited the County from imposing the Occupational Tax on Licensed Professionals, and further directed this Court to refund all Occupational Taxes collected from Licensed Professionals.

The Court has been advised that, in the wake of the Supreme Court's decision, the County sent a letter to all employers in Jefferson County who have Occupational Tax withholding accounts with the County's Revenue Department, advising those employers that they are to cease withholding the Occupational Tax from Licensed Professionals.

The Court has also been advised that 5,317 Licensed Professionals have remitted their Occupational Tax payments to the County on an individual or d/b/a basis. For those Licensed Professionals, the County has the information necessary to calculate the refunds owing to such Licensed Professionals. The County is ORDERED to refund the Occupational Taxes collected from those Licensed Professionals, less attorneys' fees awarded by separate Order, within 45 days of this Order, with said refunds to be paid from the Account.

The Court has also been advised that the County has received from 1,333 employers ("Employers") remittances of Occupational Taxes collected from their Licensed Professional employees. As to those employees, the County does not have the data reflecting the amount of Occupational Tax paid by each Licensed Professional. That data is in the possession of those Employers. The County proposes to send an aggregate refund (calculated less attorneys' fees

awarded under separate Order) to each Employer, with instructions for each Employer to follow in calculating the refunds owing to each Licensed Professional. The Court ORDERS the County to distribute refund checks to each such Employer within 45 days of this Order, paid from the Account, along with appropriate instructions for each Employer to follow in calculating and distributing the refund owing to each Licensed Professional employee.

The refund remittance the County shall send to each Employer shall be calculated in the following manner:

- (1) Taking the aggregate amount of Occupational Taxes remitted by such Employer on behalf of Licensed Professionals employees as of August 1, 2001;
- (2) Subtracting the aggregate amount of refunds obtained by the Licensed Professional employees of such Employer for license taxes paid by the employees; and
- (3) Multiplying the result in (2) by a percentage, calculated by dividing the amount remaining in the Account after payment of attorney's fees, by the amount of principal paid into the Account as of the date of this Order.

The refund for any Licensed Professional shall be calculated in the following manner:

- (1) Taking the gross amount paid by such Licensed Professional as of August 1, 2001;
- (2) Subtracting any refunds obtained from the County by such Licensed Professional for license taxes paid; and
- (3) Multiplying the amount in (2) by the percentage set forth in (3) of the preceding paragraph.

The Court has been advised of the possibility that some Employers aggregated or co-mingled remittances of Occupational Taxes from Licensed Professionals and non-Licensed Professionals. If that has occurred, then some Occupational Taxes paid by Licensed Professionals were not

deposited into the Account. The County is hereby ORDERED to take all reasonable steps to assure that all Occupational Taxes paid on behalf of Licensed Professionals are refunded to those Licensed Professionals, whether the County deposited those amounts into the Account or otherwise. As described more fully in Section II below, the County shall remain liable for all refunds to Licensed Professionals, regardless of whether the County deposited the remittance of those Licensed Professionals' Occupational Taxes into the Account.

II. Claims Period

As noted above, the County does not have records showing the amount of Occupational Taxes paid by those Licensed Professionals whose Employers remitted the Occupational Tax. Therefore, Licensed Professionals who do not receive refunds under Section I above (due to Employer co-mingling or otherwise) must have the opportunity to present claims to the County for a refund of Occupational Taxes paid.

To that end, the Court deems it advisable to exercise its discretionary powers, pursuant to Ala. R. Civ. P. 23(d)(2), and ORDERS that the County publish, at its expense, a newspaper notice ("Notice") for the benefit of Licensed Professionals, informing the Licensed Professionals that Triantos has obtained a judgment in favor of the Licensed Professionals, that the Employers of Licensed Professionals should have already calculated and distributed refunds to Licensed Professional employees, and that any Licensed Professional who has not received the appropriate refund may make a Claim for Refund ("Claim") by submitting the following to the County or, at the County's option, a Third-Party Claims Administrator approved by the Court:

- (1) the Licensed Professional's identifying data, including name, address, Employer(s), and social security number (to avoid duplication of refunds distributed through Employers and in response to the Notice);

- (2) a copy of the Licensed Professional's W-2s, K-1s, or any other similar documentation for tax years 1999 and 2000, along with the Licensed Professional's latest pay stub reflecting withholding of Occupational Taxes, for tax year 2001, or, alternatively, data from the Licensed Professional's Employer reflecting the amount of Occupational Tax withheld by said employer during that time; and
- (3) a copy of the Licensed Professional's most recent license, as issued under the Alabama Business License Code (*Ala. Code* § 40-12-1 et seq.) ("the License"), along with an Affidavit stating that such Licensed Professional has maintained the License continuously since July 26, 1999, or, in the event the Licensed Professional has not maintained the License since that time, the date on which the Licensed Professional first obtained the License.

Said Notice shall be published in The Birmingham News and Birmingham Post-Herald three times in each paper over a span of seven days, including at least one publication in the Sunday edition of The Birmingham News. Said Notice shall first be published within 75 days of this Order.

The Court hereby ORDERS that any Licensed Professional not receiving a refund pursuant to Section I of this Order shall be entitled to present a Claim to the County for an Occupational Tax refund for a period of two years from the date of this Order. See Ala. Code § 40-10-160.¹ If the County finds the claim of such Licensed Professional to be valid, it shall pay the refund to such Licensed Professional less attorneys' fees awarded by separate Order. The County shall remain

¹The Court reads section 40-10-160 *in pari materia* with Ala. Code § § 11-12-5 and, more specifically, 11-12-8. The Alabama Supreme Court has held that the presentment requirement set forth in Ala. Code § 11-12-5 does not apply to claims that a tax was illegal or void. Corbitt v. Mangum, 523 So. 2d 348 (Ala. 1988). The 12-month limitation in Ala. Code § 11-12-8 relates to the presentment of a claim to the County Commission – the requirement of § 11-12-5. Under Corbitt, then, the 12-month limitation does not apply. Rather, the two-year period set forth in § 40-10-160 is applicable.

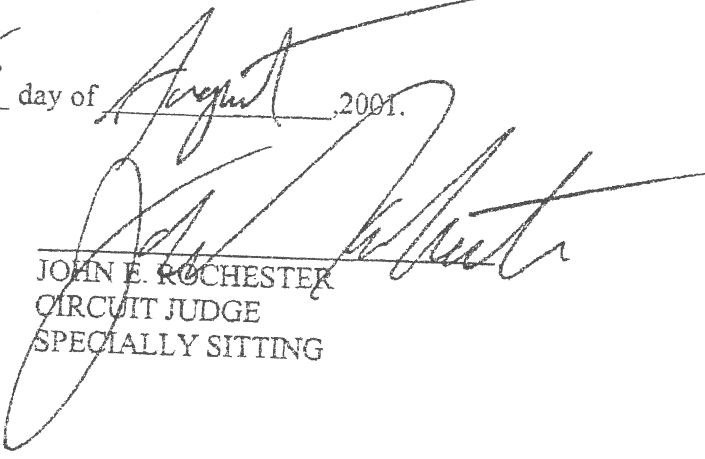
liable to each Licensed Professional for the appropriate refund, notwithstanding the fact that the County made an aggregate refund to the Employer of each such Licensed Professional. The County bears the risk to the Licensed Professionals of inaccurate refunds made by their Employers, and also bears the risk to the Licensed Professionals of any Employer's failure to distribute refunds to Licensed Professionals. The County shall have full recourse as against those Employers.

III. Finality of this Order

This Order hereby constitutes a final disposition of all claims and causes of action in both of these cases.

Without affecting the finality of this Order in any way, the Court hereby reserves jurisdiction over the consummation, implementation, enforcement, interpretation, and administration of matters relating to the refund to Licensed Professionals, including but not limited to any disputes relating to whether an individual is a Licensed Professional entitled to a refund and any dispute with any Employer of a Licensed Professional.

DONE and ORDERED this 19th day of August, 2001.


JOHN E. ROCHESTER
CIRCUIT JUDGE
SPECIALLY SITTING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JASON RICHARDS

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Plaintiff,

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JEFFERSON COUNTY,

Defendant.

ORDER AWARDING ATTORNEY'S FEES

Before the Court is the motion by Burr & Forman LLP, Triantos class counsel, for an award of attorney's fees. Having considered said motion and supporting brief, affidavits and the arguments of counsel, the Court hereby GRANTS the Motion and ORDERS as follows:

This is a classic "common fund" case - the lawyers for Dr. Triantos have literally recovered a fund for the benefit of the Triantos class (the "Class"). Therefore, the percentage-of-recovery method is the means for awarding attorney's fees to class counsel. Edelman & Combs v. Law, 663 So. 2d 957 (Ala. 1995) ("in a class action where the plaintiff class prevails and the lawyer's efforts result in a recovery of a fund, by the way of settlement or trial, a reasonable attorney fee should be

determined as a percentage of the amount agreed upon in settlement or recovered at trial"); see also Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) (mandating the use of the percentage of fund method in common fund cases). The Edelman Court continued:

Where a recovery is made on behalf of a class, it is reasonable to award attorney fees on the basis of a percentage of the amount recovered. In some cases 20% may be reasonable, based upon the amount of the award and other factors. In other cases 40%, or even 50% , may be justified.

Edelman, 663 So. 2d at 960. The Court also notes that the Eleventh Circuit recently approved a 33.3% common-fund fee in a so-called "claims made" class-action, where the class members did not receive benefits unless they filed claims. Waters v. International Precious Metals Corp., 190 F.3d 1291, 1295-97 (11th Cir. 1999).¹

Under Edelman, this Court must also consider the factors for determining a reasonable fee identified in Johnson v. Georgia Highway Express, 488 F.2d 714, 717-19 (5th Cir. 1974). In Edelman, the Court noted that the Johnson factors - which are typically applied in statutory fee cases - should be used in assessing the appropriate range of percentages of a common fund to award in attorney's fees. See Edelman, 663 So. 2d at 959-60 (adopting Johnson factors as set forth in Peebles v. Miley, 439 So. 2d 137, 140-41 (Ala. 1983)). Those factors are:

- (1) the nature and value of the subject matter of the employment;
- (2) the learning, skill and labor requisite to its proper discharge;

¹The Supreme Court has also extended the common-fund approach to so-called "claims made" cases. Boeing Co. v. Van Gemert, 444 U.S. 472 (1980). The Alabama Supreme Court has declined to extend the common-fund method, however, to a "claims made" case, in which notice was solely by publication, and where less than one percent of the class made a claim against the fund, and thus actual recovery to the class was only .2% of the amount of the hypothetical "fund." Union Fidelity Life Ins. Co. v. McCurdy, 781 So. 2d 186 (Ala. 2000). McCurdy is not applicable in this case, since all Licensed Professionals are due a refund less attorney's fees.

- (3) the time consumed;
- (4) the professional experience and reputation of the attorney;
- (5) the weight of his responsibilities;
- (6) the measure of success achieved;
- (7) the reasonable expenses incurred by the attorney;
- (8) whether the fee is fixed or contingent;
- (9) the nature and length of the professional relationship;
- (10) the fee customarily charged in the locality for similar legal services;
- (11) the likelihood that a particular employment may preclude other employment; and
- (12) The time limitations imposed by the client or by the circumstances.

Depending on the specific facts of the case, a trial judge may totally ignore some factors and give others different relative weights. *Id.*; see Ramos v. Lamm, 713 F.2d 546, 552 (10th Cir. 1983). But in a common fund case, the amount involved and results obtained are the "decisive factor." Brown v. Phillips Petroleum Co., 838 F.2d 451, 456 (10th Cir. 1988). See also Peebles v. Milev, 439 So.2d 137 (Ala. 1983) (establishing general guidelines for courts in determining reasonable attorney fees).

This Court has reviewed the factors and concludes that, even looking at the result obtained strictly from the standpoint of the monetary recovery, Class Counsel would be entitled to a forty percent fee. There is no question that the complexity of the issues in this case required a high degree of legal skill. The County and the Richards plaintiffs were represented by attorneys with extensive experience in similar complex litigation - this Court needs no reminder that this State's former Attorney General was lead counsel for the Richards plaintiffs. Despite the tremendous risks involved, the talent of the opposing lawyers, and the political climate increasing the risks of failure,

Class Counsel obtained complete relief on the claims of the Class in under two years from the commencement of this action - including the time needed to complete appeals. The complete success achieved, coupled with the time within which the result issued, renders the forty percent fee reasonable based solely on the refund portion of the relief obtained for the Class - which at present stands at approximately \$9 million.

Although the monetary portion of the judgment alone would justify the forty percent fee, the Court is mindful of two other particular factors which also support the requested fee. First, the percentage-of-recovery method is intended to mirror practice in the private marketplace, where contingent-fee attorneys typically negotiate percentage fee arrangements with their clients. In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992) (Posner, J.) ("[t]he object in awarding a reasonable attorney's fee . . . is to simulate the market. . . . 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." Contingency fees in non-class action cases typically are in the range of 33-1/3 to 50%. Blum v. Stenson, 465 U.S. 886, 904 (1984); see also In Re Prudential Sec. Inc. Ltd. Partnership Litig., 912 F.Supp. 97, 101 (S.D.N.Y 1996) (noting that "investors entered retainer agreements with private counsel which provided for a contingent fee ranging between 33-1/3% and 40% of the amounts recovered."); Kirchoff v. Flynn, 876 F.2d 320, 323 (7th Cir. 1986), (observing that "40% is the customary fee in tort litigation . . ."). This Court takes judicial notice that the forty percent contingency contract is a "benchmark" in private individual-plaintiff cases. And, the Court notes that the named plaintiff's contract with Class Counsel provides for a forty percent fee - a contract which has been in the record in this case since December of 1999.

Second, the appropriate percentage must also account for non-monetary benefits conferred on the class members - in this case the substantial injunctive relief prohibiting further imposition of the Occupational Tax or Alabama Legislative Act 99-406 (the "1999 Act") on the Triantos class. In considering fee requests in common fund cases which include injunctive relief as a component of the recovery, courts commonly include the value of the injunctive relief in evaluating the fee request. Camden I, 946 F.2d at 775 (the amount of "any non-monetary benefits conferred upon the class" is a principal factor in determining the proper percentage for a fee award); Abbey v. Lloyd's of London, 975 F. Supp. 802, 807 (E.D. Va. 1997) ("a fee award may be predicated on the grant of either monetary or equitable relief"); Arenson v. Board of Trade, 372 F.Supp. 1349 (N.D. Ill. 1974); In re Domestic Air Transportation Antitrust Lit., 148 F.R.D. 297 (N.D. Ga. 1993) (adopting constructive common fund theory for fees in non-monetary benefit situations); Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240 (S.D. Ohio 1975) (determining percentage for fees based on total estimated present value of settlement, including injunctive relief).

The value of the injunctive relief in this case is of particular importance in setting the appropriate percentage fee. Due to the efforts of Class Counsel, the Licensed Professionals have obtained an injunction prohibiting the County from imposing Occupational Taxes in the future, under either the 1967 Act or the 1999 Act. In truth, the injunctive relief has far greater value in this case than the refunds to Class Members - which themselves are worth about \$9 million. Whether viewed from the standpoint of the 1999 Act or the 1967 Act, the injunctive relief is worth at least \$7 million per year. In fact, the County has estimated that Occupational Tax collections from the Triantos class members would have been about \$7 million annually. Thus, the total value of the relief obtained for the Class Members exceeds \$16 million, assuming that only one year's worth of

the injunctive relief is included in the total value of benefits to the Class. Given the complete success achieved for the Class in such a short time period, the requested fee (which is under 25 percent of the total value of the monetary plus injunctive relief) is reasonable.

Finally, the Court again notes the case of Waters v. International Precious Metals Corp., 190 F.3d 1291, 1295-97 (11th Cir. 1999), in which the Eleventh Circuit affirmed a 33.3% common-fund fee in a claims-made case - one in which class members were required to submit claims in order to receive benefits. If a one-third fee is acceptable in a claims-made setting, then a higher fee would be well within the bounds of fairness where all class members are receiving monetary benefits plus the benefit of a real and valuable injunction.² Additionally, Waters was a class-action settlement, whereas in this case, Class Counsel has obtained a judgment in favor of the class. That factor also justifies a higher percentage.

Considering all of the foregoing facts, the Court concludes that a fee of forty (40) percent of all monies to be refunded to the Triantos class is appropriate. Accordingly, it is hereby ORDERED that:

(1) Burr & Forman LLP is awarded forty (40) percent of all funds, including any interest accrued thereon, which Jefferson County, Alabama ("Jefferson County") collected from the Triantos class members;

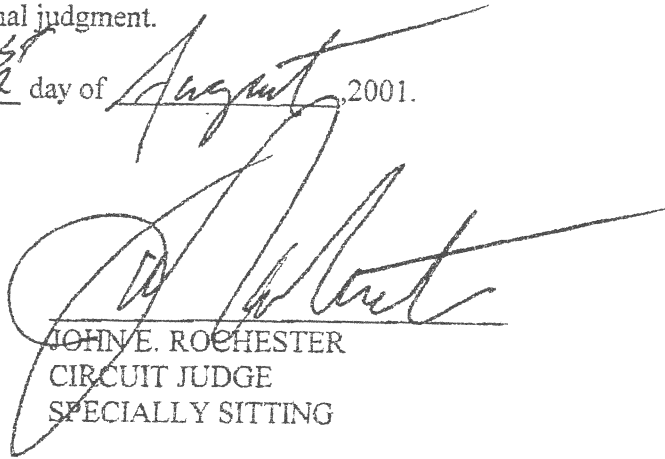
(2) Jefferson County shall remit to Burr & Forman LLP within five (5) days of the date of this Order, forty (40) percent of the total of all funds, including accrued interest, contained in the Occupational Tax Escrow Account; and

²Unlike the injunctions obtained in some class actions, the injunction in this case has real, tangible value.

(3) Jefferson County is to also remit to Burr & Forman LLP forty (40) percent of any and all occupational taxes which were paid by Triantos class members but were not deposited into the Occupational Tax Escrow Account but were incorrectly deposited into Jefferson County's general occupational tax account or elsewhere. Such payment(s) to Burr & Forman LLP is to be made by Jefferson County within five (5) days of the County's refund of incorrectly deposited funds.

Pursuant to Rule 54(b), Ala. R. Civ. P., the Court determines that there is no just reason for delay of the entry of this Order of Final Approval and Final Judgment because this Order fully and finally disposes of all claims in Triantos v. Jefferson County, CV-99-4812. Accordingly, the Court hereby directs entry of this Order as a final judgment.

DONE and ORDERED this 15th day of August, 2001.


JOHN E. ROCHESTER
CIRCUIT JUDGE
SPECIALLY SITTING