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No. 05-6379

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: ALLSTATE INSURANCE COMPANY
UNDERWRITING AND RATING PRACTICES LITIGATION

LEROY SANDERS, et al.,

Objectors-Appellants,

v.

MICHAEL SANCHEZ, et al.,

Plaintiffs-Appellees;

ALLSTATE INSURANCE COMPANY, et al.,

Defendants-Appellees,

Consolidated Cases: 05-6366 05-6372
05-6367 05-6373
05-6368 05-6374
05-6369 05-6375
05-6370 05-6379
05-6371 05-6399

**BRIEF OF APPELLANTS JOSEPH FRAUM,
RENEE FRAUM and ALAN SHAPIRO**

On Appeal From the United States District Court
For the Middle District of Tennessee
Aleta A. Trauger, Judge

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FED. R. APP. P. 26.1 AND CIR. R. 26.1 DISCLOSURE STATEMENT

Appellants state that they are individuals and not corporations, and therefore are not covered by Fed. R. App. P. 26.1.

____
John J. Pentz

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STATEMENT OF JURISDICTION

1. **District Court's Jurisdiction.** The District Court had subject matter jurisdiction over this case because the Complaint alleged claims arising under the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq*..

2. **Appellate Jurisdiction.** This Court's jurisdiction exists pursuant to 28 U.S.C. § 1291. The District Court entered a Final Judgment and Order of Dismissal with Prejudice on July 29, 2005. Appellants Joseph Fraum, Renee Fraum and Alan Shapiro filed their Notice of Appeal on August 25, 2005.

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STATEMENT OF ISSUES

1. Did the settlement Notice violate Fed. R. Civ. P. 23(h)?

2. Did the district court abuse its discretion in awarding class counsel an attorney's fee that is more than 77% of the value received by class members?

3. Was the district court's use of the common fund method of calculating an attorney's fee when the settlement did not create a common fund contrary to law?

STATEMENT OF THE CASE

This appeal arises out of the district court's approval of a class action settlement and award of attorney's fees to class counsel in a Multi-District Litigation group of cases against Allstate Insurance Company ("Allstate"). Beginning in 2000, nine different class actions were filed in state and federal courts around the country alleging that Allstate's practices with regard to consulting the credit reports of applicants for insurance and their spouses violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §1681 *et seq*. Those cases were consolidated in the Middle District of Tennessee pursuant to an order of the MDL Judicial Panel issued on June 19, 2002.

The Plaintiffs in all of the consolidated cases filed a Fifth Amended Complaint on August 26, 2004, and filed an Amended Stipulation of Settlement on September 7, 2004.

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The district court preliminarily approved the settlement on September 22, 2004. Notice was subsequently mailed to 7.8 million separate addresses, and publication notice appeared in Parade and USA Sunday magazines.

The court held a hearing on the fairness and adequacy of the settlement on July 18 and 19, 2005, at which several objectors, including the present Appellants, appeared through counsel and argued in opposition to the settlement's approval and the requested attorney's fees. The district court issued its Final Judgment approving the settlement and awarding $8 million in attorney's fee to class counsel on July 29, 2005.

STATEMENT OF FACTS

Plaintiffs alleged that Allstate failed to issue adverse action notices as required by FCRA to persons whose credit reports were checked by Allstate in connection with an application for insurance, and who were required to pay something other than the lowest premium rates as a result of their credit reports. Plaintiffs also alleged that Allstate's practice of checking the credit reports of the applicants' spouses was unauthorized by law and a violation of FCRA. Plaintiffs sought both actual damages and statutory damages of $100 - $1000 for each violation. Docket # 157.

Actual damages were apparently unprovable from the inception of this case. As conceded by class counsel at the fairness hearing, Allstate does not retain the historical credit reports on which it rates its applicants. FH

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Transcript Vol. I at p.38. Therefore, it would be impossible to go back and determine which class members had errors on their credit reports at the time they applied for an Allstate insurance policy, and consequently suffered actual damages.

Moreover, an actual damages case would have been unmanageable on a class-wide basis. At the fairness hearing, class counsel Terry Smiljanich referred to the "impossibility" of pursuing the actual damages claims on a class-wide basis, both because of the lack of evidence, and because there would be insufficient commonality to warrant class certification. Id. at p. 87. In its oral order, the district court found that actual damages "is almost impossible to prove because of the past nature of the damages." FH Transcript Vol. II at p. 307.

From the outset, therefore, this case was a statutory damages case. The FCRA provides for the recovery of between $100 and $1000 per violation, if the plaintiff can prove that the violation was willful. Given that the class consists of approximately 12.4 million persons, FH Transcript Vol. I at p. 17, potential statutory damages in this case ranged from $1.24 billion to $12.4 billion.

The settlement gives each class member the right to claim a free credit report from TransUnion. Class members who discover an error on their credit report obtained through the settlement, and have that error corrected

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through the process set forth in FCRA, will have the opportunity to make a claim for proxy damages from Allstate, in an amount ranging from $50 to $225, depending upon the number of policy periods the class member has held the policy. Docket # 158.

Since September 1, 2005, every citizen of the United States has been entitled to three free copies of their credit report each year, one from each of the three reporting agencies, pursuant to the Fair and Accurate Credit Transactions Act ("FACTA"), which added new sections to the federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §1681 et seq.. Thus, the free credit report made available through the settlement of this case is the fourth free credit report each class member may receive during 2006 or 2007 (depending upon when this appeal is resolved), and supplements the rights each class member already possesses under FCRA and FACTA.

By the deadline for filing requests for free credit reports, approximately 960,000 of the 12.4 million class members had requested a copy of their credit report through the settlement. Of that number, approximately 761,000 are potentially eligible for proxy damages. FH Transcript Vol. I at pp. 19-20.

At the fairness hearing, class counsel offered the expert opinion of economist Mark A. Cohen that, based upon the claims data received to date, the likely proxy damages paid out by the settlement would be only $1.2

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million. Declaration of Mark A. Cohen ("MACDec") at p. 27. Dr. Cohen also stated that the market price for a credit report is currently $9.50. Id. at p.7.

Allstate admitted at the fairness hearing that the cost to it of purchasing the credit reports that class members have claimed through the settlement is only $2.56 per report.[1] Using this figure, the value of the credit reports to class members who have claimed them is only $2.45 million. Using the market price of $9.50, the value of the credit reports is $9.1 million.

The maximum value of the credit reports and proxy damages to the 960,000 class members who claimed them is therefore $10.32 million. Class counsel requested, and the district court approved, an attorney's fee to class counsel of $8 million, which represents a fee of 77% of the actual class benefits, and a multiplier of approximately 1.75 times class counsel's claimed lodestar.

The Notice mailed to class members stated with regard to attorney's fees that "Class Counsel will be paid no more than $8 million in fees and costs. The Court will determine the amount of fair and reasonable costs and

[1] Allstate claimed that it must pay TransUnion $7.50 per report for those class members who dispute the accuracy of any item(s) on their credit reports. Dr. Cohen estimated that no more than 24,100 class members will do so. MACDec at p. 26.

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fees to be paid to Class Counsel." Notice at Section IV. The deadline for filing an objection to the settlement or to the attorney's fee request was May 2, 2005. Class counsel filed their Application for an Award of Attorneys' Fees and Expenses on July 7, 2005, more than two months after class members were required to file their objections to it. Docket # 631. This was the first time that any member of the class had access to the amount of class counsel's fee request or any claimed basis for it. The district court permitted class counsel to file its lodestar under seal, making it unavailable to Appellants. Docket # 647.

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SUMMARY OF ARGUMENT

Fed. R. Civ. P. 23(h)(1) requires that "a claim for an award of attorneys fees and nontaxable costs must be made by motion … Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." In this case, class members never received notice of class counsel's motion for attorney's fees. They were informed only of the provision in the settlement agreement that Allstate's obligation to pay a fee award was capped at $8 million. The Notice contained no information about class counsel's fee petition or the basis for the requested amount.

Because the maximum value of the benefits that class members will actually receive is $10.32 million, the fee award of $8 million is excessive, regardless of the method used to calculate class counsel's fees. Even using the lodestar method, class counsel's attorney's fees must be cross-checked against, and must be a reasonable percentage of, the amount of settlement benefits actually received by class members.

The district court improperly justified its fee award based on a common fund analysis, when the settlement did not create a common fund. This is prohibited by Geier v. Sundquist, 372 F.3d 784 (6th Cir. 2004).

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ARGUMENT

I. The Notice of Settlement Failed to Comply With Fed. R. Civ. P. 23(h).

The Notice of Your Rights in the Allstate Fair Credit Reporting Act Settlement ("Notice") failed to provide the information required by Fed. R. Civ. P. 23(h). Fed. R. Civ. P. 23(h) provides:

> (1) *Motion for Award of Attorney Fees*. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> (2) *Objections to Motion*. A class member, or a party from whom payment is sought, may object to the motion.

The Notice stated in relevant part:

> Allstate has agreed to pay the Class Members' attorneys' fees and costs incurred in prosecuting this case over the past four years. Class Counsel will be paid no more than $8 million in fees and costs. The Court will determine the amount of fair and reasonable costs and fees to be paid to Class Counsel.

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The Notice further stated that any objections to the settlement *or to class counsel's attorney's fees*[2] had to be filed by May 2, 2005.

This does not comport with the requirements of Rule 23(h).[3] The Notice merely refers to the obligation of Allstate to pay any attorney's fees awarded to class counsel by the court up to a maximum of $8 million, which is contained in Section IV. B. of the Amended Stipulation of Settlement, but does not provide any information about class counsel's fee petition, or the basis for the amount of fees requested.

[2] The Notice actually used the term "fee award," as if the entire fee application process were a mere formality and the fees were a done deal. That impression was reinforced by the Amended Stipulation of Settlement, which provided at Section VIII. C. that "The Stipulation and Settlement are contingent upon the Court's entry of Final Judgment in the form, without material alteration, of Exhibit B hereto approving all of the terms of this Settlement, including the substantive terms **and the terms for payment of Attorney's Fees.**" (Emphasis added.)

[3] Rule 23(h) was added to Rule 23 effective December 1, 2003. Prior to its enactment, class action settlement notices routinely contained a reference to attorney's fees, usually in the form and manner used here, *i.e.*, a statement that class counsel would apply for fees and expenses in an amount not to exceed X. Because it must be presumed that the drafters intended something by enacting Rule 23(h), it cannot be contended that Rule 23(h) was intended merely to codify existing practice. Instead, it should be given its literal meaning – class members must receive notice of class counsel's "motion" for attorney's fees, not just the fee cap contained in the settlement agreement.

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This is a case of first impression, as no court has yet construed the notice requirements of two-year-old Rule 23(h).[4] The notice requirement contained in Rule 23(h)(1) must be construed in light of the right to object to the fee request that is enshrined in Rule 23(h)(2). The notice that must be provided is one that permits class members to meaningfully evaluate class counsel's fee request and to make an informed objection to it. In a common fund case, that would entail, at a minimum, the value of the fund and the percentage of the fund sought by the attorneys. In a case like this one that does not create a common fund, reasonable notice of a motion for fees must include the amount of class counsel's claimed lodestar, the projected value of the settlement to class members, and the total amount of fees sought. The Notice contained none of these things.

Class counsel did not file its Application for an Award of Attorney's Fees and Expenses ("Fee Application") until July 7, 2005, two months after objections to their fee request were due.[5] That was the first time that class

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[4] The district court in Cobell v. Norton, 407 F. Supp. 2d 140 (D.D.C. 2005) did hold that Rule 23(h), as a procedural rule, applies to suits filed before its enactment.

[5] Class counsel filed the Declaration of Mark A. Cohen at the same time, thus depriving class members of any meaningful opportunity to rebut Cohen's extreme and unorthodox economic valuation of the credit reports. The fact that the objectors failed to put on an economic expert should not be treated as a concession that Cohen's valuation is appropriate, since the objectors had no meaningful opportunity to rebut it with experts of their own.

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counsel revealed the amount of attorney's fees it was seeking and the claimed basis for it. Class members were unable to respond to the Fee Application, of course, because their objections had been due by May 2, 2005.

In Consolidated Plaintiffs v. Consolidated Defendants, No. 1:03-cv-01519 (N.D. FL, February 23, 2005) (a copy of this unpublished decision is included in the Addendum), the court rejected a proposed settlement because of the failure of the class notice to "provide a valuation of the settlement benefits for the Class Members nor an explanation of basis for the attorney's fees requested." Id. at p. 11. Terry Smiljanich and his firm James Hoyer were lead counsel in that case, as well as this one. Remarkably, even after having a prior settlement rejected for the failure to disclose the basis for the valuation of the settlement and for the requested attorney's fees in the class notice, Mr. Smiljanich once again approved a class notice in this case that does neither of those things.

Not only does class counsel's basis for its attorney's fee request not appear in the class notice, it did not appear anywhere in the record until July 7, 2005, when the Declaration of Mark A. Cohen was filed. By that date, there was insufficient time for the objectors to depose Professor Cohen or to retain and prepare their own expert, which is presumably the purpose of Rule 23(h). Rule 23(h) is intended to give class members the tools to

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adequately challenge fee requests, and this means more than simply putting class members on notice that some fees will be requested at some future date.

The court compounded the error when it permitted class counsel to file its lodestar under seal, thus preventing even those class members who were motivated to do so from gaining access to the information necessary to evaluate class counsel's fee request.

Sufficiency of notice is not a matter consigned to the court's discretion. A claim of defective notice is reviewed by this Court *de novo*. DeJulius v. New Eng. Health Care Emples. Pension Fund, 429 F.3d 935, 942 (10th Cir. 2005). The notice procedure followed by the court below clearly violated the due process rights of class members and Fed. R. Civ. P. 23(h). Class members received *no* notice of class counsel's motion for attorney's fees. The fee application was not filed until July 7, 2005, two months after objections were due. Class members were deprived of any meaningful opportunity to object to class counsel's fee request, and they have continued to be deprived of the information – namely, class counsel's billing records – necessary to evaluate the reasonableness of class counsel's requested fees.

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II. The District Court Abused Its Discretion In Awarding Class Counsel Attorney's Fees In An Amount That Is More Than 77% Of The Benefits Actually Received By Class Members.

A district court's award of attorney's fees is reviewed for abuse of discretion. Geier v. Sundquist, 372 F.3d 784, 789 (6th Cir. 2004). "An abuse of discretion exists when the district court applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." First Tech. Safety Sys., Inc. v. Depinet, 11 F.3d 641, 647 (6th Cir. 1993). The district court did all three of those things here.

First, the district court failed to explain which legal standard for calculating attorney's fees it was employing, in violation of Rule 23(h)(3) (court "***must*** find the facts and state its conclusions of law") and Rule 52(a) ("court ***shall*** find the facts specially and state separately its conclusions of law thereon") (emphasis added). The court essentially fudged the issue by making reference to a number of factors and issues relevant to fee awards under various standards, but never settling on a methodology or making findings or conclusions that would support a fee award. For example, while the court seemed to suggest that it was making an award under the common fund doctrine in contravention of this Court's holding in Geier, supra, it stated elsewhere in its oral opinion that it did not need to place a value on the alleged "fund." Compare FH Transcript Vol. II at p. 347 (no need "to slavishly adhere to the law of the circuit where this Court is sitting" in an

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MDL proceeding), with p. 330 ("to the extent that a value needs to be placed on the settlement").

As this Court held in Geier, while "deference is to be given to a district court's determination of a reasonable attorney's fee," the district court must "provide an adequate explanation of the reasons for its award and the manner in which that award was determined." 372 F.3d at 791. This Court has found an abuse of discretion "where a district court fails to explain its reasoning adequately." Id. The district court failed to adequately explain which method of fee calculation it used, and, regardless of method, failed to make any factual findings that would support a fee award.

Where a court is purporting to award an attorney's fee under a common fund method, the first inquiry is whether a common fund has been created, and whether attorney's fees will be taken from that fund. Geier, 372 F.3d at 790. In this case, the answers to both of those questions is no.

In Geier, this Court rejected an appeal by attorneys for a class of plaintiffs who contended that the district court should have awarded fees to them under a common fund or common benefit analysis. This Court held that the common fund doctrine is not only:

> inapplicable where litigants are vindicating a social grievance, the doctrine is inappropriate here because there is simply no fund. The benefit provided to the plaintiff class … is not pecuniary in any conventional way and did not result in the creation of a fund to be divvied up among the plaintiffs, as is the case in common fund cases.

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> Although … the benefits could perhaps be *measured* as pecuniary – in the sense that a dollar value could be assigned to the cost of the remedial measures – transposing the action's social value into monetary value is imprecise, and more importantly, still leaves us without a fund.

372 F.3d at 790. The above-quoted language could not be clearer or more applicable to this case. Indeed, the district court appeared to agree with the argument made by Appellants' counsel at the fairness hearing: "The Geier case couldn't be clearer that if there's no common fund, you can't have a percentage of the fund." FH Transcript Vol. I at p. 261.

This case also illustrates the wisdom of Geier's holding that attempting to assign a dollar value to non-monetary settlement benefits is folly and woefully imprecise. The settlement's value was alleged to "range" from $57 million to $167 million, hardly the kind of precision associated with common fund awards. FH Transcript Vol. II at p. 347. Moreover, in its desperate attempts to inflate the settlement's "value" to the point that would make their $8 million fee appear reasonable, class counsel assigned value to things that are not normally counted in accepted economic analysis. Judge Trauger disregarded her own misgivings about Professor Cohen's valuation when she went ahead and relied on it anyway: "I have had Professor Cohen in other cases, and I think that the evidence from which one can value a settlement is a little firmer in those other cases than it is in this case." FH Transcript Vol. II at p. 330.

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For example, not satisfied with the $9.50 retail price for a copy of a credit report that was asserted in the Class Notice, class counsel had Dr. Cohen assign value to the probability that class members who receive their credit report will detect identity theft and receive lower rates for insurance and loans. While these things may flow from consulting one's credit report, they are presumed to be reflected in the $9.50 retail price. As Appellants' counsel pointed out at the fairness hearing:

> I pay 50 cents for a newspaper. I might glean information from that newspaper that saved me hundreds of thousands of dollars, but I don't pay anybody for that, nobody gets credit for that, no attorney comes and tries to take a middleman fee for handing me my paper.

FH Transcript Vol. I at p. 252. If a class action were settled on terms that provided each class member with a free copy of a newspaper, there is no question that the value of that settlement would be based upon the retail price of that newspaper, and not the value of the education that could be gleaned from it.

There is no sound basis for valuing the claimed credit reports in this settlement at anything higher than their actual retail price. Indeed, there is a strong argument that they should be valued at the cost to Allstate of providing them, or $2.56, which would give the credit reports a value of only $2.5 million. The retail price of a credit report is presumptively the fair

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market value, and constitutes a ceiling on the valuation that can be assigned to it.

To the extent that the district court based its fee award on a lodestar analysis, the fee must still bear a reasonable relationship to the class' recovery of benefits. See In re Excess Value Ins. Coverage Litig., M-21-84 (RMB) (S.D.N.Y., November 2, 2005) (a copy of this unpublished decision is included in Addendum). In Excess Value, Judge Berman held that the settlement's value should be based on the value of redeemed vouchers, which was $4.8 million. Although class counsel's lodestar in that case was $6.9 million, the court awarded class counsel a fee of only $2.4 million in order that the fee would bear a reasonable relationship to the value of settlement benefits received by the class.

Here, the maximum reasonable value of this settlement's benefits to those class members who elected to avail themselves of them is $10.3 million, as described above. Each of the 960,000 class members who elected to receive a credit report will receive something that has a retail market value of $9.50, for a total of $9.1 million, and the projected proxy damages that will be paid to those class members who pursue the credit report correction process is $1.2 million. Therefore, in order to be reasonable, the maximum fee that may be awarded to class counsel is $5.1

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million, which would be exactly 33% of the combined total of $10.3 million and $5.1 million.

If the district court based its fee award on class counsel's lodestar, then it erred in keeping class counsel's billing records from objectors. Reynolds v. Beneficial Natl. Bk., 288 F.3d 277, 284 (7th Cir. 2002)("There was no sound basis for sealing the fee applications, let alone for sealing [from objectors] the number of hours each of the settlement class counsel had devoted to the case."). The starting point of any lodestar analysis is the number of hours reasonably expended by counsel, and in order to determine that number class counsel's billing records must be examined. Geier, supra, 372 F.3d at 791.

The number of hours reasonably expended, multiplied by a reasonable hourly rate for those services, is usually the beginning and end of a lodestar analysis, unless the district court makes a finding that a case was "rare" and "exceptional." Geier, 372 F.3d at 795.

Just as the district court in Geier erred in refusing to apply a multiplier to class counsel's lodestar without first making a finding that the case was "unexceptional," the district court below erred in permitting a

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multiplier of 1.73[6] without first finding this case "exceptional," as required by Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986).

Under no circumstances could this case be termed "exceptional." Plaintiffs' claim for actual damages was un-winnable from the outset, because the evidence necessary to prove damages simply does not exist, as the parties conceded. The credit reporting agencies do not save historical credit reports. Therefore, there is not, and never was, any way to determine whether correctable errors existed on any class members' reports at the time they applied for insurance.

The claim for statutory damages was likewise doomed from the beginning because even the minimum amount of statutory damages ($1.2 billion) would have been so crushingly large that no court would ever have

[6] This number is derived from the court's statement at p. 350 of the fairness hearing transcript that "the lodestar starts out at about $4.6 million." $8 million divided by $4.6 million is 1.73. The lodestar is derived from the "12,000 hours" claimed by class counsel in its Fee Application, which means that the average hourly rate claimed by all of the attorneys and paralegals who billed time to this case is $383. Beyond these simple arithmetic exercises, the Appellants can make no further inferences regarding class counsel's lodestar, since the court has deprived the Appellants of the materials they require in order to properly evaluate it – the billing records.

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certified the case as a class action. See In re TransUnion Corp. Privacy Litig., 211 F.R.D. 328 (N.D. Ill. 2002).[7]

Unsurprisingly, then, the parties settled this un-winnable, nuisance value case for credit reports, something that is widely available for free from other sources, and which costs Allstate a mere $2.56 per report. A prior court has held that credit reports are worth *less* than their retail price, specifically because of the availability of free credit reports under FACTA and other sources. See Consolidated Plaintiffs v. Consolidated Defendants, No. 1:03-cv-01519 (N.D. FL, February 23, 2005) (a copy of this unpublished decision is included in the Addendum). In that case, which involved defendant Progressive Insurance Company, the court rejected a settlement virtually identical to this one, based in part on his holding that it offered insufficient value to the class.[8] Attorney Terry Smiljanich and his firm James Hoyer was the lead counsel for the plaintiffs in both this case and in Progressive.

[7] This case was cited by both parties at the fairness hearing as a reason why this case was un-winnable.
[8] In fact, one of the co-lead counsel in this case, David Szwak, submitted an affidavit in 2003 in a case captioned Clark v. Experian Info. Solutions, C.A. No. 8:00-1217-24 (D.S.C.) stating that the offer of a free credit report to class members as part of a class action settlement is "valueless." See FH Transcript Vol. I at pp. 90-92.

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The judge in Progressive was well aware of the potential to detect identity theft from consulting one's credit report when he rejected the Progressive settlement. Nevertheless, he concluded that the value of a free credit report is somewhere between the cost of that report to the defendant and its retail price of $9.00. Judge Paul correctly took into account the availability of free credit reports from other sources when he held that, "while there is a value to receiving multiple [credit] reports," that value is not $9.00 per report, but something considerably less. Id at p. 19.

Given that there is no conceivable basis for characterizing this case as exceptional, no multiplier is warranted, and this Court should remand to the district court for a fee award to class counsel equal to their unenhanced reasonable lodestar, the amount of which should be determined after a full evidentiary hearing held after the Appellants have received access to class counsel's billing records, and after the class has received reasonable notice of class counsel's fee application and the alleged basis for it.

In the alternative, if the district court were to conclude on remand that this case is exceptional, the maximum multiplier that may permissibly be applied to class counsel's lodestar (assuming that class counsel's lodestar is the $4.6 million claimed) is 1.1. This multiplier would result in a fee of $5.1 million, the maximum fee awardable given the projected value of benefits that will be received by class members, as argued above.

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In light of the limitations to the district court's discretion even in the event that it determines that this case is exceptional, it may be preferable for this Court simply to make the maximum permissible fee award of $5.1 million, which would represent a lodestar multiplier of at least 1.1. If on remand the objectors were to demonstrate that class counsel's reasonable lodestar is only $4 million, for example, a fee award of $5.1 million would represent a multiplier of 1.27, a number that would appear to be within the discretion of the lower court. In light of the minor difference that it would make to the ultimate multiplier in this case, this Court may elect simply to make a fee award at the maximum permissible amount, as it clearly has discretion and power to do, instead of remanding for a full evidentiary proceeding on class counsel's lodestar. See Darden v. Besser, 257 F.2d 285 (6th Cir. 1958).

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CONCLUSION

For the foregoing reasons, this Court should reverse the district court's fee award in the amount of $8 million to class counsel, and remand to the district court with instructions to send remedial notice to class members disclosing class counsel's fee application and the alleged basis for it, and thereafter to conduct an evidentiary hearing to determine the amount of class counsel's reasonable lodestar and what multiplier, if any, should be applied to that number. In the alternative, this Court should simply reverse the district court's fee award and set the fee at a reasonable amount itself.

Dated: April 24, 2006

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ADDENDUM: Appellants' Designation of the Contents of the Appendix

Appellants designate the following parts of the record for inclusion in the Joint Appendix:

1. Docket Sheet
2. Fifth Amended Complaint
3. Final Judgment And Order Of Dismissal
4. Amended Stipulation of Settlement
5. Mailed Class Notice
6. Objection of Joseph Fraum, Renee Fraum and Alan Shapiro
7. Declaration of Mark A. Cohen
8. Transcript of Fairness Hearing, Vols. I and II
9. Notice of Appeal of Joseph Fraum et al.

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ADDENDUM

Consolidated Plaintiffs v. Consolidated Defendants, No. 1:03-cv-01519
(N.D. FL, February 23, 2005)

In re Excess Value Ins. Coverage Litig., M-21-84 (RMB)
(S.D.N.Y., November 2, 2005)