This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0578

Edain Altamirano Flores, et al.,
Plaintiffs,

Faegre Baker Daniels LLP,
Appellant,

vs.

Spiros Zorbalas, et al.,
Respondents,

Stephen Frenz, et al.,
Respondents,

Mary Brandt,
Defendant.

Filed December 23, 2019
Affirmed
Klaphake, Judge[*]

Hennepin County District Court
File No. 27-CV-16-14225

Michael F. Cockson, James W. Poradek, James L. Volling, Nathaniel J. Zylstra, Isaac B. Hall, Faegre Baker Daniels LLP, Minneapolis, Minnesota (for appellant)

William F. Mohrman, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for respondents Spiros Zorbalas; SZ112, Inc.; S1322, Inc.; R110 Inc.; G121, Inc.; Alpha-Omega Companies Inc.)

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Richard A. Lind, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondents Stephen A. Frenz; Equity Residential Holdings, LLC; National Housing Fund, LLC; The Apartment Shop LLC; ERT LLC; Quarters for Creativity LTD.; Emerald Square Properties, Inc.; Hennepin Quarters Inc.; Powderhorn Quarters Inc.; Hiawatha Quarters, Inc.; 25 & 3146 Properties Inc.; Lahaha Holdings Inc.; Arts Avenue Properties Inc.; SS Quarters Inc.; Berkeley Holdings Inc.; 1801 Properties Inc.; JAS Apartments, Inc., Jennifer Frenz; 2020 Vision Investment, LLC)

Considered and decided by Bjorkman, Presiding Judge; Cochran, Judge; and Klaphake, Judge.

U N P U B L I S H E D   O P I N I O N

KLAPHAKE, Judge

Appellant, Faegre Baker Daniels LLP, as class counsel for a settled class action alleging fraudulent conduct by Minneapolis landlords, challenge the district court's failure to award the full amount of attorney fees requested from the common-fund settlement. Because we discern no abuse of discretion by the district court, we affirm.

D E C I S I O N

Appellant argues that the district court abused its discretion when it awarded 25% of the common-fund settlement rather than counsels' requested attorney fee of 32% of the common-fund settlement. "[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 749 (1980). Using the percentage method of awarding attorney fees in common-fund cases is both approved and well established. *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1061 (D. Minn. 2010) (quotation omitted). Minnesota state and federal courts evaluate a common-fund fee award by considering the following factors:

> (1) the benefit conferred on the class, (2) the risk to which plaintiffs' counsel was exposed, (3) the difficulty and novelty of the legal and factual issues of the case, (4) the skill of the lawyers, both plaintiffs' and defendants', (5) the time and labor involved, (6) the reaction of the class, and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.

Id. at 1062.

The court has wide discretion in the weight to assign each factor, given that not all of the individual factors apply to every case. *Id*. "We will not reverse the district court's decision on attorney fees absent an abuse of discretion." *Carlson v. SALA Architects, Inc*., 732 N.W.2d 324, 331 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007).

After nearly two years of litigation, class counsel reached a settlement through mediation on behalf of the class of Minneapolis tenants. Class counsel sought approximately 32% of the settlement fund for attorney fees. The district court analyzed the seven applicable factors and concluded that an award of 25% of the common fund was fair and reasonable.

Empirical Studies

Appellant contends that the district court erroneously relied on empirical studies of fee awards published in academic journals. The district court relied on empirical studies of attorney fees awarded in class actions[1] in its analysis of factor seven, which requires the

[1] The district court examined Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 967 Law Faculty Publication (2010); Theodore Eisenberg, et al., *Attorneys' Fees In Class Actions: 2009-2013*, 92 N.Y. L. Rev. 937 (2017); and Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010).

court to consider "the comparison between the requested attorney fee percentage and percentages awarded in similar cases." *Yarrington,* 697 F. Supp. 2d at 1062. The district court noted that federal judges rely extensively on empirical studies when assessing fee requests, citing *In re Heartland Payments Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1080-81 (S.D. Tex. 2012) ("District courts increasingly consider empirical studies analyzing class-action-settlement fee awards to set the appropriate percentage benchmark or to test the reasonableness of a given benchmark."). The district court found that for class action settlements the size of this case and in the consumer category, the average, mean, and median percentages ranged from 20% to 26% of the common fund. Appellant concedes there is no caselaw in Minnesota expressly rejecting the use of empirical studies to determine awards of attorney fees. Moreover, we know of no case that prohibits the use of such studies. The district court did not abuse its discretion when it relied in part on empirical studies to conclude that a fee award of 25% of the common-fund settlement in this case was fair and reasonable.

Lodestar Cross-Check

Appellant argues that the district court erred by failing to employ a lodestar cross-check to confirm the reasonableness of class counsels' requested fee of 32% of the common-fund settlement. "Under the lodestar method, a court must first determine the number of hours reasonably expended on the litigation and then multiply those hours by a reasonable hourly rate . . . [and second] consider other relevant circumstances bearing on the reasonableness of the fee." *Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Trust*, 912 N.W.2d 652, 659 (Minn. 2018) (quotations omitted). Courts that apply the

percentage-of-the-fund method "will often verify the reasonableness of an attorney fee award by cross-checking it against the lodestar method." *Yarrington*, 697 F. Supp. 2d at 1061; *see Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1157 (8th Cir. 1999) ("[T]he lodestar approach is sometimes warranted to double-check the result of the percentage of the fund method.") (quotations omitted).

The district court declined to employ the lodestar method, noting its concerns that the lodestar method "create[s] a temptation for lawyers to run up the number of hours for which they [are] paid." *See In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 167-68 (S.D.N.Y. 1989). Appellant concedes there is no legal authority requiring the district court to perform a lodestar cross-check to confirm the reasonableness of the fee award. Because it is within the district court's discretion to decline to employ a lodestar cross-check, the district court did not abuse its discretion.

Affirmed.