Awarding Attorneys' Fees and Managing Fee Litigation

Second Edition

Alan Hirsch and Diane Sheehey
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Foreword

Alan Hirsch and Diane Sheehey prepared the first edition of this monograph. Diane Sheehey updated this edition with assistance from Kris Markarian and Laural Hooper of the Federal Judicial Center.

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Introduction

In the federal courts, attorneys' fees litigation arises in several contexts. Almost 200 civil statutes authorize fee awards to prevailing plaintiffs and, in some cases, prevailing defendants. Bankruptcy courts must approve requests for fees for professional services, including attorneys' fees, in every Chapter 11 case and in other cases as well. In addition, common law permits courts to award fees when a suit results in a common fund or substantial benefit to a class of plaintiffs or non-parties. Judges also may award fees against parties or attorneys as a sanction for misconduct, under the court's inherent authority, or pursuant to several provisions in the Federal Rules of Civil Procedure. Finally, the 1964 Criminal Justice Act authorizes compensation to court-appointed attorneys in criminal cases. In the aggregate, attorneys' fees matters constitute a significant part of a federal judge's workload.

Fee awards were not always so prevalent in federal litigation. Under the traditional "American Rule," each party assumed its own legal costs.[1] In the nineteenth century, the Supreme Court carved out the common fund exception.[2] Throughout the twentieth century, Congress and the courts created broader exceptions. Congress enacted statutes providing for the prevailing party to recover attorneys' fees from its opponent in particular kinds of actions.[3] Invoking its inher-

1. For the history of this rule, and occasional minor departures from it, see *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247–57 (1975).

2. *See* Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885); Trustees v. Greenough, 105 U.S. 527 (1881).

3. For earlier statutes, see Amendments to Freedom of Information Act, Pub. L. No. 93-502, § 1(b)(2), 88 Stat. 1561 (amending 5 U.S.C. § 552(a)); Packers & Stockyards Act, 42 Stat. 166, 7 U.S.C. § 210(f); Perishable Agricultural Commodities Act, 46 Stat. 535, 7 U.S.C. § 499g(b); Bankruptcy Act, 11 U.S.C. §§ 104(a)(1), 641–644;

ent equity power, the Supreme Court held that attorneys' fees may be assessed against parties who disobey a court order or act in bad faith.[4] Most significantly, in the early 1970s a number of courts ordered defendants to pay the attorneys' fees of victorious plaintiffs whose lawsuits advanced important public policies, such as environmental protection.[5] But in the 1975 case of *Alyeska Pipeline Service Co. v. Wilderness Society,*[6] the Supreme Court rejected the "private attorney general" doctrine, holding that courts may not shift a prevailing party's fees to a losing party absent specific statutory authorization.

Clayton Act, § 4, 38 Stat. 731, 15 U.S.C. § 15; Unfair Competition Act, 39 Stat. 798, 15 U.S.C. § 72; Securities Act of 1933, 48 Stat. 82, as amended, 48 Stat. 907, 15 U.S.C. § 77k(e); Trust Indenture Act, 53 Stat. 1176, 15 U.S.C. § 77www(a); Securities Exchange Act of 1934, 84 Stat. 890, 897, as amended, 15 U.S.C. §§ 78i(e), 78r(a); Truth in Lending Act, 82 Stat. 157, 15 U.S.C. § 1640(a); Motor Vehicle Information & Cost Savings Act, Tit. IV, § 409(a)(2), 86 Stat. 963, 15 U.S.C. § 1989(a)(2) (1970 ed., Supp. II); 17 U.S.C. § 116 (copyrights); Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c); Education Amendments of 1972, § 718, 86 Stat. 369, 20 U.S.C. § 1617 (1970 ed., Supp. II); Norris-LaGuardia Act, § 7(e), 47 Stat. 71, 29 U.S.C. § 107(e); Fair Labor Standards Act, § 16(b), 52 Stat. 1069, as amended, 29 U.S.C. § 216(b); Longshoremen's & Harbor Workers' Compensation Act, § 28, 44 Stat. 1438, as amended, 86 Stat. 1259, 33 U.S.C. § 928 (1970 ed., Supp. II); Federal Water Pollution Control Act, § 505(d), as added, 86 Stat. 888, 33 U.S.C. § 1365(d) (1970 ed., Supp. II); Marine Protection, Research & Sanctuaries Act of 1972, § 105(g)(4), 33 U.S.C. § 1415(g)(4) (1970 ed., Supp. II); 35 U.S.C. § 285 (patent infringement); Servicemen's Readjustment Act, 38 U.S.C. § 1822(b); Clean Air Act, § 304(d), as added, 84 Stat. 1706, 42 U.S.C. § 1857h-2(d); Civil Rights Act of 1964, Tit. II, § 204(b), 78 Stat. 244, 42 U.S.C. § 2000a-3(b), and Tit. VII, § 706(k), 78 Stat. 261, 42 U.S.C. § 2000e-5(k); Fair Housing Act of 1968, § 812(c), 82 Stat. 88, 42 U.S.C. § 3612(c); Noise Control Act of 1972, § 12(d), 86 Stat. 1244, 42 U.S.C. § 4911(d) (1970 ed., Supp. II); Railway Labor Act, § 3, 44 Stat. 578, as amended, 48 Stat. 1192, as amended, 45 U.S.C. § 153(p); Merchant Marine Act of 1936, § 810, 49 Stat. 2015, 46 U.S.C. § 1227; Communications Act of 1934, § 206, 48 Stat. 1072, 47 U.S.C. § 206; Interstate Commerce Act, §§ 8, 16(2), 24 Stat. 382, 384, 49 U.S.C. §§ 8, 16(2), and 308(b), as added, 54 Stat. 940, as amended, 49 U.S.C. § 908(b); Fed. R. Civ. P. 37(a) and (c).

4. *See* Vaughan v. Atkinson, 369 U.S. 527 (1962) (bad faith); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426–28 (1923) (order disobeyed).

5. *See, e.g.,* Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Natural Res. Def. Council v. EPA, 484 F.2d 1331 (1st Cir. 1973); Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), *cert. denied,* 410 U.S. 955 (1973); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972).

6. 421 U.S. 240 (1975).

(In dicta, the Court approved continued use of fee awards in common fund and substantial benefit cases and as a sanction for misconduct.[7])

At the time of *Alyeska*, there were several dozen fee-shifting statutes. In its wake, such statutes proliferated, in particular, the Civil Rights Attorney's Fees Awards Act of 1976[8] and scores of less prominent fee-shifting statutes. Applying these statutes is often difficult. In many cases, it is unclear whether a party is entitled to a fee award, and even when an award is clearly in order, calculating the amount of the award can be complex and time-consuming. By 1983 disputes over attorneys' fees were consuming substantial judicial resources. In the seminal case of *Hensley v. Eckerhart*,[9] the Supreme Court warned lower courts not to let fee requests spawn "a second major litigation."[10] However, neither the Court's warning nor its attempted clarification of the law in *Hensley* and subsequent decisions has significantly reduced the burden or complexity of fee awards.

This monograph addresses both statutory fee-shifting awards and common fund and substantial benefit awards. Part 1 analyzes attorneys' fees awards under fee-shifting statutes and addresses the selection of class counsel under the Private Securities Litigation Reform Act. Part 2 discusses fee awards based on the common fund doctrine and its offspring, the substantial benefit doctrine. Part 3 considers an attorneys' fees issue of special significance to bankruptcy courts—the propriety of *sua sponte* review of fee petitions.[11] Part 4 presents techniques for managing attorneys' fees.

The monograph does not deal with compensation under the Criminal Justice Act or the Antiterrorism and Effective Death Penalty Act of 1996, or fees as a sanction for misconduct, which raise separate issues that warrant discrete treatment. Although the monograph does not address these areas specifically, parts of the analysis concerning

7. *Id.* at 259.

8. 42 U.S.C. § 1988 (2000).

9. 461 U.S. 424 (1983).

10. *Id.* at 437.

11. Fee issues peculiar to bankruptcy courts are, by and large, beyond the scope of this monograph. However, in Parts 1 and 2, most of the analysis concerning the amount of awards is applicable to bankruptcy court fee awards.

the amount of a fee award will apply to fees awarded as sanctions and under the Criminal Justice Act.

I
Fee-Shifting Statutes

Attorneys' fees disputes under fee-shifting statutes occur in innumerable circumstances and raise many questions. Supreme Court and lower appellate court decisions establish some guiding principles for trial courts. Although the Supreme Court decisions arise in the context of a particular statute, they generally rely on principles applicable to most fee-shifting statutes.[12] Drawing on case law, this part of the monograph addresses the questions a court must ask when analyzing a fee request.

A. Determining Whether a Fee Award Is In Order

The threshold question in an attorneys' fees case is whether any award is in order. Such a determination entails several discrete inquiries:

- Was a timely fee request made?
- Is there a prevailing party?
- Is there standing to bring a claim for fees?
- Is there a liable party?
- Are there special circumstances militating against an award?
- Is there a fee waiver?

12. *See Hensley,* 461 U.S. at 433 n.7 ("The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'"). With a few exceptions, the nuances unique to particular statutes (e.g., the Equal Access to Justice Act's prohibition of fees if the government's position was "substantially justified") are beyond the scope of this monograph.

1. Was a timely fee request made?

The Supreme Court has held that a motion for fees is untimely only if it causes "unfair surprise or prejudice" or violates a local rule.[13] The Court rejected the contention that a motion for fees is a motion to amend or alter a judgment, to which the ten-day requirement of Federal Rule of Civil Procedure 59(e) applies.[14]

Federal Rule of Civil Procedure 54(d) requires motions for attorneys' fees to be filed no later than fourteen days after entry of judgment, absent a "statute or order of the court."[15] Two circuits have held that local rules prescribing time periods for filing fees motions are court orders that preempt Rule 54's fourteen-day period.[16] Yet another circuit has held that Rule 54(d)(2)(B) motions are timely if filed no later than fourteen days after resolution of Rule 50(b), 52(b), or 59 motions.[17]

2. Is there a prevailing party?

a. Prevailing plaintiffs

The Supreme Court has said that to be eligible for a fee award, a plaintiff must prevail on "any significant claim affording some of the relief sought."[18] The relief cannot be merely declaratory or procedural; it must reach the underlying merits of the claim and "affect[ ]

13. White v. New Hampshire, 455 U.S. 445, 454 (1982).

14. In a subsequent case, the Court held that a judgment on the merits is final even if the amount of fees has not been determined. Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988). Therefore, the thirty-day period for filing an appeal begins once the judgment is entered, even if an order on the fee request has not been entered. See *infra* notes 282–83 and accompanying text for further discussion of when Rule 59(e) motions toll the thirty-day time limit for appeals.

15. Fed. R. Civ. P. 54(d)(2)(B).

16. *See* Eastwood v. Nat'l Enquirer, 123 F.3d 1249 (9th Cir. 1997); Johnson v. Lafayette Fire Fighters Ass'n Local 472, 51 F.3d 726, 729 (7th Cir. 1995) (local rule granting a party ninety days from judgment to file a fee petition was an "order of the court").

17. Weyant v. Okst, 198 F.3d 311, 315 (2d Cir. 1999).

18. Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791 (1989) (rejecting the law in some circuits that plaintiff must prevail on the "central issue" and achieve "the primary relief sought").

the behavior of the defendant towards the plaintiff."[19] Thus, for example, the Court found that the plaintiff was not a prevailing party where his success consisted of an appellate court decision reversing a directed verdict for the defendant and ordering a new trial (and making a favorable ruling for the plaintiff in requiring additional discovery). The Court stated: "The respondents have of course not prevailed on the merits of any of their [underlying] claims."[20] In another illustrative case, the Eighth Circuit rejected a fee request where the plaintiff's victory consisted solely of the district court's finding that it had jurisdiction to hear the case.[21]

At the same time, the Supreme Court has held that an award of nominal damages confers prevailing party status on the plaintiff.[22] An award of nominal damages "modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay."[23]

Consensus in the lower courts has emerged with respect to the "prevailing party" question in certain recurring situations. The courts agree that when a party's favorable judgment is vacated or reversed on appeal, the party ceases to be a prevailing party and a prior fee award

19. Hewitt v. Helms, 482 U.S. 755, 761 (1987). In *Hewitt,* an appellate court held that due process was denied an inmate sentenced by a prison committee to disciplinary confinement. On remand, the district court found the defendant immune from damage liability. The appellate court had also given essentially declaratory relief, stating that the defendant's disciplinary proceedings were improper and would have to be changed. But because the plaintiff had been released on parole, and thus did not benefit from this declaration, the Supreme Court held that he was not a prevailing party.

Rhodes v. Stewart, 488 U.S. 1 (1988), is similar, although, unlike the court in *Hewitt,* the lower court granted formal declaratory relief. By the time it was granted, however, one plaintiff had died and the other was no longer in custody. The Court held that there was no prevailing plaintiff: "A declaratory judgment, in this respect, is no different from any other judgment. It will constitute relief . . . if, and only if, it affects the behavior of the defendant towards the plaintiff." *Rhodes,* 488 U.S. at 4.

20. Hanrahan v. Hampton, 446 U.S. 754, 768 (1980).

21. Huey v. Sullivan, 971 F.2d 1362, 1367 (8th Cir. 1992).

22. Farrar v. Hobby, 506 U.S. 103 (1992).

23. *Id.* at 113.

must fall.[24] The same is generally true when the plaintiff is granted injunctive relief based on a likelihood of prevailing on the merits but ultimately loses on the merits.[25] However, all circuits that have considered the question have held that the plaintiff is a prevailing party when it obtains a preliminary injunction based on its probability of success and the case becomes moot before a final judgment.[26] But if injunctive relief is granted only to preserve the status quo so that any eventual relief would not come too late, and the court makes no assessment of the merits of the case, the plaintiff is not a prevailing party if the case becomes moot.[27]

The Supreme Court has held that favorable settlements enforced through court-ordered consent decrees qualify plaintiffs for fee awards.[28] Lower courts had developed this doctrine, holding that the plaintiff is a prevailing party when its lawsuit achieved its results by causing the defendant to voluntarily change its conduct. The Supreme Court, however, rejected this "catalyst theory" as a basis for awarding attorneys' fees under two statutes granting fees to the "prevailing party" in *Buckhannon Board and Care Home, Inc. v. West Virginia De-*

24. *See, e.g.,* Dexter v. Kirschner, 984 F.2d 979, 987 (9th Cir. 1992); Ladnier v. Murray, 769 F.2d 195, 200 (4th Cir. 1985); Harris v. Pirch, 677 F.2d 681, 689 (8th Cir. 1982).

25. Palmer v. Chicago, 806 F.2d 1316 (7th Cir. 1986), *cert. denied,* 481 U.S. 1049 (1987); Ward v. County of San Diego, 791 F.2d 1329, 1334 (9th Cir. 1986), *cert. denied,* 483 U.S. 1020 (1987); Doe v. Busbee, 684 F.2d 1375, 1380 (11th Cir. 1982); Smith v. Univ. of N.C., 632 F.2d 316 (4th Cir. 1980). *But cf.* Frazier v. Bd. of Trustees of Northwest Miss. Reg'l Med. Ctr., 765 F.2d 1278 (5th Cir. 1985) (at least where eventual loss resulted from change in the law after initial injunction was granted, plaintiff was entitled to fees), *cert. denied,* 476 U.S. 1142 (1986).

26. Dahlem v. Bd. of Educ., 901 F.2d 1508, 1512 (10th Cir. 1990); Webster v. Sowders, 846 F.2d 1032, 1036 (6th Cir. 1988); Taylor v. Fort Lauderdale, 810 F.2d 1551, 1557–58 (11th Cir. 1987); Grano v. Barry, 783 F.2d 1104, 1109 (D.C. Cir. 1986); Bishop v. Comm. on Prof'l Ethics, 686 F.2d 1278, 1290–91 (8th Cir. 1982); Coalition for Basic Human Needs v. King, 691 F.2d 597, 600 (1st Cir. 1982); Williams v. Alioto, 625 F.2d 845, 847–48 (9th Cir. 1980), *cert. denied,* 450 U.S. 1012 (1981); Doe v. Marshall, 622 F.2d 118, 119–20 (5th Cir. 1980), *cert. denied,* 451 U.S. 993 (1981).

27. Libby v. Ill. High Sch. Ass'n, 921 F.2d 96 (7th Cir. 1990).

28. Maher v. Gagne, 448 U.S. 122 (1980). *See also* Sierra Club v. EPA, 322 F.3d 718 (D.C. Cir. 2003) (holding that catalyst theory is a valid basis for awarding attorneys' fees under Clean Air Act), *cert. denied*, 540 U.S. 1104 (2004).

partment of Health and Human Resources.[29] The Court said that the term "prevailing party" is a legal term of art[30] and held that it does not "include[ ] a party that has failed to secure a judgment on the merits or a court-ordered consent decree."[31] Furthermore, the Court stated that "[a] defendant's voluntary change in conduct . . . lacks the necessary judicial *imprimatur* on the change."[32]

Courts of appeals have extended rejection of the catalyst theory to other fee-shifting statutes that award fees to the prevailing party.[33] Note, however, that the Tenth, Eleventh, and D.C. Circuits declined to extend the *Buckhannon* rationales for rejecting the catalyst theory to fee-shifting statutes that award fees "whenever . . . appropriate" as opposed to fee-shifting statutes that award fees to the prevailing party.[34]

Under the civil rights fee-shifting statute,[35] a plaintiff who prevails on a nonconstitutional statutory claim brought pursuant to section 1983 is eligible for attorneys' fees.[36]

Plaintiffs successful before administrative agencies may be entitled to fees under a fee-shifting statute that refers to an "action or proceeding," provided (1) the plaintiff filed a claim in federal court, (2) the administrative proceeding was mandatory, and (3) the issue in the administrative proceeding was related to the claim that the plaintiff advanced in the judicial proceeding.[37] One court of appeals held

29. 532 U.S. 598 (2001) (holding that catalyst theory is not a permissible basis for attorneys' fees awards under the Americans with Disabilities Act and the Fair Housing Amendments Act).

30. *Id.* at 603.

31. *Id.* at 600.

32. *Id.* at 605.

33. *See* Bennett v. Yoshina, 259 F.3d 1097, 1100–01 (9th Cir. 2001) (Civil Rights Attorney's Fees Awards Act of 1976); Johnson v. Rodriguez, 260 F.3d 493, 495 (5th Cir. 2001) (28 U.S.C. § 1988); Griffin v. Steeltek, Inc., 261 F.3d 1026, 1029 (10th Cir. 2001) (Americans with Disabilities Act (ADA)).

34. Sierra Club v. EPA, 322 F.3d 718, 721–26 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004) (Clean Air Act); Loggerhead Turtle v. County Council, 307 F.3d 1318, 1325–27 (11th Cir. 2002) (Endangered Species Act); Ctr. for Biological Diversity v. Norton, 262 F.3d 1077, 1080 n.2 (10th Cir. 2001) (Endangered Species Act).

35. 42 U.S.C. § 1988 (2000).

36. Maine v. Thiboutot, 448 U.S. 1 (1980) (per curiam).

37. N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). *Cf.* Webb v. Bd. of Educ., 471 U.S. 234 (1985) (holding award inappropriate because administrative pro-

that where the fee-shifting statute refers only to an "action"—and omits "proceeding"—fee awards for success at the administrative phase are not allowed.[38]

Courts of appeals have consistently held that when plaintiffs lose a claim governed by a fee statute but prevail on another claim, they are not entitled to fees.[39] However, they are entitled to fees if they prevail on another claim and the fee-based claim is not reached (as long as it is not frivolous).[40]

A plaintiff may be a prevailing party entitled to fees *pendente lite* rather than at the conclusion of the litigation. Courts have long had discretion to award interim fees where liability has been established but no remedial order has been entered.[41] The Supreme Court has suggested in dicta that district courts have discretion to award interim fees whenever the plaintiff achieves success sufficient to make it a prevailing party—regardless of the stage of the litigation[42]—for example, when the plaintiff receives a partial summary judgment establishing liability on one issue while other issues remain to be tried. However, interim fees should be generally granted only if they are necessary for

ceeding was not mandatory). *See also* N.C. Dep't of Transp. v. Crest St. Cmty. Council, 479 U.S. 6 (1986) (holding award inappropriate when plaintiff prevailed in mandatory administrative proceedings but filed no judicial action, except to recover fees).

38. Cann v. Carpenters' Pension Trust Fund for N. Cal., 989 F.2d 313, 316–17 (9th Cir. 1993) (ERISA). *Cf.* Anderson v. Procter & Gamble, 220 F.3d 449 (6th Cir. 2000) (no attorneys' fees at administrative stage per ERISA legislative history).

39. Mateyko v. Felix, 924 F.2d 824, 828 (9th Cir. 1990), *cert. denied,* 112 S. Ct. 65 (1991); Keely v. City of Leesville, 897 F.2d 172, 176–77 (5th Cir. 1990); Northeast Women's Ctr. v. McMonagle, 889 F.2d 466, 476 (3d Cir. 1989), *cert. denied,* 494 U.S. 1068 (1990); Finch v. City of Vernon, 877 F.2d 1497, 1507–08 (11th Cir. 1989); McDonald v. Doe, 748 F.2d 1055, 1057 (5th Cir. 1984); Gagne v. Town of Enfield, 734 F.2d 902, 904 (2d Cir. 1984); Reel v. Ark. Dep't of Corr., 672 F.2d 693, 698 (8th Cir. 1982); Haywood v. Ball, 634 F.2d 740, 743 (4th Cir. 1980).

40. Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1991), *cert. denied,* 112 S. Ct. 969 (1992); Plott v. Griffiths, 938 F.2d 164 (10th Cir. 1991); Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981).

41. Bradley v. Sch. Bd. of Richmond, 416 U.S. 696 (1974).

42. Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 790–91 (1989).

the plaintiff to continue pursuing the lawsuit, or if the case has been unusually protracted.[43]

If a plaintiff has received interim fees, but its victory on the underlying issue or issues is reversed on appeal, it may be directed to repay the money.[44] Several trial courts have conditioned interim fees on the posting of a security.[45]

b. Prevailing defendants

In *Christiansburg Garment v. EEOC,*[46] the Supreme Court held that the Title VII fee-shifting statute[47] authorizes an award to prevailing defendants as well as to prevailing plaintiffs. The holding appears to apply to all fee-shifting statutes that speak of a prevailing party without specification.[48] However, the Court held that an award for the Title VII defendant requires more than a showing that the defendant is a prevailing party. The trial court must also find that the plaintiff's suit was "frivolous, unreasonable, or without foundation."[49] It need not find subjective bad faith on the plaintiff's part.[50]

43. *See Bradley,* 416 U.S. at 722–23; McKenzie v. Kennickell, 669 F. Supp. 529, 532–33 (D.D.C. 1987); W. Side Women's Serv. v. Cleveland, 594 F. Supp. 299, 303 (N.D. Ohio 1984).

44. There is precedent for the return of fees in common fund and bankruptcy cases. *See* Mokhiber *ex rel.* Ford Motor Co. v. Cohn, 783 F.2d 26 (2d Cir. 1986) (per curiam); Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985), *cert. denied,* 476 U.S. 1169 (1986); *In re* Hepburn, 84 B.R. 855 (S.D. Fla. 1988); *In re* Chin, 31 B.R. 314 (Bankr. S.D.N.Y. 1984). Although the authors found no reported cases of parties ordered to return fees awarded pursuant to fee-shifting statutes, courts apparently have such authority. *See* People Who Care v. Rockford Bd. of Educ., 921 F.2d 132, 134 (7th Cir. 1991) ("court may . . . direct the plaintiffs to repay the money if they ultimately fail to establish an entitlement to relief").

45. *See* Feher v. Dep't of Labor & Indus. Relations, 561 F. Supp. 757, 768 (D. Haw. 1983); Howard v. Phelps, 443 F. Supp. 374, 377 (E.D. La. 1978); Nicodemus v. Chrysler Corp., 445 F. Supp. 559, 560 (N.D. Ohio 1977), *rev'd on other grounds,* 596 F.2d 152 (6th Cir. 1979).

46. 434 U.S. 412 (1978).

47. 42 U.S.C. § 2000e-5(k) (2000).

48. *See* Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983) (generalizing *Christiansburg's* holding).

49. *Christiansburg,* 434 U.S. at 421.

50. *Id.*

In *Fogerty v. Fantasy, Inc.*,[51] the Supreme Court rejected a requirement that a prevailing defendant under the Copyright Act of 1976[52] be held to a more stringent standard than a prevailing plaintiff. Although the language awarding attorneys' fees to a "prevailing party" under the Copyright Act and that under the Civil Rights Act of 1964 are "virtually identical," the Court stated that factors warranting different treatment of plaintiffs and defendants under Title VII were not at work under the Copyright Act.[53] The Court held that under the Copyright Act, "prevailing plaintiffs and prevailing defendants are to be treated alike."[54]

Since the decision in *Fogerty*, the Fourth Circuit has held that the more stringent *Christiansburg* standard applies to prevailing defendants under the Fair Housing Act,[55] and thus, a court can treat a prevailing defendant differently from a prevailing plaintiff in deciding whether to award attorney fees.[56]

c. Prevailing intervenors

Courts of appeals have held that fees may be awarded in favor of an intervenor.[57] The intervenor must "contribute[] importantly"[58] or play a "significant role"[59] in producing the favorable outcome. The Second Circuit rejected the contention that intervenors can recover

51. 510 U.S. 517 (1994).

52. 17 U.S.C. § 505 (2000).

53. The Court noted that, in contrast to the Civil Rights Act of 1964, there was no indication in the Copyright Act's legislative history that Congress intended plaintiffs and defendants to be treated differently and that the purpose of the Copyright Act was not served by favoring plaintiffs over defendants. *See Fogerty*, 510 U.S. at 524.

54. *Id.* at 534.

55. 42 U.S.C. § 3613(c)(2) (2000).

56. *See* Bryant Woods Inn, Inc. v. Howard County, Md., 124 F.3d 597, 606 (4th Cir. 1997) ("proscriptions of the FHA draw on the same policies attending Title VII of the Civil Rights Act").

57. Wilder v. Bernstein, 965 F.2d 1196, 1202–04 (2d Cir.) (en banc), *cert. denied,* 113 S. Ct. 410 (1992); Grove v. Mead Sch. Dist., 753 F.2d 1528, 1535 (9th Cir.), *cert. denied,* 474 U.S. 826 (1985); Miller v. Staats, 706 F.2d 336, 340–42 (D.C. Cir. 1983).

58. United States v. Bd. of Educ. of Waterbury, 605 F.2d 573, 574 (2d Cir. 1979).

59. Donnell v. United States, 682 F.2d 240, 246 (D.C. Cir. 1982), *cert. denied,* 459 U.S. 1204 (1983).

fees only when they assert a violation of their own rights.[60] The fee award should reflect the intervenor's contribution; efforts that duplicate work of the original plaintiffs should not be compensated.[61]

d. Prevailing pro se litigants

The Supreme Court held that under the civil rights fee-shifting statute, a pro se litigant, whether a lawyer or a layperson, is not eligible for an award of attorneys' fees.[62] The Court ruled that the word "attorney" in the Civil Rights Attorney's Fees Awards Act assumes an agency relationship.[63] Lower courts have since extended the prohibition to other fee-shifting statutes.[64] One appellate court has allowed the award of fees to a pro se attorney litigant who also represented a co-plaintiff in a civil rights action.[65] Awarding attorneys' fees to pro se litigants who sought advice from outside counsel may be appropriate,[66] but a pro se attorney litigant is not entitled to fees for his or her colleagues' work.[67]

60. Wilder, 965 F.2d at 1202.

61. *Id.* at 1204–05.

62. Kay v. Ehrler, 499 U.S. 432 (1991).

63. *Id.* at 435–36.

64. *See, e.g.*, Woodside v. Sch. Dist. of Philadelphia Bd. of Ed., 248 F.3d 129, 131 (3d Cir. 2001) (pro se attorney litigant under the Individuals with Disabilities Education Act); Doe v. Bd. of Educ. of Baltimore County, 165 F.3d 260, 263 (4th Cir. 1998) (same), *cert. denied*, 526 U.S. 1159 (1999); Burka v. United States Dep't of Health & Human Servs., 142 F.3d 1286, 1290 (D.C. Cir. 1998) (pro se attorney litigant under the Freedom of Information Act); Ray v. United States Dep't of Justice, 87 F.3d 1250, 1252 (11th Cir. 1996) (same); SEC v. Price Waterhouse, 41 F.3d 805, 808 (2d Cir. 1994) (pro se litigant under the Equal Access to Justice Act).

65. Schneider v. Colegio de Abogados de Puerto Rico, 187 F.3d 30, 32 (1st Cir. 1999).

66. Blazy v. Tenet, 194 F.3d 90, 92 (D.C. Cir. 1999) ("pro se status does not by itself preclude the recovery of fees for consultations with outside counsel"). At least one appellate court has held that the pro se attorney litigant must demonstrate a "genuine attorney–client relationship" with outside counsel. Kooritzky v. Herman, 178 F.3d 1315, 1323–24 (D.C. Cir. 1999).

67. *Burka*, 142 F.3d at 1291 (no attorney–client relationship).

e. Amici curiae

The Fifth Circuit held that there was no common law or statutory basis for an award of attorneys' fees to amici curiae who voluntarily[68] participated in a lawsuit.[69] The Ninth Circuit likewise held that amici curiae are not entitled to fees.[70] The Second Circuit has indicated in dicta that fee awards to amici curiae are not appropriate.[71] However, at least one district court awarded fees to amici curiae who "contributed to the [p]laintiffs' victory" and "could have chosen to seek leave to intervene had the case proceeded to trial."[72]

3. Is there standing to bring a claim for fees?

The Supreme Court has stated that an award of fees is to the party, not to counsel.[73] In most circumstances, this is a mere technicality. For example, the Seventh Circuit has said that a motion for fees may be made in the name of the attorney, and an award so directed:

68. Court-appointed amicus curiae may be entitled to fees from a party. The D.C. Circuit has set forth a two-part test: "the court must 'appoint [ ] an amicus curiae who renders services which prove beneficial to a solution of the questions presented'" and "'direct [the fee] to be paid by the party responsible for the situation that prompted the court to make the appointment.'" Schneider v. Lockheed Aircraft Corp., 658 F.2d 835, 854 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982) (quoting 4 Am. Jur. 2d *Amicus Curiae* § 7 (1969)).

69. Morales v. Turman, 820 F.2d 728, 731–33 (5th Cir. 1987). The court pointed out that the amici curiae never represented the class, never asked to intervene, and, in fact, would not have had standing to intervene.

70. Miller-Wohl Co. v. Comm'r of Labor & Indus., State of Mont., 694 F.2d 203 (9th Cir. 1982) (no "common benefit" exception to American rule for amici curiae).

71. Wilder v. Bernstein, 965 F.2d 1196, 1203 (2d Cir. 1992) ("ruling that present intervenors are prevailing parties [for fee award] will not open the flood-gates to *amicus curiae*, good samaritans, or even litigious meddlers so that they may 'team up' and overburden the non-prevailing party with excessive attorneys' fees").

72. Russell v. Bd. of Plumbing Examiners of the County of Westchester, 74 F. Supp.2d 349, 350, 350 n.2 (S.D.N.Y. 1999) (stating that awarding fees here "will not open the flood-gates to litigious meddlers" and that requiring the amicus trade association "to move to intervene *nunc pro tunc* so as to get paid would be exalting form over substance").

73. Evans v. Jeff D., 475 U.S. 717 (1986) (discussed in text accompanying *infra* note 98). Although the award of fees is to the party, the party may not keep the fees. *See* United States *ex rel.* Virani v. Jerry M. Lewis Truck Parts & Equip., Inc., 89 F.3d 574, 577–79 (9th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997).

"[W]here the lawyer is acting in his capacity as the client's representative . . . it would exalt form over substance to deny the motion for fees 'so that the ministerial function of substituting the plaintiff' for the attorney could be accomplished."[74]

The matter is less straightforward if the court finds the attorney lacks standing to request fees. In one case, counsel was discharged (because of the client's displeasure with his services) before the case was settled. The Second Circuit said that "[w]ere we to entertain [the attorney's] claim, clients' control of their litigation would be subject to a veto by former attorneys no longer under an obligation of loyalty."[75] In another case, the trial court granted a fee award and ordered a check payable jointly to two attorneys and a legal services organization. The plaintiffs requested that the check be made solely to the legal services organization, and the court so ordered. Over the plaintiffs' objection, one of the attorneys appealed the order. The First Circuit held that the attorney lacked standing because the appeal "was not only unauthorized by [the plaintiffs] but was not made for their benefit."[76] Although it agreed with those decisions, the Seventh Circuit permitted a fee request by an attorney who had successfully defended a judgment for his client on appeal, even though the client subsequently discharged him before the conclusion of the litigation; there was no question that the attorney had acted with the client's approval during the appeal and no ground for believing that the client objected to the fee petition.[77]

74. Richardson v. Penfold, 900 F.2d 116, 117 (7th Cir. 1990) (quoting Ceglia v. Schweicker, 566 F. Supp. 118, 120 (E.D.N.Y. 1983)).

75. Brown v. Gen. Motors, 722 F.2d 1009, 1011 (2d Cir. 1983).

76. Benitez v. Collazo-Collazo, 888 F.2d 930, 933 (1st Cir. 1989).

77. Lowrance v. Hacker, 966 F.2d 1153, 1157 (7th Cir. 1992) (fee claim based on state lien statute, not on fee-shifting statute). The Seventh Circuit followed *Lowrance* in *Samuels v. American Motor Sales Corp.*, 969 F.2d 573 (7th Cir. 1992), a case in which the plaintiff won a verdict and fee award, and his attorney withdrew during the pendency of a post-trial adjudication over the amount of damages and fees. In withdrawing, the attorney asked the court for permission to continue to represent himself with respect to fees. The trial court granted permission, and the Seventh Circuit agreed with the decision: The attorney acted on the client's behalf in securing the verdict, and there was no evidence that the client objected to the attorney's efforts to get the fee award enlarged. *Samuels*, 969 F.2d at 576–77.

4. Is there a liable party?

Any losing defendant, including the government or government officials, can be liable for fees.[78] However, plaintiffs who prevail only against government employees in their personal capacities may not recover fees from the government.[79]

The Supreme Court has held that attorneys' fees may be awarded against an intervenor, but only on a showing of bad faith.[80] Three courts of appeals have considered whether fees may be awarded against the defendant to compensate the plaintiff for successful work in opposing an intervenor. The Fourth and Seventh Circuits affirmed a denial of fees.[81] However, the Eighth Circuit affirmed an award of fees against the defendant for work by the plaintiffs in defending a court-ordered remedy against members of the plaintiff class who intervened to challenge the remedy in a desegregation case.[82] The Eighth Circuit distinguished this case from the Seventh Circuit case, noting that here "the plaintiffs incurred their fees in defending the remedy, which was crucial to the object in filing suit to begin with."[83]

5. Are there special circumstances militating against an award?

Although fee-shifting statutes generally make fee awards for prevailing parties discretionary, the Supreme Court has stated that an award should be given absent "special circumstances" that render one un-

78. *See, e.g.,* Pulliam v. Allen, 466 U.S. 522, 543–44 (1984) (state judges liable for fees).

79. Kentucky v. Graham, 473 U.S. 159 (1985).

80. Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989).

81. Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 176–78 (4th Cir. 1994) ("*Zipes* instructs us not to shift intervention-related expenses to the losing defendant."); Bigby v. Chicago, 927 F.2d 1426, 1429 (7th Cir. 1991) (affirming a denial of fees where the defendant had opposed the intervenor's position and the issue raised by the intervenors was ancillary to the main litigation).

82. Jenkins v. Missouri, 967 F.2d 1248, 1250–52 (8th Cir. 1992) (defendant should pay expenses incurred in connection with intervenors because of "special nature of desegregation cases").

83. *Id.* at 1251 n.2.

just.[84] In every Supreme Court case in which the defendants have argued that special circumstances exist, the Court has rejected the claim,[85] with one noted exception.[86] Courts of appeals have followed this lead, rejecting most claimed special circumstances, including claims based on the defendant's willingness to enter into an early settlement;[87] the lawsuit's conferring a private benefit on the plaintiff but no larger public benefit;[88] the plaintiffs' ability to pass their litigation costs on to consumers;[89] the plaintiff's proceeding in forma pauperis while benefiting from court-appointed counsel;[90] the failure of a consent decree to mention fees;[91] an award of injunctive relief only;[92] a third party's financing the plaintiffs' suit;[93] and the routine nature of the case.[94]

84. Blanchard v. Bergeron, 489 U.S. 87, 89 (1989) (quoting Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968)). *Accord* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

85. *See* Washington v. Seattle Sch. Dist., 458 U.S. 457, 487 n.31 (1982) (plaintiffs were state-funded entities); N.Y. Gaslight Club v. Carey, 447 U.S. 54, 70–71 n.9 (1980) (plaintiffs were represented pro bono by public interest group); Bradley v. Sch. Bd. of Richmond, 416 U.S. 696, 710–22 (1974) (fee-shifting statute took effect after most of litigation was completed); *Newman*, 390 U.S. at 402 (good faith was shown by defendants).

86. *See* Farrar v. Hobby, 506 U.S. 103 (1992), discussed *infra* text and accompanying notes 189–94.

87. Barlow-Gresham Union High Sch. v. Mitchell, 940 F.2d 1280 (9th Cir. 1991); Cooper v. Utah, 894 F.2d 1169, 1172 (10th Cir. 1990).

88. *See, e.g.,* Wheatley v. Ford, 679 F.2d 1037 (2d Cir. 1982). *Accord* Lawrence v. Bowsher, 931 F.2d 1579, 1580 (D.C. Cir. 1991) (trial court found special circumstances where plaintiff's success was actually harmful to a large class of prospective plaintiffs; court of appeals reversed, stating that prevailing plaintiff "is entitled to reasonable attorneys' fees independent of the district court's view of the greater good for the greatest number").

89. Am. Booksellers Ass'n v. Virginia, 802 F.2d 691, 697 (4th Cir. 1986).

90. Starks v. George Court Co., 937 F.2d 311, 315–16 (7th Cir. 1991).

91. El Club del Barrio, Inc. v. United Cmty. Corp., 735 F.2d 98, 100–01 (3d Cir. 1984).

92. Crowder v. Hous. Auth. of Atlanta, 908 F.2d 843, 848–49 (11th Cir. 1990).

93. Am. Council of the Blind v. Romer, 962 F.2d 1501, 1503 (10th Cir. 1992), *vacated and remanded on other grounds*, 113 S. Ct. 1038 (1993).

94. Staten v. Hous. Auth. of Pittsburgh, 638 F.2d 599, 605 (3d Cir. 1980).

Cases in which claims of special circumstances succeed generally involve highly unusual conditions. For example, the Tenth Circuit upheld a determination of special circumstances in a case in which the plaintiff won an injunction that was eventually mooted before the defendant had an opportunity to appeal, and in a virtually identical companion case, the decision for the plaintiff had been reversed on appeal.[95] In another example, the Eighth Circuit found that nuisance settlements also constitute "special circumstances" that render an award "unjust."[96]

6. Is there a fee waiver?

Prevailing parties may waive their right to a fee award as part of a settlement agreement.[97] In *Evans v. Jeff D.*,[98] the plaintiff accepted a gen-

95. Dahlem v. Bd. of Educ., 901 F.2d 1508, 1512, 1514 (10th Cir. 1990).

96. Tyler v. Corner Constr. Corp., 167 F.3d 1202, 1206 (8th Cir. 1999) (defining "nuisance settlement" as "one that is accepted despite the fact that the case against the defendant is frivolous or groundless, solely in an effort to avoid the expense of litigation").

97. Courts of appeals have established rules for determining whether fees are waived. The Third Circuit requires express stipulation of a waiver in the settlement agreement. Ashley v. Atl. Richfield, 794 F.2d 128, 136–39 (3d Cir. 1986); El Club del Barrio, Inc. v. United Cmty. Corp., 735 F.2d 98, 101 (3d Cir. 1984). The Ninth Circuit permits inferring a waiver from "clear evidence that . . . an ambiguous clause was intended [as a waiver] by both parties." Muckleshoot Tribe v. Puget Sound Power & Light, 875 F.2d 695, 698 (9th Cir. 1989). The Second Circuit applies a less stringent standard: "a party may express its intent to waive attorneys' fees by employing broad release language, regardless of whether that release explicitly mentions attorneys' fees." Valley Disposal, Inc. v. Cent. Vt. Solid Waste Mgmt. Dist., 71 F.3d 1053, 1058 (2d Cir. 1995).

The Third, Ninth, and Tenth Circuits require the party responsible for fees in civil rights cases to show that the settlement agreement included a release of fees. Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1201 (10th Cir. 1999); *Muckleshoot*, 875 F.2d at 698 ("any party wishing to foreclose a suit for § 1988 fees must negotiate a provision waiving attorneys' fees"); *El Club del Barrio,* 735 F.2d at 100–01. However, the Eighth and D.C. Circuits place the burden on the prevailing party to show that the release did not waive fees. Wray v. Clarke, 151 F.3d 807, 809 (8th Cir. 1998); Elmore v. Shuler, 787 F.2d 601, 603 (D.C. Cir. 1986). There is also a split among circuits on how to interpret silence regarding fees. The Sixth, Ninth, and Tenth Circuits agree that silence does not equal a waiver of attorneys' fees. *See Ellis,* 163 F.3d at n.19 and

erous settlement offer conditioned on a waiver of fees but argued on appeal that such offers placed counsel in an ethical dilemma. The Supreme Court rejected this argument, maintaining that counsel faced no ethical dilemma because there is no duty to pursue a fee award. The Court held that a fee award belongs to the party, not to counsel, and can be waived by the party. Thus, settlements contingent on a waiver of a fee award are valid and enforceable.

There is another issue of concern regarding fee awards that is nearly opposite the waiver issue. Counsel can reach a "sweetheart" settlement, in which the defendant pays a small amount to the plaintiff and a high amount in attorneys' fees. This concern is greatest in class actions, in which counsel are less likely to consult plaintiffs during settlement negotiations. The Third Circuit recommended a procedure to safeguard against this problem:

> [T]rial courts [can] insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees. Only after court approval of the damage settlement should discussion and negotiation of appropriate compensation begin. This would eliminate the situation . . . of having, in practical effect, one fund divided between the attorney and client.[99]

The Supreme Court, however, said courts may not require this approach,[100] and another Third Circuit panel and a Third Circuit task force expressed concern that the approach is unenforceable and discourages settlement.[101]

cases cited therein. *Cf.* Wray v. Clarke, 151 F.3d 807, 809 (8th Cir. 1998) ("silence may constitute a waiver of the right to claim fees").

98. 475 U.S. 717 (1986).

99. Prandini v. Nat'l Tea, 557 F.2d 1015, 1021 (3d Cir. 1975).

100. *Evans,* 475 U.S. at 738 n.30.

101. El Club del Barrio, Inc. v. United Cmty. Corp., 735 F.2d 98, 101 n.3 (3d Cir. 1984); Court Awarded Attorney Fees: Report of the Third Circuit Task Force, *reprinted in* 108 F.R.D. 237, 267–68 (1985). The task force suggested appointing a disinterested person to protect the interests of class members or unrepresented beneficiaries. *Id.* at 256.

B. Calculating the Amount of the Award

Determining that a fee award is in order is only the beginning. The proper amount of the award must be calculated, and this involves several considerations:

- What constitute fees?
- What is the method of calculating the amount of fees?
- What documentation is required?
- Should the lodestar be adjusted?
- What are the procedural aspects of fee disputes?

1. What constitute fees?

Two Supreme Court cases addressed what attorneys' fees encompass. In *Missouri v. Jenkins*,[102] the Court addressed compensation for paralegals and law clerks, holding that their work should be compensated at the rates at which it is billed to clients. Although the case turned on the question of what constitutes a "reasonable" fee for such services, not on whether such services are part of attorneys' fees (a point the defendant conceded), in addressing that question the Court made some observations relevant to the definition of fees:

> Clearly, a "reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. . . . We thus take as our starting point the self-evident proposition that the "reasonable attorney's fee" provided for by statute should compensate the work of paralegals, as well as that of attorneys.[103]

102. 491 U.S. 274 (1989).

103. *Id.* at 285. Rejecting the argument that the work of paralegals and law clerks should be compensated by reference to its cost to the firm, the Court said that the marketplace is the guide, and attorneys generally bill clients separately (at for-profit rates) for paralegals' and law clerks' work. The defendant claimed that the extension of this approach is separate compensation for "secretarial time, paper clips, electricity, and other expenses." The Court responded that the "safeguard against [such practices] is the discipline of the market." *Id.* at 287–88 n.9. *See also* Lipsett v. Blanco, 975

In *West Virginia University Hospitals, Inc. v. Casey*,[104] the Court held that a fee-shifting statute does not authorize compensation for experts' fees unless it expressly says that it does.[105] The basis of the holding was a long tradition of statutes that distinguish between experts' fees and attorneys' fees. The Court distinguished the case from *Jenkins* on two related grounds. First, no fee-shifting statutes treat fees for law clerks or paralegals separately from attorneys' fees. Second, the cost of such work has traditionally been included in an attorney's fee (even though it is now generally billed separately), whereas experts' fees have always been treated as a separate item.

The guidepost from *Jenkins* and *Casey* is the tradition of billing and fee-shifting practice.[106] The determination of what constitutes a *reasonable* fee—in terms of the work performed and the billing rate—is a somewhat different matter, which is treated at length below.

2. What is the method of calculating the amount of fees?

In *Hensley v. Eckerhart*,[107] the Supreme Court established that in fee-shifting cases the basis of a fee award is the "lodestar"—the number of

F.2d 934, 939 n.5 (1st Cir. 1992) (interpreting *Jenkins* to hold that "[w]hether paralegal hours may be billed at a market rate ultimately depends upon whether such a practice is common in the relevant legal market").

104. 499 U.S. 83 (1991).

105. The Civil Rights Act of 1991 effectively overrode *Casey,* making fees for expert witnesses available under the civil rights fee-shifting statute. However, the Act in no way undercuts the holding in *Casey* that such fees are unavailable unless expressly authorized by statute.

106. *See, e.g.,* Davis v. San Francisco, 976 F.2d 1536, 1557 (9th Cir. 1992) (instructing district court, on remand, to consider whether assorted claimed costs (e.g., a filing cabinet) "are or are not . . . ordinarily [ ] treated as reimbursable in a private attorney-client relationship"); Davis v. Mason County, 927 F.2d 1473, 1477–78 (9th Cir.) (affirming compensation for travel costs because "expenses incurred during the course of litigation which are normally billed to fee-paying counsel" are compensable under the fee-shifting statutes), *cert. denied,* 112 S. Ct. 275 (1991). Several circuits have held that computer-aided legal research costs are part of attorneys' fees and may not be separately billed. *See* United States *ex rel.* Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp., 95 F.3d 153, 172 (2d Cir. 1996); Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chicago, 38 F.3d 1429, 1440–41 (7th Cir. 1994); Standley v. Chilhowee R-IV Sch. Dist., 5 F.3d 319, 325 n.7 (8th Cir. 1993).

107. 461 U.S. 424 (1983).

hours reasonably expended multiplied by the applicable hourly market rate for legal services.[108] This is true regardless of whether the plaintiff and the attorney had a private (contingent or hourly) fee contract.[109]

Several appellate courts have rejected lower courts' attempts to calculate fees using a method other than the lodestar.[110] These cases involved low damages or limited success.[111]

108. *Id.* at 433. *See also* Gisbrecht v. Barnhart, 535 U.S. 789, 802 (2002) ("Thus, the lodestar method today holds sway in federal-court adjudication of disputes over the amount of fees properly shifted to the loser in the litigation.").

Before *Hensley*, many courts calculated fees by analyzing the *Johnson* factors: (1) time and labor required; (2) novelty and difficulty of issues; (3) skill required; (4) loss of other employment in taking the case; (5) customary fee; (6) whether fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and result obtained; (9) counsel's experience, reputation, and ability; (10) case undesirability; (11) nature and length of relationship with the clients; and (12) awards in similar cases. Johnson v. Ga. Highway Express, 488 F.2d 714, 717 (5th Cir. 1974). *Hensley* makes clear that the *Johnson* factors matter only as they bear on the market rate or hours reasonably expended, or, in rare cases, if they are a basis for adjusting the lodestar. *See infra* text accompanying notes 167–246 (discussing adjustments). *See also* Daly v. Hill, 790 F.2d 1071, 1078 (4th Cir. 1986) (stating that "the *Johnson* factors are to be considered . . . in determining the reasonable rate and the reasonable hours"). Only the Fifth and Eleventh Circuits clearly require consideration of these factors in each case. *See, e.g.,* Nisby v. Court of Jefferson County, 798 F.2d 134, 137 (5th Cir. 1986) (reversing award because court did not address "applicability of each of the *Johnson* factors"); Kraeger v. Solomon & Flanagan, P.A., 775 F.2d 1541, 1543–44 (11th Cir. 1985) (same). In the Ninth Circuit, the *Johnson* factors are known as the *Kerr* factors. (*See* Kerr v. Screen Extras Guild, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied,* 425 U.S. 951 (1976).) The *Kerr* factors that are not subsumed in the lodestar calculation are to be considered in determining if *adjustments* to the lodestar are warranted. *See* Morales v. City of San Rafael, 96 F.3d 359, 363–64 nn.8–10 (9th Cir. 1996), *amended by*, *reh'g en banc denied*, 108 F.3d 981 (1997).

109. In *Blanchard v. Bergeron*, 489 U.S. 87 (1989), the Supreme Court held that a fee award under section 1988 may exceed the amount dictated by a contingent fee agreement. In *Venegas v. Mitchell*, 495 U.S. 82 (1990), the Court held that section 1988 did not prohibit a contingent fee agreement in which a prevailing civil rights plaintiff paid his attorney more than the statutory award against the defendant.

110. *See* Quaratino v. Tiffany & Co., 166 F.3d 422, 426 (2d Cir. 1998) (rejecting a "billing judgment" approach—where fees are "reasonable" if rationally related to the monetary recovery anticipated ex ante—and reaffirming use of lodestar); Orchano v. Advanced Recovery, Inc., 107 F.3d 94, 99–100 (2d Cir. 1997) (remanding because

a. Reasonable rate

The reasonable rate is determined by reference to the marketplace.[112] Courts agree that an attorney's customary billing rate is the proper starting point for calculating fees.[113] However, that rate is not always conclusive. In *Blum v. Stenson*,[114] the Supreme Court held that a nonprofit organization is entitled to compensation at the market rate of the legal community at large.[115] The D.C. Circuit extended this holding to for-profit attorneys who charge lower rates for some clients in

lodestar analysis not made); *Morales*, 96 F.3d at 365 (rejecting court's "reasoning" of what an appropriate fee should be), *amended by, reh'g en banc denied,* 108 F.3d 981 (1997); Cullens v. Ga. Dep't of Transp., 29 F.3d 1489, 1492–94 (11th Cir. 1994) (rejecting fees based on lodestar adjusted downward by multiplier where result appeared to be a "multiple-of-damages approach").

The First Circuit, however, appears to have left open the door to an alternative method. Coutin v. Young & Rubicam P.R., Inc., 124 F.3d 331, 338, 342 (1st Cir. 1997) (holding that it was "error to forgo the lodestar" and stating that "while such a departure from preferred practice will not necessarily be fatal, spurning all consideration of a lodestar places a substantial burden upon the district court to account for its actions"). *See also* Cole v. Wodziak, 169 F.3d 486 (7th Cir. 1999), discussed *infra* text accompanying note 198.

111. *See infra* text accompanying notes 178–99.

112. *See, e.g.,* Missouri v. Jenkins, 491 U.S. 274, 285 (1989) ("we have consistently looked to the marketplace as our guide to what is 'reasonable'").

113. *See, e.g.,* Islamic Ctr. of Miss. v. Starkville, Miss., 876 F.2d 465, 469 (5th Cir. 1989); Kelley v. Metro. County Bd. of Educ., 773 F.2d 677, 683 (6th Cir. 1985) (en banc), *cert. denied,* 474 U.S. 1083 (1986); Cunningham v. City of McKeesport, 753 F.2d 262, 268 (3d Cir. 1985), *vacated on other grounds*, 478 U.S. 1015 (1986).

114. 465 U.S. 886 (1984).

115. Despite *Blum*, some courts have held that, at least in cases not brought under a civil rights statute, a salaried union attorney is entitled only to fees calculated at a cost plus overhead rate. Devine v. Nat'l Treasury Employees Union, 805 F.2d 384 (Fed. Cir. 1986), *cert. denied,* 484 U.S. 815 (1987); Harper v. Better Bus. Serv., 768 F. Supp. 817 (N.D. Ga. 1991), *aff'd,* 961 F.2d 1561 (11th Cir. 1992); Johnson v. Orr, 739 F. Supp. 945 (D.N.J. 1988), *appeal dismissed*, 897 F.2d 128 (1990). These courts reason that a market-based award would serve to subsidize the union's ordinary operation. The Third, Ninth, and D.C. Circuits have held otherwise, finding a market-based award in order, provided the union deposits the fee into a segregated litigation fund. Kean v. Stone, 966 F.2d 119, 122–24 (3d Cir. 1992); Am. Fed'n of Gov't Employees v. FLRA, 944 F.2d 922, 937 (D.C. Cir. 1991); Curran v. Dep't of Treasury, 805 F.2d 1406, 1408 (9th Cir. 1986).

an effort to promote the public interest.[116] There are other exceptions as well. Most courts consider the forum community the proper yardstick, so an award for out-of-town counsel will not be based on the rates in their usual place of work.[117] Even for local counsel, if the usual rate is sharply at odds with the prevailing market rate, courts generally have discretion to use the latter.[118] Additionally, some courts base an

116. Save Our Cumberland Mountains v. Hodel, 857 F.2d 1516, 1524 (D.C. Cir. 1988). In *Barrow v. Falck*, 977 F.2d 1100 (7th Cir. 1992), the Seventh Circuit held that the lawyer's rate trumps the general market rate, reversing the district court's award of fees based on the market rate in the community even though counsel's rate was lower. The court recognized the possibility that the lawyer charged his clients less than he could obtain and noted the holding in *Save Our Cumberland Mountains*. However, the evidence showed that the lawyer charged *all* his clients a submarket rate, thus posing a different situation from the one faced by the D.C. Circuit. The court held that the D.C. Circuit may be correct to permit compensation at the market rate in cases where counsel's usual rate is the market rate but he or she charges a particular client (or set of clients) less. However, the Seventh Circuit expressed uneasiness with this approach, too. *Barrow*, 977 F.2d at 1106.

117. *See, e.g.,* ACLU of Ga. v. Barnes, 168 F.3d 423, 437 (11th Cir. 1999); Davis v. Macon County, 927 F.2d 1473, 1488 (9th Cir.), *cert. denied,* 112 S. Ct. 275 (1991). Ackerly Communications v. Somerville, 901 F.2d 170, 172 (1st Cir. 1990); Polk v. N.Y. State Dep't of Corr. Servs., 722 F.2d 23, 25 (2d Cir. 1983). Most circuits have carved out exceptions to this rule. *See, e.g.,* Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 179 (4th Cir. 1994) (when local attorneys are unavailable and employing out-of-town counsel is reasonable, out-of-town rates apply); Gates v. Deukmejian, 987 F.2d 1392, 1404–05 (9th Cir. 1992) (affirming use of out-of-town counsel's rates when attorneys in forum were unavailable, and citing cases); *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 226, 232–33 (2d Cir. 1987) (discussing the exceptions). The D.C. Circuit carved out a narrow exception: Local rates do not apply when the bulk of the work is performed in the attorney's home state and that market reflects substantially lower rates. Davis County Solid Waste Mgmt. v. EPA, 169 F.3d 755, 759 (D.C. Cir. 1999).

118. *See, e.g.,* Davis v. San Francisco, 976 F.2d 1536, 1548 (9th Cir. 1992); Maldonado v. Lehman, 811 F.2d 1341, 1342 (9th Cir.), *cert. denied,* 484 U.S. 990 (1987); Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake, Minn., 771 F.2d 1153 (8th Cir. 1985), *cert. denied,* 475 U.S. 1011 (1986). *But see* Gusman v. Unisys, 986 F.2d 1146, 1150–51 (7th Cir. 1993) (lawyer's own rate is the presumptive rate, and a judge who departs from it "must have some reason other than the ability to identify a different average rate in the community"—e.g., "the lawyers did not display the excellence . . . implied by their higher rates" or the "plaintiff did not need top-flight counsel in a no-brainer case").

award on an hourly rate lower than the attorney's usual rate if the litigation is outside the attorney's usual field of practice.[119]

In *Blum*, the Supreme Court noted that the market takes into account variation in the skill and experience of attorneys. The reasonable rate for established, experienced practitioners is likely to be greater than the rate for new attorneys in the same market.[120] For example, the Fourth Circuit affirmed an award based on a $150 hourly rate even though the defendants proffered an affidavit showing that the usual rate for civil rights attorneys in South Carolina was $50 to $75.[121] The court cited counsel's "vast experience and expertise" and evidence on the record that "the prevailing rate for lawyers of his 'qualifications and experience in comparable complex litigation range [sic] from $100 to $250' in South Carolina."[122]

Some courts apply different rates to different tasks, for example, a higher rate for in-court work than for out-of-court work, or different rates for the liability phase of the litigation and the remedy phase.[123] More often, courts apply a flat rate for all work by a particular attorney in the case.[124]

The Third Circuit held that once a party meets its prima facie burden of establishing the "community market rate," and the opposing party does not produce contradictory evidence, the trial court does not have discretion to adjust the requested rate downward.[125] The Tenth Circuit held that it is an abuse of discretion to ignore a

119. *See, e.g.,* Dejesus v. Banco Popular de Puerto Rico, 951 F.2d 3, 6 (1st Cir. 1991); Buffington v. Baltimore County, 913 F.2d 113 (4th Cir. 1990), *cert. denied,* 111 S. Ct. 1106 (1991); Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983); Moore v. Matthews, 682 F.2d 830, 840 (9th Cir. 1982).

120. *Blum*, 465 U.S. at 895–96 n.11.

121. Plyler v. Evatt, 902 F.2d 273 (4th Cir. 1990).

122. *Id.* at 278.

123. *See, e.g.,* Leroy v. City of Houston, 906 F.2d 1068 (5th Cir. 1990).

124. *See, e.g.,* Davis v. San Francisco, 976 F.2d 1536, 1548 (9th Cir. 1992); *In re* Meese, 907 F.2d 1192 (D.C. Cir. 1990); Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), *cert. denied,* 484 U.S. 1027 (1988); Daggett v. Kimmelman, 811 F.2d 793 (3d Cir. 1987); Wildman v. Lerner Stores, 771 F.2d 605 (1st Cir. 1985); Craik v. Minn. State Univ. Bd., 738 F.2d 348 (8th Cir. 1984).

125. Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1036 (3d Cir. 1996).

party's evidence of a market rate and apply the rate the trial court "consistently grants."[126]

b. Hours reasonably expended

The Supreme Court has said that counsel is expected to exercise "billing judgment"[127] and that district courts "should exclude from this initial fee calculation hours that were not 'reasonably expended,'" including "excessive, redundant, or otherwise unnecessary" work.[128] As a result, lower courts have reduced fee awards where there has been duplication of services;[129] failure to pursue settlement prior to filing a straightforward suit;[130] excessive total time billed considering the lack of difficulty of the case;[131] excessive time billed for particular tasks;[132]

126. Case v. Unified Sch. Dist. No. 233, 157 F.3d 1243, 1256 (10th Cir. 1998).

127. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (citing Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980)).

128. *Id.* at 434.

129. *See, e.g.*, Ackerly Communications v. Somerville, 901 F.2d 170, 171–72 (1st Cir. 1990).

130. *See, e.g.*, Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 552 (7th Cir. 1999) (fee-paying client would have expected counsel to assess feasibility of quick settlement prior to filing suit).

131. *See, e.g.*, Clarke v. Frank, 960 F.2d 1146, 1153 (2d Cir. 1992) (holding not abuse of discretion to deduct hours, because "[t]his was not a complex case. Clarke's attorney took no depositions, and performed little discovery. The sole issue at trial was the amount of back pay. The trial lasted slightly more than one day. Clarke did not call any witnesses, and did not even testify. The case did not involve any novel areas of law. Clarke's post-trial motions were neither complicated nor abstruse.").

132. *See, e.g.*, Broyles v. Dir., 974 F.2d 508, 510–11 (4th Cir. 1992) (finding several items excessive—e.g., an hour to read a brief opinion and fifteen-minute calls to the clerk of court's office, which handles most inquiries in far less time); Smith v. Freeman, 921 F.2d 1120, 1124 (10th Cir. 1990) (upholding reduction of compensable hours for work on fees motion: "neither the factual nor legal issues were especially complex and . . . [counsel] was thoroughly familiar with the issues"); *Ackerly*, 901 F.2d at 173 (disallowing claims for excessive photocopying and computer research); Ustrak v. Fairman, 851 F.2d 983, 987 (7th Cir. 1988) (38 hours preparing for oral argument "is far too much" in a short and simple case; likewise, 108.5 hours preparing fee petitions is "the tail wagging the dog, with a vengeance"); Louisville Black Police Officers Org. v. City of Louisville, 700 F.2d 268, 279 (6th Cir. 1983) (holding district court's reduction of hours documented for preparation of plaintiffs' post-trial and reply briefs was not an abuse of discretion).

use of too many attorneys[133] or too much conferencing;[134] unnecessary work by a trial consultant deemed a "non-lawyer[ ] . . . doing lawyers [sic] work";[135] publicity work;[136] reading or reviewing of books not closely related to the case;[137] performance of secretarial or clerical tasks by lawyers;[138] and other assorted work deemed unnecessary.[139] The Tenth Circuit held it is not a per se abuse of discretion to award fewer hours than the defendant agrees are reasonable.[140]

The Seventh Circuit held that it was appropriate to deny fees completely when the petition for fees was "intolerably inflated" and "outrageously excessive."[141] The First Circuit reversed an award of fees where it found that the requesting party's failure to cull unnecessary hours was "inexcusable."[142] The Fourth Circuit reversed an award of fees where it found the amount requested "was so outrageously excessive so as [sic] to shock the conscience of the court."[143]

At the same time, all kinds of tasks, such as travel,[144] lobbying,[145] and public relations work,[146] are compensable if they are necessary or

133. *See, e.g.,* Goodwin v. Metts, 973 F.2d 378, 383–84 (4th Cir. 1992) (fees cut in half because firm used several attorneys where one or two would have sufficed); Grendel's Den v. Larkin, 749 F.2d 945, 953 (1st Cir. 1984) ("We see no justification for the presence of two top echelon attorneys at each proceeding.").

134. *In re* Olson, 884 F.2d 1415, 1429 (D.C. Cir. 1989).

135. Davis v. Southeastern Pa. Transp. Auth., 924 F.2d 51, 56 (3d Cir. 1991).

136. Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 176 (4th Cir. 1994) (public relations); Greater L.A. Council on Deafness v. Cmty. Television of S. Cal., 813 F.2d 217, 221 (9th Cir. 1987) (publicity and lobbying); Hart v. Bourque, 798 F.2d 519, 523 (1st Cir. 1986) (arranging lectures and publications about case).

137. Alberti v. Klevenhagen, 896 F.2d 927, 932–34 (5th Cir.), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990).

138. Lipsett v. Blanco, 975 F.2d 934, 940 (1st Cir. 1992) (trial court improperly permitted billing of clerical work, such as court filings, at lawyers' rates).

139. *See, e.g., Olson*, 884 F.2d at 1429 (disallowing hours spent on secretarial overtime, overtime dinner expense, a press release, and futile lobbying to defeat a bill that was sure to be enacted).

140. Case v. Unified Sch. Dist. No. 233, 157 F.3d 1243, 1250–51 (10th Cir. 1998).

141. Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980).

142. Lewis v. Kendrick, 944 F.2d 949, 956 (1st Cir. 1991).

143. Fair Hous. Council of Greater Wash. v. Landow, 999 F.2d 92, 96–98 (4th Cir. 1993).

144. *See, e.g.,* Perotti v. Seiter, 935 F.2d 761, 764 (6th Cir. 1991); Dowdell v. Apopka, Fla., 698 F.2d 1181, 1192 (11th Cir. 1983). *But see* Smith v. Freeman, 921

useful to litigating the case. Moreover, reasonable work at all stages of the litigation is compensable, including prefiling work;[147] work on an appeal and defending against a petition for certiorari;[148] work on a fee petition and litigating a fee dispute;[149] and work in connection with post-judgment or post-decree administration, monitoring, or fee collection.[150]

The Third Circuit affirmed an attorneys' fees award for work performed in a separate, yet related, case even though the party assessed fees was not a party in the litigation in which the work was performed. The court stated:

> [If] plaintiff can prove that the fees and expenses incurred in the other litigation resulted in work product that was actually utilized in the instant litigation, that the time spent on other litigation was "inextricably linked" to the issues raised in the present litigation, and that plaintiff has not previ-

F.2d 1120, 1122 (10th Cir. 1990) (affirming compensation at only 25% of standard hourly rate for travel time).

145. *See, e.g.,* Glover v. Johnson, 934 F.2d 703, 717 (6th Cir. 1991); Demier v. Gondles, 676 F.2d 92, 93–94 (4th Cir. 1982).

146. *See, e.g.,* Davis v. San Francisco, 976 F.2d 1536, 1545 (9th Cir. 1992).

147. *See, e.g., Dowdell*, 698 F.2d at 1192.

148. Cabrales v. County of Los Angeles, 935 F.2d 1050, 1051 (9th Cir. 1991).

149. The courts are unanimous on this point but split on whether a fee request for appellate work may be brought in the court of appeals in the first instance. *Compare* Yaron v. Northampton, 963 F.2d 33, 36 (3d Cir. 1992) (may be brought before court of appeals), *and* Ustrak v. Fairman, 851 F.2d 983, 990 (7th Cir. 1988) (same), *with* Crane v. Texas, 766 F.2d 193, 195 (5th Cir.) (per curiam), *cert. denied,* 474 U.S. 1020 (1985) (may not be brought in court of appeals), *and* Reel v. Ark. Dep't of Corr., 672 F.2d 693, 699 (8th Cir. 1982) (same), *and* Souza v. Southworth, 564 F.2d 609, 613–14 (1st Cir. 1977) (same). Some courts hold that the petition may be brought in the court of appeals, but if the court decides that a fee award is in order, it must remand the case to the trial court to calculate the amount. *See* Iqbal v. Golf Course Superintendents, 900 F.2d 227, 229–30 (10th Cir. 1990); Finch v. City of Vernon, 877 F.2d 1497, 1508 (11th Cir. 1989); McManama v. Lukhard, 616 F.2d 727, 730 (4th Cir. 1980) (per curiam). The Second Circuit holds that the application should be filed in the court of appeals, which, except in simple cases, will remand it to the district court for decision. Dague v. City of Burlington, 976 F.2d 801, 804 (2d Cir.), *rev'd on other grounds,* 112 S. Ct. 2638 (1992).

150. *See, e.g.,* Norman v. Hous. Auth. of Montgomery, 836 F.2d 1292, 1305 (11th Cir. 1988); Spain v. Mountanos, 690 F.2d 742, 747 (9th Cir. 1982).

> ously been compensated for those fees and expenses, then the district court may include those fees and expenses in its fee award.[151]

Finally, courts have held that it is improper to engage in an "*ex post facto* determination of whether attorney hours were necessary to the relief obtained."[152] The issue "is not whether hindsight vindicates an attorney's time expenditures, but whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures."[153]

3. What documentation is required?

The burden of establishing the lodestar rests on the fee applicant, who must provide appropriate documentation of the hours spent and the market rate. If the documentation is inadequate, the district court may reduce the award accordingly.[154]

The circuits' precise requirements or preferences for documentation differ. For example, the Eleventh Circuit has said the following:

> [T]he general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity. . . . A well-prepared fee petition also would include a summary, grouping the time entries by the nature of the activity or stage of the case.[155]

Although the Third Circuit agreed that a fee petition should include "'fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the

151. Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 414, 420 (3d Cir. 1993). The court pointed out that although the defendant lacked the opportunity to ensure that the plaintiff's litigation costs were "not unnecessarily escalated" in the litigation to which it was not a party, the district court had the responsibility "to award fees only for work 'reasonably expended.'" *Id.*

152. Grant v. Martinez, 973 F.2d 96, 99 (2d Cir. 1992), *cert. denied,* 113 S. Ct. 978 (1993).

153. *Id. Accord In re* Synthroid Mktg. Litig., 264 F.3d 712, 718–19 (7th Cir. 2001); Woolridge v. Marlene Indus. Corp., 898 F.2d 1169, 1177 (6th Cir. 1990); Indep. Sch. Dist. v. Digre, 893 F.2d 987, 992 (8th Cir. 1990); Dennis v. Chang, 611 F.2d 1302, 1308 (9th Cir. 1980).

154. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

155. *Norman*, 836 F.2d at 1303.

hours spent by various classes of attorneys,'"[156] it has explicitly rejected the requirement of time summaries, stating that a chronological listing of time spent per task is sufficient.[157] A number of courts have required that such a listing not be overly general.[158]

The D.C., First, Second, Seventh, and Tenth Circuits require contemporaneous fee records and may substantially reduce or even deny a fee award in their absence.[159] The Fifth Circuit has said that such records are the "preferred practice" but are not required.[160] The Ninth and Eleventh Circuits have held that reconstructed time records suffice if "supported by other evidence such as testimony or secondary documentation."[161] The Eighth Circuit has said that "whether recon-

156. Rode v. Dellarciprete, 892 F.2d 1177, 1190 (3d Cir. 1990) (quoting Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973)).

157. *Rode*, 892 F.2d at 1190.

158. *See, e.g.,* Lipsett v. Blanco, 975 F.2d 934, 938 (1st Cir. 1992) (affirming reduction of hours where "several entries contain[ed] only gauzy generalities" too nebulous to allow the opposing party to dispute their accuracy); *In re* Donovan, 877 F.2d 982, 995 (D.C. Cir. 1989) (district court properly excluded hours with "vague description[s]" such as "legal issues," "conference re all aspects" and "call re status"); Tomazzoli v. Sheedy, 804 F.2d 93, 98 (7th Cir. 1986) (affirming reduction in hours where plaintiff listed hours spent on "research," without saying what was researched). *See also* Domegan v. Ponte, 972 F.2d 401, 425 (1st Cir. 1992) (criticizing "mixed entries"—the lumping together of different activities), *vacated and remanded on other grounds*, 113 S. Ct. 1378 (1993).

159. *See In re* Olson, 884 F.2d 1415, 1428 (D.C. Cir. 1989); Lightfoot v. Walker, 826 F.2d 516, 523 n.7 (7th Cir. 1987); Grendel's Den v. Larkin, 749 F.2d 945, 952 (1st Cir. 1984); Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983); McCann v. Coughlin, 698 F.2d 112, 131 (2d Cir. 1983).

160. Alberti v. Klevenhagen, 896 F.2d 927, 931 (5th Cir.), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990). However, the court did suggest that, in certain cases, the absence of such records would be grounds for reducing the requested fee. In *Walker v. United States Department of Housing & Urban Development*, 99 F.3d 761, 773 (5th Cir. 1996), the court held that the district court's failure to reject billing records was "clearly erroneous" where the terse listings of lumped-together activities were "inadequately documented" and "non-contemporaneous."

161. Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545, 1557 (9th Cir. 1989), *cert. denied,* 494 U.S. 1017 (1990). *Accord* Jean v. Nelson, 863 F.2d 759, 772 (11th Cir. 1988), *aff'd,* 496 U.S. 154 (1990).

structed records accurately document the time attorneys have spent is best left to the discretion of the [trial] court."[162]

To establish the market rate, the prevailing party must offer more than an affidavit showing the attorney's usual rate; it should offer evidence that this rate is in line with the market rate in the community.[163] This evidence generally takes the form of affidavits from other counsel attesting to their rates or the prevailing market rate.[164] Several courts have stated that, especially in the absence of sufficient documentation, a trial court may rely on its own knowledge of the market.[165] It may not, however, substitute its notions of fairness for the market rate.[166]

162. Macdissi v. Valmont Indus., 856 F.2d 1054, 1061 (8th Cir. 1988).

163. *See* Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984) (fee applicant has burden "to produce satisfactory evidence—in addition to counsel's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation"); Lucero v. Trinidad, 815 F.2d 1384, 1385 (10th Cir. 1987) (affirming reduced rate because plaintiff's documentation "showed only the prevailing market rates at [plaintiff's] firm. [Plaintiff] did not submit any evidence that would show that its rates are representative of the prevailing market rates in Denver or in Colorado.").

164. *See, e.g.,* Glover v. Johnson, 934 F.2d 703, 718 (6th Cir. 1991) (affirming award where "third-party affidavits submitted by plaintiffs established the prevailing market rate"); Columbus Mills v. Freeland, 918 F.2d 1575, 1580 (11th Cir. 1990) (affirming award where plaintiff "produced more than an affidavit of the attorney who performed the work. [Plaintiff] produced another affidavit which established that the rates were reasonable."); Norman v. Hous. Auth. of Montgomery, 836 F.2d 1292, 1304 (11th Cir. 1988).

165. *See, e.g., Norman*, 836 F.2d at 1303; Miele v. N.Y. State Teamsters Conference Pension & Ret. Fund, 831 F.2d 407, 409 (2d Cir. 1987); *Lucero*, 815 F.2d at 1385. *But cf.* Begley v. HHS, 966 F.2d 196, 198–99 (6th Cir. 1992) (the explanation cannot be merely the court's personal belief concerning the market, "ignor[ing] the only evidence" on the record); NAACP v. City of Evergreen, 812 F.2d 1332, 1336 (11th Cir. 1987) ("A trial judge cannot substitute its own judgment for uncontradicted evidence without record support."); Black Grievance Comm. v. Philadelphia Elec. Co., 802 F.2d 648, 657 (3d Cir. 1986) (district court erred in using hourly rates other than those set out in uncontested affidavits), *vacated on other grounds*, 483 U.S. 1015 (1987).

166. *See, e.g.,* Pressley v. Haeger, 977 F.2d 295, 299 (7th Cir. 1992) (vacating award where trial court used lower than market rate for work of second and third chairs at trial, presumably because it felt their rate should be less than that of lead attorney: "Prevailing plaintiffs are entitled not to a 'just' or 'fair' price for legal services, but to the *market* price for legal services.").

4. Should the lodestar be adjusted?

In certain cases, the court may adjust the lodestar upward or downward to arrive at the appropriate fee award.[167]

a. Downward adjustments

i. Incomplete success

Incomplete success is the most common basis for a downward adjustment in attorneys' fees awards. In *Hensley v. Eckerhart*,[168] the Supreme Court said that when the plaintiff advances discrete, essentially unrelated claims,[169] and prevails on some but not others, it should not be compensated for work on the unsuccessful claims.[170] (In documenting their work, plaintiffs' attorneys are expected, where possible, to segregate work performed by claim.[171]) However, in the majority of cases, courts have rejected the contention that the lodestar should be adjusted downward for unsuccessful claims, usually finding that the successful and unsuccessful claims were legally or factually intertwined or that counsel devoted most of its time to the litigation as a whole.[172] The following exceptions may be instructive.

167. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

168. 461 U.S. 424 (1983).

169. That is, claims not involving "a common core of facts or . . . based on related legal theories." *Id.* at 435.

170. *Id. A*s the Seventh Circuit put it: "*Hensley* permits the court to award fees for losing arguments in support of prevailing claims, but not for losing claims." *Pressley*, 977 F.2d at 298.

171. *Hensley,* 461 U.S. at 437. *See also* Von Clark v. Butler, 916 F.2d 255, 259 (5th Cir. 1990) (award reduced where plaintiffs submitted summaries of time sheets and claimed the summaries pertained only to work on their successful claim); Norman v. Hous. Auth. of Montgomery, 836 F.2d 1292, 1303 (11th Cir. 1988) ("fee counsel should have maintained records to show the time spent on the different claims"). However, the First Circuit maintains that "[i]f the fee-seeker properly documents her claim and plausibly asserts that the time cannot be allocated between successful and unsuccessful claims, it becomes the fee-target's burden to show a basis for segregability." Lipsett v. Blanco, 975 F.2d 934, 938 (1st Cir. 1992).

172. *See, e.g.,* Robinson v. City of Edmond, 160 F.3d 1275, 1283–84 (10th Cir. 1998) (plaintiffs won claim for removal of religious symbol from official seal but lost "intertwined" claims); Williams v. Roberts, 904 F.2d 634, 640 (11th Cir. 1990) (plaintiff lost transfer and demotion claims but won discharge claim); Northeast Women's Ctr. v. McMonagle, 889 F.2d 466, 475 (3d Cir. 1989), *cert. denied,* 494 U.S. 1068

- Although all claims stemmed from a common incident, where claims alleging supervisory liability could be severed from claims alleging direct participation in an excessive force lawsuit, it was an abuse of discretion to award fees for the severable, unsuccessful claims.[173]
- Where the plaintiff alleged that his discharge from public employment was in retaliation for exercising his First Amendment rights and that the lack of a pretermination hearing violated due process, and he prevailed on the due process claim but not the First Amendment claim, the two claims were so distinct that the district court did not err in discounting hours spent on the unsuccessful claim.[174]
- Where the plaintiff prevailed against several state officials but the court dismissed claims against the governor and the attorney general, work in unsuccessfully defending against motions to dismiss was properly held noncompensable. Hours expended on claims against dismissed defendants are compensable "if 'plaintiff can establish that such hours also were fairly devoted to the prosecution of the claim[s] against' the defendants over whom plaintiff prevailed. . . . [T]he court only eliminated those hours specifically attributable to defending against the motions to dismiss the Governor and Attorney General. The hours worked on those motions did not further successful claims."[175]
- Where the plaintiffs' claims for partial and total disability under workers' compensation were based on "different factual

(1990) (successful RICO claim and unsuccessful trespass claim based on same evidence); Abshire v. Walls, 830 F.2d 1277, 1282–83 (4th Cir. 1987) (plaintiff won strip search claim but lost false arrest, false imprisonment, and several other related claims); Dominic v. Consol. Edison Co. of N.Y., 822 F.2d 1249, 1259–60 (2d Cir. 1987) (plaintiff won retaliation claim but lost discrimination claim).

173. Figueroa-Torres v. Todelo-Davilla, 232 F.3d 270, 278–79 (1st Cir. 2000).

174. Winter v. Cerro Gordo County Conservation Bd., 925 F.2d 1069 (8th Cir. 1991).

175. Rode v. Dellarciprete, 892 F.2d 1177, 1185, 1186 (3d Cir. 1990) (quoting Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973).

theories" and "different legal theories," a deduction for incomplete success was in order.[176]

- Where the plaintiffs prevailed on one of six unrelated claims, the Seventh Circuit cautioned that, on remand, it would be error to compensate counsel for only one-sixth of the total hours expended, because some time was spent on the litigation as a whole, for example, jury selection. The proper method is to estimate how much time would have been required if the plaintiffs had pursued only the successful claim.[177]

ii. Limited success

In *Hensley*, the Court did not limit downward adjustments in attorneys' fees for incomplete success to situations involving unrelated claims; rather, the Court instructed that even if claims are closely related, or there is just one claim, a downward adjustment to the lodestar may be appropriate if the plaintiff achieved only limited success.[178] The gauge of success is the result of the lawsuit in terms of relief; there should not be a downward adjustment simply because not every argument or theory prevailed.[179] Many defendants have asked courts to reduce awards because of the plaintiff's unimpressive results,

176. Hyman Constr. Co. v. Brooks, 963 F.2d 1532, 1539 (D.C. Cir. 1992).

177. Ustrak v. Fairman, 851 F.2d 983, 989 (7th Cir. 1988). *Accord* Schultz v. Hembree, 975 F.2d 572, 577 (9th Cir. 1992).

178. Hensley v. Eckerhart, 461 U.S. 424, 435–36 (1983). The Court noted that "[t]here is no precise rule or formula" for determining the extent of the reduction; a court "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified." *Id.* at 436.

For discussions on how success is measured in civil rights cases, see *Villano v. City of Boynton Beach,* 254 F.3d 1302, 1307–08 (11th Cir. 2001), and *Coutin v. Young & Rubicam Puerto Rico, Inc.,* 124 F.3d 331, 338 (1st Cir. 1997).

179. *Hensley,* 461 U.S. at 435–37. *See* Pressley v. Haeger, 977 F.2d 295, 298 (7th Cir. 1992) ("*Hensley* permits the court to award fees for losing arguments in support of prevailing claims."). For example, the Seventh Circuit directs a court to look at the "overall results obtained" in determining if a downward adjustment is appropriate when claims are factually or legally related. Spellan v. Bd. of Educ., 59 F.3d 642, 646 (7th Cir. 1995).

even when the plaintiff prevailed on all claims, or when the unsuccessful claims were closely related to the successful claims. Courts have usually rejected these requests,[180] but there have been exceptions.[181]

Lower courts have wrestled with the "limited success" inquiry in various other situations:

- Where the plaintiff's judgment was vacated by the Supreme Court but reinstated on remand, the plaintiff was entitled to compensation for unsuccessfully opposing the defendant's petition for certiorari:

> If a plaintiff ultimately wins on a particular claim, she is entitled to all attorney's fees reasonably expended in pursuing that claim—even though she may have suffered some adverse rulings. Here, although the Supreme Court vacated our judgment, the Court's order was simply a temporary setback on the way to a complete victory for plaintiff. . . . [A] plaintiff who is unsuccessful

180. *See, e.g.,* Jaffee v. Redmond, 142 F.3d 409, 414 (7th Cir. 1998) (trial court erred in denying fees, as a matter of law, incurred by unsuccessful argument in support of ultimately successful claim); Goos v. Nat'l Ass'n of Realtors, 68 F.3d 1380, 1384–88 (D.C. Cir. 1995); Jane L. v. Bangerter, 61 F.3d 1505, 1512 (10th Cir. 1995); Grant v. Martinez, 973 F.2d 96, 101 (2d Cir. 1992), *cert. denied,* 113 S. Ct. 978 (1993); Herrington v. County of Sonoma, 883 F.2d 739, 745 (9th Cir. 1989); Jackson v. Crews, 873 F.2d 1105, 1109–10 (8th Cir. 1989). *See Coutin*, 124 F.3d at 339, for a discussion of "limited success" scenarios as they relate to lodestar reductions in the First Circuit. See *Jaffee*, 142 F.3d at 414–16, for a summary of Seventh Circuit case law on awarding fees for unsuccessful arguments.

181. *See, e.g.,* Andrews v. United States, 122 F.3d 1367, 1375 (11th Cir. 1997) (abuse of discretion to not give greater weight to plaintiff's limited success in CERCLA case); Fleming v. Ayers & Assocs., 948 F.2d 993, 999 (6th Cir. 1991) (no abuse of discretion to reduce award where plaintiff lost at trial and prevailed only on a claim suggested to her by the court post-trial, and even on that claim she received only a portion of back pay, although she requested reinstatement and full back pay); Gilbert v. Little Rock, Ark., 867 F.2d 1063, 1066–67 (8th Cir.) (upholding downward adjustment of the fee award where plaintiffs lost on most claims and most individual plaintiffs received no relief), *cert. denied*, 493 U.S. 812 (1989); Spanish Action Comm. of Chicago v. City of Chicago, 811 F.2d 1129, 1133–36 (7th Cir. 1987) (80% reduction in fee award where plaintiff sought primarily punitive damages and won only compensatory damages, and against only one of many defendants).

> at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage.[182]

- However, where the court of appeals vacated a judgment for the plaintiffs and remanded for retrial, and the plaintiffs then dropped the suit because they had already achieved much of the desired relief, the court upheld the denial of compensation for work on the unsuccessful appeal. It may be proper to award fees for an unsuccessful appeal if the plaintiff prevails on retrial, the court said, "[b]ut in this case, the litigants decided to abandon their claims after losing on appeal. . . . Although they were prevailing parties in the case overall, it is clear that nothing associated with the appeal contributed to any favorable result achieved by the litigation."[183]
- Where the plaintiffs received fees for obtaining a favorable consent decree, they were also awarded fees for unsuccessfully defending against the defendant's motion to modify the consent decree:

> [T]he plaintiffs' work . . . was directed toward the protection of rights originally and unambiguously vindicated in the consent decree . . . . [I]n holding that the modification should be allowed, we found it necessary to review and evaluate the full range of related reforms that were . . . implemented by the terms of the consent decree. . . . [T]he district court did not abuse its discretion or err as a matter of law in concluding that the matters at issue . . . were so intertwined with the original claims that attorneys' fees for work on those proceedings should be awarded as to a still "prevailing party."[184]

- The Seventh Circuit observed that confusion can arise if a district court deducts from the plaintiff's proposed award for

182. Cabrales v. County of Los Angeles, 935 F.2d 1050, 1053 (9th Cir. 1991).

183. Clark v. City of Los Angeles, 803 F.2d 987, 993 (9th Cir. 1986).

184. Plyler v. Evatt, 902 F.2d 273, 280, 281 (4th Cir. 1990). The court added that its holding "should not be construed as guaranteeing attorneys' fees after resolution of every dispute involving the consent decree. The initial status of 'prevailing party' does not entitle appellees to compensation when resistance to modification is unsuccessful and the position taken was not essential to the preservation of the integrity of the consent decree as a whole." *Id.*

both partial success and excessive hours. To avoid this problem, the court urged close adherence to the procedures set out in *Hensley*: "First the district court should eliminate all hours claimed that are either not 'reasonably expended' or inadequately explained. Only then should it adjust the total number of 'reasonably expended' hours so that the final award is reasonable in relation to the overall results obtained by the plaintiff."[185]

- The Fifth Circuit, in *Migis v. Pearle Vision, Inc.*,[186] held that the trial court did not give adequate consideration to the eighth *Johnson* factor, "the amount involved and the result obtained," when it lowered attorneys' fees by only 10% for limited success.[187] In *Migis*, the plaintiff sought twenty-six times the damages she was awarded in her private civil rights case, and the fee award was six and one-half times the amount of awarded damages. The appellate court found that the lower court abused its discretion by "failing to give adequate consideration to the result obtained relative to the fee award, and the result obtained relative to the result sought."[188]

iii. Low or nominal damages

An obvious case of limited success is an award of only nominal damages. The Supreme Court held that the plaintiff receiving such a judgment may be awarded "low fees or no fees,"[189] but it did not say that all awards of nominal damages must result in a denial of fees or a significant downward adjustment—the "extent of success" inquiry still applies.[190] The Court provided little guidance as to how to gauge

185. *Spanish Action Comm.*, 811 F.2d at 1138.

186. 135 F.3d 1041 (5th Cir. 1998).

187. *Id.* at 1047–48. *See supra* note 108 for all factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974).

188. *Migis*, 135 F.3d at 1048.

189. Farrar v. Hobby, 506 U.S. 103, 115 (1992).

190. In *Farrar*, 506 U.S. 103, the Fifth Circuit had reversed the trial court's award of fees on the ground that a plaintiff who wins only nominal damages is not a prevailing party. The Supreme Court rejected that view (*see supra* text accompanying notes 22–23) but held that such a plaintiff, albeit a prevailing party, may be denied an award based on lack of success.

the success of a party receiving nominal damages,[191] but Justice O'Connor's concurrence cited several relevant factors: "[A] substantial difference between the judgment recovered and the recovery sought suggests that the victory is in fact purely technical"[192] and less deserving of fees. Thus, the relief sought by the plaintiff is a consideration. However, this factor is not necessarily decisive, because "an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved."[193] The court should look to the importance of the issue on which the plaintiff prevails, for example, whether the plaintiff's success serves "some public goal," such as deterring misconduct.[194]

The Seventh Circuit adopted Justice O'Connor's test for determining "whether a prevailing party has achieved a mere technical victory inappropriate for fees."[195] It directed district courts to "'look at the difference between the judgment recovered and the recovery sought, the significance of the legal issue on which the plaintiff prevailed and, finally, the public purpose of the litigation.'"[196] The Ninth Circuit has cautioned that "[t]he *Farrar* exception, which would allow the court to dispense with the calculation of a lodestar and simply establish a low fee or no fee at all, is limited to cases in which the civil rights plaintiff 'prevailed' but received only nominal damages and achieved only 'technical' success."[197]

191. Although the Court found fees inappropriate in the case *sub judice*, it gave little explanation apart from observing that the plaintiff, who sought $17 million in damages, had "accomplished little." *Farrar*, 506 U.S. at 114. The majority did not respond to the dissent's view that, having determined that the plaintiff was a prevailing party, the Court should have remanded the case for the trial court to assess what, if anything, would be a reasonable award under the circumstances. *Id.* at 124 (White, J., concurring in part and dissenting in part).

192. *Id.* at 121 (O'Connor, J., concurring).

193. *Id.*

194. *Id.* at 121, 122.

195. Johnson v. Lafayette Fire Fighters Ass'n Local 472, 51 F.3d 726, 731 (7th Cir. 1995).

196. *Id.* (quoting Cartwright v. Stamper, 7 F.3d 106, 109 (7th Cir. 1993)).

197. Morales v. City of San Rafael, 96 F.3d 359, 362–63 (9th Cir. 1996) (compensatory damages of $17,500, while substantially less than sought, were not nominal), *amended by*, *reh'g en banc denied*, 108 F.3d 981 (1997).

Two cases shed further light on when district courts may jettison the lodestar to award low fees or no fees. The Seventh Circuit held that when damages are low, but not nominal, and fees incurred are unreasonable, both ex post and ex ante, *Farrar* allows a judge to use a method other than the lodestar to devise an award.[198] The Eighth Circuit held that it was not an abuse of discretion to award no fees when the plaintiff's victory in a civil rights case amounted to $1 in compensatory damages and the message of great public importance sent to the defendant had been heard before.[199]

iv. Disproportionately low damages award

At least in cases that serve the public interest, the fact that the lodestar far exceeds the damage award is not itself grounds for a downward adjustment in attorneys' fees. In *Riverside v. Rivera*,[200] the plaintiffs, who were victimized by police misconduct, were awarded more than $200,000 in fees (based on the lodestar) even though the verdict was for just $33,000. The Court upheld the award, noting that the civil rights fee-shifting statute was adopted precisely because damages awards in civil rights cases are often small, which made it difficult for the plaintiffs to secure legal representation. However, only four justices joined the plurality opinion. Justice Powell cast the deciding vote in a concurrence that noted that the case involved the vindication of constitutional rights and a substantial gain to the public interest. He stated that "[w]here recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought," and noted that it is a "rare case in which an award of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case."[201] The plurality did not say whether it agreed.

198. Cole v. Wodziak, 169 F.3d 486, 488 (7th Cir. 1999).

199. Milton v. Des Moines, Iowa, 47 F.3d 944, 946 (8th Cir. 1995) (police brutality) (noting, "Were we the district court, we might have reached a different result; nevertheless, we cannot say that the district court abused its discretion." *Id.* at 947.).

200. 477 U.S. 561 (1986).

201. *Id.* at 585, 586 n.3 (Powell, J., concurring).

One district court, relying on Justice Powell's concurrence, interpreted *Rivera* as limiting disproportionate fees to cases that involve the public interest while requiring proportionality in cases involving only private damages; however, the Second Circuit reversed the district court's decision and acknowledged that "*Rivera* provides no guidance. It does not speak to a situation . . . where the monetary damage recovery benefits a single individual."[202] The Second Circuit laid down its own rule: The lodestar "should not be reduced simply because a plaintiff recovered a low damage award."[203] The Third Circuit has adopted the identical rule.[204] Likewise, the First and Seventh Circuits have said that "[disproportionality] alone does not make the award unreasonable."[205] The Eleventh Circuit has said that "use of a multiplier [to achieve proportionality between damages and fees] as a sole or dominant criterion" is improper.[206] The Fifth Circuit agrees that "the district court should avoid placing undue emphasis on the amount recovered."[207]

202. Cowan v. Prudential Ins., 935 F.2d 522, 526 (2d Cir. 1991).

203. *Id.*

204. Davis v. Southeastern Pa. Transp. Auth., 924 F.2d 51, 55 (3d Cir. 1991); Northeast Women's Ctr. v. McMonagle, 889 F.2d 466, 476–77 (3d Cir. 1989), *cert. denied,* 494 U.S. 1068 (1990) (rejecting contention that disproportionality holding in *Rivera* applies only in civil rights cases); Cunningham v. City of McKeesport, 807 F.2d 49, 53–54 (3d Cir. 1986) (rejecting suggestion that disproportionate fee award is permissible only if suit serves a substantial public interest), *cert. denied,* 481 U.S. 1049 (1987). *See also* Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1041 (3d Cir. 1996) ("a court may not diminish counsel fees in a section 1983 action to maintain some ratio between the fees and the damages awarded").

205. Domegan v. Ponte, 972 F.2d 401, 421 (1st Cir. 1992), *vacated and remanded in light of* Farrar v. Hobby, 506 U.S. 103 (1993); Cange v. Stotler & Co., 913 F.2d 1204, 1211 (7th Cir. 1990). *See also* Thomas v. Nat'l Football League Players Ass'n, 273 F.3d 1124 (D.C. Cir. 2001) (the fact that fees are nearly five times recovery does not make them excessive).

206. Cullens v. Ga. Dep't of Transp., 29 F.3d 1489, 1494 (11th Cir. 1994). In a later case, the court hinted that *Rivera's* rejection of proportionality is limited to civil rights actions. Andrews v. United States, 122 F.3d 1367, 1376 (11th Cir. 1997).

207. Von Clark v. Butler, 916 F.2d 255, 260 (5th Cir. 1990). *But cf.* Migis v. Pearle Vision, 135 F.3d 1041 (5th Cir. 1998), discussed *supra* text accompanying notes 186–88.

The First Circuit noted that disproportionality is nevertheless "a relevant factor to be considered in setting the size of the fee."[208] The court did not elaborate, but it appears that disproportionality could come into play when determining if counsel spent an unreasonable number of hours on the case in light of the probable outcome.[209]

Of course, extreme disproportionality may result when the plaintiff receives nominal damages only. As noted earlier, the Supreme Court held that in such cases it may be appropriate to award the plaintiff no fees or only low fees.[210]

v. Rejecting a Rule 68 settlement offer

In *Marek v. Chesny*,[211] the Supreme Court held that under the civil rights fee-shifting statute, if the plaintiff rejects a settlement offer made pursuant to Federal Rule of Civil Procedure 68, and the offer proves more favorable to the plaintiff than the eventual judgment, attorneys' fees incurred after the offer are noncompensable. The Court so held because the statute provides for fees "as part of the costs,"[212] thus bringing the fee award within the ambit of Rule 68's settlement rejection provision.[213] If, under a different fee-shifting

208. *Domegan*, 972 F.2d at 421.

209. *See* Riverside v. Rivera, 477 U.S. 561, 590 (1986) (Rehnquist, C.J., dissenting) ("I find it hard to understand how an attorney can be said to have exercised 'billing judgment' in spending such huge amounts of time on a case ultimately worth only $33,350."). In the context of that case, Chief Justice Rehnquist's argument was rejected (i.e., the Court did not consider the hours expended unreasonable even though the damage award was low). However, the Court did not reject the notion that in some cases a small award would be relevant to a determination that counsel spent excessive time on the case.

See also Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 296 (1st Cir. 2001) (proportionality not an issue where prevailing party limited fee request to prevailing claim).

210. Farrar v. Hobby, 506 U.S. 103 (1992), discussed *supra* text accompanying notes 189–94.

211. 473 U.S. 1 (1985).

212. 42 U.S.C. § 1988 (2000).

213. Rule 68 states, in pertinent part, that "[a]t any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party . . . . An offer not accepted shall be deemed withdrawn . . . . If the judgment finally obtained by the

statute, fees are not considered costs, a different result should obtain.[214] Of course, rejection of an informal settlement agreement not made pursuant to Rule 68 does not affect an award of fees.[215]

vi. Factors reflected in the lodestar

District courts have been reversed for making downward adjustments in attorneys' fees awards based on factors that are subsumed in the lodestar. In one case, the district court based a downward adjustment on, *inter alia*, insufficient documentation and mediocre performance. The Ninth Circuit said that these factors should be reflected in the lodestar and are not a basis for adjusting the lodestar.[216] Similarly, the Tenth Circuit held that a district court abused its discretion in making a downward adjustment based on simplicity of issues because that factor should be reflected in the lodestar.[217] Furthermore, it held that to make a reduction based on simplicity "could lead to the incongruous result of attorneys being less likely to take a case where a person's civil rights have been obviously and clearly violated."[218]

offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Fed. R. Civ. P. 68.

214. *See, e.g.,* Sheppard v. Riverview Nursing Ctr., Inc., 88 F.3d 1332, 1337 (4th Cir.) (Rule 68 cannot preclude fees payment pursuant to 42 U.S.C. § 2000e-5(g)(2)(B)(i), but rejection of settlement offer can be considered in determining if or how much fees should be awarded), *cert. denied*, 519 U.S. 993 (1996); Int'l Nickel Co. v. Trammel Crow Distrib. Corp., 803 F.2d 150, 157 n.2 (5th Cir. 1986) (rejection of Rule 68 offer did not preclude fee award where state fee-shifting statute authorized fees "in addition" to costs rather than "as part of costs").

215. *See* Cole v. Wodziak, 169 F.3d 486, 487 (7th Cir. 1999) (clear error to reduce lodestar because of oral settlement offer).

216. Cunningham v. Los Angeles, 859 F.2d 705, 710–13 (9th Cir. 1988) (court acknowledged that in rare cases, quality of representation may be the basis for an adjustment to the lodestar, but found that in this case, there was no showing that the mediocre performance was not subsumed in the lodestar).

217. Cooper v. Utah, 894 F.2d 1169, 1172 (10th Cir. 1990).

218. *Id.*

vii. Other downward adjustments

The Seventh Circuit held that a downward adjustment in a fee award for the plaintiff's refusal to meet with a law clerk to discuss mediation was an abuse of discretion.[219]

b. Upward adjustments

i. Novelty or complexity of issues

The Supreme Court has stated on several occasions that the novelty and complexity of the litigation are reflected in the lodestar and should not be the basis of an upward adjustment in attorneys' fees.[220] Therefore, the Eighth Circuit overturned a fee enhancement for "complexity of the case and the absence of court precedent," stating that "counsel expended greater time and effort [on account of these factors]. Consequently, counsel's lodestar figure directly reflects [these factors], and an enhancement . . . would constitute double counting."[221] Likewise, the Fifth Circuit rejected an enhancement based on novelty and difficulty because

> [a]ll counsel competent to handle a case such as this one are expected to be able to deal with complex and technical matters; this expertise is reflected in their regular hourly rate. . . . Still further, the difficulty in the handling of the case is adequately reflected in the number of hours billed.[222]

ii. Exceptional results or quality of representation

The Supreme Court has stated that the exceptional results or quality of representation of a case are reflected in the lodestar and thus are generally not a basis for a fee enhancement.[223] In a rare case, in which the success or quality of representation transcends what can be expected given the hourly rates and number of hours expended, the

219. Connolly v. Nat'l Sch. Bus Serv., Inc., 177 F.3d 593, 598 (7th Cir. 1999).

220. *See, e.g.,* Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986) (*Delaware Valley I*); Blum v. Stenson, 465 U.S. 886, 898–900 (1984).

221. Hendrickson v. Branstad, 934 F.2d 158, 163 (8th Cir. 1991).

222. Shipes v. Trinity Indus., 987 F.2d 311, 321 (5th Cir. 1993).

223. *Blum*, 465 U.S. at 899.

lodestar may be enhanced.[224] The burden of documenting the appropriateness of such an upward enhancement rests on the applicant.[225] If an enhancement is granted, it must be accompanied by "detailed findings as to why the lodestar amount was unreasonable, and in particular, as to why the quality of representation was not reflected in the [lodestar]."[226]

Lower courts have heeded the admonition that an upward adjustment for outstanding representation should be rare. One exceptional case elucidates the rule: Counsel was appointed for a jury trial beginning three days later, took the case blind, and offered "superb representation under the most adverse circumstances."[227] More typical was a Fifth Circuit opinion reversing an enhancement for exceptional results where the "district court asserted that the prevailing rates for attorneys of similar skill, experience, and reputation were not sufficient to compensate [counsel at bar], but it articulated no basis for this finding."[228] Similarly, a First Circuit panel acknowledged the "strength of the attorneys' performance [and] the magnitude of their triumph," but it nevertheless reversed an upward adjustment: "[W]e

224. *Id.* at 898–900. That such enhancements should be rare was emphasized in *Delaware Valley I*, 478 U.S. at 567–68 (reversing upward adjustment because plaintiff "presented no specific evidence as to what made the results it obtained during this phase so 'outstanding' nor did it provide an indication that the lodestar figure . . . was far below awards made in similar cases where the court found equally superior quality of performance").

225. *Delaware Valley I*, 478 U.S. at 567–68; *Blum*, 465 U.S. at 898.

226. *Blum*, 465 U.S. at 900. Thus, for example, in *Shipes v. Trinity Industries*, 987 F.2d 311, 322 (5th Cir. 1993), the Fifth Circuit said that the enhancement for exceptional results may have been warranted, since "victory was complete on all issues . . . resulted in a substantial award of monetary damages. . . and very importantly, [provided] future protection against discrimination in the form of injunctive relief." The court noted that enhancement based on exceptional results is proper in rare cases only and must be "supported by specific evidence and detailed findings by the district court." *Id.* at 322 n.9. It remanded the case for the district court to determine "whether it is customary in the area for attorneys to charge an additional fee above their hourly rates for an exceptional result after lengthy and protracted litigation." *Id.* at 322.

227. Hollowell v. Gravett, 723 F. Supp. 107, 110 (E.D. Ark. 1989).

228. Alberti v. Klevenhagen, 896 F.2d 927, 936 (5th Cir.), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990).

see nothing in the record that indicates that the services and results overshadowed, or somehow dwarfed, the lodestar."[229]

iii. Other upward adjustments

Two circuits have held that an upward adjustment in the fee award is appropriate to compensate for "undesirability" of the case.[230] The Ninth Circuit affirmed an upward adjustment in a case in which counsel's obligation to the class would continue for another ten years.[231]

iv. Delay in payment

The Supreme Court has stated that a trial court has discretion to compensate the award recipient for delay in payment.[232] This can be

229. Lipsett v. Blanco, 975 F.2d 934, 942–43 (1st Cir. 1992).

230. *See* Guam Soc'y of Obstetricians & Gynecologists v. Ada, 100 F.3d 691, 697–99 (9th Cir. 1996) (holding that fee multiplier was appropriate in civil rights action that successfully challenged constitutionality of Guam anti-abortion statute); *Alberti*, 903 F.2d at 352 (enhancement of fee award to compensate for "case undesirability" was proper because it was required to attract competent counsel for prison conditions litigation and it was supported by testimony from an expert economist on how the local market treats such cases).

231. Wing v. Asarco Inc., 114 F.3d 986, 989 (9th Cir. 1997).

232. Missouri v. Jenkins, 491 U.S. 274, 284 (1989) ("an appropriate adjustment for delay in payment—whether by application of current rather than historic hourly rates or otherwise—is within contemplation of [section 1988]"). *See also* Gates v. Deukmejian, 987 F.2d 1392, 1407 (9th Cir. 1992) ("length of the delay in payment . . . is a consideration in deciding whether an award of current rather than historic rates is warranted"); Grant v. Martinez, 973 F.2d 96, 99 (2d Cir. 1992) (appellate court held that courts have discretion to compensate for delay by using "what rate is necessary" and rejected past practice of applying current rates to recent phases of protracted litigation and historic rates to earlier phases), *cert. denied,* 113 S. Ct. 978 (1993).

This rule does not apply in suits against the United States. In *Library of Congress v. Shaw*, 478 U.S. 310 (1985), the Court held that the "no-interest" rule, preventing recovery of interest from the United States absent a waiver of sovereign immunity, applies to fee awards. Therefore, an award against the United States should generally not be enhanced for delayed payment. This no-interest rule also does not apply to suits against states. *Jenkins*, 491 U.S. at 280–82 & n.3.

achieved by calculating the lodestar in current dollars[233] or by factoring in interest, usually at the prime rate,[234] after the lodestar has been computed using historic rates.[235] Courts should be careful, however, not to mix methods.[236] When a delay is de minimus, a delay enhancement may not be necessary.[237]

The circuits are split on whether interest runs from the date the trial court rules the party is entitled to fees or from the date the trial court quantifies the fee.[238]

233. Norman v. Hous. Auth. of Montgomery, 836 F.2d 1292, 1302 (11th Cir. 1988) (expressing preference for current rates).

234. *See, e.g.*, Alberti v. Klevenhagen, 896 F.2d 927, 938 (5th Cir.) (holding court erred in using municipal bond interest rates instead of prime rate), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990); Lattimore v. Oman Constr., 868 F.2d 437, 438 n.2 (11th Cir. 1989) (approving use of IRS adjusted prime rate); Skelton v. Gen. Motors Corp., 860 F.2d 250, 255 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989) (courts should use prime rate).

235. *See* Walker v. HUD, 99 F.3d 761, 773 (5th Cir. 1996) (6% enhancement for delay approximating 2.96% interest compounded annually was not an abuse of discretion).

236. *See, e.g., id.* (noting court may use either unenhanced lodestar based on current rates or lodestar using historical rates plus a delay enhancement, but not both); *In re* Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1305 (9th Cir. 1994) (stating two ways to compensate for delay: (1) current rates or (2) historic rates plus prime rate enhancement; and holding it an abuse of discretion to use hybrid of current rate and last billed rate).

237. Smith v. Freeman, 921 F.2d 1120, 1123 (10th Cir. 1990) (holding enhancement inappropriate where delay is de minimus and there is no showing that counsel's hourly rate increased from the time the action commenced).

238. Most circuits require interest calculation from the date of fee entitlement. La. Power & Light Co. v. Kellstrom, 50 F.3d 319, 332 & n.24 (5th Cir.), *cert. denied*, 516 U.S. 862 (1995); Friend v. Kolodzieczak, 72 F.3d 1386, 1391–92 (9th Cir. 1995); BankAtlantic Inc. v. Blythe Eastman Paine Webber, 12 F.3d 1045, 1052–53 (11th Cir. 1994); Jenkins v. Missouri, 931 F.2d 1273, 1276 (8th Cir.), *cert. denied,* 112 S. Ct. 338 (1991); Mathis v. Spears, 857 F.2d 749, 760 (Fed. Cir. 1988).

The Third, Seventh, and Tenth Circuits calculate interest from the date the fee award is quantified. Eaves v. County of Cape May, 239 F.3d 527 (3d Cir. 2001) (discussing circuit split); MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/American Express, Inc., 962 F.2d 1470, 1475 (10th Cir. 1992) (fees awarded as a discovery sanction); Fleming v. County of Kane, 898 F.2d 553, 565 (7th Cir. 1990) (selecting date of quantification, without explanation).

The Ninth Circuit held that a delay in payment caused by appeal is *solely* redressed by an award of interest pursuant to 28 U.S.C. § 1961.[239]

Courts also have discretion to award interim fees in order to compensate for a delay in payment.[240]

v. Risk

In *City of Burlington v. Dague*,[241] the Court held that risk or contingency of nonrecovery is not a basis for an upward enhancement. In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*,[242] the Court reversed a risk enhancement, but only four justices maintained that such enhancements are always inappropriate. Justice O'Connor voted to reverse the enhancement in the case at bar, but her concurrence maintained that enhancement for risk is sometimes in order. Justice Blackmun's dissent, joined by three justices, agreed that such enhancements are sometimes in order but differed on what circumstances warrant them. The result, pre-*Dague*, was confusion in the lower courts over whether and when to grant such enhancements.

vi. Nonmarket factors

Some upward adjustments have been reversed because they were based on factors that did not pertain to the market rate for fees. For example, the Fifth Circuit reversed an enhancement that was based on potential conflicts of interest and the fact that the time expended on the case prevented counsel from obtaining other clients; the court

239. Corder v. Brown, 25 F.3d 833, 838 (9th Cir. 1994) (abuse of discretion to recalculate lodestar using current hourly rate).

240. *See supra* text accompanying notes 41–45.

241. 505 U.S. 557 (1992). The *Dague* Court construed the Solid Waste Disposal Act, 42 U.S.C. § 6972(e), and the Clean Water Act, 33 U.S.C. § 1365(d), but the rationale applies to similar statutes as well. *See, e.g.*, Murphy v. Reliance Standard Life Ins. Co., 247 F.3d 1313, 1314–15 (11th Cir. 2001) (ERISA); Cann v. Carpenters' Pension Trust Fund for N. Cal., 989 F.2d 313, 318 (9th Cir. 1993) (ERISA).

242. 483 U.S. 711 (1987) (*Delaware Valley II*).

noted that these factors are not bases for increasing fee rates in the private sector.[243]

5. Are there special considerations for awards to defendants?

When defendants request fee awards, the calculation is largely the same, but additional factors come into play. Denying or reducing fees is appropriate if the plaintiff is impecunious,[244] and the Seventh Circuit finds a reduction in order if the defendant fails to mitigate (for example, by moving for dismissal or summary judgment).[245] A reduction for failure to mitigate could apply to prevailing plaintiffs as well—since they are entitled to compensation only for "reasonable" hours—but will more likely apply to defendants, since defending against frivolous suits often does not require substantial time.[246]

6. What are the procedural aspects of fee disputes?

a. Case law

The Supreme Court has said little about the procedural aspects of fee disputes, apart from its admonition that such disputes should not spawn "a second major litigation."[247] The courts of appeals, however, have established certain norms.

243. Alberti v. Klevenhagen, 896 F.2d 927, 934 (5th Cir.), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990).

244. *See, e.g.,* Toliver v. County of Sullivan, 957 F.2d 47, 49–50 (2d Cir. 1992); Alizadeh v. Safeway, 910 F.2d 234, 238 (5th Cir. 1990) (award may be reduced but not eliminated); Miller v. Los Angeles, 827 F.2d 617, 621 n.5 (9th Cir. 1987); Munson v. Friske, 754 F.2d 683, 697–98 (7th Cir. 1985); Charves v. Western Union, 711 F.2d 462, 465 (1st Cir. 1983); Durrett v. Jenkins Brickyard, 678 F.2d 911, 917 (11th Cir. 1982) (award may be reduced but not eliminated). Although a defendant's indigence may be a special circumstance that warrants denial of an award to a prevailing plaintiff (see, e.g., *Toliver*, losing party's resources may be taken into account in any fee case), the ability to pay plays a more central role when defendants seek an award. *See, e.g.,* Kraeger v. Solomon & Flanagan, P.A., 775 F.2d 1541, 1544 (11th Cir. 1985) (where defendant seeks award, plaintiff's financial resources are a "thirteenth factor" to add to the twelve *Johnson* factors).

245. Leffler v. Meer, 936 F.2d 981, 987 (7th Cir. 1991).

246. *See* Hamilton v. Daley, 777 F.2d 1207, 1215–16 (7th Cir. 1985).

247. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

Many courts agree that there is no need to hold an evidentiary hearing in an attorneys' fees case "when a record has been fully developed through briefs, affidavits, and depositions."[248] Several courts have suggested that an evidentiary hearing is necessary in certain circumstances.[249] The Eighth Circuit requires a hearing when "serious factual disputes surround an application for attorney fees."[250] Likewise, the D.C. Circuit requires a hearing when "material issues of fact that may substantially affect the size of the award remain in well-founded dispute."[251] The Ninth Circuit has stated that "[w]hen a factual dispute exists as to whether a party prevailed, it is wise for the district court to conduct a hearing to resolve the conflict"[252] and has suggested that a hearing is required when there are vigorous disputes over the elements constituting the fee award.[253] The Fifth Circuit requires a hearing where there are "apparent factual disputes,"[254] especially if such a hearing is requested.[255] The Eleventh Circuit maintains that a hearing is not necessary if disputes concern "matters as to which the courts possess expertise. . . [, such as the] reasonableness of the fee, the reasonableness of the hours and the significance of the outcome," but one is necessary "where there is a dispute of material historical

248. Robinson v. City of Edmond, 160 F.3d 1275, 1286 (10th Cir. 1998). For cases rejecting the contention that a hearing must be or should have been held, see *Dejesus v. Banco Popular de Puerto Rico,* 951 F.2d 3, 7 (1st Cir. 1991); *Carey v. Crescenzi,* 923 F.2d 18, 22 (2d Cir. 1991); *Norman v. Housing Authority of Montgomery,* 836 F.2d 1292, 1303 (11th Cir. 1988); *Bailey v. Heckler,* 777 F.2d 1167, 1171 (6th Cir. 1985); *Thomason v. Schweiker,* 692 F.2d 333, 336 (4th Cir. 1982); *National Association of Concerned Veterans v. Secretary of Defense,* 675 F.2d 1319, 1330 (D.C. Cir. 1982).

249. *See* Fed. R. Civ. P. 54(d)(2)(D), quoted *infra* text accompanying note 275, which provides that district courts may adopt rules establishing special procedures for resolving fee-related disputes without resorting to an extensive evidentiary hearing.

250. Herrera v. Valentine, 653 F.2d 1220, 1223 (8th Cir. 1981).

251. *Concerned Veterans*, 675 F.2d at 1330.

252. Church of Scientology v. United States Postal Serv., 700 F.2d 486, 494 (9th Cir. 1983).

253. *Id.*

254. Henson v. Columbus Bank & Trust Co., 651 F.2d 320, 329 (5th Cir. 1981).

255. King v. McCord, 621 F.2d 205, 206 (5th Cir. 1980).

fact such as whether or not a case could have been settled without litigation or whether attorneys were duplicating each other's work."[256]

Several courts have held that if the district court orders an award lower than that proposed and documented by the plaintiff, it must provide an explanation.[257] Numerous reversals have resulted because the district court failed to explain how it arrived at a fee award.[258] The Eleventh Circuit has stated that the court "must articulate the decisions it made, give principled reasons for those decisions, and show its calculation. . . . If the court disallows hours, it must explain which hours are disallowed and show why an award of these hours would be improper."[259] The Sixth Circuit has stated that "the district court must not only articulate findings of fact and conclusions of law regarding the *inclusion* of hours amounting to the fee awarded, but those regarding the *exclusion* of hours as well."[260] The First Circuit has stated that the court must "explicate the basis for its fee awards . . . . Although findings are necessary, however, they need not be 'infinitely precise,' . . . 'deluged with details,' or even 'fully articulated.'"[261]

Despite these norms, at least in certain circumstances most circuits permit a trial court to make deductions without identifying ex-

256. Norman v. Hous. Auth. of Montgomery, 836 F.2d 1292, 1304 (11th Cir. 1988).

257. *See* United Steelworkers v. Phelps Dodge, 896 F.2d 403, 406 (9th Cir. 1990); Cunningham v. City of McKeesport, 807 F.2d 49 (3d Cir. 1986), *cert. denied,* 481 U.S. 1049 (1987); Gekas v. Attorney Registration & Disciplinary Comm'n, 793 F.2d 846, 851 (7th Cir. 1986).

258. *See, e.g.,* Case v. Unified Sch. Dist. No. 233, 157 F.3d 1243, 1255 (10th Cir. 1998); Fleming v. Ayers & Assocs., 948 F.2d 993, 1000 (6th Cir. 1991); Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc. 886 F.2d 1545, 1556–57 (9th Cir. 1989), *cert. denied,* 494 U.S. 1017 (1990); Student Pub. Interest Research Group of N.J., Inc. v. AT&T Bell Labs., 842 F.2d 1436, 1456 (3d Cir. 1988); *Norman*, 836 F.2d at 1304; Johnson v. New York City Transit Auth., 823 F.2d 31, 33 (2d Cir. 1987).

259. *Norman,* 836 F.2d at 1304.

260. Glass v. HHS, 822 F.2d 19, 22 (6th Cir. 1987).

261. Foley v. City of Lowell, 948 F.2d 10, 20 (1st Cir. 1991) (citing *Foster,* 943 F.2d at 141; Langton v. Johnston, 928 F.2d 1206, 1226 (1st Cir. 1991); Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 950 (1st Cir. 1984); United States v. Metro. Dist. Comm'n, 847 F.2d 12, 16 n.4 (1st Cir. 1988); Gabriele v. Southworth, 712 F.2d 1505, 1507 (1st Cir. 1983); Jacobs v. Mancuso, 825 F.2d 559, 564 (1st Cir. 1987)).

actly what hours it disallows. The Tenth Circuit endorses a "general reduction of hours claimed in order to achieve what the court determines to be a reasonable number."[262] The Seventh Circuit held that a district court acted within its discretion when it cut a lump sum rather than evaluate every entry: This was a "practical means of trimming fat" from an inadequately documented petition.[263] The D.C. Circuit has endorsed this method,[264] as have the Second and Ninth Circuits, in cases in which the fee petition was voluminous.[265] The Third Circuit, which once stated that the district court must identify all disallowed hours,[266] permitted a 10% pro rata reduction in compensable hours in light of the "complex and lengthy record" in a case.[267] The Ninth Circuit emphasized that when a court makes a percentage reduction, it still must review the record, and it should explain why it chose the particular percentage.[268]

The Seventh Circuit also approved a reduction arrived at by sampling billable time sheets. The district court had closely examined two or three particular tasks described in the fee application and applied its findings to the remaining hours claimed. The court informed counsel that it would do this and gave opposing counsel the opportunity to suggest the specific work to be scrutinized. Although it affirmed the lower court's decision, the Seventh Circuit noted that "it might be a better practice to allow both the party opposing the fee

262. Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1203 (10th Cir. 1986).

263. Tomazzoli v. Sheedy, 804 F.2d 93, 98 (7th Cir. 1986). *See also In re* Ohio-Sealy Mattress, 776 F.2d 646 (7th Cir. 1985). The Seventh Circuit expressed reservations about a percentage reduction where a great deal of money was at stake. *In re* Cont'l Ill. Sec. Litig., 962 F.2d 566, 570 (7th Cir. 1992) (common fund case).

264. Copeland v. Marshall, 641 F.2d 880, 903 (D.C. Cir. 1980) (en banc).

265. Gates v. Deukmejian, 987 F.2d 1392, 1399 (9th Cir. 1992); *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 226, 237–38 (2d Cir. 1987) (common fund case).

266. *In re* Fine Paper Antitrust Litig., 751 F.2d 562 (3d Cir. 1984).

267. Daggett v. Kimmelman, 811 F.2d 793, 797–98 (3d Cir. 1987) (suggesting, however, that a different result would have obtained if the reduction had been significantly higher).

268. *Gates*, 987 F.2d at 1400.

award and the party seeking fees to suggest the individual tasks to be sampled."[269]

The Third Circuit has held that the district court may not decrease a fee award based on factors not raised by the adverse party.[270] A Fourth Circuit case appears to hold differently.[271] The Seventh Circuit has stated that the plaintiff is entitled to be heard before the court makes a significant reduction in requested hours.[272]

The Ninth and Tenth Circuits have rejected the contention that the award of attorneys' fees may be submitted to a jury.[273] The Fifth Circuit has held that there is no Seventh Amendment right to a jury trial on fees, but it is permissible for a jury to determine fees.[274]

b. Rule 54

The procedural requirements and options available to judges faced with fee disputes are set forth in Federal Rule of Civil Procedure 54(d)(2):

> (C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a).

269. Evans v. City of Evanston, 941 F.2d 473, 477 (7th Cir. 1991), *cert. denied,* 112 S. Ct. 3028 (1992) (reiterating its approval of the sampling method in *In re Continental Illinois Securities Litigation,* 962 F.2d 566, 572–73 (7th Cir. 1992)). "Sampling" is discussed *infra* text accompanying notes 510–13.

270. Bell v. United Princeton Props., 884 F.2d 713, 719 (3d Cir. 1989); Cunningham v. City of McKeesport, 753 F.2d 262, 267 (3d Cir. 1985), *vacated on other grounds*, 478 U.S. 1015 (1986).

271. Broyles v. Dir., 974 F.2d 508, 510 (4th Cir. 1992) ("Although the [defendant] has not challenged the number of hours claimed, we have the responsibility of determining whether the fees sought are *reasonable.*").

272. Smith v. Great Am. Rests., 969 F.2d 430, 440 (7th Cir. 1992).

273. MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/American Express, Inc., 962 F.2d 1470, 1475 (10th Cir. 1992); Hatrock v. Jones & Co., 750 F.2d 767, 776 (9th Cir. 1984).

274. Resolution Trust v. Marshall, 939 F.2d 274, 279 (5th Cir. 1991). The court did not say whether it is wholly within the discretion of the court to have a jury determine fees or whether consent of the parties is required.

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of Rule 53 (a)(1) and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.[275]

C. Issues on Appeal

The legal issues discussed above apply to the courts of appeals as well as to the district courts. The following issues apply only to the courts of appeals:

- the timing of the appeal;
- the scope of review; and
- whether the court of appeals may calculate the award.

1. Timing of appeal

In *White v. New Hampshire*,[276] the Supreme Court held that a request for attorneys' fees is collateral to and separate from a decision on the merits.[277] In *Budinich v. Becton Dickinson & Co.*,[278] the Court held that a request for attorneys' fees will not prevent an otherwise final decision on the merits from becoming final for purposes of appeal.[279]

In *Ramsey v. Colonial Life Insurance Co. of America*,[280] the Fifth Circuit distinguished the Supreme Court cases, which concerned original requests for attorneys' fees, from the case before it, which involved a motion to reconsider attorneys' fees. It held that a request to reconsider a denial of attorneys' fees was a Rule 59(e) motion that tolled the thirty-day period for taking an appeal on the merits of the case. In *Ramsey*, the district court had entered a judgment that included both a disposition on the merits and a denial of attorneys' fees. The Fifth Circuit stated, "a motion to reconsider a judgment will be

275. Fed. R. Civ. P. 54(d)(2)(C) and (D). Rule 54(d)(2)(E) exempts from the amended rule a request for attorneys' fees as a sanction.

276. 455 U.S. 445 (1982).

277. *Id.* at 451–52.

278. 486 U.S. 196 (1988).

279. *Id.* at 202–3.

280. 12 F.3d 472 (5th Cir. 1994).

considered a Rule 59(e) motion even where the request for reconsideration encompasses only that part of the judgment regarding attorney's fees."[281]

The Tenth Circuit, in contrast, held that a Rule 59(e) motion to rescind an award of attorneys' fees did not toll the time for appeal of the merits.[282] It distinguished the case from *Ramsey*, which concerned a final disposition of the question of attorneys' fees, that is, they were denied. The Tenth Circuit case did not involve a final disposition of attorneys' fees; the amount of fees was not set. Relying on *Budinich*, the Tenth Circuit noted that the fees issue remained "collateral to the merits judgment, particularly when the judgment contemplates significant further proceedings concerning costs and attorney's fees."[283]

The Third, Sixth, and Ninth Circuits have rejected the contention that Federal Rule of Appellate Procedure 39(d) requires an appeal from a fee order to be filed within fourteen days.[284] They held that Rule 39(d) applies only to certain costs specified in the text of the rule—briefs, appendices, and copies of records allowed under 39(c)—and not to attorneys' fees. The D.C. Circuit has held to the contrary.[285] The First, Third, Fifth, Sixth, and Eleventh Circuits have held that an appellate court's order that each party bear its own costs does not preclude an award of attorneys' fees.[286] The Second Circuit has held to the contrary.[287]

281. *Id.* at 478.

282. Utah Women's Clinic v. Leavitt, 75 F.3d 564 (10th Cir. 1995).

283. *Id.* at 567.

284. McDonald v. McCarthy, 966 F.2d 112, 114 (3d Cir. 1992); Kelley v. Metro. County Bd. of Educ., 773 F.2d 677, 682 n.5 (6th Cir. 1985) (en banc), *cert. denied,* 474 U.S. 1083 (1986); N. Plains Res. Council v. EPA, 670 F.2d 847, 848 n.1 (9th Cir. 1982), *vacated on other grounds*, 464 U.S. 806 (1983).

285. Montgomery & Assocs., Inc. v. Commodity Futures Trading Comm'n, 816 F.2d 783, 785 (D.C. Cir. 1987) (motion for fees untimely because not filed within the Rule 39(d) time period).

286. *McDonald*, 966 F.2d at 115–18; Chems. Mfrs. Ass'n v. EPA, 885 F.2d 1276, 1278 (5th Cir. 1989); Lattimore v. Oman Constr., 868 F.2d 437, 440 n.6 (11th Cir. 1989); *Kelley*, 773 F.2d at 681; Robinson v. Kimbrough, 652 F.2d 458, 463 (5th Cir. 1981); Farmington Dowel Prod. v. Forster Mfg. Co., 421 F.2d 61, 91 (1st Cir. 1969). In so holding, these courts found that attorneys' fees are distinct from the costs referred to in Rule 39. *See also* Terket v. Lund, 623 F.2d 29, 33 (7th Cir. 1980) (because fees and costs are distinct, appeal from order taxing costs did not give court of appeals

As a result of Supreme Court dicta,[288] district courts generally view proceedings on the merits as procedurally distinct from post-judgment fee proceedings. For example, they often enter separate orders on the merits and on the fee request.[289] When this occurs, a separate notice of appeal from the fee decision must be filed.[290]

The Third, Fifth, Sixth, Eighth, and Eleventh Circuits have held that an order determining liability for fees but not establishing the amount is not a final, appealable order.[291] The Seventh Circuit has disagreed.[292]

Interim fee awards, which are based on success of the litigation in part while other issues remain to be resolved, are generally not appealable.[293] However, the Fifth, Sixth, Seventh, and Ninth Circuits have held that they are appealable under the collateral order doctrine

jurisdiction over fee award). Some of these cases were decided before the Supreme Court's ruling in *Marek v. Chesny*, 475 U.S. 717 (1986), which held that fees are part of costs under Rule 68. However, the Third and Sixth Circuits distinguished them from *Marek* (*see McDonald*, 966 F.2d at 116; *Kelley*, 773 F.2d at 681–82 n.5), noting that Fed. R. Civ. P. 68 is silent as to what constitutes costs, whereas Fed. R. App. P. 39(d) specifically enumerates costs and makes no mention of attorneys' fees.

287. Toliver v. County of Sullivan, 957 F.2d 47 (2d Cir. 1992).

288. *See supra* note 14 and accompanying text.

289. In *Maristuen v. National States Insurance Co.*, 57 F.3d 673, 678 (8th Cir. 1995), the Eighth Circuit stated a preference for reviewing judgments that include a decision both on the merits and on attorneys' fees awards "whenever possible and practical."

290. *McDonald*, 966 F.2d at 118; Quave v. Progress Marine, 918 F.2d 33, 34 (5th Cir. 1990); Art Janpol Volkswagen v. Fiat Motors of N. Am., 767 F.2d 690, 697 (10th Cir. 1985); Exch. Nat'l Bank of Chicago v. Daniels, 763 F.2d 286, 291–92 (7th Cir. 1985).

291. Pennsylvania v. Flaherty, 983 F.2d 1267, 1276–77 (3d Cir. 1993); Echols v. Parker, 909 F.2d 795 (5th Cir. 1990); Gates v. Cent. Teamsters Pension Fund, 788 F.2d 1341, 1343 (8th Cir. 1986); Morgan v. Union Metal, 757 F.2d 792, 794 (6th Cir. 1985); Fort v. Roadway Express, 746 F.2d 744, 747 (11th Cir. 1984). *See also* Andrews v. Employees' Ret. Plan, 938 F.2d 1245, 1248 (11th Cir. 1991) (court reaffirmed this position but nevertheless entertained the appeal because, on the facts of the case, it saw "no practical purpose in delaying resolution of the attorney's fee issue").

292. John v. Barron, 897 F.2d 1387, 1390 (7th Cir. 1990); Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 826–27 (7th Cir. 1984).

293. Shipes v. Trinity Indus., 883 F.2d 339 (5th Cir. 1989).

if the defendant would otherwise have trouble recovering its money after the litigation.[294]

2. Scope of review

The Supreme Court has stated that district courts' factual determinations with respect to a fee award should be reviewed deferentially under an "abuse of discretion" standard.[295] The First Circuit reviews a fee award only for a mistake of law or an abuse of discretion.[296] The Third Circuit has said that the legal standards used by the district court are given plenary review.[297] Similarly, the Seventh, Ninth, and Tenth Circuits have remarked that, although the amount of a fee award is generally reviewed for abuse of discretion, whether the plaintiff is entitled to any award is usually a question of statutory interpretation, reviewed de novo.[298]

3. May the court of appeals calculate the award?

As a general rule, when a court of appeals finds a calculation of fees to be erroneous, it remands the case for recalculation. However, on occasion the courts of appeals have decided the matter themselves in order to further the administration of justice. The Seventh Circuit has suggested that when a case has been in litigation for years, this "short-

294. People Who Care v. Rockford Bd. of Educ., 921 F.2d 132, 134 (7th Cir. 1991); *Shipes*, 883 F.2d 339; Rosenfeld v. United States, 859 F.2d 717, 721–22 (9th Cir. 1988); Webster v. Sowders, 846 F.2d 1032, 1035 (6th Cir. 1988).

295. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). However, such review requires a district court to "provide a concise but clear explanation for its reasons for the fee award." *Id.*

296. Coutin v. Young & Rubicam P.R., Inc., 124 F.3d 331, 336 (1st Cir. 1997).

297. Bell v. United Princeton Props., 884 F.2d 713, 718 (3d Cir. 1989); *see also* Domegan v. Ponte, 972 F.2d 401, 406 (1st Cir. 1992), *vacated and remanded on other grounds*, 113 S. Ct. 1378 (1993).

298. *See, e.g.,* Jaffee v. Redmond, 142 F.3d 409, 413 (7th Cir. 1998); Schultz v. Hembree, 975 F.2d 572, 574 n.2 (9th Cir. 1992); Homeward Bound, Inc. v. Hissom Mem'l Hosp., 963 F.2d 1352 (10th Cir. 1992). The Ninth Circuit has also said that "any elements of legal analysis and statutory interpretation which figure in the district court's [attorneys' fees] decision are reviewable de novo." Coalition for Clean Air v. S. Cal. Edison, 971 F.2d 219, 229 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 1361 (1993).

cut" is justifiable.[299] The First Circuit has found a remand unnecessary if "the record is sufficiently developed that we can apply the law to the facts before us" to recalculate the award in an essentially "mechanical" manner.[300] The Fifth Circuit has agreed.[301] The Eleventh Circuit has stated that it has authority to calculate a fee without a remand unless an evidentiary hearing is required to clarify disputed facts.[302]

299. *See* Ustrak v. Fairman, 851 F.2d 983, 989 (7th Cir. 1988) (because remand can "prolong litigation on what to begin with is a collateral matter, . . . [p]ractice has trumped theory . . . [and] in many cases in this and other circuits the court of appeals has made the adjustment in the fee award . . . without bothering to remand the case").

300. Lipsett v. Blanco, 975 F.2d 934, 943 (1st Cir. 1992).

301. La. Power & Light Co. v. Kellstrom, 50 F.3d 319, 326 (5th Cir. 1995) (modifying fee award without remand).

302. ACLU of Ga. v. Barnes, 168 F.3d 423, 431–32 (11th Cir. 1999). *See also* Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 181 (4th Cir. 1994) (finding authority to calculate a fee award without a remand, but not enough information on record to do so).

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II
Common Fund and Substantial Benefit

A. Common Fund

A brief review of four Supreme Court cases establishes the perimeters of the common fund doctrine. In the 1881 case of *Trustees v. Greenough*,[303] a bondholder's suit resulted in recovery of trust assets and realization of dividend payments to himself and other bondholders. The Court held that he should be reimbursed from the trust fund for his attorneys' fees lest the other bondholders be unjustly enriched at his expense.[304] A few years later, in *Central Railroad & Banking Co. v. Pettus*,[305] the Court expanded the common fund doctrine, holding that the plaintiff's counsel in a class action not only had standing to seek fees reimbursement for his client but also was eligible for an award of his own (not limited to what the client owed him). The Court reasoned that otherwise, the class members would be unjustly enriched at counsel's expense.

Greenough and *Pettus* involved a kind of recovery that differs fundamentally from statutory fee shifting in that fees are shared by the beneficiaries of the lawsuit rather than shifted to the losing party. They established that the common fund doctrine gives rise to two

303. 105 U.S. 527 (1881).

304. The Court suggested that fees might also be recovered directly from the other beneficiaries. *Id.* at 532. However, there are no reported cases in which such a recovery has been ordered. *Cf.* Vincent v. Hughes Air W., 557 F.2d 759, 770 (9th Cir. 1977) ("any claim must be satisfied out of the fund").

305. 113 U.S. 116 (1885).

kinds of claims: claims by plaintiffs to have their legal costs shared and claims by attorneys for an award other than that paid or owed by the client.[306] (As in statutory fee-shifting cases, intervenors and their attorneys are also eligible for an award.[307]) Each of the two kinds of claims prevents unjust enrichment of the beneficiaries.

Although many common fund cases are class actions, like *Pettus*, the common fund doctrine is not limited to class actions. This point was clarified and the common fund doctrine further expanded in *Sprague v. Ticonic,*[308] which involved a trust fund that was jeopardized when a bank went into receivership. After the plaintiff successfully sued for a lien establishing her right to recover from the trust, she sought reimbursement of attorneys' fees from the trust. Although the suit had only indirectly established the rights of others, and had not created a fund, the Court held that fees were in order:

> Whether one sues representatively or formally makes a fund available for others may, of course, be relevant circumstances in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.[309]

Sprague notwithstanding, most common fund cases are class actions. In *Boeing v. Van Gemert*[310] the Supreme Court held that the un-

306. *See* Skelton v. Gen. Motors Corp., 860 F.2d 250, 253 (7th Cir. 1988) ("Thus, in statutory fee-shifting cases, only parties (usually plaintiffs) may seek reimbursement whereas in common fund cases *attorneys* may seek compensation."), *cert. denied,* 493 U.S. 810 (1989).

307. *See, e.g.,* Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1302 (2d Cir. 1990); Kargman v. Sullivan, 589 F.2d 63, 68–69 (1st Cir. 1978); Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 540 F.2d 102, 112 (3d Cir. 1976). The court must, of course, assess whether the intervenor made a meaningful contribution. *See, e.g.,* Bandes v. Harlow & Jones, 852 F.2d 661, 671 (2d Cir. 1988) (fees denied intervenors who "did nothing to create the fund"); *Lindy Bros.,* 540 F.2d at 112 (intervenors awarded fees because "the financial strength they added to the plaintiff class . . . helped to force the settlement").

308. 307 U.S. 161 (1939).

309. *Id.* at 166.

310. 444 U.S. 472 (1980).

claimed portion of a fund established by a class action may be tapped for a fee award. It rejected the contention that the nonclaimants cannot be considered beneficiaries, reasoning that entitlement to the fund makes all class members beneficiaries for the purposes of the common fund doctrine.[311]

Despite these cases, application of the common fund doctrine will not invariably be simple. Like fee-shifting cases, common fund cases require a three-step inquiry: (1) whether there is entitlement to a fee award; (2) how the award should initially be calculated; and (3) whether any adjustment to the presumptive award should be made.

B. Class Actions

Federal Rule of Civil Procedure 23(h)[312] governs motions for attorneys' fees awards in class actions. Rule 23(h) does not mandate Rule 54(d)(2)(B)'s[313] fourteen-day filing requirement. Rather, the court sets the time frame in which to file a motion for attorneys' fees.

1. Determining whether an award is in order

a. Is there a fund?

When a party requests fees from a common fund, the threshold question is whether a common fund exists. On occasion, parties seek awards when there is no common fund.[314] The requirement of a common fund is not applied mechanically. For example, the D.C. Circuit rejected a contention that "the [common fund] doctrine is inap-

311. The Ninth Circuit held that the entire class action settlement fund should be the basis for a fee award even if the unclaimed portion of the fund reverts back to the defendant; the defendant should have negotiated a lower settlement fund if it wished to limit fees. Williams v. MGM-Pathe Communications Co., 129 F.3d 1026, 1027 (9th Cir. 1997) (per curiam). *Accord* Waters v. Int'l Precious Metals Co., 190 F.3d 1291, 1292–97 (11th Cir. 1999).

312. Fed. R. Civ. P. 23(h).

313. Fed. R. Civ. P. 54(d)(2)(B).

314. *See, e.g.,* Christensen v. Kiewit-Murdock Inv. Corp., 815 F.2d 206, 211 (2d Cir.), *cert. denied,* 484 U.S. 908 (1987) ("The award appellants seek would not be payable out of any 'fund.'"); Holbrook v. Pitt, 748 F.2d 1168, 1175 (7th Cir. 1984) ("the common fund doctrine cannot be applied because there is no 'common fund'").

plicable because 'there is literally no common fund'"; although retroactive salary payments were paid out of several different appropriations, "[i]n [the court's] view [this] is a mere technicality . . . . The entire sum paid to federal employees is the 'common fund'. . . to which the request or contribution is applicable."[315]

b. Did the lawsuit bring about or enhance the fund, or create access to it?

In common fund cases, it is not necessary for the court to determine whether the plaintiff achieved success sufficient to warrant a fee award: The fund itself signifies success. The plaintiff must, however, establish that its suit was a "but for" cause of the fund (or at least ensured access to the fund). One case illustrates this requirement.[316] A Nicaraguan company paid an American company for a shipment of goods. The shipment was not made, in part because the Nicaraguan company was taken over by its government. The former owner sought return of the payment, and Alvarez, a representative of the Nicaraguan government, intervened. The American company interpleaded the money, and the two claimants—the former owner and Alvarez—went to trial. The former owner prevailed, but the trial court granted Alvarez attorneys' fees from the payment, presumably because the fund benefited the unrepresented shareholders and Alvarez had "demonstrated some solicitude" for them.[317] The Second Circuit reversed this decision because Alvarez "did nothing to create the common fund."[318]

The court could have stressed that Alvarez not only did not "create" the fund but also played no role in benefiting the shareholders (since the fund would have become available even if he had not intervened). This distinction is important because the common fund doctrine does not require that the suit bring about a fund *ab initio*. The leading Supreme Court cases involved funds that predated the suit.[319]

315. Nat'l Treasury Employees Union v. Nixon, 521 F.2d 317, 320–21 (D.C. Cir. 1975).

316. Bandes v. Harlow & Jones, 852 F.2d 661 (2d Cir. 1988).

317. *Id.* at 671.

318. *Id.*

319. *See supra* text accompanying notes 303–11.

The D.C. Circuit has stated that the common fund doctrine applies to actions that "create[ ], enhance, preserve, or protect [a] fund."[320] The Ninth Circuit has said it applies if the plaintiff "created, discovered, increased or preserved" a fund.[321] Such formulations are underinclusive. The common fund doctrine has also been applied in cases that resulted in a fund's reapportionment[322] or distribution.[323] The doctrine may apply, then, if a lawsuit creates a fund or ensures access to funds.[324]

The plaintiff's efforts need not involve an actual adjudication. Recovery can be appropriate when the common fund results from a formal settlement,[325] or when the defendant takes remedial action that moots the case.[326] In addition, a common fund recovery is arguably available from a fund created by a legislative or administrative action spurred by the plaintiff's lawsuit.[327] Finally, in one case, the Supreme

320. Abbott, Puller & Myers v. Peyser, 124 F.2d 524, 525 (D.C. Cir. 1941).

321. B.P. N. Am. Trading, Inc. v. Vessel Panamax Nova, 784 F.2d 975, 977 (9th Cir.), *cert. denied,* 479 U.S. 849 (1986).

322. *See, e.g.,* United States v. ASCAP, 466 F.2d 917, 918 (2d Cir. 1972); Nolte v. Hudson Navigation Co., 47 F.2d 166 (2d Cir. 1931); Dorfman v. First Boston Corp., 70 F.R.D. 366 (E.D. Pa. 1976).

323. *See, e.g.,* Powell v. Pa. R.R., 267 F.2d 241 (3d Cir. 1959); Lafferty v. Humphrey, 248 F.2d 82 (D.C. Cir.), *cert. denied,* 355 U.S. 869 (1957).

324. *See* Sprague v. Ticonic, 307 U.S. 161, 166–67 (1939) (the fact that fund was not "formally established by litigation" not decisive as long as suit "makes a fund available for others"). The breadth of the doctrine is occasionally overlooked. *See, e.g.,* Feick v. Fleener, 653 F.2d 69, 78 (2d Cir. 1981) (rejecting award from an estate for attorney whose work during protracted litigation enhanced the estate; the court denied fees because no fund "was created by [his] efforts," overlooking the fact that the common fund doctrine can apply when litigation enhances an existing fund).

325. *See, e.g.,* Kopet v. Esquire Realty, 523 F.2d 1005, 1008 (2d Cir. 1975).

326. *See, e.g.,* Koppel v. Wien, 743 F.2d 129, 135 (2d Cir. 1984) (fees appropriate even though "no judgment or consent decree was entered and the complaint was dismissed as moot"); Reiser v. Del Monte Props., 605 F.2d 1135, 1139 (9th Cir. 1979) (fees not precluded where defendant voluntarily takes action, favorable to plaintiff, that moots suit).

327. *See* Winton v. Amos, 255 U.S. 373, 393 (1921) (fee recovery appropriate where attorney persuaded legislative and executive branches to restore lands and funds to his clients). *Winton* has rarely been cited, and it was rejected by the D.C. Circuit *sub silentio* in *Whittier v. Emmett,* 281 F.2d 24, 32 (D.C. Cir. 1960), *cert. denied,* 364 U.S. 935 (1961) ("claim for compensation for services rendered in sponsor-

Court held that an award was appropriate for *defendants* whose litigation efforts preserved a fund.[328]

c. Are there beneficiaries?

In a number of cases, awards have been denied because there were no bona fide beneficiaries of the fund other than the plaintiff. In one case, a minority shareholder prevailed in a derivative suit against the officers of the corporation, who were also the other shareholders. The officers were ordered to reimburse the corporation for the diminution of stock value caused by their breach of fiduciary duty. The Fifth Circuit found a fee award inappropriate because "the effect of such an award is to shift the liability for those fees to the defendant,"[329] whereas the common fund doctrine aims to spread the fee among beneficiaries. The court elaborated:

> The trial court's judgment on the derivative claim in this case creates no common fund benefiting the remaining former . . . shareholders other than [the plaintiff]. Rather, the other shareholders are cast in judgment in the corporation's favor. Therefore, the effect of the award of attorney's fees out of the so-called derivative recovery is to increase the defendant's liability to include the plaintiff's attorney's fees. The award of attorney's fees to the plaintiff who successfully litigates the corporation's claim is not designed "to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them."[330]

In a First Circuit case, the plaintiff, Joseph Catullo, and the defendant, Conservit, Inc., a Maryland corporation, agreed to form a company, Barlof Salvage, to do business in Puerto Rico. When Conservit began to compete with Barlof, Catullo brought a derivative suit on behalf of Barlof. Catullo prevailed and sought fees from the judgment recovered to "avoid burdening the plaintiff and unjustly enriching the only other shareholder—Conservit."[331] The First Circuit rejected the

ing favorable legislation [does] not deserve prolonged discussion"). *But see* Paris v. Metro. Life Ins., 94 F. Supp. 792 (S.D.N.Y. 1947) (ordering recovery from fund created by action of administrative agency).

328. *See* Rude v. Buchhalter, 286 U.S. 451, 461 (1932).

329. Junker v. Cory, 650 F.2d 1349, 1352 (5th Cir. 1981).

330. *Id.* (quoting Mills v. Elec. Auto-lite, 396 U.S. 375, 396–97 (1970)).

331. Catullo v. Metzner, 834 F.2d 1075, 1083 (1st Cir. 1987).

request because the "[p]laintiff is the sole shareholder to benefit from the derivative action. The only other party in interest, Conservit, must advance the money which plaintiff now proclaims to be a common fund."[332]

In *Sprague v. Ticonic,*[333] the Supreme Court found the common fund doctrine applicable where the petitioner established the claims of non-plaintiffs through *stare decisis.* Lower courts have applied this doctrine in cases resembling *Sprague,* that is, cases in which the plaintiff and the beneficiary had similar claims on a particular fund.[334] Courts do not apply the common fund doctrine whenever a suit establishes a rule of law that later brings success to others.[335] A Second Circuit case illustrates this limitation. New York farmers who sold milk in Connecticut challenged a government regulation that gave a larger subsidy to Connecticut farmers. When they prevailed by relying on a Supreme Court decision that invalidated a similar regulation (for farmers in other states), the attorney who won in the Supreme Court case intervened in the Second Circuit case to petition for fees. The court rejected the "novel assertion that attorneys who are victorious in one case may . . . claim fees from all subsequent litigants who might rely on it or use it in one way or another."[336]

332. *Id.* at 1084. *See also In re* Chicago, Milwaukee, St. Paul & Pac. R.R., 840 F.2d 1308, 1318–19 n.9 (7th Cir. 1988) (common fund recovery impermissible where it effectively shifts fees to opposing party); McQuiston v. Marsh, 707 F.2d 1082, 1085 (9th Cir. 1983) (same).

333. 307 U.S. 161 (1939). *See supra* text accompanying notes 308–09.

334. *See, e.g.,* City of Klawock v. Gustafson, 585 F.2d 428, 431 (9th Cir. 1978) (affirming fees based on *Sprague's stare decisis* rule because "[s]pecific property was in the hands of the same defendant which had lost the case and that defendant's duty under the previous decision was clear").

335. *See* Maier Brewing Co. v. Fleischmann Distilling Corp., 359 F.2d 156, 164 n.13 (9th Cir. 1966) (*Sprague* usually applied "in cases having closely analogous facts"), *aff'd,* 386 U.S. 714 (1967). In *Sprague* itself, the Court cautioned without elaboration that fees for a suit benefiting others via *stare decisis* are limited to "exceptional cases" involving "dominant reasons of justice." *Sprague*, 307 U.S. at 167.

336. Cranston v. Hardin, 504 F.2d 566, 580 (2d Cir. 1974); *accord* Schleit v. British Overseas Airways Corp., 410 F.2d 261 (D.C. Cir. 1969) (per curiam) (rejecting claim of lawyer who successfully challenged discriminatory user fees and sought attorneys' fees when another foreign carrier benefited from the decision in a subsequent suit).

The Ninth Circuit expanded *Sprague* in one respect. In *City of Klawock v. Gustafson*,[337] the underlying decision that benefited other parties was made by a district court (with no appeal taken) and thus lacked *stare decisis*. The Ninth Circuit held that a fee award was nevertheless in order and found that it would be unfair to penalize the plaintiff because the case did not go up on appeal.[338] However, in a similar case the Second Circuit reached a different conclusion and denied fees because "it is at least doubtful whether [the plaintiff's] unreviewed judgment would work as a collateral estoppel in favor of another similarly situated plaintiff."[339]

d. Can fees be shifted to the beneficiaries with precision?

A common fund fee award must result in costs being "shifted with some exactitude to those benefiting."[340] Thus, courts deny awards when there are only a few beneficiaries and other parties would be harmed by recovery of fees from the fund. In one case, the plaintiff sued a pension plan, challenging its procedures for awarding disability benefits. The plaintiff prevailed, but the Second Circuit found a fee award inappropriate because "the financial benefit of [the plaintiff's] success . . . accrue[s] to a relatively few members of the Plan, which provides pension as well as disability benefits."[341] Similarly, the Ninth Circuit denied fees in a suit that stopped the construction of a state highway and thereby preserved the state highway fund. The fund could not be shifted "proportionately and accurately" to the beneficiaries because "it would be impossible to determine which beneficiary bears what costs, since residents and taxpayers pay varying amounts into the fund."[342]

As the Ninth Circuit case illustrates, courts generally reject claims for a common fund recovery out of the government treasury; the

337. 585 F.2d 428 (9th Cir. 1978).

338. *Id.* at 431.

339. Fase v. Seafarers Welfare & Pension Plan, 589 F.2d 112, 115 (2d Cir. 1978).

340. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 265 n.39 (1975).

341. *Fase*, 589 F.2d at 115.

342. Southeast Legal Def. Group v. Adams, 657 F.2d 1118, 1123 (9th Cir. 1981).

award will come at the expense of all taxpayers, not solely the beneficiaries of the lawsuit.[343]

The paradigmatic situation in which a fee award would be fairly and precisely spread among beneficiaries is a class action in which "each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf."[344] Of course, plaintiffs in non-class actions that achieve a similar result are also eligible for common fund awards.

343. *See, e.g.,* Brzonkala v. Morrison, 272 F.3d 688, 692 (4th Cir. 2001); *In re* Hill, 775 F.2d 1037, 1041 (9th Cir. 1985); Grace v. Burger, 763 F.2d 457, 459 (D.C. Cir.), *cert. denied,* 474 U.S. 1026 (1985); Jordan v. Heckler, 744 F.2d 1397, 1400 (10th Cir. 1984). *Jordan* is illustrative. Because the suit forced the Department of Health and Human Services to make a change in policy that would increase the number of Social Security recipients, the trial court awarded fees under the common fund doctrine. The Tenth Circuit reversed the decision. Common fund awards must be borne by beneficiaries, but "[a]n award of fees against the Secretary does not have such a consequence. If the award is taken from the Social Security Trust Fund it will not in any way reduce the payments to [the beneficiaries] . . . . The Trust Fund comes from Social Security taxes on all workers and from general Treasury funds. It is simply an award against the Government or all persons who pay Social Security taxes and is not related or restricted to [the beneficiaries]."

In similar circumstances the D.C. Circuit approved an award of fees from a state treasury. Puerto Rico v. Heckler, 745 F.2d 709 (D.C. Cir. 1984). Yet it cast doubt about this decision *sub silentio* a year later, denying an award in a substantial benefit case because it "'would ultimately be born[e] by all taxpayers, rather than just those benefiting [from the suit].'" *Grace*, 763 F.2d at 459 (quoting Trujillo v. Heckler, 587 F. Supp. 928 (D. Colo. 1984)).

In some common fund and substantial benefit cases, plaintiffs argued that all citizens or taxpayers did benefit. The courts denied fees, however, because if awards were permitted on that basis, the common fund and substantial benefit doctrines "would merge into the private-attorney general concept rejected in *Alyeska*." Satoskar v. Ind. Real Estate Comm'n, 517 F.2d 696, 698 (7th Cir.), *cert. denied,* 423 U.S. 928 (1975). *Accord Brzonkala*, 272 F.3d at 691; *Hill*, 775 F.2d at 1041–42; McQuiston v. Marsh, 707 F.2d 1082, 1085 (9th Cir. 1983); Stevens v. Mun. Court, 603 F.2d 111, 113 (9th Cir. 1979).

344. Boeing Co. v. Van Gemert, 444 U.S. 472, 479 (1980). The Court noted that, "[a]lthough the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery." *Id.* However, not all class actions result in an "entire judgment fund," as was the case in *Boeing*. A class action may establish liability

e. Does the court have "control" of the fund?

In *Trustees v. Greenough,* the Supreme Court stated that the common fund must be "subject[ ] to the control of the court."[345] In *Boeing Co. v. Van Gemert,* the Court explained that this means the court must have "[j]urisdiction over the fund involved in the litigation."[346] This criterion is generally satisfied by jurisdiction over a party that controls the fund,[347] usually the defendant. Therefore, absence of control, by itself, is rarely the basis for denial of a fee award.[348]

f. Does some other circumstance militate against an award?

Even when the above conditions are met, circumstances involving a statute that manifests congressional intent not to share fees or involving beneficiaries of the plaintiff's suit with adverse interests may render a fee award improper.

i. Congressional intent

In *Bloomer v. Liberty Mutual Insurance,*[349] an injured longshoreman successfully sued the shipowner. Since the plaintiff was required by

and leave each class member's claim to be determined individually without establishing a total judgment amount. In such circumstances, the common fund doctrine presumably does not apply—there is no common fund—and the attorneys who prosecute the individual claims would be compensated by the individual claimants. Of course, gray areas may arise (in terms of the relief awarded and the relationship between class members and class counsel), and courts may wish to consider flexible application of the common fund doctrine to prevent unjust enrichment of some class members or inadequate compensation for class counsel.

345. 105 U.S. 527, 536 (1881).

346. *Boeing,* 444 U.S. at 478.

347. *See* Mary Frances Derfner & Arthur D. Wolf, Court Awarded Attorney Fees § 2.03, at 2-27 to 2-34.1 (1992) (discussing various ways in which a court may exercise control of a fund).

348. As one commentator puts it, the control criterion amounts to whether there are sufficient means "at the disposal of the court to effectuate the end of fairly apportioning the legal fees." *Id.* at 2-28. Thus, the issue of control is generally subsumed in the matters already discussed in the text—whether there is a fund, and beneficiaries, and whether a fee award would fairly spread the costs among the beneficiaries (and only them). By contrast, the "control" criterion has independent significance in substantial benefit cases. *See infra* text accompanying notes 459–63.

349. 445 U.S. 74 (1980).

law to give part of his recovery to the stevedore to offset payments that the stevedore had made to the plaintiff through workers' compensation, the plaintiff sought to have the stevedore pay a portion of his attorney's fees. He argued that his judgment against the shipowner created a common fund from which the stevedore would draw an ascertainable amount. Although the usual conditions of a common fund recovery were met, the Supreme Court denied recovery because the Longshoremen's and Harbor Workers' Compensation Act addressed the longshoreman-stevedore-shipowner triangle and did not seem to contemplate a distribution of fees.[350]

While acknowledging that a statute governing a particular area can vitiate a common fund award if it manifests congressional intent not to share fees,[351] the Second, Third, and Seventh Circuits have held that, absent such a showing of legislative intent, the fact that a fee-shifting statute applies to a particular case does not preclude recovery from a common fund.[352] No courts have held to the contrary.

350. Similarly, the Seventh Circuit interpreted a Supreme Court dictum as suggesting that common fund recoveries are inappropriate in Title VII and civil rights cases. Evans v. City of Evanston, 941 F.2d 473, 479 (7th Cir. 1991), *cert. denied,* 112 S. Ct. 3028 (1992). In *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989), the Supreme Court stressed that, under the civil rights fee-shifting statute, damages should not be overemphasized and nonmonetary relief should not be short-changed. The Seventh Circuit interpreted this analysis as suggesting the impropriety of common fund awards in Title VII and civil rights cases because such awards could "skew the incentives of plaintiffs' lawyers toward damages rather than equitable remedies." *Evans*, 941 F.2d at 479. It did not, however, decide the issue, because the district court had made a statutory award and was "correct to rule that it was unnecessary to allow *both* a recovery from the defendants and the common fund in this case." *Id.*

351. *See, e.g.,* Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1327 (2d Cir. 1990) ("obviously, if, under a particular combination of facts, the operation of the equitable fund doctrine conflicts with an intended purpose of a relevant fee-shifting statute, the statute must control and the . . . doctrine must be deemed abrogated to the extent necessary to give full effect to the statute").

352. *Id.* at 1327; Skelton v. Gen. Motors Corp., 860 F.2d 250, 255 (7th Cir. 1988), *cert. denied,* 493 U.S. 810 (1989); *In re* Fine Paper Antitrust Litig., 751 F.2d 562, 583 (3d Cir. 1984). *See infra* text accompanying notes 379–80 (discussing situations in which recovery could be awarded pursuant to either a fee-shifting statute or the common fund doctrine).

ii. Adverse interests

In certain circumstances, fee sharing is inappropriate because the other beneficiaries of the plaintiff's suit had interests adverse to those of the plaintiff.[353] In the seminal case of *Hobbs v. McLean,*[354] the plaintiff obtained a judgment on behalf of a bankrupt. Believing that the sum recovered rightly belonged to them, and fearing that the plaintiff would distribute it to creditors, two other parties brought suit against the plaintiff and won. The plaintiff then moved for attorneys' fees for his efforts in winning the original judgment. The Supreme Court denied the motion, finding the common fund doctrine inapposite in this situation:

> We see no reason why [they] should pay [him], who, instead of aiding them in securing their rights, has been an obstacle and obstruction to their enforcement. The services for which [he] seeks pay . . . were not rendered in their behalf, but in hostility to their interest. When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the court of equity . . . will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts. But where one brings adversary proceedings to take the possession of trust property from those entitled to it . . . and fails in his purpose, it has never been held . . . that such person had any right to demand reimbursement.[355]

This common fund doctrine was applied in *United States v. Tobias.*[356] The U.S. government condemned territory and named Johnson, an owner of the land, in its complaint. Although the parties negotiated, Tobias, who claimed to own a portion of the land, intervened. A settlement was reached in which the government deposited a sum in court and left Johnson and Tobias to fight over it. Johnson and Tobias went to trial, and a judgment was entered splitting the fund between them. Johnson moved for Tobias to defray his

353. For a discussion of cases in which courts held that there were no beneficiaries (other than the plaintiff) because the alleged beneficiaries were actually harmed by the suit, see *supra* text accompanying notes 329–32. In the cases discussed in this section, others *do* benefit from the common fund.

354. 117 U.S. 567 (1886).

355. *Id.* at 581–82.

356. 935 F.2d 666 (4th Cir. 1991).

fees, claiming his negotiations with the government increased the value of the fund, which benefited Tobias. The district court granted a fee award, but the Fourth Circuit, citing *Hobbs,* reversed the decision: "A party may not recover and try to monopolize a fund, but then, failing in the attempt, declare it a 'common fund' and obtain his expenses from those whose rightful share of the fund he sought to appropriate."[357]

In contrast, in a Second Circuit case, the appellate court held that the plaintiff's opposition to the class settlement that eventually took place was not a ground for denying the plaintiff attorneys' fees from the settlement pot because the plaintiff had made a substantial contribution to the class.[358] This case is reconcilable with *Hobbs* and its progeny because, although the plaintiff opposed the particular settlement that was made, its interests and posture in the litigation were not in opposition to those of the class.

iii. Fund claimants that were represented

Several appellate courts have held that when beneficiaries of the common fund are themselves represented by counsel, they are "deemed not to have taken a 'free ride' on the efforts of another's counsel," and their portion of the fund should therefore not be used to defray the plaintiff's legal costs.[359] If lead counsel are appointed and do a disproportionate amount of the work, courts may waive this rule.[360]

357. *Id.* at 668. The court rejected Johnson's contention that he and Tobias were not adverse parties, since both were named defendants in the condemnation action. "We will not adopt such a mechanical test. This case was a pure title dispute between the 'co-defendants.' No equitable doctrine will ignore the reality of the controversy by looking only to which side of the 'v' the disputants are on." *Id.*

358. *Suffolk* v. Long Island Lighting Co., 907 F.2d 1295, 1327 (2d Cir. 1990).

359. *E.g., Tobias,* 935 F.2d at 668; Vincent v. Hughes Air W., 557 F.2d 759, 771 (9th Cir. 1977); *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1019 (5th Cir. 1977).

360. *Tobias*, 935 F.2d at 668; *Vincent*, 557 F.2d at 772.

2. Calculating the amount of an award

a. What method should be used?

i. Percentage v. lodestar

Courts have traditionally determined the amount of common fund fee awards by considering several factors, especially the size of the fund, and frequently have based awards on what they consider a reasonable percentage of the fund. In the early 1970s, courts began moving away from this practice and toward the lodestar method.[361] However, in the 1980s two developments sparked reconsideration of the lodestar in common fund cases. First, in a footnote in *Blum v. Stenson,*[362] the Supreme Court distinguished between the calculation of fees under fee-shifting statutes and calculation under the "'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class."[363] Second, in 1985, a Third Circuit task force on attorneys' fees recommended the percentage method in common fund cases.[364]

In large part as a result of the *Blum* dictum and the task force's recommendations, the percentage method has been gaining favor in common fund cases. The D.C. and Eleventh Circuits require the percentage method.[365] The First, Second, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have stated that the district court may use either the percentage method or the lodestar method.[366] The Seventh Circuit

361. The seminal case was *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166–69 (3d Cir. 1973). Other courts quickly followed suit.

362. 465 U.S. 886 (1984).

363. *Id.* at 900 n.16.

364. Court Awarded Attorney Fees: Report of the Third Circuit Task Force, *reprinted in* 108 F.R.D. 237, 255–56 (1985). For a summary of Third Circuit jurisprudence governing fee awards in common fund cases, see *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000).

365. *See* Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993); Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991).

366. *See* Goldberger v. Integrated Res., Inc., 209 F.3d 43, 49–50 (2d Cir. 2000) (percentage method appropriate only if it prevents unwarranted windfalls); Johnston v. Comerica Mortgage Co., 83 F.3d 241, 244–46 (8th Cir. 1996); *In re* Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995); *In re* Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1295 (9th Cir.

has indicated that the percentage method is preferred.[367] The Ninth Circuit has suggested that the percentage method is particularly appropriate when there are multiple claims and it would be difficult to determine what hours were expended on the claims that produced the fund.[368] The Ninth Circuit also suggested that the lodestar is preferable when "special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors."[369] The Fifth Circuit has not explicitly adopted the percentage method, but seems to allow a combined percentage and lodestar approach.[370]

Supporters of the percentage method say that it offers several advantages. It helps ensure that the fee award will simulate marketplace rates, since most common fund cases are the kinds of cases normally taken on a contingency fee basis, by which counsel is promised a percentage of any recovery. In addition, if fees are based on the lodestar, plaintiff's counsel has no incentive to settle the case early—counsel continues to rack up fees by litigating the case. Furthermore, the lodestar requires detailed record keeping by plaintiffs and consumes far

1994); Rawlings v. Prudential-Bach Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993); Harman v. Lyphomed, 945 F.2d 969, 975 (7th Cir. 1991); Brown v. Phillips Petroleum, 838 F.2d 451 (10th Cir.), *cert. denied,* 488 U.S. 822 (1988).

367. *In re* Cont'l Ill. Sec. Litig., 962 F.2d 566, 572–73 (7th Cir. 1992).

368. Thus, in *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989), the court approved use of the percentage method, finding that it would be "impractical if not impossible" to determine precisely the hours spent creating the fund; but in *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990), it upheld use of the lodestar, because "we have no such division of claims."

369. Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990). *See also In re* Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1296 (9th Cir. 1994) ("As always, when determining attorneys' fees, the district court should be guided by the fundamental principle that fee awards out of common funds be '*reasonable under the circumstances.*'") (emphasis added) (quoting Florida v. Dunne, 915 F.2d 542, 545 (9th Cir. 1990)).

370. *See* Strong v. BellSouth Telecomm. Inc., 137 F.3d 844, 852–53 (5th Cir. 1998) (approving application of lodestar and stating that application of a percentage approach could be restricted to a percentage of claims actually made by class members and not the total amount that might be claimed).

more of the court's resources.[371] Defendants in common fund cases have no incentive to scrutinize fee requests, and individual fund beneficiaries generally lack sufficient incentive to do so.[372] Thus, the court is saddled with the entire burden of reviewing submissions concerning hours expended and the hourly rate.[373]

ii. Lodestar-percentage cross-check[374]

The court may use a percentage for an initial determination and adjust it upward or downward depending on various factors, including those reflected in the lodestar (for example, hours expended and the market rate).[375] This is sometimes referred to as a "cross-check" or "hybrid approach." Upward and downward adjustments in common

371. However, even if the court uses a percentage method, it may ask counsel to maintain time-keeping records in case it is later deemed desirable to switch to a lodestar calculation or because these records may affect the percentage chosen or an adjustment to it. *See* Court Awarded Attorney Fees: Report of the Third Circuit Task Force, *reprinted in* 108 F.R.D. 237, 271–72 (1985).

372. *See, e.g., Cont'l Ill.*, 962 F.2d at 568 (district court reviewed submissions "despite the absence of an adversary presentation. (The class was notified of the fee request, but no member of the class objected. There is no appellee.)"). An exception is where several law firms vie for fees from a limited source, so each has incentive to scrutinize others' applications. *See, e.g., In re* Fine Paper Antitrust Litig., 751 F.2d 562 (3d Cir. 1984). In statutory fee-shifting cases, by contrast, defense counsel generally relieve the court of much of the burden of reviewing the plaintiff's lodestar figures.

373. The court often offers the only protection for fund beneficiaries. As a result, it is generally agreed that courts have not only authority but also responsibility to review fee requests sua sponte in common fund cases. *See, e.g., Cont'l Ill.*, 962 F.2d at 573. Several courts have said that fee requests from common funds are subject to heightened judicial scrutiny. *See, e.g.,* Skelton v. Gen. Motors Corp., 860 F.2d 250, 253 (7th Cir. 1988), *cert. denied,* 493 U.S. 810 (1989); *Fine Paper,* 751 F.2d at 583. *See also* Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 519 (1st Cir. 1991) (In the case of a "clear sailing" agreement—i.e., where the party paying fees agrees not to contest the court-awarded amount as long as it does not exceed a negotiated ceiling—"rather than merely rubber-stamping the request, the court should scrutinize it to ensure that the fees awarded are fair and reasonable.").

374. *See* Manual for Complex Litigation (Fourth) § 14.121 n.504 (2004).

375. Alternatively, the court may permit these factors to influence what percentage it chooses. The choice of percentage is discussed *infra* text accompanying notes 381–89.

fund cases, whether to the lodestar or to a percentage of the fund, are discussed below.

iii. Fee-shifting statute litigation establishes a common fund

A case governed by a fee-shifting statute may, through settlement or judgment, create a common fund. As noted earlier, a common fund award is not necessarily precluded in such a case.[376] The Second and Seventh Circuits have suggested that the court has discretion to make either a fee-shifting award against defendants or an award from the common fund, but it should not grant both.[377]

b. Lodestar in common fund cases

If the court uses the lodestar in a common fund case, it should engage in virtually the same analysis as it does in fee-shifting cases. Thus, for example, the Seventh Circuit, using several aspects of the analysis outlined in Part 1, found a number of errors in the calculation of the lodestar in a common fund case. It found that the trial court substituted its own notions of a reasonable hourly rate for the market rate, refused to allow compensation of paralegals at market rates, and slashed hours without identifying which hours were excessive and why.[378]

The calculation of the lodestar in common fund cases differs from the calculation in statutory fee-shifting cases in one respect. Although fees for time spent preparing the fee application and litigating fee disputes are compensable in statutory fee-shifting cases, they are not

376. *See supra* text accompanying notes 351–52.

377. Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1327 (2d Cir. 1990) ("Duplicative recovery is to be avoided, of course."); Evans v. City of Evanston, 941 F.2d 473, 479 (7th Cir. 1991) (district court made statutory award and was "correct to rule that it was unnecessary to allow *both* a recovery from the defendants and the common fund in this case"). The Third Circuit task force recommends that "those statutory fee cases that are likely to result in a settlement fund" should be treated like common fund cases from the beginning (i.e., a percentage fee should be established early in the case). Court Awarded Attorney Fees: Report of the Third Circuit Task Force, *reprinted in* 108 F.R.D. 237, 255 (1985).

378. *In re Cont'l* Ill. Sec. Litig., 962 F.2d 566, 568–70 (7th Cir. 1992).

compensable in common fund cases.[379] Such efforts do not serve the beneficiaries—indeed, if fees were compensated they would deplete the common fund from which the beneficiaries draw.[380]

c. Choosing a percentage

If a court opts for the percentage method, it is faced with the task of finding an appropriate percentage.[381] The Ninth Circuit has indicated that 25% is the "benchmark" award.[382] The Second Circuit declined to endorse a benchmark because it held that assessment of a reasonable percentage should be made on a case-by-case basis.[383] The Tenth Circuit has said that the twelve *Johnson* factors should be applied to determine the proper percentage.[384] The Eleventh Circuit agreed that the *Johnson* factors should be considered and added other relevant factors: "whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the

379. *See, e.g.*, Kinney v. Int'l Bhd. of Elec. Workers, 939 F.2d 690, 694 n.5 (9th Cir. 1991); Donovan v. CSEA Local Union 1000, 784 F.2d 98, 106 (2d Cir. 1986); *In re* Fine Paper Antitrust Litig., 751 F.2d 562, 595 (3d Cir. 1984).

380. *Kinney*, 939 F.2d at 694 n.5; *Donovan*, 784 F.2d at 106.

381. This determination can be made at any stage of the litigation. *See infra* notes 524–40 (discussing the implications of the timing in connection with case management). For an extensive discussion of the factors involved in this task, see Manual for Complex Litigation (Fourth) § 14.121 (2004).

382. Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990). *See also In re* Pac. Enters. Sec. Litig., 47 F.3d 373, 379 (9th Cir. 1995) (holding that 33% award of attorneys' fees, in light of complexity, risk, and nonmonetary results, was not an abuse of discretion and stating that 25% benchmark can be adjusted when there are "special circumstances").

383. Goldberger v. Integrated Res., Inc., 209 F.3d 43, 49–50 (2d Cir. 2000). *See also In re* Cendant Corp. Prides Litig., 243 F.3d 722, 736 (3d Cir. 2001) (stating that "a district court may not rely on a formulaic application of the appropriate range in awarding fees but must consider the relevant circumstances of the particular case," including size of the settlement).

384. Brown v. Phillips Petroleum Co., 838 F.2d 451, 454–55 (10th Cir. 1988). The court suggested that the essential factor in fee-shifting cases—time and labor required—may be less important in common fund cases than the results obtained and amount involved. *Id.* at 456. For enumeration of the *Johnson* factors see *supra* note 108.

settlement, and the economics involved in prosecuting a class action."[385] The court stated further that, as a general rule, 50% may be established as an upper limit.[386] Other courts have not set such a limit and do not require consideration of the *Johnson* factors when determining a percentage.

Some courts award a lower percentage if the fund is large.[387] A few courts have used a sliding scale, allowing recovery of a given percentage of a certain amount of the fund, and decreasing percentages of subsequent amounts.[388] Courts have discretion to use whatever percentage arrangements may prove just or workable in a particular case. For example, if a colossal fund is created, fees may be extracted from the interest earned rather than from the corpus of the fund.[389]

d. Should the fee be adjusted?

Regardless of the method used for calculating the initial fee, a court can make an upward or downward adjustment based on the individual circumstances of a case.[390] Some of the factors justifying an adjustment of the lodestar in fee-shifting cases will also apply in a common fund case (regardless of whether the lodestar or percentage method is used). In addition, the Ninth Circuit has stated that courts should consider all pending fee applications to ascertain whether "the

385. Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768, 775 (11th Cir. 1991).

386. *Id.* at 774.

387. *See, e.g., In re* Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 340 (3d Cir. 1998) (remanded "for a more thorough examination and explication of the proper percentage to be awarded . . . in light of the magnitude of the recovery"). *See also In re* Smithkline Beckman Sec. Litig., 751 F. Supp. 525, 534 (E.D. Pa. 1990) ("the percentage of recovery fee should decrease as the size of the common fund increases").

388. *See, e.g., In re* Fidelity Bancorporation Sec. Litig., 750 F. Supp. 160, 163 (D.N.J. 1990) (awarding 30% of the first $10 million, 20% of the next $10 million, and 10% of any fund beyond $20 million).

389. *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1296 (E.D.N.Y. 1985) ($180 million fund case earned $15 million interest, out of which $10 million was assigned as fees), *modified*, 818 F.2d 226 (2d Cir. 1987).

390. However, if the court selects a percentage for recovery based in part on the kind of factors normally used to make an adjustment, an adjustment would be inappropriate because it would involve a double impact of certain factors.

combined effect of granting the fee applications in toto would be to reduce substantially the size of the common fund available for distribution to the plaintiff class."[391] The court implied that trial courts may adjust an award if attorneys would otherwise receive an unacceptably high portion of the common fund.[392]

Before the Supreme Court's decision in *City of Burlington v. Dague,*[393] courts permitted risk enhancements in common fund cases.[394] The two circuits that have addressed the issue have held that *Dague's* prohibition against risk enhancements does not apply in common fund cases.[395]

e. The effect of a private fee agreement

A private agreement between the plaintiff and its counsel—whether for payment by hourly rate or contingent fee—does not necessarily dictate the amount of fees to be recovered from a fund, because such an agreement could still leave the beneficiaries unjustly enriched by

391. Florida v. Dunne, 915 F.2d 542, 546 (9th Cir. 1990).

392. *Id.* at 546 (remanding for further fact finding and noting that "[t]he fact that 72% of the common fund could be distributed in attorneys' fees and costs in this case is disturbing").

393. 505 U.S. 557 (1992).

394. *See, e.g.,* Skelton v. Gen. Motors Corp., 860 F.2d 250 (7th Cir. 1988); Bebchick v. Wash. Metro. Area Transit Comm'n, 805 F.2d 396, 406–07 (D.C. Cir. 1986). *See supra* note 242.

395. *In re* Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1299 (9th Cir. 1994); Florin v. Nationsbank of Ga., N.A., 34 F.3d 560, 564–65 (7th Cir. 1994). In dictum, the Third Circuit stated that *Dague* precluded a risk multiplier in common fund cases. *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir. 1995). Later, the Third Circuit noted that if risk multipliers were applied, "they require particular scrutiny and justification." *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 341 n.121 (3d Cir. 1998). Several district courts have applied *Dague* to common fund cases. *See* Nensel v. Peoples Heritage Fin. Group, 815 F. Supp. 26 (D. Me. 1993); Weinberger v. Great N. Nekoosa Corp., 801 F. Supp. 804 (D. Me. 1992); Bolar Pharm. v. Gackenbach, 800 F. Supp. 1091 (E.D.N.Y. 1992). *See also In re* Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 619 (1st Cir. 1992) (Lay, J., sitting by designation, concurring) (in vacating fee award for other reasons, majority did not address propriety of risk enhancement in common fund case; Judge Lay expressed his view that *Dague* does apply to common fund cases).

the lawyers' work (or be unfair to the beneficiaries).[396] Thus, notwithstanding any private agreement, courts must independently determine a reasonable fee under the circumstances of the case.[397]

f. May plaintiffs be compensated for personal expenses?

The question arises whether the plaintiff's compensation from a common fund may go beyond attorneys' fees to include the private costs incurred in bringing the suit. In *Trustees v. Greenough,* the Supreme Court said long ago that it may not:

> [T]here is one class of allowances made by the [trial] court which we consider decidedly objectionable. We refer to those made for the personal services and private expenses of the complainant. . . . [Allowing compensation] would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon . . . having all their private expenses paid.[398]

However, two appellate courts have limited the reach of this holding. The Sixth Circuit permitted reimbursement for money the plaintiff spent on accountants and investment bankers, maintaining that these expenditures were "related to advancing the litigation" and thus "not 'private' in the sense found objectionable in *Greenough.*"[399] The Seventh Circuit noted that "[s]ince without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable."[400] The court denied compensation for the plaintiff's personal expenses in the case *sub judice,* maintaining that such compensation is in order only if the

396. *See* Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116, 126–27 (1885).

397. *See, e.g.,* Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 540 F.2d 102, 120 (3d Cir. 1976). *See also* Bowling v. Pfizer, Inc., 102 F.3d 777, 781 (6th Cir. 1996) (discovery of fee-sharing agreements not warranted during post-settlement approval).

398. 105 U.S. 527, 538 (1881).

399. Granada Invs. v. DWG Corp., 962 F.2d 1203, 1208 (6th Cir. 1992).

400. *In re* Cont'l Ill. Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992).

record suggests that no named plaintiff could otherwise have been recruited.

The Seventh Circuit did not mention the Supreme Court's 1881 seemingly categorical rejection of recovery for the plaintiff's personal expenses, but the Seventh Circuit's rationale for sometimes permitting recovery of such expenses—that it may be necessary to attract a class representative—seems to borrow from the fee-shifting statute rationale. However, the goals of fee-shifting statutes and the common fund doctrine differ: Whereas the goal of fee-shifting statutes is to encourage certain kinds of actions, the goal of the common fund doctrine is to prevent unjust enrichment.[401]

g. Procedures

If a class action creates a common fund, a hearing on a motion for attorneys' fees is optional but the court "must find the facts and state its conclusions of law."[402] Furthermore, notice of the motion for fees must be "directed to class members in a reasonable manner."[403] In cases of settlement, the parties should submit motions for attorneys' fees soon after announcing a settlement so that the Rule 23(h)(1) notice of fees request can be combined with the required Rule 23(e) notice of settlement.[404]

In non-class actions, because the fee request is often unopposed, and yet fund beneficiaries are affected by the award, the rationale for an evidentiary hearing is compelling. As the D.C. Circuit put it:

> In "common fund" cases, the losing party no longer continues to have an interest in the fund; the contest becomes one between the successful plaintiffs and their attorneys over division of the bounty. By contrast, . . . where the prevailing party's fees are paid by the loser pursuant to statute, the adversary papers . . . may adequately illuminate the factual predicate for a reasonable fee. This is so because the losing party in statutory fee cases retains an interest in contesting the size of the fee. This is not the case in "common

401. *See, e.g.,* Boeing Co. v. Van Gemert, 444 U.S. 472, 479 (1980).
402. Fed. R. Civ. P. 23(h)(3).
403. Fed. R. Civ. P. 23(h)(1).
404. *See* Manual for Complex Litigation (Fourth) § 21.721 (2004).

fund" fee litigation, so the District Court in those cases has a special obligation to ensure that the fee is fair.[405]

The Third Circuit requires a hearing before a common fund award is made,[406] and the D.C. and Second Circuits, at a minimum, strongly encourage one.[407] The First Circuit encourages such a hearing where large sums are at stake.[408] These holdings are all in cases involving use of the lodestar. If a court uses the percentage method and there are no factual disputes concerning an upward or downward adjustment, a hearing seems less necessary. The court can protect the interests of beneficiaries or potential beneficiaries by choosing a reasonable percentage. The court need not expend time examining submissions by counsel, as it does in cases involving the lodestar.

If a hearing is held, the court should ensure that all attorneys staking a claim to fees are given a reasonable opportunity to be heard.[409]

The Eleventh Circuit has said that the district court "should articulate specific reasons for selecting the percentage upon which the

405. Copeland v. Marshall, 641 F.2d 880, 905 n.57 (D.C. Cir. 1980) (citation omitted).

406. *In re* Fine Paper Antitrust Litig., 751 F.2d 562, 584 (3d Cir. 1984) (stating that "the hearing on a fee application in an equitable fund case requires compliance with those procedural rules which assure fair notice and an adequate opportunity to be heard. Equally plainly, the requirement of an evidentiary hearing demands the application in that hearing, of the Federal Rules of Evidence.").

407. *Copeland*, 641 F.2d at 905 n.57 ("A hearing may be vital in cases involving attorney's fees to be paid from a common fund."); Detroit v. Grinnell Corp., 495 F.2d 448, 470, 473 (2d Cir. 1974) (*Grinnell I*) ("the court should typically take pains to allow a complete airing of all objections to a petitioner's fee claim"; where there are overt factual disputes, "an evidentiary hearing, complete with cross-examination, is imperative"; even absent such disputes, there may "still remain a need for an additional hearing" to fill any "factual voids which remain before an adequate fee can be fairly determined").

408. *In re* Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 614 (1st Cir. 1992) (evidentiary hearing not necessary in all cases, but here the district court held one, "wisely . . . considering the stakes").

409. *Id.* (reversing fee award in large-scale consolidated case in which lawyers from steering committee were permitted to testify, examine witnesses, and offer oral argument at evidentiary hearing, but other lawyers representing individual clients were not).

attorneys' fee award is based. . . . [It] should identify all factors upon which it relied and explain how each factor affected its selection of the percentage."[410] In common fund cases no less than in fee-shifting cases, effective appellate review requires that the trial court articulate clearly the bases for its decisions and calculations.[411] Failure to do so may be an abuse of discretion.[412]

Federal Rule of Civil Procedure 54 applies in the common fund context as well.

3. Issues on appeal

a. Timing

A decision awarding or denying fees from a common fund, like a decision pursuant to a fee-shifting statute, is severable from the decision on the merits and separately appealable.[413] The discussion of the timing of appeals of statutory fee determinations[414] also applies to appeals of common fund decisions.

b. Scope of review

Courts have said little about the scope of review in common fund cases. A district court's factual determinations clearly must be reviewed deferentially.[415] The Ninth and Tenth Circuits have suggested that a district court's decision of what method to use to calculate the award is also entitled to deference.[416]

410. Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768, 775 (11th Cir. 1991).

411. *Fine Paper*, 751 F.2d at 596.

412. *See* Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000) (abuse of discretion not to sufficiently explain award); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195–201 (3d Cir. 2000) (same). *See also* Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988).

413. Trustees v. Greenough, 105 U.S. 527, 531 (1881); Boeing Co. v. Van Gemert, 444 U.S. 472, 479 n.5 (1980); *San Juan Dupont Plaza Hotel Fire*, 982 F.2d at 609–10; Overseas Dev. Disc Corp. v. Sangamo Constr. Co., 840 F.2d 1319, 1324 (7th Cir. 1988).

414. *See supra* text accompanying notes 13–17 and 276–94.

415. *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 226, 237 (2d Cir. 1987).

416. Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988).

c. May the court of appeals calculate an award itself?

The same considerations that might lead a court of appeals in a rare statutory fee-shifting case to calculate the award itself rather than remand it for calculation[417] appear to apply as well in common fund cases.[418]

C. Substantial Benefit

The substantial benefit (or the common benefit) doctrine extends the common fund doctrine to lawsuits that produce nonmonetary benefits. Application of the two doctrines is similar, but there are noteworthy differences.[419]

The Supreme Court has applied the substantial benefit doctrine in two seminal cases. *Mills v. Electric Auto-lite*[420] involved a derivative suit by minority shareholders to set aside a merger. Finding that the merger violated securities laws, the Court remanded the case for the district court to fashion a remedy and specified that the plaintiffs should be awarded attorneys' fees. The Court noted that "this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid" but maintained that, "[a]lthough the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a 'common fund' for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses."[421] Rather, fees may be awarded where litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction of the subject

417. *See supra* text accompanying notes 299–302.

418. *See, e.g., In re* Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 312 (1st Cir. 1995) (court of appeals calculates award rather than remanding).

419. Although courts often used to treat the common fund doctrine and substantial benefit doctrine as one, the trend is to treat them independently. Of course, if a suit produces both a common fund and a substantial nonmonetary benefit, both doctrines may be applicable.

420. 396 U.S. 375 (1970).

421. *Id.* at 392.

matter of the suit makes possible an award that will operate to spread the costs proportionately among them."[422]

In *Hall v. Cole,*[423] the Supreme Court applied the substantial benefit doctrine in a "union democracy" case. In assessing fees against a labor union that expelled the plaintiff for violating a union rule found to be unconstitutional, the Court held that the plaintiff "necessarily rendered a substantial service to his union as an institution and to all its members. . . . [B]y vindicating his own right (of free speech), the successful litigant dispel[led] the 'chill' cast upon the rights of others."[424] Extracting fees from the union treasury "simply shifts the costs of litigation to 'the class that has benefited from them and that would have had to pay them had it brought the suit.'"[425]

In *Alyeska Pipeline Service Co. v. Wilderness Society,*[426] the Supreme Court rejected the "private attorney general" doctrine as a basis for attorneys' fees, but affirmed the vitality of the substantial benefit doctrine developed in *Mills* and in *Hall.* The Court noted that when fees are claimed under this doctrine, the primary inquiry is similar to that required in a common fund case: Did the plaintiff's suit produce a substantial benefit for an identifiable class of beneficiaries, and can the benefits be traced and the costs shifted fairly and with some accuracy?[427] (As in statutory fee-shifting and common fund cases, interve-

422. *Id.* at 393–94. The beneficiaries were the shareholders, and an award against the corporation spread costs proportionately among them.

423. 412 U.S. 1 (1973).

424. *Id.* at 8.

425. *Id.* at 9 (quoting *Mills*, 396 U.S. at 397).

426. 421 U.S. 240 (1975).

427. *Id.* at 264–65 n.39. The Ninth Circuit has held that the "tracing" requirement does not apply in labor cases because *Mills* did not mention it. Southerland v. Int'l Longshoremen's Union, 845 F.2d 796, 798–99 (9th Cir. 1987). No other court has so held, and both the Third and D.C. Circuits have cited the tracing requirement in labor cases. Brennan v. United Steelworkers of Am., 554 F.2d 586, 604–05 (3d Cir. 1977), *cert. denied,* 435 U.S. 977 (1978); Usery v. Local Union No. 639, Int'l Bhd. of Teamsters, 543 F.2d 369, 382 (D.C. Cir. 1976). In any case, *Mills* requires an "ascertainable class" of beneficiaries; where there is such a class, benefits can generally be traced with accuracy.

nors are eligible for awards based on the substantial benefit doctrine.[428])

1. Determining whether an award is in order

a. Did the suit confer a substantial benefit?

In *Mills* the Supreme Court said that a substantial benefit "'must be something more than technical in its consequence'" and must "'accomplish[ ] a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest.'"[429] Even apart from the fact that this statement applies only to shareholder suits, it provides limited guidance. Lower courts have not developed a more precise standard,[430] and determinations of whether suits conferred a substantial benefit have been largely fact-specific. Nevertheless, the case law provides guidance on some important issues.

As should be clear from *Mills,* not every beneficiary must benefit personally for the plaintiff to recover fees. In labor cases involving, for

428. Donovan v. CSEA Local Union 1000, 784 F.2d 98, 103 (2d Cir. 1986); *Brennan*, 554 F.2d at 604; *Usery*, 543 F.2d at 382–89. Indeed, substantial benefit awards in labor cases are often made to intervenors. These cases are brought under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 401–531, which authorizes suit by the Secretary of Labor only. The court must determine the extent to which the intervenor's work helped secure the benefit as opposed to merely duplicating the efforts of the Secretary. *See, e.g.,* Marshall v. United Steelworkers, 666 F.2d 845, 852 (3d Cir. 1981) (reversing denial of fees to intervenors whose efforts "narrowed the issues for Labor and helped to isolate the specific problems with the election" but upholding denial of compensation for work at later stages found by the district court to be either duplicative of the Secretary's work or ineffectual); Donovan v. Local Union 70, 661 F.2d 1199, 1203 (9th Cir. 1981) (award proper in light of Secretary's counsel attesting to intervenor's assistance, but the "modest amount awarded strongly suggests it does not exceed the value of the intervenor's contribution"). The intervenor often confers a benefit on the membership "by identifying, investigating and presenting for the Secretary's ultimate prosecution, evidence of union violations." *Donovan*, 784 F.2d at 106.

429. *Mills,* 396 U.S. at 396 (quoting Bosch v. Meeker Coop. Light & Power Ass'n, 101 N.W.2d 423 (Minn. 1960)).

430. *But cf. Southerland*, 845 F.2d at 800–01 (equating substantial benefit with "valuable service").

example, an improper election or a violation of free speech, the remedy affects all members only insofar as they are presumed to benefit from a more democratic union; this is sufficient for recovery of fees.[431] Indeed, the Third Circuit rejected a claim that an award was improper because it secured free elections for only one district. The district court held that "it strains belief to conclude that a benefit bestowed upon District 31, whose membership comprises approximately 9% of the entire union membership, inures to the benefit of the steelworkers as a whole."[432] But the appellate court held that, "to the extent that prosecution of [Labor-Management Reporting and Disclosure Act of 1959] violations supports union democracy, such activity confers direct and substantial benefit upon the entire union membership."[433]

The Fifth Circuit has suggested that the benefit cannot consist solely of the likelihood that the defendant will change its practices to prevent future liability.[434] However, no court has so held, and the Eleventh Circuit explicitly disagreed, finding that a labor union's "incentive to change" constituted a substantial benefit to the members:

431. *See, e.g.,* Zamora v. Local 11, 817 F.2d 566, 571 (9th Cir. 1987) (where suit forced union to provide Spanish translation at its meetings, defendant argued that fee award was improper because most members did not benefit; court disagreed because the suit "benefits the entire membership, including English-speaking members, by facilitating discussion and participation at the monthly meetings").

432. Brennan v. United Steelworkers of Am., 554 F.2d 586, 605 (3d Cir. 1977), *cert. denied*, 435 U.S. 977 (1978).

433. *Id.* Of course, the benefit must be more than that shared by the entire population. *See, e.g., id.* at 606 (doctrine inapplicable where "every individual might be said to benefit"); Crane Co. v. Am. Standard, 603 F.2d 244, 255 (2d Cir. 1979) (denying fees because "[t]he shareholders . . . received no benefit from this litigation, other than the incremental benefit which arguably accrues to all participants in the securities markets whenever violations of the securities laws are uncovered").

434. Shimman v. Int'l Union of Operating Eng'rs, 744 F.2d 1226, 1235 n.13 (5th Cir. 1984) (en banc) ("Since there was no injunction . . . the benefits received by other union members were achieved not by direct operation of the judgment, but rather were the result of a realization that the union would have to reform itself or risk exposure to further liability."), *cert. denied,* 469 U.S. 1215 (1985). This must be regarded as dictum, as it consisted of a footnote in an opinion rejecting the fee award on other grounds.

"[W]e do not find such incentive an insubstantial benefit. Substantiality does not rest on compulsory reform or injunctive relief."[435]

As a general matter, the substantial benefit need not be achieved by a formal judgment.[436] For example, a suit may confer a substantial benefit if a settlement is reached,[437] or if the defendant takes action that moots the case.[438] In the latter situation, the Third and Ninth Circuits required the plaintiff to demonstrate that its complaint was "meritorious."[439]

The Sixth Circuit held that a suit conferred a substantial benefit where a preliminary injunction forced a union to distribute the plaintiffs' campaign literature. The case was subsequently mooted before the court could rule on the merits—the suit "did create a 'common benefit' for all of the union members: It ensured free and democratic elections of candidates for union office."[440] This holding is consistent with the Eleventh Circuit's reversal of a fee award where the plaintiff was granted a preliminary injunction preventing the imposition of a trusteeship on the union but then lost on the merits.[441] The Eleventh Circuit found the award inappropriate because the plaintiff's success procured no meaningful or lasting benefit for the union members.[442]

435. Erkins v. Bryan, 785 F.2d 1538, 1549 (11th Cir.), *cert. denied,* 479 U.S. 961 (1986).

436. *See* Ramey v. Cincinnati Enquirer, 508 F.2d 1188, 1196 (6th Cir. 1974) ("So long as a substantial benefit is conferred upon the corporation, it is not necessary that the litigation be brought to a successful completion."), *cert. denied,* 422 U.S. 1048 (1975).

437. *See, e.g.,* Koppel v. Wien, 743 F.2d 129, 135 (2d Cir. 1984).

438. *See, e.g.,* Lewis v. Anderson, 692 F.2d 1267, 1270 (9th Cir. 1982); *Ramey*, 508 F.2d at 1196.

439. *Lewis*, 692 F.2d at 1270–71; Kahan v. Rosenstiel, 424 F.2d 161, 167 (3d Cir.), *cert. denied,* 398 U.S. 950 (1970).

440. Bliss v. Holmes, 867 F.2d 256, 258 (6th Cir. 1988).

441. Markham v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 901 F.2d 1022 (11th Cir. 1990). *See also* Benda v. Grand Lodge, 584 F.2d 308 (9th Cir. 1978) (finding award premature where plaintiff was granted preliminary injunction but decision on the merits had yet to be reached), *cert. dismissed*, 441 U.S. 937 (1979).

442. *Markham*, 901 F.2d at 1028. The court explicitly held open the possibility of fees where a preliminary injunction "form[ed] a vital function in changing the legal relationship between the parties." *Id.*

The Ninth Circuit held that fees are inappropriate for a labor union defendant that succeeds in defending a suit.[443] Such an award would shift costs away from the beneficiaries and on to the opposing party—this is not the rationale in substantial benefit cases.[444]

b. Do the defendant and the beneficiaries share an identity of interests?

In keeping with *Mills* and *Hall,* substantial benefit awards are usually made in suits by a shareholder against a corporation or by a labor union member against a union.[445] Fees are paid by the defendant, because it is the alter ego of the beneficiaries who would otherwise be unjustly enriched by the suit. If the defendant and the beneficiaries

443. Ackley v. W. Conference of Teamsters, 958 F.2d 1463 (9th Cir. 1992).

444. In *Oldfield v. Athletic Congress*, 779 F.2d 505 (9th Cir. 1985), the Ninth Circuit applied the same reasoning in a non-labor case, holding that a victorious defendant could not be awarded fees against the plaintiff because the plaintiff "has not benefited from this action. To saddle him with the attorney's fee will only increase his losses from this action, not correlate costs with benefits." *Id.* at 509. In the union context, the Ninth Circuit has stated a second rationale for the denial of fees against the plaintiff: The "mere prospect of such an award would 'chill union members in the exercise of their statutory right to sue the union.'" *Ackley*, 958 F.2d at 1479 (quoting Pawlak v. Greenawalt, 713 F.2d 972, 980 (3d Cir. 1983)).

445. The shareholder suits are generally class actions or derivative suits. The courts are split on whether the substantial benefit doctrine applies when the plaintiff brings suit as an individual shareholder. *Compare* Bailey v. Meister Brau, 535 F.2d 982, 995 (7th Cir. 1976) (doctrine inapplicable because award would shift costs to losing party), *with* Reiser v. Del Monte Props., 605 F.2d 1135, 1139 (9th Cir. 1979) (to require that suit be brought derivatively or representatively misconstrues the purpose of the doctrine). The *Reiser* court made a strong case that as long as the suit benefits shareholders, recovery should not depend on the status of the plaintiff. *See also Meister Brau,* 535 F.2d at 997 (Swygert, J., dissenting) ("The majority employs a formalistic approach . . . which obscures the purpose of the [substantial benefit] rule . . . and thereby achieves an inequitable result. That purpose is to insure that the costs of litigation are not borne solely by one or a few shareholders" where a benefit is conferred on all the shareholders.).

Successful shareholder derivative actions qualify for a substantial benefit award only when they produce nonmonetary relief. When they produce a monetary recovery for the corporation, the common fund doctrine applies.

have no such identity of interests, an award against the defendant is improper because it would shift the costs unfairly.[446]

A Ninth Circuit case illustrates this point. A suit by residents of an irrigation district forced the Secretary of the Interior to free up land for the residents to buy at a below-market price. The plaintiffs sought fees from the district, since members of the district benefited from the suit. However, the Ninth Circuit found an award inappropriate because

> the result achieved is not beneficial to all landowners within the District. Those who own excess lands will be required to sell the excess at below-market prices, or will no longer receive water for irrigating those lands. If appellants' attorneys' fees were drawn from the District's general revenues, there would be no congruence between the funds disbursed as the fee award and the funds taken in from the beneficiary class in whose name that award is made.[447]

Even in shareholder suits or suits by labor union members against a union, an award may be inappropriate because of insufficient congruence between the defendant and the beneficiaries; that is, the suit may not benefit all shareholders or union members, and therefore, a fee award unfairly penalizes the nonbeneficiaries. Thus, the Ninth Circuit found an award inappropriate where a suit established that a union's policy, as it applied to the plaintiff, resulted in the unfair denial of pension benefits: Not all—or even most—union members

446. *See, e.g.,* Johnson v. HUD, 939 F.2d 586, 590 (8th Cir. 1991) (denying award because "defendants are neither the alter ego nor the representative of the benefited class"); Oster v. Bowen, 682 F. Supp. 853, 857 (E.D. Va.) ("Where the common benefit rule is invoked against a stock corporation or a union, the beneficiaries may incur their share of the costs by such means as reduced dividends or higher union dues. MSVRO, however, is a non-stock corporation. Plaintiff has demonstrated no financial relationship whatsoever between MSVRO and the physicians who may benefit from the new procedures."), *appeal dismissed*, 859 F.2d 150 (4th Cir. 1988), *cert. denied,* 489 U.S. 1019 (1989). *See also* Home Sav. Bank v. Gillam, 952 F.2d 1152, 1163 (9th Cir. 1991) (where bank sued and recovered severance benefits from its former CEO, award of fees was reversed because defendant was hurt by the suit, and where "the party ordered to pay fees is not a beneficiary . . . the common benefit exception does not apply").

447. United States v. Imperial Irrigation Dist., 595 F.2d 525, 531 (9th Cir. 1979), *rev'd in part, vacated and remanded on other grounds*, 447 U.S. 352 (1980).

benefited from the suit.[448] Moreover, the change in policy resulting from the suit would not make the union more democratic; its only benefit was to the handful of employees whose pensions would be increased.

Similarly, most courts reject the applicability of the substantial benefit doctrine in suits against the government.[449] If only some members of the population benefit from the suit, an award from the government treasury is inappropriate because it would involve all taxpayers in the fee sharing.[450] Indeed, because of the required identity of

448. Burroughs v. Bd. of Trustees, 542 F.2d 1128, 1132 (9th Cir. 1976). The court also noted that because "no records . . . reveal[ ] the identity of persons benefited by [the] action," the class of beneficiaries is "of indeterminable size and not easily identifiable." This focus is misleading because even if the beneficiaries were identified, an award would have been improper because many members of the union were not beneficiaries yet would have shared in the costs of any fee award. These two concerns—unequal benefits and difficulty identifying beneficiaries—often overlap. *See, e.g.,* Edwards v. Heckler, 789 F.2d 659, 660 (9th Cir. 1985) (reversing award where suit resulted in more lenient standard for Social Security benefits: "the class of persons benefited is not easily identifiable because it includes all who will benefit in the future from the new standard . . . . The benefit will be difficult to trace because each class member will receive a different amount depending upon his or her circumstances. Lastly, the costs cannot be shifted with exactitude [for these reasons]."); Cantwell v. San Mateo, 631 F.2d 631, 639 (9th Cir. 1980) (fees properly denied where suit required county to change policy with respect to retirement benefits: "The decision in this case will affect all county employees in the entire state of California. . . . There is no ready way to identify all the employees who might be able to avail themselves. . . . More importantly, for the same reason, there is no method of shifting the costs with some exactitude.").

449. *See, e.g.,* Linquist v. Bowen, 839 F.2d 1321, 1326 (8th Cir.), *cert. denied,* 488 U.S. 908 (1988); *In re* Hill, 775 F.2d 1037, 1041 (9th Cir. 1985); Grace v. Burger, 763 F.2d 457, 459 (D.C. Cir.), *cert. denied,* 474 U.S. 1026 (1985); Jordan v. Heckler, 744 F.2d 1397, 1400 (10th Cir. 1984).

450. As noted *supra* note 343, if all citizens or taxpayers benefit, courts generally reject an award because it would merge the substantial benefit doctrine into the rejected private-attorney general concept. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court noted that in its substantial benefit and common fund cases, the beneficiaries were "small in number." *Id.* at 265 n.39. However, the number of beneficiaries does not appear to be a ground for denial of fees *except* in suits against the government. In one substantial benefit case, the Third Circuit rejected the contention that an award was inappropriate because there were too many beneficiaries:

interests shared by the defendant and the beneficiaries, claims for fees based on the substantial benefit doctrine infrequently succeed outside the corporate and labor union contexts.

c. Has the plaintiff benefited disproportionately?

The Sixth Circuit has held several times that when the plaintiff receives a damage award from a labor union, a fee award would shift the costs unfairly.[451] As the Fifth Circuit observed, if the plaintiff who received a personal award were also awarded fees,

> he would pay no greater portion of the fees than any other union member who benefited only incidentally. The fee award would not distribute fees in proportion to benefits.
>
> This is clearly not a case where the plaintiff "benefits a group of others in the same manner as himself." . . . [Plaintiff] obtained redress for personal injuries not shared by other union members. The purpose of the common benefit exception is to shift the costs of litigation to "the class that benefited from them and that would have had to pay them had it brought the suit." . . . Other union members could not have brought suit to redress [plaintiff's] personal injuries.[452]

Similarly, the D.C. Circuit said that fees are inappropriate where "a litigant obtain[s] a direct and pecuniary benefit, and the 'benefit' to

> The magistrate apparently understood that language [in *Alyeska*] to mean absolute numbers, and indicated that a class of 1,400,000 was too large to have been benefited. Like any other statement, that one must be viewed in context. Given this context, mere size does not support the contention that the class of USWA members did not receive a common benefit from [plaintiff's] activity . . . . In our view, the requirement of identifiability weighs heavily in this determination, and USWA members, though numerous, are readily identifiable as the benefited group.

Brennan v. United Steelworkers of Am., 554 F.2d 586, 606 (3d Cir. 1977), *cert. denied,* 435 U.S. 977 (1978).

451. Black v. Ryder, 970 F.2d 1461, 1472 (6th Cir. 1992); Guidry v. Int'l Union of Operating Eng'rs, 882 F.2d 929, 944 (6th Cir. 1989), *vacated on other grounds*, 494 U.S. 1022 (1990).

452. Shimman v. Int'l Union of Operating Eng'rs, 744 F.2d 1226, 1235 (5th Cir. 1984) (en banc), *cert. denied,* 469 U.S. 1215 (1985) (citations omitted).

the class . . . is incremental and relatively intangible."[453] The Tenth Circuit agreed.[454]

Courts have awarded fees based on the substantial benefit doctrine even though the plaintiff recovered damages, without discussing the disproportionality issue.[455] In any event, the Sixth Circuit's position has limited scope. First, it appears to apply only to cases in which the plaintiff recovers damages personally—not to cases in which damages are ordered paid to the union.[456] Second, it does not apply if the plaintiff receives damages *and* an injunction that directly benefits the other union members.[457] Finally, it cannot be construed to apply to awards beyond money damages. Clearly, a fee award should not be denied simply because the plaintiff benefits more than other beneficiaries, for example, if a suit that overturns a fraudulent election results in the plaintiff's becoming elected.[458]

d. Does the court have jurisdiction to make an award?

As explained earlier, the requirement in common fund cases that the court have jurisdiction over the fund is generally met because the

453. Am. Ass'n of Marriage v. Brown, 593 F.2d 1365, 1369 (D.C. Cir. 1979).

454. Aguinaga v. United Food & Commercial Workers Int'l Union, 993 F.2d 1480, 1484–85 (10th Cir. 1993).

455. *See, e.g.*, Bise v. Int'l Bhd. of Elec. Workers, 618 F.2d 1299 (9th Cir. 1979), *cert. denied,* 449 U.S. 904 (1980); Rosario v. Amalgamated Ladies Garment Cutters Union, 605 F.2d 1228 (2d Cir. 1979), *cert. denied,* 446 U.S. 919 (1980); Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382 (8th Cir. 1977); McDonald v. Oliver, 525 F.2d 1217 (5th Cir.), *cert. denied,* 429 U.S. 817 (1976).

456. *See* Erkins v. Bryan, 785 F.2d 1538, 1549 (11th Cir.) (distinguishing *Shimman* from case in which damages award was ordered paid to the union), *cert. denied,* 479 U.S. 961 (1986).

457. *Shimman* itself could arguably be read to suggest that fees may be in order in such cases. *See Shimman*, 744 F.2d at 1235 nn.13, 14. A year later, the Sixth Circuit removed any doubt. *See* Murphy v. Int'l Union of Operating Eng'rs, 774 F.2d 114, 127 (6th Cir. 1985), *cert. denied,* 475 U.S. 1017 (1986).

458. *See, e.g.*, Marshall v. United Steelworkers, 666 F.2d 845, 853 (3d Cir. 1981) (error to deny fees to plaintiff whose suit overturning union election led to his own election: "That the individual who brought suit also receives a direct personal benefit from it is of no matter."), *cert. denied,* 459 U.S. 823 (1982). In addition, it is irrelevant that plaintiff's motive in bringing the suit may have been to help himself rather than the union. Pawlak v. Greenawalt, 713 F.2d 972, 980 (3d Cir. 1983).

court has jurisdiction over the defendant who controls the fund.[459] In substantial benefit cases, in which there is no fund, the "jurisdiction" or "control" criterion has occasionally proved to be more complex.

In a Sixth Circuit case, the plaintiff sued both his labor union and an automobile company for various offenses. He prevailed against the company for making improper payments to union officers. The district court awarded fees against the union, but the Sixth Circuit held that the district court lacked jurisdiction to make such an award, since the union was not party to the claim for which fees were awarded:

> In holding that the court need only "have 'jurisdiction over an entity through which the contribution can be effected,'" the district judge has confused jurisdiction over the person with jurisdiction over the subject matter . . . . Liability for attorneys' fees cannot rest, without more, on the fortuitous chance that the claim on which a plaintiff seeks recovery of fees may be joined in the same action with a separate claim against the intended source of that recovery. The court making the award must have jurisdiction over the target of that award *by virtue* of its jurisdiction over the *subject matter* of the claim on which the award is based.[460]

The Ninth Circuit has held that the substantial benefit doctrine does not create subject matter jurisdiction, and it therefore dismissed a suit for recovery of fees filed after completion of the underlying litigation.[461] After the plaintiffs settled their inverse condemnation proceeding, they brought action for fees in federal court against property owners who were not parties to the litigation but who had benefited from the settlement. There was no independent basis for federal jurisdiction, and the Ninth Circuit held that the substantial benefit doctrine did not supply a basis for jurisdiction. The court acknowledged that this issue had not been raised in the numerous cases awarding fees based on the substantial benefit doctrine (and common fund doctrine), but it noted that "in each such case the fee request was part

459. *See supra* text accompanying notes 345–48.

460. Toth v. UAW, 743 F.2d 398, 406 (6th Cir. 1984) (citations omitted).

461. Sederquist v. Court, 861 F.2d 554, 557 (9th Cir. 1988) (substantial benefit doctrine is not part of the federal common law but "merely an equitable exception to the traditional 'American rule' governing attorneys' fees" and does not confer jurisdiction under 28 U.S.C. § 331).

of the original proceeding and the district court's jurisdiction rested on grounds independent of the fee request."[462]

Note that the plaintiffs could not have recovered from the property owners as part of the original suit because the property owners were not parties. In general, a court cannot order fees paid by beneficiaries personally if they are not party to the litigation.[463]

e. Is an award contrary to congressional intent?

As is true in the common fund context, in substantial benefit cases, a remedial scheme or other evidence that Congress did not intend a fee award in a particular class of cases will defeat an award.[464]

2. Method for determining amount of award

The lodestar is generally used to determine the amount of fees in substantial benefit cases.[465] The kinds of adjustments to the lodestar permitted in cases under the fee-shifting statutes may be made in substantial benefit cases as well.[466] In addition, the Sixth Circuit has said that an award may be adjusted upward or downward to reflect the extent of the benefit conferred.[467]

In substantial benefit cases, work preparing a fee request or litigating over fees is compensable; in common fund cases, it is not.[468] In

462. *Id.*

463. *See, e.g.,* Cantwell v. San Mateo, 631 F.2d 631, 639 (9th Cir. 1980) (rejecting creative fee-sharing proposal that required non-parties to contribute to attorneys' fees).

464. Usery v. Local Union No. 639, Int'l Bhd. of Teamsters, 543 F.2d 369, 386–88 (D.C. Cir. 1976).

465. *See, e.g.,* Southerland v. Int'l Longshoremen's Union, 845 F.2d 796, 800–01 (9th Cir. 1987). *See also* Rosenbaum v. MacAllister, 64 F.3d 1439, 1447 (10th Cir. 1995) (holding that a "percentage of the fund" approach is not appropriate in substantial benefit cases, and that while the *Johnson* factors must be considered, the calculation need not be based on the same approach as that used in statutory fee cases).

466. Kinney v. Int'l Bhd. of Elec. Workers, 939 F.2d 690, 695–96 (9th Cir. 1991) (rejecting argument that adjustment to lodestar "is inappropriate in any case where the award of fees is based upon" the substantial benefit doctrine).

467. Smillie v. Park Chem. Co., 710 F.2d 271, 275 (6th Cir. 1983).

468. *Kinney*, 939 F.2d at 693–95; Donovan v. CSEA Local Union 1000, 784 F.2d 98, 106 (2d Cir. 1986); Pawlak v. Greenawalt, 713 F.2d 972, 983–84 (3d Cir. 1983).

common fund cases, the work on fees, if compensated, would deplete the very fund that benefits the beneficiaries. This is not so in substantial benefit cases, in which the benefit conferred by the lawsuit is nonpecuniary.[469]

3. Issues on appeal

The discussion on appellate issues in common fund cases[470]—specifically, the timing of appeals, the scope of review, and whether the court of appeals can calculate the award itself—applies in toto to substantial benefit cases.

D. Private Securities Litigation Reform Act of 1995

Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA)[471] "to prevent frivolous and unmeritorious securities class actions."[472] The goal of the PSLRA was to replace lawyer-driven litigation with client-driven litigation.[473] Debate quickly arose as to whether trial judges had authority under the PSLRA to conduct an auction for selecting class counsel.[474] The Third Circuit has addressed

469. *See Kinney*, 939 F.2d at 694 n.5; *Donovan*, 784 F.2d at 106; *Pawlak*, 713 F.2d at 981.

470. *See supra* text accompanying notes 413–18.

471. 15 U.S.C. § 78u-4 (2000). The PSLRA provides that "[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class." *Id.* § 78u-4(a)(3)(B)(v). The PSLRA also provides that total attorney fees and expenses awarded by the court "shall not exceed a reasonable percentage of the amount of any damages . . . actually paid to the class." 15 U.S.C. § 78u-4(a)(6). Courts still have a duty under Rule 23 to review the reasonableness of fees at the end of litigation. *See, e.g., In re* Cendant Corp. Prides Litig., 243 F.3d 722, 730–31 (3d Cir. 2001).

472. *See* Manual for Complex Litigation (Fourth) § 31.3 (2004).

473. Berger v. Compaq Computer Corp., 257 F.3d 475, 484 (5th Cir. 2001) (under the PSLRA "[c]lass action lawsuits are intended to serve as a vehicle for capable, committed advocates to pursue the goals of the class members through counsel, not for capable, committed counsel to pursue their own goals through those class members").

474. Selection of class counsel by an auction or bidding process was developed by Judge Vaughn Walker in *In re Oracle Securities Litigation,* 131 F.R.D. 688 (N.D. Cal. 1990), *modified*, 132 F.R.D. 538 (N.D. Cal. 1990), a securities class action that pre-

the issue at the stage of selection of lead counsel,[475] and the Ninth Circuit has addressed the issue at the stage of selection of lead plaintiff. [476]

The Third Circuit ruled that selecting lead counsel by competitive bidding is generally not permitted under the PSLRA.[477] In *In re Cendant Corp. Litigation*,[478] the district court declined to accept the lead plaintiffs' choices for lead counsel and concomitant retainer agreements. The court conducted an auction in order to establish reasonable attorneys' fees through market simulation.[479] The Third Circuit vacated the award of attorneys' fees made pursuant to the auction terms.[480] Acknowledging that the PSLRA renders plaintiff's counsel selection "subject to the approval of the court,"[481] the Third Circuit found that appointing counsel through auction was *more* than "approving" or "disapproving" the lead plaintiff's choice.[482] The court explained:

> This language makes two things clear. First, the lead plaintiff's right to select and retain counsel is not absolute—the court retains the power and the duty to supervise counsel selection and counsel retention. But second, and just as importantly, the power to "select and retain" lead counsel belongs, at least in the first instance, to the lead plaintiff, and the court's role is confined to deciding whether to "approv[e]" that choice. Because a court-ordered auction involves the court rather than the lead plaintiff choosing

dated the PSLRA. *See infra* text accompanying notes 524–40. *See also* Proceedings of the 2001 Third Circuit Task Force on the Selection of Class Counsel, *in Third Circuit Task Force Report on Selection of Class Counsel*, 74 Temp. L. Rev. 689 (2001), for an in-depth evaluation of and recommendations on auctioning practices under the PSLRA; and Laural Hooper & Marie Leary, Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study (Federal Judicial Center 2001).

475. *In re* Cendant Corp. Litig., 264 F.3d 201 (3d Cir. 2001). *Cendant* involves two actions: the non-Prides claims and the Prides claims. The Third Circuit addressed the auctioning issue in the non-Prides claims.

476. *In re* Cavanaugh, 306 F.3d 726 (9th Cir. 2002).

477. *Cendant*, 264 F.3d at 273.

478. 182 F.R.D. 144 (D.N.J. 1998).

479. *Id.* at 150. Because the PSLRA affords lead plaintiffs the opportunity to choose counsel, the court allowed plaintiffs' counsel to meet the terms of the lowest bids. *Id.* at 151. Lawyers for the two lead plaintiffs matched the lowest bids, and the court appointed each attorney as lead counsel for the respective plaintiff.

480. *Cendant*, 264 F.3d 201.

481. 15 U.S.C. § 78u-4(a)(3)(B)(v) (2000).

482. *Cendant,* 264 F.3d at 274.

> lead counsel and determining the financial terms of its retention, this latter determination strongly implies that an auction is not generally permissible in a Reform Act case, at least as a matter of first resort.[483]

Furthermore, the Third Circuit found that the "auction" model runs contrary to the PSLRA's "lead plaintiff model" and to its legislative history.[484] It stated that the PSLRA "evidences a strong presumption in favor of approving a properly-selected lead plaintiff's decisions as to counsel selection and counsel retention."[485] The court stated that a district court's "inquiry is appropriately limited to whether the lead plaintiff's selection and agreement with counsel are reasonable on their own terms."[486] The court continued, "the ultimate inquiry is always whether the lead plaintiff's choices were the result of a *good faith selection and negotiation process* and were arrived at via *meaningful arms-length bargaining*."[487]

The Ninth Circuit rejected conducting an auction to select class counsel and held that it was error to select the lead plaintiff according

483. *Id.* at 273.

484. *Id.* at 273–74.

485. *Id.* at 276.

486. *Id.* The court gave a non-exhaustive list of questions to ask:

> In making this determination, courts should consider: (1) the quantum of legal experience and sophistication possessed by the lead plaintiff; (2) the manner in which the lead plaintiff chose what law firms to consider; (3) the process by which the lead plaintiff selected its final choice; (4) the qualifications and experience of counsel selected by the lead plaintiff; and (5) the evidence that the retainer agreement negotiated by the lead plaintiff was (or was not) the product of serious negotiations between the lead plaintiff and the prospective lead counsel.

Id.

487. *Id*. (emphasis added). In *In re Lucent Technologies, Inc., Securities Litigation*, 194 F.R.D. 137 (D.N.J. 2000), a case that predates *Cendant*, the district court held a sealed-bid auction to select class counsel because it seemed "unlikely that there ha[d] been a great deal of (if any) independent, arm's length negotiating between Lead Plaintiff and the proposed lead counsel." *Id.* at 156. The court's decision to hold an auction was also based on judicial economy—the auction was "an effort to keep this matter moving" and "recognized" that the provisional lead plaintiff may be replaced. *Id*.

to how advantageous an attorneys' fee arrangement was negotiated.[488] The district court judge had refused to appoint as lead plaintiff the party with the largest stake in the controversy because there were "significant differences in potential attorney fees" among parties.[489] Finding no other plaintiffs to be "adequate," the district court appointed a nominal plaintiff and conducted an auction to select class counsel.

The Ninth Circuit vacated the order appointing the nominal plaintiff[490] and expressed its disfavor with auctions for selecting class counsel.[491] It explained that under the PSLRA, the plaintiff with the largest financial stake becomes the presumptive lead plaintiff if he or she meets Federal Rule of Civil Procedure 23(a)'s[492] typicality and adequacy requirements.[493] The court rejected "deficiencies in the [ ] fee agreement" as evidence that the potential lead plaintiff was inadequate, and thus allowed the court to conduct an auction.[494] It stated:

> The presumptive lead plaintiff's choice of counsel and fee arrangements may be relevant in ensuring that the plaintiff is not receiving preferential treatment through some back-door financial arrangement with counsel, or proposing to employ a lawyer with a conflict of interest. But this is not a beauty contest; the district court has no authority to select for the class what it considers to be the best possible lawyer or the lawyer offering the best possible fee schedule. Indeed, the district court does not select class counsel at all.[495]

The Third Circuit did hold open the door to selection of lead counsel through auctions in limited situations. The court noted that if it appeared that the lead plaintiff's choice of counsel and fee arrange-

488. *In re* Cavanaugh, 306 F.3d 726, 731–36 (9th Cir. 2002). In *Cavanaugh*, the Ninth Circuit held that the PSLRA did not change the standard for adequacy under Fed. R. Civ. P. 23(a). *Id.* at 736. The Fifth Circuit came to a different conclusion in *Berger v. Compaq Computer Corp*., 257 F.3d 475, 483 (5th Cir. 2001), *reh'g denied*, 279 F.3d 313 (5th Cir. 2002).

489. *In re* Quintus Sec. Litig., 201 F.R.D. 475, 488 (N.D. Cal. 2001).

490. *Cavanaugh*, 306 F.3d at 739.

491. *Id.* at 734 n.14.

492. Fed. R. Civ. P. 23(a).

493. *Cavanaugh*, 306 F.3d at 730.

494. *Id.* at 732.

495. *Id.*

ments were not reasonable, then the court should give the plaintiff a chance to renegotiate. If the plaintiff chose not to renegotiate a more fair arrangement, then the court could designate that plaintiff as "not adequate" and choose an alternative. In the rare situation that no other "adequate" plaintiff existed, the court could appoint lead counsel through an auction.[496]

In *Cendant*, the Third Circuit set forth guidelines for reviewing the "reasonableness" of an attorneys' fees award. The court stated that "under the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel."[497] This presumption could be rebutted "by a prima facie showing that the (properly submitted) retained agreement fee is clearly excessive."[498] If the presumption were

496. *Cendant,* 264 F.3d at 277. District courts have selected lead counsel through an auction when the court doubted the "adequacy" of the lead plaintiff. *See, e.g., In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection 2 (N.D. Cal. June 27, 2001) (district court ordered lead plaintiff to conduct an auction under court-established procedures when the only choice for lead plaintiff had limited English skills and was therefore not able to exercise due diligence in selecting counsel).

On a related note, one district court refused to appoint a group of four unrelated institutional investors as lead plaintiff because the group was "cobbled together by cooperating counsel for the obvious purpose of creating a large enough grouping of investors to qualify as 'lead counsel.'" *In re* Razorfish Inc. Sec. Litig., 143 F. Supp.2d 304, 308–09 (S.D.N.Y. 2001). See also *In re Gemstar-TV Guide International, Inc. Securities Litigation,* 209 F.R.D. 447, 451–52 (C.D. Cal. 2002), for a list of cases in which district courts refused to appoint groups of unrelated investors as lead plaintiffs.

497. *Cendant,* 264 F.3d at 282.

498. *Id.* at 283. In *Cendant*, the Third Circuit said that courts should be guided by the factors it set forth in *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190, 195 n.1 (3d Cir. 2000), in determining whether the retainer is excessive:

> (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

rebutted, "the court would need to set a reasonable fee according to the standards our previous cases have set down for class actions not governed by the PSLRA."[499]

The Ninth Circuit held that the PSLRA does not require that attorneys' fees be calculated on the basis of a percentage of recovery minus expenses.[500]

Cendant, 264 F.3d at 283. The court noted that under the PSLRA, factors 3 and 7 should be given less weight. *Id.* at 284. It also stated that a lodestar "cross-check" may be appropriate. *Id.*

499. *Cendant,* 264 F.3d at 285.

500. Powers v. Eichen, 229 F.3d 1249, 1258 (9th Cir. 2000) (interpreting 15 U.S.C. § 78u-4(a)(6) language that fees "shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class").

III
The Obligation of Bankruptcy Courts to Examine Fee Petitions

The usual professional fee petition in bankruptcy court does not present an adversarial situation. Because the estate, not the opposing party, pays the award of attorneys' fees, petitions are often unopposed. This puts an additional burden on the bankruptcy court if it scrutinizes the fee petition. The question arises, however, whether bankruptcy judges are obligated (or even authorized) to scrutinize fee petitions sua sponte pursuant to 11 U.S.C. § 330.[501]

The overwhelming number of bankruptcy courts that have addressed the question have held that bankruptcy courts have not only the power but also the obligation to scrutinize fee petitions sua sponte.[502] The district courts that have addressed the issue have generally concurred.[503]

501. 11 U.S.C. § 330 (2000) (compensation for services and reimbursement of expenses for estate officers). The following discussion involves bankruptcy cases wherein professional fees have not been preapproved by the court pursuant to 11 U.S.C. § 328 (2000) (authorizing the trustee, with court approval, to retain professional services). Where a section 328 retention order is granted, a section 330 "reasonableness review" is not appropriate, and the terms of fee payment cannot be altered absent a finding that the original terms are "improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. § 328(a) (2000). *See In re* Nat'l Gypsum Co., 123 F.3d 861, 862 (5th Cir. 1997); *In re* Reimers, 972 F.2d 1127, 1128 (9th Cir. 1992).

502. *See, e.g., In re* Gillett Holdings, 137 B.R. 462, 466 (Bankr. D. Colo. 1992); *In re* Bank of New England, 134 B.R. 450, 453 (Bankr. E.D. Mass. 1991); *In re* Bush, 131 B.R. 364, 365 (Bankr. W.D. Mich. 1991); *In re* Gold Seal Prods., 128 B.R. 822, 827–28 (Bankr. N.D. Ala. 1991); *In re* Concept Clubs, 125 B.R. 634, 636 (Bankr. D. Utah 1991); *In re* Saunders, 124 B.R. 234, 236 (Bankr. W.D. Tex. 1991); *In re* E Z Feed Cube, 123 B.R. 69, 73 (Bankr. D. Or. 1991); *In re* Sounds Distrib. Corp., 122 B.R. 952,

In response to a flurry of district court orders in the Eastern District of Pennsylvania stating that bankruptcy courts do not have authority to review fee petitions sua sponte,[504] the Third Circuit addressed the issue. The court held that "[b]eyond possessing the power, . . . the bankruptcy court has a *duty* to review fee applications, notwithstanding the absence of objections . . . . "[505]

The Third Circuit emphasized, however, that it did not intend for bankruptcy courts to "'become enmeshed in a meticulous analysis of every detailed facet of the professional representation.'"[506] Rather, noting that bankruptcy courts' time is precious, the court clarified that the bankruptcy court faced with an unopposed fee application "need only correct reasonably discernible abuses, not pin down to the nearest dollar the precise fee to which the professional is ideally entitled."[507]

The Third Circuit made a compelling case that bankruptcy judges may—indeed must—review fee applications even when there is no objection. The Third Circuit recognized the potential burden on judicial administration and recommended appropriate measures to re-

957 (Bankr. W.D. Pa. 1991); *In re* CVC, Inc., 120 B.R. 874, 876–77 (Bankr. N.D. Ohio 1990); *In re* Great Sweats, Inc., 113 B.R. 240, 242 (Bankr. E.D. Va. 1990); *In re* Gary Fairbanks, Inc., 111 B.R. 809, 811 (N.D. Iowa 1990); *In re* Oberreich, 109 B.R. 936, 937 (Bankr. D. Wis. 1990); *In re* Inslaw, Inc., 106 B.R. 331, 333 (Bankr. D.D.C. 1989); *In re* Miami Optical Exp., Inc., 101 B.R. 383, 384 (Bankr. S.D. Fla. 1989). This list is partial; many other cases reach the same conclusion.

503. *In re* Taxman Clothing Co., 134 B.R. 286, 290–91 (N.D. Ill. 1991); *In re* NRG Res., Inc., 64 B.R. 643, 650 (W.D. La. 1986).

504. *In re* Ross, 135 B.R. 230, 239 (E.D. Pa. 1991); *In re* T & D Tool & Die, Inc., 132 B.R. 525, 528 n.1 (E.D. Pa. 1991); *In re* Jensen's Interiors, 132 B.R. 105, 106 (E.D. Pa. 1991); *In re* Pendleton, No. CIV.A.90-1091, 1990 WL 29645, at *1 (E.D. Pa. March 15, 1990); Fleet v. United States Consumer Council, Inc., No. CIV.A.89-7527, 1990 WL 18926, at *1 (E.D. Pa. Feb. 23, 1990). The sentiment was not unanimous, however. In *In re Rheam*, 137 B.R. 151, 152 (Bankr. E.D. Pa.), *vacated in part on other grounds*, 142 B.R. 698 (E.D. Pa. 1992), the bankruptcy court thoroughly addressed "the now-controversial issue" and held that there is the "right and duty" to review uncontested fee petitions.

505. *In re* Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 841 (3d Cir. 1994).

506. *Id.* at 845 (quoting Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp., 540 F.2d 102, 116 (3d Cir. 1976) (en banc)).

507. *Id.*

duce it. Much more can be done to control the attorneys' fees process (in both the district courts and the bankruptcy courts) by case management, discussed *infra* Part 4.

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IV
Techniques for Managing Attorneys' Fees

This part covers case-management techniques that judges use for controlling the attorneys' fees process. Most of the ideas were gleaned from interviews with judges conducted in 1993 and 2001.[508] When possible, those interviewed in 1993 updated their statements for this monograph's revision. Lawyers, computer specialists, and U.S. trustees were also interviewed.

Most of the time that judges spend on fees involves reviewing fee applications and conducting hearings. We consider methods for performing each of these tasks. We also discuss selecting lead counsel through a competitive bidding process. Finally, we discuss rules of thumb that may apply to either hearings or review of fee applications.

A. Facilitating Review of Fee Applications

According to most of the judges interviewed, reviewing fee applications to ensure their reasonableness is the most burdensome aspect of the attorneys' fees process. Determining the appropriate rate can be difficult, and assessing the reasonableness of the hours claimed is more difficult. A number of methods are available to make this process more manageable.

508. For further discussion of judges' practices in managing and reviewing attorney fee petitions, see Manual for Complex Litigation (Fourth) § 14.2 (2004). For guidance in managing fee litigation, see Fed. R. Civ. P. 23(h) and accompanying Committee Note.

1. Sampling

The law permits courts to award only "reasonable" fees, but examining every item in a fee petition can be enormously time-consuming. A few judges test the reasonableness of the hours claimed without scrutinizing the entire petition: They "sample" certain parts of the petition and apply the findings to the entire petition.[509] Sampling can be done randomly—for example, every tenth page or tenth day—or can be done by looking at a discrete activity.[510]

In *Evans v. City of Evanston,*[511] the Seventh Circuit approved this approach: "This sampling procedure operates on the reasonable premise that a lawyer's billing and work habits and practices are, in fact, habits and practices, which will uniformly apply to all of the lawyer's work."[512] Judge James Zagel, the trial judge in that case, explained that he allowed each *Evanston* defense attorney to select three stages of the case to be scrutinized. Judge Zagel applied the billing determinations he made in these samples to the entire case.[513]

509. For example, a former U.S. bankruptcy trustee reported that when she sampled hours billed for "internal communications," she found they accounted for more than 50% of the bill. She concluded that too much time was spent on internal communications, and made an across-the-board objection to the entire fee petition. Telephone Interview by Diane Sheehey with Marcy Tiffany, former U.S. trustee (Bankr. C.D. Cal.) (Apr. 6, 1993).

510. When choosing a discrete activity to sample, Judge Charles E. Matheson (retired) favored choosing an activity that had been litigated in front of him and with which he was familiar. Telephone Interview by Diane Sheehey with Judge Charles E. Matheson (Bankr. D. Colo.) (Apr. 22, 1993).

511. 941 F.2d 473 (7th Cir. 1991).

512. *Id.* at 476.

513. Telephone Interview by Diane Sheehey with Judge James B. Zagel (N.D. Ill.) (Apr. 22, 1993). Because he was not satisfied with the three stages chosen by defense counsel, Judge Zagel chose a fourth stage for sampling. The Seventh Circuit approved this technique, but expressed a preference for allowing both parties to suggest which tasks are to be sampled. *Evans*, 941 F.2d at 476.

2. Requiring a pretrial estimate of fees

Some judges require attorneys at the beginning of the case to submit an estimate of the hours they anticipate the case will entail.[514] A pretrial plan or budget helps a court ensure that counsel approached the case reasonably from the beginning—the court will be less prone to make its assessment of reasonableness of fees according to how the case turned out.[515] It also facilitates review of the fee application, because hours in excess of the submission can be presumed unreasonable (although the presumption may be rebutted). In addition, attorneys should be familiar with estimating anticipated hours because many clients require attorneys to submit estimates for legal work.

3. Computerized billing programs

Computerized billing programs enable judges to analyze fee requests rapidly and discern such indicia of reasonableness as the ratio of partners to associates and the time spent on various activities, such as discovery, research, intra-office conferences, and travel. A former U.S. bankruptcy trustee stated that she had used a computerized billing program's "sorting" capabilities to discover oddities, such as one attorney's billing more than twenty-four hours in a single day and attorneys' use of "rounding," by which they bill the same amount of time every day.[516]

4. Requiring attorneys to categorize records

Difficulty in reviewing fee applications can stem from the opacity of the information they contain. For instance, if the hours are listed chronologically by attorney (a common format for client billing), it is hard to ascertain how many hours are spent on a discrete activity. Therefore, some judges require that hours be categorized. Judge Grady, in *In re Continental Illinois Securities Litigation*,[517] required at-

514. For example, Judge Ivan Lemelle reported requiring a confidential, pretrial estimate of hours in order to facilitate settlement of fee disputes. Telephone Interview by Diane Sheehey with Judge Ivan L.R. Lemelle (E.D. La.) (Apr. 27, 1993).

515. *See supra* text accompanying notes 152–53.

516. Telephone Interview by Diane Sheehey with Marcy Tiffany, former U.S. trustee (Bankr. C.D. Cal.) (Apr. 6, 1993).

517. 572 F. Supp. 931 (N.D. Ill. 1983).

torneys to submit time records chronologically by *activity* rather than by attorney.[518]

Local rules and guidelines may also require categorization. For example, in civil rights and discrimination cases, the U.S. District Court for the District of Maryland requires that time records be organized by litigation phase.[519] The U.S. Bankruptcy Court for the Northern District of California has guidelines that encourage categorized time records and discourage "clumping," that is, grouping several discrete tasks into one time entry.[520]

5. Having defendants submit records

Many judges agree with Judge Edward Becker of the Third Circuit that "the most difficult aspect of handling fee awards is assessing how much time it should have taken a lawyer to do a given piece of work."[521] Some judges make this task easier, and reduce disputes, by requiring defense counsel to submit their own billing records. These records provide a reference point for particular activities: If defendants claim that plaintiffs spent too much time researching an issue, it is instructive to see how much time their counsel spent.[522] On occasion, this method will uncover blatant contradictions, such as billing unequal hours for attending the same conference. However, there cannot always be an exact correspondence between the defendant's hours and the plaintiff's hours. For example, if a plaintiff spends few hours writing a complaint and it contains vague legal theories, the defendant will need to spend more time figuring out the complaint.[523]

518. *Id*. at 934. *See also* Tom Willging, Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial (Federal Judicial Center 1984) 30–32.

519. *See infra* Appendix A (Appendix B to Local Rules, paragraph 1b).

520. Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees, attached as Appendix B.

521. Telephone Interview by Diane Sheehey with Judge Edward Becker (3d Cir.) (May 25, 1993).

522. For example, Judge William Browning found "a significant amount of discrepancies" when he required defendants to submit their records in one case. Telephone Interview by Diane Sheehey with Judge William D. Browning (D. Ariz.) (Apr. 21, 1993).

523. Telephone Interview by Diane Sheehey with Judge James B. Zagel (N.D. Ill.) (Apr. 22, 1993).

B. Selection of Lead Counsel by Competitive Bidding

Judge Vaughn Walker developed a method for awarding fees in common fund cases—selecting class counsel through competitive bidding. In a celebrated case,[524] he had each firm that wanted to represent the class submit an application (under seal) that established the firm's qualifications and specified a schedule of percentages according to which it would request fees.[525] He reasoned that bidding "most closely approximates the way class members themselves would make these decisions and should result in selection of the most appropriately qualified counsel at the best available price."[526] In a subsequent opinion, Judge Walker expressed satisfaction with the result: he described "arrangements fully consistent with the . . . standard of reasonable compensation" and "accomplished without the 'protracted, complicated, and exhausting' fee litigation that typically accompanies lodestar determinations."[527]

Judge Walker has used the method more than once.[528] He notes that he does not necessarily appoint the lowest bidder as class counsel—quality and experience must be considered.[529]

Over time, judges who have used bidding to select counsel have developed guidelines or required specific procedures. The following is a brief overview of these guidelines and procedures.[530]

524. *In re* Oracle Sec. Litig., 131 F.R.D. 688 (N.D. Cal.), *modified*, 132 F.R.D. 538 (N.D. Cal. 1990). *See supra* note 474.

525. The bid of the firm selected called for different percentages for different ranges of recovery: 24% of the first $1 million recovered, 20% of the next $4 million, 16% of the next $10 million, and 12% of any additional recovery. These percentages were to apply if the case was resolved within a year; higher percentages were to apply otherwise.

526. *Oracle*, 131 F.R.D. at 690.

527. *Oracle*, 132 F.R.D. at 547–48.

528. *In re* Quintus Sec. Litig., 201 F.R.D. 475 (N.D. Cal. 2001); Wenderhold v. Cylink Corp., 189 F.R.D. 570 (N.D. Cal. 1999); *In re* California Micro Devices Sec. Litig., 168 F.R.D. 257 (N.D. Cal. 1996); *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223 (N.D. Cal. 1994).

529. Telephone Interview by Diane Sheehey with Judge Vaughn Walker (N.D. Cal.) (Apr. 21, 1993).

- *Discovery*: Bidding is usually performed prior to discovery.[531] Judge Milton Shadur explained that because the object of bidding is to simulate the market, where clients and attorneys negotiate fees without the benefit of discovery, discovery should not be a component.[532]
- *Limits on field of potential bidders*: Most district courts have opened bidding to any interested attorney or firm.[533] In a PSLRA case, Judge William Alsup ordered that an invitation for bidding proposals from potential class counsel be placed on the case's Web site.[534]
- *Sealed bids*: Sealed bids are usually required.
- *Joint bids*: Joint bids have been allowed,[535] but judges caution that allowing large firms to collude may chill competition in the marketplace.[536]

530. This overview draws heavily from Laural L. Hooper & Marie Leary, Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study (Federal Judicial Center 2001).

531. For cases filed after the Private Securities Litigation Reform Act of 1995, discovery is stayed until after selection of lead plaintiff and class counsel. 15 U.S.C. §§ 772-1(b)(1), 78u-4(b)(3)(B) (2000).

532. Hooper & Leary, *supra* note 530, at 30, n.161 (Telephone Interview by Laural Hooper and Marie Leary with Senior Judge Milton I. Shadur (N.D. Ill.) (July 6, 2001)).

533. Judge Shadur limits bidding to attorneys of record and attorneys who filed timely motions. *Id.*

534. *See In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection 4 (N.D. Cal. June 27, 2001). *See supra* text accompanying notes 471–500 for a discussion of when bidding is not allowed under the PSLRA.

535. *See In re* Comdisco Sec. Litig., 141 F. Supp.2d 951, 955 (N.D. Ill. 2001); *In re* Bank One Shareholders Class Actions, 96 F. Supp. 2d 780 (N.D. Ill. 2000); *In re* Cendant Corp. Litig., 182 F.R.D. 144, 151 (D.N.J. 1998).

536. Judge Shadur believes that allowing previously unassociated firms to engage in joint discussions lessens the quality and freedom of bidding by chilling the market. Telephone Interview by Laural Hooper and Marie Leary with Senior Judge Milton I. Shadur (N.D. Ill.) (July 6, 2001). In one case, Judge Vaughn Walker banned two firms from submitting a joint bid because allowing the well-financed firms to collude "might very well eliminate whatever possibility remains in this case of a meaningful competition to secure class counsel designation." *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223, 226 (N.D. Cal. 1994). Judge Walker noted, however, that a "joint bid by

- *Expenses included in bids*: Judge Walker, who has required expenses to be included in all of his bidding cases, explains that to not include costs would "encourage[ ] counsel to inflate cost calculations . . . . It creates an incentive for the firm to categorize as costs anything that could conceivably be so considered and diminishes the incentives for the firm to economize."[537]
- *Time period for bid submission*: In cases surveyed,[538] time periods for bid submission ranged from eight to fifty-four calendar days.[539]

Even judges who have not used the "bidding" approach recommend negotiating a fee at the outset of a case that is likely to create a common fund.[540]

C. Eliminating or Streamlining Hearings

A number of judges have adopted measures that preclude the need for or at least streamline fee hearings.

1. Tentative ruling

To avoid unnecessary hearings, Judge Geraldine Mund issues a tentative ruling on the fee petition.[541] Judge Mund's judicial assistant faxes

two or more firms otherwise too small to take on class counsel responsibilities would introduce a new competitor to the selection process." *Id.*

537. Wenderhold v. Cylink Corp., 189 F.R.D. 570, 573 (N.D. Cal. 1999).

538. *See* Hooper & Leary, *supra* note 530, at 49.

539. The latter time period covers an extension of the bidding period in one case and a second round of bidding in another. Hooper & Leary, *supra* note 530, at 49.

540. The Third Circuit Task Force recommended establishing a percentage at the "earliest practicable moment." Court Awarded Attorney Fees: Report of the Third Circuit Task Force, *reprinted in* 108 F.R.D. 237, 255 (1985). Even if the percentage is not established early on, the court can tell the parties that the percentage method will be used. This will reduce their incentive to increase hours expended and can induce early settlement. As a case progresses, the court may find that the lodestar is more suitable than a percentage, and thus may want to shift from a percentage to the lodestar. *See id.* at 272. Therefore, the court might require plaintiff's counsel to maintain billing records.

541. Telephone Interview by Diane Sheehey with Judge Geraldine Mund (C.D. Cal.) (Apr. 2, 1993) (updated by mail Jan. 6, 2004).

the tentative ruling to lead counsel with instructions that the ruling be given to each legal professional involved in the case. If counsel submits to the ruling, he or she faxes back an acceptance letter and does not appear. If a party shows up at the hearing and objects, Judge Mund continues the matter. If there is no objection, the tentative ruling becomes final and counsel submits an order on it. However, if counsel chooses not to submit to the tentative ruling and argues against it, Judge Mund will not reimburse counsel for the appearance if she is not persuaded to change the ruling. The form Judge Mund faxes to lead counsel is reproduced *infra* Appendix C. Although Judge Mund sits in bankruptcy court, tentative rulings could cut down on the number of hearings in district courts as well. And by alerting counsel to parts of the petition that the judge finds troublesome, tentative rulings help focus hearings that do take place.

2. Written declaration in lieu of testimony

To streamline contested fee hearings, attorneys may present evidence of their hours by way of written declaration in lieu of direct testimony.[542]

3. Informal conference

An informal conference can either eliminate the need for or focus a fee hearing. Judge William Schwarzer sees great potential in holding an informal conference to narrow and define issues before a hearing.[543]

D. General Techniques

The above techniques are specific measures for facilitating review of applications and avoiding or streamlining hearings. Some more general ideas for managing fees also emerged from our interviews.

542. *See* Charles Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial,* 72 Geo. L.J. 73 (1983) (advocating this technique for trials).

543. Interview by Diane Sheehey with Judge William W Schwarzer (N.D. Cal.), Washington, D.C. (Mar. 18, 1993).

1. Setting a framework early in the case

Many judges stress the importance of informing attorneys, early in the case, what is expected of them in regard to attorneys' fees. Some judges lay down specific instructions at the outset of the case.[544] Ground rules can cover staffing at depositions, hearings, and trials; rates of compensation for various levels of legal work; communications among attorneys; and expenses.[545] Judges should not hesitate to require lawyers to resubmit unclear or incomprehensible fee petitions.

2. Local rules, guidelines, and written opinions

A number of courts have adopted billing guidelines or local rules on attorneys' fees. For example, the U.S. District Court for the District of Maryland adopted guidelines for determining attorneys' fees in civil rights and discrimination cases.[546] The guidelines require that the fee application be organized by litigation phase.[547] The guidelines also list compensable and non-compensable time, and set hourly rate ranges for attorneys.

In contrast to this last aspect of the Maryland guidelines, the Southern District of Texas Bankruptcy Court's Order Regarding Chapter 13 Attorney's Fees[548] set aside previously adopted benchmark fees. Instead the court adopted a market approach to attorneys' fees.[549]

Many bankruptcy courts publish ground rules for reimbursement of attorneys and other professionals so that no one is surprised at the end of the proceeding.[550]

544. *See, e.g., In re* Cont'l Ill. Sec. Litig., 572 F. Supp. 931 (N.D. Ill. 1983). See also Tom Willging, Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial (Federal Judicial Center 1984), a study demonstrating the legal profession's support for Judge Grady's pretrial order regulating attorneys' fees in that case.

545. *Cont'l Illinois*, 572 F. Supp. at 933–35.

546. *See infra* Appendix A.

547. *See supra* text accompanying notes 517–20.

548. Sept. 4, 2002.

549. *See infra* Appendix D.

550. *See supra* text accompanying notes 544–45. A copy of the Northern District of California Bankruptcy Court's Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees is presented in Appendix B.

Many judges emphasize that, one way or another, it is helpful for a court to establish and publicize a modus operandi concerning attorneys' fees. Guidelines should at least direct attorneys to submit fee applications in a readable and comprehensible form and to provide appropriate informative summaries to save the judge from having to plow through voluminous backup data.

3. Delegation

At every stage of the fee process, the court should consider calling on others for assistance.

a. Law clerks, assistants, and deputies

Law clerks, judicial assistants, and even deputies can help with the sometimes onerous task of cross-checking attorneys' claims for time against court records. For example, an assistant can compare an attorney's claim for appearances against the court reporter's or deputy's time records.[551] A law clerk can pull a motion out of the court file to check if time billed for it is reasonable.[552] Clerks can also check final petitions against interim submissions.[553]

b. Magistrate judges

Referral of attorneys' fees issues to magistrate judges varies throughout the courts. Many judges call on magistrate judges to handle fees in complex cases. Judge Jack Weinstein says that in large cases that settle, and in which the magistrate judge has handled discovery, he refers the attorneys' fees issue to the magistrate judge with guidelines on what is compensable.[554] In a fully tried complex case, however, Judge Wein-

551. Telephone Interview by Diane Sheehey with Judge William D. Browning (D. Ariz.) (Apr. 21, 1993).

552. Interview by Diane Sheehey with Judge William W Schwarzer (N.D. Cal.), Washington, D.C. (Mar. 18, 1993).

553. Telephone Interview by Diane Sheehey with Judge Norma Shapiro (E.D. Pa.) (May 12, 1993).

554. Telephone Interview by Diane Sheehey with Judge Jack B. Weinstein (E.D.N.Y.) (Apr. 6, 1993), updated by mail (Jan. 5, 2004).

stein handles the fees issues because he has seen the legal work played out before him.[555]

c. Special masters and alternative dispute resolution

Some judges appoint special masters to assist with attorneys' fees, especially in complex cases. Professor Laura Bartell, who has served as a special master, notes that the parties liked it

> because it meant the fee application was going to be decided fast. They were very happy to see that somebody had responsibility for this who was not going to be distracted by a docket, by the Speedy Trial Act, or anything else, and was just going to focus on this, decide it, write the opinion, and issue it so they could get paid.[556]

Depending on the practices in their district, judges may also wish to consider alternative dispute resolution for especially complex fee disputes.

d. Experts

On occasion, a judge may need expert assistance in reviewing fee applications if the judge feels that he or she has been away from practice so long that he or she is out of touch with billing practices and rates. Judges are increasingly availing themselves of expert assistance, especially in bankruptcy court.[557] Finding such experts is getting easier, as more lawyers, bar committees, and other consultants are offering to provide these services.

e. Lead counsel and class actions

The management of attorneys' fees in class actions presents unique issues and options. First, the selection of class counsel can be tied to the attorneys' fees process. Second, Federal Rule of Civil Procedure

555. *Id.*

556. Telephone Interview by Diane Sheehey with Laura B. Bartell (Apr. 9, 1993), updated by mail (Jan. 5, 2004). At the time of the interview, Professor Bartell was a partner with Shearman & Sterling. She is now Associate Professor at Wayne State University Law School.

557. Judge Sidney Brooks, for example, has used court-appointed experts to examine fees in several cases. Telephone Interview by Diane Sheehey with Chief Judge Sidney Brooks (Bankr. D. Colo.) (Apr. 1, 1993), updated by mail (Jan. 2004).

23(e) requires court approval of class action settlements, many of which include attorneys' fees, and courts can take measures that make fee settlement fairer and easier for the court to review.

Additionally, in class actions, lead counsel can be given chores that facilitate the judge's management of fees. For example, lead counsel can supervise fee petitions submitted by all law firms.[558]

E. Conclusion

The techniques described in this section are not exhaustive. Apart from presenting ideas for judges to consider, this discussion is intended to encourage innovation in judges' efforts to manage the attorneys' fees process.

558. Telephone Interview by Diane Sheehey with Judge Norma Shapiro (E.D. Pa.) (May 12, 1993), updated by mail (Dec. 29, 2003).

Appendix A
Local Rules of the U.S. District Court for the District of Maryland, Appendix B (2004)

APPENDIX B: RULES AND GUIDELINES FOR DETERMINING LODESTAR ATTORNEYS' FEES IN CIVIL RIGHTS AND DISCRIMINATION CASES[1]

1. Mandatory Rules Regarding Billing Format, Time Recordation, and Submission of Quarterly Statements

a. Time shall be recorded by specific task and lawyer or other professional performing the task as set forth more fully in L.R. 109.2.b.

b. Fee applications, accompanied by time records, shall be submitted in the following format organized by litigation phase[2]

1. These rules and guidelines apply to cases in which a prevailing party would be entitled to reasonable attorneys' fees under 42 U.S.C. § 1988(b) and to cases brought under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, the Americans With Disabilities Act, ERISA, the Rehabilitation Act, the Individuals With Disabilities Education Act, the Family and Medical Leave Act, the Fair Credit Reporting Act, and equivalent statutes. They do not apply to Social Security cases.

2. In general, preparation time and travel time should be reported under the category to which they relate. For example, time spent preparing for and traveling to and from a Court hearing should be recorded under the category "Court hearings." Factual investigation should also be listed under the specific category to which it relates. For example, time spent with a witness to obtain an affidavit for a summary judgment motion or opposition should be included under the category "motions

i. case development, background investigation and case administration (includes initial investigations, file setup, preparation of budgets, and routine communications with client, co-counsel, opposing counsel, and the Court);

ii. pleadings;

iii. interrogatories, document production, and other written discovery;

iv. depositions (includes time spent preparing for depositions);

v. motions practice;

vi. attending Court hearings;

vii. trial preparation and post-trial motions;

viii. attending trial;

ix. ADR; and

x. fee petition preparation.

c. Counsel for a party intending to seek fees if the party prevails shall submit to opposing counsel quarterly statements showing the amount of time spent on the case and the total value of that time. These statements need not be in the "litigation phase" format provided in Guideline 1.b or otherwise reflect how time has been spent. The first such statement is due at the end of the first quarter in which the action is filed.

d. Upon request by the Judge (or private mediator agreed upon by the parties) presiding over a settlement conference, counsel for all parties (with the exception of public lawyers who do not ordinarily keep time records) shall turn over to that officer (or mediator) statements of time and the value of that

practice." Similarly, a telephone conversation or a meeting with a client held for the purpose of preparing interrogatory answers should be included under the category "Interrogatories, document production and other written discovery." Of course, each of these tasks must be separately recorded in the backup documentation in accordance with Guideline 1.a.

time in the "litigation phase" format provided in Guideline 1.b.

e. If during the course of a fee award dispute a Judge orders that the billing records of counsel for the party opposing fees must be turned over to the party requesting fees, those billing records shall be submitted in the "litigation phase" format.

2. Guidelines Regarding Compensable and Non-compensable Time

a. Where plaintiffs with both common and conflicting interests are represented by different lawyers, there shall be a lead attorney for each task (e.g., preparing for and speaking at depositions on issues of common interest and preparing pleadings, motions, and memoranda), and other lawyers shall be compensated only to the extent that they provide input into the activity directly related to their own client's interests.

b. Only one lawyer for each separately represented party shall be compensated for attending depositions.[3]

c. Only one lawyer for each party shall be compensated for client and third party conferences.

d. Only one lawyer for each party shall be compensated for attending hearings.[4]

3. Departure from this guideline would be appropriate upon a showing of a valid reason for sending two attorneys to the deposition, e.g. that the less senior attorney's presence is necessary because he organized numerous documents important to the deposition but the deposition is of a critical witness whom the more senior attorney should properly depose. Departure from the guideline also would be appropriate upon a showing that more than one retained attorney representing the defendant attended the deposition and charged the time for her attendance. (If two lawyers from a public law office representing a defendant attend a deposition, the Court should consider this fact and the role played by the second lawyer, i.e., whether she provided assistance, including representation of a separate public agency or individual defendant, or was present for merely educational purposes, in determining whether plaintiff should also be compensated for having a second lawyer attend.)

4. The same considerations discussed in footnote 3 concerning attendance by more than one lawyer at a deposition also apply to attendance by more than one lawyer at a hearing. There is no guideline as to whether more than one lawyer for each

e. Generally, only one lawyer is to be compensated for intra-office conferences. If during such a conference one lawyer is seeking the advice of another lawyer, the time may be charged at the rate of the more senior lawyer. Compensation may be paid for the attendance of more than one lawyer at periodic conferences of defined duration held for the purpose of work organization and delegation of tasks in cases where such conferences are reasonably necessary for the proper management of the litigation.

f. Travel

   i. Whenever possible time spent in traveling should be devoted to doing substantive work for a client and should be billed (at the usual rate) to that client. If the travel time is devoted to work for a client other than the matter for which fees are sought, then the travel time should not be included in any fee request. If the travel time is devoted to substantive work for the client whose representation is the subject of the fee request, then the time should be billed for the substantive work, not travel time.

   ii. Up to 2 hours of travel time (each way and each day) to and from a Court appearance, deposition, witness interview, or similar proceeding that cannot be devoted to substantive work may be charged at the lawyer's hourly rate.

   iii. Time spent in long-distance travel above the 2 hours limit each way, that cannot be devoted to substantive work, may be charged at one-half of the lawyer's hourly rate.

party is to be compensated for attending trial. This must depend upon the complexity of the case and the role that each lawyer is playing. For example, if a junior lawyer is present at trial primarily for the purpose of organizing documents but takes a minor witness for educational purposes, consideration should be given to billing her time at a paralegal's rate.

3. **Guidelines Regarding Hourly Rates**[5]

   a. Lawyers admitted to the bar for less than five years: $135-170.

   b. Lawyers admitted to the bar for five to eight years: $150-225.

   c. Lawyers admitted to the bar for more than eight years: $200-275.

   d. Paralegals and law clerks: $90.

4. **Reimbursable Expenses**

   a. Generally, reasonable out-of-pocket expenses (including long-distance telephone calls, express and overnight delivery services, computerized on-line research and faxes) are compensable at actual cost.

   b. Mileage is compensable at the rate of reimbursement for official government travel in effect at the time the expense was incurred.

   c. Copy work is compensable at the rate established by the Court for taxation of costs.

5. These rates are intended solely to provide practical guidance to lawyers and judges when requesting, challenging and awarding fees. The factors established by case law obviously govern over them. However, the guidelines may serve to make the fee petition less onerous by narrowing the debate over the range of a reasonable hourly rate in many cases. The guidelines were derived by informally surveying members of the bar concerning hourly rates paid on the defense side in employment discrimination and civil rights cases and adding an upward adjustment to account for the risk of nonpayment faced by a plaintiff's lawyer in the event that her client does not prevail. The guideline rates also are generally comparable to those applied by the Court in several recent cases involving the award of fees to plaintiffs' counsel after considering affidavits submitted in support of such rates. They do not apply to cases governed by the Prison Litigation Reform Act, which sets an hourly rate by statute.

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Appendix B
Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees, U.S. Bankruptcy Court for the Northern District of California

United States Bankruptcy Court
Northern District of California
Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees

The following guidelines are promulgated pursuant to B.L.R. 9029-1 and govern the most significant issues related to applications for compensation and expense reimbursement. The guidelines cover the narrative portion of an application, time records and expenses. They apply in their entirety to professionals seeking compensation under 11 U.S.C. § 330 and, where indicated, to Chapter 7 and Chapter 11 trustees. The guidelines are not intended to cover every situation. The court is advised that compliance with these guidelines will satisfy the requirements of the United States Trustee.

I. Guidelines Applicable to Attorneys and Other Professionals

The Narrative

1. **Employment and Prior Compensation**—The application should disclose the date of the order approving applicant's employment and contain a clear statement itemizing the date

of each prior request for compensation, the amount requested, the amount approved and the amount paid.

2. **Case Status**—With respect to interim requests, the application should briefly explain the history and the present posture of the case.

   In Chapter 11 cases, the information furnished should describe the general operations of the debtor; whether the business of the debtor, if any, is being operated at a profit or loss; the debtor's cash flow; whether a plan has been filed, and if not, what the prospects are for reorganization and when it is anticipated that a plan will be filed and a hearing set on the disclosure statement.

   In Chapter 7 cases, the application should contain a report of the administration of the case including the disposition of property of the estate; what property remains to be disposed of; why the estate is not in a position to be closed; and whether it is feasible to pay an interim dividend to creditors.

   In both Chapter 7 and Chapter 11 cases, the application should state the amount of money on hand in the estate and the estimated amount of other accrued expenses of administration. On applications for interim fees, the applicant should orally supplement the application at the hearing to inform the Court of any changes in the current financial status of the debtor's estate since the filing of the application.

   With respect to final requests, applications should meet the same criteria except, where a Chapter 7 Trustee's final account is being heard at the same time, the financial information in the final account need not be repeated.

   Fee applications submitted by special counsel seeking compensation from a fund generated directly by their efforts, auctioneers, real estate brokers, or appraisers do not have to comply with the above. For all other applications, when more than one application is noticed for the same hearing, they

may, to the extent appropriate, incorporate by reference the narrative history furnished in a contemporaneous application.

3. **Project Billing**—In any application exceeding $10,000, or when the professional's anticipated services for the case will exceed $20,000, the narrative should categorize by subject matter and separately discuss each project or task. All work for which compensation is requested should be in a category.

   The professional may use reasonable discretion in defining projects for this purpose, provided that the application provides meaningful guidance to the Court as to the complexity and difficulty of the task, the professional's efficiency, and the results achieved. The number of billing categories created should take account of the total amount of fees and expenses sought in the case. Thus, for example, an application totaling $100,000 should generally be broken into more categories than an application totaling $10,000, even if the nature of the work represented in the two applications is otherwise similar.

   There is no minimum amount necessary to justify the creation of a new billing category. The maximum amount that should be included in a single category should generally be $20,000. This cap may be exceeded where further breakdown is impractical (e.g., courtroom time in a long trial). Generally, each category should contain less than $20,000. Miscellaneous items may be included in a category such as *case administration*, but such a category should not generally represent more than 15% of the fee request.

   Work in a main case should be broken into categories appropriate to the size, chapter, and complexity of the case, and the role of the professional. Generally, each adversary proceeding should be set forth in a separate category. Within each adversary proceeding, subcategories should be created for *pleadings*, *discovery*, *motions*, and *trial*. In complex adversary proceedings, additional categories may be appropriate.

   With respect to each project or task, the number of hours spent, the results obtained, and the amount of compensation

and expenses requested should be set forth at the conclusion of the discussion of that project or task. Please also note the requirement in Guideline 11 relating to time records by project.

4. **Billing Summary**—Hours and total compensation requested in each application should be aggregated and itemized as to each professional and paraprofessional who provided compensable services.

5. **Paraprofessionals**—Fees may be sought for paralegals, professional assistants and law clerks only if identified as such and if the following requirements are met:

   a. The services for which compensation is sought would have had to be done by the professional if not done by the paraprofessional, and would have been compensable under these guidelines;

   b. The person who performed the services is specially trained or is a law school student, and is not primarily a secretary or clerical worker; and

   c. The application includes a resume or summary of the paraprofessional's qualifications.

6. **Preparation of Application**—Reasonable fees for preparation of a fee application may be requested. Fees for preparation of a fee application ***may not exceed five percent*** of the total amount of fees and costs requested in the application. This five percent guideline is a ceiling rather than a floor; preparation expenses equaling five percent are not presumptively reasonable. The aggregate number of hours spent, the amount requested and the percentage of the total request which the amount represents must be disclosed. If the actual time spent will be reflected and charged in a future fee application, this fact should be stated but an estimate nevertheless provided.

7. **Client Review of Billing Statement**—A debtor in possession, trustee or official committee shall exercise reasonable business judgment in monitoring the fees and expenses of the estate's

professionals. Billing statements should be sent to the employing entity (debtor in possession, trustee or official committee) on a monthly basis. A fee application shall be sent to the employing entity at least ***20 days prior*** to the scheduled hearing date. The application shall be transmitted with a cover letter that contains the following statement:

The court's Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees provide that a debtor in possession, a trustee or an official committee must exercise reasonable business judgment in monitoring the fees and expenses of the estate's professionals. We invite you to discuss any objections, concerns or questions you may have with us. The Office of the United States Trustee will also accept your comments. The court will also consider timely filed objections by any party in interest at the time of the hearing.

A copy of the transmittal letter shall be attached to the application.

8. **Certification**—Each application for compensation and expense reimbursement must contain a certification by the professional designated by the applicant with the responsibility in the particular case for compliance with these guidelines ("Certifying Professional") that: (a) the Certifying Professional has read the application; (b) to the best of the Certifying Professional's knowledge, information and belief, formed after reasonable inquiry, the compensation and expense reimbursement sought is in conformity with these guidelines, except as specifically noted in the certification application; and (c) the compensation and expense reimbursement requested are billed at rates, in accordance with practices, no less favorable than those customarily employed by the applicant and generally accepted by the applicant's clients.

9. **Short Form Applications**—Where the professional is filing only a final request for compensation in a Chapter 7 case and the request, exclusive of costs, ***does not exceed $15,000*** for the case, and has not charged in excess of one hour of time for

preparation of the application, the professional has the option of utilizing the approved Chapter 7 form application.

In a Chapter 13 case, where the professional has utilized and filed the Rights and Responsibilities of Chapter 13 Debtors and their Attorneys, the professional has the option of utilizing the approved Chapter 13 form application when seeking compensation in excess of that approved at the time of confirmation.

Copies of the approved form applications are available in the Clerk's Office.

Time Records

10. **Time Records Required**—All professionals, except auctioneers, real estate brokers, appraisers and those employed on a contingency fee basis, must keep accurate contemporaneous time records. The Court may, however, specifically direct that time records be kept on a contingent fee matter.

11. **Time Records By Project**—In any application ***exceeding $10,000,*** or where the professional's anticipated services for the case ***will exceed $20,000,*** time records should be kept by categories as described in Paragraph 3 relating to Project Billing above. Time records should be sorted, assembled and attached to the application by category corresponding to the discussion in the narrative.

12. **Increments**—Professionals are required to keep time records in minimum increments ***no greater than six minutes.*** Professionals who utilize a minimum billing increment ***greater than .1 hour*** are subject to a substantial reduction of their requests.

13. **Descriptions**—At a minimum, the time entries should identify the person performing the services, the date performed, what was done and the subject involved. Mere notations of telephone calls, conferences, research, drafting, etc., without identifying the matter involved, may result in disallowance of the time covered by the entries.

14. **Clumping**—If a number of separate tasks are performed on a single day, the fee application should disclose the time spent for each such task (i.e., no "grouping" or "clumping").

15. **Conferences**—Professionals should be prepared to explain time spent in conferences with other professionals or paraprofessionals in the same firm. Failure to justify this time may result in disallowance of all fees related to such conferences.

16. **Multiple Professionals**—Professionals should be prepared to explain the need for more than one professional or paraprofessional from the same firm at the same court hearing, deposition or meeting. Failure to justify this time may result in compensation for only the person with the lowest billing rate.

17. **Airplane Travel Time**—Airplane travel time is not compensable, but work actually done during a flight is compensable. If significant airplane travel time is expected in a case, specific guidelines should be obtained for that case.

18. **Administrative Tasks**—Time spent in addressing, stamping and stuffing envelopes, filing, photocopying or "supervising" any of the foregoing is not compensable, whether performed by a professional, paraprofessional or secretary.

Expenses

19. **Firm Practice**—All expenses for which reimbursement is sought must be of the kind, and at the least expensive rate, the applicant customarily charges nonbankruptcy/insolvency clients.

20. **Actual Cost**—Is defined as the amount paid to a third party provider of goods or services without enhancement for handling or other administrative charge.

21. **Documentation**—Must be retained and made available upon request for all expenditures in ***excess of $50.00.*** Where possible, receipts should be obtained for all expenditures.

22. **Office Overhead**—Not reimbursable. Overhead includes: secretarial time, secretarial overtime, word processing time, charges for after-hour and weekend air conditioning and other utilities, and cost of meals or transportation provided to professionals and staff who work late or on weekends.

23. **Word Processing**—Not reimbursable.

24. **Computerized Research**—Actual cost.

25. **Paraprofessional Services**—May be compensated as a paraprofessional under § 330 but not charged or reimbursed as an expense.

26. **Professional Services**—A professional employed under § 327 may not employ, and charge as an expense, another professional (e.g., special litigation counsel employing an expert witness) unless the employment of the second professional is approved by the Court prior to the rendering of services.

27. **Photocopies (Internal)**—Charges must be disclosed on an aggregate and per page basis. If the per page cost ***exceeds 20 cents,*** the professional must demonstrate to the satisfaction of the Court, with data, that the per page cost represents a good faith estimate of the actual cost of the copies, based upon the purchase or lease cost of the copy machine and supplies therefor including the space occupied by the machine, but not including time spent in operating the machine.

28. **Photocopies (Outside)**—Actual cost.

29. **Postage**—Actual cost.

30. **Overnight Delivery**—Actual cost where shown to be necessary.

31. **Messenger Service**—Actual cost where shown to be necessary. An in-house messenger service is reimbursable but the estate cannot be charged more than the cost of comparable services available outside the firm.

32. **Facsimile Transmission**—Actual cost of telephone charges for outgoing transmissions are reimbursable. Transmissions received are reimbursable on a per page basis. If the per page cost ***exceeds 20 cents,*** the professional must demonstrate to the satisfaction of the Court, with data, that the per page cost represents a good faith estimate of the actual cost of the copies, based upon the purchase or lease cost of the facsimile machine and supplies therefor including the space occupied by the machine, but not including time spent in operating the machine.

33. **Long Distance Telephone**—Actual cost.

34. **Automotive Transportation**—Travel of one hour or less round-trip is not reimbursable. Travel expense for trips in excess of one hour round-trip is reimbursable in accordance with the amount allowed by the Internal Revenue Service. (IRC § 274(d) and the current applicable I.R.B. Announcement. At this date the amount is 31 cents per mile.) Travel by a professional, paraprofessional or other staff member between his or her residence and principal place of business is not reimbursable regardless of the day of the week or time of day.

35. **Parking**—Actual cost, provided that parking for professionals, paraprofessionals or other staff member at their principal place of business is not reimbursable regardless of the day of the week or time of day.

36. **Air Transportation**—Air travel is expected to be at regular coach fare for all flights.

37. **Hotels**—Due to wide variation in hotel costs in various cities, it is not possible to establish a single guideline for this type of expense. All persons will be required to exercise discretion and prudence in connection with hotel expenditures.

38. **Meals-Travel**—The cost of lunches while a party is away from the Bay Area, or in the Bay Area from another city, is not re-

imbursable. Reimbursement may be sought for the reasonable cost of breakfast and dinner while traveling.

39. **Meals-Working**—Working meals at restaurants or private clubs are not reimbursable. Reimbursement may be sought for working meals only where food is catered to the professional's office in the course of a meeting with clients, such as a Creditors Committee, for the purpose of allowing the meeting to continue through a normal meal period.

40. **Amenities**—Charges for entertainment, alcoholic beverages, newspapers, dry cleaning, shoe shines, etc. are not reimbursable.

41. **Filing Fees**—Actual cost.

42. **Court Reporter Fees**—Actual cost.

43. **Witness Fees**—Actual cost.

44. **Process Service**—Actual cost.

45. **UCC Searches**—Actual cost.

II. Guidelines Applicable to Trustees

Chapter 7 and Chapter 11 trustees must maintain contemporaneous time records in every case. Time records must be maintained by project categories. At a minimum, project categories should include: (1) Assets Recap (asset analysis and recovery/asset disposition); (2) Investigation of Financial Affairs of the Debtor; (3) Claims Administration and Objections; and (4) Fee Applications. Trustees may add additional categories at their discretion. Trustees are also subject to Guidelines 4, 5 (subject to § 326), 10, 12, 13 and 19-45 dealing with expenses.

In cases in which the trustee's compensation request is anticipated to be ***$15,000*** or less, the trustee may submit a brief narrative description of the services performed and a statement of the amount of time spent. In cases in which the final compensation exceeds ***$15,000,*** or where an interim request is made and it is anticipated that the total compensation requested will exceed ***$15,000,*** the trustee's application must include time records as well as a narra-

tive description of the services performed and comply with the guidelines referenced above.

The guidelines regarding trustee time records shall apply only to cases filed on or after January 1, 1997.

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Appendix C
Notice of Tentative Ruling on Fees, U.S. Bankruptcy Court for the Central District of California

The following is a copy of the form Judge Geraldine Mund (Central District of California Bankruptcy Court) uses for tentative rulings on fee applications.

NOTICE OF TENTATIVE RULING ON FEES

[Seal]
DATE:
TO:
FROM:
RE: Notice of Tentative Ruling
In re
Case No.

Attached is the tentative ruling on fee applications.

You are to transmit this cover sheet and the tentative rulings to all other professionals who have applied for fees (if any) and to the office of the united states trustee.

If you wish to submit on the tentative ruling without appearance, please send a fax to [name], my judicial assistant, at [phone number] and notify her of that fact. The tentative ruling will then become the order of the court. If there is any opposition received to your application (or any party appears to object at the hearing) and they do not

also agree that the tentative ruling will be the order of the court, I will continue this matter to a future date for hearing. If you submit on the tentative, you are to submit a proposed order to the court with the correct amounts, hearing date, copies, envelopes, etc.

Geraldine Mund
Bankruptcy Judge

Appendix D
Order Regarding Chapter 13 Attorney's Fees, U.S. Bankruptcy Court for the Southern District of Texas

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
PLAINTIFF	§	CASE NO.

ORDER REGARDING CHAPTER 13 ATTORNEY'S FEES

The Court, sitting en banc, reviewed the fees of debtors' counsel in several chapter 13 cases. This Court has jurisdiction of this proceeding pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding.

The Court is once again struggling to balance compliance with the Bankruptcy Code's requirement concerning attorney fee disclosure and approval, which apply equally to counsel representing a million dollar corporation and counsel representing a wage earner trying to make ends meet, with the reality that the wage earner, his counsel, and creditors bear an economic cost for this compliance disproportionately high compared to the fees sought and the value of the estate. In the past, this Court analogized the provision of legal services in chapter 13 cases with the production of a standardized commodity with a fixed cost. Under that view, the Court streamlined the process for

chapter 13 attorneys to meet the Bankruptcy Code's requirements for fee disclosure and approval by establishing a "benchmark" for fees, below which the Court did not routinely hold a hearing. Unfortunately, this method has as its unintended consequence the effect of disguising as efficient and productive, debtor representation which is in fact poor or simply unresponsive to the needs of the client and the creditors. Moreover, testimony at the en banc hearing made plain that reasonable minds differ over what services should be included in a "standard" chapter 13 case entitling counsel to the "benchmark" fee.

Testimony at the hearing came from attorneys practicing primarily or exclusively consumer bankruptcy law. Counsel varied in experience from 4 years in practice to more than 20 years, with chapter 13 case filings per month of 10 to 40 or more and hourly rates of $200 and up. The testimony generally agreed that 25% to 30% of services rendered in chapter 13 cases are not ultimately paid due to debtor's inability to pay or because counsel did not seek payment believing that the Court would not compensate the services rendered under the benchmark fee set for chapter 13 cases. Some attorneys deal with the benchmark by avoiding client phone calls, avoiding preparing written responses to motions or objectionable claims, or by screening out potential clients who have problems that cannot be resolved for $1,500.

Adhering to the benchmark causes burnout, a frantic pace and mistakes, and pressures counsel to complete each case within a certain amount of time at a certain cost regardless of whether a particular client wants more responsiveness and is willing to pay more for it. Courts in other districts alleviate the pressure on counsel under a benchmark fee by ending counsel's case responsibilities at confirmation or by limiting the ability of creditors to object to confirmation. Evidence was proffered concerning the rise of the consumer price index and the employment cost index since this Court last evaluated the benchmark fee. Testimony indicated that potential chapter 13 clients seek the lowest possible fee before hiring an attorney. This market demand combined with the competition of experienced reliable consumer counsel should help maintain the availability of low cost competent counsel for debtors of limited means. With these factors in mind and with the goal that competent reliable counsel be available to

serve the ever-increasing numbers of consumer debtors, the Court adopts a market approach to chapter 13 attorney fees and sets aside the benchmark adopted previously. The benefit and necessity of counsel services to the debtor in connection with the case will be evaluated without regard to the benchmark and solely in accordance with the factors set forth in 11 U.S.C. § 330. The Standing Order for Fee Applications for Debtors' Counsel in Chapter 13 Cases entered in 1998, along with its format for Chapter 13 Fee Notice and Chapter 13 Fee Application (together General Order 1998-4) are superseded by this order.[1]

The Court will require fee applications for all fees sought by debtor's counsel for services rendered pre-confirmation. The fee application should be filed and a copy delivered to chambers no later than 5 days prior to confirmation. An order will be entered at confirmation approving the application or setting it for further hearing. To facilitate fee application review and to reduce the costs associated with producing a fee application in the format utilized in chapter 11 cases, counsel may use the truncated format attached to this order as Exhibit 1 in describing the legal services rendered and the actual time expended in the case. Counsel will, nevertheless, need to maintain contemporaneous time records detailing the time expended and hourly rates charged on each case in the event the Court requires a hearing or further submission of information in order to determine the reasonableness or necessity of work performed in a particular case. Counsel will file the fee application with the Court and serve the fee application on debtor, the trustee, the U.S. Trustee and the 5 largest creditors in the case and file a certificate of service with the Court. Pre-confirmation counsel fees will be approved at confirmation of the debtor's plan or set for hearing at that time. Post-confirmation services rendered in the case where debtor's confirmed chapter 13 plan provides for vesting of the property of the estate in the debtor upon confirmation, may be paid directly by debtor, otherwise counsel may file an additional fee application and be paid through debtor's plan.

1. Similarly, all prior formats for presentation of chapter 13 attorneys fees, such as the Fact Form and Fee App are superseded by this order.

Counsel shall also file a timely Rule 2016(b) statement detailing the compensation paid or agreed to be paid within one year before date of filing petition, the source of the compensation, and any agreement to share the compensation and shall update such information with amended Rule 2016(b) statements throughout the case as further fees are incurred until the case is closed.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: * CASE NO.
*
*

CHAPTER 13 FEE APPLICATION

Counsel of Debtor in this case requests allowance of compensation and reimbursement of expenses for the time expended, hourly rates, and expenses incurred shown below. Counsel received no property from the debtor or in connection with the case except $ _____ pre-petition which was expended in the manner set out below. Counsel seeks payment under the plan of $ _____.

Type of Case: Business Case _____ or Consumer Case _____ (check one)

Activity	Attorney Time (approximate)	Paralegal Time (approximate)
Prepetition Client Consultations		
Postpetition Client Consultations		
Schedules, Plan		
Amendments		
341 (Preparation and Attendance)		
Creditor Contact		
Proof of Claim Review		
Motion(s) to Dismiss: # of Motions to Dismiss: 1 2 3 4 5 (circle one)		
Contested Motions: # of Contested Motions: 1 2 3 4 5 (circle one) Specify Type: _____ _____		
Objections to Confirmation: # of Objections to Confirmation: 1 2 3 4 5 (circle one)		

Activity	Attorney Time (approximate)	Paralegal Time (approximate)
Adversary Proceeding(s): # of Adversary Proceedings: 1 2 3 4 5 (circle one) Specify Type: _____ _____		
Claims Objections/Valuation: # of Claims Object./Valuations: 1 2 3 4 5 (circle one) Specify Type: _____ _____		
Confirmation Hearings: # of Confirmation Hearings: 1 2 3 4 5 (circle one)		
Operating Reports		

Name of Attorney/Paralegal	Hourly Rate	Est. Hours	Rate x Hours
1.			
2.			

Expenses
1.
2.

Date: _____

_____
Counsel Name
Counsel Address

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
	§	
DEBTOR(S)	§	CASE NO.
	§	

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of _____, 20__, a true and correct copy of the foregoing Chapter 13 Fee Application has been mailed to the following parties by first class mail:

Debtors

Trustee

U.S. Trustee

Five Largest Creditors

Date: _____ _____

Counsel Name
Counsel Address

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	*	**CASE NO.**
	*	
DEBTOR and	*	XX-XXXXX-HX-13
JOINT DEBTOR	*	
	*	
DEBTOR(S)	*	**Chapter 13**
	*	

ORDER FOR COMPENSATION

The Court, having considered the Chapter 13 Fee Application of Debtor's attorney, [*name of debtor's attorney*], has concluded that the Application sets forth a sufficient factual basis in accordance with the criteria set forth in the matter of [*case name and date*], to warrant granting the relief sought. It is therefore

ORDERED that, [*name of debtor's attorney*], be awarded an allowance of attorney's fees in the amount of $_____, and expenses of $ _____ as an administrative expense.

SIGNED this _____ day of _____, 20__

_____
UNITED STATES BANKRUPTCY JUDGE

Table of Cases

The Federal Judicial Center

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Judge Bernice B. Donald, U.S. District Court for the Western District of Tennessee
Judge Terence T. Evans, U.S. Court of Appeals for the Seventh Circuit
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Judge Pierre N. Leval, U.S. Court of Appeals for the Second Circuit
Judge James A. Parker, U.S. District Court for the District of New Mexico
Judge Stephen Raslavich, U.S. Bankruptcy Court for the Eastern District of Pennsylvania
Judge Sarah S. Vance, U.S. District Court for the Eastern District of Louisiana
Leonidas Ralph Mecham, Director of the Administrative Office of the U.S. Courts

Director

Judge Barbara J. Rothstein

Deputy Director

Russell R. Wheeler

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By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovations & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.