COURT AWARDED ATTORNEYS' FEES: WHAT IS "REASONABLE"? *

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I. INTRODUCTION

In the overwhelming majority of professional matters handled by lawyers, fees are determined privately between attorney and client. This almost invariably is the case when the representation does not involve litigation, unless, of course, a dispute over the fee arises between attorney and client.[1] Even when the representation does involve litigation, the "American rule" on attorneys' fees, which requires each party to a lawsuit to bear the cost of its own lawyer, is firmly entrenched[2] and leaves the matter of attorneys' fees to be resolved in accordance with the contractual arrangement between attorney and client.

The American rule, however, is not without exceptions. In an increasing number of litigation contexts, the critical arena for determining who will ultimately bear the burden for the attorney's services shifts from the lawyer's office to the courtroom. A growing number of federal statutes—more than seventy to date[3]—either

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[1] Although many of the principles discussed in this Article would apply to cases involving fee disputes between attorney and client, those cases are not specifically addressed here. Rather, this Article focuses on those cases where courts are called upon to determine whether, and to what extent, persons other than the client should be required to pay for the services of an attorney with whom they have not expressly contracted.

[2] The American rule often has been criticized. *See, e.g.*, Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Comment, *Court Awarded Attorney's Fees and Equal Access to the Court*, 122 U. PA. L. REV. 636, 648-55 (1974); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967). *See also* Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 437-38 (1973). Nonetheless, the American rule was recently strongly reaffirmed by the Supreme Court in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). For a discussion of the contrary "English rule", see Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

[3] *See* note 104 *infra* & accompanying text.

authorize or mandate courts to award attorneys' fees as part of the relief granted. Moreover, although the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*[4] sharply limits the authority of the federal courts to award attorneys' fees in the absence of such an authorizing statute, the Court in *Alyeska* did reaffirm the historic equity power of the federal courts to compel all of the beneficiaries of a "common fund" recovered or preserved by the plaintiff to pay, out of the fund, their proportionate share of the compensation to which plaintiff's attorneys are entitled.[5] The Court also recognized the established equity power of the federal courts to tax a losing party for its opponent's attorney's fees under a "common benefit" theory, where the party compelled to pay fees was in effect the beneficiary of the lawsuit,[6] and against a party who has proceeded " 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' "[7]

Although the threshold question before the courts in each of these situations is whether an obligation for attorneys' fees should be imposed upon someone other than the contractual client, courts must determine not only "who pays," but also "how much." While courts often describe their effort as fee "shifting," what is involved is more than simply assigning a client's obligation for fees to others.

Under either equitable or statutory rationales for fee awards, the amount the client agreed to pay the attorney does not necessarily determine what others should be compelled to pay by the court. The statutes that authorize a court to award attorneys' fees between parties prescribe that "reasonable" fees shall be taxed.[8] What constitutes a reasonable fee may be more or less than the client is obligated to pay the attorney. It is a determination that ultimately must be made by the court. Nor is the court simply reallocating the client's contractual obligation when it exercises its equitable powers under the common fund or common benefit doctrines. While the client's claim against the other beneficiaries in these situations may be limited to one for contribution for litigation expenses actually incurred,[9] the attorney too has a claim against the bene-

[4] 421 U.S. 240 (1975).

[5] *Id.* 257.

[6] *Id.* For example, an unsuccessful corporate defendant in a stockholder derivative suit can be compelled to pay the attorneys' fees for the plaintiff shareholder where the corporation as a whole has benefited from the lawsuit. Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

[7] 421 U.S. at 258-59, *quoting* F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974).

[8] *See* note 104 *infra* & text accompanying note 114 *infra.*

[9] *See* note 73 *infra* & text accompanying notes 72-75 *infra.*

ficiaries for the reasonable value of his or her services.[10] As will be more fully discussed below, the attorney's contractual agreement with his or her client will not necessarily represent the reasonable value of those services because it may reflect the attorney's expectation of recovering additional compensation from other beneficiaries of the lawsuit. Thus, whether the court is proceeding under statutory or equitable authority, once it has determined that attorneys' fees should be awarded, it cannot escape the task of determining the reasonable fee to assess.

Part II of this article sketches the current confused and conflicting state of the law on how a reasonable attorney's fee is determined. Part III examines the two distinct sources of judicial power to award fees—the equitable power of courts with a proper jurisdictional grant to prevent unjust enrichment, and the statutory authority conferred by Congress to aid the enforcement of designated rights. In either context, the discretion of the courts in determining the proper amount of a fee award is not unlimited. In the equitable cases, courts must exercise their power in a manner consistent with the fundamental purpose of preventing unjust enrichment. Similarly, in the statutory cases courts are constrained to award fees that further the congressional intent of promoting full enforcement of the substantive rights underlying the fee provisions. Although the source and purpose of the court's power in the equitable and statutory contexts are distinct, the analysis in Part III suggests that they lead to the same result: a reasonable fee in either context is one that awards the attorney the market value of the time and effort justifiably expended.

Part IV develops a framework for determining a reasonable fee that is consistent with the purposes of such awards. The approach advanced employs most of the factors considered by courts in the past, purposely excludes others (particularly the results of the lawsuit), and does so within an analytic framework that would bring a greater degree of consistency and objectivity to this expanding judicial activity.

II. The Current State of the Law

Given the frequency with which courts are confronted with the task of fee setting and the impact that it has upon the allocation of legal resources, one would expect a general consensus to have emerged on the manner in which reasonable attorneys' fees should

[10] *See* text accompanying notes 76-81 *infra.*

be determined. On the contrary, there are nearly as many approaches to the issue as there are judges. The Supreme Court has never addressed the question,[11] and most of the courts of appeals have left the matter substantially to the discretion of the district courts.[12] As a result, many lower courts have confronted the problem with little or no analysis; those courts that have been more analytical have adopted widely varying approaches. To a great extent the outcome of these cases has depended upon "the roll of the dice"—from court to court and from case to case.

Until quite recently the most common approach taken by the lower courts in setting fees was no approach at all. A review of all decisions reported in volumes 384-94 of *Federal Supplement* (1974-1975) reveals that of the twenty-eight reported cases involving a fee determination, thirteen contain absolutely no articulated reason for the amount awarded. For example, in *Canterbury v. Dick*,[13] a case brought under the Fair Labor Standards Act of 1938 [14] which authorizes the award of reasonable attorneys' fees,[15] the court merely stated that "[t]he court finds that $2,750.00 is a fair and reasonable attorney's fee for legal services rendered to and for the Plaintiffs by their counsel in the suit; and Plaintiffs are entitled to recover such reasonable attorney's fee in such amount from the Defendants." [16]

[11] On several occasions, however, the Supreme Court has dealt with a party's or attorney's entitlement to recover fees in a particular case. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974); Northcross v. Memphis Bd. of Educ., 416 U.S. 696 (1974); Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Central R.R. v. Pettus, 113 U.S. 116 (1885); Trustees v. Greenough, 105 U.S. 527 (1881). The Court has never squarely considered a question involving the proper amount of a fee award, however.

[12] The latitude conferred upon the district courts in making fee determinations varies considerably among the circuits. The First Circuit has left the manner in which fees are to be set almost entirely to the discretion of the lower courts. *See* Hoitt v. Vitek, 495 F.2d 219, 221 (1st Cir. 1974) ("The specific amount of attorneys' fees is within the judge's discretion."). Several circuits have enumerated lists of factors which the district court should consider in setting fees, *see* note 18 *infra* & accompanying text, and consequently have taken the view that "an analysis by the district court which encompasses [those enumerated] considerations is most assuredly an analysis well within the bounds of trial court discretion." Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). A few courts of appeals, most particularly the Third Circuit, have been more rigorous in their review of fee awards, enumerating a particular analytical framework for fee determinations and confining the lower courts to that analysis. *See* note 28 *infra*.

[13] 385 F. Supp. 1004 (S.D. Tex. 1973).

[14] 29 U.S.C. §§ 201-19 (1970 & Supp. V 1975).

[15] *Id.* § 216(b).

[16] 385 F. Supp. at 1009.

More recently, most of the courts of appeals have recognized that the failure to articulate the reasons for a particular fee award renders the district court's determination effectively unreviewable and constitutes an abuse of discretion.[17] Several of these appellate courts have adopted lists of factors to be considered by the trial judge in making a fee determination.[18] The list enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*,[19] which in turn was based upon the guidelines for private fee arrangements set forth in the American Bar Association's *Code of Professional Responsibility*,[20] is most frequently cited. The court listed twelve factors courts should consider in determining reasonable attorneys' fees:

1) the time and labor required;

2) the novelty and difficulty of the questions;

3) the skill requisite to perform the legal service properly;

4) the preclusion of other employment by the attorney due to acceptance of the case;

5) the customary fee;

6) whether the fee is fixed or contingent;

7) time limitations imposed by the client or the circumstances;

8) the amount involved and the results obtained;

9) the experience, reputation, and ability of the attorneys;

10) the "undesirability" of the case;

11) the nature and length of the professional relationship with the client; and

12) awards in similar cases.[21]

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[17] *See, e.g.*, Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); Monroe v. Bd. of Comm'rs of Jackson, 505 F.2d 105, 109 (6th Cir. 1974); Evans v. Sheraton Park Hotel, 503 F.2d 177, 187-88 (D.C. Cir. 1974); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); Detroit v. Grinnell Corp., 495 F.2d 448, 473-74 (2d Cir. 1974); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974); Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 170 (3d Cir. 1973).

[18] *See, e.g.*, Kerr v. Screen Extras Guild, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); Doe v. Poelker, 515 F.2d 541, 548 (8th Cir. 1975); Monroe v. Board of Comm'rs of Jackson, 505 F.2d 105, 109 (6th Cir. 1974); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).

[19] 488 F.2d 714, 717-19 (5th Cir. 1974).

[20] ABA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 2-106(B).

[21] 488 F.2d at 717-19. By no means have the relevant factors listed by various courts been uniform. *Compare id. with* Arenson v. Board of Trade of Chicago, 372

Simply providing the lower courts with an exhaustive checklist of relevant factors, however, has done little to eliminate the confusion. Many courts have done little more than give lip service to their consideration of such factors. *Meyers v. Clearview Dodge Sales, Inc.*[22] is typical. After determining that a fee award was appropriate under the Truth-in-Lending Act,[23] the court stated:

> In determining the amount of the fee in this case, we have referred to the factors outlined by the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., . . . a Title VII case. We are further aware of the time and effort expended by plaintiff's counsel, much of which was occasioned by the defendants' strenuous and able defense. Considering all of these factors, plaintiff is entitled to recover the sum of $3,000 as a reasonable attorney's fee.[24]

Other courts have discussed some or all of the factors *seriatim* and then jumped to a no less conclusory judgment.[25]

The fundamental problem with an approach that does no more than assure that the lower courts will consider a plethora of conflicting and at least partially redundant[26] factors is that it provides no analytical framework for their application. It offers no guidance on the relative importance of each factor, whether they

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F. Supp. 1349, 1351-52 (N.D. Ill. 1974) *and* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258, 302 (M.D. Pa. 1965), *vacated on other grounds,* 377 F.2d 776 (3d Cir. 1967), *aff'd in part, rev'd in part,* 392 U.S. 481 (1968) *and* In Re Osofsky, 50 F.2d 925, 927 (S.D.N.Y. 1931).

[22] 384 F. Supp. 722 (E.D. La. 1974), *aff'd in part, rev'd in part on other grounds,* 539 F.2d 511 (5th Cir. 1976).

[23] 15 U.S.C. § 1640(a)(2) (1970) (current version at 15 U.S.C. § 1640(a)(3) (Supp. IV 1974)).

[24] 384 F. Supp. at 729.

[25] *See, e.g.,* Kelsey v. Weinberger, No. 1660-73 (D.D.C. April 8, 1975); National Council of Community Mental Health Centers v. Weinberger, 387 F. Supp. 991, 995-97 (D.D.C. 1974), *rev'd on other grounds sub nom.* National Council of Community Mental Health Centers v. Matthews, 546 F.2d 1003 (D.C. Cir. 1976); Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221 (N.D. Ill. 1972); TWA v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970), *modified on other grounds,* 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973) (in a case involving a $7.5 million fee award); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258, 302-03 (M.D. Pa. 1965), *vacated on other grounds,* 377 F.2d 776 (3d Cir. 1967), *aff'd in part, rev'd in part,* 392 U.S. 481 (1968).

[26] For example, the "time and labor required" (*Johnson* factor 1) usually will substantially reflect the "novelty and difficulty of the questions" involved in the case (*Johnson* factor 2).

are to be applied differently in different contexts, or, indeed, how they are to be applied at all.[27]

A few circuits recognize that such an approach is an invitation to further confusion and have adopted a particular analytical framework to be used by lower courts in setting fees.[28] While this development should bring some measure of consistency to fee calculations in those circuits, the approaches adopted are by no means uniform; moreover, these formulations contain significant defects.[29]

The most significant disparity in the manner of fee setting is between those courts that have stressed the results achieved (the output of the lawsuit) and those that have stressed the amount of time expended by the attorneys (the input of the attorneys). For many courts, particularly where damages are recovered by the plaintiff, "[t]he key criterion for the award of counsel fees is not the time spent but the amount of recovery." [30] Many of these courts simply have awarded counsel a flat percentage of the recovery.[31] Others, while rejecting the idea of applying a percentage

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[27] As a consequence, different courts have applied the same factor in contrary ways. For example, some courts have viewed the fact that benefits were conferred on the general public by the litigation as a consideration that should increase the award, while other courts have seen this factor as one which should lower it. *Compare*, for example, the opinion of the court of appeals in Kiser v. Huge, 517 F.2d 1237, 1254 (D.C. Cir. 1974), *with* the district court opinion it affirmed in this respect, Kiser v. Miller, 364 F. Supp. 1311, 1318, 1320 (D.D.C. 1973), *modified sub nom.* Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974). Several courts have taken account of the contingent nature of the representation only when the client agreed to pay the attorney a percentage of the recovery if successful, while other courts have recognized a contingency factor whenever the attorney has taken the case without a guarantee of full payment. *Compare* Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117 (3d Cir. 1976) *with* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974).

[28] The initiative in this direction has come from the Third Circuit. In three recent cases it has prescribed an approach that awards fees based upon the normal hourly rate for the time expended, "adjusted" for the contingency of the case and the quality of the attorney's effort as reflected in the court's evaluation of the work it observed, the complexity of the issues, and the result achieved. *See* Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976); Merola v. Atlantic Richfield Co., 515 F.2d 165 (3rd Cir. 1975); Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973). The *Lindy* approach has been adopted by the District of Columbia Circuit, National Treasury Employees Union v. Nixon, 521 F.2d 317 (D.C. Cir. 1975), and, at least for certain cases, by the Eighth Circuit, Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). The Second Circuit has outlined a similar, although not identical approach. *See* Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

[29] *See* text accompanying notes 61-68, 83-91 & 144-52 *infra*.

[30] Feder v. Harrington, 58 F.R.D. 171, 177 (S.D.N.Y. 1972).

[31] *See, e.g.*, Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587 (10th Cir. 1961), *appeal dismissed sub nom.* Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962); Feder v. Harrington, 58 F.R.D. 171, 177 (S.D.N.Y. 1972); Rosenfeld v. Black, 56 F.R.D. 604 (S.D.N.Y. 1972); Philadelphia Elec. Co. v. Anaconda American Brass Co., 47 F.R.D. 557 (E.D. Pa. 1969).

to the recovery, have taken the size of the damage award into consideration in arriving at the appropriate hourly rate to apply against the lawyer's time. *Arenson v. Board of Trade of Chicago*[32] is illustrative of this latter approach. After examining the number of hours expended by the plaintiffs' attorneys in obtaining a settlement of that private antitrust action, the court multiplied the hours spent by four times the attorneys' normal billing rates, explaining: "This Court's award of four times the hourly rate of the plaintiffs' attorneys is meant to adequately compensate them for initiating this significant litigation and negotiating such a beneficial settlement for the class . . . .[33]

Those courts that have viewed the results achieved as the essential ingredient of the fee determination have varied dramatically in their ultimate judgment of how much of the recovery the attorneys should receive. Even in cases of a similar nature, the range has been enormous. For example, in eighteen private antitrust cases examined,[34] the fee awarded ranged from five to sixty-seven percent of the treble damages or settlement.[35] Any

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[32] 372 F. Supp. 1349 (N.D. Ill. 1974).

[33] *Id.* 1359.

[34] (Percentages following each case indicate the court awarded attorneys' fees as percentage of treble damages or settlement.) *See* Perkins v. Standard Oil of California, 474 F.2d 549 (9th Cir.), *cert. denied,* 412 U.S. 940 (1973) (12%); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964) (33%); A. C. Becken Co. v. Gemex Corp., 314 F.2d 839 (7th Cir.), *cert. denied,* 375 U.S. 816 (1963) (24%); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587 (10th Cir.), *appeal dismissed,* 371 U.S. 801 (1962) (15%); Clapper v. Original Tractor Cab Co., 270 F.2d 616 (7th Cir. 1959), *cert. denied,* 361 U.S. 967 (1960) (34%); Darden v. Besser, 257 F.2d 285 (6th Cir. 1958) (67%); Twentieth Century-Fox Film Corp. v. Brookside Theater Corp., 194 F.2d 846, 859 (8th Cir.), *cert. denied,* 343 U.S. 942 (1952) (9%); Milwaukee Towne Corp. v. Loews, Inc., 190 F.2d 561, 569 (7th Cir.), *cert. denied,* 342 U.S. 909 (1951) (8%); American Can Co. v. Bruce's Juices, 187 F.2d 919, 920 (5th Cir.), *appeal dismissed,* 342 U.S. 875 (1951) (19%); Woode Exploration & Producing Co. v. Alcoa, [1973] TRADE REG. REP. (CCH), ¶ 74,668 (20%); Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, [1973] TRADE REG. REP. (CCH), ¶ 74,523 (28%); Vandervelde v. Put and Call Brokers & Dealers Ass'n, 344 F. Supp. 157 (S.D.N.Y. 1972) (50%); Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221 (N.D. Ill. 1972) (33%); Hartford Hosp. v. Charles Pfizer & Co., [1972] TRADE REG. REP. (CCH), ¶ 74,112 (10%); TWA v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970), *modified on other grounds,* 449 F.2d 51 (2d Cir.), *rev'd on other grounds,* 409 U.S. 363 (1973) (5%); Hanover Shoe, Inc. v. United Shoe Machine Corp., 245 F. Supp. 258, 303 (M.D. Pa. 1965), *vacated on other grounds,* 377 F.2d 776 (3d Cir. 1967), *aff'd in part on other grounds, rev'd in part on other grounds,* 392 U.S. 481 (1968) (15%); Bal Theatre Corp. v. Paramount Film Distrib. Corp., 206 F. Supp. 708 (N.D. Cal. 1962) (13%); Noerr Motor Freight v. Eastern R.R. Presidents Conference, 166 F. Supp. 163 (E.D. Pa. 1958), *aff'd,* 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds,* 365 U.S. 127 (1961) (31%).

[35] The Clayton Act, 15 U.S.C. § 15 (1970), provides that a successful plaintiff in a private antitrust action "shall" recover three times his or her damages "and the cost of suit, including a reasonable attorney's fee." As a result of that and

attempt to discern a rational basis for the dramatic variation in these cases—based upon the difficulty of the case, its importance to the public, or even the hours devoted by the attorneys—is fruitless.[36]

Although the result achieved has been the most important factor in determining counsel fees for many courts, other courts have considered the results of the lawsuit as supplementary only,[37] and a few courts have essentially ignored the results entirely.[38] For the latter courts, the perceived essential task is to compensate the attorneys for the time they devoted to the lawsuit.[39] However, even among courts that have adopted the time-spent approach there has been substantial differences in analysis, leading to widely disparate results.

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other similar provisions in the antitrust laws, settlements in these cases frequently include an agreement by the defendant to pay reasonable attorneys' fees. Grunin v. International House of Pancakes, 513 F.2d 114, 118 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975); Merola v. Atlantic Richfield Co., 493 F.2d 292, 294 (3d Cir. 1974); Arenson v. Board of Trade of Chicago, 372 F. Supp. 1349, 1350-51 (N.D. Ill. 1974). Where there is no such agreement, courts regularly award counsel fees in settlements of private antitrust class actions out of the common fund, although not always articulating the basis of their authority. *See, e.g.,* Detroit v. Grinnel Corp., 495 F.2d 448, 469 (2d Cir. 1974); Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 164-66 (3d Cir. 1973); In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 680, 689-90 (D. Minn. 1975).

36 The almost uncontrollable impulse of some courts to determine counsel fees based upon the amount of the recovery is well illustrated by Colson v. Hilton Hotels Corp., 59 F.R.D. 324 (N.D. Ill. 1972), a private antitrust case that was settled for slightly in excess of $5 million. After ostensibly rejecting the idea of calculating a fee based upon a percentage of the recovery, suggesting instead that "the primary consideration ought to be the dollar value to be attributed per hour of service," *id.* 327, the court turned to the number of hours that the attorneys had spent on the case—6,238. The court then stated "that $152.29 per hour is a fair award of compensation, the total amount awarded for 6,238 hours coming to $950,000. This amount is about 18.5% of the net settlement sum . . . ." *Id.* 329. It is unlikely that the court determined, in the first instance, that the value of an hour of these attorneys' services was $152.29. Rather it seems clear that, in spite of itself, the court concluded that $950,000 was a reasonable share of the settlement, deriving its hourly rate from arithmetic rather than the marketplace.

37 *See, e.g.,* Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 118 (3d Cir. 1976); National Treasury Employees Union v. Nixon, 521 F.2d 317, 322 (D.C. Cir. 1975); Grunin v. International House of Pancakes, 513 F.2d 114, 129 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975); Merola v. Atlantic Richfield Co., 493 F.2d 292, 298 (3d Cir. 1974); Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973).

38 For example, while the Second Circuit did not specifically rule out consideration of the results as one of the "other, less objective factors [that] can be introduced into the calculus," Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974), it proceeded to outline a framework of analysis which did not include a consideration of results.

39 The Third Circuit calls this the "lodestar" determination, to which adjustments can be made in certain circumstances. *See* Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 112 (3d Cir. 1976).

The first determination for these courts has been the time expended by the attorneys. Some courts have rigorously reviewed the time asserted by the attorneys and the manner in which it was expended; [40] others have engaged in wholesale markdowns with little explanation of why the time claimed was excessive.[41]

In deriving the hourly rate to be applied to the time allowed, courts most frequently start with the attorney's normal billing rate, or the prevailing rate for similar legal services in the community. That rate, however, has been discounted in some contexts and substantially marked up in others. It is not uncommon, for example, for courts to deflate the hourly rate for experienced trial attorneys in civil rights and environmental litigation to as low as thirty dollars,[42] while raising the rate in private antitrust and securities cases to as much as five hundred dollars per hour.[43]

Some courts have based the hourly rate multiplier (which may range as high as 400% of the normal rate [44]) upon the risk of nonrecovery; [45] others, upon the results achieved.[46] Moreover, regardless of which factor is being rewarded by inflating the hourly rate, the process of selecting an appropriate multiplier has been essentially arbitrary. In a recent antitrust class action involving the drug industry, for example, the court, after determining the number of hours and the normal billing rates for the various attorneys and law firms involved, multiplied the hourly compensation by a "risk

[40] *See, e.g.,* Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 382 F. Supp. 999 (E.D. Pa. 1974), *vacated,* 540 F.2d 102 (3d Cir. 1976).

[41] *See, e.g.,* Parker v. Matthews, 411 F. Supp. 1059, 1067 (D.D.C. 1976); Larinoff v. United States, 365 F. Supp. 140, 146-47 (D.D.C. 1973), *aff'd,* 533 F.2d 1167 (D.C. Cir. 1976); Kiser v. Miller, 364 F. Supp. 1311, 1318, 1320 (D.D.C. 1973), *modified on other grounds sub nom.* Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974); United Fed'n of Postal Clerks v. United States, 61 F.R.D. 13 (D.D.C. 1973).

[42] *See, e.g.,* Souza v. Travisono, 512 F.2d 1137, 1140-41 (1st Cir.), *vacated,* 423 U.S. 809 (1975); Red School House v. OEO, 386 F. Supp. 1177, 1199 (D. Minn. 1974); Gilpin v. Kansas State High School Activities Assn., 377 F. Supp. 1233, 1253 (D. Kan. 1974); Kiser v. Miller, 364 F. Supp. 1311, 1318, 1320 (D.D.C. 1973), *modified on other grounds sub nom.* Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974); Wyatt v. Stickney, 344 F. Supp. 387, 410 (N.D. Ala. 1972), *aff'd in part, rev'd in part on other grounds sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[43] *See, e.g.,* In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 680, 694 (D. Minn. 1975); In Re Gypsum Cases, 386 F. Supp. 959, 967 (N.D. Cal. 1974); Arenson v. Board of Trade of Chicago, 372 F. Supp. 1349, 1358-59 (N.D. Ill. 1974); City of Philadelphia v. Chas. Pfizer & Co., 345 F. Supp. 454, 485 (S.D.N.Y. 1972).

[44] *See, e.g.,* Arenson v. Board of Trade of Chicago, 372 F. Supp. 1349, 1358-59 (N.D. Ill. 1974).

[45] *See, e.g.,* In Re Gypsum Cases, 386 F. Supp. 959, 967 (N.D. Cal. 1974).

[46] *See, e.g.,* Arenson v. Board of Trade of Chicago, 372 F. Supp. 1349, 1358-59 (N.D. Ill. 1974).

factor" of from 1 to 3.[47] The court never explained how it distinguished between a multiplier of 2.5 and one of 3. Nonetheless, for the senior attorney in the case, the difference between the maximum "overall rating" of 3 and the minimum of 1 was over $2 million in fees.[48]

Another common approach of courts focussing primarily on the time expended by the attorneys is the addition of a "bonus" or "incentive premium" after calculating the fee based upon a normal hourly rate.[49] But even these courts have differed sharply on what is being rewarded by such a bonus or incentive. In *Kiser v. Miller*,[50] the court awarded the attorney a 10% bonus with no clear explanation of why the reward was justified. In *Pealo v. Farmers Home Administration*[51] the attorneys were awarded a 50% bonus based upon the results achieved. In *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp. (Lindy II)*[52] the Third Circuit affirmed a bonus of 100% based upon the risk involved in the case and the unusually high quality of work performed by the attorneys. In *National Association of Regional Medical Programs, Inc. v. Weinberger*[53] the court awarded plaintiffs' attorneys a 100% bonus based upon an amalgam of factors, some of which already were reflected in the amount of time spent or the normal billing rate. The bonus incorporated

> the benefits conferred upon the class, the benefits conferred upon the public, the contingent nature of the fee arrangement, the difficulty of the issues and the skill demonstrated, the preclusion of other employment, the incentive fee or

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[47] In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions (Doughboy Industries), 410 F. Supp. 680 (D. Minn. 1975). Although the court described its multiplier as a "risk factor," its application of the multiplier to various lawyers and types of work involved in the case indicates that the court in fact was applying what it at one point described as an "overall rating" to the various lawyers' work and contribution. *Id.* 697.

[48] *Id.* 694.

[49] *See, e.g.*, Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 113 (3d Cir. 1976); Pete v. UMW Welfare & Retirement Fund, 517 F.2d 1267, 1272 (D.C. Cir. 1974); Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973); Stanford Daily v. Zurcher, 64 F.R.D. 680, 687-88 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977); Larinoff v. United States, 365 F. Supp. 140, 146-47 (D.D.C. 1973), *aff'd*, 533 F.2d 1167 (D.C. Cir. 1976); United Fed'n of Postal Clerks v. United States, 61 F.R.D. 13, 21 (D.D.C. 1971); Blankenship v. Boyle, 337 F. Supp. 296, 302-03 (D.D.C. 1971).

[50] 364 F. Supp. 1311, 1318 (D.D.C. 1973).

[51] 412 F. Supp. 561, 567-68 (D.D.C. 1976).

[52] 540 F.2d 102, 115-16 (3d Cir. 1976).

[53] 396 F. Supp. 842, 850-51 (D.D.C. 1975).

bonus in similar cases, and the other factors enumerated in *Evans v. Sheraton Park Hotel* . . . .[54]

The only truly consistent thread that runs throughout federal court decisions on attorneys' fees is their almost complete inconsistency. The resulting confused and conflicting state of the law has several unfortunate consequences. First, it inevitably results in unfairness to both attorneys and litigants. At present, the enormous variation in fee awards cannot be explained in terms of the differing facts and circumstances from case to case. Rather, it reflects the dissimilar manner in which various courts approach the job of fee setting. As a result, from court to court and from case to case, attorneys and litigants who are similarly situated are subjected to widely differing treatment.

The generally arbitrary nature of fee awards has generated two conflicting criticisms leveled at the courts. On the one hand, inordinately high fee awards in some cases, and the absence of a coherent rationale for justifiably large awards in other cases, have lent support to the sentiments of the Italian proverb that "a lawsuit is a fruit tree planted in a lawyer's garden." As one commentator has noted, "the bitterest complaints [about the legal profession] from laymen [are directed at] the windfall fees and featherbedding that lawyers have managed to perpetuate through . . . their influence with the judiciary." [55] Others, particularly members of the public interest bar, have contended that fee awards in certain kinds of litigation—environmental and civil rights lawsuits, for example—often have been unreasonably low.[56] Given the current state of the law, both criticisms have merit.

A second consequence of the chaotic state of the law is an excessive amount of litigation concerning the proper fee amount. In some cases the issue of attorneys' fees becomes more complicated, and involves more attorney time, than the underlying lawsuit.[57] Al-

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[54] *Id.* 850.

[55] Graham, *Guest Opinion on Legal Fees: Fluffing the Golden Fleece*, JURIS DOCTOR 10-11 (February, 1973). *See also* Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974); Alpine Pharmacy, Inc. v. Chas. Pfizer, Inc., 481 F.2d 1045, 1049-50 (3d Cir.), *cert. denied*, 414 U.S. 1092 (1973); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 571 (2d Cir. 1968) (Lumbard, J., dissenting); Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221, 224 (N.D. Ill. 1972); Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26, 30 (S.D.N.Y. 1972).

[56] *See, e.g.*, COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 321 (1976).

[57] *See, e.g.*, Kiser v. Miller, 364 F. Supp. 1311, 1316-17 (D.D.C. 1973), *modified sub nom.* Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974) (nearly half of the bulk of paper filed in the case involved attorneys' fee issues); National Council

though lawyers can be expected to assert their fee claims strenuously, a more rational and consistent approach among the courts would greatly reduce the existing necessity of relitigating the ground rules in each case.

A third consequence of the existing state of the law is the arbitrary and haphazard allocation of legal resources. It is clear, for example, that attorneys' fee awards in private antitrust actions under the Clayton Act [58] have generally been substantially higher than awards in employment discrimination cases under Title VII of the Civil Rights Act of 1964.[59] Yet in both cases courts are proceeding under congressionally enacted attorneys' fee provisions designed to encourage private enforcement of the underlying statutory policies. One searches in vain for any expression by Congress of the relative importance of private antitrust versus private civil rights enforcement. Yet the courts have provided far more attractive financial inducements for lawyers to represent private antitrust claimants. If judgments about the relative importance of differing statutory rights are to be made, those judgments should be made deliberately by Congress, not unwittingly by courts in the process of fixing attorneys' fees.[60]

Finally, the high degree of subjectivity involved in most fee decisions is unhealthy for both the legal profession and for the conduct of litigation. Although *In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions (Doughboy Industries)* [61] may be an extreme example of how much can ride on the court's "overall rating" of an attorney,[62] many courts explicitly consider the quality of the attorney's work in determining the amount of the fee award.[63] Such considerations are, of course, a double-edged sword; several courts apparently have decreased the fee award where the work of the attorneys did not meet with their approval. In *Freeman v. Ryan*,[64] for example, the court pointedly noted that

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of Community Mental Health Centers v. Weinberger, 387 F. Supp. 991, 996 (D.D.C. 1974), *rev'd on other grounds sub nom.* National Council of Community Mental Health Centers v. Matthews, 546 F.2d 1003 (D.C. Cir. 1976) (more than half of the time asserted by attorney related to fee questions).

[58] 15 U.S.C. § 15 (1970).

[59] 42 U.S.C. § 2000e-5(k) (1970).

[60] *See* text accompanying notes 128-39 *infra.*

[61] 410 F. Supp. 680 (D. Minn. 1975).

[62] *See* text accompanying notes 47-48 *supra.*

[63] *See, e.g.*, Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117-18 (3d Cir. 1976); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974); Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168-69 (3d Cir. 1973).

[64] 408 F.2d 1204 (D.C. Cir. 1968).

"we would be less than candid if we failed to note that a significant aspect of the research required for the prior opinion had to be undertaken by this court, and . . . the sharpness of tone and approach in various submissions diluted the assistance available from counsel." [65] Grading the quality of attorneys' work in setting their compensation creates an uneasy tension between the attorneys' duty to press their clients' interests vigorously and at times even contentiously before the court, and the fear of the attorneys that, in so doing, they may literally pay the price at the close of the lawsuit. While most lawyers will not pull their punches, nor will most courts arbitrarily punish overassertive attorneys or reward favored ones, those suspicions inevitably will undermine the confidence of the bar and the public in the integrity of the judicial fee-setting function.[66] Upgrading the quality of the litigation bar unquestionably is a worthwhile objective, but there are other methods not requiring that an attorney's compensation in a particular case turn upon the impression he or she makes upon the court.

Even where courts have not expressly evaluated the quality of the attorney's work, the process of fee setting nonetheless has involved a high degree of subjectivity, either because the courts have not articulated the basis for their determinations or because of the high degree of selectivity involved in picking and choosing among almost inexhaustible lists of sometimes conflicting factors. This lack of objective standards and the resulting vulnerability of the courts to the criticism that such awards reflect "the strong fellow-feeling of judges for brothers in the guild" [67] certainly must account, in part at least, for the view expressed by several courts that the practice of awarding attorneys' fees is "delicate, embarrassing and disturbing." [68]

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[65] *Id.* 1206.

[66] In rejecting an abandonment of the basic American rule regarding attorneys' fees, the Supreme Court was concerned with, among other things, "the possibility of a threat being posed to the principle of independent advocacy by having the earnings of the attorney flow from the pen of the judge before whom he argues." F. D. Rich v. Industrial Lumber Co., 417 U.S. 116, 129 (1974). That threat is greatest where the determination of the court cannot be measured against objective standards.

[67] Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 HARV. L. REV. 1597, 1653 (1974).

[68] Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 569 (7th Cir. 1951), *cert. denied,* 342 U.S. 909 (1952); *see* Detroit v. Grinnel Corp., 495 F.2d 448, 469 (2d Cir. 1974).

III. What Is "Reasonable" Must Be Determined in Light of the Source and Purpose of the Court's Powers

The wide range of approaches that district courts have applied in determining reasonable attorneys' fees reflects the broad discretion in fixing fees allowed by the courts of appeals. While it is unquestionably true that, except in unusual circumstances,[69] the district court should establish the fees in the first instance,[70] its discretion is not unlimited. The concept of reasonableness may not be susceptible of mathematical precision, but neither is it devoid of content. The power of the district court to impose extracontractual fee obligations derives from identifiable historical or statutory sources, and that power must be exercised in a manner designed to effectuate its purposes. Thus, the starting point for determining what is a reasonable fee must be an examination of the source and purpose of the courts' authority to award them.

The Supreme Court made clear in *Alyeska* that federal courts do not have roving authority to impose fee obligations whenever they deem it appropriate.[71] Rather, federal courts must derive their authority from one of two distinct sources: (1) the historic equity power of the courts to impose fee obligations in certain definable circumstances, or (2) a statute authorizing or mandating fee awards.

A. *The Equity Power*

In *Alyeska* the Court strictly limited the equity power of the federal courts to award attorneys' fees to certain historically recognized situations. Specifically, the Court reaffirmed three bases for such equitable authority: the common fund, the common benefit, and the bad faith rationales.

Of these three equitable bases, the common fund rationale arises most frequently. It received Supreme Court sanction nearly a century ago in *Trustees v. Greenough.*[72] In that case a bondholder of the Florida Railroad Company sued, on behalf of himself and

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[69] *See, e.g.,* Doe v. Poelker, 515 F.2d 541, 548 (8th Cir. 1975), *rev'd on other grounds,* 97 S. Ct. 2391 (1977); Freeman v. Ryan, 408 F.2d 1204, 1206 (D.C. Cir. 1968).

[70] In one of its earliest decisions on attorneys' fees, the Supreme Court noted that the lower court "has far better means of knowing what is just and reasonable than an appellate court can have." Trustees v. Greenough, 105 U.S. 527, 537 (1882). As the First Circuit has stated, "the lower court . . . has lived with the case and, therefore, is more alert to the merits of each request for counsel fees." Green v. Transitron Elec. Corp., 326 F.2d 492, 496 (1st Cir. 1964).

[71] 421 U.S. at 260.

[72] 105 U.S. 527 (1882).

the other bondholders, the trustees of a land fund that had been pledged as security for the bonds, alleging, *inter alia,* that the trustees were wasting those security assets. The suit succeeded in bringing the assets within the control of the court. The Supreme Court held that the complainant was entitled to reimbursement for his costs, including his attorneys' fees, out of the fund itself.[73] The Court reasoned that

> [i]t would be very hard on [the complainant] to turn him away without any allowance except the paltry sum which could be taxed under the fee-bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.[74]

The Court in *Greenough* applied the traditional equitable principle of unjust enrichment, derived from the law of restitution, which postulates that "enrichment through another's loss is unjust and should be restored." [75] The court's control over the assets that had been recovered or preserved gave it jurisdiction to compel the beneficiaries of the complainant's effort, who had not been personally before the court, to contribute proportionately to the complainant's costs by charging those costs against the fund.

Three years later, in *Central Railroad & Banking Co. of Georgia v. Pettus,*[76] the Supreme Court extended the principle by holding that the attorney has an independent claim to reimbursement from the fund. Several unsecured creditors of the Montgomery and West Point Railroad Company had succeeded in establishing

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[73] While allowing the complainant "his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit," *id.* 537, the Court specifically found objectionable allowances for "the personal services and private expenses of the complainant." *Id.*

[74] *Id.* 532. For a discussion of the history of congressional enactments prescribing the taxable costs which routinely can be recovered in the federal courts, see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-57 (1975). Those provisions are codified at 28 U.S.C. §§ 1920, 1923(a) (1970).

[75] Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation,* 88 HARV. L. REV. 849, 850 (1975). *See also* RESTATEMENT OF RESTITUTION § 1 (1937); RESTATEMENT OF CONTRACTS §§ 5, 348 (1932); 66 AM. JUR. 2d *Restitution and Implied Contracts* §§ 3, 24 (1973).

[76] 113 U.S. 116 (1885).

that their lien on certain property was superior to the rights of a company that had subsequently acquired the property from the railroad. The Court held that "when an allowance to the complainant [out of the fund] is proper on account of solicitors' fees, it may be made directly to the solicitors themselves without any application by their immediate client." [77]

The impact of *Central Railroad,* however, goes beyond the simple proposition that the attorney has standing to assert the client's claim for fee reimbursement against the fund; the Court held that the attorney's cause of action is independent of the client's and is not limited to the amount that the client is obligated to pay. In opposing the award, counsel for the appellants had argued

> that the utmost which the court may do is to charge upon the property such reasonable expenses as complainants themselves incurred, and became directly and personally bound to meet; and, since appellees [the attorneys] have received from the creditors, specially engaging their services, all that those creditors agreed to pay, it cannot be said that the compensation demanded in respect of such as were not parties, otherwise than by filing their claims [against the fund] with the register, constitute a part of the expenses incurred by the complainants.[78]

Noting that this aspect of the general question had not been presented in *Greenough,*[79] the Court proceeded to reject that argument. Acknowledging that the attorneys had received their contractual fee from their clients, the Court nonetheless concluded that the litigation had conferred value on the otherwise worthless bonds of all the unsecured creditors. As a consequence,

> [t]he creditors who were entitled to the benefit of the decree had only to await its execution in order to receive the full amount of their claims; and that result was due to the skill and vigilance of the [attorneys], so far as the result of litigation may, in any case, be referred to the labors of counsel.[80]

Accordingly, the Court held that the attorneys were entitled to "reasonable compensation for their professional services in establishing a lien, on behalf of the unsecured creditors." [81]

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[77] *Id.* 124-25.
[78] *Id.* 125.
[79] *Id.*
[80] *Id.* 126.
[81] *Id.* 127.

Thus, the Court extended the unjust enrichment principle of *Greenough* to encompass the efforts of the attorneys themselves. The efforts of the attorneys conferred a benefit upon an ascertainable class, and the court's control of the assets preserved by those efforts enabled it to prevent beneficiaries not before the court from appropriating the benefits without incurring the costs. In that respect, *Central Railroad* was a logical extension of the restitution principles of *Greenough.*

The Supreme Court then proceeded, in a conclusory fashion that has become characteristic of fee award determinations, to award the attorneys a percentage of the proceeds.[82] In so doing, the Court planted the seed which has matured into the lawyers' fruit tree. As Professor John Dawson has convincingly demonstrated in two recent articles,[83] the proposition that an attorney should be awarded a share of the proceeds of the lawsuit, as a measure of his or her compensation for producing those results, is a misapplication of the restitution principles upon which it rests. Certainly an attorney can contract with his or her client to be paid upon any mutually agreeable basis, including a percentage of the client's recovery. In *Central Railroad,* however, and in the multitude of common fund cases which have followed from it, courts are not enforcing contractual obligations; they are creating extracontractual ones. The courts have jurisdiction to impose such obligations upon nonclient, nonparty beneficiaries because of their control over the fund against which the fee is charged.[84] The rationale for imposing such obligations arises from the equitable principle of unjust enrichment.[85]

[82] *Id.* 128.

[83] Dawson, *supra* note 67; Dawson, *supra* note 75.

[84] Even in class action suits, where the nonclient beneficiaries of the lawsuit are subject to the personal jurisdiction of the court as members of the plaintiff class, courts have been unwilling to impose binding in personam obligations against them for attorneys' fees. The power of the courts to render binding in personam judgments on the absent members of the class, consistent with due process, depends upon the presence of adequate representatives of the class. Hansberry v. Lee, 311 U.S. 32 (1940). As the District of Columbia Circuit recently has held, however, the court has a duty to "undertake a stringent and *continuing* examination" of the adequacy of representation. National Ass'n of Regional Medical Programs v. Mathews, Inc., 551 F.2d 340, 341 (D.C. Cir. 1976) (emphasis added). The court held that when the fee petition is being asserted by the class's counsel, or by the class's representative who attempts to make the absent members of the class responsible for a portion of the fee obligation, the petitioner's interests are adverse to the absent class members. Therefore, neither is an adequate representative for the purpose of imposing an in personam judgment for attorneys' fees against the absent members. *See also* National Council of Community Mental Health Centers, Inc. v. Matthews, 546 F.2d 1003 (D.C. Cir. 1976). A court, however, need not reach the question of in personam jurisdiction when it has jurisdiction over the fund and a fee award from it is not otherwise barred, for example, by 28 U.S.C. § 2412 (1970).

[85] *See* text accompanying note 75 *supra.*

The enrichment is unjust, however, only to the extent that the beneficiaries have not compensated the creator for the losses he or she incurred. Beyond that, the enrichment—even though it may have been unanticipated by the beneficiaries—is not unjust at all, but merely a measure of their legal injury. By awarding attorneys a share of the damages which exceeds the value of their time and effort expended, the courts have applied the extraordinary equitable remedy of fee awards in a way that exceeds its rationale.

Professor Dawson points out that in every other analogous legal context the remedy for one who has conferred an unsolicited benefit upon another is limited to the loss he or she incurred in conferring the benefit.[86] Indeed, in the *Greenough*-type situation the right of the plaintiff to recover is limited to the costs incurred.[87] Yet the attorney, whose capacity to confer a benefit upon others is merely derivative of the client's cause of action, has been treated differently by the courts and has been allowed not only to recover his or her loss but to share in the benefits themselves. Professor Dawson concludes that "[t]here is nothing in the law of restitution, or indeed in the law of contract, that provides either justification or analogy for the profitsharing privileges that have been conferred, uniquely, on lawyers." [88]

That is not to say, however, that the attorney merely stands in the shoes of the client, or that the attorney's claim necessarily will be measured by the contractual obligation of the client. An attorney may agree to take a case on a basis that will not fully compensate the time and effort to be expended because of the expectation that the lawsuit will create or preserve a fund for the benefit of a broader class. To the extent the contract with the client affords the attorney less than the market value of his or her time and effort, the attorney has incurred a loss in the course of conferring benefits

[86] Dawson, *supra* note 75, at 850.

[87] There is no authority for the plaintiff's recovery of a share of the other beneficiaries' damages in addition to recovering litigation expenses.

[88] Dawson, *supra* note 75, at 929. Professor Dawson notes that in some limited contexts

> [r]estitution remedies . . . sometimes award an accounting for profit without any finding of corresponding loss. This occurs primarily where fiduciary obligations have been violated, and in a few types of intentional torts but the motive of deterring wrongdoing in such cases is strong enough to justify, indeed to require, taking away *all* the profit. In the situations to be considered here all elements of misconduct are completely missing. The most that can be said is that successful litigation has cast on strangers, as an inevitable byproduct, some benefit which they retain for the quite sufficient reason that the litigation has proved it to be theirs.

Id. 852 (footnote omitted) (emphasis in original).

upon others.[89] That loss is the measure of the unjust enrichment to the nonclient beneficiaries. Where the court has jurisdiction to prevent such unjust enrichment because of its control over a fund, the attorney will have a claim against the fund for that difference.

In short, the rationale underlying the common fund doctrine supports the plaintiff's recovery of all but his or her share of the actual costs incurred in conferring the benefit upon others,[90] and supports recovery by the attorney of the market value of his or her time and effort, to the extent not so compensated by the client. It does not support more. In fact, if the costs incurred by the attorney exceed the total benefit conferred (the total amount of the fund recovered or preserved), recovery should be limited to the amount of the benefit.[91]

The common benefit theory, for these purposes, is merely a corollary of the common fund principle; it expands the situations in which the court has jurisdiction to award fees, but is grounded upon the same principle of unjust enrichment. Thus, in *Sprague v. Ticonic National Bank* [92] the Supreme Court extended the unjust enrichment rationale for awarding attorneys' fees to a case where the plaintiff did not actually create a fund. The plaintiff in *Sprague* successfully sued the bank to impress a lien upon the proceeds of bonds that had been pledged as security for her trust deposits. In so doing, she also established a similar lien for fourteen other trust depositors who were similarly situated but not before the court.[93] Nonetheless, the Supreme Court upheld an award of her attorneys' fees out of the proceeds of the bonds. The Court reasoned that "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[es] the power of equity in doing justice as between a party and the beneficiaries of his litigation." [94]

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[89] Text accompanying note 167 *infra.*

[90] *But see* note 73 *supra.*

[91] Dawson, *supra* note 75, at 851.

[92] 307 U.S. 161 (1939).

[93] *Id.* 163.

[94] *Id.* 167. This oft-quoted language suggests that an attorney who represents a client in a suit which enables plaintiffs in a separate suit to prevail through *stare decisis* might be entitled to collect attorneys' fees from the plaintiffs of the other suit. No court, however, has yet accepted the Supreme Court's invitation to so extend the common benefit rationale. Dawson, *supra* note 75, at 917-18. Rather, the common benefit rationale has been applied where the losing defendant in fact was the beneficiary of the law suit, as in a shareholder derivative suit. *See, e.g.,* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

The common benefit rationale reached full blossom in *Mills v. Electric Auto-Lite Co.*[95] Shareholders of Electric Auto-Lite brought a stockholder derivative action against the corporation, successfully establishing that its merger with another corporation had been tainted by misleading proxy statements. Although there was no monetary recovery, the Court held that it would be proper to charge the plaintiffs' attorneys' fees to the defendant corporation because the corporation was in fact the beneficiary of the lawsuit. The lower court's jurisdiction over the corporation, as in the case of jurisdiction over a fund, permitted it to prevent the unjust enrichment that would result if the real beneficiaries—all the shareholders—were permitted to enjoy the benefits without incurring the corresponding costs. The Court reasoned that

> [t]he dissemination of misleading proxy solicitations was a 'deceit practiced on the stockholders as a group,' *J. I. Case Co. v. Borak,* [377 U.S. 426, 432 (1964)], and the expenses of petitioners' lawsuit have been incurred for the benefit of the corporation and the other shareholders.
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> . . . .
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> To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit.[96]

Thus, the common benefit rationale is simply a jurisdictional extension of the common fund doctrine. It is not the court's control over a fund which empowers it to prevent the unjust enrichment; it is the court's jurisdiction over the defendant.[97] Nonetheless, the claim of the plaintiff, and that of the attorneys, arise from the same principle of unjust enrichment, and the measure of their remedy—the litigation costs incurred by the plaintiff and the market value of the attorneys' time and effort—is controlled by the same principles that apply to the common fund situation.[98]

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[95] 396 U.S. 375 (1970).

[96] *Id.* 392, 396-97.

[97] The Supreme Court indicated in *Alyeska* that it is proper to impose such an extra-contractual obligation under the common benefit doctrines only where "[t]he benefits [can] be traced with some accuracy, and there [is] reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 264 n.39 (1975).

[98] Nonetheless, courts have been no less inclined in common benefit cases than in common fund cases to award attorneys' fees based upon the results achieved by the lawsuit. At times this effort to quantify essentially intangible benefits has bizarre consequences. In Bakery & Confectionery Workers Int'l Union v. Ratner,

The final equitable rationale for imposing a fee obligation that survives *Alyeska* is the bad faith doctrine. The courts may assess attorneys' fees for " 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant' " [99] or "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " [100] In most of the cases that have applied this rationale, bad faith was found in the defendant's dilatory or obstructionist conduct during the litigation itself,[101] although there is authority for awarding fees based upon the bad faith of the defendant's conduct that gave rise to the litigation.[102]

The bad faith rationale for awarding attorneys' fees is not based upon an unjust enrichment principle. Rather, as the Supreme Court has noted, "the underlying rationale of 'fee shifting' in the bad faith cases is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." [103] Because the purpose of the award is deterrence, it may be less important to protect litigants against whom fees are assessed from unnecessarily high fee awards. Nonetheless, as in the common fund and benefit cases, there does not appear to be any sound justification for awarding the attorneys more than the market value of their time and effort. It is the client who has been injured by the other party's bad faith, not the attorney.

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335 F.2d 691 (D.C. Cir. 1964), for example, the District of Columbia Circuit, in awarding attorneys' fees to several union members who had successfully sued the defendant union because of the misconduct of union officials, held that such fees should be based upon the "value of the benefits [afforded] to the International and its membership." *Id.* 697. Upon remand, the district court concluded that the value of the successful lawsuit was the difference between honest and dishonest union leadership. Moschetta v. Cross, 241 F. Supp. 347, 349-51 (D.D.C. 1964). As a measurement of this benefit, the court awarded the attorneys 12.5% of the average annual union dues paid by the membership. The court of appeals affirmed. Ratner v. Bakery & Confectionery Workers Int'l Union, 354 F.2d 504 (D.C. Cir. 1965).

[99] 421 U.S. at 258, *quoting* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

[100] 421 U.S. at 258-59, *quoting* F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974).

[101] *See, e.g.,* Red School House, Inc. v. OEO, 386 F. Supp. 1177, 1193-94 (D. Minn. 1974); Gates v. Collier, 371 F. Supp. 1368 (N.D. Miss.), *aff'd,* 489 F.2d 298 (5th Cir. 1973), *vacated and remanded,* 522 F.2d 81 (5th Cir. 1975); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), *aff'd,* 409 U.S. 942 (1972).

[102] *See, e.g.,* Doe v. Poelker, 515 F.2d 541, 548 (8th Cir. 1975), *rev'd on other grounds,* 97 S. Ct. 2391 (1977). *See also* Hall v. Cole, 412 U.S. 1, 15 (1973); Schlein v. Smith, 160 F.2d 22, 25 (D.C. Cir. 1947); Miller v. Carson, 401 F. Supp. 835, 853-57 (M.D. Fla. 1975); Kiser v. Miller, 364 F. Supp. 1311, 1320 (D.D.C. 1973), *aff'd in part, rev'd in part sub nom.* Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974).

[103] Hall v. Cole, 412 U.S. 1, 5 (1973).

As long as the attorney is compensated fully for all of his or her time, including the extra time necessitated by the opposing party's intransigence, it is difficult to perceive why counsel should receive a windfall because of the adversary's bad faith.

B. *Statutory Power*

After *Alyeska,* in the absence of a common fund, a common benefit, or bad faith, the federal courts do not have the power to award attorneys' fees unless such authority has been specifically conferred upon them by the federal statute under which the plaintiff seeks relief. To date, at least seventy-five such statutory grants of authority have been enacted by Congress.[104] Almost all of these

[104] *See* Federal Contested Elections Act § 17, 2 U.S.C. § 396 (1970); Act of Nov. 21, 1974 (Freedom of Information Act amendments) § 1(b)(2), 5 U.S.C. § 552(a)(4)(E) (Supp. V 1975); Privacy Act of 1974 § 3, 5 U.S.C. § 552a(g)(2)(B) (Supp. V 1975); Government in the Sunshine Act § 3, 5 U.S.C.A. § 552b(i) (Supp. 1977); Workmen's Compensation Acts § 208, U.S.C. § 8127(b) (1970); Commodity Futures Trading Commission Act of 1974 § 106, 7 U.S.C. §§ 18(f), (g) (Supp. V 1975); Packers and Stockyards Act, 1921 § 309, 7 U.S.C. § 210(f) (1970); Perishable Agricultural Commodities Act, 1930 § 7, 7 U.S.C. §§ 499g(b), (c) (1970 & Supp. IV 1973); Agricultural Fair Practices Act of 1967, § 6, 7 U.S.C. §§ 2305(a), (c) (1970); Plant Variety Protection Act § 125, 7 U.S.C. § 2565 (1970); Bankruptcy Act § 1, 11 U.S.C. §§ 205, 641, 643, 644 (1970); Home Owners Loan Act of 1933, 12 U.S.C. § 1464(d)(8) (1970), *as amended by* Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 102(a), 80 Stat. 1036 (1966); National Housing Act, 12 U.S.C. § 1730(m), *as amended by* Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 102(a), 80 Stat. 1036 (1966); Federal Credit Union Act, 12 U.S.C. § 1786(o) (1970), *as amended by* Act of Oct. 19, 1970, Pub. L. No. 91-468, § 1(3), 84 Stat. 1010 (1970); Federal Deposit Insurance Act, 12 U.S.C. § 1818(n) (1970), *as amended by* Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 202, 80 Stat. 1036 (1966); Bank Holding Company Act Amendments of 1970 § 106(e), 12 U.S.C. § 2607(d) (Supp. V 1975); Clayton Act § 4, 15 U.S.C. § 15 (1970); Clayton Act § 4, 15 U.S.C.A. § 15c (Supp. 1977), *as amended by* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1394; Clayton Act § 16, 15 U.S.C.A. § 26 (1976), *as amended by* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 302(3), 90 Stat. 1396; Federal Trade Commission Act, 1975 Amendments § 202(a), 15 U.S.C. § 57a(h) (Supp. V 1975); Unfair Competition Act § 801, 15 U.S.C. § 72 (1970); Securities Act of 1933 § 11, 15 U.S.C. § 77k(e) (1970); Trust Indenture Act of 1939 § 323, 15 U.S.C. § 77www(a) (1970); Securities Exchange Act of 1934 §§ 9, 18, 15 U.S.C. §§ 78i(e), 78r(a) (1970); Jewelers' Liability Act (Gold and Silver Articles) § 1(b), 15 U.S.C. § 298(b), (c), (d) (1970); National Traffic and Motor Vehicle Safety Act of 1966 § 111, 15 U.S.C. § 1400 (1970); Truth in Lending Act § 408(a), 15 U.S.C. § 1640(a) (Supp. V 1975); Consumer Leasing Act of 1976 § 3, 15 U.S.C.A. § 1667b (Supp. 1977); Fair Credit Reporting Act § 601, 15 U.S.C. §§ 1681(n), (o) (1970); Equal Credit Opportunity Act § 503, 15 U.S.C. § 1691(e) (Supp. V 1975), *redesignated as* § 1691e(d) *and amended by* Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, § 6, 90 Stat. 253 (1976); Motor Vehicle Information and Cost Savings Act §§ 109, 409, 15 U.S.C. §§ 1918, 1989(a)(2) (Supp. V 1975); Consumer Product Safety Commission Improvements Act of 1976 §§ 10(a), (b), 15 U.S.C.A. §§ 2059(e), 2060(c) (Supp. 1977); Consumer Product Safety Act §§ 23, 24, 15 U.S.C. §§ 2072, 2073 (Supp. V 1975), *as amended by* Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No.

statutory fee provisions confer the right to recover attorneys' fees upon the parties themselves, rather than upon the attorneys.[105] Most of these provisions leave the question whether to award attorneys' fees to the discretion of the court,[106] although some make the award of attorneys' fees a mandatory part of the statutory remedy; [107] some authorize fee awards, in the discretion of the court,

94-284, §§ 10(c), (d), 90 Stat. 503 (1976); Hobby Protection Act § 3, 15 U.S.C. § 2102 (Supp. V 1975); Magnuson-Moss Warranty–Federal Trade Improvement Act § 110(a)(5), 15 U.S.C. § 2310(d) (Supp. V 1975); Copyrights Act § 1, 17 U.S.C. § 116 (1970), *redesignated as* § 505 *and amended by* Pub. L. No. 94-553, § 101, 90 Stat. 2541 (1976); Organized Crime Control Act of 1970 § 901(a), 18 U.S.C. § 1964(c) (1970); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2520 (1970); Emergency School Aid Act § 718, 20 U.S.C. § 1617 (Supp. V 1975); American-Mexican Chamizal Convention Act of 1964 § 5, 22 U.S.C. § 277d-21 (1970); International Claims Settlement Act of 1949 § 4, 64 Stat. 13 (1950) (current version at 22 U.S.C. § 1623(f) (1970)); Act of June 25, 1948 (Federal Tort Claims), ch. 646, 62 Stat. 984 (1948) (current version at 28 U.S.C. § 2678 (1970)); Norris-LaGuardia Act § 7, 29 U.S.C. § 107(e) (1970); Fair Labor Standards Amendments of 1974, § 6(d)(1), 29 U.S.C. § 216(b) (Supp. V 1975); Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C. § 1132(g) (Supp. V 1975); State and Local Fiscal Assistance Amendments of 1976 § 7(b), 31 U.S.C.A. § 1244(e) (Supp. 1977); Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 §§ 13, 15, 33 U.S.C. §§ 928, 933 (Supp. V 1975); Federal Water Pollution Control Act Amendments of 1972 §§ 505, 507, 33 U.S.C. §§ 1365(d), 1367(c) (Supp. V 1975); Marine Protection, Research, and Sanctuaries Act of 1972 § 105, 33 U.S.C. § 1415(g)(4) (Supp. V 1975); Deepwater Port Act of 1974 § 16(d), 33 U.S.C. § 1515(d) (Supp. V 1975); Patent Infringement Act § 1, 35 U.S.C. § 285 (1970); Safe Drinking Water Act § 1449(d), 42 U.S.C. § 300j-8 (Supp. V 1975); Social Security Act § 206, 42 U.S.C. § 406 (1970); Clean Air Act § 12a, 42 U.S.C. § 1857h-2(d) (1970); Voting Rights Act Amendments of 1975 § 402, 42 U.S.C. § 1973l(e) (Supp. V 1975); Civil Rights Attorney's Fees Awards Act of 1974 § 2, 42 U.S.C.A. § 1988 (1976); Civil Rights Act of 1964 §§ 204, 706, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1970); Atomic Energy Act of 1954 § 1, 42 U.S.C. § 2184 (1970); Fair Housing Act of 1968 § 812, 42 U.S.C. § 3612(c) (1970); Crime Control Act of 1976 § 122(b), 42 U.S.C.A. § 3766(c)(4)(B) (1976); Noise Control Act of 1972 § 12, 42 U.S.C. § 4911(d) (Supp. V 1975); National Mobile Home Construction and Safety Standards Act of 1974 § 613, 42 U.S.C. § 5412(b) (Supp. V 1975); Railway Labor Act § 3, 45 U.S.C. § 153(p) (1970); Shipping Act, 1916 § 30, 46 U.S.C. § 829 (1970); Communications Act of 1934 §§ 206, 407, 47 U.S.C. §§ 206, 407 (1970); Act of Mar. 3, 1887 (aliens holding land) § 6, 48 U.S.C. § 1506 (1970); Interstate Commerce Act §§ 8, 16, 220, 308, 417, 49 U.S.C. §§ 8, 15(9), 16(2), 322(b), 908(b), 1917(b) (1970); Natural Gas Pipeline Safety Act Amendments of 1976 § 8, 49 U.S.C.A. § 1686e (1976); Housing and Rent Act of 1947, § 205, 61 Stat. 199 (1947) (repealed 1948); Defense Production Act of 1950, § 409, 64 Stat. 811 (1950) (repealed 1951).

[105] There are few exceptions. *See, e.g.*, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 § 13, 33 U.S.C. § 928 (Supp. V 1975) (in an administrative proceeding necessitated by employer's controversion of employee's workmen's compensation claim, reasonable attorneys' fees taxed against unsuccessful employer and paid directly to the attorney).

[106] *See, e.g.*, Privacy Act of 1974 § 3, 5 U.S.C. § 552a(g)(2)(B) (Supp. V 1975); Agricultural Fair Practices Act of 1967 § 6, 7 U.S.C. § 2305(c) (1970).

[107] *See, e.g.*, Packers and Stockyards Act, 1921 § 309, 7 U.S.C. § 210(f) (1970); Bank Holding Company Act Amendments of 1970 § 106(e), 12 U.S.C. § 1975 (1970).

to either party.[108] Some allow them only to parties who have "prevailed" [109] or "substantially prevailed" [110] on the merits; several provide for fee awards "in the interests of justice;" [111] a few provide for fee awards only in "exceptional cases."[112] Almost all are statutory exceptions to the American rule in that they provide for the taxation of fees against the opposing party, in addition to any other relief obtained.[113]

Although these statutory attorneys' fee provisions vary somewhat in their entitlement standards (the circumstances under which a party is eligible for a fee award), they are virtually identical in their language pertaining to the amount of the award where one is appropriate. They provide that "reasonable" attorneys' fees should be awarded. Moreover, they almost never attempt to define "reasonable." [114]

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[108] *See, e.g.,* Securities Act of 1933 § 11, 15 U.S.C. § 77k(e) (1970); Employee Retirement Income Security Act § 502, 29 U.S.C. § 1132(g) (Supp. V 1975).

[109] *See, e.g.,* Consumer Product Safety Act §§ 23, 24, 15 U.S.C. §§ 2072, 3072 (Supp. V 1975), *as amended by* Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, §§ 10(c), (d), 90 Stat. 503 (1976). Perishable Agricultural Commodities Act, 1930 § 7, 7 U.S.C. § 499g(b) (1970); Packers and Stockyards Act, 1921 § 309, 7 U.S.C. § 210(f) (1970).

[110] *See, e.g.,* Privacy Act of 1974 § 3, 5 U.S.C. § 552a(g)(2)(B) (Supp. V 1975); Freedom of Information Act Amendments § 1(b)(2), 5 U.S.C. § 552(a)(4)(E) (Supp. V 1975).

[111] *See, e.g.,* Consumer Product Safety Act §§ 22, 23, 15 U.S.C. §§ 2072, 2073 (Supp. V 1975), *as amended by* Pub. L. No. 94-284, §§ 10(c), (d), 90 Stat. 507 (1976).

[112] *See, e.g.,* Plant Variety Protection Act § 125, 7 U.S.C. § 2565 (1970); Patent Infringement Act § 1, 35 U.S.C. § 285 (1970). The Fair Housing Act of 1968 § 812, 42 U.S.C. § 3612(c) (1970), provides that the court may award fees to a prevailing plaintiff if, in the opinion of the court, the plaintiff is not financially able to assume his or her attorneys' fees.

[113] A few of the attorneys' fee provisions enable courts to award reasonable attorneys' fees out of the recovery rather than from the opposing party. *See* International Claims Settlement Act of 1949 § 4, 64 Stat. 13 (1950) (current version at 22 U.S.C. § 1623(f) (1970)); American-Mexican Chamizal Convention Act of 1964 § 5, 22 U.S.C. § 277d-21 (1970); Act of June 25, 1948, 62 Stat. 984 (1948) (current version at 28 U.S.C. § 2678 (1970)). These few exceptions appear to proceed from a different premise than the other statutes in that they exhibit a desire to control statutorily the amount that attorneys can recover from their clients. For example, the American-Mexican Chamizal Convention Act of 1964 provides, in addition to the fee award, that it shall be a misdemeanor for attorneys to charge their clients more than 10% of the award. 22 U.S.C. § 277d-21. The other two statutes cited in this footnote have been amended to remove the fee award provisions. They retain the fee limitations, however. *See,* 22 U.S.C. § 1623(f) (1970); 28 U.S.C. § 2678 (1970). Thus, these provisions are not statutory exceptions to the American rule at all, but rather are statutory controls upon the contractual rights of attorneys and their clients.

[114] Two recent enactments provide welcome exceptions to that general rule. *See* Consumer Product Safety Commission Improvements Act of 1976, 15 U.S.C.A. § 2059(e)(4) (Supp. 1977); Natural Gas Pipeline Safety Act Amendments of

In determining the meaning and dimensions of "reasonable" attorneys' fees under these statutes, the courts do not have unlimited discretion. As with the interpretation of any other congressional enactment, courts must apply this statutory language in the manner that will best effectuate Congress' purpose. But while the courts have at times looked to those purposes in deciding whether or not they have authority to award a fee in a particular case,[115] they rarely set about the job of fee-setting with a similar appreciation of the limitations upon their discretion.

Although for many of the statutory attorneys' fee provisions little legislative history exists, it is clear from the legislative history available that the fundamental purpose of these provisions is to encourage full enforcement of the substantive rights to which they are attached. The statutes are premised upon the proposition that private enforcement is essential to the effectuation of the substantive statutory scheme and that the award of attorneys' fees is essential to effective private enforcement.

Congress explicitly expressed this purpose in connection with one of its most recent enactments of an attorneys' fee provision—the only instance in which Congress has enacted legislation dealing solely with attorneys' fee awards. The House Committee on the Judiciary explained the purpose of the Civil Rights Attorney's Fees Awards Act of 1976 [116] as follows:

1976, § 8, 49 U.S.C.A. § 1686e (Supp. 1977). The Consumer Product Safety Commission Improvement Act of 1976 provides:

> [A] reasonable attorney's fee is a fee (A) which is based upon (i) the actual time expended by an attorney in providing advice and other legal services in connection with representing a person in an action brought under this subsection, and (ii) such reasonable expenses as may be incurred by the attorney in the provision of such services, and (B) which is computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee .

15 U.S.C.A. § 2059(e)(4) (Supp. 1977).

Although this formulation conforms in part to the approach suggested by this Article, *see* text accompanying notes 140-72 *infra*, it does not account for the risk of nonrecovery, *see* text accompanying notes 168-72 *infra*, and it leaves a certain ambiguity regarding the prevailing rate to be applied. Hopefully, however, this statutory interpretation of "reasonable" attorney fees—as far as it goes—will provide some guidance to courts which must interpret provisions for reasonable attorneys' fees found in other statutes. *See* note 104 *supra*.

[115] *Compare* National Resources Defense Council, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973) *with* National Resources Defense Council, Inc. v. EPA, 512 F.2d 1351, 1356-58 (D.C. Cir. 1975). *See also* Citizens Ass'n of Georgetown v. Washington, 535 F.2d 1318 (D.C. Cir. 1976); Rosenfeld v. Southern Pac. Co., 519 F.2d 527 (9th Cir. 1975); United States Steel Corp. v. United States, 519 F.2d 359 (3d Cir. 1975).

[116] 42 U.S.C.A. § 1988 (Supp. 1977).

> The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.[117]

Similarly, in its 1975 reenactment of the Voting Rights Act,[118] Congress provided for a private right of action to enforce the Act and authorized courts to award reasonable attorneys' fees to a prevailing party. The Senate Judiciary Committee explained the purpose of the amendments:

> The amendment proposed by S. 1279 would authorize courts to grant . . . relief to private parties in suits brought to protect voting rights in covered and noncovered jurisdictions. . . . In enacting remedial legislation, Congress has regularly established a dual enforcement mechanism. It has, on the one hand, given enforcement responsibility to a governmental agency, and on the other, has also provided remedies to private persons acting as a class or on their own behalf. The Committee concludes that it is sound policy to authorize private remedies to assist the process of enforcing voting rights.
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> Section 402 allows a court, in its discretion, to award attorneys' fees to a prevailing party in suits to enforce the voting guarantees of the Fourteenth and Fifteenth amendments, and statutes enacted under those amendments. . . . Such a provision is appropriate in voting rights cases because there, as in employment and public accommodations cases, and other civil rights cases, Congress depends heavily upon private citizens to enforce the fundamental rights involved. Fee awards are a necessary means of enabling private citizens to vindicate these Federal rights.
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> . . . .

117 H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976).

118 42 U.S.C. § 1973*l* (Supp. V 1975).

> In several hearings held over a period of years, the Committee has found that fee awards are essential if the Constitutional requirements and Federal statutes to which [section 402 applies] are to be fully enforced. We find that the effects of such fee awards are ancilliary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance.[119]

When applying these attorneys' fee statutes, the Supreme Court has emphasized that their purpose is to encourage full enforcement of the underlying statutory duties by assuring that, as a practical matter, the private remedy for violation of those duties will be available to aggrieved persons. Interpreting the purposes of the attorneys' fee provision of Title II (public accommodations) of the Civil Rights Act of 1964, the Court explained:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to

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[119] S. REP. No. 295, 94th Cong., 1st Sess. 40-41 (1975) (footnote omitted). *See also* S. REP. No. 854, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6267 (relating to Freedom of Information Act Amendments of 1974); S. REP. No. 1183, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6916 (relating to Privacy Act Amendments of 1974); S. REP. No. 1084, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5519 (relating to Bank Holding Company Act); H.R. REP. No. 1033, 92d Cong., 2d Sess. (1972) (relating to Motor Vehicle Information Act); H.R. REP. No. 928, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 3592 (relating to Jewelers' Hall-Mark Act); H.R. REP. No. 159, 93d Cong., 1st Sess. (1973), *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2719 (relating to Hobby Protection Act); H.R. REP. No. 533, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4639 (relating to Employee Retirement Income Security Act); S. REP. No. 414, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668 (relating to Federal Water Pollution Control Act Amendments of 1972); S. REP. No. 1146, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5356 (relating to Clean Air Amendments of 1970).

A recent piece of legislative history pointedly discusses the *Alyeska* decision and asserts that the fee provisions are being passed in part in response. H.R. REP. No. 499, 94th Cong., 2d Sess. 18-20 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2588-90 (relating to Hart-Scott-Rodino Antitrust Improvements Act of 1976).

> bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. *Congress therefore enacted the provisions for counsel fees*—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, *to encourage individuals injured by racial discrimination to seek judicial relief under Title II.*[120]

Based upon the legislative history and judicial interpretation of these attorneys' fee provisions, it is evident that Congress had two related objectives. First, it sought to achieve the fullest possible voluntary compliance with the statutory duties imposed by providing a private remedy that is readily available. In this sense the attorneys' fee provisions act as a deterrent to noncompliance. As former Secretary of Commerce Elliot Richardson explained in support of such provisions in the Freedom of Information Act Amendments: "Enforcement provisions are needed . . . to create a strong and reliable incentive to overcome the initial bureaucratic resistance to change that might otherwise prove to be a crucial obstacle to the prompt and full achievement of fair information practice." [121] Second, the availability of an award of attorneys' fees enables those who have been aggrieved by a violation of the statute to vindicate their rights, both for themselves and, acting as private attorneys general, for others similarly situated. In this sense the attorneys' fees provisions have the avowed purpose of encouraging litigation

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[120] Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-02 (1968) (emphasis supplied) (footnotes omitted). *See also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975) ("under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation." *Id.*); Northcross v. Board of Educ., 412 U.S. 427, 428 (1973).

[121] S. REP. No. 1183, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6916, 6942. *Cf.* Fitzgerald v. United States Civil Serv. Comm'n, 407 F. Supp. 380, 387 (D.D.C. 1975) (a post-*Alyeska* decision construing § 7701 of the Veterans Preference Act to allow awards of attorneys' fees despite lack of specific Congressional authorization). The *Fitzgerald* court reasoned that:

> It is particularly in such cases that the need for attorneys' fees is greatest, lest government officials such as the ones involved here be free to harass or victimize disfavored employees, secure in the knowledge that the employee will either be wholly unable to stand up for his or her rights because of the staggering cost of the prospective fees involved, or, even if the employees is especially courageous and tenacious, will be left with a legal bill which to virtually all federal employees would be financially catastrophic.

Id.

by those who are injured under the statute.[122] Moreover, they provide more equal access to judicial remedies for those protected by the statute. They proceed from the assumption that the wealth of the victim should not determine his or her capability to enforce the particular rights conferred. As Senator Strom Thurmond argued in support of the attorneys' fee provision of the Freedom of Information Act Amendments:

> We must insure that the average citizen can take advantage of the law to the same extent as the giant corporations with large legal staffs. Often the average citizen has foregone the legal remedies supplied by the Act because he has had neither the financial nor legal resources to pursue litigation when his Administrative remedies have been exhausted.[123]

In short, statutory attorneys' fee provisions are intended to achieve the fullest possible enforcement of the congressional policy embodied in the underlying statutory scheme. Reasonable attorneys' fees under these statutes are those which will best achieve that purpose. In fixing fees under these statutory attorneys' fee provisions, however, the courts have applied widely varying measures of reasonableness. A recent unpublished survey of one hundred forty district court cases involving attorneys' fees illustrates this pattern.[124] While the mean hourly rate awarded by courts under the fee provisions of the private antitrust statutes was $181 in the cases surveyed, the mean hourly rate awarded in the Title VII (employment discrimination) cases surveyed was $40.[125] A general review of the reported decisions inescapably confirms the conclusion that statutory fee awards under civil rights, environmental, con-

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[122] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975); Bradley v. School Bd. of Richmond, 416 U.S. 696, 719 n.27 (1974); Northcross v. Board of Educ., 412 U.S. 427, 428 (1973); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (per curiam); Hairston v. R & R Apartments, 510 F.2d 1090, 1092 (7th Cir. 1975); Clark v. American Marine Corp., 320 F. Supp. 709, 710-11 (E.D. La. 1970), *aff'd* 437 F.2d 959 (5th Cir. 1971). *Cf.* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210-11 (1972) (standing to sue under § 810(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(a) (1970), granted based on private attorney general rationale).

[123] S. REP. No. 854, 93d Cong., 2d Sess. 18 (1974).

[124] Helfman, "Court Awarded Attorneys' Fees: A Statistical Survey of One Hundred and Forty Recent District Court Cases Involving Attorneys' Fees," (Project Submitted to the Faculty of Antioch School of Law, 1975).

[125] *Id.* 182. This same discrepancy is evident when awards in all the commercial cases surveyed are compared with the awards in all civil rights cases surveyed. In the former category, the mean hourly rate awarded was $93; for the civil rights cases, that rate was $38. *Id.*

sumer, and government information access statutes have been substantially lower than awards under antitrust, securities, and other fee statutes involving commercial rights.

This variation reflects a view, explicitly taken by many courts,[126] that statutory fee awards in civil rights, environmental, consumer, and information access cases should be lower than statutory awards in more traditional private commercial litigation. This "public interest discount" has been justified by the courts on the ground that attorneys have a professional responsibility to represent impecunious clients and nonpecuniary causes and, therefore, they should not expect to receive the same compensation when they undertake such cases. As one court noted:

> A member of the legal profession has the obligation to represent clients who are unable to pay for counsel and also to bring suits in the public interest. While embarking upon their duties, they should not be motivated by a desire for profit but by public spirit and sense of duty.[127]

This view, however, and the resulting variation in statutory fee awards between private commercial cases and public interest cases, has several inherent problems. First, courts simply do not have the authority to assign relative priorities to the statutes Congress itself has selected for enforcement incentives. The respective legislative histories of the private antitrust and Title VII statutes, for example, contain no suggestion that the policies embodied in the former are of greater importance, or deserve more vigorous enforcement incentives, than the policies of the latter. Yet the practical effect of awarding fees in private antitrust cases that are four to five times higher than those awarded in Title VII cases is to make private antitrust cases financially more attractive to the legal profession, thereby creating an economic distinction that is likely to affect the allocation of legal resources between these types of litigation.

It is precisely this kind of judicial activity that the Supreme Court rejected in *Alyeska*. The Court held that the judiciary did not have the power to select from the wide range of national policies those which were of such overriding importance that attorneys' fees should be awarded to encourage their enforcement. The Court

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[126] *See, e.g.*, Souza v. Travisono, 512 F.2d 1137, 1140-41 (1st Cir.), *vacated and remanded*, 423 U.S. 809 (1975); National Resources Defense Council, Inc. v. EPA, 484 F.2d 1331, 1338-39 (1st Cir. 1973).

[127] Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1253 (D. Kan. 1974).

held that such a determination is a legislative one.[128] Similarly, if private antitrust enforcement is to be given stronger incentives than the enforcement of antidiscrimination statutes, that judgment must come from Congress, not the courts. In the absence of such a congressional signal, courts are constrained to apply a single standard of reasonableness.[129]

The "public interest discount" suffers from yet another faulty premise. Statutory fee provisions are not enacted for the benefit of lawyers; rather, they are enacted for the benefit of the class of persons protected by the statutes. They seek to assure that sufficient legal resources will be available to enforce fully the rights conferred and that the potential litigants' means will not affect his or her ability to vindicate those statutory rights. Reducing the fees awarded on the ground that lawyers should be inspired by their sense of civic responsibility reduces the economic attractiveness of such cases, thereby restricting the supply of legal resources made available. It is little consolation to a victim of illegal job discrimination, who cannot find a lawyer willing to accept the reduced fees courts often award in Title VII cases, that the Code of Professional Responsibility states that there ought to be a lawyer who will take the case at less than the normal fee.[130]

There are several ironies in the reasoning behind the "public interest discount." First, it invokes the interests of the disadvantaged to justify a policy contrary to their interests. Deflating fee awards because the class of persons protected by a statute is impoverished tends to reduce the number of attorneys attracted to vindicating the rights of others similarly situated. Second, it affects lawyers in inverse relationship to their charitable commitment. Those lawyers who engage in no public interest legal representation whatsoever are unaffected by judicial admonitions that virtue is its own reward. Finally it has the anomalous effect of placing a lower value on certain cases because they admittedly serve a broader public interest.[131]

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[128] *See* 421 U.S. at 269.

[129] This view was recently suggested by the House Judiciary Committee in connection with the Civil Rights Attorney's Fees Awards Act. Comparing civil rights cases to private antitrust cases, the committee stated that "civil rights plaintiffs should not be singled out for different and less favorable treatment." H.R. REP. No. 1558, 94th Cong., 2d Sess. 9 (1976).

[130] *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 2-24, 2-25 (1969).

[131] Several courts have seized upon the $20-$30 hourly fee schedule provided for appointed criminal cases under the Crimes and Criminal Procedure Act, 18 U.S.C. 3006A(d)(1) (1970), as the appropriate rate to award fees in civil public interest cases. *See, e.g.*, Souza v. Travisano, 512 F.2d 1137, 1141 (1st Cir. 1975),

The tendency of many courts to set fee awards below the market value of a lawyer's services in certain types of public interest cases may reflect the development over the past decade of the public interest law movement. Public interest lawyers generally have foregone the more lucrative pursuits of their profession to serve clients or causes that cannot or do not secure representation through the normal market mechanisms. Although these public interest lawyers have had a visible impact in recent years,[132] they are literally few and far between. The most comprehensive survey to date identified approximately six hundred public interest lawyers practicing in ninety public interest law centers around the country,[133] compared with the private bar of about 400,000 lawyers.[134] The services of the *pro bono* bar, which is concentrated in the eastern urban centers,[135] simply is not available to most people.[136]

To achieve full enforcement of the private rights created by statutes which include attorneys' fee provisions, the resources of the private bar must be brought to bear. But the supply of free or reduced-fee legal services available from the private bar is also extremely limited; for any particular potential litigant, its availability is largely fortuitous. A random sampling of 1450 lawyers conducted in 1973-1974 revealed that the average lawyer spends only about 27

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vacated and remanded, 423 U.S. 809 (1975); Red House School v. OEO, 386 F. Supp. 1177, 1199 (D. Minn. 1974); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1253 (D. Kan. 1974); Sierra Club v. Lynn, 364 F. Supp. 834, 851 (W.D. Tex. 1973), *modified,* 502 F.2d 43 (5th Cir. 1974); Wyatt v. Stickney, 344 F. Supp. 387, 410 (N.D. Ala. 1972), *aff'd in part, rev'd in part on other grounds sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). Professor Dawson has endorsed this view. *See* Dawson, *supra* note 75, at 906. In addition to the other reasons for rejecting a "public interest discount" approach, text accompanying notes 126-31 *supra,* it should also be noted that attorneys who undertake cases under the Crimes and Criminal Procedure Act enjoy a more or less guaranteed volume of cases by a simple trip to the courthouse. Moreover, fees under the Act are available regardless of the outcome of the representation. The fees were fixed nearly seven years ago, have not been adjusted for inflation, *see* 18 U.S.C. § 3006A(d)(1) (1970), and can be soundly criticized as inadequate even for the limited purpose they serve. They certainly are an inappropriate guideline for other types of cases.

[132] *See* Council for Public Interest Law, *supra* note 56, at 165-215.

[133] *Id.* 3.

[134] *Id.* 165. The limited resources available to the public through public interest lawyers is further reflected in the $40 million total budget for 1975 for all tax-exempt public interest law centers compared with the $11 billion annual gross receipts of the private bar. *Id.* 5, 53.

[135] *Id.* 80.

[136] The government-funded legal services program is a significant source of free legal representation for those with incomes of less than 125% of the poverty level as set by the Office of Management and Budget. Those services, however, are simply not available for the vast majority of Americans who are above that minimal income level.

hours of nonbillable time a year on *pro bono* work and that the bulk of this time is devoted to matters that do not involve litigation.[137] To achieve Congress' goal of giving all aggrieved persons the opportunity to enforce certain statutory rights requires that the economic interests of the legal profession be activated. As a result, public interest cases must be placed on a comparable financial footing with the competing demands for legal services, which compensate attorneys at the full market value for their services. If this means that lawyers will receive fee awards somewhat higher than those a more public spirited bar might accept, so be it. In the context of statutory fee awards, lawyers are necessary instruments to achieve national policies established by Congress.

It might be argued that full enforcement[138] of statutory rights could be accomplished by awarding something less than the full market value of attorneys' services because there is unused capacity in the legal system. Unemployed and underemployed lawyers, for example, presumably would be willing to take on additional work at something less than their standard rate. It is undoubtedly true that as the "earnings gap" (the difference between the maximum return for a particular lawyer's time and the return on these cases) decreases, more and more lawyers will be attracted to them. There are nevertheless a number of reasons why it would be unwise for courts to use this rationalization for awarding fees at less than full market rates.

First, there is no way for the courts to determine the point at which fee awards at something less than full market rates will make available sufficient legal resources to enforce these statutes to the fullest extent possible. Indeed, that point, if it exists at all, may vary from one substantive field of law to another. Thus courts would either be drawn into a morass of supply and demand analysis or revert to arbitrary determinations, which should be avoided.

Second, there is no indication that Congress intended that the enforcement of these important national policies should rely upon unemployed or underemployed lawyers. Effective enforcement,

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[137] Handler, Hollingsworth, Erlanger & Ladinsky, *The Public Interest Activities of Private Practice Lawyers*, 61 A.B.A.J. 1388, 1389 (1975).

[138] It is obviously impossible to measure the extent of the unmet need for legal services in the particular areas covered by these statutes since there is no way to calculate rights not vindicated or suits not brought. Every indication, however, is that it is substantial. A survey of the legal needs of the public conducted by a special committee of the A.B.A., for example, found that of the respondents who indicated that they had suffered from a discriminatory denial of a job or promotion, only 1.1% had used a lawyer in the most recent occurrence of such discrimination. B. CURRAN & F. SPALDING, THE LEGAL NEEDS OF THE PUBLIC 83 (1974).

particularly in more difficult and complex cases, requires the services of experienced attorneys, who are less likely to be underemployed. Although there are approximately 400,000 lawyers in the United States, the pool of potential legal resources for these purposes is far smaller. As a practical matter, most lawyers are not available for these cases because of their lack of interest in or experience with litigation, and due to their specialization in other areas of the law. Moreover, even if the risk of nonrecovery is taken into account in setting the market value of the lawyer's services,[139] many lawyers simply are unwilling to work on a contingency basis, with the attendant uncertainty and burden of uncompensated costs during the pendency of a case, which may be unresolved for several years. In short, even if there are some additional legal resources available at less than their full market value, the concerns for full enforcement and objectivity in fee awards support the determination of such awards based upon full market rates.

It appears, therefore, that the courts do not have quite as much discretion in setting "reasonable" attorneys' fees under statutory fee provisions as many have assumed. They must set fees in a manner that will satisfy the congressional purpose of achieving the fullest possible enforcement of the underlying statute. Furthermore, in the absence of a congressional mandate to the contrary, fees must be awarded in a manner that does not discriminate on the basis of the particular statutory right being enforced.

These goals can be accomplished, and at the same time a far more objective approach to fee setting can be achieved, by compensating lawyers for the time and effort they have reasonably expended at the full market rate for their services. The attorneys' fee statutes necessarily reflect the judgment of Congress that the charity of the bar is inadequate. Yet by awarding fees at less than the full market value of the particular attorney's services, the courts have not eliminated the necessity for depending upon legal charity; they have merely reduced the amount that must be made up by such contributions.

IV. Fee Determinations Based on Market Value

The foregoing analysis leads to the conclusion that regardless of whether the court is proceeding under its equity power or pursuant to statutory authority, a "reasonable" attorneys' fee is one that compensates lawyers for the full market value of their time and

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139 *See* text accompanying notes 168-72 *infra*.

effort. Such a determination can never be reduced to a neat mathematical formula; it involves important matters of judgment. It is grounded, however, upon a series of factual determinations that, as many courts have recognized, should be the subject of a separate evidentiary hearing.[140] It entails consideration of most of the factors listed by various courts,[141] but within an analytical framework that reflects private, time-based fee-setting.[142]

A. *Time Reasonably Expended*

As discussed above,[143] the unjust enrichment rationale of fee awards under the equitable theories requires that the time expended by the attorneys, rather than the results achieved, be the basis of the fee determination in such cases. Considerations of policy lead to the same conclusion in the statutory cases. Many of the statutes that provide for fee awards do not give rise to monetary recoveries.[144] It is virtually impossible in such cases to translate the results of the lawsuit into quantitative terms. How does a court determine the monetary value of desegregated education, or the right to vote, or access to government information? Any attempt to quantify the results of such cases, and to reward the attorneys based even in part upon such determinations, is necessarily an arbitrary exercise.[145] Yet to award attorneys' fees only in cases that

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[140] The Supreme Court indicated that, in the context of fee awards under § 4 of the Clayton Act, 15 U.S.C. § 15 (1970), an evidentiary hearing is appropriate. Perkins v. Standard Oil Co., 399 U.S. 222, 223 (1970) (per curiam). A number of courts have recognized that an evidentiary hearing is required whenever facts pertaining to the fee award are in dispute. *See, e.g.,* National Treasury Employees Union v. Nixon, 521 F.2d 317, 322 n.18 (D.C. Cir. 1975); Thomas v. Honeybrook Mines, Inc., 428 F.2d 981, 988-89 (3d Cir. 1970), *cert. denied,* 401 U.S. 911 (1971). The lower court should be required to state its findings of fact and conclusions of law. *See, e.g.,* Monroe v. Board of Comm'rs of Jackson, 505 F.2d 105, 109 (6th Cir. 1974); Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 169-170 (3d Cir. 1973).

[141] *See* text accompanying notes 172-177 *infra.*

[142] Fees are also set in the marketplace on the basis of a contingent percentage of the recovery; however, private fee arrangements which proceed on that basis are not an appropriate model for courts to use in setting fees. *See* text accompanying notes 83-89 *supra,* 143-52 *infra.*

[143] *See* text accompanying notes 72-98 *supra.*

[144] *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam) (discussing Title II of the Civil Rights Act of 1964).

[145] The difficulty in attempting to measure quantitatively the benefits of injunctive relief, even in private antitrust actions, is well-illustrated by the Third Circuit's effort to do so in Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975). Because the Third Circuit had taken the position that a time-based fee award should be adjusted, *inter alia,* to reflect the recovery obtained, *see* Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), it felt compelled to remand the fee question in *Merola* for a determination of the monetary value of a settlement that required the oil company defendant

produce monetary recoveries is to engage in precisely the discriminatory priority setting that is beyond the authority of the courts.[146]

Even where there is a monetary recovery, "[a]nchoring the analysis [to time expended] is the only way of approaching the problem that can claim objectivity." [147] How does a court decide whether the attorney should receive 5% or 25% or 26% of the recovery? As we have seen,[148] the wide range of choices that courts have made, even in similar cases, strongly suggests the essentially arbitrary nature of "percentage picking." The difference of even a single percentage of a large recovery, however, can have a substantial impact upon the fee recovery.[149] There can be no rational justification for the ensuing windfall or loss based solely on the court's arbitrary selection of a convenient percentage.

Moreover, the premises implicit in awarding attorneys' fees based upon a percentage of the recovery, inflating the hourly rate based upon results, or awarding a bonus based upon the result, are questionable. Such a practice assumes a direct relationship between the size of the recovery and the attorneys' efforts, which is not always the case. As one court has noted, "[a] point is reached where the amount of the plaintiff's recovery is unrelated to services of counsel. The large amounts involved do not add to the complexity of the problems, increase the responsibilities of counsel or require greater capabilities of counsel." [150] Even in cases involving smaller recoveries, damages may follow directly once liability is established, with as much skill and effort required to produce the first dollar as the last. No court has yet suggested that where an attorney recovers less than expected, a part of the pre-arranged fee should be refunded to the client.[151]

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to alter its service station leasing policy to lengthen the guaranteed period of the dealers' leases. The court of appeals described the benefit it sought to be quantified as the "limitation of opportunities for coercion." 515 F.2d at 170.

[146] *See* text accompanying notes 128-29 *supra.*

[147] City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974).

[148] *See* note 34 *supra.*

[149] The problem is no different analytically if the court seeks to reward the attorney for the results achieved by inflating the hourly rate by some multiplier, or by adding a bonus to the regular fee based upon the recovery. The court is still faced with the arbitrary task of deciding the appropriate relationship of the fee to the recovery.

[150] TWA v. Hughes, 312 F. Supp. 478, 484-85 (S.D.N.Y. 1970), *modified on other grounds,* 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973).

[151] The difficulties in attributing the results to the attorneys' efforts are further compounded by the presence of co-counsel or several law firms representing various plaintiffs, as will often be the case in complex class action cases. *See, e.g.,* City of Philadelphia v. Chas. Pfizer & Co., 345 F. Supp. 454 (S.D.N.Y. 1972).

Two other considerations argue against fee awards based upon results even in statutory cases. Unlike the common fund situation, attorneys' fees in statutory cases are not paid out of the recovery. Rather, they are taxed against the defendant in addition to any other judgment against him. The damage recovery reflects the court's measurement of the legal wrong to the plaintiff. But the defendant has not violated any duties to the plaintiff's attorneys. The statute imposes upon the unsuccessful party the obligation to pay for the wrong done to the plaintiffs, as prescribed by the statute, plus a sufficient attorneys' fee to provide the necessary enforcement incentive. It does not impose upon the defendant the obligation to pay, for example, 120% of the statutorily appropriate damages so that the attorney can share in the consequences of defendant's wrong to the plaintiff.

Finally, awarding attorneys' fees based upon results fundamentally misconceives the role of the lawyer. A lawsuit is not an investment in a uranium mine in which the lawyer is a co-venturer. Rather it is an attempt by the plaintiff to obtain redress for a legal injury. To this endeavor attorneys contribute their time, advocacy skills, and professional judgment—not their capital. Fully compensating the attorneys for the time they have invested is therefore not only sufficient to provide the necessary incentives, but additionally is consistent with the function of lawyers to bring disinterested professional judgment to their cause.[152]

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[152] Fee calculations based upon results have been justified by some based upon a different conception of the lawyer's work. As one court stated: "The value of a lawyer's services is not merely measured by time or labor. The practice of law is an art in which success depends as much as in any other art on the application of imagination—and sometimes inspiration—to the subject matter." Arenson v. Board of Trade, 372 F. Supp. 1349, 1356 (N.D. Ill. 1974) (citation omitted). The leading proponent of this view has been Professor George Hornstein who has argued for awards based on the percentage of recovery. *See* Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658 (1956). Professor Hornstein argues that "[o]ne thousand plodding hours may be far less productive than one imaginative, brilliant hour. A surgeon who skillfully performs an appendectomy in seven minutes is entitled to no smaller fee than one who takes an hour; many a patient would think he is entitled to more." *Id.* 660.

Several things can be said in response to these arguments. Although it is true that a thousand plodding hours may be less productive than one brilliant hour, the thousand plodding hours are usually a prerequisite to the single brilliant one. In any case, to the extent one lawyer is more creative or efficient than another, that will ultimately be reflected in his or her market rate. As for the analogy to the deft surgeon (putting aside the question whether the pricing mechanisms of the medical profession are the model to which we should aspire), the relationship between time expended and the benefits provided is far more tenuous in medicine than law, particularly in the subprofession Professor Hornstein has chosen for his illustration. It might be added that surgeons receive their fee, albeit occasionally from someone other than the patient, whether or not the operation is successful.

The starting point for calculating a fee that compensates the attorney for the value of his or her time and effort is a determination of the number of hours justifiably expended. A court is not bound by the claim asserted by the lawyer. Many courts have properly recognized their obligation to scrutinize the hours submitted by the attorney to assure that the time expended was not unnecessarily duplicative, or indeed, not expended at all.[153] As one court noted that "[t]he Court may discount the number of hours counsel has submitted in its logs, if the Court determines, based upon the facts, circumstances and legal issues in the case, that the hours expended were unnecessary, unrelated or involved duplication of activity." [154]

Several considerations should be borne in mind by the courts in reviewing the hours submitted by the lawyers. Several courts have engaged in wholesale markdowns of the time asserted with little or no explanation of why time was disallowed.[155] The purpose of judicial review is to assure that the time claimed was in fact expended and was necessary to a vigorous prosecution of the claim. It is not a device for discounting the fee award on other grounds. Thus, to avoid any suspicion that review is being used to pursue unrelated ends, and to give guidance—both to the lawyers who are before the court and to those who are not—as to precisely why the claim was excessive, courts should specify with particularity the hours that are disallowed. The courts should also allow hours expended on unsuccessful claims, unless they are clearly frivolous.

[153] *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974) (court refused to compensate attorneys for time spent by two or three lawyers in the courtroom when one would have sufficed); Stanford Daily v. Zurcher, 64 F.R.D. 680, 683 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977); Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 382 F. Supp. 999, 1004-14 (E.D. Pa. 1974), *vacated*, 540 F.2d 102 (3d Cir. 1976). This will, of course, require that attorneys keep complete and well-documented time records. Several courts have refused to compensate time for which there was no detailed records. *See, e.g.*, In re Meade Land & Development Co., 527 F.2d 280, 284 (3d Cir. 1975); In re Roustabout Co., 386 F.2d 354, 355 (3d Cir. 1967) (per curiam). The consequence of inadequate time records is illustrated by Davis v. Board of School Comm'rs, 526 F.2d 865 (5th Cir. 1976), a school desegregation case in which the court, disallowing some of the time asserted by the attorneys, cited as an example of excessiveness twenty-six hours spent by two attorneys "reviewing a seven line order of this court denying a stay pending application for certiorari to the Supreme Court." *Id.* 868-69 n.3. It is, of course, possible to imagine how twenty-six hours could be justifiably expended in reviewing the legal and strategic consequences of a denial of such a stay; however, the attorneys' failure to specify how they spent that time gave the court no basis for concluding that it was necessary.

[154] United Fed'n of Postal Clerks v. United States, 61 F.R.D. 13, 19 n.16 (D.D.C. 1973).

[155] *See* note 41 *supra*.

Although several courts have not followed this course in cases brought under the antitrust statutes,[156] nothing in the language of the statutes compels this result.[157] On the contrary, as one court has noted, "courts should not require attorneys (often working in new or changing areas of the law) to divine the exact parameters of the courts' willingness to grant relief." [158] Courts should be wary of interfering too deeply in the strategic judgments made by a litigator. Time should be disallowed only if it reflects duplication, padding, gross overstaffing, or if it was spent on clearly frivolous claims.[159]

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[156] Bowl America, Inc. v. Fair Lanes, Inc., 299 F. Supp. 1080, 1100 (D. Md. 1969); Union Leader Corp. v. Newspapers of New England, 218 F. Supp. 490, 491-92 (D. Mass. 1963), *cert. denied,* 379 U.S. 931 (1971); Osborn v. Sinclair Refining Co., 207 F. Supp. 856, 864 (D. Md. 1962), *rev'd on other grounds,* 324 F.2d 566 (4th Cir. 1963). *But see* Locklin v. Day-Glo Color Corp., 429 F.2d 873, 878-79 (7th Cir. 1970), *cert. denied,* 400 U.S. 1020 (1971); TWA v. Hughes, 312 F. Supp. 478, 483 (S.D.N.Y. 1970), *modified on other grounds,* 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973).

[157] The Clayton Act, for example, merely provides that a person injured under the antitrust laws shall recover "threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1970).

[158] Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (N.D. Cal. 1974), *aff'd,* 550 F.2d 464 (9th Cir. 1977). In a recent Title VII case, the court, which granted relief to the plaintiff on one of his eight counts, rejected the contention of the defendant that the fee award should be similarly prorated, pointing out that "the policy underlying the fee provisions of Title VII is best served by encouraging plaintiffs to seek the broadest relief they feel, in good faith, they are entitled to." Palmer v. Rogers, 10 Empl. Prac. Dec. ¶ 10,499 at 6130 (D.D.C. 1975) (citation omitted).

[159] Most courts which have considered the question have recognized the right to recover attorneys' fees for the time spent litigating the fee issue itself, both to prevent the defendant from effectively defeating enforcement of the statute by erecting costly barriers to the fee recovery and to enable the court to make its determination of fees on the basis of a full examination of the facts. *See, e.g.,* Rosenfeld v. Southern Pac. Co., 519 F.2d 527, 530-31 (9th Cir. 1975); Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 539 (5th Cir. 1970); Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (N.D. Cal. 1974), *aff'd,* 550 F.2d 464 (9th Cir. 1977). *But see* Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 110-11 (3d Cir. 1974) (time spent on fee application in a common fund case disallowed). Courts also have generally awarded compensation for time spent on appellate proceedings. *See, e.g.,* Perkins v. Standard Oil Co., 399 U.S. 222, 223 (1970) (per curiam); Ward v. Kelly, 515 F.2d 908, 912 (5th Cir. 1975). The Supreme Court has noted that "[t]he amount of the award for [appellate] services should, as a general rule, be fixed in the first instance by the District Court." Perkins v. Standard Oil Co., 399 U.S. 222, 223 (1970) (per curiam) (citation omitted). *But see* note 69 *supra* & accompanying text.

Finally, even where courts are acting pursuant to statutes which permit awards only to "prevailing" parties, the district court has discretion to award fees "incident to the final disposition of interim matters." Bradley v. School Bd., 416 U.S. 696, 723 (1974). The Supreme Court suggested in *Bradley* that "the entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees. . . ." *Id.* 722-23 n.28. *See also* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396-97 (1970). Such a practice recently was endorsed, in appropriate circumstances, by the House Judiciary Committee in connection with the Civil Rights Attorney's Fee Awards

B. *The Hourly Rate*

The court must determine a value for the attorney's time that will place statutory fee cases on a competitive economic basis and that will compensate attorneys in equitable fee cases for the loss sustained in creating the appropriated benefit. For lawyers engaged in customary private practice, who at least in part charge their clients on an hourly basis regardless of the outcome, the marketplace has set that value. For these attorneys, the best evidence of the value of their time is the hourly rate which they most commonly charge their fee-paying clients for similar legal services. This rate reflects the training, background, experience, and previously demonstrated skill of the individual attorney in relation to other lawyers in that community.

Special factors in a particular case may affect the rate an attorney charges a private, fee-paying client; correspondingly, it is appropriate for the court to account for the presence of such unusual circumstances when it is setting the fee. Thus, if the lawyer is significantly departing from his or her field of expertise, a lower rate may be justified.[160] Unusual time constraints reasonably imposed by the case or the client may push the rate upward. The impact of a particular representation on the lawyer's practice may influence the rate—one way or the other. A particularly unpopular cause may risk the loss of other clients, warranting a higher rate, while a case's potential to attract future business may warrant charging the client less. To the extent any of these factors are present in a case requiring the court to fix a fee, the best evidence of how the marketplace would account for the presence of such a factor is to look to instances where the particular lawyer was faced with similar circumstances in private practice. In the absence of such experience, the court can look to the experience of other lawyers similarly situated in the community.[161]

Act of 1976. The Committee stated that "[s]uch awards pendente lite are particularly important in protracted litigation, where it is difficult to predicate [sic] with any certainty the date upon which a final order will be entered." H.R. REP. No. 1558, 94th Cong., 2d Sess. 8 (1976).

[160] Lawyers engaged in a litigation practice ordinarily do not vary their rates to fee-paying clients depending upon the subject matter of the litigation. A lawyer who specializes in tax planning, however, would ordinarily not be able to charge a client for litigating a non-tax matter at the rate which reflects his or her tax planning skill and experience. *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718-19 (5th Cir. 1974); Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973).

[161] The burden of proof on market rate, as in the case of other issues involved in setting a fee, rests with the petitioner—the plaintiff in most statutory cases and the lawyer in most common fund or benefit cases. To sustain that burden the

In valuing the time expended, there is no reason why the defendant in a statutory case, or the nonclient beneficiaries in a fund case, should support "overlawyered" lawsuits. If some of the activities involved in the litigation manifestly could have been conducted by a lawyer with less experience, or even by a paralegal, the court is justified in compensating that time at a reduced rate.[162] To the extent that activities such as research, routine pleading or motion preparation, brief or memorada writing, or document and transcript review could have been performed by a less experienced lawyer, the court can compensate this time at the market rate for a more junior attorney. Some activities, such as settlement administration or document abstracting, may be compensable at the prevailing market rate for paralegal time. The administration of justice would not be well served, however, by a judicial determination of the precise skill level required for each hour asserted.[163] Broad categories should suffice.

In determining the value of the attorney's time, a somewhat different situation is presented when the attorney does not have a customary hourly rate set by the competitive marketplace. This will be the case when the attorney's normal practice is the contingent fee arrangement, or when the lawyer regularly provides legal services on a noneconomic basis. This latter group would include a salaried attorney for a litigating organization or an attorney who ordinarily subsidizes otherwise unrepresented clients and causes by charging less than demonstrably could be obtained for the services were the lawyer to act in a more "economically rational" manner.

In such cases, the purposes underlying fee awards can best be fulfilled by basing the fee upon the full market value of the legal

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lawyers involved can submit their own affidavits setting forth the hours expended on each activity and, for those lawyers who have an hourly rate set by the marketplace, the rate most commonly charged for similar professional services. Where the attorney does not have a rate established by the marketplace, affidavits from other lawyers of similar skill and experience in the community should be submitted. Judicial expertise will obviate the need for expert testimony on this question. *See, e.g.,* Tranberg v. Tranberg, 456 F.2d 173, 175 (3d Cir. 1972).

[162] *See, e.g.,* City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 680, 695 (D. Minn. 1975); National Council of Community Mental Health Centers, Inc. v. Weinberger, 387 F. Supp. 991, 996 (D.D.C. 1974), *rev'd on other grounds sub nom.* National Council of Community Mental Health Centers v. Mathews, 546 F.2d 1003 (D.C. Cir. 1976). In *Weinberger, supra,* the court noted in the context of a fee determination in a case handled by a sole practitioner that "his work was at many different gradations of professional responsibility and no flat rate can reasonably be applied to his work as a whole." 387 F. Supp. at 996. In more complex cases, staffed by a team of lawyers with varying levels of experience, the actual time spent by each lawyer will ordinarily reflect more nearly the skill required.

[163] *See* Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 116-17 (3d Cir. 1976).

services provided.[164] In the statutory fee award case, where the objective is full enforcement of the underlying substantive right, a market value fee award to a nonprofit litigating organization or a reduced profit public interest lawyer simply enables such resources to be made more widely available to others who wish to assert the same rights. Even if the private bar is compensated at market rates for such cases, these litigating organizations and public interest lawyers will continue to provide the specialization, freedom from conflicts with private clients, readiness to take on unpopular causes, and willingness to carry the costs of protracted cases that is indispensible to full enforcement.

This result involves no unfairness to the defendant against whom fees are assessed; as between defendants, the identity and the fee arrangements of the plaintiffs' attorneys are totally fortuitous.[165] It would, however, be fundamentally unfair to award fees based upon full market rates to attorneys who ordinarily seek to maximize their economic return—a result which is essential to enlist their services based upon economic self-interest—while at the same time awarding something less than full market value to attorneys who forego some of their earning capacity by representing clients who cannot afford adequate representation. To do so is to penalize those attorneys for their public spiritedness. It seems clear that Congress intended that cases arising under statutes with fee provisions were to be removed from the charity rolls, regardless of the identity of the attorney. As one court stated: "Congress certainly intended any award under the statute to be reasonable by traditional standards. It did not look, like Lear's jester, to the breath of the unfeed [sic] lawyer, but considered that the prevailing litigant should be able to pay the laborer the worth of his hire." [166]

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[164] *See, e.g.*, National Treasury Employees Union v. Nixon, 521 F.2d 317, 322-23 (D.C. Cir. 1975); Tillman v. Wheaton-Haven Recreation Ass'n., 517 F.2d 1141, 1147-48 (4th Cir. 1975); Hairston v. R & R Apartments, 510 F.2d 1090, 1092-93 (7th Cir. 1975); Wilderness Soc'y v. Morton, 495 F.2d 1026, 1037 (D.C. Cir. 1974), *rev'd on other grounds sub nom.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); Fairley v. Patterson, 493 F.2d 598, 606-07 (5th Cir. 1974). *But see* Hoitt v. Vitek, 495 F.2d 219, 220-21 (1st Cir. 1974) (court awarded attorneys' fees to the private attorney while denying an award of fees to New Hampshire Legal Assistance because "[t]he policy of encouraging future representation was secured by the award [to the private attorney]." *Id.* 221.

[165] *See* National Resources Defense Council, Inc. v. EPA, 484 F.2d 1331, 1338 n.7 (1st Cir. 1973).

[166] Clark v. American Marine Corp., 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd* 437 F.2d 959 (5th Cir. 1971). For an expression of similar views, see Miller v. Amusement Enterprises, Inc., 426 F.2d 534 (5th Cir. 1970) ("Congress did not intend that vindication of statutorily guaranteed rights would depend on . . . the availability of legal assistance from charity—individual, collective or organized." *Id.* 539).

The attorney is entitled to "the worth of his hire" under the equitable rationales as well, regardless of what, if anything, the client has agreed to pay or whether the lawyer sometimes or always provides legal representation at less than its full market value. To the extent that the fee obligation of the client is less than the full market value of the lawyer's services, the lawyer is sustaining a loss that is compensable under an unjust enrichment principle. The measure of that loss, and the extent of the beneficiaries unjust enrichment, is the difference between what the lawyer could have charged for the time and any fee received. The fact that in other situations the lawyer does not charge all that he or she could does not alter the fact that the opportunity to sell the time devoted to that particular case at its full market value has been lost.[167]

In order to establish a market value for the services of a lawyer who does not have an hourly rate set by the marketplace, it is necessary to look to the rate charged by comparable attorneys who do. That is not to say that every such lawyer is entitled to the highest rate for legal services in the community, or even the highest rate charged by his or her contemporaries. Rather, it will be necessary for a lawyer so situated to demonstrate the prevailing rate in the community for lawyers of similar experience, professional background, reputation, and skill who are engaged in cases of similar magnitude and complexity.

C. *The Risk of Nonrecovery*

Unless an attorney has some agreement with the client guaranteeing compensation regardless of the outcome, the attorney will receive no fee in the event that the suit does not succeed in some manner.[168] In these cases counsel bear the risk that they will not be compensated at all for their time and effort. The experience of the marketplace indicates that lawyers generally will not provide

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[167] The attorney is entitled to no more than the full market value of his or her time and effort. Thus, where the attorney receives a contractual fee from his client which represents the reasonable value of his or her services, "[t]he fee [award] would go [initially] to the attorneys, who would then reimburse their client." National Treasury Employees Union v. Nixon, 521 F.2d 317, 322 (D.C. Cir. 1975). However, where counsel has represented the client at a reduced rate because of his or her belief that the case furthers the public interest, "the District Court should award [the attorneys] such additional amounts [above what they received from their client] as are necessary to bring the compensation up to reasonable value." *Id.* 323.

[168] Under the equitable theories, there can be no fee award unless a fund is created, recovered or preserved, or a benefit is conferred. Most of the attorneys' fee statutes authorize or require fee awards only to a party who has in some manner prevailed, either through judgment, settlement, or voluntary compliance by the other party. *See* H.R. REP. No. 1558, 94th Cong., 2d Sess., 6-8 (1976).

legal representation on a contingent basis unless they receive a premium for taking that risk. Ordinarily, when lawyers undertake a representation on a contingency basis, they bargain for a percentage of the recovery. That percentage is sufficiently high to compensate the lawyer not only for the reasonable value of the time he or she anticipates devoting to the particular lawsuit, but also for the time devoted to other lawsuits undertaken on the same basis but unsuccessful in result. Thus, in a rough and arbitrary way, the contingent percentage fee accounts for the risk of nonrecovery. For reasons already discussed [169] the percentage-of-recovery approach is inappropriate when courts are setting fees. Nonetheless, the risk of nonrecovery must be accounted for if these cases are to attract lawyers. Courts can account for this risk by making one additional inquiry. The court initially looks to the hourly rate for comparable representation where compensation is guaranteed. In adjusting that basic hourly rate where compensation is not guaranteed, the court should attempt to assess the likelihood of success at the outset of the representation—the point at which the lawyer is confronted with the decision whether to take the case, and, if so, under what fee arrangement. In making this inquiry, courts should consider "any information that may help to establish the probability of success." [170] The Second Circuit has outlined the inquiry as follows:

> The tangible factors which comprise the "risk of litigation" might be determined by asking the following questions: has a relevant government action been instituted or, perhaps, even successfully concluded against the defendant; have related civil actions already been instituted by others; and, are the issues novel and complex or straightforward and well worn? Thus determined, the litigation risk factor might well be translated into mathematical terms.[171]

As the Second Circuit suggests, each of the elements of the fee determination ultimately must be reduced to numbers. Obviously,

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[169] *See* text accompanying notes 83-91, 143-52 *supra.*

[170] *See* Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973). *See also* Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117 (3d Cir. 1976); City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974); Stanford Daily v. Zurcher, 64 F.R.D. 680, 685-86 (N.D. Cal. 1974), *aff'd,* 550 F.2d 464 (9th Cir. 1977).

[171] City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974).

there is no precise way to quantify the likelihood of success (or risk of nonrecovery), particularly since the court is standing at the finish line and assessing the way things looked at the starting gate. Nonetheless, it is theoretically useful to think for a moment about what a court would do if it were possible to determine precisely the likelihood of success at the outset. If the court were to conclude that there was no realistic chance of losing at the inception of the case, the risk of nonrecovery would be zero, and the basic hourly rate should not be adjusted. If the court were to conclude that there was an even chance of success at the outset, it would in effect be saying there was a fifty percent risk of nonrecovery. A lawyer would have to take two of these cases on a contingent basis to receive one fee. Accordingly, if risk were to be fully compensated, the lawyer would be entitled to twice his basic hourly fee.

As a practical matter, however, a court can do no better than to reach one of a few general conclusions concerning risk. If, viewed from the perspective of a reasonable attorney looking at the case from its outset, success was virtually assured, there has been no significant risk and there should be no adjustment. If the court concludes that success was more likely than not at the outset, an increase in the fee award in the range of fifty percent would be appropriate. Where the court concludes that the chance of success was about even at the outset, an increase in the hourly rate in the range of 100% appears appropriate. Finally, if the case appeared unlikely to succeed when initiated, an increase of the basic hourly rate of up to 200% may be justified to compensate the attorney for the substantial risk undertaken. Beyond that, any attempt to quantify feigns illusory precision and may greatly exaggerate the fee awards in the least likely cases.

Two other points should be made with respect to accounting for risk. First, there is no necessity of applying a risk multiplier to the time expended in obtaining a fee award after the suit is successfully concluded and the award is assured. Nor is there any risk associated with post-settlement administration of a fund. Second, it should be stressed that a risk factor need only be applied to non-guaranteed time; to the extent that the attorneys are guaranteed payment by a contract with their client, there is no risk of non-recovery.[172]

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[172] For example, if a lawyer who brings a class action case that produces a common fund has been guaranteed by the named plaintiffs compensation of $30 per hour regardless of the outcome, and the lawyer's market rate is $100 per hour, the risk multiplier should be applied only to the $70 per hour that was not guaranteed.

V. Conclusion

The approach to fee setting suggested by this Article—hours justifiably expended, multiplied by the attorney's market rate, multiplied by the risk of nonrecovery—provides courts with a coherent analytic framework for applying the factors they have traditionally considered in fixing fees. In determining the time reasonably expended, the court accounts for the time and labor required and, in large measure, the novelty and difficulty of the issues. In applying the marketplace rate for the lawyer's time, with appropriate adjustments for unusual circumstances present in a particular case [173] and for "over-lawyering," [174] the court accounts for skill required, the customary fee, the time limitations imposed, the experience and ability of the attorneys, the undesirability of the case, and the nature of the professional relationship with the client. Finally, in determining the risk of nonrecovery, the court takes into account the contingent nature of the fee.[175]

Certain of the factors traditionally considered by the courts are deliberately rejected. The most important of these is the monetary amount involved in the litigation and the results obtained. Their inclusion would not reflect sound law or sound policy.[176] The court should also exclude consideration of the preclusion of other employment; if lawyers are compensated fully for their time, the fact that they are not doing something else is economically irrelevant. Consideration of awards in similar cases is also rejected because this factor is little more than a post hoc rationalization for the result otherwise achieved. Finally, the court should not account for the quality of the lawyer's work, except to the extent that the lawyer's time is clearly excessive.[177]

The approach outlined has several distinct advantages. First, and most important, it attempts to satisfy the underlying purposes of fee awards, both in the statutory and equitable context. Second, it is a uniform approach that can be applied whenever the court is tasked with fee-setting, in contrast to the current tendency to travel different paths in different cases. Third, while it necessarily leaves the district court with important questions of judgment,[178] it re-

[173] *See* text accompanying notes 160-61 *supra*.

[174] *See* text accompanying notes 162-63 *supra*.

[175] *See* text accompanying notes 168-72 *supra*.

[176] *See* text accompanying notes 83-91, 143-52 *supra*.

[177] *See* text accompanying notes 61-68 *supra*.

[178] For example, the court must determine if the time claimed was necessary, if the work could have been performed by a person with less expertise, and what the likelihood of success was at the outset of the suit.

duces the fee determination to a series of essentially factual questions, the answers to which can be reviewed by appellate courts as well as by lawyers and litigants:

> 1. How much time did the attorneys justifiably expend on the lawsuit?
>
> 2. What is the hourly market rate of the particular lawyer for similar legal services? If the particular attorney has no such market rate for these services, what is the rate for lawyers in the community with similar experience, background, skill and reputation who handle cases of similar magnitude and complexity?
>
> 3. What was the risk of nonrecovery at the outset of the litigation?

Finally, another significant benefit of this alternative approach is that it provides an analytical construct for rational thinking where confusion and arbitrariness have prevailed.