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The Prevailing Party Should Recover Counsel Fees

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INTRODUCTION

THE TIME HAS COME when our judicial system should make compensation to the prevailing party for expenses incurred in litigation a meaningful right, as opposed to a valueless gesture. In brief, this means that in the bulk of civil cases a successful party should no longer have to bear the full burden of his own counsel fees, and conversely those who take to our courts in vain should no longer be permitted to avoid the justice of substantial participation in the costs they have occasioned. To do this requires considerable alteration of the present cost structure applied by our rules as well as a change in our philosophy of compensation for loss.

It has, of course, long been theorized that the essential element of our damage rules is to make the injured party "whole." No party in a breach of contract situation, for example, should be left following the breach with less in hand than he would have had if his adversary had lived up to his bargain. But realistically speaking, this is precisely what happens under the present cost and damage structure when litigation occurs.

I recently won a modest recovery for an abused client who had rendered services without being compensated. Alas, after collection of a full judgment for him with interest and costs, as presently defined, the total recovery was less than a fair and appropriate statement for services rendered. Has this client been made "whole" for the losses he suffered? Has the judicial machinery treated him with even elementary fairness? I submit that it is self-evident that it has not.

It is not recovering plaintiffs alone who suffer fantastic losses. Consider the party unjustly sued, whose contentions ultimately prevail in the judicial test. Does the system make him "whole"? The answer to this rhetorical question is again, "no." Except in the rarest instance, no counsel fee can be recovered, not even the slightest part of it. Not only has this defendant been unjustly required to waste time in litigation, but he must also bear his own counsel fee and numerous other costs uncompensated

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for by an obsolete system of awards that covers only a small fraction of his out-of-pocket expense.

While the transfer of the cost burden to the unsuccessful litigant is basically desirable because it compensates the innocent party, as a system of justice should, it also has an added advantage. Our inundated judicial machinery needs some relief from clogged courts and calendars.

Is it not likely that windfall-minded claimants lacking a true cause of action, but anxious for a "strike" settlement, will be a little less anxious to enter our courts if they knew that at the end of the judicial road a sizable judgment for costs, including all or a substantial part of an opponent's legal fees would be waiting for them? Or, in the matter of less doubtful claims, is not settlement or fair adjustment far more likely when each side knows there are real and substantial risks in defeat and not just the danger of minimal costs? Under such circumstances, dubious plaintiffs should prove less anxious to sue and intransigent defendants more prone to settle. If for no other reasons than these, judicial housekeeping requires a new attitude toward costs.[1]

COST STRUCTURE, PAST AND PRESENT

The ancient rule of minimal costs would appear to be based at least partially on historical factors. Despite an early tendency to follow English practice in the colonial period, there were fears in America that the court system would be operated contrary to the interests of the common man. To grant legal fees as costs might, some thought, discourage the poor man's use of the court machinery. There was also the fear that wealthy landed interests might dominate the law and that somehow or other a grant of legal fees could perpetuate that power. These fears have vanished with the years, but not the policies that accompanied them.

In the formative years of this country the total population of 3,929,214 people[2] lived mainly on farms. Legal disputes were few, usually over land boundaries. The courts were discovering the law rather than interpreting it. Poor or rich, a litigant could go before a court himself and achieve the same verdict as that gained by a lawyer representing him. The founding fathers, realizing this, stamped the American attorney a luxury. Frowning on extravagance and fearing the result of high court costs, America broke judicially from the English tradition of allowing legal fees as costs to the prevailing party.

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[1] A look at the New York statute is revealing. Assume that one can locate the appropriate provisions specified in the Civil Practice Law & Rules, and that a grant of costs would not be inequitable "under all the circumstances." The prevailing party may then recover $25 before note of issue; after note of issue, $50, and following trial or inquest, $75. N.Y. CIV. PRAC. § 8101, 8201 (McKinney 1974). Counsel fees, except in the extraordinary case, remain uncompensated. *See* notes 73-75, *infra,* and accompanying text.

[2] Official 1790 total United States population, United States Official Census, U.S. Bureau of the Census.

The public policy of the eighteenth and nineteenth centuries dictated that Americans take their disputes to court. The theory was twofold. By so doing, the litigants would have their issue decided in a fair and compulsory manner and American jurisprudence would be advanced by increased exposure. America was a noble experiment. For the first time in recorded history the poor and common man could seek the protection of a tribunal of justice on a universal scale.[3]

As American jurisprudence matured, the noble experiment continued with the same public policy dictates and procedures as set down in 1776. Concurrently, population exploded, cities grew, the industrial revolution shook the Jeffersonian Utopia to bits, and the problems of the citizenry changed.

Today, we still do not allow attorney fees as part of court costs. The American population has grown to 205,614,000,[4] mostly living in urban areas. This phenomenon has resulted in substantial overloading of the court calendars with pending suits. Instead of speaking in terms of trial by jury, we think in terms of revolving door justice and plea bargaining. In an attempt to alleviate the procedural problems and the abuse of the judicial system, jurists idealistically ask that disputants settle their differences without the aid of the courts.[5] But still thousands of suits are brought with doubtful intent, merit, and with no legal issue. As the abuse continues the common man of the eighteenth and nineteenth centuries has become the poor urban dweller of the twentieth century, a man who is barred from litigating his problems because of high legal costs and an antiquated system. His wrong cannot be made right. Paradoxically, the reason for the procedural breakdown of our courts and the exclusion of a large percentage of the population is that we are trying to help the poor and the judicial problems of today with 200-year-old methodology.

It is time for the judicial fraternity and lawmakers to admit to the reality that attorneys are no longer an embellishment in the nation's courtrooms. Our laws are vast and complex. A layman must seek legal advice to guide him through the maze of legal procedure and substance of all litigations.

The present cost structure is geared to support large damage litigation to the exclusion of small claims of the poor and common man. It does not necessarily follow, however, that small dollar claims represent small legal and humanitarian issues, and that high dollar actions represent complex and worthy questions.[6] The unfortunate consequence of this situation is

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[3] *See generally* Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?* 49 IOWA L. REV. 75 (1963) [hereinafter cited as Kuenzel].

[4] Official 1970 total United States population, United States Official Census, U.S. Bureau of the Census.

[5] *See, e.g.,* White v. Flood, 258 Iowa 402, 409, 138 N.W.2d 863, 867 (1965); Bakke v. Bakke, 242 Iowa 612, 618, 47 N.W.2d 813, 817 (1951).

[6] Kuenzel, *supra* note 4, at 84.

as obvious as it is socially unjust and dangerous. The legal problems of the common citizen are often complex and personally humiliating, but monetarily too insignificant to have a judicial remedy. The result often is frustration, alienation from society, and desperation. A victim of such a plight frequently becomes the violator in search of revenge. And so the cycle makes another turn; crime rates and the number of civil rights infringements rise.

The entire difficulty with our present but antiquated cost structure is simply that it fails to make the injured party "whole." For example, in a negligence action an attorney will work on a basis of a one-third contingent fee.[7] If he prevails his client will be made two-thirds "whole" and it is quite possible that the attorney has earned only a percentage of the reasonable value of his services.

There are many similar situations of injustice. The court will award only nominal damages for violations to civil rights, reputation, and for assaults and batteries not accompanied by bodily injury or financial loss. The legal fee remains high. The victim prevails in name only; he still must suffer financial injuries and the cost of securing his civil rights to life, liberty and the pursuit of happiness.[8] The poor man who is most susceptible to this type of injustice cannot afford to win.

The conclusion can be but one: In our noble attempt to keep the doors of justice open to all, in our desire to make the court machinery effective, we have accomplished the opposite by clinging to an agrarian solution to a now urban problem. Why do we refuse to recognize that this procedure is not only unadaptable to modern problems, but also it is acting as its own catalyst in advancing those very evils that we try to prevent.

THE ENGLISH SYSTEM OF COSTS[9]

The obvious and simplest remedy for curing the overcrowding of our courts, while at the same time opening the doors of justice to all citizens, is to rejoin England in the policy of awarding reasonable attorney fees to the prevailing party as part of court costs.

Allowing attorney fees as part of costs would join reality and theory by making the injured party "whole." It would alleviate the situation where an attorney working on a contingent basis must accept less than his reasonable value. The court calendar would not be as populous with the disappearance of strike actions and groundless claims of would-be plaintiffs who now bring actions with no chance of winning. This legal blackmail which forces the defendant to settle for an amount that is not

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[7] This is true only if the prognosis for a recovery is at least large enough to cover his costs. Obviously this does not help the indigent person.

[8] Kuenzel, *supra* note 4, at 84.

[9] For an American comparative view, *see* Greenberger, *Appellate Review in England and the United States—Who Bears the Ultimate Burden?* 1 DUQ. U.L. REV. 161 (1963).

justly owing the plaintiff would be unable to achieve its economic goal. A defendant would not be able to force a prevailing plaintiff into time-wasting litigation by groundless appeals.

In other words, with attorney fees awarded to the prevailing party, legal blackmail and the necessity to balance the cost of settlement against the expense of litigation will cease to be a potent tool to prevent justice.[10]

In England the court has the discretionary authority to award counsel fees to the prevailing party in a lawsuit. This has been the rule for hundreds of years. The English system of court costs was not planned or designed to prevent misuse and abuse of the judicial system and is not directed toward such ends today. The beneficial effect that this cost system has on limiting the court congestion, holding down costs and discouraging nonmeritorious suits has contributed to the efficiency and quality of British justice and should continue to do so in the future.[11]

> In the face of this fact it is noteworthy that their judicial manpower has remained comparatively stable for ninety years [as of 1964], despite the fact that the total population of England and Wales has increased from 22.7 million people to 43.5 million during the period in question.[12]

The cost system was designed and is used for the purpose of making an injured party "whole." In 1858 Lord Cranworth expounded the underlying philosophy: "I think that the general principle upon the subject of cost is, and ought to be . . . that the cost ought never to be considered as a penalty or punishment, but merely a necessary consequence of a party having created a litigation in which he has failed."[13]

After successful litigation, barristers and solicitors submit a document of cost items into court. Either the unsuccessful adversary consents to pay these enumerated costs or if a dispute develops a special taxing master makes a determination of what items and amounts are necessary, reasonable and proper. "Moreover, if the tortfeasor or contract breaker refuses to honor the legitimate demands of the ultimately successful party and forces the latter to resort to litigation, he is considered to have increased the damages inflicted."[14]

Under the English rules the trial judge has the discretion to deny costs, or even award them to a losing party in a case (as happens) where

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10 Kuenzel, *supra* note 4, at 79.

11 Greenberger, *The Cost of Justice: An American Problem, An English Solution,* 9 VILL. L. REV. 400, 401 (1963) [hereinafter cited as Greenberger].

12 *Id.* at 400-01. The ratio of Queen's Bench Division Judges per million in population has increased from 1 to 1.26, to 1 to 2.18. INITIAL REPORT OF THE COMMITTEE ON SUPREME COURT PRACTICE AND PROCEDURE, CMD. No. 7764, Appendix C, p. 59.

13 Clark v. Hart, 6 H.L.C. 633, 667, 10 Eng. Rep. 1443, 1457 (1858).

14 Greenberger, *supra* note 12, at 401.

the "loser" has really won or the successful suit is unjustified. In other unusual circumstances, fees may be denied or even charged to the prevailing party where, for example, a plaintiff refuses a fair settlement offer and recovers less after trial.[15]

The taxing master allows only necessary and reasonable costs that were directly incurred preparing and attaining justice. Allowance is not permitted for money spent by maintaining an overcautious position, or for a mistake which results in excessive court time, or extravagant or special charges of a witness.[16] A person who abuses the system and increases the cost of litigation above the essential cost does so at the risk of having to pay the burden of the entire cost or that portion which the court considers excessive. The thrifty English litigant rarely abuses the system.[17]

Even with the cost control legislation and three methods of determining the reasonable attorney fee,[18] the court has awarded generous allowances. In *Graigola Merthyr Co. v. Swansea Corp.*,[19] the court awarded the prevailing defendant $350,000. The high absolute dollar awards, however, serve to keep the teeth of the legislation sharp. Would-be abusers know that it will be unprofitable to bring an unjustified suit and persons with legitimate claims, even for small dollar amounts, can proceed assured that the contract-breaker or tortfeasor will pay the costs.

The American dream of equal justice for all exists in England. By incorporating into our state and federal statutes similar legislation allowing reasonable attorney fees for the prevailing party in the discretion of the court we can bring that dream to America and merge reality with theory.

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[15] For an excellent discussion of the exception to the rule of allowing attorney fees as court costs to prevailing party, *see* Greenberger, *supra* note 12.

[16] Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 43, § 50.

[17] *See* Smith v. Buller, L.R. 19 Eq. 473, 475 (1875).

[18] The Evershed Report Committee on SUPREME COURT PRACTICE AND PROCEDURE, FINAL REPORT, CMD. No. 8878, § 720-72 (1954), recommended three taxing methods: "party and party" taxation, "common fund" taxation, and "solicitor and own client" taxation.

"Party and Party taxation" is the most common method. The costs to litigate the suit are kept to a reasonable minimum. The procedure is controlled by a taxing master, who is similar to a referee in a bankruptcy proceeding, who determines what costs are necessary and reasonable to achieve justice.

"Common Fund Standard" method is a rich man's "Party and Party." Under this liberalized cost method fees and charges that would be ruled excessive under the "Party and Party" taxation are allowed, and certain items that would be stricken as luxuries are acceptable to the taxing master. This method of taxing is allowed only under special circumstances. The "Solicitor and Own Client" taxation method is comparable to the present American system. The lawyer and client determine the fee; however, to prevent abuse, the court and taxing master reserve the power to rule on the propriety of the fee.

See 30 HALSBURY'S LAWS OF ENGLAND, pt. 2, § 6 (3d ed. 1959), for complete discussion and related case application.

[19] 45 T.L.R. 219 (K.B. 1929).

THE FEDERAL STATUTES

Copyright

Under the Federal Copyright Law,[20] reasonable attorney fees are permitted in the court's discretion.[21] "In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the *prevailing party a reasonable attorney's fee as part of the costs.*"[22]

The effect of this section, which allows the court to award reasonable attorney's fee to the prevailing party, has acted as an incentive for those who have valid claims of copyright infringement to seek the aid of the judicial machinery. It has not justified the fears and predictions of the opponents of such a proviso that the courts will become the private domain of the rich, that the poor will be discouraged from seeking the court's protection, and that legitimate claims will go unredressed. In fact the opposite conclusion would seem more valid.

The courts have advanced several predominant theories in copyright cases favoring the awarding of counsel fees as part of court costs. The most prevalent of these theories is to make the winning party "whole." The explanation basically is that the losing party to an action, be it the plaintiff or the defendant, must bear the burden of paying the opponent's counsel fees as a direct and proximate result of his infringement of the plaintiff's copyright. Or, if defendant prevails, the proximate result is the securing to the defendant of full use and enjoyment of the profits and benefits of his creative work unmolested by others.

The classes of situations that fit in this discretionary category are based on some moral wrong in instituting the action. One such target is the deliberate copyright infringer, such as in *Stein v. Rosenthal.*[23] In this case the

> . . . defendants unconscionably invaded plaintiffs' copyright and in their solicitation of customers for their infringing merchandise, harassed the plaintiffs' customers and resorted to such devices as impersonation of federal agents in an attempt to gain a view of the tradesmen's records of business with plaintiffs. Where the techniques

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[20] Copyrights, 17 U.S.C. § 116 (1947).

[21] Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc., 329 F.2d 194 (2d Cir. 1964); Orgel v. Clark Boardman Co., 301 F.2d 119 (2d Cir. 1962); Leo Feist, Inc., v. Apollo Records N.Y. Corp., 300 F. Supp. 32 (S.D.N.Y. 1969), *aff'd* 418 F.2d 1249 (2d Cir. 1969); Breffort v. I Had a Ball Co., 271 F. Supp. 623 (S.D.N.Y. 1967); C. S. Hammond & Co. v. International College Globe, Inc., 210 F. Supp. 206 (S.D.N.Y. 1962); Cloth v. Hyman, 146 F. Supp. 185 (S.D.N.Y. 1956); Jerome v. Twentieth Century Fox Film Corp., 71 F. Supp. 914 (S.D.N.Y. 1946).

[22] Copyrights, 17 U.S.C. § 116 (1947) (emphasis added).

[23] 103 F. Supp. 227 (S.D. Cal. 1952). *See* Leo Feist, Inc. v. Apollo Records, N.Y. Corp., 300 F. Supp. 32 (S.D.N.Y. 1969); Johnson v. Maryland, 283 F. Supp. 929 (D.C. Md. 1968). *See also* C. S. Hammond & Co. v. International College Globe, Inc., 210 F. Supp. 206 (S.D.N.Y. 1962).

> of copying and vending infringing articles are so tinged with bad faith, plaintiffs are entitled to reasonable attorney's fees . . .[24]

The court's discretionary wrath in copyright cases is also turned toward the plaintiff who institutes an action in bad faith merely to vex and harass the defendant, where the claim is so lacking in merit that it is unreasonable. Such was the case in *Cloth v. Hyman*,[25] where the court said that

> [a]n attorney's fee is properly awarded when the infringement action has been commenced in bad faith, as where the evidence establishes that the plaintiff's real motive is to vex and harass the defendant or where plaintiff's claim is so lacking in merit as to present no arguable question of law or genuine issue of fact.[26]

In the actions where counsel fees were awarded there has been an element of bad faith. In these cases the award was used as a penalty as well as compensation to the prevailing party. Bad faith is an element weighted heavily by the court when exercising its "discretion."

The fact that counsel fees are awarded as a penalty in some cases is blatant, such as, where the prevailing party is disallowed counsel costs because of bad faith on his part. In *United Artists Television, Inc. v. Fortnightly Corp.*,[27] the prevailing defendant was denied $40,000 attorney fees, because the court felt that such awards are to be made only for "penalization" of the losing party. In *Jerome v. Twentieth Century Fox Film Corp.*,[28] the prevailing defendant's application for $30,000 attorney fees was disallowed, to penalize him for his over-technical attitude which forced plaintiff to unnecessary litigation and expense.

The courts have also disallowed attorney fees where the question litigated is unique, novel, complex and of a genuine issue accompanied by no moral guilt or blame. An excellent discussion concerning this subject is Judge Feinberg's decision in *Davis v. E. I. DuPont de Nemours & Co.*[29]

In *Breffort v. I Had A Ball Co.*,[30] the court summed up the theory that reasonable attorney fees are awarded to the prevailing defendant to deter copyright infringement by making it more expensive to do so and to shift the burden of protecting the copyright property to the infringer. The theory for awarding a successful defendant reasonable attorney fees is to impose a penalty upon the plaintiff for instituting a "baseless, frivolous, or unreasonable suit, or one instituted in bad faith."[31]

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[24] 103 F. Supp. at 231-32.

[25] 146 F. Supp. 185 (S.D.N.Y. 1956). *See* Burnett v. Lambino, 206 F. Supp. 517 (S.D.N.Y. 1962); Loew's, Inc. v. Columbia Broadcasting System, 131 F. Supp. 165 (D.C. Cal. 1955).

[26] 146 F. Supp. at 193.

[27] 300 F. Supp. 1005 (S.D.N.Y. 1969).

[28] 71 F. Supp. 914 (S.D.N.Y. 1946).

[29] 257 F. Supp. 729 (S.D.N.Y. 1966).

[30] 271 F. Supp. 623 (S.D.N.Y. 1967).

[31] *Id.* at 627.

The Copyright Act[32] makes it possible for individuals, groups and corporations to bring action in the courts to defend their rights to exclusive use of their creative property from infringers regardless of the size of damages to be expected. Unlike other areas of law where reasonable attorney fees are expressly denied as part of the costs,[33] parties involved in this branch of law can bring actions for even a small, but frustrating, infringement because they can be made "whole." It also prevents claims that are intended to harass and blackmail on groundless allegations.

There is no reason why such a rule should not be established to apply uniformly to other branches of civil law. The doors to the judicial machinery will then be reopened to the monetarily weaker litigant who will find relief for his injuries suffered, although compensatory damages are small and legal fees high.

Section 116 of the Copyright Act does not authorize or speak to the allowance of the actual attorney fee, but to a "reasonable" attorney fee.[34] Apparently the difference between an actual allowance and a reasonable allowance escapes the detection of critics, accounting for the fears of such an award. Allowing reasonable attorney fees would not inflate actual fees because any extravagance, waste or excessiveness would not be compensated for in the court's awarding of attorney fees. Costs which increase the prevailing party's legal fee will be his own responsibility. Abuse of the system could only be self-defeating.

In most cases, the court has been generous in awarding counsel fees. The allowances are often large, both in absolute dollar amount and also in percentage of damages awarded. In rare instances the court has allowed attorney fees even to the extent of 100% of damages, where the award was modest.[35]

Once the court has decided to award a reasonable counsel fee, it next applies a second test to determine the dollar amount. Most courts follow the same test of relevant factors, but each court considers certain individual elements more important than others.

The elements most commonly considered important in determining the dollar amount of attorney fees are amount of work necessary,[36]

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32 17 U.S.C. 116 (1947).

33 *E.g.*, N.Y. CIV. PRAC. § 8304.4 (McKinney 1974).

34 *See* 2 NIMMER, NIMMER ON COPYRIGHT § 161 (1974).

35 In M. Witmark & Sons v. Calloway, 22 F.2d 412 (E.D. Tenn. 1927), damages awarded were $250 and counsel fees were $250.

36 In determining what is a reasonable attorney's fee, the court considered amount of work necessary, the amount of work done, the skill employed, the monetary amount involved, and the result achieved. Cloth v. Hyman, 146 F. Supp. 185 (S.D.N.Y. 1956). *See also* Orgel v. Clark Boardman Co., 301 F.2d 119 (2d Cir. 1962); *In Re* Continental Vending Machine Corp., 318 F. Supp. 421 (E.D.N.Y. 1970).

amount of work done,[37] amount of skill employed,[38] amount of damages involved,[39] result achieved,[40] distance traveled,[41] amount of time involved,[42] and the attorney's professional standing and reputation.[43] It should be emphasized that actual attorney's fee is irrelevant in the determination.

The actual dollar awards have been large, both in absolute amount and percentage of damages awarded. In *Davis v. E. I. DuPont de Nemours & Co.*,[44] for example, the counsel fee of $15,000 was 60% of the $25,000 damages awarded.[45]

Antitrust

The Federal Antitrust Law states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore,...and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[46]

The purpose of this statute is to put teeth into antitrust regulations as they affect private individuals and corporations. Although recovery of the reasonable attorney's fee is awarded only to the prevailing plaintiff in a

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[37] *See* cases cited note 36 *supra*. In Cohan v. Richmond, 86 F.2d 680 (2d Cir. 1936), the attorney for the plaintiff submitted a brief of only seven pages with only 10 or 12 citations. The court felt that this showed little effort, work or ingenuity. The attorney's fee was, therefore, limited to $400.

[38] The case is in some respects novel and was difficult and extraordinary, requiring careful, extended and painstaking preparation, original investigation and exploration of a subject in certain aspects with few landmarks for guidance.... Upon the motion for costs, plaintiff's counsel sets up a detailed statement of services rendered and indicates that if he were reasonably compensated by his client there would be nothing left out of the award.

Cory v. Physical Culture Hotel, 14 F. Supp. 986 (W.D.N.Y. 1936). "In the case at bar, while a substantial amount of time was spent by plaintiffs' counsel, much of it was necessitated by counsel's unfamiliarity with the field." Orgel v. Clark Boardman Co., 301 F.2d 119, 122 (2d Cir. 1962). As a result, the attorney's fee was reduced from $10,000 to $5,000.

[39] *See* cases cited note 36 *supra*. *See also* Burnett v. Lambino, 206 F. Supp. 517 (S.D.N.Y. 1962), wherein the court stated: "In fixing these amounts I have considered the time necessarily spent by defendants' attorneys in thorough trial preparation... skill demonstrated by defendants' attorneys, their professional standing and reputation, and the monetary amount potentially involved [$9,000,000]." 206 F. Supp. at 519.

[40] *See* cases cited note 36 *supra*.

[41] In Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 55 (2d Cir. 1939), the court considered the extremely large amount of work done, the long and intricate computation, the fact that the plaintiff made a trip to California, and that the case had been pending for seven years.

[42] *See* cases cited notes 38, 41 *supra*. In determining the counsel fees for the prevailing plaintiff, the court considered the lawyers' high degree of skill and the "amount of work they did during more than six years which was considerable, occupying over 2,000 hours of partners' time." Davis v. E. I. DuPont de Nemours & Co., 257 F. Supp. 729, 733 (S.D.N.Y. 1966).

[43] *See* cases cited note 39 *supra*.

[44] 257 F. Supp. 729 (S.D.N.Y. 1966).

[45] *Id.* at 732. *See also* Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950); Lewys v. O'Neil, 49 F.2d 603 (S.D.N.Y. 1931).

[46] 15 U.S.C. § 15 (1914).

private litigation, it does make the courts available to an injured party. The beneficial effect this statute has had in protecting parties from violation of the antitrust regulations is best illustrated by the results of antitrust suits brought by the United States against private parties. In actions brought by the federal government no allowance is permitted. Because of the immense size of legal fees in bringing or defending an antitrust litigation it is common practice for corporations to plead "no contest" and pay the penalty to avoid the cost of litigation. In the private sphere, prior to the regulations concerning attorney fees, one corporation or person could bring such an action to harass, being reasonably confident that a "no contest" plea would be entered and that actual litigation would never be commenced. The overall effect is clear: the antitrust infringer had a green light because his victim could not afford to bring an action.[47]

Unlike the Copyright Act, the Antitrust Act states that court costs shall include a reasonable attorney fee; court discretion plays no part in determining if the plaintiff will recover this cost. The unsuccessful plaintiff in an antitrust action is not awarded his attorney's fee, except in the "case of a derivative suit brought on behalf of a corporation, where it is shown that the corporation has received substantial benefit."[48]

The dollar amount to be awarded as attorney fees is solely within the court's discretion, if reasonably exercised.[49] In determining the amount of this cost, the court looks to the following elements: the nature of the question, its novelty and difficulty, the skill and competence of counsel, his reputation in the community, amount involved, the result in relation to the pleading, counsel experience and customary charges for similar actions.[50] The size of the attorney's fee awarded by the court is realistic

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47 The primary purpose of Section 4 is to grant *private* parties the right to recover treble damages for injuries to their property by reason of a violation of the antitrust laws. . . . It was now so enlarged as to give much broader rights to a private party injured so that such party would not only be more adequately protected, but the law itself be in fact made more effective.

2 VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS § 11.04 & n.7 (1974).

48 2 VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS § 11.04(1) (1974). *See* Schechtman v. Wolfson, 244 F.2d 537 (2d Cir. 1957).

> The modern equity practice is to allow counsel fees to successful prosecutors of derivative suits although no judgment has been obtained if they show substantial benefit to the corporation through their effort. [Citing cases.] But there should be some check on derivative actions lest they be purely strike suits of great nuisance and no affirmative good, and hence it is ruled generally that the benefit to the corporation and the general body of shareholders must be substantial.

244 F.2d at 540. *See also* Globus, Inc. v. Jaroff, 279 F. Supp. 807 (S.D.N.Y. 1968).

49 In South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767 (6th Cir. 1970), the court awarded the plaintiff $2,410,452 in damages before tripling as required by the Sherman Antitrust Act and Clayton Act. In answer to the defendant's contention that the award of a $335,000 attorney's fee was unreasonable, the court said: "A party seeking review of an award of attorney's fee in an antitrust case has the burden of clearly demonstrating error in the factual basis of the award or an abuse of discretion." 434 F.2d at 794.

50 Bal Theatre Corp. v. Paramount Film Distributing Corp., 206 F. Supp. 708, 716-18 (N.D. Calif. 1962). *See also* Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970); Farmington Dowel Products Co. v. Forster Mfg. Co., 297 F. Supp.

and covers, in most instances, a large part of the actual legal cost. Usually, the award is held to less than the actual damages awarded, before tripling. An exception to this rule is in cases where the actual damages are small. In such cases the court will award an attorney's fee that is based on the above criteria, regardless of the fact that it amounts to more than the actual damages.[51]

The usual attorney fees awarded pursuant to the antitrust regulations are large both in actual dollar amount and in percentage of trebled damages.[52] As one would expect, as the damages awarded increase, the reasonable attorney fees also increase, but at a slower percentage rate.[53] The net effect of the generous and realistic awards that reflect the purchasing value of the dollar is that, in both the antitrust and copyright areas of the law, the basic theory of the founding fathers is being put into practice.

The concepts of poverty and expense are, among other factors, relative to one's neighborhood, social position, and needs. A corporation is poverty stricken in relation to the federal government; the lone novelist is poor compared with a major motion picture corporation. Before the copyright and antitrust regulations allowing reasonable attorney fees were passed, victims of powerful violators were also the victims of legal blackmail, strike actions and remediless violations that thrive under the present system of torts and contracts.

Other Federal Legislation

The Copyright and Antitrust Regulations are not the only federal

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924 (S.D. Me. 1969). In the exercise of its sound discretion the *Farmington* court sustained an attorney's fee of $327,300 based on the following factors:

> (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government; (2) the standing of counsel at the bar...; (3) time and labor spent by counsel; (4) the magnitude and complexity of the litigation; (5) the responsibility undertaken by counsel; (6) the amount recovered; and (7) the knowledge the court has of the conferences, the arguments that were presented and the work shown by the record to have been done by the attorneys for the plaintiff prior to trial.

297 F. Supp. at 925-26.

[51] Advance Business Systems & Supply Co. v. S.C.M. Corp., 415 F.2d 55, 70 (4th Cir. 1969) (counsel fees $35,875, damages before trebling $16,714); Osborn v. Sinclair Refining Co., 207 F. Supp. 856, 864 (D. Md. 1962) (single damages—$325.00, attorney fee allowed—$14,000, percentage of single damages—43%, percentage of trebled damages—14.4%).

[52] For instance, in Twentieth Century Fox Film v. Goldwyn, 328 F.2d 190 (9th Cir. 1964), the court awarded trebled damages of $300,000, and $100,000 for attorneys' fees, or 33.34%. *See also* Union Leader Corp. v. Newspapers of New England, Inc., 218 F. Supp. 490 (D. Mass. 1963) (single damages—$29,441.99, attorney fee allowed—$68,000, percentage of single damages—235%, percentage of trebled damages—78%); Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970) (single damages—$45,870,478, attorney fee allowed—$7,500,000).

[53] For instance, in Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587 (10th Cir. 1961), where trebled damages were $4,400,000, and attorney fees were $500,000, or only 11.36%.

statutes providing for reasonable attorney fees. Without exhausting the list of such statutes, the following acts parallel the Antitrust Regulations in allowing a reasonable attorney's fee for the prevailing plaintiff: Fair Labor Standard Act,[54] Interstate Commerce Act,[55] Railway Labor Act,[56] Packers and Stockyard Act,[57] Merchant Marine Act,[58] Communication Act,[59] and the Tort-Claim Act.[60] The Securities Act of 1933,[61] like the Copyright Act, allows either prevailing party a reasonable attorney's fee.

With the knowledge of the above federal statutes and the state statutes to be discussed below, it becomes difficult to justify the argument against allowing reasonable attorney fees in other areas of law. The success of these statutes in providing remedies for all wrongs, regardless of monetary amount, in making injured parties "whole," in eliminating or decreasing abuse of the legal system and in clearing the court calendars of actions that have no merit or that can be settled without court

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[54] 29 U.S.C. § 216(b) (1938): "The court in such action *shall,* in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant..." (emphasis added).

The awarding of reasonable attorney's fees under the statute is made mandatory by the replacement of "shall" for "may." Wright v. Carrigg, 275 F.2d 448 (4th Cir. 1960). *See also* Snelling v. O.K. Service Garage, Inc., 311 F. Supp. 842, 847 (E.D. Ky. 1970); Retail Store Employees Union v. Drug Fair—Community Drug Co., 307 F. Supp. 473, 480 (D.C. D.C. 1969); Foster v. Irwin, 258 F. Supp. 709, 712 (E.D. La. 1966). The dollar amount of the mandatory attorney fee, however, remains in the discretion of the court. Montalvo v. Tower Life Building, 426 F.2d 1135, 1149 (5th Cir. 1970).

[55] 49 U.S.C. § 16 (1906): "If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the cost of the suit."

[56] 45 U.S.C. § 153 (1926): "If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of costs of the suit." *See* United Transportation Union v. Soo Line Railroad Co., 457 F.2d 285, 288 (7th Cir. 1972); Bangor & Aroostook Railroad Co. v. Brotherhood of Locomotive Firemen & Engineers, 442 F.2d 812, 823 (D.C. 1971); Laday v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co., 299 F. Supp. 580, 582 (E.D. Wis. 1969).

[57] 7 U.S.C. § 210 (1921): "If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit."

[58] 46 U.S.C. § 1227 (1936): "Any person who shall be injured in his business or property by reason of anything forbidden by this section... shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[59] 47 U.S.C. § 206 (1934):

> In case any common carrier shall do, or cause or permit to be done, any act, matter or thing in the chapter prohibited or declared to be unlawful... shall be liable to the person... injured thereby for the full amount of damages sustained ... together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery....

[60] 28 U.S.C. § 2678 (1948).

[61] 15 U.S.C. § 77(E) (1970):

> In any suit under this or any other section of this subchapter, the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigation if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him.

assistance, is evident by reading court opinions dealing with these statutes. Why opponents of such legislation cling to their unsubstantiated fears is a mystery. Those who maintain that such a cost system would not work in civil cases of tort and contract are closing their eyes to the English system and the statutes which reflect its success with mathematical clarity. These opponents must also discount or explain away the success that Alaska, Washington and Oregon have had with statutes similar to the federal legislation.

STATE STATUTES

Alaska, Washington and Oregon all have statutes that grant attorney fees to the prevailing party in a lawsuit.[62] These statutes, although not in agreement with the present legislation of the original 13 colonies, do offer, in fact, judicial protection to all citizens. The concept of reasonable attorney fees, which is a matter of heated scholarly debate and of questionable merit in the east, is commonplace in the courts of the aforementioned western states. It is the authors' opinion that if we stop talking and look to the practical results achieved by these three western states and England, the answer will be self-evident. The three questions that should be posed are: Does our system today offer the protection of legal justice that the founding fathers described? Do Alaska, Washington, Oregon and England offer such protection? What do these jurisdictions have that we do not? The answer to the third rhetorical question is, of course, in large part, that these jurisdictions include reasonable attorney fees as part of court costs.

To illustrate, under the Alaska law in *Varnell v. Swires*,[63] where an employee-appellant sought judgment against his employer in the United States District Court without pursuing his remedies under the local workman's compensation law, a legal fee was awarded to the respondent in the sum of $150.00. The case clearly followed the rule of *McNeill & Libby v. Alaska Industrial Board*,[64] where a $200.00 fee was similarly allowed the prevailing party.

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62 ALASKA STAT. § 09.60.010-.060 (1973). "Except as otherwise provided by statute the Supreme Court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case." *Id.* at § 09.60.010.
WASH. REV. CODE § 4.84.010-.020 (1962).

> The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, express or implied, of the parties, but there shall be allowed to the prevailing party upon judgment certain sums by way of indemnity for his expenses in the action, which allowances are termed costs.

Id. at § 4.84.010.
ORE. REV. STAT. § 20.010 (1973):

> The measure and mode of compensation of attorneys shall be left to the argument, express or implied, of the parties, but there may be allowed to the prevailing party in the judgment or decree certain sums by way of indemnity for his attorney fees in maintaining the action or suit, or defense thereto, which allowance are termed costs.

63 261 F.2d 891 (9th Cir. 1958).
64 191 F.2d 260 (9th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952).

In *Jonas v. Bank of Kodiak*,[65] a dispute arose over whether travel expenses were allowable to an attorney for a successful party under the Alaska Statute. There was only one attorney then resident in Kodiak at this time and he represented the unsuccessful plaintiff in the case. While counsel fees of $500.00 were allowed the successful defendant, the necessary travel expense was denied as outside the scope of the statute.

Under a pre-statehood Alaska rule, evidence need not be submitted to the jury as to the reasonableness of an attorney's fee. The appellate courts have found the local judge to be fully capable of determining a reasonable fee without the need of testimony being taken.[66]

Similarly, in *Columbia Lumber Co. v. Agostino*,[67] the appellate court refused to interfere with the trial court's discretion in awarding a $250.00 counsel fee to the successful party. The respondent had considered it insufficient.

In the State of Washington, under a statutory rule, attorney's fees are allowed only in modest specific amounts to the prevailing party other than in cases which are recognized exceptions.[68] A more substantial grant will be made where the matter of fees is covered by contract, a note, or where litigation has been caused by a malicious third party.[69] This section limits fees to rather nominal amounts. While the principle is properly established by the statute, we feel this minimal approach is not sufficient. Oregon is similarly modest in its approach to the problem. Under the statute[70] and case law,[71] a reasonable counsel fee to the prevailing party is permitted in cases where the amount in controversy is less than $1,000.00, and a demand has been made for the same at least 10 days before suit was instituted.

It should be said that these three states are not the only jurisdictions allowing such costs. New York, for example, has granted a certain class of persons under limited circumstances such costs in Section 64 of the General Corporation Law.[72] It should be noted that this statute more

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[65] 166 F. Supp. 739 (D.C. Alaska 1958).

[66] *See* Forno v. Coyle, 75 F.2d 692 (9th Cir. 1935).

[67] 184 F.2d 731 (9th Cir. 1950).

[68] WASH. REV. CODE § 4.84.060 (1962).

[69] *See* Vincent v. Parkland Light & Power, 5 Wis. App. 684; 491 P.2d 692 (1971); Armstrong Construction Co. v. Thompson, 64 Wis. 2d 191, 390 P.2d 976 (1964).

[70] ORE. REV. STAT. § 20.080 (1973).

[71] *See* Hollopeter v. Oregon Mutual Insurance Co., 225 Ore. 73, 464 P.2d 316 (1970); Draper v. Mullenex, 220 Ore. 1, 357 P.2d 519 (1960).

[72] N.Y. GEN. CORP. § 64 (McKinney Supp. 1972):

> Any person made a party to any action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, incurred by him in connection with the defense of such action, suit or proceeding, and in connection with any appeal therein, assessed against the corporation or against another corporation at the request of which he served as such director, officer or employee, upon court order...

closely follows the English system of solicitor and barrister taxation than its American counterpart. The New York General Corporation Law says "actually and necessarily," not "reasonable." It has been shown that "reasonable costs" have been liberally construed by courts based on time involved, skill employed and other subjective criteria, while the British courts, although also rendering large allowances at times, look more to basic necessities. The English system thus interpreted and employed in the New York General Corporation Law is an excellent compromise between the two systems that could reap all the benefits outlined above and still be more acceptable to opponents of such legislation.

In New York, in limited classes of exceptional cases, counsel fees may also be imposed on the unsuccessful party. These would include instances where a contract sued upon specifies the obligation to pay counsel fees as a matter of right. Actually, the recovery if allowed, is upon the contract and not a matter of costs. Similarly, where there is fraud or malice or where a party is obliged to litigate with a third person due to defendant's bad faith, legal fees may be allowed.

In the case of *Chatham Nameplate Inc. v. Pfeffer,*[73] the Supreme Court of Queens County allowed counsel fees to the plaintiff where the defendant had forced the plaintiff to litigate with a controlled corporation while diluting its assets to himself. The court found fraud and bad faith on the defendant's part, as well, and felt that the case fitted within "the recognized exception to the rule that attorney fees incurred in litigating a claim are not recoverable as an item of damage."[74]

As an alternative theory, the court found a right to assess counsel fees as part of "punitive damages" for wanton conduct. By this test, as well, the defendant was found responsible.

Where an attachment against a defendant's property has been improperly issued and is set aside, counsel fees in securing the vacatur may also be recovered.[75]

The approach of these decisions is not the approach that your authors submit for your consideration. There should be no requirement of fraud or bad faith before an allowance of fees is permitted. But these cases do refute the argument made by our opponents that the courts cannot responsibly set fair compensation to prevailing counsel and that to impose such a duty would overwhelm the judiciary.

We suggest, for your consideration, a proposed state statute to read as follows:

> Any court of record with appropriate jurisdiction of any action or proceeding is hereby authorized and directed, effective _____,

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[73] 168 N.Y.L.J. No. 13, at 10, July 20, 1972.

[74] *See* Russian Church v. Dunkel, 67 Misc. 2d 1032, 326 N.Y.S.2d 772 (1971).

[75] A. C. Israel Co. v. Banco de Brasil, 50 Misc. 2d 362, 270 N.Y.S.2d 283 (1966).

197____, to order payment to the prevailing party or parties in said action or proceeding pending before it, upon the entry of any order or judgment therein, of counsel fees in a sum to be determined in the court's reasonable discretion, as well as costs and disbursements as provided by law. Such fees may be determined by the court on stipulation of the parties or otherwise by the court, or if found necessary, referred to a referee for hearing and report. Where the matter of such counsel fees is contested, it shall be determined with a view to such criteria as results achieved, time expended, novelty of legal problems involved, experience of counsel, public benefit and other relevant factors. No such listing of criteria is to be regarded as exclusive. While the matter of good faith of the nonprevailing party in instituting such action or proceeding may be considered as relevant as to the size of any such counsel fee so awarded, a finding of such good faith shall not in itself bar or limit the granting of reasonable counsel fees to the prevailing party or parties. Provided, however, that in the event that the court finds that the action or proceeding brought or defenses asserted, were frivolous in nature or for damages in excess of any reasonable demand or otherwise unjustified, then and in such event the court shall have the discretion to deny counsel fees to the prevailing party or parties in part or in toto.

CONCLUSION

There are a host of other examples authorizing the granting of fees to the prevailing parties. These fees have been administered without huge windfalls to lawyers or anyone else. Judicial techniques can easily be utilized to meet this problem. They have overcome far more serious difficulties in legal administration.

Logic, fairness and equity now clearly require discretion in our courts to permit the granting of a counsel fee to a prevailing party where litigation has been instituted. The precise manner to accomplish this purpose and the methods and techniques to be utilized should be fully and promptly investigated. While there are problems to be dealt with, the principle should be quickly established which will allow damaged parties the assurance of reasonable indemnity. The legal profession, society and justice would be the beneficiaries. Counsel fees should be considered as the direct and proximate result of the damages litigated. The victim of a wrong should not be forced to weigh the cost of attaining justice against the cost of putting the judicial machinery into operation.