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Calculation of Attorneys' Fees Awards in Title VII Actions Against Private Defendants

DRUCILLA STENDER RAMEY*

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964¹ is a comprehensive statute which has as its primary purpose assuring "equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin."² Although the governmental role in the Act's enforcement is substantial, "the plaintiff [victim of discrimination] is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'"³

Central to this "private attorney general" function is Title VII's provision for award of reasonable attorneys' fees to prevailing parties: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorneys' fee as part of the costs . . ."⁴ In enacting the fees provision, Congress recognized that most victims of discrimination are unable to afford legal representation in vindicating their rights under the Act. Accordingly, Congress sought to encourage attorneys to take these onerous cases by mandating calculation of fee awards at levels applied in other areas of equally complex federal litigation, including antitrust suits.⁵

Although plaintiffs' *entitlement* to an attorney's fee under the Act has been liberally construed by the courts in light of the beneficial remedial objectives of the legislation,⁶ trial judges have calculated these

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1. 42 U.S.C. § 2000e-1 to 17 (1976)[hereinafter cited as the Act or Title VII].

2. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

3. *Christianburg Garment Co. v EEOC*, 434 U.S. 412, 418 (1978), *quoting Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 401, 402 (1967).

4. 42 U.S.C. § 2000e-5(k) (1976).

5. S. REP. NO. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 5908, 5913. *See also* notes 50-77 & accompanying text *infra*.

6. *See Christianburg Garment Co. v EEOC*, 434 U.S. 412, 417 (1978). Title VII prevailing plaintiffs are ordinarily entitled to attorneys' fees in all but special circumstances. Ordinarily, a prevailing defendant can be awarded attorney's fees only if plaintiff's action is adjudged frivolous, unreasonable, or without foundation. *Id.* at 422.

fees at abnormally low levels.⁷ This has been accomplished through a variety of mechanisms including: arbitrary elimination of documented hours from fee requests; slashing of requested hourly rates; denial of the multiplier often applied in such cases to reflect that the fee is contingent upon victory and its receipt is thereby delayed; and a refusal to make upward adjustments for services of exceptionally high quality.⁸ As a result, while it is not unusual for courts to award hourly rates ranging from \$125.00 to \$250.00 to successful antitrust and securities class action attorneys, their Title VII counterparts are fortunate to receive hourly rates averaging \$40.00 to \$100.00 in their most successful and complex cases.⁹ This extraordinary differential persists despite the comparably complex, lengthy, costly, and high-risk nature of the litigation involved, and in defiance of the equally strong public policy considerations which underlie fee awards in both the commercial and civil rights spheres.

Predictably, Title VII plaintiff attorneys increasingly have been forced by economic necessity to resort to more traditional and remunerative areas of practice. Many turn their expertise to Title VII defense work, which pays handsomely and on a current basis, while

7. See, e.g., *EEOC v. Strasburger*, Price, 626 F.2d 1272 (5th Cir. 1980)(\$10.60/hour); *EEOC v. Safeway Stores*, 597 F.2d 364 (10th Cir. 1980)(\$12.22/hour); *Jacobs v. Martin Sweets Co.*, 550 F.2d 634 (6th Cir. 1977)(\$27/hour); *Kinsey v. Legg Mason Wood Walker*, [1980] 23 Fair Empl. Prac. Cas. 773 (D.D.C. 1978)(\$40—\$65/hour for partners; \$20—\$45/hour for associates); *Saucedo v. Brothers Well Serv., Inc.*, 464 F. Supp. 919 (S.D. Tex. 1979)(\$40/hour); *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976)(\$60/hour).

8. See cases cited in note 7 *supra*. See also *Kamberos v. GTE Automatic Elec., Inc.*, 603 F.2d 598 (7th Cir. 1979); *Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978); *Swicker v. William Armstrong & Sons, Inc.*, 484 F. Supp. 762 (E.D. Pa. 1980); *Waters v. Heublein, Inc.*, 485 F. Supp. 110 (N.D. Cal. 1979); *Bachman v. Pertschuk*, [1980] 23 Fair Empl. Prac. Cases 1046 (D.D.C. 1979).

9. For example, in the federal securities suit *In re Equity Funding Corp. of America Sec. Litigation*, 438 F. Supp. 1303 (C.D. Cal. 1977), attorneys were awarded \$6,458,310.00. In contrast, attorneys in a civil rights action, *Gary v. Stone of La.*, 441 F. Supp. 1121 (E.D. La. 1977), received only \$205,000.00

A recent comprehensive survey of attorney's fee awards in 186 antitrust and securities class actions found that plaintiffs' attorneys were awarded an average of \$213.37 per hour. Those attorneys with recoveries in the highest recovery range (\$10,233,000-\$218,000,000) averaged \$249.90 per hour; those in the lowest recovery range (\$102,720-\$650,000) averaged \$102.34 per hour. All figures are based on 1980 deflated dollar values. *Attorney Fee Awards in Antitrust and Securities Class Actions*, 6 CLASS ACTION REPORTS 82, 129 (1980)[hereinafter cited as *Antitrust and Securities Class Actions*].

An earlier unpublished survey of 140 district court fee awards established the mean hourly rate awarded in private antitrust actions to be \$181.00 while the mean hourly rate awarded in Title VII cases was \$40.00. Helfman, *Court Awarded Attorneys' Fees: A Statistical Survey of One Hundred and Forty Recent District Court Cases Involving Attorneys' Fees* (1975)(project Submitted to the Faculty of Antioch School of Law), cited in Berger, *Court Awarded Attorneys' Fees: What is Reasonable?*, 126 U. PA. L. REV. 281, 310 n.124 (1977)[hereinafter cited as *Court Awarded Attorneys' Fees*].

others simply develop other specialties.¹⁰ Some practitioners, however, have devoted considerable effort to the fees issue, and have successfully convinced courts to compute fee awards on a basis which more closely achieves the purposes of the Act.¹¹

In this article it will be argued that the legislative history of the attorneys' fees provision of Title VII requires that fee awards be computed by a method which produces fees sufficient to sustain a Title VII bar, and that this may best be accomplished by a modified version of the approach customarily used in the antitrust area.¹²

First addressed will be a brief overview of Title VII litigation problems, with emphasis on the complexity, duration, and high-risk nature of the work involved. Then follows a discussion of the legislative purpose of Title VII and its fee provisions, with particular attention to the strong public policy considerations which must underlie judicial implementation of the fee award provisions of the Act. Next addressed will be the comparative advantages of the two primary methods of fee calculation employed by federal courts in complex litigation based, respectively, on the Title VII case of *Johnson v. Georgia Highway Express*¹³ and the antitrust case of *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*¹⁴ It will be argued that the *Lindy* method should be adopted by courts in computing Title VII fee awards. Lastly, two selected problem areas of implementation of *Lindy* in the Title VII context will be discussed.¹⁵

10. See, e.g., Declaration of Richard T. Seymour and Affidavit of Christopher D. Burdick filed in support of plaintiffs' Motion for Award of Attorneys' Fees and Costs, *Westerlund v. Fireman's Fund Ins. Co.*, [1981] 24 Fair Empl. Prac. Cas. 1190 (N.D. Cal. 1980)[hereinafter cited as Declaration of Seymour and Affidavit of Burdick, respectively]. In his Declaration, Mr. Seymour, a seasoned Title VII practitioner, states:

When I opened my solo law office on October 1, 1973, I took with me a number of substantial class actions challenging employment discrimination. . . . In each of my class actions, I provided my services to the plaintiffs and class members without charge to them. This is common in the private enforcement of Title VII. . . .

After three years and four months . . . I closed my office in debt to a substantial amount. . . .

In my judgment, the fees awarded by the courts in litigated cases have often not been sufficient to accomplish the purposes of the fee-award provisions of Title VII.

Id. at 3-4.

11. See *Lewis v. FMC Corp.*, No. C-74-2327 RFP (SJ)(N.D. Cal., filed Sept. 12, 1980)(Order of attorneys' fees)(attorney and paralegal fees of \$289,373.24); *Westerlund v. Fireman's Fund Ins. Co.*, [1981] 24 Fair Empl. Prac. Cas. 1190 (N.D. Cal. 1980)(attorneys' fees of \$232,887); *Neely v. City of Grenada*, 624 F.2d 547, 551 (5th Cir. 1980)(hourly rate of \$100 held appropriate for legal work of lead counsel).

12. See *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (*Lindy I*).

13. 488 F.2d 714 (5th Cir. 1974).

14. 540 F.2d 102 (3d Cir. 1976).

15. This article will not survey exhaustively the vast field of attorney's fee award calculations in public interest cases. For a detailed and comprehensive discussion of the

II. THE NATURE OF TITLE VII LITIGATION

The magnitude of the attorneys' fees awards problem in Title VII actions must be viewed against the difficulties of the litigation involved. Title VII class actions are extraordinarily complex, lengthy, risky, and costly cases. The Act itself prohibits employment discrimination based on race, color, religion, sex, or national origin by substantially all public and private employers, labor unions, employment agencies, and joint labor-management committees controlling apprenticeship or other training. Barred is discrimination in virtually all aspects of employment, including recruitment, hiring, testing, job assignment, compensation, benefits, hours, promotion, training, discipline, seniority rights, termination, and retaliation.¹⁶

The Act relies on a labyrinth of administrative exhaustion procedures,¹⁷ requiring initial recourse by aggrieved individuals to the agency created to administer Title VII, the Equal Employment Opportunity Commission (EEOC). The charge must then temporarily be referred to an appropriate state or local agency, if any, after which the complainant is required to exhaust EEOC internal administrative remedies.¹⁸ Ultimate recourse to federal district court than may be taken by the complainant, individually or on behalf of a class, or the action may be prosecuted by the EEOC.¹⁹ The already complex task of the complainant is greatly aggravated by the constant change in interpretation of these requirements occasioned by regulatory and judicial action.²⁰ Finally, plaintiffs must comply with procedural prerequisites

problem areas in the field, see R. LARSEN, FEDERAL COURT AWARD OF ATTORNEY'S FEES (to be published Summer 1981) [hereinafter cited as LARSEN]; *Court Awarded Attorneys' Fees*, supra note 9; Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975); Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976*, 13 JOHN MAR. L. REV. 331 (1979-80).

16. 42 U.S.C. §§ 2000e-2(a) to (d) (1976).

17. Procedures governing federal employees are particularly cumbersome. Responsibility for their administration was recently transferred from the Civil Service Commission to the EEOC. 42 U.S.C. § 2000e-16 (1976)(Reorganization Plan No. 1 of 1978, effective Jan. 1, 1979).

18. See 29 C.F.R. §§ 1601.1-.74 (1977).

19. 42 U.S.C. § 2000e-5(a) to -5(k) (1976). See generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 769-826 (1976) and Supplement 207-17 (1979); see also *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 (1980). Since 1972, the EEOC has been empowered to bring civil actions or to intervene in those brought by private parties, but lacks the vast gamut of civil and criminal sanctions available under the antitrust and securities acts. Compare 42 U.S.C. § 2000e-5-(f)(1) (1975) and 15 U.S.C. § 77t(a)-(c)(1975).

20. See, e.g., 29 C.F.R. § 1601.1-.74, as amended 1978, which established new EEOC procedures for the filing, drafting, investigation, settlement, dismissal, determination, and final processing of charges under 42 U.S.C. § 2000e-5(a) to-5(c) (1976). See also *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980); *Delaware State College v. Ricks*, ___ U.S. ___, 101 S. Ct. 498 (1980); *United Air Lines v. Evans*, 431 U.S. 553 (1977)(timeliness decisions substantially affecting plaintiffs' right to sue under Title VII).

and limitation periods of other statutes commonly pleaded in conjunction with Title VII.²¹

Class action plaintiffs additionally must grapple with all the problems attendant upon class certification and management under Rule 23 of the Federal Rules of Civil Procedure.²² Until the Supreme Court's recent decision in *East Texas Motor Freight, Inc. v. Rodriguez*,²³ courts had long held appropriate under Title VII "across-the-board" class actions by one or more named plaintiffs representing one or more protected groups, attacking the entire gamut of an employer's policies and practices. These actions were often prosecuted on a multi-facility, city-wide, state-wide, or even national basis,²⁴ requiring a commensurately broad-based discovery and trial approach. Although courts are more wary of certifying post-*Rodriguez* across-the-board class actions,²⁵ they have continued to permit these actions where adequate class representation can be shown.²⁶ Nevertheless, the possible conflicts of interest among sub-classes, as well as the enormous expenditure of time and money they entail, have led many plaintiffs' attorneys to narrow the scope of the suit.

The constant state of flux in the applicable substantive law aggravates the inherently cumbersome nature of class actions prosecuted under the Act. The Supreme Court began substantive construction of the Act in 1971,²⁷ and theories of proof under Title VII continue to be uncertain. In 1976-1977, the Supreme Court issued five decisions which dramatically altered Title VII law in the areas of seniority discrimination, pregnancy discrimination, class action certification, timeliness of

21. See, e.g., Equal Pay Act of 1963, 29 U.S.C. § 206d (1976); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976); Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981, 1983, 1985, 1986 (1976).

22. FED. R. CIV. P. 23.

23. 431 U.S. 395 (1977). The Supreme Court in *Rodriguez* held that the named plaintiffs in that action, which had never been certified by the trial court, were not discriminated against and, therefore, given the peculiar procedural posture of the case, were unable to represent a class. *Id.* at 403-04.

24. *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir. 1975) (nationwide scope of action); *Barnett v. W.T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975); *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir. 1970), *cert. denied*, 400 U.S. 951 (1970) (across-the-board class actions endorsed); *Parker v. Bell Helicopter Co.*, 78 F.R.D. 507, 513-14 (N.D. Tex. 1978) (employees at one facility may represent workers in separate plant as well as applicants, as long as the interests of the class are adequately represented).

25. *Chavez v. Temple Union High School Dist.* #213, 565 F.2d 1087 (9th Cir. 1977); *Ricks v. Schlesinger*, [1981] 24 Fair Empl. Prac. Cas. 694 (D.D.C. 1979); *Talley v. Hoechst Fibers Indus.*, [1981] 24 Fair Empl. Prac. Cas. 580 (D.S.C. 1979) (class action scope limited).

26. See, e.g., *Parker v. Bell Helicopter Co.*, 78 F.R.D. 507 (N.D. Tex. 1978).

27. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a unanimous Court held that facially neutral employment practices which could be shown to have a disparate impact or effect on blacks violate Title VII regardless of the subjective intent of the employer, unless the employer can demonstrate that such practices bear a manifest relationship to job performance. *Id.* at 431-32.

filing of suit, and standards of statistical proof of discrimination.²⁸ These decisions and others have marked a growing conservatism in the Court's interpretation of plaintiff's rights under Title VII.²⁹ This trend has significantly augmented the plaintiffs' burden in these actions, requiring litigators continually to develop novel alternative theories of discrimination adapted to the fluctuating legal standards and fact patterns posed by contemporary discrimination law.³⁰

Even in areas where the law is relatively stable, Title VII class actions present enormous problems of proof. Moreover, these difficulties have multiplied in recent years as plaintiffs have begun to pursue the so-called "second generation" of Title VII suits. As stated by one district court judge:

If there ever was a time of facile Title VII litigation, it surely ended with the demise of intentional violations of equal employment opportunity. Today's parade of Title VII cases present more and more subtle manifestations of discrimination. Proof of invidious practices becomes more difficult as the ability to separate the real violation from the unfounded suspicion grows harder. This is especially so since many employers and unions . . . have made substantial good faith efforts toward eliminating racial distinctions from the workforce.³¹

28. *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977)(standards of statistical proof); *Eastern Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977)(class actions); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977)(seniority); *General Elec. Co. v. Gilbert*, 429 U.S. 1079 (1977)(pregnancy); *United Airlines Inc. v. Evans*, 431 U.S. 553 (1977)(timeliness).

29. *Griggs* itself may be in jeopardy. The Court in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), reversed every circuit which had ruled on the issue holding that a seniority system does not violate Title VII absent a showing, in essence, that the system was the product of intentional discrimination. *Id.* at 352-53.

President Reagan's EEOC transition team has recommended that the proof of discriminatory intent should be applied to all employment practices. Lubin, *Reagan's Advisors Accuse the EEOC of "Racism," Suggest Big Cutback*, *Wall St. J.*, Jan. 30, 1981, § 2, at 21, col. 4 [hereinafter cited as *Reagan's Advisors*].

30. See, e.g., *Crocker v. Boeing*, 437 F. Supp. 1138, 1192 (E.D. Pa. 1977)(plaintiffs' case greatly affected by recent Supreme Court cases); *Smith v. Union Oil Co.*, [1979] 18 Fair Empl. Prac. Cas. 1183, 1184 (N.D. Cal. 1978)(court noted plaintiffs' difficult position because the case went to trial at a time when the state of the law governing class' burden of proof in Title VII class actions was in flux); *Freeman v. Motor Convoy*, [1980] 21 Fair Empl. Prac. Cas. 168, 169 (N.D. Ga. 1979)(states that *Eastern Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977), *United Airlines Inc. v. Evans*, 431 U.S. 553 (1977), and *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) "constitute a jurisprudential triptych setting forth entirely new rules for Title VII and Section 1981 litigation"); *Allen v. Terminal Transp. Co.*, 486 F. Supp. 1195, 1199 (1980)(plaintiffs required to deal with "constantly changing law, especially in the areas of union liability and seniority").

31. *Swint v. Pullman-Standard*, 539 F.2d 77, 99 (5th Cir. 1976); see also *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 613 (N.D. Cal. 1979).

Title VII actions today can entail discovery, review, synthesis, and evidentiary introduction of millions of items of data, organized within abstruse statistical models designed to illustrate discrimination under the Act. The nature of these statistical showings has become increasingly complex as discrimination itself has become an increasingly subtle phenomenon.³²

In light of these characteristics, Title VII class actions are characterized as extraordinarily risky, lengthy, and expensive undertakings. Because Title VII plaintiffs are normally unable to pay even the costs of suit, let alone fees, and because the Act provides for attorneys' fees awards only to prevailing plaintiffs, fees in Title VII lawsuits are entirely contingent in nature. Title VII defendants, by contrast, are often large corporations with the resources to marshal large, well-paid law firms in their defense. These firms often wage unrelenting "wars of attrition" at all stages of the litigation.³³

Each major stage in these cases poses a high degree of risk. The risk of failure at the class certification stage has increased substantially, both as a result of judicial response to the Supreme Court's decision in *East Texas Motor Freight Systems, Inc. v. Rodriguez*,³⁴ and because of a growing tendency on the part of trial judges to require far more substantial evidentiary showings by plaintiffs in support of class certification.³⁵ Moreover, under recent Supreme Court decisions, plaintiffs may not appeal the denial of a class action certification motion until the conclusion of the case, which must necessarily first be prosecuted to completion on a non-class basis.³⁶ In a 1980 survey of 357 class actions filed in one district between 1970 and 1979, three percent of the cases studied had proceeded to trial on the merits.³⁷

Plaintiffs' risk of loss at trial is substantial in Title VII cases, and is particularly high in class actions where counsel, as fiduciaries for the

32. See *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1976); *Smith v. Union Oil Co.*, [1979] 18 Fair Empl. Prac. Cas. 1183, 1185 (N.D. Tex. 1980); see also *Vuyanaich v. Republic Nat'l Bank*, [1981] 24, Fair Empl. Prac. Cas. 127 (N.D. Tex. 1980)(132-page opinion largely devoted to detailed review of statistical methods of proof in an across-the-board class action). See generally Fisher, *Multiple Regression in Legal Proceedings*, 80 COLO. L. REV. 702 (1980).

33. See, e.g., *Jones v. Glitch*, 489 F. Supp. 990, 996 n.4 (N.D. Tex. 1980)(defense attorneys mounted a "never give an inch defense").

34. 431 U.S. 395 (1977).

35. *Id.* See also *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 272-81 (4th Cir. 1980); *Harris v. Pan Am. World Airways, Inc.*, 74 F.R.D. 24 (N.D. Cal. 1977).

36. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978).

37. Chatty, *The Question of Job Bias*, San Francisco Examiner & Chronicle, Nov. 18, 1979, California Living Magazine at 7 [hereinafter cited as Chatty]. The author found that 15% were either dismissed for failure to prosecute or other procedural reasons, or consolidated with other actions; 20% more were settled prior to class certification. In 26% of the remaining cases, the court either denied class certification or granted defense motions for summary judgment. *Id.*

class, must press all possible theories of liability on behalf of unrepresented class members.³⁸ Plaintiffs must prevail not only on the merits (Stage I), but subsequently on the equally problematic relief stage of the case (Stage II).³⁹ All too often, proof of individual claims of relief in Stage II proceedings develops into a series of mini-trials on the merits.⁴⁰ It should be noted that both liability and proof issues are particularly complex in actions brought against federal, state, or local entities.⁴¹

Even in the event of success by a plaintiff through both Stage I and Stage II of trial, appeals from final orders are common. Although many Title VII class actions are settled prior to judgment, it is not unusual for one or more persons to file and litigate objections to such decrees.⁴² Moreover, litigation of attorneys' fees issues, left open by many decrees, may occupy several more years.⁴³ Lastly, plaintiffs' attorneys often are responsible for monitoring effective compliance with a court order or consent decree over a period of years following conclusion of the case on the merits.

In light of these factors, it is not unusual for Title VII class actions to require several thousands of hours of attorney and paralegal time simply to establish liability. Many cases drag on for five to ten years or longer if the case involves a substantively fluctuating area of the law. As recently noted by the fifth circuit in its fourth consideration of a Title VII class action originally filed in 1966:

38. See, e.g., *Allen v. Terminal Transp. Co.*, 486 F. Supp. 1195, 1201 (N.D. Tex. 1980)(plaintiffs' counsel would have been remiss in duty as representatives of the class had they not pressed all available theories warranted in light of the law at that time); *Jones v. Glitch*, 489 F. Supp. 990, 996 (N.D. Tex. 1980)(single-plaintiff cases exhibit a rather low rate of success).

39. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 361-62 (1977).

40. See, e.g., *Kyriazi v. Western Elec. Co.*, 476 F. Supp. 335 (D.N.J. 1979); see also *Mitchell v. Mid-Continent Spring Co.*, 583 F.2d 275 (6th Cir. 1973)("formula" settlement of Stage 2 claims impermissible).

41. In the House Report on the [1976] Civil Rights Attorney's Fees Awards Act, the Committee noted that: "[I]n some cases, immunity doctrines and special defenses available only to public officials, preclude or severely limit the damage remedy." H.R. REP. NO. 1558, 94th Cong., 2d Sess. (1976). See generally M. Dunlap, *Attorneys' Fees Against Government Defendants: Economics Requires a New Proposal*, 2 W. NEW ENG. L. REV. 311 (1979). See also the recently enacted Equal Access to Justice Act, Pub. L. No. 96-481, 49 U.S.L.W. 193-96 (Jan. 13, 1981)(to be codified in 28 U.S.C. § 2412), which establishes guidelines for award for attorneys' fees to certain prevailing litigants against the federal government, but by its terms limits its application to exclude cases already covered by federal fee-shifting statutes such as "the Civil Rights Act . . . in which Congress indicated a specific intent to encourage vigorous enforcement . . ." H. REP. NO. 1418, 96th Cong., 2d Sess. 18 (1980).

42. See *Alaniz v. California Processors, Inc.*, 572 F.2d 657 (9th Cir. 1978); *Mandujano v. Basic Vegetable Prod., Inc.*, 541 F.2d 832 (9th Cir. 1976); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610 (N.D. Cal. 1979).

43. See *Neely v. City of Grenada*, 624 F.2d 547 (5th Cir. 1980).

The length of litigation in complex Title VII class actions often rivals that of even the most notorious antitrust cases. In the instant case, we encounter another judicial paleolithic museum piece Nonetheless, we are undaunted by the crushing weight of accumulated record and remain mindful that the Court must not diverge from the direction chartered for us by the Title VII compass, no matter how long and difficult the journey. We, thus, address ourselves to the fourth appearance of this case, determined to ensure that the victims of illegal racial discrimination receive the full measure of relief which the law accords them.⁴⁴

The resulting cost of these actions is immense, both in terms of years of time expended by an attorney who has no assurance of payment, and as measured by the financial outlay entailed. In one recent case, for example, plaintiffs requested compensation for over 2,770 hours of attorney time and 244 hours of paralegal work, as well as reimbursement for over \$90,000 in costs.⁴⁵ These costs included statistical and computer resources and experts, and thousands of dollars in travel expenses occasioned by out-of-town depositions and other discovery.⁴⁶ These hours and costs would have spiraled even higher had the case culminated in trial and appeal, rather than in settlement.⁴⁷ Because of the contingency nature of Title VII class actions, the plaintiffs' law firm was forced to prosecute the case for over four years with no assurance of compensation. As a result of its experience in this and other cases, that law firm, the most prominent of the handful of San Francisco firms doing plaintiffs' Title VII work, has left the field.⁴⁸ The staggering burdens involved in Title VII class action litigation are summarized in the recent Declaration of a Title VII lawyer forced to close his office deep in debt.

The problem is that successful prosecution of a fair employment class action can require two or three thousand hours' work simply through the decision of the trial court, and paralegal time can easily amount to an additional couple of

44. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1168 (5th Cir. 1978)(EEOC charge filed Nov. 22, 1965; suit filed 1966; case still in progress). *See also*, *Allen v. Terminal Transp. Co.*, 486 F. Supp. 1195 (N.D. Cal. 1980)(eight years from original filing of suit through attorneys' fees decision on appeal); *Freeman v. Motor Convoy*, [1980] 21 Fair Empl. Prac. Cas. 168 (N.D. Ga. 1979)(class certified 1974; trial order 1975; vacated 1978 in light of *Teamsters* decision; relitigation of most issues ordered 1980); *Bowe v. Colgate Palmolive Co.*, 443 F. Supp. 696 (S.D. Ind. 1977)(fee decision in case spanning eleven years, two appeals, and 387 docket entries).

45. *Thornberry v. Delta Air Lines, Inc.*, No. C-76-798 RFP (N.D. Cal. Dec. 5, 1980)(Memorandum and Order 2, 10-11).

46. *Id.*

47. *Id.*

48. Affidavit of Burdick *supra* note 10.

thousand hours' work. The expense of prosecuting a complex Title VII class action frequently is in the \$30,000 - \$50,000 range, through the decision of the trial court [as to liability] Because the awards are ordinarily not collectable until after findings on liability have been affirmed and because it can take several years before such findings are even entered by the trial court, the prosecution of plaintiffs' Title VII cases on a contingent basis frequently involves an enormous financial drain on counsel. Because of this drain, I have been informed by a number of plaintiffs' Title VII attorneys that they are reducing the proportion of their time that they spend on the prosecution on such cases.⁴⁹

In light of the prohibitively costly nature of Title VII litigation, the courts must provide the bar with the realistic prospect of substantial attorneys' fee awards upon successful completion of a case. Private enforcement of Title VII will otherwise cease.

III. LEGISLATIVE PURPOSE OF TITLE VII'S FEE AWARD PROVISIONS

In calculating fee awards under Title VII, trial judges must recognize and implement the strong public policy considerations underlying this legislation. Awards in Title VII actions should thus parallel judgments in antitrust and security cases.

Both Title VII and the corporate policing statutes deal with injuries of an economic nature.⁵⁰ Title VII was enacted as a central component of the omnibus civil rights legislation passed by Congress in response to the acute racial crisis of the early 1960s. As expressed by President Kennedy in his Special Message to Congress of June 19, 1963:

The result of continued Federal legislative inaction will be continued if not increased racial strife—causing the leadership on both sides to pass from the hands of reasonable and

49. Declaration of Seymour, *supra* note 10, at 4; Declaration of Jules Gordon, Associate Regional Attorney, EEOC, filed in support of plaintiffs' Motion for Award of Attorneys' Fees and Costs, *Westerlund v. Fireman's Fund Ins. Co.*, [1981] 24 Fair Empl. Prac. Cas. 1190 (N.D. Cal. 1980).

50. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)(Title VII); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970)(securities); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940)(antitrust); *In re Gypsum Cases*, 346 F. Supp. 959 (N.D. Cal. 1974)(antitrust); See also Remarks of Senator Humphrey in urging passage of Title VII:

The shameful fact is that educated Negroes often are denied the chance to get jobs for which they are trained and qualified. . . .

Discrimination in employment . . . is also harmful to the nation as a whole. . . .

So, discrimination in employment is not only costly in terms of what it does to a human being, his general nature, his attitude toward his country and himself, but it is costing the American economy billions of dollars in loss of income.

110 CONG. REC. 13091 (1964) reprinted in B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1224 (1970).

responsible men to the purveyors of hate and violence, endangering domestic tranquility, retarding our nation's economic and social progress and weakening the respect with which the rest of the world regards us.⁵¹

Congress' purpose in enacting Title VII was that of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."⁵²

Enforcement of both Title VII and its antitrust and securities counterparts is predicated on a combination of public and private enforcement efforts, but the private plaintiff plays a central role in both areas. The United States Supreme Court highlighted early the role of the private plaintiff in enforcement of the 1964 Civil Rights Act, and subsequently applied its reasoning specifically to Title VII.

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.

When [a plaintiff] 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.⁵³

The broad role of the private plaintiff in the statutory scheme resulted from the failure of civil rights advocates to convince Congress to vest the Equal Employment Opportunities Commission (EEOC), the enforcement agency under the Act, with cease-and-desist powers, such as those exercised by the National Labor Relations Board.⁵⁴

Antitrust and securities legislation similarly depends upon the initiative of private plaintiffs to achieve its goals,⁵⁵ but the role of the

51. 109 CONG. REC. 1157 (1963).

52. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

53. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968)(Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a)), cited with approval in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 416-18 (1978)(Title VII); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980)(Title VII).

54. See section-by-section analysis of H.R. 1746, 118 CONG. REC. 7564-65 (1972). Until the 1972 amendments, the EEOC did not even have the right to bring suit. Under the 1972 amendments, United States Department of Justice's power to bring "pattern and practice" suits under § 707 of the Act was finally transferred to the EEOC and § 706 was amended to empower the EEOC to bring suit based on charges filed by EEOC or private changing parties. However, under the 1972 amendments, the Commission's administrative powers continued to be limited to those of conciliation and persuasion. See M. Heins, *The Fourteen-Year Furor Over Equal Employment*, 6 WORKING PAPERS FOR A NEW SOCIETY 71, 76 (Center for the Study of Public Policy, Inc., eds.)(1978) [hereinafter cited as *The Fourteen-Year Furor*].

55. See, e.g., 15 U.S.C. § 15h (Supp. 1977), as amended by the Hart-Scott-Rodino Act of 1976, Pub.L. No. 94-435, § 301, 90 Stat. 1344 (private civil suit for treble damages for an-

respective enforcement agencies under these acts is considerably greater than that of the EEOC. As noted by one writer, prior to the 1972 Amendments to Title VII, the EEOC "could only investigate complaints and attempt conciliation—a poor, enfeebled thing."⁵⁶ By 1978, lack of resources, leadership, and governmental commitment had culminated in a backlog of 130,000 unprocessed charges and a minimal docket of cases.⁵⁷ A brief and controversial period of vitality under new leadership⁵⁸ is apparently about to end with the advent of the Reagan administration.⁵⁹

By contrast, the antitrust and securities laws provide for and have resulted in energetic civil and criminal enforcement by governmental agencies.⁶⁰ The Securities and Exchange Commission is widely regarded as the single strongest agency in the Federal government.⁶¹ Similarly, as noted by one expert, "[t]he Antitrust Division [of the United States Department of Justice] is a law office, a good one with a strong tradition of high competence that transcends and perhaps inhibits programmatic change."⁶²

In both the civil rights and commercial spheres, however, the "private attorney general" function is central, and realized only if competent counsel can be persuaded to undertake plaintiffs' cases. Adequate attorneys' fees awards have long been recognized by Congress and the courts as a chief incentive to securing this representation.⁶³

titrust violation); Comment, *Shareholders' Derivative Suits to Enforce a Corporate Right of Action Against Directors Under SEC Rule 10b-5*, 114 U. PA. L. REV. 578 (1966).

56. *The Fourteen-Year Furor*, *supra* note 54, at 76.

57. *Id.* at 76, 77.

58. *Id.* at 76.

59. It has already been reported that President Reagan's EEOC transition team has recommended an EEOC budget reduction and the imposition of a one-year freeze on EEOC lawsuits and regulations. *Reagan's Advisors*, *supra* note 29.

60. For a full discussion of civil and criminal governmental enforcement of the antitrust laws by the United States Department of Justice Antitrust Division and the Federal Trade Commission, see L. SULLIVAN, *ANTITRUST 751-69* (1977) [hereinafter cited *ANTITRUST*]. For discussion of governmental enforcement of the Securities Acts, see Jacobs, *Judicial and Administrative Remedies Available to the S.E.C. for Breaches of Rule 10b-5*, 53 ST. JOHN'S L. REV. 397 (1979); Mathews, *A.L.I. Proposed Federal Securities Code: Part XV-Administration and Enforcement*, 30 VAND. L. REV. 465, 482 (1977); Note, *The Securities and Exchange Commission: An Introduction to the Enforcement of the Criminal Provisions of the Federal Securities Laws*, 17 AM. CRIM. L. REV. 121 (1979) [hereinafter cited as *Securities and Exchange Commission*].

61. *Securities and Exchange Commission*, *supra* note 60, at 143; [Oct. 6, 1976] SEC. REG. & L. REP. (BNA), No. 372 at A-5.

62. *Antitrust*, *supra* note 60, at 752.

63. One district court, in construing Title VII's attorney's fee provisions, noted:

The court approaches [the award of Title VII fees] with an awareness of the importance that adequate fee awards play in the vindication of the rights guaranteed by Title VII. Litigation in this area often involves extraordinarily complex legal and factual issues that many attorneys would simply be unable to handle successfully. The important individual and societal issues at stake in such litigation may not be adequately

The basis for judicial award of attorneys' fees for prevailing plaintiffs in Title VII cases is found in the statute itself, which provides in relevant part:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.⁶⁴

Title VII's contemporaneous legislative history states that the purpose of the fees provision is to facilitate meritorious suits by persons of limited means.⁶⁵

protected unless attorneys possessing the requisite skills can be induced to take Title VII cases. . . . [T]he awards must be sufficient to make such representation financially attractive to highly qualified attorneys.

Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co., 406 F. Supp. 828, 830 (N.D. Cal. 1976). See also *United States v. Operating Engineers*, [1974] 6 Fair Empl. Prac. Cas. 984, 985 (N.D. Cal. 1973). Courts have similarly predicated fee awards in antitrust and securities class actions on the need to stimulate legal representation of persons bringing cases involving "corporate therapeutics." *Mills v. Elec. Auto-Lite*, 396 U.S. 375, 396 (1970). See also *Beecher v. Able*, 435 F. Supp. 397, 419 (S.D.N.Y. 1977); *Knutson v. Daily Review, Inc.*, 479 F. Supp. 1263, 1267 (N.D. Cal. 1979), quoting *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (private enforcement of substantive antitrust policy is "bulwark of antitrust enforcement").

64. 42 U.S.C. § 2000e-5(k) (1976). Title VII is one of approximately 125 federal statutes which authorize discretionary or mandatory fee-shifting to prevailing parties or to prevailing plaintiffs alone. 3 FED. ATTORNEY FEE AWARDS REP., (No. 5) at 2 (August 1980). These statutes constitute exceptions to the American rule, whereby each party bears his or her own attorney's fees. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Plaintiffs who prevail at trial on Clayton Act antitrust violations are mandatorily awarded attorneys' fees from the defendant. 15 U.S.C. §§ 15, 26 (1976). Plaintiffs in antitrust class actions who successfully secure a settlement benefiting others similarly situated by creation of a "common fund" or a "substantial benefit" are awarded fees pursuant to a second exception to the American rule. In this situation, the courts exercise their equitable powers to assess fees from non-parties who have benefited from the creation of such fund or benefit. See *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Trustees v. Greenough*, 105 U.S. 527 (1881); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). Prevailing plaintiffs in shareholder's derivative actions brought under § 14(a) of the Securities and Exchange Act of 1934 are also awarded fees from the benefited corporation under the "common fund" exception. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970). Fees are awardable to prevailing parties under several of the federal securities laws, although these statutes are not designed to encourage "private attorneys general" under this act. See § 11(e) of the Securities and Exchange Act of 1933, 15 U.S.C. § 73(k)(e) (1976), and §§ 9(e) and 18(a) of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78(i)(e) and 78(r)(a) (1976). Commentaries on attorney's fee awards in antitrust and securities actions include Mowrey, *Attorney Fees in Securities Class Action and Derivative Suits*, 3 J. CORP. L. 267 (1978); Springer, *Fee Awards in Antitrust Litigation*, 44 A.B.A. ANTITRUST L.J. 97 (1975); *Antitrust and Securities Class Actions*, supra note 9; *Attorney Fees: Awards in Class Recoveries*, 3 CLASS ACTION REPORTS 154 (1974).

65. 110 CONG. REC. 12724 (1964). See *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978).

The legislative purpose behind this statute is found not only in the legislative history of Title VII, but also in the more extensive history of the Civil Rights Attorneys' Fees Awards Act of 1976, an act explicitly intended by Congress to be governed by the same standards as those prevailing under Title VII.⁶⁶ Congress further underlined the importance of attorneys' fees to secure enforcement of public interest statutes, like Title VII, in its passage of the 1976 Act. As stated in the Senate report:

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends upon governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements, which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.⁶⁷

The problems in implementation of this congressional purpose do not stem from overly restrictive rules concerning entitlement to fees in Title VII cases. Despite the discretionary language of the Act's fee provision, plaintiffs' entitlement to fees has long been liberally construed by courts in light of the beneficial purposes of the Act. Thus, award of fees has been held to be one crucial aspect of complete relief under the Act, necessary for the fulfillment of federal goals, and mandatorily awarded absent "special circumstances" which would render such an award unjust.⁶⁸ Consistent with this liberal approach, plaintiffs have

66. 42 U.S.C. § 1988 (1976). See S. REP. NO. 1011, 94th Cong., 2d Sess. 4, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912. "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." *Id.*

67. S. REP. NO. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913. The 1976 Act was passed in response to the Supreme Court's decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). *Alyeska* barred, with a few exceptions, award of fees by federal courts in the exercise of their equitable powers, absent express congressional authorization. The 1976 Act provides for discretionary award of attorneys' fees, as part of costs, to prevailing parties in actions brought under 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986 (1976); 20 U.S.C. § 1681a-b (1976); 26 U.S.C. § 7401 (1976); and 42 U.S.C. § 2000d (1976).

68. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978), *quoting* *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401 (1968); *See also* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) *citing* *Louisiana v. United States*, 380 U.S. 145, 154 (1965) ("Where racial discrimination is concerned, the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future").

held to be "prevailing" not only upon securing trial victory, but also when they have secured substantial benefits for themselves and/or their class through settlement, or through activity which serves as a catalyst to produce voluntary compliance with the Act by a defendant.⁶⁹ Additionally, the Supreme Court recently held that a district court action may be brought to recover attorneys' fees for a complainant who prevails in state administrative and judicial proceedings pursuant to Title VII administrative remedies provisions.⁷⁰ Finally, the EEOC recently published guidelines which grant prevailing plaintiffs fees for the prosecution of federal administrative proceedings under Title VII.⁷¹

In contrast to the liberal judicial standards applied in determining eligibility for attorneys' fees under Title VII, the standards applied by courts in calculating the amounts of fee awards have operated to discourage, rather than to encourage, qualified attorneys from representing the victims of discrimination.⁷² This result runs counter to Congress' legislative purpose in enacting the Act's fees provision, as supplemented by the detailed congressional findings accompanying the 1976 Act.⁷³

The Senate Report on that Act articulated three fundamental statements of congressional policy. First: "It is intended that the amount of fees awarded under [the Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases, and not be reduced because the rights involved may be non-pecuniary in nature."⁷⁴ Second, the Senate expressed its intention that fees in public interest cases be calculated on the same basis as that employed by private practitioners in billing their fee-paying clients, that is, "for all time reasonably expended on a matter."⁷⁵

Third, the Senate cited with approval three cases which it found to have produced "fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys."⁷⁶ None of these cases

69. *Maher v. Gagne*, 448 U.S. 122 (1980)(settlement); *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971)(catalyst); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970). *But see Hanrahan v. Hampton*, 446 U.S. 754, *reh. denied*, 448 U.S. 913 (1980)(party not "prevailing" for purposes of interim fee award until he/she has established entitlement to some relief on the merits of the claim).

70. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 71 (1980).

71. 29 C.F.R. § 1613.271(c) (1980).

72. *See* notes 7-9 & accompanying text *supra*.

73. Not only is the Senate Report on the 1976 Act by its terms applicable to Title VII, *see* note 66 & accompanying text *supra*, but the Supreme Court also recently recognized its applicability to Title VII cases in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 n.9 (1980); *see also Copeland v. Marshall*, [1980] 23 Fair Empl. Prac. Cas. 967, 973 (D.C. Cir. 1980).

74. S. REP. NO. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE & AD. NEWS 5913.

75. *Id.*

76. *Id. citing* *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v.*

relies on the traditional analysis customarily applied by courts in public interest cases. Rather, each lays the basis for awarding substantial fees by use of criteria which expressly recognize the complexity, contingent nature, and public importance of public interest cases.⁷⁷

As discussed in the following section, these and other cases demonstrate the need for enlightened judicial implementation of a fee-setting formula which more effectively implements the above congressional directives than that customarily employed by courts at present.

IV. TWO METHODS OF FEE SETTING — THE ADVANTAGES OF THE LINDY APPROACH

In calculating statutorily and equitably based attorneys' fees awards in complex federal cases, most courts currently adhere to guidelines established by one or both of two cases: *Johnson v. Georgia Highway Express Inc.*⁷⁸ and *Lindy Bros. Builders, Inc. v American Radiator and Standard Sanitary Corp.*⁷⁹ The fifth circuit in *Johnson* attempted to insure against award of inadequate fees in Title VII cases by requiring trial judges to justify their awards by documented consideration of twelve factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney because of acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.⁸⁰ These factors

County of Los Angeles, [1975] 8 Fair Empl. Prac. Cas. 244 (C.D. Cal. 1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975).

77. In light of the difficulty and excellent results of a complex Title VII class action, the court in *Davis v. County of Los Angeles*, [1975] 8 Fair Empl. Prac. Cas. 244 (C.D. Cal. 1973), (1) set a generous hourly rate for the two experienced lead counsel in the case, despite their employment by a non-profit public interest law firm, (2) refused to reduce the award because of issues ultimately lost or dropped from the case, and (3) augmented the base award by a 10% bonus to compensate for the case's difficulty and results. In *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), the district judge, expressly adopting the fee-calculation formula used in antitrust cases, augmented by 21% the base fee award in a complex constitutional case on the basis of the contingency nature of compensation, quality of the legal work, novel issues, and public importance of the results obtained. In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975), the trial court awarded generous fees in a major school desegregation case taking into account *inter alia* similar fees paid to defense counsel, as well as the length, excellent results, and social importance of the case and immense hardship suffered by the plaintiff's attorneys in pursuing the action.

78. 488 F.2d 714 (5th Cir. 1974)(Title VII).

79. 487 F.2d 161 (3d Cir. 1973)(antitrust).

80. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)

were modelled after, and closely parallel, those established by the American Bar Association's Code of Professional Responsibility.⁸¹

The judicial concern reflected by the third circuit in *Lindy* was the limitation of trial court awards of excessively high fees in plaintiffs' antitrust actions yielding high monetary results.⁸² Accordingly, the *Lindy* formula, which has come to be employed by most courts in antitrust and other business litigation, disapproves fees calculated on the basis of a fixed percentage of the monetary recovery in the case. Rather, trial courts are directed to calculate fees on the basis of a prescribed formula, by which a comparatively objective base figure is first calculated by multiplying the number of hours worked by a reasonable hourly rate. This "lodestar" figure which emphasizes the attorney's actual time expenditure on the case may then be adjusted by a "multiplier" (e.g., 1.5% of the "lodestar") reflecting the court's more subjective evaluation of the increase merited by the contingency nature of the case, and, where appropriate, the adjustment merited by the exceptional quality of the attorney's services.⁸³

Until recently, the *Johnson* analysis, or a similar open-ended "multi-factor" approach, has ordinarily been adopted by courts for the purpose of calculating fees in public interest cases, including those brought under Title VII.⁸⁴ Trial court opinions under *Johnson* typically consist of listing all or some of the twelve factors, accompanied by a few conclusory observations regarding each factor, and culminating in a flat dollar award, no part of which is specifically attributable to any one factor.⁸⁵ This process is inherently susceptible to great abuse, which may

81. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-18, Disciplinary Rule 240-6 (B).

82. See *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974); *Knutson v. Daily Review, Inc.*, 479 F.Supp. 263, 267 (N.D. Cal. 1979); *In re Gypsum Cases*, 386 F. Supp. 959, 962 (N.D. Cal. 1974), *aff'd*, 565 F.2d 1124 (9th Cir. 1977); *TWA, Inc. v. Hughes*, 312 F.Supp. 478, 484 (S.D.N.Y. 1970), *aff'd and modified on other grounds*, 449 F.2d 51, 79 (2d Cir. 1971), *rev'd on other grounds, sub. nom. Hughes Tool Co. v. TWA, Inc.*, 409 U.S. 363 (1973).

83. *Lindy I*, 487 F.2d 161, 166-69 (3d Cir. 1973); see also, *Lindy II*, 540 F.2d 102 (3d Cir. 1976).

84. See *Neely v. City of Grenada*, 624 F.2d 547 (5th Cir. 1980)(*Johnson*); *Walston v. School Bd. of City of Suffolk*, 566 F.2d 1201 (4th Cir. 1977)(ABA Code); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir. 1977)(*Johnson*); *Kerr v. Screen Extras Guild, Inc.* 526 F.2d 67, 69-70 (9th Cir. 1975)(*Johnson*); *Walters v. Wisconsin Steelworkers of Int'l Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974)(ABA Code).

85. For criticisms of this approach see *Copeland v. Marshall*, [1980] 23 Fair Empl. Prac. Cas. 967, 973 (D.C. Cir. 1980); *King v. McCord*, 621 F.2d 205, 207 (5th Cir. 1980); *Davis v. Fletcher*, 598 F.2d 469, 470-71 (5th Cir. 1979). Courts continue, however, to issue conclusory opinions. See, e.g., *Firefighters Inst. v. City of St. Louis*, 588 F.2d 235, 242-43 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979); *Meyers v. Clearview Dodge Sales, Inc.*, 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).

or may not be corrected on appeal. In one 1977 case, for example, the appellate court reversed an award of \$300, representing \$4.50 per hour, in a largely successful fifteen plaintiff action.⁸⁶ That same year, however, another appellate court found no abuse of discretion in a trial court's award of \$27.00 per hour to prevailing Title VII plaintiffs.⁸⁷

The tremendous latitude afforded the trial courts through the *Johnson* approach provides greater opportunity for some judges to express, via their fee decisions, their own prejudices. First, as an overwhelmingly white, male, middle-class group, federal district court judges are often unfamiliar with or unsympathetic toward the interests represented by Title VII attorneys, their clients, and their cases.⁸⁸ As expressed by one unusually candid judge in the context of a major school desegregation case:

The case was difficult. The first and greatest hurdle was the district court. The judge, who was raised on a cotton farm which had been tended by slave labor in his grandfather's time, started the case with the uninformed assumption that no intentional segregation was being practiced . . . , that the aims of the suit were extreme and unreasonable, and that a little bit of a push was all that the Constitution required of the court. The plaintiffs . . . demonstrated that segregation in Charlotte was no accident, and that it was still the systematic practice of the school administration and the community at large. These and other factors . . . produced a reversal in the original attitude of the district court.⁸⁹

A second judicial prejudice which is relatively uncontrolled in fee decisions under *Johnson*, is a perception of Title VII litigators as zealots

86. *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 880 (8th Cir. 1977).

87. *Jacobs v. Martin Sweets Co.*, 550 F.2d 364, 372-73 (6th Cir. 1977). *See also* *Neely v. City of Grenada*, 623 F.2d 547 (5th Cir. 1980)(award of \$45 per hour for in-court hours held an abuse of discretion, but award of \$35 per hour for all other legal work affirmed in successful across-the-board class action against entire municipality); *EEOC v. Strasburger, Price*, [1981] 24 Fair Empl. Prac. Cas. 1279, 1281 (5th Cir. 1980)(no abuse of discretion in trial court award of \$2500 attorney's fees for over 236 hours of work by law professor in successful intervention in Title VII case).

88. In February 1981, 450 out of a total of 516 district court judges were white males (87%); out of 132 circuit court judges, 10 were black, 2 were Chicano, and 11 were women. Telephone conversation with Sheila Joy, Statistician United States Dep't of Justice Statistical Dep't, Washington, D.C. (Feb. 6, 1981). In 1979, of the 525 active federal judges, only 29 were racial minorities and only 10 were women. *Hearings on Selection and Confirmation of Federal Judges Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 53 (1979)(prepared statement by Charles R. Halpern).

89. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483, 484-85 (W.D.N.C. 1975).

who do not expect or deserve to be compensated comparably with their more affluent equals in the commercial bar. This attitude was most clearly expressed by courts espousing the early-discredited theory that attorneys employed by public interest or legal aid firms either should not be compensated at all, or not receive compensation on the same basis as those employed in the private bar.⁹⁰ The most recent permutation of this theory appeared in the panel opinion in *Copeland v. Marshall*, recently reversed *en banc* by the District of Columbia circuit.⁹¹ The panel construed *Johnson* to require that awards of attorneys' fees in Title VII cases against federal defendants should represent compensation only for actual costs incurred by their law firm on the case, including attorneys' salaries, plus a "reasonable and controllable profit."⁹² The circuit's rejection of this theory was based both on its inherent administrative difficulties, and, more importantly, on its obvious adverse impact on public interest lawyers and law firms. The court explained that the cost-plus formula will yield different fees than the market value approach where the plaintiff is represented by a public interest law firm.⁹³ Such firms often represent their clients for low fees or no fee at all. Since a cost-plus calculation focuses on the attorneys' salaries rather than the value of the services rendered, the individual attorney is compensated at a rate far below the market price under this approach. Noting that Congress had expressly mandated use of a market value approach in enacting the 1976 Attorneys' Fees Awards Act,⁹⁴ the court stated: "The purpose of Title VII's fee awards provision . . . is to encourage the private enforcement of the civil rights laws. While some lawyers would assist in the private enforcement of Title VII for a reduced fee, congress has recognized that payment of full fees will provide greater enforcement incentives."⁹⁵

90. See discussion in *Rodriguez v. Taylor*, 569 F.2d 1231, 1244-50 (3d Cir. 1977). See also *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980)(representation by public interest group is not a "special circumstance" that should result in denial of counsel fees in Title VII action); *Oldman v. Ehrlich*, 617 F.2d 163 (8th Cir. 1980)(§ 1988); *Dennis v. Chang*, 611 F.2d 1302, 1309 (9th Cir. 1980)(Title VII); *Davis v. County of Los Angeles*, [1975] 8 Fair Empl. Prac. Cas. 244 (C.D. Cal. 1974)(Title VII).

91. *Copeland v. Marshall*, 594 F.2d 244 (D.C. Cir. 1978), *reh. denied*, [1979] 20 Fair Empl. Prac. Cas. 79 (D.C. Cir.); *rev'd en banc*, [1980] 23 Fair Empl. Prac. Cas. 967 (D.C. Cir.).

92. *Copeland v. Marshall*, [1979] 20 Fair Empl. Prac. Cas. 79, 80 (D.C. Cir.). See also *Page v. Presser*, 468 F. Supp. 399 (D.C. Iowa 1979).

93. *Copeland v. Marshall*, [1980] 23 Fair Empl. Prac. Cas. 967, 980 (D.C. Cir.).

94. S. REP. NO. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5913, *citing with approval*, *Davis v. County of Los Angeles*, [1975] 8 Fair Empl. Prac. Cas. 244, 246 (C.D. Cal. 1974). In *Davis*, the court held, "[I]t is in the interest of the public that public interest law firms be awarded reasonable attorneys' fees to be computed in the traditional manner. . . ." *Id.* at 246.

95. *Copeland v. Marshall*, [1980] 23 Fair Empl. Prac. Cas. 967, 973 (D.C. Cir.).

In general, however, with or without a *Copeland* approach, trial judges consistently have employed *Johnson* to reach fee determinations which utterly fail to reflect either the complexity of Title VII litigation or the Congressional policy underlying the Act's fee provisions. The resulting two-tiered structure of fee awards in complex federal litigation has been observed to constitute, in effect, judicial legislation of priorities among federal statutes.

[I]n both cases [public interest and antitrust] courts are proceeding under Congressionally enacted attorneys' fees 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 rates are to be made, those judgments should be made deliberately by Congress, not unwittingly by courts in the process of fixing attorneys' fees.⁹⁶

Ironically, the Title VII plaintiffs' bar may have contributed to this "judicial legislation" by failing to seek aggressively fees which truly reflect the value of their services.⁹⁷

In recent years, however, Title VII litigators have increasingly extended the focus of their work beyond substantive interpretation of the Act to efforts to secure the compensation necessary to pursue a continuing Title VII practice.⁹⁸ In light of the almost certain cut-back in public

96 *Court Awarded Attorneys' Fees*, *supra* note 9, at 293. See also *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 682 (N.D. Cal. 1974), in which Judge Peckham stated that "[t]he rationale of rewarding reasonable attorneys' fee, after all, springs from the need for placing the legal defense of certain constitutional principles and some Congressional policies on an equal footing with the protection of private interests" (citation omitted).

97. As one judge noted in a recent Title VII case:

The parties have not discussed the point, but the fee in this case was contingent in the most extreme sense of the word. Plaintiffs' counsel will receive no more than awarded by this court, and *had it been requested* this consideration would have justified a serious notion of augmentation of the award. . . . The plaintiffs will be satisfied if they receive approximately what they have requested, so no multiplier has been applied. . . .

Allen v. Terminal Transp. Co., 486 F. Supp. 1195, 1198 (N.D. Ga. 1980)(emphasis added). See also *Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1972)(plaintiffs requested \$60/hour); *Schaeffer v. Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972)(plaintiffs did not request fees for appeal); *Gay v. Board of Trustees, San Jacinto College*, [1980] 23 Fair Empl. Prac. Cas. 1570 (S.D. Tex.)(attorney voluntarily discounted hourly rate for routine services).

98. This may be attributable to the cutback in foundation funding of public interest litigation, and to the movement of Title VII attorneys out of the public interest firms in which they have been concentrated and into the private practice of law. One recent survey

enforcement of Title VII under the Reagan administration, proper judicial implementation of Title VII's fees awards provisions is of paramount importance to the survival of the evolving Title VII bar.⁹⁹

The *Lindy* formula complements and organizes the *Johnson* guidelines into a structure which best achieves this objective. In recognition of its advantages, courts increasingly have adopted a *Lindy* approach in computing fee awards in Title VII and other public interest cases.¹⁰⁰ First, as a practical matter, *Lindy* does not splinter assessment of the circumstances surrounding a case into far more units than is efficient or sensible. Many of the twelve *Johnson* factors overlap, or represent different aspects of the same basic consideration. *Johnson* factor number five, for example, the "customary hourly fee," reflects virtually every other *Johnson* factor. By contrast, the *Lindy* formula focuses on four critical and relatively discrete areas of inquiry: (1) hours worked; (2) the reasonable hourly rate to be applied to these hours; (3) adjustment reflecting the contingency nature of the case; and (4) adjustment reflecting exceptional quality of representation.

More importantly, *Lindy* prioritizes among these four considerations: (1) Market value compensation for all hours reasonably spent in the client's interest; and (2) augmentation of a base "hours-times-rate" figure by a multiplier reflecting the contingent, lengthy nature of complex litigation, and concomitant delay in receipt of a fee. This ranking

of employment discrimination suits on file in the Northern District of California from 1973 to 1978 found that over half of all cases culminating in decrees were litigated by legal aid societies, public interest firms and/or the EEOC, and that many other cases were handled by former employees of these organizations. Chatty, *supra* note 37, at 10. See also COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA (1976).

99. President Reagan's "EEOC transition team" recently recommended that a one-year freeze on EEOC litigation be imposed, together with substantial cutbacks in the agency's budget. *Reagan's Advisors*, *supra* note 29.

100. See *Copeland v. Marshall*, [1980] 23 Fair Empl. Prac. Cas. 967, 973-74 (D.C. Cir.) (expressly adopts the *Lindy* formula in calculating attorney's fees under "statutes like Title VII"); *Northcross v. Board of Educ. of the Memphis City Schools*, 611 F.2d 624, 636-38 (6th Cir. 1979) (§ 1988 case adopting hours-times-rate formula, with upward adjustment of rate to account for contingency nature of case); *Kamberos v. GTE Automatic Elec., Inc.*, 603 F.2d 598, 603-04 (7th Cir. 1979) (Title VII case adopting hours-times-rate formula, adjusted by other ABA Code of Professional Responsibility factors, including contingency nature of case, results obtained, and quality of representation); *Cleverly v. Western Elec. Co.*, 594 F.2d 639 (8th Cir. 1979) (action brought under Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, adopting *Johnson* modified by "lodestar" approach). See also *Merchandise Nat'l Bank of Chicago v. Scanlon*, 86 Ill. App. 3d 719, 408 N.E.2d 248 (1980) (truth in lending action which applies *Lindy* rather than *Johnson*); *Prandini v. National Tea Co.*, 585 F.2d 471 (3d Cir. 1978) (Title VII case adopting *Lindy* formula); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978) (§ 1988 case adopting use of formula established by *Lindy* and another antitrust case, *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975)); *Westerlund v. Fireman's Fund Ins. Co.*, [1981] 24 Fair Empl. Prac. Cas. 1190, 1191 (N.D. Cal. 1980) (Title VII case adopting *Johnson* factors but utilizing *Lindy* approach); *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980) (§ 1988 case adopting *Lindy* approach); see generally LARSEN, *supra* note 15.

requires courts to focus on the most important principles which in turn serves as an incentive for attorneys to undertake complex, lengthy litigation.

A. *Lindy Emphasis on Input Rather Than Results—
A Necessary Approach in Title VII Fee Setting*

The *Lindy* formula is predicated upon compensation of successful plaintiffs' attorneys on the basis of their input in a case, rather than on the monetary results of the litigation. Hence, the base fee is normally the product of all attorney hours actually expended on the case, times the market value of those hours. As noted in a recent survey of awards under *Lindy* in the commercial cases in which it is customarily employed, "the disallowance of claimed time is the exception rather than the rule."¹⁰¹

This approach is consistent with the congressional directives governing calculation of fees in Title VII cases. First, "[i]n computing the fee, counsel for prevailing party should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" Secondly, "[i]t is intended that the amount of fees . . . not be reduced because the rights involved may be non-pecuniary in nature."¹⁰²

Lindy's de-emphasis on the *results* of a successful action is critical in the Title VII area. The formula directs the court to consider "results" only when determining whether the base hours-times-rate "lodestar" should be adjusted in light of the exceptionally good or bad quality of the legal representation. As later clarified in *Lindy II*, this adjustment reflects both: (1) the results obtained, in an absolute sense and relative to the possible recovery; and (2) an evaluation of the professional behavior of the attorney in the particular case.¹⁰³ The *Lindy* formula does *not* allow the court's evaluation of the results to affect its determination of the "reasonable hourly rate" in the lodestar, instead basing this figure solely on the market value of the services of the attorney as a general matter in cases of this type.

The *Johnson* formula, by contrast, contains as one of its twelve, equally weighted fee determinants, consideration of the "amount involved and the results obtained."¹⁰⁴ Although the decision does recognize the importance of rewarding injunctive relief in the across-the-board discrimination cases, it does not otherwise discuss the practical difficulties of a result-orientation, particularly one focusing on monetary

101. *Antitrust and Securities Class Actions*, *supra* note 9, at 131.

102. S. REP. NO. 1011, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 59131.

103. *Lindy II*, 540 F.2d 102, 118 (3d Cir. 1976).

104. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (1976). *See also* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

results, in Title VII cases. These problems arise as a result of Title VII's statutory emphasis on injunctive remedies necessary to eradicate employment discrimination throughout the economy. Consistent with that scheme, Title VII monetary relief is of an entirely equitable nature, limited to back pay extending back to a date not more than two years prior to the filing of an administrative charge with the EEOC.¹⁰⁵ As a result, relief orders in Title VII cases tend to yield limited outright monetary gain, in striking contrast to the treble damages awards authorized under the Clayton Act.¹⁰⁶

Many courts utilizing *Johnson* have focused their fee determination on the money damages yielded in the case, to the plaintiff's detriment. The first circuit recently reversed one such decision rejecting the lower court's stated policy of imposing a fifty-percent-of-monetary-recovery ceiling on attorneys' fee awards under the 1976 Attorneys' Fees Awards Act.¹⁰⁷ The circuit court noted that the trial court's interpretation of the Act ignores the reality that even actions for solely monetary damages vindicate the principle of civil rights, and that a fixed percentage ceiling discourages private enforcement of civil rights acts.¹⁰⁸ Courts in Title VII cases often purport to de-emphasize the im-

105. 42 U.S.C. § 2000e-5(g) (1976). The legislative history of the Equal Employment Opportunity Act of 1972 indicates that this limitation on back pay was imposed to roughly parallel statutes of limitations on actions in other areas.

Under existing law, recovery of back pay in such pattern or practice suits can extend back to 1965, the effective date of enactment of the Civil Rights Act of 1964. Thus potential respondents . . . may be subject to enormous monetary penalties in the absence of a definite limitation. To avoid the litigation of stale charges and to preclude respondents from being subject to indefinite liabilities, it is clear that a precise statute of limitation is needed. In view of the tremendous backlog currently existing at the EEOC, and the failure to require a prompt service of the charge on named respondents . . . equitable principles require a limitation on liability.

H.R. REP. NO. 938, 92nd Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2175.

106. 15 U.S.C. § 15 (1970). See also H.R. REP. No. 1558, 94th Cong., 2d Sess. (1976): Of course, it should be noted that the mere recovery of damages should not preclude the awarding of counsel fees. . . . Furthermore, while damages are theoretically available under the statute covered by [the Fees Act] it should be observed that, in some cases immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damages remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal, civil, and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by [the Fees Act] only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees. . . .

107. *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1980), cert. denied, 444 U.S. 1035 (1980).

108. *Id.* But see *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 197 (6th Cir. 1978)(trial court upheld in refusing to award fees to Title VII plaintiff who established violation of her rights but because of peculiar circumstances in the case was unable to establish a right to relief). *Contra*, *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381 (D. Minn. 1980).

portance of monetary results,¹⁰⁹ but nevertheless calculate Title VII awards at levels which reflect concern over this factor.¹¹⁰

Even under a *Lindy* analysis, plaintiffs' attorneys must anticipate that courts will continue to be reluctant to award large fees in cases which do not on their face appear to yield large monetary benefits to the class. Title VII attorneys have recently attempted to address this problem by evaluating for the court the financial consequences of the affirmative injunctive relief yielded by an order or decree. For example, goal and time-tables for accelerated hiring promotion, and/or training of affected class members, a common feature in Title VII remedial orders, can be evaluated by an expert to ascertain their monetary value over at least the time-period of the court's continuing supervision of the case. In a recent nationwide sex discrimination case,¹¹¹ the settlement's goals and timetables were conservatively evaluated at \$18 million over a five-year period, and at \$56 million over a ten-year period.¹¹²

B. *Contingency Multiplier—An Essential Consideration in Calculating Title VII Fees*

Johnson factor number six directs trial courts to consider the "contingency" as opposed to "fixed nature" of the fee. As explained by the *Johnson* court, however, this factor is seen as relevant only to the question of the attorney's original assessment of the prospects of the case.¹¹³ Subsequent decisions have generally rejected this analysis as either incorrect or, more importantly, as irrelevant to calculation of the fair market value of the fee award.¹¹⁴

109. *Copeland v. Marshall*, [1980] 23 Fair Empl. Prac. Cas. 967, 986 (D.C. Cir.). See also *Chicano Police Officers' Ass'n v. Stover*, 624 F.2d 127 (10th Cir. 1980)(acknowledging propriety of fee award in recognition of substantial subjunctive relief); *Rosenfeld v. Southern Pac. Co.*, 519 F.2d 527 (9th Cir. 1979)(same); *Bachman v. Pertschuk*, 437 F. Supp. 973 (D.D.C. 1977)(same); *Davis v. County of Los Angeles*, [1975] 8 Fair Empl. Prac. Cas. 244 (C.D. Cal. 1974)(same).

110. See notes 9, 10 & accompanying text *supra*.

111. Declaration of Guy Saperstein in support of Motion for Award of Attorneys' Fees and Costs, *Westerlund v. Fireman's Fund Ins. Co.*, [1981] 24 Fair Empl. Prac. Cas. 1190 (N.D. Cal. 1980).

112. Expert evaluation of injunctive relief has long been successfully utilized in both public interest and antitrust cases to support fee awards. See, e.g., *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Ca. 1980)(replacement housing provided by defendants valued at \$230,000 million; rapid transit facilities valued at over \$100,000 million); *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975)(trial court should consider expert testimony evaluating dollar value of three-year commercial leases as compared to one-year leases); *Arenson v. Board of Trade of City of Chicago*, 372 F. Supp. 1349 (N.D. Ill. 1974)(expert testimony admitted concerning value to brokers of elimination of fixed-rate schedule).

113. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

114. See *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3rd Cir. 1976); *Sherrill v. J.P. Stevens & Co.*, 441 F. Supp. 846 (W.D.N.C. 1977). But see *Buxton v. Patel*, 595 F.2d 1182 (9th Cir. 1979)(prevailing single-

By contrast, the *Lindy* formula places great emphasis on the substantial upward adjustment of a basic hours-times-rate award ("lodestar") by a multiplier reflecting, in part, the contingent nature of success of the case.¹¹⁵ As elaborated in *Lindy II*, this factor requires trial court appraisal of: (1) the plaintiffs' burden in the case, given its complexity, and the chances of success on liability and recovery of damages; (2) the risks assumed by the plaintiffs in developing the case, including the number of attorney-hours risked without guarantee of payment and the amount of out-of-pocket expenses necessarily advanced for the case; and (3) the delay in receipt of payment for the services rendered.¹¹⁶

Commentators in both the commercial and public interest fields have stressed the importance of the contingency factor as an inducement to attract plaintiffs' attorneys to undertake this arduous and risky work. In one recent study of commercial class actions, the reporter emphasized that the risks of contingent fee litigation are cumulative, and include both the general risks of losing even the best cases, and the specific risks of obtaining class certification, prevailing on liability and obtaining damages. The reporter concluded: "In order for a rational plaintiff's class action attorney to undertake a case with only an even chance of success, he must have a reasonable expectation of being awarded double the fee that he would receive in a case almost certain of success."¹¹⁷

As discussed in Part II above, Title VII cases are arguably far riskier than their commercial counterparts. Not only are they enormously complex, lengthy, and costly, but they are also rarely, if ever, preceded by relevant governmental or other legal action against the same defendant, a common advantage in the commercial area. These risks are substantially enhanced by the rapidly changing and conflicting state of the case law, and the general inability of Title VII clients to advance even minimal costs.¹¹⁸ Also, the plaintiff's attorney is often pitted against financially secure defendants with retained counsel.

Added to these risks is the very real danger that the attorney will be financially destroyed by the burden of deferred compensation. Title VII private practitioners tend to be relatively isolated in small practices which lack both the solid financial and experiential base of plaintiffs' antitrust firms. They, therefore, pursue their work to the almost total

plaintiff not entitled to attorney's fees where action enforced single violation of private rights; presence of contingency fee agreement possible indication that attorney perceived case to have "bright [financial] prospects" and, therefore, needed no incentive to undertake it). See also Comment, *Attorneys' Fees Awards Act of 1976*, U. CHI. L. REV. 332 (1980).

115. *Lindy I*, 487 F.2d at 468.

116. *Lindy II*, 540 F.2d at 116-17.

117. *Antitrust and Securities Class Actions*, supra note 9, at 133-34; see also *Court Awarded Attorneys' Fees*, supra note 9, at 324-26.

118. *United States v. Operating Eng'rs*, [1974] 6 Fair Empl. Prac. Cas. 985, 987(N.D. Cal. 1973).

exclusion of other, non-contingency cases, and have no capital base from which to draw salary and overhead pending final outcome of their contingency cases.¹¹⁹

Although the *Johnson* formula does not recognize *Lindy's* "contingency" multiplier approach, courts increasingly have taken this factor into account in calculating fee awards in public interest cases.¹²⁰ Nevertheless, while awarding contingency multipliers which double, triple or quadruple the "lodestar" in commercial cases,¹²¹ judges are reluctant to apply multiples of even ten percent to fifty percent in Title VII actions.¹²²

This reluctance has produced precisely the unfortunate result presaged by a district court in 1974, which held that:

[The] contingent fee . . . allows attorneys—including attorneys who could not otherwise absorb the costs of lost cases—to take the financial gamble of representing penurious clients, since, over the long run, substantial fees awards in successful cases will provide full and fair compensation for all legal services rendered to all clients. From the public's standpoint, the contingent fee helps equalize the access of rich,

119. See note 10 *supra*.

120. See *Sherrill v. J.P. Stevens & Co.*, 441 F. Supp. 846, 849 (W.D.N.C. 1977)(expressly basing "incentive award" on protracted, contingency nature of Title VII case); *Westerlund v. Fireman's Fund Ins. Co.*, [1981] 24 Fair Empl. Prac. Cas. 1190, 1190-91 (N.D. Cal. 1980)(purportedly using *Johnson*, but applying multiplier of 1.50 which reflected in part the protracted nature of contingency litigation); *Copeland v. Marshall*, [1980] 23 Fair Empl. Prac. Cas. 967 (D.C. Cir.)(expressly adopting the *Lindy* contingency multiplier).

Some courts reject the concept of a contingency multiplier, and instead inflate the reasonable rate to account for the contingency factor. See *Northcross v. Board of Educ.*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

121. See *In Re Gypsum Cases*, 386 F. Supp. 959 (N.D. Cal. 1974)(contingency multiplier of three); *Arenson v. Board of Trade of Chicago*, 372 F. Supp. 1349 (N.D. Ill. 1974)(multiplier of four); *Goldstein v. Alodex Corp.*, 409 F. Supp. 1201 (E.D. Pa. 1973)(multiplier of five); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973)(multiplier of two even though criminal prosecutions preceded case and additional fees were received through private contingent fee contracts).

122. See *Westerlund v. Fireman's Fund Ins. Co.*, [1981] 24 Fair Empl. Prac. Cas. 1190, 1191 (N.D. Cal. 1980)(multiplier of only 1.50 in successfully settled nationwide class action against a major defendant); *Neely v. City of Grenada*, 624 F.2d 547, 551 (5th Cir. 1980)(augmentation of fee held appropriate in light of such factors as contingency nature of case, when litigation corrected across-the-board discrimination affecting a large class); *Kamberos v. GTE Automatic Elec., Inc.*, 603 F.2d 598, 604 (7th Cir. 1979)(reducing from 50% to 25% multiplier applied by trial court to reflect contingent nature of fees and quality of representation); *Love v. Pullman*, EMPL. PRAC. GUIDE (CCH)(19 Empl. Prac. Dec.) ¶ 9167 at 7046 (D.C. Colo. 1979)(no contingency multiplier in successful major Title VII class action which went to United States Supreme Court on grounds that factors justifying incentive fee were already reflected in the twelve *Johnson* considerations); *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976) *aff'd*, 561 F.2d 320 (D.C. Cir. 1976)("incentive fee" of 25% appropriate to reflect contingency and three other factors).

middle-class, and poor individuals to the courts by making attorney decisions concerning representation turn on an action's merits rather than on the size of a client's income. Courts' application of the doctrine in the aid of a 'private attorneys general' helps attract attorneys to the enforcement of important constitutional policies which might otherwise go unrepresented (citation omitted).¹²³

Judge Peckham's decision in the above case was one of those cited with approval in the Senate Report on the 1976 Attorney's Act as reflecting proper judicial application of standards in the computation of fee awards under civil rights acts, including Title VII.¹²⁴

In light of both the Congressional policy underlying Title VII and its fees provisions, and the harsh realities of the prosecution of employment discrimination litigation, the *Lindy* enhancement approach to contingency fee litigation is a necessity. Perhaps the highest multiplier ever awarded in a public interest case, a 3.5 percent multiplier awarded in *Keith v. Volpe*,¹²⁵ was based explicitly upon the court's acknowledgment of the extraordinary length, complexity, and difficulty of the case, absence of a fee-paying client, and uncertainty of success on the merits at the outset. Close examination and recognition of these factors is implicit in the *Lindy* approach. This recognition, in conjunction with the other advantages of the *Lindy* method of fee calculation discussed above, clearly recommended its use by all courts in calculating Title VII attorney's fees awards.

V. APPLICATION OF *LINDY* IN THE TITLE VII CONTEXT

Two questions are of particular importance in judicial application of the *Lindy* formula in the Title VII context. First, should prevailing plaintiffs' attorneys be compensated for labor on issues on which the plaintiff did not ultimately prevail? Secondly, what is the "reasonable hourly rate" to be applied to the labor of attorneys whose billing rates fail to reflect the market rate for legal work of similar complexity, duration and risk?

A. *Compensation for Unsuccessful Work*

The circuit courts are split on the question of whether or not hours spent by prevailing plaintiffs' attorneys on ultimately unsuccessful claims are compensable. Some courts, typified by the District of Columbia circuit, refuse to compensate these hours, often without discussion.¹²⁶

123. *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 685 (N.D. Cal. 1974).

124. S. REP. NO. 94-1011, 94th Cong., 2d Sess. 5, 6, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5912, 5913

125. *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980).

126. See, e.g., *Copeland v. Marshall*, [1980] 23 Fair Empl. Prac. Cas. 967, 975 (D.C. Cir.); *EEOC v. Safeway Stores*, 597 F.2d 251 (10th Cir. 1980); *Dillon v. AFBIC Dev. Corp.*,

The ostensible rationale for this reduction is that it would impose an unfair burden on the defendant and/or would constitute a windfall to the plaintiff's attorney.¹²⁷ Many courts temper this position in cases in which the plaintiff fails to prevail on one of several alternative legal theories originally advanced to remedy essentially the same conduct, or where the successful claim was inextricably related to claims on which the plaintiff did prevail. Unless the claims are truly fractionable, these courts award compensation for all hours reasonably related to the primary successful thrust of the action, even though these same services may also have supported prosecution of other, unsuccessful theories.¹²⁸ Some courts have firmly rejected the narrow view, however, insisting that prevailing plaintiffs be compensated for all time reasonably calculated to advance the client's interest.¹²⁹ Many of these courts have relied on the legislative history of the 1976 Attorneys' Fees

597 F.2d 556 (5th Cir. 1979); *Roesel v. Joliet Wrought Washer Co.*, 596 F.2d 183, 187 (7th Cir. 1979); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972). *But see* *Jones v. Diamond*, 594 F.2d 997, 1026-27 (5th Cir. 1979) *reh. ordered*, 602 F.2d 1243 (5th Cir. 1979)(award should be proportionate to extent plaintiff prevails but court should consider net result of efforts).

127. *See, e.g.*, *Jones v. Diamond*, 594 F.2d 997, 1027 (5th Cir. 1979) *reh. ordered*, 602 F.2d 1243 (5th Cir. 1979)(defendants should not have to pay for claims which lack the merit of some basis in fact or law).

128. *Copeland v. Marshall*, [1980] 23 Fair Empl. Prac. Cas. 967, 975 n.18 (D.C. Cir.)(Title VII) no rigid percentage reduction for unsuccessful claim where unsuccessful "issue was all part and parcel of one matter"; *Lamphere v. Brown Univ.*, 610 F.2d 46, 47 (1st Cir. 1979); *Hughes v. Repko*, 578 F.2d 483, 487 (3d Cir. 1978)(§ 1988)(compensation appropriate for all hours reasonably supportive of successful claims and necessary to overall success, even if hours also supported unsuccessful claims); *Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978)(Title VII)(mechanical percentage reduction for unsuccessful claims not appropriate in absence of close scrutiny of actual hours necessarily expended on prevailing claims); *Wright v. Heizer Corp.*, 503 F. Supp. 802 (N.D. Ill. 1980)(shareholders' derivative action)(appropriate to compensate all hours reasonably related to primary thrust of case). The United States Supreme Court lent support to this approach, holding that fees ordinarily available to plaintiffs who prevail on constitutional claims should not be denied because a court has held for plaintiff on statutory, rather than constitutional grounds. This policy, said the Court, "furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the long-standing judicial policy of avoiding unnecessary decision of important constitutional issues." *Maher v. Gagne*, 448 U.S. 122, 133 (1980)(§ 1988). *See also*, *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980). This principle also found express approval in the House of Representatives Report on the Civil Rights Attorneys' Fees Act of 1976, H.R. REP. NO. 1558, 94th Cong., 2d Sess. 4 n.7 (1976).

129. *See, e.g.*, *Sherkow v. Wisconsin Dep't of Pub. Instruction*, [1980] 23 Fair Empl. Prac. Cas. 939 (7th Cir.)(Title VII); *Johnson v. Nordstrom-Larpenteur Agency*, 623 F.2d 1279 (8th Cir. 1980)(Title VII); *Northcross v. Board of Educ.*, 611 F.2d 624, 636 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980)(§ 1988); *Brown v. Bathke*, 588 F.2d 634, 637 (8th Cir. 1978), *cert. denied*, 434 U.S. 987 (1978)(§ 1988); *Allen v. Terminal Transp. Co.*, 486 F. Supp. 1195, 1201 (N.D. Ga. 1980)(Title VII); *Airline Pilots Ass'n Int'l v. United Airlines*, 480 F. Supp. 1107, 1115 (E.D.N.Y. 1979); *Davis v. County of Los Angeles*, [1975] 8 Fair Empl. Prac. Cas. 244 (C.D. Cal. 1974)(Title VII); *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974)("private attorney general").

Awards Act, citing the language of the Senate Report: "In computing the fee, the counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'"¹³⁰

Denial of compensation for ultimately unsuccessful claims has the practical effect of subverting this congressional policy by undercompensating attorneys who undertake public interest litigation. As noted by one court: "We know of no 'traditional' method of billing whereby an attorney offers a discount based upon his or her failure to prevail on 'issues or parts of issues.'"¹³¹ The economic burden of pursuing Title VII litigation thereby is shifted from the defendant—discriminator to the plaintiff—victim, who has succeeded in vindicating both individual and public rights under the civil rights laws.

The probable effect of the rule is two-fold in the Title VII context. First, attorneys will be discouraged from taking the risky and difficult Title VII cases in the first instance. If attorneys know that in all likelihood they will not receive full compensation for the hours they have necessarily devoted to a complex Title VII case on which they prevail in part, many instead will choose to engage in litigation which is not subject to this "public interest discount." This result runs directly counter to the central purpose of the fee-shifting provisions of the Act. Second, contrary to congressional mandate, lawyers who do litigate Title VII cases will be discouraged from pursuing all but the most straight-forward claims and theories.¹³² Ironically, it is the lawyers who undertake the most important class actions to enforce the Act that bear the brunt of this policy. Class action counsel are ethically bound to initially pursue all theories which appear warranted at the outset of the litigation. Unlike their peers in more pedestrian practice, they are not able to secure informed consent from their class "client" to narrow the action to the easier issues. These lawyers constitute the backbone of the Title VII bar, yet are subjected to the largest disincentives to continue in this capacity.

The growth in the numbers and sophistication of the defense bar coupled with the increasingly conservative bent of not only the Supreme Court, but also the legislative and executive branches as well, insure that this issue will assume even greater importance in the future. The recent Reagan transition-team report on the EEOC highlights the paramount importance of courts providing the maximum possible incen-

130. S. REP. NO. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5913. See, e.g., *Northcross v. Board of Educ.*, 611 F.2d 624, 636 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980)(§ 1988); *Brown v. Bathke*, 588 F.2d 634, 637 (8th Cir. 1978), cert. denied, 434 U.S. 987 (1978)(§ 1988).

131. *Northcross v. Board of Educ.*, 611 F.2d 624, 636 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

132. *Id.*

tives to attorneys who are capable of handling this increasingly uphill work. Included in the recommendations of the task force are:

- (1) A one-year freeze on law suits by the EEOC;
- (2) Imposition of the requirement of proof of intent to discriminate in order to prove violation of Title VII;
- (3) Legalization of use of pre-employment screening devices, long held to disparately affect women and/or minorities without being justified by business necessity; and
- (4) Abandonment of EEOC use of hiring and promotional goals in settling charges.¹³³

The *Lindy* emphasis on the reasonable input of the attorneys, rather than on the results of the litigation, is fully consistent with a role requiring compensation for all time reasonably expended in the client's interest. Moreover, Title VII cases do not present the troublesome issues created by implementation of this rule in the "common fund/substantial benefit" cases. The fees involved are assessed against the defendant law-violator rather than taken from the class which received no monetary benefits from the services in question. Additionally, the spillover in benefits of a partial victory for the class in Title VII cases, which focus on equitable relief, may be far greater than that in antitrust cases, which focus on monetary compensation to the class.

B. *Establishing a Reasonable Hourly Rate for Title VII Attorneys*

Perhaps the most difficult task facing attorneys and courts in applying *Lindy* is the determination of the "lodestar" reasonable hourly rate. Two aspects of the problem will be discussed below. First, the court must adopt the appropriate standard for determining the reasonable rate for each attorney's labor on the case. Second, the court must consider the impact of inflation on historic hourly rates which would have been billed and collected in earlier years of prolonged litigation, but which are not actually assessed by the court and paid until years later at the conclusion of the case.

As contemplated by *Lindy* and its progeny, the "reasonable hourly rate" factor of the lodestar represents the rate normally charged for non-contingent work of similar complexity by lawyers in the community who have experience, reputation, and ability comparable to that of the plaintiffs' attorney.¹³⁴ In antitrust and other commercial litigation, this figure is ordinarily reflected in the attorney's normal billing rate.¹³⁵ This index is inappropriate in the Title VII area because Title VII attorneys do not normally charge their clients fees which reflect the market value

133. *Reagan's Advisors*, *supra* note 29.

134. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974); *In re Equity Funding Corp. of America Securities*, 438 F. Supp. 1303, 1329 (C.D. Cal. 1977).

135. *Lindy I*, 487 F.2d at 167.

of their skills. Reference to the billing rates of other Title VII or public interest lawyers in the community yields a similarly defective result. In light of the legislative history of Title VII's fee provisions, as clarified in the Senate Report on the 1976 Attorneys' Fees Awards Act,¹³⁶ courts must instead devise indices for hourly rates in Title VII cases which reflect the "same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases. . . ."¹³⁷

In attempting to arrive at a fair market value for the work of public interest lawyers, courts have often relied on affidavits or declarations filed by both the petitioning attorney and by respected practitioners in the community.¹³⁸ The plaintiff's attorney's affidavit states the attorney's legal background, experience, and special expertise in Title VII and other complex federal litigation. The affidavits of lawyers from the community may address the plaintiff's attorney's level of expertise and legal reputation in the community, stating the average hourly rate charged by the lawyers of similar expertise and reputation for representation of clients in similarly complex, non-contingent federal litigation over the period of time spanned by the case. These attorneys often cite their own or their law firm's billing rates, where such rates are reflective of the market value of services similar to those of the petitioning attorney.

The affidavit-method described above is cumbersome and expensive, particularly for attorneys who are not well-connected in the local legal community. It may also subject the affiants to detailed discovery by defendants, probing into the affiant's billing practices and those of his or her firm in specific cases. At least two possible solutions to this problem have been attempted.

First, plaintiffs' attorneys have directed courts to consider the fees charged by opposing counsel in the case under submission.¹³⁹ Courts are divided on the question of the relevance and materiality of the defendants' counsel fees in establishing the market value of the plaintiffs' attorneys' efforts. One trial court, for example, found that *Johnson* provides a mandate for plaintiffs' discovery of the rates of opposing counsel because these attorneys were most intimately involved in the litigation

136. The Senate Report states: "It is intended that the standards for awarding fees [under the 1976 Act] be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. REP. No. 1011, 94th Cong., 2nd Sess. 6, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912.

137. *Id.* The Fifth Circuit recently expressly applied the principles of the Senate Report in evaluating a *Johnson*-based fee calculation in Title VII case. *Neely v. City of Grenada*, 624 F.2d 547, 549 (5th Cir. 1980).

138. *See, e.g., Neely v. City of Grenada*, 624 F.2d 547, 550-51 n.3 (5th Cir. 1980)(examples of attorney affidavits).

139. Plaintiffs have also attempted to submit evidence of defense hours as probative of the number of hours reasonably spent in the case. *See* cases cited in notes 140 & 141 *infra*.

at issue.¹⁴⁰ Other courts have rejected as irrelevant evidence of the defense billing rate.¹⁴¹

Defense counsel's billing rates logically and legally may be the most probative evidence readily available to the court in determining the reasonable market rate of the efforts of plaintiffs' attorneys of similar experience levels. Congress implicitly authorized judicial reference to these rates in enacting the 1976 Attorneys' Fees Awards Act, by acknowledging with approval in the Senate Report the standards utilized in *Swann v. Charlotte-Mecklenburg Board of Education*, a case in which "fees paid to opposing counsel" was one of nine factors on which the trial court based its fee computations.¹⁴²

Possible objections to the discovery and admission of such evidence are clearly outweighed by its probative value. Claims of privilege, for example, are far less compelling arguments for defense counsel in the case than for outside attorneys who may subject themselves to defense discovery by attesting to their own fees in cases wholly unrelated to that before the court. Furthermore, courts can easily meet defense objections by subjecting information regarding defense fees to a protective order. Some courts' reluctance to consider defense counsel fees as probative of the value of plaintiffs' counsel's services may reflect an implicit value judgment that public interest attorneys simply do not expect or deserve to be paid the rates prevailing in large establishment law firms.¹⁴³ To the extent that this view is based on anything other than the actual quality and complexity of the legal work performed by the specific attorney involved, it is clearly proscribed by governing case law.¹⁴⁴

In light of the time and expense of litigating the reasonable rate issue, it has been suggested that district courts approach the problem by enacting district-wide local rules which establish the upper and lower boundaries of a fee spectrum.¹⁴⁵ The district would first conduct an an-

140. *Naismith v. Professional Golfers Ass'n*, 85 F.R.D. 552, 563 (N.D. Ga. 1979). The court found defendant's fees to be particularly relevant in light of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which held unconstitutional the minimum fee schedule advocated by the *Johnson* court. *Id.* at 563 n.6. See *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714, 718 (5th Cir. 1974). See also *Stastny v. Southern Bell Tel. & Tel. Co.*, 77 F.R.D. 662, 663-64 (W.D.N.C. 1978), *rev'd on other grounds*, 628 F.2d 267 (4th Cir. 1980); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483, 485 (W.D.N.C. 1975).

141. See, e.g., *Samuel v. University of Pitt.*, 80 F.R.D. 293, 295-96 (W.D. Pa. 1978); *Nirabal v. General Motors Acceptance Corp.*, 576 F.2d 729, 731 (7th Cir. 1978), *cert. denied*, 439 U.S. 1039 (1978).

142. 66 F.R.D. 483, 485 (W.D.N.C. 1975), cited in S. REP. NO. 1011, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5913.

143. One court has noted to the contrary, that "the extent to which defendants may have obtained high-priced legal counsel is relevant to show the reasonableness of plaintiffs in hiring high-priced counsel." *Naismith v. Professional Golfers Ass'n*, 85 F.R.D. 552, 564 (N.D. Ga. 1979).

144. See text accompanying notes 91-93 *supra*.

145. This and other suggestions to reduce the uncertainties of fee litigation and

nual survey of rates charged by attorneys employed in litigation similar to that giving rise to court-awarded attorneys' fees, stratified by difficulty level and experience level. Based on the findings, the resulting fee spectrum would presumptively limit the court's discretion in calculating a fee.¹⁴⁶

Whatever their disadvantages, both of these controversial methods of establishing plaintiffs' attorneys' reasonable rates have the effect of requiring courts to consider plaintiffs' attorneys' labor in public interest cases on a par with that of counsel in complex commercial litigation who are paid on a contemporaneous basis.

The second major problem courts face when determining a reasonable hourly rate for Title VII attorneys is the need to adjust rates to reflect the monetary effects of prolonged delay in receipt of payment of fee. Although many courts purport to correct for delay by augmenting the contingency multiplier,¹⁴⁷ this factor involves a separate consideration which is more properly and easily dealt with in the context of the reasonable rate issue.

The delay factor logically diminishes the value of the fee when finally paid in two ways. First, the effects of inflation devalue each dollar ultimately awarded. Second, the attorney loses the investment or interest income that could have been earned on the deferred compensation. These factors are illustrated by a recent survey of 186 fee awards in antitrust and securities class actions. The survey noted that the Consumer Price Index rose between 1971 and 1979 by approximately 79%.¹⁴⁸ Therefore, a dollar in October, 1973 was worth only fifty-eight cents in February 1980. The survey's authors further cited a recent survey of lawyers' fees in large cities which demonstrated that the average increase in the median hourly rate charged by attorneys between 1971 and 1979 approximated the rate of increase in the Consumer Price Index.¹⁴⁹ The authors note:

Particularly for more recent cases, a multiple of 1.5 or 2.0 is not infrequently necessary just for successful plaintiffs' counsel to neutralize the time factor [B]y the time a fee is awarded, inflation has reduced its value by an average of

thereby to encourage settlement, are contained in a letter dated May 6, 1980 from John T. Hansen, Esq. to the Chairs of the San Francisco Bar Association's Federal Courts Committee (reprinted as Appendix V to this article).

146. *Id.*

147. *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980); *Westerlund v. Fireman's Fund Ins. Co.*, [1981] 24 Fair Empl. Prac. Cas. 1190, 1191 (N.D. Cal. 1980); *Weiss v. Drew Nat'l Corp.*, 465 F. Supp. 548, 552-53 (S.D.N.Y. 1979); *AAMCO Automatic Transmissions, Inc. v. Taylor*, 82 F.R.D. 405, 412 (E.D. Pa. 1979).

148. *Antitrust and Security Class Actions*, *supra* note 9, at 83.

149. *Id.* See also *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980)(court adopts hourly rates for senior attorney which increased from \$50.00 per hour in 1971 to \$117.50 per hour in 1979).

21.3%. Thus in the average case, a multiple of 1.27 is required just to offset inflation, and a further multiple in the same range would be necessary to counter the interest loss factor.¹⁵⁰

Similar adjustments for projected future inflation are commonly applied by courts in personal injury law suits. As stated by one court: "[I]t is inconsistent with economic reality and grossly unfair to the plaintiff to ignore the effects of inflation upon a damage award While the administrative convenience of ignoring inflation when the rates are high is to ignore economic reality."¹⁵¹ These cases stress that future inflation is not speculative, but rather, it is capable of definition and prediction by economic experts, and must be considered if victims are to be fully compensated. This logic is considerably more persuasive in the context of computation of fee awards, since relevant rates of historic inflation are a matter of public record rather than future speculation. If courts are to fully implement the congressional purpose of Title VII's fee award provisions, some adjustment for inflation and/or interest must be made in lengthy cases.

Courts are divided, however, in their approach to the problem. Some courts simply refuse to make any accommodations at all to this factor.¹⁵² Others "inflate" historic, or past, hourly rates for each month or year of the litigation by application of an indicator like the Consumer Price Index¹⁵³ to reach the current dollar value of each individual past rate.¹⁵⁴ Alternatively, some judges have recognized the advantages of correcting for inflation by applying current hourly rates to all hours expended in the litigation at any time.¹⁵⁵ This method allows compensation for both the loss of interest and inflation. Nor is this approach overly generous; as one court noted: "if we used historic rates and added to

150. *Antitrust and Securities Class Actions*, *supra* note 9.

151. *United States v. English*, 521 F.2d 63, 74-75 (9th Cir. 1975). *See also* *Sauers v. Alaska Barge*, 600 F.2d 238 (9th Cir. 1979).

152. *See* *Kinsey v. Legg Mason Wood Walker*, [1980] 23 Fair Empl. Prac. Cas. 773, 776-77 (D.C. Cir. 1978), where the court refused to award an interest rate on fees stemming from approximately seven years of litigation.

153. U.S. BUREAU OF LABOR STATISTICS, DEPT OF LABOR, *Consumer Price Index for Urban Wage Earners and Clerical Workers, U.S. City Average, All Items*, in CPI DETAILED REPORT—JAN. 1981 DATA (March 1971) at Table 7.

154. *See, e.g.*, *Parker v. Califano*, 443 F. Supp. 789, 793 (D.D.C. 1978), where the court stated: "multiplying the \$65/hour rate by the current Gross National Product deflator factor for 1975—1.110—results in a current value of \$72/hour, which the Court finds to be fair and reasonable compensation").

155. *Lindy II*, 504 F.2d 102 (3d Cir. 1976)(current rates applied); *In re Master Key Antitrust Litigation*, 1978-1 Trade Cas. (CCH) ¶ 61,887 (D. Conn. 1978)(dictum endorsing use of current rates)(court stated "attorneys are ordinarily justified in 'seeking payment of past charges in terms of present dollar values'"); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 395 (D.D.C. 1978)(uses current rates because it simplifies calculation and "roughly counterbalances inflation").

them compensation for interest and inflation, the Court would add far more than the 5-11% difference between a calculation of the hours at the two different rates."¹⁵⁶

VI. CONCLUSION

Enforcement of Title VII depends largely on effective litigation by victims of discrimination acting in the capacity of "private attorneys general." This function, in turn, is realized only if the Act's fee-shifting provisions are liberally construed to yield fee awards at a level which encourages attorneys to undertake Title VII cases. This principle finds clear expression in the legislative history applicable to the Act, as most succinctly articulated in the Senate Report on the Civil Rights Attorneys' Fees Awards Act of 1976.¹⁵⁷ That Report directs Title VII courts to compensate plaintiffs' attorneys pursuant to the same standards as those employed in other areas of complex federal litigation; to calculate these awards on the same basis as fees billed by private practitioners, for all time reasonably spent on the case; to fully recognize and compensate injunctive relief; and to adjust the award to compensate for the complexity, length and risk of the case.¹⁵⁸

Judicial response to this legislative imperative has produced a contrary result. Fees awarded to prevailing plaintiffs in Title VII cases are customarily calculated at minimal levels reflecting judicial disregard for the determinants stressed by Congress and lack of recognition of the enormous costs in hours and dollars of federal litigation which is of maximum complexity and risk. Awards under the Act compare so unfavorably to those made in other areas of complex federal litigation as to impute to federal judges a view of civil rights as less deserving of vindication than the economic rights secured by the antitrust and corporate securities acts.

Attorneys seeking to enforce judicial recognition and implementation of the congressional purpose underlying Title VII and its fees provisions must convince courts to employ a method of fee calculation which most effectively compensates attorneys who undertake Title VII cases. The multi-factor approach commonly employed by courts in calculating Title VII fee awards¹⁵⁹ has proven disastrously inadequate to the task. The factors themselves fail adequately to recognize and reward either the contingent nature and delayed receipt of payment in Title VII cases, or their enormous complexity and impact. The *Johnson*

156. *City of New York v. Darling-Delaware*, 440 F. Supp. 1132, 1134 (S.D.N.Y. 1977).

157. 42 U.S.C. § 1988. S. REP. NO. 1011, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913.

158. *Id.*

159. See *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974); ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-18, Disciplinary Rule 240-6 (B).

approach also fragments judicial consideration of the circumstances surrounding each case, and provides no structure of priorities within which to calculate an actual dollar amount. As a result, courts have been free to acknowledge each of the factors in passing, while proceeding to exercise largely unreviewable discretion in calculating an inadequate reward.

The formula established in *Lindy*,¹⁶⁰ by contrast, requires judges to predicate their awards on the attorneys' input in the case, compensated at an hourly rate found to be reasonable for complex federal litigation, and adjusted by a factor reflecting close scrutiny of the contingency nature of the fee, delay in receipt of payment, and exceptional quality of effort expended and result achieved in a particular case. Awards made under *Lindy* are thereby focused upon the factors which most influence an attorney's economic decision to undertake Title VII cases. *Lindy* awards also subject the trial court's determination to focused appellate review, insuring that the purposes underlying the fee-shifting provision of the Act will be properly implemented by trial courts.

Trial judges must liberally implement *Lindy* in light of the broad remedial purposes of Title VII. This requires affirmative response to problem issues raised by litigation under the Act, including those posed by determination of reasonable hourly rates, compensation for contingency nature and delayed receipt of payment of fee, and remuneration for the many hours necessarily expended on matters on which the plaintiffs do not ultimately prevail. When properly implemented, *Lindy* represents the best vehicle presently available to courts for calculating reasonable Title VII attorneys' fees awards.

Trial court implementation of the *Lindy* formula in Title VII fee calculations is obviously no panacea for the ills that afflict the Title VII bar. Nevertheless, liberal application of the formula, in response to the problems discussed above as well as those in other troublesome areas, may yield fees sufficient to attract and support the highly skilled attorneys required to prosecute effect Title VII litigation.

160. See notes 82-83 & accompanying text *supra* for a discussion of the *Lindy* approach.