

Masthead Logo

McGeorge Law Review

Volume 17 | Issue 4

Article 6

1-1-1986

Attorneys' Fees in Civil Rights Cases: Contingent Fee Awards under Section 1988

Susan M. Murray

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

Part of the [Law Commons](#)

Recommended Citation

Susan M. Murray, *Attorneys' Fees in Civil Rights Cases: Contingent Fee Awards under Section 1988*, 17 PAC. L. J. 1275 (1986).
Available at: <https://scholarlycommons.pacific.edu/mlr/vol17/iss4/6>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Comments

Attorneys' Fees in Civil Rights Cases: Contingent Fee Awards Under Section 1988

Litigants in state and federal courts generally are not awarded attorneys' fees as part of their relief.¹ A lawyer representing a prevailing party in certain federal civil rights suits, however, is entitled to an award of reasonable attorneys' fees under 42 U.S.C. section 1988.² One purpose of section 1988 is to open the door to individuals with meritorious civil rights claims who could not otherwise afford to enforce their rights. A secondary purpose of section 1988 is to enable private practitioners to commit themselves to civil rights litigation.³ Section 1988, however, does not directly address whether contingent

1. See *infra* notes 32-33 and accompanying text.

2. The Awards Act, 42 U.S.C. §1988 (1976). Section 1988 states:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal case is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id.

3. See S. REP. No. 94-1011, 94th Cong., 2d Sess. 1, reprinted in 1976 U.S. CODE CONG. & AD. NEWS, 5910. Congress recognized that in many cases arising under our civil rights laws, the plaintiff has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, citizens must have the opportunity to recover what it costs them to vindicate these rights in court. *Id.* See also Comment, *The Civil Rights Attorney's*

fee agreements between attorney and client are to be upheld when a reasonable fee pursuant to section 1988 is available; nor does section 1988 address how the contingent fee is to affect the determination of a section 1988 fee award.⁴

The United States Supreme Court in *Hensley v. Eckerhart*⁵ attempted to interpret the legislative history of section 1988 by designating a formula for the determination of a reasonable fee.⁶ The Court in *Hensley* held that the fee award should reflect reasonable hours charged at a reasonable rate.⁷ The Court acknowledged that other factors must be considered, including whether a contingent fee agreement exists between client and counsel that may require a district court to adjust a fee upward or downward.⁸ Cases decided by the federal circuit and district courts since *Hensley*, however, indicate the Supreme Court was not successful in setting firm criteria for the determination of a reasonable fee when a contingent fee agreement exists.⁹

Since *Hensley*, various federal appellate courts have addressed the issue of how to determine a reasonable fee under section 1988 when a contingent fee agreement exists.¹⁰ These courts agree that no losing party should have to pay a fee to the prevailing party in excess of a reasonable amount. Confusion exists, however, as to the calculation of a reasonable fee and as to the weight that should be given a contingent fee agreement in the determination of a reasonable fee. One approach proposes that the existence of a contingent fee agreement does not preclude the award of a reasonable fee pursuant to section 1988.¹¹ Under this approach, the court first determines a reasonable fee. The court awarded attorneys' fee is limited, however,

Fees Awards Act of 1976: A View From the Second Circuit, 29 BUFFALO L. REV. 559, 559 (1980) (the Awards Act was envisioned as a boon to litigants and attorneys. The act was to benefit all citizens through active litigation of civil rights).

4. See generally S. REP. NO. 94-1011, 94th Cong., 2nd Sess. 1, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908-09.

5. 461 U.S. 424 (1983).

6. *Id.* at 433-34.

7. *Id.* at 433.

8. *Id.* at 434 n.9 (the Court was specifically referring to the factors set out by the Fifth Circuit in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-719 (5th Cir. 1974)).

9. Compare *Cooper*, 719 F.2d 1496, 1500-1501 with *Hamner v. Rios*, 769 F.2d 1404, 1407 (9th Cir. 1983) (the Tenth Circuit used the *Hensley* test to determine the statutory award; the Ninth Circuit used the equivalent of the factors set out by the Fifth Circuit in *Johnson* to determine the statutory award).

10. See e.g. *Hamner*, 769 F.2d at 1409 (the Ninth Circuit held that the contingent fee agreement should be upheld if reasonable); *Cooper*, 719 F.2d at 1496 (the Tenth Circuit effectively eliminated contingent fee agreements in civil rights cases); *Pharr v. Housing Authority of the City of Prichard*, 704 F.2d 1216, 1217 (11th Cir. 1983) (the Eleventh Circuit used the contingent fee as a ceiling for the statutory award).

11. See *Pharr*, 704 F.2d 1216.

by the amount agreed upon in the contingent fee contract.¹² Therefore, the agreed upon contingent fee limits the reasonable fee awarded by the court under section 1988.¹³ For example, if the contingent fee contract was for thirty three percent of the total recovery, the statutory award under section 1988 could not exceed thirty three percent of that amount. If the recovery was only \$10,000, the attorney would be limited to \$3,333 in fees, which may not cover the attorney's actual time and expenses. This approach mandates that the difference between the reasonable fee determined by the court under section 1988, and the contingent fee agreement between the attorney and prevailing party will be paid by the losing party.¹⁴

In contrast, another approach effectively eliminates contingent fee agreements between client and counsel in civil rights cases by holding that the contingent fee agreement can be no higher than the reasonable fee determined by the court pursuant to section 1988.¹⁵ Under this approach, the district court first determines the reasonable fee pursuant to section 1988.¹⁶ The contingent fee agreement is then limited to the amount of the reasonable fee on the theory that the fee determined pursuant to section 1988 is adequate compensation for the attorney's services.¹⁷

Finally, a middle approach will uphold a contingent fee agreement if that agreement is reasonable.¹⁸ The court will consider the existence of the contingent fee agreement in calculating the reasonable fee under section 1988.¹⁹ This compromise approach gives the court discretion to compel a prevailing party, rather than a losing party, to pay the difference between the fee awarded pursuant to section 1988 and the contingent fee agreement.²⁰

Initially, this comment will analyze section 1988 and contingent fee agreements in civil rights litigation.²¹ This comment will then examine the approaches of various federal courts of appeals to the award of reasonable attorneys' fees under section 1988 when a contingent fee agreement exists between the attorney and the party in a civil rights action.²² This comment will conclude that an award of reasonable

12. *Id.* at 1217.

13. *Id.*

14. *Id.* at 1218.

15. *See Cooper*, 719 F.2d 1507.

16. *Id.*

17. *Id.*

18. *See Hamner*, 769 F.2d at 1409.

19. *Id.*

20. *Id.*

21. *See infra* notes 28-176 and accompanying text.

22. *See infra* notes 177-236 and accompanying text.

attorneys' fees under section 1988 and contingent fee agreements are not mutually exclusive.²³ The existence of a contingent fee agreement should not preclude the award of a reasonable fee to the prevailing party pursuant to section 1988.²⁴ The contingent fee should limit the determination of a reasonable fee²⁵ and should be a factor in the determination of the fee award under section 1988.²⁶ Finally, an approach to the problem of the weight to be given to a contingent fee agreement in the determination of a reasonable fee will be recommended that comports with both the legislative history of 1988 and the purpose of contingent fee agreements.²⁷

LEGISLATIVE HISTORY AND CURRENT ANALYSIS OF SECTION 1988

A. *The American Rule*

Prior to 1976, attorneys' fees in federal civil rights litigation were governed by the "American Rule."²⁸ Under the American Rule, each party in a lawsuit pays its own counsel.²⁹ The rationale behind the rule is that parties should not be penalized merely for defending or bringing a lawsuit.³⁰ Routinely awarding attorneys' fees would unjustly discourage the poor from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel.³¹

Federal courts traditionally have refrained from awarding attorneys' fees to prevailing parties in civil rights cases absent either specific

23. See *infra* notes 237-255 and accompanying text.

24. See *infra* notes 27-172 and accompanying text.

25. See *Pharr*, 704 F.2d at 1217.

26. See *Hamner*, 769 F.2d at 1407.

27. See *infra* notes 237-255 and accompanying text.

28. The American Rule differs from the English Rule, under which fees are routinely awarded to the prevailing party. See Comment, *supra* note 3, at 561 n.8; see also, Howard, *Attorney's Fees Under Civil Rights Litigation - An Evasive Standard*, 20 IDAHO L. REV. 635, 637 (1984) [hereinafter cited as Howard, *Attorney's Fees*].

29. See Howard, *supra* note 28, at 637.

30. *Id.*

31. See generally Howard, *Attorney's Fees*, *supra* note 28, at 637. See also Note, *Surveying the Law of Fee Awards Under the Attorney's Fees Awards Act of 1976*, 59 NOTRE DAME L. REV. 1293 n.2 (1984) [hereinafter cited as Note, *Surveying the Law*] citing *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). But see Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUMBIA L. REV. 346, 348 (1980). Criticism of the American Rule has been abundant. Commentators argue that far from being democratic, the American Rule effectively denies the poor access to the courts by withholding an important means for paying counsel. *Id.* See generally Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society* 54 CALIF. L. REV. 792 (1966); Tunney, *Financing the Costs of Legal Rights*, 122 U. PA. L. REV. 632 (1974) (articles criticizing the American Rule for the aforementioned reasons).

statutory authorization³² or a finding that the case falls under one of several well recognized judicial exceptions which allow fee awards.³³ The most significant exception to the American Rule is the private attorney general exception.³⁴ If litigants benefit a particular class and the action effectuates a strong congressional policy by bringing suit, the litigants will be deemed private attorneys general and will be entitled to a fee award.³⁵ The second exception to the American Rule is the bad faith exception. The court will award attorneys' fees to a party whose opponent has proceeded in bad faith, vexatiously, or oppressively.³⁶ The third exception to the American Rule is the common fund doctrine.³⁷ A common fund is created and the fund is used to pay attorneys' fees in cases when the litigation is for the benefit of others.³⁸ Finally, an attorney may recover fees from a recalcitrant defendant who disobeys a court order in a civil contempt proceeding.³⁹

In 1975, the Supreme Court reaffirmed the American Rule in *Alyeska Pipeline Service Co. v. Wilderness Society*.⁴⁰ In *Alyeska*, the Court was faced with determining the propriety of an award for attorney's fees to environmental interests that had sought to prevent issuance of permits by the Secretary of Interior authorizing the construction of the trans-Alaska oil pipeline.⁴¹ After receiving a favorable ruling granting injunctive relief, plaintiffs claimed a substantial amount for attorneys' fees incurred in bringing the action.⁴² The Court held that, in general, federal courts do not have the power to award attorneys' fees to civil litigants in the absence of congressional authorization.⁴³ The result of *Alyeska* was to render fee awards unavailable in most civil rights actions, particularly those actions brought under the Civil Rights Act of 1866.⁴⁴

32. See *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1876) (the Supreme Court held that federal courts are not empowered to award fees without congressional authorization).

33. See Note, *Surveying the Law*, *supra* note 31, at 1293 n.1. See also Howard, *Attorney's Fees*, *supra* note 28, at 637.

34. See Comment, *supra* note 3, at 559.

35. *Id.*

36. See Note, *Surveying the Law*, *supra* note 31, at 1293 n.1.

37. *Id.*

38. *Id.*

39. *Id.*

40. 421 U.S. 240 (1975).

41. *Id.* at 241.

42. *Id.* at 241. See also Howard, *supra* note 28, at 638 (under the theory that they were performing the services of "private attorneys general").

43. See *Alyeska*, 421 U.S. at 240 (the court acknowledged the exception to the general rule for bad faith on the part of a party). *Id.* at 245.

44. See Note, *The Civil Rights Attorney's Fees Awards Act: Expansion and Contraction*, 46 BROOKLYN L. REV. 865, 874 (1980).

Less than one year after *Alyeska*, Congress enacted the Civil Rights Attorneys Fees Awards Act of 1976 (1976 Act).⁴⁵ The 1976 Act amended section 1988 to allow district courts to award reasonable attorneys' fees to parties who prevail in actions brought under certain civil rights statutes.⁴⁶ The stated purpose of the 1976 Act was to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce various civil rights acts passed by Congress since 1866.⁴⁷ The 1976 Act was also intended to fill gaps in civil rights laws created by *Alyeska* and to achieve consistency in civil rights laws.⁴⁸ Congress placed a high value on civil rights suits brought by individuals and sought to stimulate private enforcement of civil rights.⁴⁹ The legislative history of the 1976 Act states that the remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area.⁵⁰ Specifically, Congress has instructed the courts to use the broadest and most effective remedies to achieve the goals of civil rights laws.⁵¹

45. See Note, *Surveying the Law*, *supra* note 31, at 1294 (the Attorneys' Fees Awards Act of 1976 was enacted in part as a response to the decision in *Alyeska*).

46. 42 U.S.C. §1988 (1976). The pertinent language of section 1988 states:

[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id. The sections to which section 1988 applies are commonly referred to as the Reconstruction Era Civil Rights Acts. Section 1981 requires equality in civil rights. 42 U.S.C. §1981. Section 1982 guarantees all persons within the United States jurisdiction equality in civil rights. 42 U.S.C. §1982. Section 1983 prohibits anyone from depriving any United States citizen or any person within jurisdiction of the United States of any right, privilege or immunity granted by the Constitution under color of state law. 42 U.S.C. §1983. Section 1985 prohibits conspiracies to interfere with the civil rights of another. 42 U.S.C. §1985. Section 1986 provides a penalty for those who are aware of conspiracies that violate section 1985 but fail to act to prevent the interference although they have the power to do so. 42 U.S.C. §1986.

47. See S. REP. No. 94-1011, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908-09.

48. *Id.*; see also Note, *Surveying the Law*, *supra* note 31, at 1294. Prior to the 1976 Act, attorneys' fees were not awarded unless the court could find that the prevailing party fit under one of the recognized exceptions to the American Rule. The result was that some prevailing parties were able to recover attorneys' fees, while others were not. The 1976 Act attempts to rectify this discrepancy, allowing the award of attorneys' fees to all prevailing parties in specified civil rights litigation. *Id.*

49. S. REP. No. 94-1011, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5910.

50. *Id.*

51. *Id.* The Senate Committee quoted Judge Clark in *Hall v. Cole*: "Not to award counsel fees in cases such as this would be tantamount to repealing the act itself by frustrating its basic purpose." Note, *Surveying the Law*, *supra* note 31, at 1295.

B. Recovery of Attorneys' Fees Under the 1976 Act

Section 1988 allows the prevailing party⁵² to recover attorneys' fees in certain civil rights cases.⁵³ In an overwhelming majority of cases, the party seeking to vindicate rights protected by the civil rights statutes will be the plaintiff.⁵⁴ Congress intended that the standards for awarding fees be generally the same as the fee provisions of the 1964 Civil Rights Act,⁵⁵ which adopted the criteria developed by the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*⁵⁶ In *Newman*, the plaintiffs prevailed by obtaining an injunction under Title II of the Civil Rights Act of 1964 prohibiting racial discrimination at a drive-in establishment.⁵⁷ Legislation similar to section 1988 authorized the court to award attorneys' fees to a prevailing party.⁵⁸ The Supreme Court held that a prevailing⁵⁹ plaintiff should ordinarily recover attorneys' fees unless special circumstances would render recovery unjust.⁶⁰ The rationale behind the holding in *Newman* is that "private attorneys general" should not be deterred from bringing good faith actions to vindicate fundamental rights by the prospect of having to pay their opponents' counsel fees should they lose.⁶¹

52. To be a prevailing party, a plaintiff need only achieve some degree of success, winning at least, "an important matter in the course of the litigation since to delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel." *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 723 (1974); *see also*, Garrison, *Attorney's Fees Under Fee-Shifting Statutes*, 56 CONN. B. JOURNAL 66, 67 (1982).

53. The Awards Act, 42 U.S.C. §1988 (1976).

54. *See* Comment, *supra* note 3, at 565.

55. 42 U.S.C. §2000a (1976). Title II of the Civil Rights Act of 1964 prohibits discrimination in places of public accommodation. Section 2000a-3(b) covers attorneys' fees and provides: "In any action pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for cost the same as a private person." *Id.* §2000a-3(b)(1976). Title VII of the Civil Rights Act of 1964, prohibits discriminatory practices. Section 2000e-5(k) covers attorneys' fees and provides:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] 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.

42 U.S.C. §2000e (1976). The most notable distinction regarding attorneys' fees between Titles II and VII of the Civil Rights Act of 1964 and section 1988 is that in Titles II and VII Congress included express language imposing liability on the United States equal to that of a private person. Courts later found the omission of such language in section 1988 critical and exempted the United States from liability under the act. *See* Note, *supra* note 31, at 1295.

56. 390 U.S. 400 (1968).

57. *See Newman*, 390 U.S. at 400-401.

58. *Id.* at 401 n.1. *See supra* note 55 (text of 42 U.S.C. §2000a-3(b)).

59. *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978).

60. *Newman*, 390 U.S. at 402. *See infra* notes 62-67 and accompanying text for a definition of special circumstances.

61. S. REP. No. 94-1011, 94th Cong. 2d Sess. 1, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS AT 5912.

Similarly, in *Northcross v. Board of Education*,⁶² successful plaintiffs in an action resulting in desegregation of public schools in Memphis, Tennessee, sought attorneys' fees.⁶³ The Supreme Court indicated that a plaintiff obtaining an injunction is a prevailing party.⁶⁴ The Court held that as the prevailing party, plaintiff was entitled to reasonable attorneys' fees pursuant to statutory authorization, unless special circumstances existed.⁶⁵ This principle became known as the *Newman-Northcross* rule, and has provided the basis for awards of attorneys' fees to prevailing plaintiffs seeking and obtaining equitable injunctions in civil rights litigation.⁶⁶

Although the United States Supreme Court has not addressed the precise issue of what constitutes "special circumstances" as mentioned in *Northcross*, the decisions of a number of courts of appeal provide guidance in this area.⁶⁷ Special circumstances that would render an award unjust have been defined by courts as, for example, a tort action cloaked in a due process constitutional claim,⁶⁸ or litigation that did not benefit the public.⁶⁹ Special circumstances do not include the defendant's good faith,⁷⁰ the plaintiff's ability to pay attorneys' fees,⁷¹ or the plaintiff's recovery of minor or nominal damages.⁷²

The legislative history of the 1976 Act indicates that prevailing defendants may also recover fees.⁷³ The United States Supreme Court in

62. 412 U.S. 427 (1973).

63. *Id.*

64. *Id.* at 428.

65. *Id.*

66. See Howard, *supra* note 28, at 641-42.

67. The strongest justification for the refusal to award attorneys' fees because of special circumstances was outlined by the Second Circuit. See *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978), cert. denied, 439 U.S. 1072 (1977). The court stressed that the availability of competent counsel precluded the necessity of an award of attorneys' fees. This conclusion was based on the rationale that the award of attorneys' fees would attract competent counsel. *Id.* But compare *Milwe v. Cavuota*, 653 F.2d 80, 84 (2d Cir. 1981) (the court held that denial of attorneys' fees amounted to an abuse of judicial discretion since attorneys' fees should not be denied just because the plaintiff had the financial resources to obtain competent counsel), with *Buxton v. Patel*, 595 F.2d 1182, 1185 (9th Cir. 1979) (the Ninth Circuit Court of Appeals denied attorneys' fees under section 1988 to successful plaintiffs who prevailed in establishing a violation of their civil rights, explaining that the defendants' conduct did not involve a violation of a broad public interest and the nature of the litigation was such that it would attract competent counsel).

68. See Note, *Surveying the Law*, *supra* note 31, at 1298 n.30, citing *Martin v. Hancock*, 466 F. Supp. 454, 456 (D.C. Minn. 1983) (common law negligence dog bite case); *Zarcone v. Perry*, 438 F. Supp. 788, 790 (E.D. N.Y. 1977) (false imprisonment and false arrest case).

69. Note, *Surveying the Law*, *supra* note 31, at 1298 n.3, citing *Martin*, 466 F. Supp. at 456; *Zarcone*, 438 F. Supp. at 790; *Perez v. University of P.R.*, 600 F.2d 1, 2 (1st Cir. 1979); *Buxton v. Patel*, 595 F.2d 1181, 1185 (9th Cir. 1979).

70. See *Garrison*, *supra* note 52, at 68.

71. *Id.* at 69.

72. *Id.* at 68-69.

73. See H.R. REP. No. 1558, 94th Cong., 2d Sess. 7 (1976); Note, *Surveying the Law*, *supra* note 31, at 1299.

Christianburg Garment Co. v. EEOC,⁷⁴ however, refused to extend the statutory award of attorneys' fees to a prevailing defendant.⁷⁵ In *Christianburg*, the Equal Employment Opportunity Commission (EEOC) sued Christianburg Garment Company on charges of unlawful employment practices.⁷⁶ The district court granted Christianburg's motion for summary judgment.⁷⁷ The company then petitioned for a grant of attorneys' fees against the EEOC pursuant to section 706(k) of Title VII.⁷⁸ Section 706 authorizes district courts to grant the prevailing party a reasonable attorney's fee.⁷⁹ Finding that the action brought by EEOC was not without merit, the district court ruled that an award of attorneys' fees to Christianburg was not justified.⁸⁰ The Circuit Court of Appeals and the United States Supreme Court affirmed.⁸¹ Therefore, after *Christianburg*, defendants may receive a statutory award pursuant to section 1988 only if the plaintiff's suit was frivolous, unreasonable or groundless, or if the plaintiff continued to litigate after the action clearly had become frivolous.⁸²

Most courts are reluctant to rule that a plaintiff has litigated in bad faith to avoid chilling the plaintiff's exercise of civil rights.⁸³ The *Christianburg* court noted that this high standard favors prevailing plaintiffs over prevailing defendants for two reasons.⁸⁴ First, the plaintiff is the instrument chosen to advance congressional policy.⁸⁵ Second, if a plaintiff prevails, the fee award is against the defendant who has violated federal laws.⁸⁶ As a result, defendants rarely will be awarded attorneys' fees in civil rights suits. Prevailing plaintiffs, however, will be awarded attorneys' fees, unless special circumstances render the award unjust.

C. Establishing a Reasonable Fee

Once a party has established entitlement to a fee award, the court must calculate the proper amount of the award.⁸⁷ The determination

74. 434 U.S. 412 (1978); see also, Howard, *supra* note 31, 643-44.

75. See *Christianburg*, 434 U.S. at 422.

76. *Id.* at 414.

77. *Id.*

78. *Id.* at 415.

79. See *Id.* at 412.

80. *Id.*

81. See *Christianburg*, 550 F.2d 949.

82. See *Christianburg*, 434 U.S. at 422.

83. See Comment, *supra* note 3, at 565.

84. See *Christianburg*, 434 U.S. at 418-419.

85. *Id.* at 418.

86. *Id.* at 419.

87. See Note, *Surveying the Law*, *supra* note 31, at 1309.

of a reasonable fee is crucial to promoting the purpose of section 1988, since the size of fee awards will directly affect the willingness of attorneys to litigate civil rights suits.⁸⁸ An award must not be a windfall to the attorney, yet must approach the amount an attorney would have earned in similar work.⁸⁹

Courts currently do not use a consistent approach for determining a reasonable fee.⁹⁰ The legislative history of section 1988 contained minimal guidance on fee calculation.⁹¹ The Senate Report on section 1988, however, cites the twelve factors announced in *Johnson v. Georgia Highway Express*.⁹² In *Johnson*, the plaintiff brought an action for damages and a class action for injunctive relief by reason of his discharge from employment allegedly because of race or color.⁹³ The district court entered a final order in plaintiff's favor and made an award of attorneys' fees.⁹⁴ The appellate court held that since the award did not elucidate factors upon which the determination was based, the case would be remanded for reconsideration in light of guidelines promulgated by the court.⁹⁵ The *Johnson* factors include the time and labor expended by counsel;⁹⁶ the novelty and difficulty of the case;⁹⁷ the particular skill of the attorney;⁹⁸ any preclusive effect

88. See S. REP. No. 1011, 94th Cong., 2d Sess. 1, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908.

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. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Id. See also Note, *Surveying the Law*, *supra* note 31, at 1309.

89. See Note, *Surveying the Law*, *supra* note 31, at 1309.

90. *Id.*

91. *Id.* at 1310. See generally S. REP. No. 94-1011, 94th Cong., 2d Sess. 1, reprinted in 1976 U.S. CODE CONG. & AD. NEWS.

92. 488 F.2d 714, 717-719 (5th Cir. 1974). The twelve criteria are analogous to those enumerated in the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (1979), for calculating attorneys' fees, with the exception of: criterion number 10 — the undesirability of being associated with the case. *Id.* at 719.

93. *Id.* at 714.

94. *Id.* at 716.

95. *Id.*

96. See *King v. Greenblatt*, 560 F.2d 1024, 1028 (1st Cir. 1977) (the court considered in the calculation of the fee award that the attorney had spent more than 80 hours on the case); *Suzuki v. Yuen*, 507 F. Supp. 819, 824 (D. Hawaii 1981) (the court considered time and labor required for preparation of briefs and oral argument).

97. See *King*, 560 F.2d at 1028 (the case was novel in that the civil rights suit was to improve conditions of confinement at a treatment center for the sexually dangerous); *Blum v. Stenson*, 104 S.Ct. 1541, 1547 (the court rejected the argument that since the issues were novel and litigation complex the fee award should be increased by fifty percent).

98. See *King*, 560 F.2d at 1024 (the award of \$4,000 in attorneys' fees was reasonable, particularly since the results depended upon the work of counsel and counsel performed with diligence and skill); *United States v. 243.538 Acres of Land*, 509 F. Supp. 981, 989 (D. Hawaii 1981) (the court considered the skill requisite to perform the legal services properly).

the case might have had on counsel's ability to take other cases;⁹⁹ the attorney's customary fee;¹⁰⁰ the contingent nature of the litigation;¹⁰¹ any unusual time limitations imposed by the litigant;¹⁰² the amount of money involved in the case, or relief sought;¹⁰³ the experience, ability and reputation of counsel;¹⁰⁴ any undesirability in being associated with the case;¹⁰⁵ the length of the relationship between the attorney and client;¹⁰⁶ and finally, awards in similar cases.¹⁰⁷

The *Johnson* factors, however useful, have not reduced the confusion regarding the calculation of fee awards to any substantial degree.¹⁰⁸ Commentators have criticized the factors because the *Johnson* court failed to state which factors, if any, should be weighed more heavily than others.¹⁰⁹ In addition, some of the factors appear redundant,¹¹⁰ and others contradict the legislative history of section 1988.¹¹¹ Despite this criticism, most courts have adopted the *Johnson* factors.¹¹² The

99. See *Suzuki*, 507 F. Supp. at 824 (the court found no preclusive effect on counsels' ability to take other cases).

100. 104 S. Ct. at 1547 (fee award calculated by the prevailing market rate); *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D., at 486 (fee award calculated with reference to hourly rates generally charged in federal litigation); *243.538 Acres of Land*, 509 F. Supp. at 989 (the court considered the customary fee in determining the fee award).

101. See *Hamner v. Rios*, 769 F.2d 1404, 1407 (9th Cir. 1985) (the Ninth Circuit Court of Appeals used the existence of a contingent fee agreement as a factor in the determination of the fee award). *But see Cooper v. Singer*, 719 F.2d 1496, 1498 (10th Cir. 1983) (the Tenth Circuit Court of Appeals used the fee award to limit the contingent fee agreement, effectively eliminating contingent fee agreements in civil rights cases).

102. See *Suzuki*, 507 F. Supp. at 824 (the court considered the fact that no unusual time limits were imposed by the litigant).

103. *Id.* (the court considered the amount involved and results obtained).

104. *Dennis v. Chang*, 611 F.2d 1302, 1308. (9th Cir. 1980) (counsel had demonstrated skill and experience in civil rights litigation); *King*, 560 F.2d at 1024 (the court noted that the results of the case depended on counsels' performing with diligence and ability).

105. See *Yuclan Intern, Inc. v. Arre*, 504 F. Supp. 1008, 1013 (1980) (plaintiff's counsel failed to cite characteristics which rendered the case undesirable).

106. See *Suzuki*, 507 F. Supp. at 824 (the court found no evidence as to the length of the attorney-client relationship).

107. See *Dennis*, 611 F.2d at 1308 (award of attorney's fee was in part based specifically upon the fact that rates of compensation were typical of those earned by experienced Honolulu attorneys).

108. See Note, *Surveying the Law*, *supra* note 31, at 1311.

109. *Id.*; See Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable?"*, 126 U. PA. L. REV. 281, 286-87 (1977) Note, *Surveying the Law*, *supra* note 31, at 1311.

110. *Id.* at 1311 n.115 "Time and labor required" and "novelty and difficulty" are redundant, as are "attorney's skill" and "experience, ability and reputation of counsel." *Id.* at 1311 n.115.

111. *Id.* at 1311. The length of the relationship between attorney and client and amount of money involved in the case conflict with the legislative history of §1988. *Id.* at 1311 n.116. See S. REP. No. 94-1011, *supra* note 47, at 6.

112. *But see Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) (the Second Circuit Court of Appeals rejected the criteria due to inherent complexity and subjectivity). See also *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 167-169 (3rd Cir. 1975) (the Third Circuit utilizes the criteria set forth in *Lindy Bros. Builders, Inc. v. American Radiator & Standard*

courts, however, have applied the factors differently.¹¹³ The result is that attorneys are not able to confidently evaluate their chances of receiving a reasonable fee, and are ultimately discouraged from representing clients in civil rights cases.¹¹⁴ Recently, the United States Supreme Court in *Hensley v. Eckerhart*,¹¹⁵ decided the proper method for calculating fee awards.¹¹⁶ By the time *Hensley* was decided many lower courts, including the Fifth Circuit Court of Appeals, had de-emphasized the *Johnson* factors because of the difficulty of applying them.¹¹⁷

In *Hensley*, plaintiff's brought an action on behalf of all persons involuntarily confined at the forensic unit of a state hospital.¹¹⁸ Plaintiffs challenged the constitutionality of the medical treatment received and general conditions at the hospital.¹¹⁹ The district court found constitutional violations and awarded attorneys' fees to the plaintiff.¹²⁰ The court of appeals affirmed the district court ruling.¹²¹ The Supreme Court vacated and remanded the case, holding that the district court did not properly consider the relationship between the extent of plaintiff's success and the amount of the attorney's fee award.¹²² Specifically, the district court refused to eliminate from the attorney's fee award the hours spent by respondent's attorneys on unsuccessful claims.¹²³ The Supreme Court held that the extent of a plaintiff's success is a crucial factor in the fee award determination under section 1988.¹²⁴ In a situation in which the plaintiff failed to prevail on a claim unrelated to the successful claim, the hours spent on unsuc-

Sanitary Corp.); *Lindy Brothers*, 487 F.2d 161, 166-169 (3rd Cir. 1961) (the *Lindy* formula multiplied the hours spent on a case by a reasonable hourly rate of compensation for each attorney involved, and considered (1) the contingent nature of the case, and (2) the quality of work performed, complexity of issues, and recovery obtained, to determine a reasonable fee).

113. Compare *Kiser v. Huger*, 517 F.2d 1237, 1254 (D.C. Cir. 1974) (the court discounted the fee award because of the small amount of public benefit of the litigation) with *Doherty v. Wilson*, 356 F. Supp. 35, 41 (M.D. Ga. 1973) (the court found the fact that the case had little public benefit was irrelevant to the award of fees); see Note, *Surveying the Law*, *supra* note 31, at 1311 n.117 (discussing these cases).

114. See Note, *Surveying the Law*, *supra* note 31, at 1311-12.

115. 461 U.S. 424 (1983).

116. *Id.* at 1312.

117. *Id.*

118. See *Hensley*, 461 U.S. at 426.

119. *Id.*

120. See *Hensley*, 475 F. Supp. 908 (1979).

121. 664 F.2d 294 (8th Cir. 1981).

122. 461 U.S. at 424.

123. *Id.*

124. *Id.*

cessful claims should be excluded in considering the amount of a reasonable fee.¹²⁵

The *Hensley* court employed a two-step process to calculate a fee award.¹²⁶ First, the court determined that the plaintiff was a prevailing party.¹²⁷ Second, the court decided upon a reasonable fee.¹²⁸ To arrive at the reasonable fee, the court multiplied reasonable hours by a reasonable rate.¹²⁹ Discretionary adjustments of this initial fee were made by factoring in the results obtained, and if necessary, the *Johnson* factors.¹³⁰

The *Hensley* decision has been criticized, however, for overemphasizing the "results obtained" factor in discretionary adjustments to the base fee.¹³¹ The *Hensley* opinion has been criticized also for failing to articulate clear standards to be used in the application of the test.¹³² Terms such as "prevailing party," "results obtained," "reasonable hours," and "reasonable rates" were not clearly defined by the Supreme Court in *Hensley*.¹³³ Neither *Johnson* nor *Hensley* provides the lower courts with objective criteria to calculate a reasonable fee under section 1988.¹³⁴ Further, the lower courts are still unclear as to which standard to use.¹³⁵ While most courts have adopted the test enunciated in *Hensley*, some courts still use the *Johnson* factors, or their equivalent, to determine a fee award under section 1988.¹³⁶ As a result, attorneys still must speculate as to their possible fee award under section 1988 in civil rights cases.¹³⁷ This uncertainty undermines the effectiveness of section 1988, since counsel representing clients in civil rights cases have no basis upon which to predict their fee award.¹³⁸ The dual legislative purposes of section 1988, namely, to enable individuals to enforce their rights and to enable private practi-

125. *Id.*

126. *Id.* at 433-34. See Note, *The Supreme Court's "Reasonable Fee" Test Under Section 1988 - Hensley v. Eckerhart*, 20 WAKE FOREST L. REV. 485, 495 (1984).

127. See *Hensley*, 461 U.S. at 433.

128. *Id.*

129. *Id.*

130. *Id.* at 433 n.9.

131. See Note, *Surveying the Law*, *supra* note 31, at 1314.

132. See Note, *supra* note 126, at 503.

133. *Id.* See, e.g., *Sisco v. J.S. Alberici Construction Co.*, 564 F. Supp. 765, 766-68 (E.D. Mo. 1983); *Pinshaw v. Monk*, 565 F. Supp. 44, 45-47 (D. Mass. 1983) (illustrations of problems that have resulted from the lack of precision in *Hensley* revealing conflicting applications of the *Hensley* test).

134. See *Hensley*, 461 U.S. at 433; *Johnson*, 488 F.2d at 718.

135. See *supra* note 9 and accompanying text.

136. See *Hamner*, 769 F.2d at 1407.

137. See *supra* note 9 and accompanying text.

138. *Id.*

tioners to commit themselves to civil rights litigation are weakened by the uncertainty surrounding the computation of a reasonable fee.¹³⁹

CONTINGENT FEES

A contingent fee agreement provides that an attorney will receive a percentage of the client's recovery at trial or through settlement, but will receive nothing if the suit is unsuccessful.¹⁴⁰ At one time contingent fees were not only void, but constituted a criminal offense.¹⁴¹ Today, contingent fees are generally upheld, but are viewed with disfavor by many.¹⁴² While the contingent fee makes possible the enforcement of legitimate claims which otherwise might be abandoned because of the poverty of the claimants, many ethical questions related to the propriety of the fees remain in dispute.¹⁴³ Contingent fees are thought to impair the relationship between attorney and client¹⁴⁴ and to give incentive to lawyers to solicit clients, instigate fraudulent or vexatious claims and use unethical practices in prosecuting these claims.¹⁴⁵ Contingent fees are thought to also tempt the attorney to settle the claim in a manner advantageous to the attorney and not the client.¹⁴⁶ As a result, courts closely scrutinize contingent fee agreements.¹⁴⁷

Three common justifications exist for contingent fee agreements.¹⁴⁸ First, by making a lawyer's gross earnings depend upon the amount of the client's recovery, a contingent fee gives a lawyer a direct incentive to work in the client's interest.¹⁴⁹ Second, a contingent fee

139. *Id.*

140. See Note, *Cooper v. Singer: Contingent Fee Agreements That Exceed Section 1988 Statutory Fee Awards Violate Public Policy*, 1984 UTAH L. REV. 635, 637 (1984).

141. See Radin, *Contingent Fees in California*, 28 CALIF. L. REV. 587, 587 (1940). See also Note, *supra* note 140, at 637 n.16. A few early decisions in this country relied upon English common law to find contingent fee agreements illegal. That policy, however, was soon abandoned in all states except Massachusetts. *Id.* The subsequent acceptance of contingent fees in this country may be explained by the American Rule, which requires litigants to pay their own attorneys' fees. *Id.* Contingent fee agreements were not the only way that many potential plaintiffs could obtain counsel. That purpose is not served in England, where costs are charged to the losing party. *Id.*

142. See Radin, *supra* note 141, at 587.

143. *Id.* at 589.

144. See Note, *Contingent Fee Contracts: Validity, Controls and Enforceability*, 47 IOWA L. REV. 942, 944 (1962).

145. *Id.*

146. *Id.*

147. See Note, *supra* note 140, at 639. See also *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1108-09 (3rd Cir. 1979); See generally Radin, *supra* note 141.

148. See Schwartz, Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1125 (1970).

149. *Id.* Hence, the incentive effect of the contingent fee assures that the lawyer will be on the client's side. *Id.*

allows a client to shift some of the risk inherent in a lawsuit to the lawyer.¹⁵⁰ Finally, a contingent fee allows a client to borrow a lawyer's services in advance of settlement.¹⁵¹

In general, a contingent fee arrangement will be upheld unless harm to the public or client outweighs the advantages of the fee as a method of financing lawsuits.¹⁵² Courts may use their supervisory powers to set aside contingency fees in three situations.¹⁵³ First, a court may set aside a fee if the fee is excessive.¹⁵⁴ A court determines whether a fee is excessive by looking at factors such as the degree and amount of work involved in each case.¹⁵⁵ Second, a court may set aside a contingent fee agreement if evidence of fraud or unethical conduct is present.¹⁵⁶ Both the Model Code of Professional Responsibility¹⁵⁷ and an attorney's status as a fiduciary impose a duty upon the attorney to disclose fully relevant factors and to discuss alternative fee arrangements with the client before entering into a contingent fee arrangement.¹⁵⁸ Courts refuse to enforce contingent fee agreements if an attorney has failed to inform the client of a state statute authorizing the court to award fees or that the case involves little or no risk.¹⁵⁹ Third, a court may set aside a contingent fee agreement by holding the contract void as contrary to public policy.¹⁶⁰ An example of a void contract is a situation in which the attorney's financial interest in the outcome of the litigation is considered detrimental to an important state interest.¹⁶¹

The legislative history of section 1988 does not directly address the impact of contingent fee agreements on the determination of a

150. *Id.* If the client does not recover, the lawyer receives no fee. The lawyer bears some of the risk under the contingent fee, since settlement may be less than expected, and the attorney's share of the settlement may not fully compensate for the time invested. *Id.*

151. *Id.* The client's access to an attorney will be limited, particularly if the client is in a lower income group. The contingent fee allows a client with limited financial resources to, in essence, borrow the funds to prosecute the case. *Id.* at 1125-26.

152. See Note, *supra* note 140, at 640.

153. *Id.*

154. See *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1109 (3rd Cir. 1979); see also *Farmington Dowell Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 87-88 (1st Cir. 1970). See generally Note, *supra* note 140, at 640 (the author discusses the power of courts over contingent fee agreements).

155. See *Rader v. Thrasher*, 57 Cal. 2d 244, 253, 368 P.2d 360, 365, 18 Cal. Rptr. 736, 741 (1962); see also *Anderson v. Kenelly*, 547 P.2d 260, 261 (1975).

156. See Note, *supra* note 140, at 640 n.30.

157. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19, 2-20, 5-7 (1981).

158. See Note, *supra* note 140, at 640.

159. *Id.* at 640 n.32, 33.

160. *Id.* at 641.

161. *Id.* For example, the Model Code of Professional Responsibility prohibits contingent

reasonable fee.¹⁶² The Senate Report on section 1988 states only that in computing the fee, counsel for the prevailing party should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter."¹⁶³ The *Johnson* court treated a contingent fee agreement as one factor in the determination of a reasonable fee and used the agreed upon fee as an upper limit for the fee awarded pursuant to section 1988.¹⁶⁴ Specifically, the court in *Johnson* noted that a fee quoted to the client or the percentage of recovery agreed upon is helpful in demonstrating the attorney's fee expectations.¹⁶⁵ Whether or not the attorney agreed to accept a fee, and in what amount, is not conclusive as to the determination of a reasonable fee.¹⁶⁶

Other courts have followed the "bright prospects" rule.¹⁶⁷ The bright prospects rule requires that fees are not awarded to prevailing parties who are able to attract counsel through contingency agreements.¹⁶⁸ The rule is grounded in the rationale that section 1988 is intended to secure effective representation for civil rights litigants, and that if a client can secure counsel through a traditional contingent fee agreement, no need exists to apply the benefits of section 1988.¹⁶⁹ This rule, however, finds no support in the legislative history of 1988, and has not been widely followed.¹⁷⁰

The Supreme Court in *Hensley* did not use the existence of a contingent fee agreement as a factor for determining a reasonable fee under section 1988.¹⁷¹ The contingent fee agreement was considered only after the determination of a base fee, and then only at the discretion of the district court.¹⁷² While *Hensley* adheres to the notion that

fees in criminal cases. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (1981). The Code also strongly discourages the use of contingent fees in domestic relations cases. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1981).

162. S. REP. N. 94-1011, 94th Cong., 2d Sess. 1, reprinted in 1976 U.S. CODE CONG. & AD. NEWS.

163. *Id.*

164. See *Johnson*, 488 F.2d at 718.

165. *Id.*

166. *Id.*

167. See e.g. *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2nd Cir. 1978) (the bright prospects rule was first announced); *Buxton v. Patel*, 595 F.2d 1182, 1185 (9th Cir. 1979) (bright prospects rule followed); see also *Cooper*, 719 F.2d at 1501.

168. See *Cooper*, 719 F.2d at 1501.

169. *Id.*

170. *Id.* See also *Sanchez v. Schwartz*, 688 F.2d 503, 505 (7th Cir. 1982). This one-dimensional perspective of section 1988 ignores the other purposes of section 1988, which include penalizing obstructive litigation by civil rights defendants and generally deterring civil rights violations. See *Cooper*, 719 F.2d at 1501; see also Note, *Attorney's Fees in Damages Actions Under the Civil Rights Attorney's Fees Awards Act of 1976*, 47 U. CHI. L. REV. 332, 344-49 (1980).

171. See *Hensley*, 461 U.S. at 434.

172. *Id.*

a fee award pursuant to section 1988 and a contingent fee agreement are not mutually exclusive, the Court did not find the existence of a contingent fee agreement significant to the determination of a reasonable fee.¹⁷³

The purpose of a contingent fee agreement, like the award of attorneys' fees under section 1988, is to allow litigants who otherwise may not be able to enforce their claims to have their day in court.¹⁷⁴ While the legislative history of section 1988 does not directly address the treatment of a contingent fee agreement in the calculation of a reasonable fee, the stated purpose and legislative intent behind section 1988 indicate that a contingent fee agreement should be upheld for the same reasons that the prevailing party is entitled to a reasonable fee.¹⁷⁵ The rationale behind section 1988 and contingent fee agreements must be considered in determining the best possible solution to the problem of how to handle contingent fee agreements in conjunction with a fee award under section 1988.¹⁷⁶

APPELLATE COURT DECISIONS REGARDING ATTORNEYS' FEES

The purpose for the award of a reasonable fee under section 1988 is to encourage meritorious civil rights litigation.¹⁷⁷ The purpose of contingent fee agreements is to permit the enforcement of legitimate claims which otherwise may be abandoned because of the poverty of the claimants.¹⁷⁸ Generally, courts are in agreement that a section 1988 reasonable fee will be awarded to a prevailing party unless special circumstances exist.¹⁷⁹ The courts also agree that a contingent fee agreement must be upheld unless the fee is found to be unreasonable.¹⁸⁰ Confusion exists in the courts,¹⁸¹ however, regarding the weight to be given to the contingent fee in the determination of the reasonable

173. *Id.*

174. *See supra* note 3 and accompanying text.

175. *See supra* notes 52-86 and accompanying text.

176. *See supra* notes 28-176 and accompanying text.

177. *See supra* note 3 and accompanying text.

178. *Id.*

179. *See e.g. Newman*, 390 U.S. at 402; *Northcross*, 412 U.S. at 428.

180. *See Hensley*, 461 U.S. at 433.

181. Courts have adopted different approaches to treating a contingent fee when a prevailing party is entitled to a fee award under section 1988. *Compare Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985) (the contingent fee does not preclude a fee award, and the court has discretion to compel the prevailing party to pay the difference between the two awards) with *Sullivan v. Crown Paper Board Co.*, 719 F.2d 667, 670 (3rd Cir. 1983) (counsel should receive the contingent fee or the statutory amount, whichever is greater). *See also Lenard v. Argeno*, 699 F.2d 874, 900 (7th Cir. 1983) (the fee contract does not provide an automatic ceiling on the amount of a fee award in a civil rights action); *Cooper v. Singer*, 719 F.2d

fee pursuant to section 1988.¹⁸² The courts also disagree as to whether the plaintiff¹⁸³ or the defendant¹⁸⁴ should be responsible for paying the difference, if one should exist, between the reasonable fee determined pursuant to section 1988 and the contingent fee award. This section will delineate the various approaches and analyze the merits of each in terms of the purpose of section 1988 and the contingent fee agreement.

A. *Pharr v. Housing Authority of the City of Prichard*

In *Pharr v. Housing Authority of the City of Prichard*,¹⁸⁵ the court upheld a contingent fee agreement that was in excess of the fee award determined by the court pursuant to section 1988. The court used the fee agreed upon in the contingent fee contract to limit the award of a reasonable fee under section 1988. The losing party was held responsible for the difference between the reasonable fee determined by the court and the contingent fee agreement.¹⁸⁷ In *Pharr*, after settlement of a suit brought under section 1983 and the fourteenth amendment, the plaintiff moved for an award of attorneys' fees under the Civil Rights Attorneys Fees Awards Act.¹⁸⁸ The district court awarded \$6,570 in attorney's fees.¹⁸⁹ That award was less than the award would have been under the contingent fee contract, which provided that the expected fee would be one-third of any back pay or damages, or

1496, 1504 (10th Cir. 1983) (the reasonable fee acts as a limitation on the contingent fee agreement, and the contingent fee is considered a factor in the determination of the reasonable fee); *Pharr v. Housing Authority of Prichard*, 704 F.2d 1216, 1217-18 (11th Cir. 1983) (the court limited the award by the terms of the fee contract in a 1983 action and the losing party paid the difference between the fee award and the contingent fee); *Wheatley v. Ford*, 679 F.2d 1037, 1047 (2d Cir. 1982) (contingent fee agreement deemed satisfied in full by payment of the fee award in a section 1983 case); *Cleverly v. Western Electric Co.*, 594 F.2d 638, 643 (8th Cir. 1979) (the fee award in an age discrimination case was not limited to the amount provided by the contingent fee agreement because any fees awarded would certainly not exceed the agreed upon fee); *Sargeant v. Sharp*, 579 F.2d 645, 649 (1st Cir. 1978) (fee agreement is irrelevant to the issue of entitlement and should not enter into the determination of the amount of a reasonable fee award in a civil rights action); *Johnson v. Georgia Highway Express*, 488 F.2d 714, 718 (5th Cir. 1974) (the Fifth Circuit Court of Appeals held that a litigant may not be awarded a fee greater than the amount in the contingent fee contract agreement).

182. See *Cooper*, 719 F.2d 1496 (holding that the reasonable fee should limit the contingent fee agreement).

183. See *Hamner*, 769 F.2d at 1409 (the court has discretion to compel the plaintiff to pay the difference between the reasonable fee and contingent fee).

184. See *Pharr*, 704 F.2d 1216 (the court held that the defendant should be responsible for paying the difference between the reasonable fee pursuant to section 1988 and the contingent fee).

185. *Pharr*, 704 F.2d at 1216.

186. *Id.* at 1218.

187. *Id.* at 1217.

188. *Id.* at 1216-17.

189. *Id.* at 1217.

\$9,667.¹⁹⁰ The court of appeals reversed and remanded, holding that the fee recovery under section 1988 was determined by terms of the fee contract between plaintiff and attorney, and the award for \$9,667 was not unreasonable.¹⁹¹

The rationale in *Pharr*, namely, upholding the contingent fee if reasonable and limiting the reasonable fee by the terms of the contingent fee contract, closely comports with the purpose of section 1988 and the purpose behind contingent fee agreements.¹⁹² *Pharr* fails, however, to provide a workable solution to the dilemma of how to determine a reasonable fee when a contingent fee agreement exists, because the court held the losing party responsible for the difference between a reasonable fee award pursuant to section 1988 and the contingent fee.¹⁹³ This solution should be rejected for several reasons. When a plaintiff voluntarily enters into a contingent fee agreement knowing that as a prevailing party the attorney will be eligible for reasonable attorneys' fees pursuant to section 1988 as well, the plaintiff should be responsible for the amount of attorneys' fees above and beyond the fee.¹⁹⁴ Defendants should not be held responsible for an amount in excess of the reasonable fee awarded to plaintiffs under section 1988.¹⁹⁵ While the solution that the plaintiff be held responsible for the amount of attorneys' fees above the reasonable fee decreases a plaintiff's damage recovery, plaintiffs still recover reasonable attorneys' fees. Thus, the purpose of section 1988 is effectuated.¹⁹⁶ In addition, the plaintiff's right to enter into a private fee agreement is preserved, which allows plaintiffs with limited finances to obtain counsel.¹⁹⁷

B. *Cooper v. Singer*

Another approach to the determination of a reasonable fee under section 1988 when a contingent fee agreement exists is to eliminate the contingent fee agreement in civil rights cases.¹⁹⁸ This approach was adopted by the Tenth Circuit Court of Appeals in *Cooper v.*

190. *Id.* at 1218.

191. *Id.*

192. *Id.* at 1217 (court uses the *Johnson* rationale; *Johnson* was cited in the legislative history to section 1988).

193. *Id.* at 1218.

194. *See Hamner*, 769 F.2d at 1409.

195. *Id.*

196. *See Pharr*, 704 F.2d at 1216.

197. *Id.*

198. *See Cooper*, 719 F.2d at 1507.

Singer.¹⁹⁹ The plaintiffs in *Cooper* brought a section 1983 suit claiming they were illegally terminated for attempting to organize a union.²⁰⁰ Plaintiffs obtained a judgment in federal district court for \$60,000, each plaintiff receiving a \$15,000 share.²⁰¹ Plaintiffs then petitioned the district court for attorneys' fees under section 1988.²⁰² Their request was denied because of the existence of a contingent fee agreement.²⁰³ The court of appeals held that while the existence of a contingent fee agreement did not foreclose the possibility of an attorney's fee award under section 1988, the contingent fee agreement would set the upper limit on the amount of the fee award.²⁰⁴ On rehearing, the court held that the existence of a contingent fee agreement did not limit the client's recovery of attorneys' fees under the civil rights statute.²⁰⁵ The court determined a reasonable fee under section 1988. The court then compared the reasonable fee to the contingent fee contract.²⁰⁶ If the client's section 1988 attorney fee recovery was less than the amount owed to the attorney under the contingent fee agreement, the attorney would be expected to reduce the fee to the amount awarded by the court.²⁰⁷ If the fee award was greater than the contingent fee agreement, the attorney would be entitled to the full amount of the award.²⁰⁸

The *Cooper* court, at first glance, seemed to adopt the prevailing view that a contingent fee agreement does not limit or preclude a prevailing party's fee award.²⁰⁹ The court relied upon the *Hensley* formula, reiterating the rationale that the contingent fee is a relevant, but inconclusive, indication of the value of an attorney's services.²¹⁰ The determination by the *Cooper* court, however, that the reasonable fee awarded pursuant to section 1988 limits the contingent fee in effect eliminates the contingent fee in civil rights actions.²¹¹

The rationale of the court in *Cooper* was not consistent with the legislative intent of section 1988, or with the purpose of contingent

199. *Id.* at 1496.

200. *Id.* at 1497.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 1498.

205. *Id.* at 1496.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 1502.

210. *Id.* at 1500.

211. See Note, *supra* note 140, at 640.

fee arrangements.²¹² The elimination of the contingent fee is unnecessary and conflicts with the general rule upholding contingent fees barring unusual circumstances.²¹³ In addition, elimination of contingent fee arrangements may serve as a disincentive for clients and attorneys to litigate civil rights violations.²¹⁴ While the court in *Cooper* concluded that Congress intended that the section 1988 fee award fulfill the plaintiffs fee obligations, the result in *Cooper* does not comport with the aim of section 1988.²¹⁵ Section 1988 seeks to provide an incentive for clients and attorneys to bring meritorious civil rights actions.²¹⁶ *Cooper* takes away this incentive by limiting the attorney's fee to the reasonable fee awarded by the court pursuant to section 1988.

C. *Hamner v. Rios*

A third approach to the determination of a statutory award under section 1988 when a contingent fee agreement exists has been taken recently by the Ninth Circuit Court of Appeals in *Hamner v. Rios*.²¹⁷ In *Hamner*, the prevailing plaintiff in a civil rights action filed a motion for an award of attorneys' fees under section 1988.²¹⁸ The district court denied the plaintiff's motion for attorneys' fees based upon the existence of a contingent fee agreement.²¹⁹ The court of appeals held that failure to award attorneys' fees under the attorney's fee provisions of the civil rights statute was an abuse of discretion.²²⁰ The proper procedure for the district court would have been to determine a reasonable award of attorneys' fees.²²¹ If the award under that analysis was less than the contingent fee, the trial court could in its discretion determine whether the plaintiff should be compelled to pay the difference between the reasonable fee awarded by the court pursuant to section 1988 and the contingent fee.²²²

212. *But see Cooper*, 719 F.2d at 1504. "Legislative history on this issue is sparse; nevertheless the history seems to imply that the fee award should fully define the attorney's compensation." (quoting S. REP. No. 94-1011, 94th Cong., 2d Sess. 1, reprinted in U.S. CODE CONG. & AD. NEWS 5908-09.

213. *See Note, supra note 140*, at 640.

214. *See Hamner*, 769 F.2d at 1409.

215. *See generally* S. REP. No. 94-1011, 94th Cong., 2d Sess. 1, reprinted in U.S. CODE CONG. & AD. NEWS 5908-09.

216. *See Cooper*, 719 F.2d at 1507.

217. 769 F.2d 1404.

218. *Id.*

219. *Id.* at 1405.

220. *Id.*

221. *Id.*

222. *Id.*

The *Hamner* opinion reiterated the rule that a contingent fee agreement should be enforced if reasonable.²²³ *Hamner* differs from *Pharr* in holding that the court has discretion to compel the prevailing party to pay any difference between a contingent fee and a reasonable fee.²²⁴ The court in *Hamner* utilized an equivalent of the *Johnson* factors²²⁵ to determine the reasonable fee.²²⁶ Furthermore, the court adopted the viewpoint that the existence of a contingent fee agreement is only one factor that the court must consider in the determination of the fee award.²²⁷

The result reached by the court in *Hamner* comports with the rationale behind both of the two fee awards, and provides a fair and equitable solution to the problem.²²⁸ Specifically, the *Hamner* court noted that a prevailing party in a civil rights suit is entitled to reasonable attorneys' fees.²²⁹ The court also acknowledged that contingent fee agreements are to be enforced if reasonable, emphasizing, however, the power of the court to supervise fee awards under contingency agreements to avoid unreasonable results.²³⁰ Furthermore, the court supported this rule by stating that since a plaintiff voluntarily enters into a contingent fee agreement, the difference should come out of the plaintiff's damages recovery.²³¹ In addition, the court has the discretion to deny an award of the difference between the reasonable fee determined by the court pursuant to section 1988 and the sum provided in the contingent fee agreement, in situations in which counsel's performance was poor, or when an award beyond the reasonable fee would constitute a windfall to the attorney.²³²

The three different viewpoints dividing the federal courts of appeal can be summarized as follows: (1) contingent fees should provide a limit on the award of a reasonable fee awarded pursuant to section 1988, with the defendant responsible for paying any difference be-

223. *Id.* at 1409.

224. *Id.*; see also *Pharr*, 704 F.2d 1217.

225. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

226. See *Hamner*, 769 F.2d at 1407.

227. *Id.* This is implicit in the use by the court of the *Kerr* factors. The existence of a contingent fee agreement is one of twelve factors used by the court in the determination of the fee award. *Id.* See also *Sullivan v. Crown Paper*, 719 F.2d 667, 668-69 (3rd Cir. 1983); *Lenard v. Argento*, 699 F.2d 874, 899 (7th Cir. 1983).

228. See *supra* notes 28-176 and accompanying text.

229. See *Hamner*, 769 F.2d at 1406 (quoting 42 U.S.C. §1988).

230. *Id.* at 1409 (this rule preserves the rights of parties to enter into their own contracts, and avoids unnecessary interference with the attorney-client relationship).

231. *Id.* The court declined to hold civil rights defendants responsible for an amount in excess of the reasonable fee awarded against them under section 1988.

232. *Id.* at 1409-10.

tween the fee award and the contingent fee agreement;²³³ (2) contingent fees should be eliminated in civil rights cases;²³⁴ (3) the contingent fee agreement should be upheld if reasonable, but the court has discretion to compel the plaintiff to pay any difference between the fee award and the contingent fee.²³⁵ While the last proposal seems to follow the legislative intent of 1988 and the purpose behind contingent fee agreements, a more objective set of criteria must be developed to determine the reasonable fee before the aim of section 1988 can be met.²³⁶

PROPOSAL

The rationale developed by the Ninth Circuit Court of Appeals in *Hamner* should be adopted by all of the federal courts. Contingent fee agreements should be one factor in the determination of the reasonable fee,²³⁷ and contingent fee agreements should be upheld unless unreasonable. The court should have discretion to compel a plaintiff to pay the difference between the fee award under section 1988 and the contingent fee.²³⁸ Before this solution can carry out the aims of the legislature in enacting section 1988, however, a uniform, objective set of criteria must be adopted by Congress for the determination of a reasonable fee.²³⁹ Presently, no clear standard exists.²⁴⁰ Some courts are still using the *Johnson* factors, while others have adopted the *Hensley* test.²⁴¹ Both of these tests have been criticized for allowing too much discretion to the lower courts and for requiring excessive subjective analysis.²⁴² Before section 1988 can encourage meritorious civil rights litigation, attorneys need to be able to predict, with some certainty, the size of fee awards under the statute.²⁴³ Only when an attorney can calculate the fee award with reasonable accuracy and certainty will the purpose behind section 1988 be effectuated.²⁴⁴

One commentator has suggested that courts adopt the standard enunciated in *Newman v. Piggie Park Enterprises*,²⁴⁵ which was cited with

233. See *Pharr*, 704 F.2d at 1217-18.

234. See *Cooper*, 719 F.2d at 1504.

235. See *Hamner*, 769 F.2d at 1409.

236. See *infra* notes 237-255 and accompanying text.

237. See *Hamner*, 769 F.2d at 1409; *Johnson*, 488 F.2d at 714.

238. See *Hamner*, 769 F.2d at 1409.

239. See Note, *supra* note 126, at 503.

240. *Id.*

241. See *supra* note 10 and accompanying text.

242. See Note, *supra* note 126, at 502.

243. See *supra* note 88 and accompanying text.

244. *Id.*

245. 390 U.S. 400 (1968).

approval in the legislative history of section 1988.²⁴⁶ *Newman* necessitates a two-step inquiry. First, the court must determine who is a prevailing party.²⁴⁷ Second, the court must determine whether any special circumstances²⁴⁸ exist that would preclude recovery by that prevailing party.²⁴⁹ The *Johnson* factors are applied under this test only when the court concludes that the fee award should be enhanced.²⁵⁰

While the *Newman* test is more objective and less time-consuming than that in either *Johnson* or *Hensley*, the test fails to consider as part of the base fee determination factors such as a contingent fee agreement or the preclusive effect that the case may have had on counsel's ability to take other cases.²⁵¹ These factors should be considered in the determination of a reasonable fee under section 1988.

The ideal standard for the determination of a fee award under section 1988 is a combination of the tests proposed by the *Hensley*, *Johnson* and *Newman* courts. As indicated in the legislative history of section 1988 and case law interpreting the statute, fees should be awarded only to a prevailing party.²⁵² A formula like the formula in *Hensley*²⁵³ must be developed and carefully defined. The test must take into account, however, those of the *Johnson* factors that comport with the legislative history of section 1988.²⁵⁴ The contingent nature of the fee, awards in similar cases, the time and skill expended by the attorney and the preclusive effect of the case must be considered by the court in determining a reasonable fee.²⁵⁵ To implement this test effectively, Congress must carefully define each term so that courts can award fees with consistency. Specifically, terms including "prevailing party," "special circumstances," and the factors to be used in the determination of the fee award must be clarified. Counsel will then be able to determine, with some accuracy, the fee award under section 1988. Only then will the purpose of section 1988 be effectuated.

246. S. REP. NO. 94-1011, 94th Cong., 2d Sess. 1, reprinted in 1976 U.S. CODE CONG. & AD. NEWS, 5910.

247. See *supra* notes 52-66 and accompanying text; see also *Newman*, 390 U.S. at 400.

248. See *supra* notes 67-72 and accompanying text.

249. See Note, *supra* note 126, at 502.

250. *Id.* at 503. The factors should never be used to decrease the attorney's award. An increased award, however, should be the exception, not the rule. *Id.*

251. See *Johnson*, 488 F.2d at 717-718.

252. S. REP. NO. 94-1011, 94th Cong., 2d Sess. 1, reprinted in 1976 U.S. CODE CONG. & AD. NEWS, 5910.

253. See *supra* notes 126-130 and accompanying text.

254. See *Johnson*, 488 F.2d at 717-719.

255. *Id.*

CONCLUSION

The Senate report on section 1988 recognized that if the cost of private enforcement becomes too great, no private enforcement of civil rights claims will occur. The report further suggested that unless our civil rights laws are to become "mere pronouncements that the average citizen can not enforce," attorneys' fees must be awarded. While section 1988 does not guarantee the award of attorneys' fees, the language of the Act reflects a general goal of Congress to award fees.

Section 1988 does not directly address the impact of a contingent fee agreement on the determination of a reasonable fee. The legislative history of section 1988 and the purpose of the contingent fee agreement indicate, however, that the contingent fees and reasonable fees determined by the courts pursuant to section 1988 need not be mutually exclusive. Courts have proposed various solutions to this problem, ranging from allowing the contingent fee to limit the reasonable fee to effectively eliminating contingent fee agreements in civil rights cases. Only the approach taken by the Ninth Circuit Court of Appeals comports with both the legislative history of section 1988 and the nature and purpose of the contingent fee. The Ninth Circuit has held that contingent fees should be upheld unless unreasonable. A contingent fee should be a factor in the determination of the reasonable fee. Furthermore, the court should have the discretion to compel the plaintiff to pay the difference between the fee awarded pursuant to section 1988 and a contingent fee. Once Congress has adopted an objective, uniform set of criteria on which to base a reasonable fee, civil litigants and attorneys will be able to commit themselves to civil rights litigation.

Susan M. Murray

