AWARDING ATTORNEY FEES AGAINST ADVERSARIES: INTRODUCING THE PROBLEM

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The American Rule¹ does not allow a prevailing litigant to recover an attorney fee from the losing litigant.² The rule has long been subject to both judicially fashioned³ and statutory⁴ exceptions. In addition to these exceptions, the common fund doctrine, in providing for recovery not from the losing defendant but from those who share in the benefit of the litigation, functions as a partial exception to the rule.⁵

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1. Most other countries with comparable litigation systems use some form of fee shifting. The significance of this fact cannot be assessed in a vacuum. Litigation content, legal culture, trial costs, and other elements may be quite different in different systems. Litigation of cases involving substantial doubt as to the law and the facts is common in the United States, for example, but perhaps not so common in Europe. In the absence of predictable outcomes, routine fee shifting is more difficult to justify. Additionally, the degree to which fees are fixed by the adversary process varies from country to country. See Pfennigstorf, *The European Experience with Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 37, 55-59.

2. The American Rule was supposedly established in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796). See Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9, 15.

3. Fee shifting is permitted when a contract between the parties so provides, when the loser acts in bad faith or vexatiously, and when attorney fees constitute an item of damages recoverable under ordinary damages rules (as where the defendant is liable to the plaintiff for malicious prosecution or on an injunction bond). Fees are also awarded in certain cases of contempt of court, and in certain domestic relations cases in which one party has a duty to support the other. See generally D. DOBBS, REMEDIES § 3.8 (1973).

4. Examples of such statutory exceptions may be found in 15 U.S.C. § 15(a) (1982) (antitrust claims) and 17 U.S.C. § 505 (1982) (copyright claims). Although there are now many such statutory exceptions, they are so narrow in scope that they have provoked no general reconsideration of fee shifting.

5. See *infra* notes 35-45 and accompanying text.

As long as the American Rule was subject to only minor exceptions, fee litigation remained a small industry. But with the passage of legislation in 1964⁶ and 1976,⁷ the prevailing plaintiff in most civil rights actions became entitled to recover a reasonable fee from the losing party. The growth of civil rights litigation, the passage of additional legislation authorizing fee awards,⁸ and the increase in litigation of class actions that permit fee awards⁹ have all engendered considerable secondary litigation over attorney fees.¹⁰ This litigation has in turn engendered criticism focusing on the excessiveness of fees,¹¹ the disproportionality of awards,¹² and the burdens placed on the judicial system. At the same time, it is not clear that the structure for calculating fee awards can achieve the aim of fee award statutes by producing the compensation necessary to attract counsel to civil rights cases.¹³

A variety of factual situations may give rise to attorney fee awards. Fee awards based on misconduct in the litigation itself are possible in cases of all kinds.¹⁴ Fee awards are also made in many cases involving no

6. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1982).

7. Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).

8. For a list of over 100 federal statutes that authorize fee awards, see *Marek v. Chesny*, 105 S. Ct. 3012, 3035-39 (1985) (Brennan, J., dissenting). A list is included in every issue of the *Attorney Fee Awards Reporter*. See, e.g., *Federal Statutes Authorizing the Award of Attorney Fees*, ATT'Y FEE AWARDS RPTR., June 1986, at 2-3.

9. See, e.g., *In re Fine Paper Antitrust Litig.*, 751 F.2d 562 (3d Cir. 1984).

10. The increase in fee litigation has prompted a significant amount of legal scholarship. See M. DERFNER & A. WOLF, *COURT AWARDED ATTORNEY FEES* (1985); E. LARSON, *FEDERAL COURT AWARDS OF ATTORNEY'S FEES* (1981); S. SPEISER, *ATTORNEYS' FEES* (1973); Berger, *Court Awarded Attorney Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977); Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651. The Third Circuit has published the report of a task force appointed to recommend solutions to some of the problems. REPORT OF THE THIRD CIRCUIT TASK FORCE, *COURT AWARDED ATTORNEY FEES*, 108 F.R.D. 237 (1985) [hereinafter *THIRD CIRCUIT REPORT*]. Some researchers have sought to provide a better picture of costs of litigation, both public and private. See J. KAKALIK & R. ROSS, *COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR VARIOUS TYPES OF CIVIL CASES* (1983); Kritzer, Sarat, Trubek, Bumiller & McNichol, *Understanding the Costs of Litigation: The Case of the Hourly-Fee Lawyer*, 1984 AM. B. FOUND. RES. J. 559 [hereinafter Kritzer].

11. Allegations of exaggerated claims of billable hours, excessive charges for hours billed, and poor documentation are common. See, e.g., *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952-55 (1st Cir. 1984); *Poolaw v. City of Anadarko*, 738 F.2d 364, 368 (10th Cir. 1984), cert. denied, 105 S. Ct. 784 (1985).

12. Disproportion between the plaintiff's recovery and the amount of the fee is common. See *infra* notes 302-05 and accompanying text. Because many of the benefits secured by the suit may be external to the plaintiff, a discrepancy between the damage award and the fee award does not necessarily indicate that the fee award is unreasonable. See *City of Riverside v. Rivera*, 106 S. Ct. 2686, 2694 (1986); *THIRD CIRCUIT REPORT*, *supra* note 10, at 252.

13. The civil rights statutes are explicitly aimed at providing fees "adequate to attract competent counsel." S. REP. NO. 1011, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5908, 5913.

14. See *infra* notes 46-64 and accompanying text.

fault at all; courts have awarded fees in a wide range of commercial,¹⁵ government,¹⁶ and public interest litigation.¹⁷

The practice of awarding attorney fees against adversaries is causing

15. Fees may be awarded in cases involving willful trademark violations, *see* *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1384-85 (9th Cir. 1984), willful patent infringements, *see* *Lam, Inc. v. Johns-Manville Corp.*, 668 F.2d 462, 476 (10th Cir.), *cert. denied*, 456 U.S. 1007 (1982), antitrust violations, *see* 15 U.S.C. § 15(a) (1982), and copyright violations, *see* 17 U.S.C. § 505 (1982).

Contract claims may also engender fee shifting. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-341.01 (Supp. 1985); IDAHO CODE § 12-120(1) (Supp. 1986). Many contracts, especially consumer and debt contracts, provide that only the drafting party can collect attorney fees. Statutes in some states equalize the position of the parties in such cases by providing that either party may recover a fee upon prevailing. *See* CAL. CIV. CODE § 1717(a) (West 1985); OR. REV. STAT. § 20.096 (Supp. 1985). Consumers may also claim fee awards under the Truth in Lending Act, 15 U.S.C. § 1640(a)(3) (1982), or under state unfair trade acts. *Cf.* *Tousley v. North Am. Van Lines, Inc.*, 752 F.2d 96, 105 (4th Cir. 1985) (buyer of vehicle recovered fees in case brought under South Carolina Business Opportunity Sales Act, S.C. CODE ANN. §§ 39-57-10 to -80 (Law. Co-op. 1976)).

16. Both the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1982), and the Privacy Act of 1974, 5 U.S.C. § 552a(g)(2)(B) (1982), impose fee liability on the government in cases where the plaintiff substantially prevails. Environmental litigation in which the government is the defendant may also engender fee awards against the government. *See* 42 U.S.C. § 7607(f) (1982) (court may award fees in Clean Air Act proceedings where "such award is appropriate"). The Equal Access to Justice Act authorizes a fee in favor of the prevailing plaintiff and against the United States when the litigating position of the United States was not substantially justified. *See* 5 U.S.C.A. § 504 (West Supp. 1986) (authorizing fee awards in certain agency proceedings); 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1986) (authorizing fee awards in certain civil actions). Awards under this act have been made in a variety of litigation contexts. *See* *Keasler v. United States*, 766 F.2d 1227, 1229-38 (8th Cir. 1985) (taxpayer awarded attorney fees in successful refund suit); *United States v. 640.00 Acres of Land*, 756 F.2d 842, 847-48 (11th Cir. 1985) (former landowner awarded attorney fees where condemnation award exceeded government prelitigation offer); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd.*, 735 F.2d 895, 898-902 (5th Cir. 1984) (civil rights plaintiff awarded attorney fees); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 724 F.2d 211, 214 (D.C. Cir. 1984) (public interest corporation awarded attorney fees for successful challenge to Civil Aeronautics Board regulations).

17. *See* *Maier v. Gagne*, 448 U.S. 122, 128-33 (1980) (upholding fee award in suit to recover Aid to Families with Dependent Children benefits); *Hall v. Cole*, 412 U.S. 1, 15 (1973) (affirming union defendant's liability for fee award where union member's litigation conferred substantial benefit on union as a whole); *DiFilippo v. Morizio*, 759 F.2d 231, 233-34 (2d Cir. 1985) (reversing reduction of fee award in housing discrimination action); *Ganey v. Edwards*, 759 F.2d 337, 339-40 (4th Cir. 1985) (holding that prisoner denied access to law library may obtain fees even if he recovers no damages).

Some litigants seek judicial restructuring of social or political institutions. Such litigation often takes years and engenders substantial fee awards for the prevailing plaintiff. *See* *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 917 (3d Cir. 1985) (fee award appropriate in suit challenging procedure governing commitment of juveniles to mental health facilities); *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1153 (5th Cir. 1985) (fee award appropriate where plaintiff successfully settled school board reapportionment suit); *In re Kansas Congressional Dists. Reapportionment Cases*, 745 F.2d 610, 612-13 (10th Cir. 1984) (fee award appropriate in successful congressional district reapportionment suit); *see also* *Bradley v. School Bd.*, 416 U.S. 696, 722-23 (1974) (delaying fee award until conclusion of predictably lengthy litigation would discourage institution of actions, contrary to congressional intent; therefore interim fee award appropriate).

important changes in the way litigation is financed in the United States.¹⁸ Financing litigation by fee awards provides a new incentive to lawyers to increase their fees. The adversary's predictable response is to litigate the fee claim itself. The result is that the courts must either risk the escalation of fees or devote public and private resources to the fee litigation after the merits have been fully resolved.

Courts have not confronted this dilemma squarely. On the one hand, they have exhorted lawyers to claim only reasonable fees and to avoid excessive litigation over the fee itself.¹⁹ On the other hand, because fees cannot be contained if litigation to limit them is restricted, courts have increasingly prescribed rules regarding the litigation of the fee claim.²⁰

Problems generated by this dilemma and other constraints of a fee-shifting regime have become significant. Quite possibly resolution of fee-shifting problems will come only when we develop a coherent theory of litigation finance—one in which fee shifting, as a means of financing litigation, might play only a relatively small part. But the practical problems of fee shifting should be understood before alternative methods of litigation finance are considered. It is to those problems that this article turns.

The problems considered here fall into three broad categories. First, what are the bases for shifting attorney fees?²¹ Second, who is entitled to fee awards, and how is liability to be allocated among different parties?²² Third, how are fees to be calculated?²³ This third question encompasses many of the most troubling problems in the American system of fee shifting, and my analysis leads to the conclusion that alternative methods should be considered in developing general principles of litigation finance.

18. The topic of litigation financing has received less attention than it deserves. For a compilation of data pertaining to public costs of civil litigation, see J. KAKALIK & R. ROSS, *supra* note 10. Private costs far exceed public costs. One observer estimated that the legal profession contributed about \$30 billion to the GNP in 1980—an amount that exceeded the electric power industry's contribution. See Cutler, *Conflicts of Interest*, 30 EMORY L.J. 1015, 1016 (1981). Dean Cramton, writing in 1985, estimated that lawyers' charges may be as high as \$50 billion annually. Cramton, *The Trouble with Lawyers (and Law Schools)*, 35 J. LEGAL EDUC. 359, 360 (1985).

19. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

20. See *infra* notes 311-16 and accompanying text.

21. See *infra* notes 24-78 and accompanying text.

22. See *infra* notes 79-168 and accompanying text.

23. See *infra* notes 169-330 and accompanying text.

I. BASES OF FEE SHIFTING

A. *The Common Law Private Attorney General Experiment.*

Before the passage of the Civil Rights Attorney's Fees Awards Act of 1976,²⁴ some federal courts experimented with fee awards authorized neither by statute nor by common law. The Supreme Court held in 1968 that when a civil rights statute *did* authorize a fee award, that award should ordinarily be granted, at least when only injunctive relief was available.²⁵ The Court explained that in civil rights cases the plaintiff acted as a "private attorney general," vindicating public rights.²⁶ Lower federal courts expanded the private attorney general rationale to allow plaintiffs to recover attorney fees even when Congress had *not* authorized a fee recovery.²⁷ The Supreme Court rejected this approach in *Alyeska Pipeline Service Co. v. Wilderness Society*,²⁸ a decision that prompted the enactment of a general civil rights fee award statute.²⁹

Today most courts make fee awards only if there is statutory authorization or if the award would have been allowed under the common law.³⁰ Of the several common law grounds,³¹ only a few have ever had much general application. First, a fee award is possible if a valid contract calls for payment of attorney fees to the fee claimant.³² Second, the attorney fee may be recovered as an item of damages in malicious prosecution suits.³³ Finally, when a defendant's tortious conduct or breach of contract causes the plaintiff to litigate with a third party, the defendant may be liable for the attorney fees generated.³⁴ None of these grounds,

24. 42 U.S.C. § 1988 (1982).

25. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968).

26. *Id.*

27. *See, e.g., La Raza Unida v. Volpe*, 57 F.R.D. 94, 98-102 (N.D. Cal. 1972).

28. 421 U.S. 240, 263 (1975). California, however, still adheres to the private attorney general theory. *See Serrano v. Priest*, 20 Cal. 3d 25, 38-48, 569 P.2d 1303, 1309-16, 141 Cal. Rptr. 315, 320-27 (1977).

29. Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).

30. A few states also make fee awards under the private attorney general theory. *See supra* note 28; *see also* *Senior Citizens Coalition v. Minnesota Pub. Utils. Comm'n*, 355 N.W.2d 295, 302 n.10 (Minn. 1984) (stating in dictum that the private attorney general rule is "well established," but citing only California law).

31. *See supra* note 3.

32. *See, e.g., Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 306, 316 (2d Cir. 1985); *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1337-38 (10th Cir. 1984).

33. *See, e.g., Bertero v. National Gen. Corp.*, 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1975). *Cf. Kerr v. City of Chicago*, 424 F.2d 1134 (7th Cir.) (allowing civil rights plaintiff to recover attorney fees incurred in wrongful criminal prosecution), *cert. denied*, 400 U.S. 833 (1970).

34. *See, e.g., Mutual Fire, Marine & Inland Ins. Co. v. Costa*, 789 F.2d 83, 88-90 (1st Cir. 1986); *Eureka Inv. Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 940-41 (D.C. Cir. 1984). In the case of a statutory cause of action, however, the absence of a fee provision may preclude the recovery of fees as an item of damages. *See, e.g., Summit Valley Indus., Inc. v. United Bhd. of Carpenters Local 112*, 456 U.S. 717, 726-27 (1982).

however, has played a major role in contemporary cases. There are three sets of circumstances in which fee awards are most often made today: (1) when the common fund doctrine or its substantial benefit expansion applies, (2) when there has been misconduct in litigation, and (3) when a statute authorizes a fee award.

B. *Common Fund and the Substantial Benefit Expansion.*

The common fund rule permits one who has litigated successfully and thereby conferred a benefit upon others to require those who have benefited to share in the cost of producing the benefit—that is, to share in the attorney fee.³⁵ For example, a beneficiary of a trust might sue trustees who have siphoned off assets of the trust. When a recovery is made, it is enjoyed by all the beneficiaries, not merely the plaintiff, and accordingly the fund recovered should bear the attorney fee.³⁶ This rule lies behind the award of attorney fees from funds recovered in class actions,³⁷ and in some stockholder's derivative suits.³⁸

The common fund rule originated as a restitutionary rule to prevent unjust enrichment of the other beneficiaries at the client-plaintiff's expense.³⁹ It was quickly expanded, however, to permit lawyers themselves to recover a fee from the beneficiaries and to recover more than the plaintiff had paid or become obligated to pay the lawyer.⁴⁰ In this expanded version, the common fund rule may well go beyond restitution, but the theoretical basis for doing so, if there is any, has not been found. The restitutionary basis of the rule is preserved, however, in that it is the beneficiaries of the fund, not the losing party or the adversary, who must share in the fee. The winning plaintiffs, not the losing defendants, are liable under the common fund rule.⁴¹

35. See *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trustees v. Greenough*, 105 U.S. 527 (1881). See generally Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974) (discussing origins and development of common fund doctrine).

36. Cf. *Trustees v. Greenough*, 105 U.S. 527, 528-29 (1881) (suit by bondholder against trustees who depleted assets held to secure bonds).

37. See, e.g., *In re Fine Paper Antitrust Litig.*, 751 F.2d 562 (3d Cir. 1984).

38. See *infra* note 45.

39. See *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166-69 (3d Cir. 1973); see also Dawson, *supra* note 35.

40. *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 126-27 (1885).

41. This is formally correct, but in practice the fund created must be sufficient to satisfy both the claims on the merits and the fee, so that when settlement rather than litigation is involved, the adversary may negotiate directly about both the merits and the fee size, if permitted to do so by ethical considerations. Ethical objections are discussed in *Prandini v. National Tea Co.*, 557 F.2d 1015, 1019-21 (1977).

The common fund rule has been expanded in a novel way in several cases to include "benefits" that are intangible and perhaps even nonexistent. In *Hall v. Cole*,⁴² a union member was improperly ousted by his union after he had criticized union officials. The union member sued the union and won reinstatement. This was no doubt a victory for union democracy, but it resulted in no money recovery or other tangible benefit. Nevertheless, the Court held that the union members had benefited substantially and that imposing fee liability upon the union was an appropriate way to make the union share the cost of the benefit.⁴³ This benefit is fictional,⁴⁴ and all the more so because it goes under the name of "substantial benefit."

Courts have taken a similar approach in stockholder's derivative suits. Thus the corporation-defendant may be held liable for the plaintiff's attorney fees even though the litigation produces no money or tangible benefit.⁴⁵ Because the *defendant* is forced to pay the winning plaintiff's fee, these cases are more closely related to the judicially rejected private attorney general model than to a restitutionary model involving the sharing of fee costs by a group of victors.

C. *Misconduct in Litigation.*

Two kinds of misconduct in litigation may give rise to fee awards: the assertion of groundless or unfounded claims or defenses,⁴⁶ and the assertion of good claims or defenses in a bad-faith manner.⁴⁷ Courts use

42. 412 U.S. 1 (1973). The dissident-against-union pattern found in *Hall* is repeated in many cases. See *Murphy v. International Union of Operating Eng'rs Local 18*, 774 F.2d 114 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1201 (1986); *Rosario v. Amalgamated Ladies' Garment Cutters' Union Local 10*, 749 F.2d 1000 (2d Cir. 1984); *Shimman v. International Union of Operating Eng'rs Local 18*, 744 F.2d 1226 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1191 (1985).

43. *Hall*, 412 U.S. at 8-9.

44. *Cf. Shimman v. International Union of Operating Eng'rs Local 18*, 744 F.2d 1226, 1235 n.13 (6th Cir. 1984) ("The common benefit theory should not be allowed to merge into the private attorney general approach."), *cert. denied*, 105 S. Ct. 1191 (1985). There may be some sort of "benefit" in these cases, but it is one that the "beneficiaries" have not asked for and are not in a position to reject. In the common fund cases, on the other hand, the beneficiary can choose to reject a share of the fund and avoid fee liability. Although this option is seldom exercised, the ability to reject both benefit and liability means that no benefit is foisted upon an unwilling recipient. This is not true in the "substantial benefit" cases, where the recipient is involuntarily forced to pay for the benefit. This violates fundamental fair play and the rules of restitution. See D. DOBBS, *supra* note 3, § 4.9.

45. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970). When the litigation neither produces a fund nor enforces a right, fee awards have been denied. See, e.g., *Grace v. Ludwig*, 484 F.2d 1262 (2d Cir. 1973), *cert. denied*, 416 U.S. 905 (1974).

46. See, e.g., *American Family Life Assurance Co. v. Teasdale*, 733 F.2d 559, 569-70 (8th Cir. 1984).

47. See, e.g., *Hermes v. Hein*, 742 F.2d 350, 358 (7th Cir. 1984) (remanding to determine point in litigation when it should have become clear to plaintiffs that further discovery would be frivolous); *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178, 181 (D.C. Cir. 1980) (per curiam) (fees

an objective test that resembles the probable cause test used in malicious prosecution cases⁴⁸ to decide whether there were reasonable grounds for the claim or defense asserted. Under this test, the assertion of "unreasonable," "meritless," "groundless," or "frivolous"⁴⁹ claims or defenses constitutes objective fault. Courts use a subjective test to decide whether there was bad faith in the conduct of litigation. This test, which resembles the "malice" test used in malicious prosecution cases,⁵⁰ inquires into the litigant's state of mind, focusing on improper purpose such as intent to harass or delay.⁵¹

Courts impose fee liability in common law malicious prosecution cases only when the plaintiff establishes that the prior suit was brought with "malice" and without probable cause.⁵² Some courts have taken a similar approach in fee-shifting cases based on misconduct in litigation outside the civil rights context, requiring the fee claimant to establish both objective and subjective fault, that is, that a groundless suit was accompanied by an improper purpose.⁵³

In civil rights cases, in contrast, the Supreme Court has stated that one need not establish subjective fault to recover fees.⁵⁴ It suffices to establish objective misconduct by showing that the claim or defense was initially asserted groundlessly, frivolously, or unreasonably, or by showing that the fee-defender continued to assert the claim or defense after its impropriety had become apparent.⁵⁵ With respect to the analogous mali-

awarded where defendants engaged in dilatory tactics, failed to meet filing deadlines, misused discovery, and misled court by misquoting or omitting material portions of documentary evidence).

48. For a discussion of the probable cause test used in malicious prosecution cases, see W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON TORTS* § 119 (5th ed. 1984) [hereinafter *PROSSER & KEETON*].

49. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420-22 (1978).

50. For a discussion of the "malice" test used in malicious prosecution cases, see *PROSSER & KEETON*, *supra* note 48, § 119.

51. See *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178, 182 (D.C. Cir. 1980) (*per curiam*).

52. See *PROSSER & KEETON*, *supra* note 48, § 119. "Malice" is a term of art in tort law; it has no fixed meaning and does not necessarily import subjective bad faith.

53. See *Sierra Club v. United States Army Corps of Eng'rs*, 776 F.2d 383, 390 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1464 (1986); *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983); see also Note, *Attorneys' Fee Awards to Complex Litigation Defendants: Striking a Balance*, 77 NW. U.L. REV. 818, 838-43 (1983). Under *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), subjective fault is not required in civil rights cases. Courts requiring both objective and subjective fault in cases outside the civil rights area have generally not discussed reasons for adopting a different view. In light of the fact that the civil rights plaintiff is given a preferred position—by virtue of the one-way fee shifting rules adopted in *Christiansburg* itself, for example—the Court's willingness to impose liability on the civil rights plaintiff without subjective fault would seem to suggest that at least as demanding a rule ought to be imposed on other plaintiffs.

54. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

55. See *id.* at 422; *Hermes v. Hein*, 742 F.2d 350, 358 (7th Cir. 1984).

cious prosecution cases,⁵⁶ commentators have said that a want of probable cause may be evidence of malice, because ordinarily one would not persist in litigation without colorable grounds unless one were motivated by an improper purpose.⁵⁷ This rule is somewhat troublesome in the common law cases, and it has so far been rejected in the bad faith fee-shifting cases.⁵⁸

In one situation, establishing subjective fault by itself might be sufficient. This is the situation in which a sound claim or defense is asserted in an improper manner, as where a party misleads the judge, or engages in excessive discovery or dilatory tactics.⁵⁹ But even in this case, it is doubtful whether the subjective state of mind is really what counts. Instead it appears that the objectively improper conduct, not personal animosity, is probably the important element.

Some statutes require a lesser showing of fault than do the judge-made rules. Under the Equal Access to Justice Act,⁶⁰ for example, the government is liable for attorney fees if it has litigated a position without substantial justification. The offer of judgment rule provides another example.⁶¹ This rule applies when a plaintiff⁶² rejects a settlement offer and litigates to a conclusion less favorable than the offer. It imposes liability for costs incurred after the offer, that is, for the added costs of litigation. This may include attorney fees, which some statutes treat as "costs."⁶³ Some may regard the offer of judgment rule as based on an-

56. Malicious prosecution is analogous because it functions to shift attorney fees. See Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218 (1979).

57. See PROSSER & KEETON, *supra* note 48, § 119, at 884.

58. See, e.g., *Sierra Club v. United States Army Corps of Eng'rs*, 776 F.2d 383, 391 (2d Cir. 1985) (fact that defenses were colorless does not necessarily mean they were asserted for an improper purpose), *cert. denied*, 106 S. Ct. 1464 (1986).

59. See *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178, 182 (D.C. Cir. 1980) (*per curiam*) ("where a litigant is substantially motivated by vindictiveness, obduracy or *male fides*, the assertion of a colorable claim will not bar the assessment of attorneys' fees against him"; language directed at misconduct such as dilatory tactics).

60. 5 U.S.C.A. § 504(a)(1) (West Supp. 1986) (authorizing fee awards in certain agency proceedings); 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1986) (authorizing fee awards in certain civil actions).

61. FED. R. CIV. P. 68.

62. This is a one-way fee-shifting rule in that it seems to work only against plaintiffs or others affirmatively asserting a claim. The rule provides that "a party *defending* against a claim may serve upon the adverse party an offer to allow judgment to be taken against him." *Id.* (emphasis added).

63. See, e.g., Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982). If the statute involved does not define "costs" to include fees, fees are not available under Rule 68. See *Marek v. Chesny*, 105 S. Ct. 3012, 3017 n.2 (1985) (noting that Rule 68 incorporates the definition of costs that otherwise applies to the case). A statute that authorizes costs does not necessarily authorize fees. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980) (costs under 28 U.S.C. § 1927 do not include attorney fees). Although Congress has revised the statute in *Roadway*, see *Morris v. Adams-Millis Corp.*, 758 F.2d 1352, 1357 n.7 (10th Cir. 1985) (noting that the category of expenses

other species of fault; but if it is a species of fault, the fault involved is presumed rather than established.⁶⁴

Basing a claim for fees on an allegation of litigation misconduct may have advantages in particular cases. First, federal courts have held that public entities cannot avoid fee liability based on bad-faith litigation, even though such entities may be otherwise immune by reason of the eleventh amendment.⁶⁵ Second, it is conceivable that a nonprevailing party might be entitled to some award if a portion of the adversary's claim was tainted by litigation misconduct.

If a claim or defense is frivolous from the start, the fee claimant can usually obtain a full fee award against the frivolous litigator.⁶⁶ But if the claim's lack of substance becomes apparent only at a later stage in the litigation, or if the fee award is based on misconduct in the way the claim is pursued, the fee liability is more limited: only the added costs imposed by the misconduct or by the pursuit of the claim after it was discovered to be groundless are recoverable.⁶⁷

D. *Prevailing as a Litigant.*

Most statutes that authorize fee shifting do so on grounds independent of fault or benefit. The basic requirement found in almost all statutes is that the party seeking the fee award be a "prevailing" party.⁶⁸ Some statutes condition the right to a fee further by allowing an award only to the prevailing *plaintiff*.⁶⁹ Other statutes allow the judge discre-

recoverable under section 1927 has been expanded to include attorney fees), the case nonetheless demonstrates that the words of a statute authorizing costs will be important. Note that Rule 68 does not impose liability upon a plaintiff who has lost completely, but only upon one who has obtained a judgment for an amount less favorable than the defendant's settlement offer. See *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 360 (1981).

64. Rule 68 is designed to encourage settlement, but its theory is not clear. If fault is the basis for the fee liability, why is this a one-way rule limited to offers made by the defendant? And why are there no protections for the plaintiff who receives an offer too early in the case to make an intelligent response to it? I suspect that some degree of fault is being presumed, perhaps not always fairly.

65. See *Sierra Club v. United States Army Corps of Eng'rs*, 776 F.2d 383, 388-89 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1464 (1986). Since the eleventh amendment does not immunize states from fee liability in civil rights cases, however, this bad-faith exception is of limited importance. See *infra* note 135 and accompanying text.

66. Civil rights plaintiffs whose claims are frivolous may be forgiven some or all of their fee liability because of their relative poverty, however. See *infra* note 193 and accompanying text.

67. See, e.g., *Sierra Club v. United States Army Corps of Eng'rs*, 776 F.2d 383, 389 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1464 (1986); *Cote v. James River Corp.*, 761 F.2d 60, 61 (1st Cir. 1985). If the fee claimant cannot show that the frivolous litigation imposed added costs, the fee claim may be denied. See *Colombrito v. Kelly*, 764 F.2d 122, 132 (2d Cir. 1985); *Jensen v. Stangel*, 762 F.2d 815, 818 (9th Cir. 1985) (*per curiam*).

68. See, e.g., 15 U.S.C. § 77k(e) (1982); 35 U.S.C. § 285 (1982); 42 U.S.C. § 1988 (1982).

69. See, e.g., 15 U.S.C. § 15 (1982); 29 U.S.C. § 216(b) (1982).

tion in deciding whether to award a fee to the prevailing party.⁷⁰ The civil rights fee award statutes, however, require only that the litigant prevail on the merits of the litigation.⁷¹

E. *A Comment on the Theory of Fee Awards.*

Fee awards made under the litigation misconduct rule are relatively easy to justify.⁷² The justification for imposing strict⁷³ fee liability upon a litigant merely because he loses is less clear, however.

One theory is that the prevailing party's fees should be recoverable as damages resulting from the violation of the plaintiff's substantive rights. This theory is generally unsatisfactory. As a normative theory, it is questionable because it would not allow fees to a prevailing defendant.⁷⁴ As a theory to explain existing law, it is inadequate because it would require fee awards in all prevailing plaintiff cases, not merely in cases where an award is statutorily authorized.⁷⁵ It might be desirable to adopt a general rule awarding attorney fees to prevailing plaintiffs and a general rule denying such awards to prevailing defendants, even in a society such as ours in which the law is often uncertain and in which both defendants and plaintiffs are encouraged to resort to litigation. But the theory behind such a rule is incongruous with current practice.

70. See *infra* notes 79-81 and accompanying text.

71. 42 U.S.C. § 1988 (1982); 42 U.S.C. § 2000e-5(k) (1982). The civil rights statutes have been construed, despite their neutral text, to provide for one-way fee shifting. See *infra* notes 86-89 and accompanying text.

72. Professor Rowe has made a thorough analysis of possible legal theories for fee awards. See Rowe, *supra* note 10. Professor Rowe identifies six rationales for fee awards. Some of these have been collapsed for simplicity in the present discussion; two are not directly discussed. One of these is the rationale that fee shifting can be used to provide "equalization of party strengths." *Id.* at 665. The other is the rationale that fee shifting can be structured so as to encourage meritorious small claims and to discourage weak ones. *Id.* at 665-66. As Professor Rowe notes, however, it is difficult to hypothesize a model under which an effective balance of incentives would be achieved.

73. At least in some sense, fee liability is strict in any case in which litigation is conducted reasonably and in good faith, even when there is fault on the merits.

74. See Rowe, *supra* note 10, at 657-59. Professor Rowe, however, is persuaded by the damages or "make whole" theory, and seems happy enough to accept the one-way fee shifting that results. See *id.* at 679.

75. Under a damages theory, fee liability would be, subject only to causal limits, the rule in every case. The prevailing defendant could not recover under this theory, since the plaintiff would not have violated his substantive rights. To cover both prevailing defendants and prevailing plaintiffs, a theory of strict liability for choosing to litigate would have to be adopted. Some rules do exist that permit fees as damages in certain cases, but these rules have no general application. See *supra* note 33. There is language, however, in *Evans v. Jeff D.*, 106 S. Ct. 1531, 1539 (1986), that treats the fee award under the civil rights statutes as a "remedy." But it is not clear that the Court has embraced the theory that the award is an element of damages resulting from the original civil rights violation.

Statutes awarding fees to prevailing parties are often thought justified on the theory that they represent legislative versions of the private attorney general rule. But even if the plaintiff's litigation has benefited the public, it does not obviously follow that private defendants⁷⁶ should pay for this public benefit.⁷⁷ Indeed, insofar as a defendant litigates reasonably and in good faith, the general public benefit that is derived from litigation may flow as much from the efforts of the defendant as from those of the plaintiff. From this perspective, the broad principle behind the private attorney general theory suggests that the public should pay attorney fees for both sides, not that the prevailing plaintiff alone should recover a fee.

A third theory might be that one who chooses to litigate should be strictly liable, regardless of the reasonableness of the litigation. An analogy might be made to theories of strict liability in tort law.⁷⁸ Such a

76. Public entities are defendants in many civil rights cases. When such entities are defendants, their liability might be regarded as a kind of public liability for the public benefit. But it is a costly benefit. First, there is the cost of fee fixing. Second, there is the problem in some cases of double public payments, as where a publicly funded legal services organization collects fees from a public entity defendant. See *infra* text accompanying notes 127-28. Furthermore, insofar as the problem is one of distributive justice, its resolution by means of the corrective justice system of the courts seems inappropriate.

77. See Rowe, *supra* note 10, at 655. Although Professor Rowe points out that the public might reimburse the winner if reimbursement is desirable, he dismisses this outcome as unlikely. In discussing the private attorney general doctrine specifically, he emphasizes the externalized benefits accruing in some cases and concludes that the "basic rationale for having someone other than the successful plaintiff bear at least the share of the legal expenses beyond that related to plaintiff's own benefit" is sound. *Id.* at 663.

I disagree. Although a public benefit analysis suggests that someone other than the successful plaintiff should pay some of the costs, it does not always suggest that the defendant should do so. It suggests, in fact, that the public should do so. It may be unlikely that the public *will* pay some of the costs, but that does not affect the question whether there is any *justification* for imposing the costs upon a defendant. Furthermore, in a democratic society, it seems to be bad policy to impose costs upon the public indirectly—by imposing them upon a defendant who then passes them on to the public—if the public would reject those costs were they imposed directly. As to the likelihood that the public would accept the burdens of litigation costs, it should be noted that the public has already accepted many of those costs. See *supra* note 18.

Later, Professor Rowe justifies a charge against defendants rather than against the public on the fees-as-damages theory. See Rowe, *supra* note 10, at 672. But as to cases in which public benefit is the main theory of the fee award, he concedes that payment from public funds might sometimes be the only justifiable solution. He appears in the end to dismiss this, however, on the pragmatic ground that public funds are not available for this purpose. See *id.* at 672-73.

78. Commentators have argued for strict liability in tort cases on the moral ground that one who chooses a course of conduct receives the benefits of that conduct and should also pay for its costs. See, e.g., R. EPSTEIN, A THEORY OF STRICT LIABILITY 71-75 (1980). Economic theories of strict liability in tort also abound. See, e.g., G. CALABRESI, THE COSTS OF ACCIDENTS (1970).

Moral and economic theories, however, are difficult to adapt to the fee liability problem. An argument for strict fee liability would be based on the premise that one who chooses to litigate should pay the costs that litigation entails. The problem of access to courts as a social means of dispute resolution poses a serious impediment to using this line of reasoning. Another problem

theory does not explain the present legal rules, however, since no existing rule sanctions fee shifting in all cases. And strict liability for honest litigation does not accord well with ideals of open access to courts.

None of the theories surveyed above answers the question why some of the costs of litigation are to be paid by the loser while others are to be paid by the public. For example, if the defendant is required to pay the plaintiff's litigation costs because the defendant's activities generated the litigation, should not the defendant be required to pay the public's costs as well? Yet under current practice, no liability is imposed for, say, a share of the judge's salary or a pro rata share of the cost of maintaining the court house. The historical allocation of litigation costs between private litigants and the public may not be rational; but any satisfying fee-shifting theory will have to account for that allocation or propose a new one.

The absence of a comprehensive theory makes it difficult to analyze many fee award problems. For example, if a fee award in favor of a prevailing plaintiff is justified only because the person who pays is also the person who violated the plaintiff's substantive rights, then an intervenor who supports the losing defendant's position should not be liable. On the other hand, if fee awards are justified by a strict liability theory, that same intervenor should be liable for a share of the plaintiff's fees. The absence of a comprehensive theory of fee shifting leaves no principled basis for deciding such issues. This problem with theoretical underpinnings explains why some of the issues discussed in this article are inherently as well as practically difficult to analyze.

II. ENTITLEMENT TO AND ALLOCATION OF FEE AWARDS

As a threshold issue, a fee claimant must establish a basis for an award under one of the theories discussed above or one of the common law exceptions. Several issues of entitlement may arise under any one of the theories for fee awards. These include questions of discretion in fee awards and the conditions under which particular parties are to receive or pay fees. Questions involving the allocation of fee liability among multiple defendants also arise.

A. *Discretion in Fee Awards.*

The civil rights fee award statutes speak of making an award in the

arises in applying this reasoning to the defendant who litigates in response to a complaint initiated by the plaintiff. The defendant is arguably acting under compulsion and should be excused from fee liability.

court's "discretion."⁷⁹ Although such language apparently authorizes the judge to grant or deny the award,⁸⁰ this discretion has been judicially encumbered. In a civil rights case there is virtually no discretion to deny a fee award to a prevailing plaintiff: the award must be made in the absence of some factor peculiar to the individual case, such as misconduct in the litigation by the plaintiff.⁸¹ The defendant's good faith is thus in effect no more a defense to the fee claim than it is to the merits of many civil rights claims.

B. *One-Way Fee Shifting.*

Some statutes authorize fee awards only to prevailing *plaintiffs*.⁸² Constitutional doubts about such statutes⁸³ seem to have subsided in the wake of judicial approval of one-way fee awards under the civil rights statutes.⁸⁴

The civil rights cases construe statutes that are facially neutral: the statutes authorize a fee award to the prevailing *party*.⁸⁵ Nevertheless, the Supreme Court has construed this language to mean that the trial court must ordinarily grant a fee award to the prevailing plaintiff⁸⁶ and deny one to the prevailing defendant.⁸⁷ The prevailing defendant must therefore pay his own attorney, except when the plaintiff has litigated unrea-

79. 42 U.S.C. § 1988 (1982); 42 U.S.C. § 2000e-5(k) (1982). The "exceptional circumstances" test found in several statutes also suggests a degree of discretion. *See, e.g.*, 15 U.S.C. § 1117(a) (Supp. II 1984) (trademark statute); 35 U.S.C. § 285 (1982) (patent statute).

80. The judge has more limited discretion in fixing the *amount* of an award, which must be "reasonable." *See* 42 U.S.C. § 1988 (1982) ("[T]he court, in its *discretion*, may *allow* the prevailing party . . . a *reasonable* attorney's fee.") (emphasis added). The legislative history of section 1988 suggests the same. "Congress has passed many statutes *requiring* that fees be awarded to a prevailing party. Again, the committee adopted a more moderate approach by leaving the matter to the discretion of the judge." H.R. REP. NO. 1558, 94th Cong., 2d Sess. 8 (1976). In the next paragraph of the Report, the committee emphasized that the fee was to be "reasonable." The Senate Report stated that the fee should be the same as paid to attorneys compensated by a fee-paying client. S. REP. NO. 1011, 94th Cong., 2d Sess. 6 (1976). There remains discretion in the narrow sense that when there is room for different judgments after appropriate evidence has been taken and procedures followed, a reasonable judgment is not reversible.

81. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

82. *See supra* note 68.

83. *See* Gulf, Colo. & S.F. Ry. v. Ellis, 165 U.S. 150, 165-66 (1897) (holding that a one-way fee shifting statute denied railroads equal protection). *Ellis* met with an avalanche of silence. It is the object of considerable disdain in Leubsdorf, *supra* note 2, at 26.

84. *See infra* notes 86-87 and accompanying text.

85. 42 U.S.C. § 1988 (1982); 42 U.S.C. § 2000e-5(k) (1982).

86. *See* Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968).

87. *See* Hughes v. Rowe, 449 U.S. 5, 14 (1980) (per curiam) (fees allowable only if suit frivolous, unreasonable, or without foundation). Some courts have interpreted other facially neutral statutes to require two-way fee shifting, *see, e.g.*, Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1147-49 (Fla. 1985) (interpreting FLA. STAT. § 768.56 (1981)), but the one-way rule is settled practice in civil rights cases.

sonably or in bad faith. Even in those exceptional cases in which defendants have obtained fee awards, courts have considered the plaintiff's relative ability to pay⁸⁸ or the plaintiff's status as a socially useful organization⁸⁹ and have forgiven or greatly reduced the fee award. The resulting rule is usually called one-way fee shifting, because it works in favor of the plaintiff, but not the defendant.

The Equal Access to Justice Act⁹⁰ presents a different form of one-way fee shifting: the government may be held liable, but may not assert the liability of others, for the costs of litigation conducted without substantial justification.⁹¹ This is not a distinction between plaintiff and defendant, but a distinction between government and citizen. The citizen who prevails can recover attorney fees, whether that citizen is a prevailing plaintiff or a prevailing defendant; the government, in contrast, can never recover attorney fees.

Under certain limited circumstances, one-way fee shifting in favor of defendants has been permitted. The common law tort of malicious prosecution distinctly favored the prevailing defendant, who could recover attorney fees from the plaintiff if the litigation had been motivated by malice and brought without probable cause.⁹² Similar relief was not available to plaintiffs subjected to malicious and improbable defenses.⁹³

C. *Identifying a Prevailing Party.*

1. *Complexity of Winning and Losing.* Many fee-shifting cases do not involve simple two-party, single-issue lawsuits. Plaintiffs may win some but not all of their substantive claims, receive some but not all of the remedy sought, or attain some but not all of their collateral aims. When they do realize their goals, it may not be by verdict and judgment, but by settlement or by legislative or administrative action. Determining

88. See *infra* note 193 and accompanying text.

89. For example, in *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807, 814 (2d Cir.), *cert. denied*, 464 U.S. 937 (1983), the court noted that the union defendant was entitled to special consideration because it was "a non-profit association comprised primarily of members who earn their living with their hands." The court's reduction of the award, however, seemed to be based only on ordinary computation.

90. 5 U.S.C.A. § 504(a)(1) (West Supp. 1986) (in adversary adjudication proceedings conducted by agencies, fees shall be awarded "to a prevailing party other than the United States"); 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1986) (in certain civil actions, fees shall be awarded "to a prevailing party other than the United States").

91. Courts have applied a "reasonableness" test in determining whether the government's position was substantially justified. See, e.g., *Hirschey v. FERC*, 760 F.2d 305, 309 (D.C. Cir. 1985); *United States v. 640.00 Acres of Land*, 756 F.2d 842, 849-50 (11th Cir. 1985).

92. See PROSSER & KEETON, *supra* note 48, §§ 119-120.

93. See Van Patten & Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 893 (1984).

whether a plaintiff is a prevailing party for fee-shifting purposes is often difficult.

Most federal courts⁹⁴ have used a "generous formulation"⁹⁵ to give the plaintiff prevailing party status. The plaintiff is a prevailing party under this test if he succeeds on any significant issue in the case and achieves some of the relief sought.⁹⁶ This test makes the plaintiff a prevailing party even if he does not win more than he loses and even if he does not win the most important issues. Thus a plaintiff who recovers only nominal damages,⁹⁷ or who wins on only one of several theories,⁹⁸ or who obtains only one remedy when several were demanded⁹⁹ is nonetheless a prevailing party. A plaintiff can be a prevailing party even if others joined as plaintiffs lose entirely,¹⁰⁰ or even if some defendants win.¹⁰¹ Although the plaintiff's losses thus do not preclude recovery of attorney fees, they are important in determining the amount of the award.¹⁰²

94. A few have used the seemingly more stringent rule that the plaintiff must prevail on a primary or central issue. *See, e.g., Iranian Students Ass'n v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979).

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

96. *See Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). The thrust of the *Nadeau* test has been widely accepted. *See, e.g., Othen v. Ann Arbor School Bd.*, 699 F.2d 309, 313 (6th Cir. 1983); *Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979). In *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), the Supreme Court called the *Nadeau* formulation "typical" and characterized it as "a generous formulation," but did not explicitly adopt its wording as authoritative. Nevertheless, some circuits have taken *Hensley* to be an approval of the "generous formula." *See, e.g., Environmental Defense Fund, Inc. v. EPA*, 716 F.2d 915, 919 (D.C. Cir. 1983) (per curiam). Other courts that originally used a more stringent rule, awarding fees only to the plaintiff who has prevailed on a "primary" or "central" issue, have continued to do so since *Hensley*. *See, e.g., Uviedo v. Steves Sash & Door Co.*, 753 F.2d 369, 371 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 791 (1986).

Unless one could consider both parties prevailing at the same time, the *Nadeau* rule necessarily means that the standards for determining whether a defendant prevails must be different from the standards for determining whether a plaintiff prevails. *See, e.g., M. DERFNER & A. WOLF, supra* note 10, ¶ 8.03(2) (discussing different standards for determining prevailing plaintiff and prevailing defendant under civil rights fee-shifting statutes).

97. *See, e.g., Fast v. School Dist.*, 728 F.2d 1030, 1032 (8th Cir. 1984) (en banc); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 736 F.2d 441, 446 (8th Cir.), *cert. denied*, 105 S. Ct. 385 (1984). In *Ganey v. Edwards*, 759 F.2d 337, 340-41 (4th Cir. 1985), the court awarded fees for the plaintiff's successful claim that he had been denied constitutional rights, despite the fact that the jury awarded zero damages.

98. *See, e.g., Goodson v. City of Atlanta*, 763 F.2d 1381, 1389-90 (11th Cir. 1985); *Abraham v. Pekarski*, 728 F.2d 167, 175 (3d Cir.), *cert. denied*, 467 U.S. 1242 (1984).

99. *See, e.g., Mims v. Shapp*, 744 F.2d 946, 955 (3d Cir. 1984).

100. *See, e.g., Nephew v. City of Aurora*, 766 F.2d 1464, 1466 (10th Cir. 1985) (fee awarded, though amount sought was reduced on basis that only two of the four plaintiffs prevailed).

101. *See, e.g., Poolaw v. City of Anadarko*, 738 F.2d 364, 368 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 784 (1985); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1280-81 (7th Cir. 1984).

102. *See infra* notes 213-14 and accompanying text.

2. *The Effect of Settlement.* It is now clear that a plaintiff can be considered a prevailing party even if the case is settled, provided some of the relief sought is obtained.¹⁰³ Even a settlement that is in some respects favorable to the defendant can serve as a foundation for the plaintiff's prevailing-party fee claim.¹⁰⁴

Fee shifting in the settlement context can be complicated by a number of factors. The plaintiff in a civil rights suit may secure a settlement even if neither the Constitution nor any statute would have required the relief originally sought. Or, the defendant may offer in settlement an amount it was willing to give even before the suit. In the first instance, the plaintiff has vindicated no civil right; in the second, suit has not caused the settlement. In neither case should the plaintiff be entitled to a fee award. Accordingly, a settling plaintiff may be required to show that the suit induced the settlement,¹⁰⁵ and even then a defendant may defeat the fee claim by showing that the plaintiff had no colorable claim and that settlement was not based on the merits.¹⁰⁶

103. This has been true notably as to civil rights claims. See *Maier v. Gagne*, 448 U.S. 122, 129 (1980). But some statutes may call for a different result. Under the antitrust statute, for example, fees are due when the plaintiff recovers a judgment, but if there is a settlement the plaintiff must rely on the common fund rule. See, e.g., *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 582 (3d Cir. 1984).

104. See *Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979).

105. The problem typically arises in litigation in which the plaintiff seeks to reform a governmental entity's operation. When, before judgment, the entity unilaterally makes or offers to make the reform, it is possible that its actions are based not on the suit but on other considerations. In such cases, the plaintiff must demonstrate a "causal connection" between suit and settlement in order to be awarded attorney fees. See *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1152 (5th Cir. 1985). Courts frequently use the word "catalyst" to describe the causal relation that must exist between the suit and the settlement. See, e.g., *Moore v. National Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093, 1098 (D.C. Cir. 1985). In *Disabled in Action v. Mayor of Baltimore*, 685 F.2d 881 (4th Cir. 1982), a group of disabled persons seeking better access to Baltimore's Memorial Stadium settled their claim. The city argued that it had already planned the improvements provided in the settlement. The court said it was enough that the suit "served to a limited extent to expedite the planning and achievement gained." *Id.* at 886 (quoting *United Handicapped Fed'n v. Andre*, 622 F.2d 342, 348 (8th Cir. 1980)). In *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978), the court stated that a fee award would be justified if the plaintiff's suit was a "necessary and important factor" in achieving the improvements sought even though the accomplishment was largely attributable to constructive leadership by defendant officials. In *Coen v. Harrison County School Bd.*, 638 F.2d 24, 26-27 (5th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982), the court denied fees to a plaintiff who received in settlement only what could have been received by a presuit demand.

106. See, e.g., *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1153 (5th Cir. 1985) (plaintiff whose action has "no colorable, or even reasonable, likelihood of success on the merits" not entitled to recover fees merely because of settlement); *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978) (settled claim must not be frivolous, unreasonable, or groundless).

Settlements also raise a burden-of-proof problem. *Hennigan* put the burden of proving a noncolorable claim on the defendant, and put the burden of proving causation on the plaintiff. *Hennigan*, 749 F.2d at 1152-53. However, when a governmental defendant uses political means to provide some of the relief sought, the burden on the causation issue may be put on the defendant. See *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 922 (1st Cir. 1980). Courts have failed to

A formal settlement that makes no mention of fees could be read as waiving the fee or as embodying a final settlement of all claims,¹⁰⁷ but courts have been reluctant to interpret settlements in this fashion.¹⁰⁸ Settlements that address the issue of attorney fees give rise to different questions: whether the plaintiff can voluntarily waive the fee award,¹⁰⁹ whether the parties can negotiate fees as part of the settlement on the merits,¹¹⁰ and whether the defendant can offer a settlement conditioned on a waiver of the fee award.¹¹¹ These questions do not go directly to the problem of defining the prevailing party, but they are unavoidably connected to that problem when parties consider a settlement.

address adequately many problems concerning allocation of the burden of proof in this area, and some of their statements are rather casual.

107. See *Jennings v. Metropolitan Gov't*, 715 F.2d 1111, 1114 (6th Cir. 1983).

108. Courts have dealt with the problem in different ways. Some have ordered fee awards without mentioning the problem. See, e.g., *Bonnes v. Long*, 651 F.2d 214, 219 (4th Cir. 1981), *cert. denied*, 455 U.S. 961 (1982). Some have treated the silence as an evidentiary issue. See, e.g., *National Treasury Employees Union v. IRS*, 735 F.2d 1277, 1279 (11th Cir. 1984); *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 132 (10th Cir. 1980). Some courts have held that the fee claim is not barred unless the settlement contains a specific written waiver. See, e.g., *El Club Del Barrio v. United Community Corps.*, 735 F.2d 98, 100-01 (3d Cir. 1984).

109. The Supreme Court has stated that district courts have discretion to approve fee waivers in negotiated settlements of certain civil rights actions, where a fee award under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), might otherwise be appropriate. See *Evans v. Jeff D.*, 106 S. Ct. 1531, 1545 (1986).

110. The court in *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020-21 (3d Cir. 1977), recognized the possibility that any "negotiated" fee allocation in a class action settlement could simply reflect acquiescence by the defendant to an unconscionably high fee for the plaintiffs' attorneys. Finding this prospect intolerable, the court held that it was necessary to have a complete settlement on the merits, followed by a separate negotiation for fees. *Id.* at 1021. This approach arguably creates uncertainty that may discourage any settlement by the defendant, who would be hesitant to settle one portion of the case when extensive liabilities might still be imposed with respect to another portion. Thus, if the court sees no danger of a "sweetheart" agreement, it should let the fee settlement stand. See *Malchman v. Davis*, 761 F.2d 893, 905 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1798 (1986). Indeed, the Supreme Court has approved simultaneous negotiation of fees and merits in civil rights actions. See *Evans v. Jeff D.*, 106 S. Ct. 1531, 1543 n.30 (1986).

111. In *Evans v. Jeff D.*, 106 S. Ct. 1531 (1986), the defendant offered to settle a class action on behalf of institutionalized children provided the plaintiffs would waive the fee claim. The plaintiffs' lawyer initially agreed, but sought to avoid the waiver when the settlement was before the court for approval. The district court approved the entire settlement, but the court of appeals invalidated the fee waiver, and remanded for a determination of an appropriate fee award notwithstanding the waiver. *Id.* at 1536. The court of appeals noted that federal policy strongly favored an award of fees to prevailing plaintiffs in civil rights actions and pointed out that the settlement offer placed the plaintiffs' lawyer in an inescapable conflict of interest. *Id.* The Supreme Court reversed and held that the district court had authority to approve the settlement, including the fee waiver. *Id.* at 1545. The Court found nothing in the language or legislative history of the Civil Rights Attorney's Fees Awards Act that indicated congressional intent to ban all fee waivers. *Id.* at 1538-40. The Court pointed out that it was within the district court's discretion to accept or reject the proposed settlement, but not, as the court of appeals' action suggested, to rewrite the settlement for the parties by accepting the settlement on the merits but imposing its own determination as to the fee award. *Id.* at 1537.

3. *Relief Outside the Forum: Political and Administrative Relief.*

When a plaintiff seeking structural reform sues a public entity, legislative or administrative action may moot judicial relief. In such cases, the plaintiff can recover attorney fees as a prevailing party even though, as in the case of settlements, no controversy has been adjudicated and it has not been shown that the defendant has violated the plaintiff's rights. The courts have insisted, however, that the plaintiff show that the lawsuit was a catalyst to or a partial cause of the legislative or administrative action,¹¹² and that the claim was at least colorable on the merits.¹¹³ Sometimes it is required that the plaintiff have sought vindication in another forum, either as a prerequisite to asserting the fee-justifying claim, or as a collateral part of pursuing that claim. In such cases, a prevailing plaintiff may be awarded attorney fees for work outside the forum;¹¹⁴ indeed, success outside the forum may even count to give the plaintiff prevailing party status in the first place.¹¹⁵ The rules in this area are somewhat technical, and there are instances in which a court will deny the plaintiff any fee award for work outside the forum.¹¹⁶

4. *Success on the Merits.* As the above discussion implies, the plaintiff is not "prevailing" until he succeeds on the merits in some fashion. Purely procedural success is not enough; for example, success in persuading a judge to deny a defense motion for summary judgment does not make the plaintiff a prevailing party.¹¹⁷ And a plaintiff who obtains

112. See, e.g., *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 916 (3d Cir. 1985); *DeMier v. Gondles*, 676 F.2d 92, 93 (4th Cir. 1982).

113. Although the focus has often been on causation, it seems clear that the plaintiff's success in the nonjudicial forum must vindicate the right in question. See *Coen v. Harrison County School Bd.*, 638 F.2d 24, 26 (5th Cir. 1981) ("[I]t is enough that [the plaintiff's] suit has served to vindicate his rights . . ."), *cert. denied*, 455 U.S. 938 (1982); *Oldham v. Ehrlich*, 617 F.2d 163, 168 (8th Cir. 1980) (when administrative decision to abandon contested regulation was direct result of plaintiff's suit, plaintiff is a prevailing party).

114. See *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 767 (7th Cir. 1982) (fee award included compensation for time spent attempting to achieve administrative relief designed to move legal action towards disposition), *cert. denied*, 461 U.S. 956 (1983).

115. See *Crest St. Community Council, Inc. v. North Carolina Dep't of Transp.*, 769 F.2d 1025, 1028-29 (4th Cir. 1985) (administrative work and work in state court in separate suit), *cert. granted*, 106 S. Ct. 784 (1986); *Lampher v. Zagel*, 755 F.2d 99, 103-04 (7th Cir. 1985) (work in state court after federal abstention).

116. Some prelitigation work, such as drafting pleadings, is clearly a part of the case and subject to a fee award. Prelitigation work in an administrative proceeding may be subject to a fee award if such work is a precondition to suit. See *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 60-65 (1980). Work in an administrative proceeding that is not a precondition to suit is not compensable. See *Webb v. Board of Educ.*, 105 S. Ct. 1923, 1928 (1985) (no recovery of fees expended by teacher in pursuing negotiations with school board after his termination).

117. See, e.g., *Hanrahan v. Hampson*, 446 U.S. 754, 756-59 (1980) (fact that court reversed directed verdict in favor of defendants and remanded for trial on merits did not make plaintiff a prevailing plaintiff).

some affirmative relief without any determination on the merits—a preliminary injunction, for instance—is not a prevailing party and is not entitled to a fee award.¹¹⁸

But a plaintiff may receive a fee award after prevailing on the merits in some fashion even though the suit has not proceeded to final judgment. Such awards are deemed especially appropriate in cases that consume months or years. Once the plaintiff has established that the defendant school district is operating a segregated system of public education, for example, an interim fee award may be appropriate; the plaintiff is considered a prevailing party as to that amount.¹¹⁹ The court might then order supplemental awards as it resolves further issues on the merits.

Although the plaintiff must succeed on the merits on at least one issue, the plaintiff need not have directed all the work for which a fee award is made toward the successful issue. For example, after an injunction has been ordered, the plaintiff may want to monitor the defendant's compliance. Such posttrial work is fully compensable.¹²⁰ Courts have been reluctant, however, to grant fee awards for demonstrably unsuccessful postjudgment ancillary work.¹²¹

Finally, the plaintiff may assert several theories in a single suit, only some of which would justify a fee award if successful. In civil rights cases the fee-justifying claim often raises both constitutional and nonconstitutional issues. Under the familiar practice of avoiding constitutional issues, a court may rule for the plaintiff on a nonconstitutional theory that does not carry a fee award. Although the plaintiff in such a case has not succeeded on the fee-justifying issue, the plaintiff is still regarded as a prevailing party.¹²²

118. See, e.g., *Frazier v. Board of Trustees*, 777 F.2d 329, 330 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 2252 (1986); *Smith v. University of North Carolina*, 632 F.2d 316, 352-53 (4th Cir. 1980). *Cf.* *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861, 871-72 (8th Cir. 1977) (fees for interlocutory appeal denied in discretion of court). *But cf.* *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 339 (5th Cir. Unit B Nov. 1981) (granting fees for interlocutory appeal); *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131, 1131 (9th Cir. 1974) (same).

119. See, e.g., *Pennsylvania v. Delaware Citizens' Council for Clean Air*, 106 S. Ct. 3088, 3094-96 (1986); *Bradley v. Richmond School Bd.*, 416 U.S. 696, 721-23 (1974); *Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 637 F.2d 506, 522-24 (8th Cir. 1980).

120. See, e.g., *Garrity v. Sununu*, 752 F.2d 727, 738-39 (1st Cir. 1984); *Willie M. v. Hunt*, 732 F.2d 383, 387 (4th Cir. 1984).

121. See, e.g., *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 920 (3d Cir. 1985) (no fee award for work after "last benefit" was earned); *Willie M. v. Hunt*, 732 F.2d 383, 386-87 (4th Cir. 1984) (no fee award for unsuccessful postjudgment litigation over meaning of consent judgment).

122. See *Maher v. Gagne*, 448 U.S. 122, 128-29 (1980); *Carreras v. City of Anaheim*, 768 F.2d 1039, 1050 (9th Cir. 1985). But a fee award may be denied if the relationship between the pretermi-

5. *Liability Limited to Losers.* The Supreme Court has construed statutes that do not specify who is to pay the fee award to mean that the losing party is to pay.¹²³ When there are several parties on each side of a dispute, determining who is to be considered a loser as well as who is to be considered a winner may become complicated. Yet the principle that only a loser should be liable to pay the winner's fee seems fundamental and compelling when fee liability is based neither on fault nor on benefit to the defendant.¹²⁴ In such cases a prevailing plaintiff can justly claim a fee only if the defendant is shown to have violated the plaintiff's rights in some way. Thus a plaintiff who has obtained a preliminary injunction without any determination on the merits has obtained valuable relief, but since this entails no showing that the defendant has actually violated a right, a fee award against the defendant would be unjustified.¹²⁵ It is also doubtful whether an intervenor who did not violate the plaintiff's rights in the first place, but who merely intervened in support of a losing defendant, should be considered a losing party even though the plaintiff prevails on his contentions.¹²⁶

D. *Status of Parties and Lawyers—Disentitlements and Immunities.*

1. *Status of the Lawyer.* In a few instances the status of the plaintiff's attorney has figured in the question whether to award fees. Defendants have argued that when the plaintiff is assisted by lawyers who are paid by public appropriations, no fee award should be made. The courts have generally rejected this argument¹²⁷ and have ordered compensation

ted constitutional claim and the nonconstitutional claim is merely tenuous. *See* Lund v. Affleck, 587 F.2d 75, 77 (1st Cir. 1978).

If one of two claims carries a fee right and the other does not, a plaintiff who prevails on both might find the fee award reduced because a portion of the lawyer's work related to the nonfee claim. The court in *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 136 (3d Cir. 1984), remanded for such a determination. Many cases involving both fee and nonfee claims have not recognized this problem.

123. *See* *Kentucky v. Graham*, 105 S. Ct. 3099, 3104 (1985).

124. *See supra* notes 76-78 and accompanying text.

125. *See supra* note 118 and accompanying text.

126. But courts have allowed fee awards against intervenors who are not responsible for the relief and who did not cause the problem in the first place. *See* *Haycraft v. Hollenbach*, 606 F.2d 128, 132-33 (6th Cir. 1979) (fee assessed against intervenor who unsuccessfully advanced alternative desegregation plan); *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1268, 1272-73 (N.D. Ohio 1984) (fee assessed against intervenor on behalf of city in challenge to city abortion ordinance). *Cf.* *May v. Cooperman*, 578 F. Supp. 1308, 1317-18 (D.N.J. 1984) (fee assessed against intervenors representing legislature that had passed unconstitutional statute), *aff'd on the merits, appeal dismissed as to fee award*, 780 F.2d 240 (3d Cir. 1985).

127. *See* *Lund v. Affleck*, 587 F.2d 75, 76 (1st Cir. 1978); *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1268, 1271 (N.D. Ohio 1984); *see also* Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 HARV. L. REV. 411 (1973) (supporting fee awards to legal aid offices).

at market rates.¹²⁸ Similarly, courts have made full fee awards to public interest lawyers who are paid compensatory salaries by a foundation or public interest group.¹²⁹

Pro se litigants who have pursued their own claims without the help of professional lawyers have fared differently. Even if the pro se litigant has fully prevailed, a fee award generally will be denied.¹³⁰ But some courts have awarded fees to pro se litigants who are also professionally qualified lawyers.¹³¹ Courts might view fee claims based on bad faith more favorably, or they might find awards to pro se litigants permissible under some statutes but not under others.¹³²

2. *Public Entities and Officers—Immunities.* Unless a litigant sidesteps the eleventh amendment, state governments cannot be made to pay fee awards.¹³³ This protection does not extend to local public entities, however. Thus school boards, cities, and other local entities can be made to pay fee awards on the same basis as other litigants.¹³⁴

A civil rights plaintiff, however, can probably avoid the bar of the eleventh amendment. Since Congress has the power to provide for enforcement of the fourteenth amendment, and has enacted fee liability statutes pursuant to that power, the eleventh amendment provides no shield against fee liability when the claim is grounded ultimately in the

128. See *Blum v. Stenson*, 465 U.S. 886, 889 (1984).

129. See, e.g., *Palmigiano v. Garrahy*, 616 F.2d 598, 602 (1st Cir.) (salary of lawyer not a factor to be considered in fixing fee), *cert. denied*, 449 U.S. 839 (1980).

130. See *Owens-EI v. Robinson*, 694 F.2d 941, 942-43 (3d Cir. 1982) (pro se prisoner civil rights claim). This rule is based on a number of objections. One objection is that pro se litigants risk their case and the public good that is supposed to flow from it when they do not retain counsel. Other objections are that pro se litigants lack detached perspective and that their fee award would be difficult to compute. See Note, *Pro Se Can You Sue? Attorney Fees for Pro Se Litigants*, 34 STAN. L. REV. 659, 669-77 (1982).

131. See, e.g., *Duncan v. Poythress*, 750 F.2d 1540, 1542-43 (11th Cir. 1985); *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1056-57 (5th Cir. 1983). But see *Falcone v. IRS*, 714 F.2d 646, 647-48 (6th Cir. 1983) (no fee award), *cert. denied*, 466 U.S. 908 (1984); *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387, 388-89 (4th Cir.) (lawyer representing himself lacked perspective and detachment, and thereby added costs to the trial; no fee award), *cert. denied*, 447 U.S. 923 (1980).

132. Compare *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1056-57 (5th Cir. 1983) (fee award granted to pro se litigant, an attorney, in action based on Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E)) with *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387, 388-89 (4th Cir.) (no fee award to pro se litigant, an attorney, in action based on Truth in Lending Act, 15 U.S.C. § 1640(a)(3)), *cert. denied*, 447 U.S. 923 (1980).

133. See generally Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875 (1975).

134. See, e.g., *Cunningham v. Grayson*, 541 F.2d 538, 543 (6th Cir. 1976) (county boards of education liable for fee award), *cert. denied*, 429 U.S. 1074 (1977); *Lytte v. Commissioners of Election*, 541 F.2d 421, 426 (4th Cir. 1976) (county elections board liable for fee award), *cert. denied*, 438 U.S. 904 (1978).

fourteenth amendment.¹³⁵ It is not clear whether other congressional fee authorizations, passed pursuant to some other constitutional provision, could constitutionally thrust aside the eleventh amendment to impose liability upon the states.¹³⁶ Even if they could, it is not clear that the fee provisions would be read to do so.¹³⁷

When a public officer is sued in a purely official capacity, the suit is treated as an action against the state, and ordinary eleventh amendment principles apply.¹³⁸ Most officers in the executive branch enjoy only qualified immunity in damages actions brought against them in a personal capacity, and accordingly are liable for actions in bad faith.¹³⁹ A similar principle applies in civil rights cases,¹⁴⁰ and officers subject to damages claims are also subject to liability for fee awards.¹⁴¹ If a plaintiff fails to recover anything on the merits because of an officer's immunity, however, there is no fee liability.¹⁴²

135. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 693-94 (1978) (state liable for fee awards under Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988; no eleventh amendment immunity); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456-57 (1976) (state liable for fee award under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k); no eleventh amendment immunity).

136. In *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979), the court awarded attorney fees authorized under the copyright statute in a copyright action against the state. The court reasoned that the Constitution specifically authorized Congress to enact copyright laws, and hence, though the article I copyright clause antedated the eleventh amendment, it nevertheless limited its effect. *Mills Music*, 591 F.2d at 1283-85. See also *Johnson v. University of Va.*, 606 F. Supp. 321, 324 (D. Va. 1985) (copyright legislation waives eleventh amendment immunity from liability for copyright infringements). An earlier decision, *Wihtol v. Crow*, 309 F.2d 777, 782 (8th Cir. 1962), interposed eleventh amendment immunity in a copyright case. But *Wihtol* was decided before *Hutto v. Finney*, 437 U.S. 678 (1978), and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), both of which were relied on in *Mills Music*. *Wihtol* also conferred the state's eleventh amendment immunity upon a school district. *Wihtol*, 309 F.2d at 782.

137. If it is accepted that the Constitution permits Congress to constrict the eleventh amendment in certain cases, it remains an issue whether Congress has in fact done so in a given case. Fee awards statutes do not specify the state's liability, so there is a question of construction. The majority in *Hutto v. Finney*, 437 U.S. 678, 694 (1978), construed the Civil Rights Attorney's Fee Awards Act of 1976 to cover states because the Act was addressed to "any" action to enforce civil rights and because the underlying right was aimed specifically at state action. *Mills Music* suggests that the specificity of the constitutional authorization is important. While commerce clause enactments might require Congress to declare state liability explicitly, fourteenth amendment or copyright clause enactments would not. See *Mills Music*, 591 F.2d at 1285.

138. See *Kentucky v. Graham*, 105 S. Ct. 3099, 3105-07 (1985).

139. See PROSSER & KEETON, *supra* note 48, § 132, at 1059.

140. In civil rights cases, however, officers may be liable for actions that were objectively unreasonable, whether or not there was subjective bad faith. See, e.g., *Malley v. Briggs*, 106 S. Ct. 1092, 1096 (1986) (interpreting 42 U.S.C. § 1983 (1982)).

141. See *Gibbs v. Town of Frisco City*, 626 F.2d 1218, 1221 (5th Cir. 1980). Indeed, officers may be liable for fees even when they are *not* liable for damages. See *infra* note 145 and accompanying text.

142. See *Pulliam v. Allen*, 466 U.S. 522, 527-28 (1984) ("There is no indication . . . that Congress intended to provide for a fee award if the official was immune from the underlying relief on which the award was premised.").

Some officers, notably judges and legislators, enjoy absolute immunity in carrying out judicial and legislative tasks within their jurisdictions.¹⁴³ Judges engaged in nonjudicial tasks that are executive in nature may, however, be held liable for the fee award as well as on the merits.¹⁴⁴ In addition, judges and legislators may be subjected to injunctions; in such instances, there is liability for any fee award appropriate on the facts.¹⁴⁵ Legislators have also been held responsible for fee awards in cases in which they have intervened and taken an active role in the litigation.¹⁴⁶

E. Allocation of Fee Liability Among Parties.

1. *Joint and Several Liability.* If two or more defendants are liable for damages¹⁴⁷ in a statutory¹⁴⁸ fee award case, the court must decide whether to levy the fee award severally or jointly and severally. One can plausibly argue that if the defendants are jointly and severally liable for the damages awarded on the merits, they should be jointly and severally liable for the fee award. Indeed, some cases support this position.¹⁴⁹ But

143. See *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 732-35 (1980).

144. See *Stump v. Sparkman*, 435 U.S. 349, 360 (1978) (immunity attaches only to "judicial act").

145. See *Pulliam v. Allen*, 466 U.S. 522, 543-44 (1984).

146. See *May v. Cooperman*, 578 F. Supp. 1308, 1317 (D.N.J. 1984) (no immunity where state legislators "abandoned their legislative role and took on a quasi-enforcement role by intervening to defend the statute"), *aff'd on the merits, appeal dismissed as to fee award*, 780 F.2d 240 (3d Cir. 1985).

147. Many civil rights cases seek only injunctive relief and relief incidental to that. Defendants in such cases are often only formal parties. It is very difficult to speak of joint and several liability on the merits of such cases. If there is no joint and several liability on the merits of the case, joint and several liability for the fee award would seem to be justified only as to parties who had it in their legal power to settle out of the case or who litigated vexatiously and in concert, or vexatiously in such a way as to cause a single, indivisible injury.

148. In common fund cases the liability for a fee is based on benefits received; hence joint and several liability is inappropriate. In the substantial benefit cases, however, the benefit is nonmonetary and perhaps fictional. These cases are often private attorney general cases in disguise, and as such they resemble the statutory fee cases. Bad faith or vexatious litigation cases justify a fee because of fault in the litigation process itself. They thus resemble cases involving the problem of joint and several liability for punitive damages; since punishment is by nature individualized, joint and several liability for bad faith fee awards would be justified only when there is evidence of joint bad faith. For simplification, the textual analysis is limited to ordinary statutory cases.

149. In *Riddell v. National Democratic Party*, 712 F.2d 165, 169 (5th Cir. 1983), the court explicitly assessed joint and several liability for fees without stating a rationale. Courts have often rendered or upheld joint and several judgments using language that does not distinguish fee claims from claims on the merits. Joint and several fee liability is supported inferentially in a number of cases. See *Smith v. Updegraff*, 744 F.2d 1354, 1368 (8th Cir. 1984); *Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516, 520 (9th Cir. 1984); *Thomas v. Sams*, 734 F.2d 185, 194 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3476 (1985); *Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279, 287 (3d Cir. 1983); *Jacobson v. Rose*, 592 F.2d 515, 521 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979); see also *Jennings v. Metropolitan Gov't*, 715 F.2d 1111,

the issue demands more serious consideration, partly because its complexities have not been explored and partly because there may be some confusion about even the basic rules of joint and several liability.¹⁵⁰

Courts impose joint and several liability either when there is concert of action or when two or more defendants acting independently cause a single, indivisible injury. The effect of joint and several liability is to make each defendant liable for the entire judgment, though the plaintiff cannot collect twice.¹⁵¹ Joint and several liability puts the risk of one defendant's insolvency on a codefendant rather than on the plaintiff. Joint and several liability for the fee award would, therefore, favor the plaintiff when one defendant has only limited assets.

Joint and several liability for the plaintiff's fee might seem especially appropriate when multiple defendants are represented jointly. But the prospect of such liability can create a conflict of interest for the attorney representing multiple defendants, because the attorney's decision to increase litigation with respect to a separate interest of one defendant would increase the joint fee liability of the others.

If the defense is not conducted jointly, the efforts of different defendants might generate different levels of litigation by the plaintiff, and hence different defendants would generate different portions of the plaintiff's fee award. If any identifiable portion of the plaintiff's fee arises from work not directed at defendant *B*, then *B* probably should not be held jointly and severally liable for that portion of the fee.

On the other hand, joint and several liability for the plaintiff's fee is presumptively sound if the plaintiff presents a unified case against all defendants. In such a case, it might seem that the defendant who claims to be liable only for a discrete portion of the fee award should have the burden of showing that his litigation generated only a specific, identifiable portion of the plaintiff's litigation expense.¹⁵² But fee liability is not entirely analogous to liability on the merits. Causation with respect to the initial harm and causation with respect to the fee costs are arguably wholly separate matters. Moreover, fee liability may chill access to courts. In the case of fee awards, the burden of proof arguably should be on the plaintiff—the party with the best access to records of fees gener-

1114 (6th Cir. 1983) (joint and several fee liability appropriate if findings supported joint and several liability on merits).

150. Several cases indicate that there is considerable misunderstanding of these rules at the trial court level. *See, e.g.,* *Watts v. Laurent*, 774 F.2d 168, 179-80 (7th Cir. 1985); *Smith v. Updegraff*, 744 F.2d 1354, 1356-57 (8th Cir. 1984).

151. *See* PROSSER & KEETON, *supra* note 48, § 52, at 345.

152. *Cf.* RESTATEMENT (SECOND) OF TORTS § 433B (1965) (burden on defendant to show plaintiff's injury is divisible and apportionable to each tortfeasor).

ated—to show that all of the work for which the fee is claimed was aimed at both defendants.

2. *Contribution and Allocation Among Defendants.* Defendants held jointly and severally liable for fees may seek contribution. The idea behind contribution is that one tortfeasor who pays more than a fair share is entitled to claim contribution from others who are also jointly and severally liable. In cases involving several liability, courts make a "fair share" allocation among tortfeasors in the first instance. "Fair share" in contribution cases originally implied an equal allocation.¹⁵³ Courts adopting comparative negligence standards, however, have held it to mean comparative fault share.¹⁵⁴ In cases involving strict liability, when fault is theoretically not an issue, it has sometimes meant something like comparative causation share.¹⁵⁵

It is not clear that any of these rules is adaptable to attorney fees. Some fee award cases involve fault on the part of defendants, others do not.¹⁵⁶ Sometimes the named defendant is the one person who is clearly not at fault.¹⁵⁷ Sometimes when two public entities are sued for enforcing an unconstitutional law, one of them litigates fiercely and the other does no more than it must.¹⁵⁸ And sometimes a party who intervenes

153. See Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 130-31 (1982).

154. See, e.g., *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 587, 578 P.2d 899, 904, 146 Cal. Rptr. 182, 187 (1978).

155. When the acts of two defendants have different levels of causal significance with regard to a single injury, courts may apportion liability on a comparative causation basis. Because "comparative causation" is not widely recognized as a term of art, courts in such cases sometimes use the term "comparative fault." See, e.g., *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322, 328-32, 579 P.2d 441, 444-46, 146 Cal. Rptr. 550, 553-55 (1978) (supermarket whose fault contributed 80% toward accident liable for 80% of award, cart manufacturer liable for 20% of award); see also Rizzo & Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L. REV. 1399 (1980) (proposing method for apportioning liability in accordance with relative causal contributions of tortfeasors).

156. In employment discrimination cases, for example, good faith is no defense to the claim on the merits, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-23 (1975), or to the fee claim. To recover under 42 U.S.C. § 1983 (1982), for a deprivation of property without due process of law, a plaintiff is required to show that the deprivation was a "deliberate decision" of a government official. See *Daniels v. Williams*, 106 S. Ct. 662, 665 (1986). Again, however, good faith is no defense. See *Owen v. City of Independence*, 445 U.S. 622, 650 (1980) (city liable for wrongful termination of police chief, notwithstanding good faith).

157. See, e.g., *In re Kansas Congressional Dists. Reapportionment Cases*, 745 F.2d 610, 611-12 (10th Cir. 1984) (defendant secretary of state agreed that current districts were unconstitutional but had no power to cure problem).

158. See, e.g., *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 960 (1st Cir. 1984) (state liquor control agency assessed higher percentage of fees than local agency because state agency's support of unconstitutional regulation was more vigorous).

had nothing to do with the plaintiff's injury in the first place.¹⁵⁹ These examples suggest that ultimate responsibility for the fee is not necessarily related to the conduct that governs the merits of the case. Thus courts should not mechanically apply the rule prohibiting contribution among intentional tortfeasors¹⁶⁰ in the fee award context.

Case discussion of the problem has been quite limited. However, courts have allocated fee charges to a single defendant if that defendant has clearly generated those charges.¹⁶¹ And in cases involving intervenors, courts might similarly allocate fee liability on the basis of the added work the intervenor caused.¹⁶² In other cases involving multiple defendants, courts could analyze the comparative vigor with which each defendant litigated.¹⁶³ Alternatively, courts could allocate the fee liability in equal shares, or on the basis of comparative responsibility for the original injury.¹⁶⁴ A court might even use some combination of these allocation schemes.¹⁶⁵ Finally, it should be noted that courts have been willing to allocate fee liability in part on the basis of ability to pay or ability to spread the costs,¹⁶⁶ considerations that may have a rather different significance in the case of a public entity defendant than in the case of a bad-faith plaintiff.

Allocation on the basis of joint and several liability may be deemed inconsistent with the *Hensley v. Eckerhart*¹⁶⁷ principle that a court must take the plaintiff's success into account when fixing the fee award.¹⁶⁸ In multiple defendant cases, this rule would seem to require that the degree of success against each defendant should be taken into account. Thus *Hensley* may eliminate the possibility of adopting joint and several liability except where the plaintiff succeeds against the defendants in substantially equal degree.

159. See, e.g., *Haycraft v. Hollenbach*, 606 F.2d 128, 133 (6th Cir. 1979) (intervenor opposing desegregation plan); *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1275, 1279 (N.D. Ohio 1985) (intervenors supporting constitutionality of abortion ordinance).

160. See PROSSER & KEETON, *supra* note 48, § 50, at 339.

161. See, e.g., *Vulcan Soc'y v. Fire Dep't*, 533 F. Supp. 1054, 1060 (S.D.N.Y. 1982).

162. See, e.g., *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1275, 1294 (N.D. Ohio 1985).

163. See, e.g., *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 960 (1st Cir. 1984).

164. See, e.g., *Burney v. Housing Auth.*, 735 F.2d 113, 117 (3d Cir. 1984).

165. See, e.g., *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 959-60 (1st Cir. 1984) (comparing both the respective responsibility of the defendants for the offense and the respective involvement of the defendants in the litigation); *Vulcan Soc'y v. Fire Dep't*, 533 F. Supp. 1054, 1064 (S.D.N.Y. 1982) (remaining fees divided equally among all principal defendants after initial allocation of certain fees to party solely responsible for generating them).

166. See *supra* note 88 and accompanying text; see *infra* note 193 and accompanying text.

167. 461 U.S. 424 (1983).

168. See *infra* notes 211-14 and accompanying text.

III. CALCULATING THE FEE

A. *Goals in Calculating the Fee.*

Calculating the fee to be awarded is perhaps the most significant and most difficult problem in the world of fee awards. The statutes that authorize fee awards require that the fee be "reasonable."¹⁶⁹ The problem has been to infuse the "reasonable fee" formula with enough principled content so that fee claims can be evenhandedly adjudicated without full-scale litigation. At the same time, not only must the fee award provide adequate compensation in fact, but it must also be available with sufficient certainty to induce the lawyer to take the case in the first place.¹⁷⁰ These goals conflict with each other, and the tendency has been to compromise each of them. The result in practice has been lamentable and disheartening.

B. *Basic Approaches to Calculating the Fee.*

1. *Methods of Charging Clients.* Market considerations aside, lawyers use several distinctly different methods to fix their fees. The fee may be based on a percentage of recovery or of assets being managed, a flat amount for an entire case or for particular legal services, or the hours worked multiplied by a predetermined rate.¹⁷¹ These different methods originated as methods for charging one's own client, but they have been used in the fee award cases to assess fee liability. Although courts generally adhere to an hourly fee charge as the basic method because it is most consistent with the compensatory theory of fee awards, they continue to fall back on highly subjective factors that have roots in the percentage method and the flat fee method.¹⁷²

2. *Percentage Recoveries.* Influenced by contingent fee practice in areas involving high damages claims, some courts have evaluated the fee award in terms of a percentage of the recovery.¹⁷³ This can result in

169. See *supra* note 80.

170. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 430 n.4 (1983) (courts should award fees "adequate to attract competent counsel, but which do not produce windfalls to attorneys").

171. Hourly billing is most common today. See Kritzer, *supra* note 10, at 565 n.16 (noting that over half of surveyed attorneys billed on hourly basis). A generation ago, it was more common to fix fees in advance. Percentage fees were common in probate and collections cases. Some of the old minimum fee schedules, for instance, do not even mention hourly rates. See, e.g., *Bench and Bar—Minimum Fee Bills*, 12 MINN. L. REV. 199, 202-05 (1928). Others list hourly fees, but their importance is overshadowed by the numerous flat fee and contingent fee charges. See, e.g., Note, *Minimum Fee Schedules: Are They Worthwhile?*, 40 IOWA L. REV. 642, 645-47 (1955).

172. See *infra* notes 173-98 and accompanying text.

173. See Berger, *supra* note 10, at 287 & n.31. In recent times, however, pure percentage-of-recovery calculations have generally been rejected. See *infra* note 78 and accompanying text. Nonetheless, vestiges of the percentage approach remain.

very high fee awards in some cases.¹⁷⁴ In other cases, however, this approach can result in awards that do not represent fair compensation.¹⁷⁵ Such would be the case where only injunctive relief is available or where damages are necessarily limited because the only right at issue is an intangible one. This occurs frequently in the civil rights context.¹⁷⁶ Although some courts may continue to give percentage assessments dominant weight without saying so,¹⁷⁷ appellate courts have held that percentages alone cannot be used to calculate the fee award.¹⁷⁸ Similarly, fee awards that must be reduced for some reason cannot be reduced by a stated percentage,¹⁷⁹ and even the plaintiff's own contingent fee contract will not necessarily provide a guide for calculating the fee award.¹⁸⁰ But the cases indicate that when the percentage approach is beaten back in one place, it tends to crop up in another.¹⁸¹

174. There is some evidence that lawyers generally do not invest more time in a case as the stakes go up, and that many large cases in fact involve quite limited expenditures of time. See Kritzer, *supra* note 10, at 567. This evidence is rather incomplete because it is not correlated with degree of success actually achieved or with the likelihood of success as estimated at the time the decision to limit time investment was made. Still, the evidence strongly suggests that there are many instances of high recoveries with minimal time investment. To the extent that this is true, a flat percentage fee at any of the conventional percentage levels would very likely overcompensate.

175. Cf. *Easley v. Empire Inc.*, 757 F.2d 923, 931-32 (8th Cir. 1985) (approving fee award of \$30,000 where contingent percentage fee on which lawyer had taken case would have been only \$900).

176. In the civil rights context, there is also the risk that a jury or even a court will express its dissatisfaction with the civil rights claim by returning a low award. Prisoner rights cases are natural examples of this phenomenon. See *Ganey v. Edwards*, 759 F.2d 337, 339 (4th Cir. 1985) (jury refused to award prisoner even nominal damages though denial of access to prison library violated his rights). It seems harsh indeed to deny a fee award when the lawyer has pursued a right that was actually established and vindicated.

177. A great deal is hidden in fee calculations. Trial judges have used vague and conclusory findings, claimed personal familiarity with the work of counsel, and claimed discretion to insulate fee awards from review. As one federal district court has said:

[T]he trial judge is cast adrift in a sea of judicial discretion. . . . [T]he process of arriving at the precise multiplier is more a function of gestalt than cerebration. In the instant case I add to my knowledge of the plaintiff and the amount of the verdict and the time, stress, and energy expended by counsel, a sense of what is appropriate . . . based upon my own participation in similar cases as a trial lawyer.

Black Gold, Ltd. v. Rockwool Indus., Inc., 529 F. Supp. 272, 279 (D. Colo. 1981). Appellate courts have come to insist on better fact finding and articulation of reasons underlying fee awards. See, e.g., *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1137 (11th Cir. 1984). Still, the trial judge can manipulate the findings to support a predetermined percentage result.

178. See *Segal v. Gilbert Color Sys., Inc.*, 746 F.2d 78, 85-86 (1st Cir. 1984) ("[A] 'reasonable' counsel fee cannot be equated reflexively with a percentage of the dollar recovery.").

179. See *Heiar v. Crawford County*, 746 F.2d 1190, 1204 (7th Cir. 1984) (noting inappropriateness of arbitrary 50% reduction of claimed amount except in small cases), *cert. denied*, 105 S. Ct. 3500 (1985).

180. See *Easley v. Empire Inc.*, 757 F.2d 923, 932 (8th Cir. 1985) (contingent fee contract places no ceiling on fee award); *Segal v. Gilbert Color Sys., Inc.*, 746 F.2d 78, 86 (1st Cir. 1984) (court should disregard the existence of a private fee arrangement).

181. See *infra* notes 222-27 and accompanying text.

3. *Subjective Factors.*

a. Origins of the Factors Analysis. The most influential method of fee award computation requires courts to consider a large number of factors, none of which is quantified. This approach to fee awards may be derived from the lawyer's practice of setting flat fees per case or for a given type of legal service.¹⁸² Market pressures aside, the lawyer setting a fee in this manner would presumably consider several factors. The American Bar Association's 1908 *Canons of Ethics* provided a list of factors to be considered in fixing a fee.¹⁸³ This list, with some modifications, continues to provide guidelines for the practitioner.¹⁸⁴

Despite the fact that this list of factors was meant to guide the lawyer in setting his fee and not to guide a court in fixing the amount of a fee award, it was used for precisely that purpose by the United States Court of Appeals for the Fifth Circuit in *Johnson v. Georgia Highway Express*.¹⁸⁵ Under the *Johnson* approach, consideration is to be given to such factors as the novelty of the case, the amount of time and labor expended, the attorney's skill, the customary fee, the attorney's prior relationship with the client, and the amount involved.¹⁸⁶ The *Johnson* approach has been influential in fee award cases in the civil rights context¹⁸⁷ and elsewhere.¹⁸⁸

b. Objections to the Factors Approach. The factors approach probably provided adequate guidelines in the situation for which it was evidently intended—aiding lawyers in setting their own fees. In that context, the shortcomings of the factors approach could be overlooked be-

182. See *supra* note 171.

183. See CANONS OF ETHICS Canon 12, reprinted in 33 A.B.A. REP. 575, 578 (1908).

184. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1983); see also *infra* note 186.

185. 488 F.2d 714 (5th Cir. 1974).

186. The ABA version lists eight elements:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed . . . ; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer . . . ; (8) whether the fee is fixed or contingent.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1983). The *Johnson* list includes two factors not in the ABA list: the undesirability of the case and the amount of fees awarded in similar cases. *Johnson*, 488 F.2d at 719.

187. See, e.g., *NAACP v. City of Richmond*, 743 F.2d 1346, 1358-59 (9th Cir. 1984).

188. See *Harman v. Levin*, 772 F.2d 1150, 1152 & n.1 (4th Cir. 1985) (*Johnson* factors applied in bankruptcy proceeding); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975) (*Johnson* factors applied in union member's suit against union), *cert. denied*, 425 U.S. 951 (1976).

cause market factors would operate as a constraint. Such is not the case when courts use the factors to determine the amount of a fee award.

The chief problem with the factors approach is that courts have had little guidance as to what significance they should give the individual factors in calculating the award. The *Johnson* list was merely illustrative of the types of factors courts should consider in appropriate circumstances. There is no apparent logic behind the organization of the list; the factors are presented as if they were all different and all of equal importance, when in fact they are neither. Some courts have tended to view the *Johnson* list as a check list, reciting the various factors without analyzing their individual relevance.¹⁸⁹ Other courts have introduced additional factors, confusing matters even more.¹⁹⁰

When courts use the *Johnson* factors as a check list, they overlook the fact that some factors are important only as evidence of others. For example, the novelty of the case is undoubtedly important because novel issues demand more time and skill. Time and skill in turn are important in determining the customary fee, another factor in the list. Because some factors overlap, courts using the *Johnson* list may at times make unjust fee awards.¹⁹¹

A further problem may arise when courts purport to consider all the *Johnson* factors without taking note of the context in which the fee award is made. Under *Johnson*, a court may consider the amount involved in the action as one factor that should influence the fee award. In the civil rights context, however, the amount involved has no real relevance.¹⁹²

The popularity of the factors approach may encourage other courts to consider factors not mentioned in *Johnson*. The *Johnson* list of factors does not include the financial situation of the plaintiff, but some courts have cited the plaintiff's relative lack of wealth as a ground for reducing the fee award to which a prevailing defendant would otherwise be enti-

189. See, e.g., *Davis v. Fletcher*, 598 F.2d 469, 470-71 (5th Cir. 1979) (remanding for lower court to explain the award calculation; lower court claimed to have "consider[ed] all the relevant factors," but did not explain how individual factors influenced sum awarded).

190. See, e.g., *Faraci v. Hickey-Freeman Co.*, 607 F.2d 1025, 1028-29 (2d Cir. 1979) (reducing fee award on basis of plaintiff's financial distress).

191. See, e.g., *In re Casco Bay Lines, Inc.*, 25 Bankr. 747, 760-61 (Bankr. 1st Cir. 1982) (substituting appellate panel's assessment of fee award, \$170,000, for bankruptcy court's assessment, \$83,000, because bankruptcy court's "incorrect application of redundant *Johnson* criteria . . . produced a skewed determination").

192. Cf. Note, *Surveying the Law of Fee Awards Under the Attorney's Fees Awards Act of 1976*, 59 NOTRE DAME L. REV. 1293, 1311 n.116 (1984) (noting that the "length of attorney-client relationship" factor conflicts with section 1988 goal of assisting persons unable to afford legal assistance).

tled.¹⁹³ The justification for considering this factor is questionable. Insofar as a defendant must establish some form of litigation misconduct to recover attorney fees from a losing plaintiff, courts' attention to a plaintiff's wealth may go beyond what is required to maintain appropriate incentives. Moreover, this factor introduces further asymmetry into courts' treatment of plaintiffs and defendants—courts do not reduce the fee liability of a defendant to a prevailing plaintiff on the basis that the plaintiff enjoys a strong financial position.¹⁹⁴

In practice, the use of the factors approach has resulted in a highly subjective system of fee awards. It is easy to see the potential for abuse, either through double-counting or through consideration of factors in inappropriate contexts. Under the factors approach, fee awards cannot be predicted with any degree of certainty, and the results are difficult to evaluate.¹⁹⁵

c. Potential Utility of the Factors Method. It might be possible to use the *Johnson* factors as an aid in estimating the market value of the lawyer's services. In damages or condemnation cases, market value controls.¹⁹⁶ Determining market value frequently involves taking expert opinion evidence in the form of a conclusion.¹⁹⁷ Ordinarily that conclusion is supported or attacked by examining the factors on which it was based. These factors merely assist the trier of fact in determining whether the conclusion about market value—the ultimate matter at issue—is sound. Conceivably courts could use the *Johnson* factors to the same end, in which case the ultimate conclusion would have at least some relationship to the market value of the lawyer's services. But in fact courts have not used these factors in this way. Instead of using them as evidence bearing on an empirical estimate by a witness familiar with the market, they have used them as tests of abstract reasonableness.

d. Lingering Influence of the Factors Approach. The *Johnson* approach to fixing fee awards enjoyed much popularity, perhaps because it

193. See, e.g., *Faraci v. Hickey-Freeman Co.*, 607 F.2d 1025, 1028-29 (2d Cir. 1979) (\$2,500 fee award reduced to \$200 because of plaintiff's financial distress); cf. *Munson v. Friske*, 754 F.2d 683, 697-98 (7th Cir. 1985) (fee award not reduced since plaintiff could not establish his indigency).

194. See, e.g., *Duncan v. Poythress*, 750 F.2d 1540, 1542 (11th Cir.) ("Plaintiff's counsel is not denied fees under section 1988 merely because the plaintiff is able to pay for counsel . . ."), *vacated, reh'g granted*, 756 F.2d 1981 (11th Cir. 1985) (en banc).

195. See *Berger*, *supra* note 10, at 286 (noting tendency of courts to give lip service to factors, but to jump from unsystematic analysis of factors to unexplained lump-sum fee award figure).

196. See *D. DOBBS*, *supra* note 3, § 3.2, at 143.

197. See *id.* § 3.4, at 158-61.

gave judges a high degree of control¹⁹⁸ and required neither hard analysis nor any actual proof of facts about market value. In theory, at least, an approach to fee fixing based on hourly billing rates has supplanted the *Johnson* approach. In professing adherence to the hourly market rate approach, however, courts have not rejected the factors approach altogether. The nonmarket, subjective approach taken in *Johnson* still influences courts which in theory apply the hourly market-rate analysis.

4. *The Lodestar or Market Method—Hourly Charges.* Shortly before *Johnson* laid down its twelve factors, the United States Court of Appeals for the Third Circuit adopted a radically different approach. In *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp. (Lindy I)*,¹⁹⁹ the court held that the chief determinant of a fee award was the market value of the attorney's services. *Lindy I* provided the formula *Johnson* lacked. It required the trier to determine the number of hours reasonably spent in providing legal services and to multiply this number by a reasonable hourly rate.²⁰⁰ The resulting figure was the "lodestar of the court's fee determination."²⁰¹ This approach, which the Supreme Court later embraced,²⁰² differs radically from the *Johnson* approach both operationally and in principle. Operationally, it calls for a different and more objective kind of proof. In principle, it is grounded specifically in the market value of the property in question—the lawyer's services.

Courts often award "general damages" in terms of market value of property.²⁰³ Thus a plaintiff who is entitled to property is entitled to its market value when the property is destroyed; this principle applies whether or not the plaintiff would actually have used the property or benefited from it in any way.²⁰⁴ A market value approach in fee cases yields similar results. A court should calculate the fee based on the market value of the legal services rendered, even if the plaintiff did not pay

198. See, e.g., *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 921 (3d Cir. 1985) (applying *Johnson* factors and reducing fee award because plaintiff was not 100% successful, then augmenting award because quality of lawyer's work was high).

199. 487 F.2d 161, 167-69 (3d Cir. 1973).

200. *Id.* at 167.

201. *Id.* at 168.

202. See *Blum v. Stenson*, 465 U.S. 886, 899-900 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The Supreme Court may have some reservations, however. See *infra* notes 211-21 and accompanying text.

203. See D. DOBBS, *supra* note 3, § 3.2, at 138-48.

204. *Id.* § 3.2, at 140. Because the plaintiff's own particular losses are usually irrelevant in assessing general damages, there is nothing radical about a general damages or market value approach to fee awards.

market value for those services.²⁰⁵ Although such an approach may arouse concern,²⁰⁶ it has roots in the general law of damages,²⁰⁷ and the advantage of using an objective measure of fee liability may heavily outweigh the disadvantages.²⁰⁸

Although market value furnishes a more objective test than the subjective *Johnson* factors, unresolved issues remain. For example, suppose a lawyer practices in one geographical area but tries a case in another. Does he recover a fee commensurate with that which his services would command in the area where he practices, or the area where the case is tried? More importantly, does a court in determining the market for legal services look to what other lawyers with similar qualifications charge for similar work, or to the fee claimant's own historical fee charges for similar work? More importantly still, can a lawyer's services in litigation be said to have any market at all? These are serious issues. But even if there exists no model market for legal services, an hourly rate approach based on hourly rates charged by similar practitioners furnishes a more objective, less whimsical guide than does the *Johnson* factors approach.

C. *Enhancements and Multipliers Applied When Calculating the Fee.*

1. *The Back Door to the Johnson Factors.* Although the court in *Lindy I* looked toward market value, it did not rule out consideration of nonmarket, subjective factors. In *Lindy I*, the court specified two factors that could justify increasing or decreasing the lodestar figure: the quality of the services provided and the risk the lawyer took that there would be no payment at all.²⁰⁹ Later, in *Lindy II*, the same court recognized that,

205. See *Blum v. Stenson*, 465 U.S. 886, 899-900 (1984).

206. See *Copeland v. Marshall*, 641 F.2d 880, 909 (D.C. Cir. 1980) (Wilkey, J., dissenting) ("[T]he market value concept is unworkable where there is no true market . . .").

207. There are, however, some distinctions between this situation and the normal common law damages action. For one thing, the hourly rate for legal services includes an amount to cover overhead. Assuming that both are allowed to use the same hourly rate in calculating fee awards, a nonprofit law firm with low overhead will actually make more "profit" than an entrepreneurial firm. When the fee is to be fixed for legal services rendered to an established client, this fact may be taken into account. Cf. *Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 306, 315 (2d Cir. 1985) (lawyer's lower overhead considered as one ground for reducing hourly rate).

208. The advantages of the market approach become more apparent when one considers the valuation problems that arise in other areas. For example, in the case of pain and suffering, no market is available, and awards are consequently disparate and dependent on highly subjective factors unrelated to the merits of the case. Wildly disparate fee awards are themselves bad. Using a market approach cannot simplify fee calculations, but it can enable courts to deal with them in a judicial fashion.

209. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973). The court recognized the possibility that other factors might also appropriately be considered, but it mentioned only these two. *Id.*

at least to a large extent, the "quality" of legal services was already accounted for in selecting a reasonable hourly rate, so that enhancement of a fee for exceptional legal services might actually overcompensate.²¹⁰ *Lindy I* in effect said that reasonable hours times a reasonable hourly rate produces a reasonable fee, but that a reasonable fee must then be doubled in order to be reasonable. Though *Lindy II* recognized this error, it nonetheless left room for the practice, and courts have continued to augment fees found to be reasonable by adding enhancements or "multipliers"—a practice that reflects both the urge to use percentages and the habits of thought embodied in the *Johnson* list of factors.

2. *The Curious Implications of Hensley.* The Supreme Court accepted the lodestar formula in *Hensley v. Eckerhart*.²¹¹ But it also countenanced the open back door for importing the *Johnson* factors. The Court said that a district court may properly consider the *Johnson* factors, but noted that many of these factors are ordinarily subsumed in the lodestar figure.²¹² In fact, the Court's analysis in *Hensley* depended heavily on one of the *Johnson* factors, namely the "results obtained" factor. In *Hensley*, the Court held that when the plaintiff is less than completely successful, the trier must reduce the fee award if the lack of success is significant.²¹³ Since a low level of success can mandate a reduction in the fee, the implication would seem to be that a high level of success could mandate an enhancement of the fee, and indeed, the Court said that exceptional success might justify an enhanced fee award.²¹⁴ Behind *Hensley*, then, might lie the implicit view that the time invested and hourly rate figures do not already cover the issue of quality of work. The effect of this view would be to let the *Johnson* camel into the *Lindy* tent.

However, when the precise issue of enhancement actually arose, the Supreme Court held quite differently. In *Blum v. Stenson*²¹⁵ the Court held that enhancements of a fee based on the quality of legal work would not be acceptable, at least in ordinary cases, for the very reason that quality of work was subsumed in the hourly rate.

The effect of *Blum* was a firm position against the *Johnson* factors method of fee calculation. Given a fee computation based on hourly fee charges, most of those factors would already be reflected in the determination of reasonable hours or in the determination of the reasonable rate.

210. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976).

211. 461 U.S. 424 (1983).

212. *Id.* at 434 n.9.

213. *Id.* at 434.

214. *Id.* at 435.

215. 465 U.S. 886 (1984).

For example, novelty and complexity of the case "were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in the fee."²¹⁶ Special skill of counsel "should be reflected in the reasonableness of the hourly rates"²¹⁷ and the same would apply to the quality of representation.²¹⁸ Public benefit obtained by the plaintiff's success, the Court thought, had no obvious effect on the fee calculation at all.²¹⁹ And even "results obtained," which the Court in *Hensley* had found so significant in fixing the fee, was thought to be "subsumed within other factors used to calculate a reasonable fee" so that "it normally should not provide an independent basis for increasing the fee award."²²⁰ The Court reiterated a similar analysis in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*.²²¹

It is difficult to reconcile the holding in *Blum* with the holding in *Hensley*. Under *Blum*, the lawyer's extraordinary success in the case does not warrant an increase in the fee award, while under *Hensley*, the lawyer's failure to achieve total success may require a reduction in the fee award. *Blum* assumes the market rate encompasses the value of high success. *Hensley* assumes the market rate does *not* encompass the value of limited success.

How is this apparent conflict in premises to be resolved? The *Hensley* decision might be interpreted to mean simply that a reduction is required if the practice of lawyers generally—the market—would be to make a reduction. If this is all *Hensley* means, it can easily coexist with *Blum*. Yet such an interpretation seems strained.

Trial judges setting fees find the subjective factors congenial; those factors do not require taking extensive evidence, and appellate courts have little objective basis for review. The seeming conflict between *Hensley* and *Blum* encourages a reading of *Blum* that permits continued use of subjective factors. The result may be a conflict in principles at the highest level and a risk of over- or under-compensation.

D. *The Risk Factor.*

1. *Contingency Enhancement Rationale and Effect.* Courts have often used a contingency or risk multiplier on the ground that the reasonable hourly fee was reasonable only if payment was assured.²²² Lawyers

216. *Id.* at 898.

217. *Id.*

218. *Id.* at 899.

219. *Id.* at 900.

220. *Id.*

221. 106 S. Ct. 3088 (1986).

222. See, e.g., *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1356-57 (11th Cir. 1983).

representing civil rights plaintiffs and class action plaintiffs may have no source of revenue other than fee awards, so if they lose, they may receive nothing. To bring the fee award up to a level they considered fully compensatory, some courts have accordingly multiplied the lodestar fee by a figure that was intended to reflect the risk factor.²²³ The resulting fee awards ranged from as little as 110%²²⁴ to as much as 400%²²⁵ of the fee based on the reasonable hourly rate. Most multipliers in civil rights cases fell somewhere in the range between 1.0 and 2.0.²²⁶ Whatever the range, the difference between one multiplier and another might run to millions of dollars in fees.²²⁷

2. *Criticism of the Contingency Multiplier.* The contingency multiplier has been subject to much criticism.²²⁸ Some of this criticism focuses on the difficulty of establishing a suitable multiplier. The multipliers used are almost entirely subjective; there is no way to test whether a multiplier is fair without some information about market values. Yet there probably is no market to which one could turn since most clients do not pay their lawyers on a contingent hourly rate.²²⁹ Furthermore, a rational effort to award multipliers for risk would require a case-by-case assessment of the risk of winning or losing.²³⁰ Case-by-case assessment would become even more complicated in substantial cases where the contingency or risk may change as the litigation progresses.²³¹ In cases of this kind, the imponderable risk would have to be pondered and recalculated repeatedly. This would require substantial litigation,

223. Prior to *Blum*, courts sometimes used multipliers in conjunction with the *Johnson* factors. See, e.g., *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1356-57 (11th Cir. 1983).

224. See, e.g., *Lamphere v. Brown Univ.*, 610 F.2d 46, 47 (1st Cir. 1979).

225. See, e.g., *Arenson v. Board of Trade*, 372 F. Supp. 1349, 1358 (N.D. Ill. 1974).

226. See *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 613 (1st Cir. 1985) (citing survey indicating that multipliers as high as 2.0 are rare in civil rights cases).

227. In *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 680, 693-703 (D. Minn. 1975), one lawyer was given a multiplier of 3.0. After deducting \$1.5 million from the award because of other fees the lawyer could collect, the court awarded him over \$3 million. *Id.* at 694.

228. See, e.g., Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 482-97 (1981).

229. Contingent fee contracts usually provide for a percentage of the dollar recovery in the case, not for hourly fees. Hourly fee billing, on the other hand, is usually not contingent. Thus, there is no "market" in any practical sense.

230. It is not clear, however, what class of contingency would be estimated. The court might consider the risk of loss in (a) all cases, (b) civil rights cases only, (c) cases characterized in some narrower fashion, e.g., "police brutality cases," or (d) the particular case before the court. Still other methods for evaluating the risk might be used. The court might look to the lawyer's own historic success rate. That rate would of course reflect the lawyer's preference in cases, ability to obtain good cases, and skill in trying or settling them.

231. See M. DERFNER & A. WOLF, *supra* note 10, ¶ 16.04[1]; Leubsdorf, *supra* note 228, at 494. This depends on the standard used in measuring the risk, however. See *supra* note 230.

and more time might consequently be spent litigating the fee issues than the merits.²³²

A further problem is that the use of contingency multipliers is likely to encourage unmeritorious litigation.²³³ As Professor Leubsdorf pointed out, the lawyer is given the largest fee for bringing the most unpromising case and the smallest fee for bringing the best case.²³⁴ The lawyer thus has an incentive to argue that the case is weak. Because fees are often claimed during trial or before appeal, this kind of argument may later cut against the client's interest if the case is retried on the merits. The result is a conflict of interest.²³⁵

3. *Pre-Blum Acceptance of Contingency Multipliers and Post-Blum Divisions.* Before the Supreme Court decided *Blum*, lower courts solidly favored contingency or risk multipliers.²³⁶ Several courts have continued to use the contingency multiplier in spite of what may be the implications of *Blum* and *Hensley*.²³⁷ Two courts, however, have spoken out against the practice. The United States Courts of Appeals for the District of Columbia Circuit²³⁸ and the Seventh Circuit²³⁹ accepted the validity of Professor Leubsdorf's observation that the use of contingency multipliers encouraged lawyers to pursue unmeritorious litigation.²⁴⁰

232. See Leubsdorf, *supra* note 228, at 485-86.

233. See McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984); Leubsdorf, *supra* note 228, at 491.

234. See Leubsdorf, *supra* note 228, at 488-89.

235. *Id.* at 482-84.

236. See, e.g., Northcross v. Board of Educ., 611 F.2d 624, 638-39 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 113-14 (3d Cir. 1976). *But cf.* Bonner v. Coughlin, 657 F.2d 931, 936 (7th Cir. 1981) (risk of nonpayment insufficient by itself to justify multiplier).

237. See, e.g., Wildman v. Lerner Stores Corp., 771 F.2d 605, 611-13 (1st Cir. 1985); Delaware Valley Citizens' Council For Clean Air v. Pennsylvania, 762 F.2d 272, 282 (3d Cir. 1985), *aff'd in part and rev'd in part*, 106 S. Ct. 3088 (1986); LaDuke v. Nelson, 762 F.2d 1318, 1333 (9th Cir. 1985).

Five months after *Blum* was decided, an Eleventh Circuit panel approved a contingency enhancement. See Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1138 (11th Cir. 1984). There was no citation to *Blum*. Almost a year after *Blum* was decided, another Eleventh Circuit panel approved contingency enhancements in dictum, citing *Blum*, but not discussing any of its possible implications. See Jones v. Central Soya Co., 748 F.2d 586, 591-93 (11th Cir. 1984) (contingent fee contract with the client would be grounds for an increase in attorney fees). The Fourth Circuit, apparently reading *Blum* to cover contingency as well as quality multipliers, approved a contingency enhancement of a fee award on the ground that the attorneys' investment of over 6,000 hours of time over a ten-month period constituted an exceptional circumstance that justified the enhancement in light of the risk involved. See Vaughns v. Board of Educ., 770 F.2d 1244, 1246 (4th Cir. 1985).

238. See Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 26 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 3488 (1985); see also Murray v. Weinberger, 741 F.2d 1423, 1430-31 (D.C. Cir. 1984).

239. McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1985) (Posner, J.).

240. Leubsdorf, *supra* note 228, at 482-97; see *supra* notes 230-32 and accompanying text.

These courts also noted that the use of contingency multipliers indirectly compensated lawyers for the cases they lost by augmenting their winnings when they won.²⁴¹ Such a result, these courts suggested, violates the *Hensley* rule that no compensation be given for losses on any matter distinct from the claim that was won.²⁴²

4. *The Interaction Between a Client's Fee Payment and Contingency.* The role that the client's fee contract plays in fee award determination is too complicated for a complete investigation here.²⁴³ One aspect, however, is critical to the contingency multiplier. If the client has paid the agreed-upon fee in advance, there is obviously no risk that the lawyer will go unpaid. One would expect that no fee enhancement for contingency would be possible.²⁴⁴ If the client has not actually paid the lawyer but has agreed to do so, there remains a risk that the client will not actually pay, although there is no contingency as to the liability of the client. One court has reasoned that no multiplier should be used in this case.²⁴⁵ Use of a contingency multiplier would seem justified, if at all, only when the client has no contractual obligation to pay a fee, or when the obligation to pay is contingent on success. The client who has paid all or part of the fee in advance has eliminated the contingency and should recover the prepaid amount with interest from whatever amount the lawyer is awarded.

241. As the court stated in *McKinnon*:

The fundamental problem of a risk bonus is that it compensates attorneys, indirectly but effectively, for bringing unsuccessful civil rights suits, even though the attorney's fee statute is expressly limited to cases where the party seeking the fee prevails. . . . Suppose a plaintiff asks for and receives a multiplier of 2 because he had a 50 percent chance of losing the case. This means that if the plaintiff's lawyer tries 10 such cases and wins 5 . . . he will be paid as if he had won them all; that is, he will be paid twice his normal charge for each of the 5 cases he won, to compensate him for getting nothing in the 5 cases he lost.

McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984). The court in *Laffey* made the same observation and cited *Hensley* in support of its position. The court stated that the *Hensley* rule limiting compensation to portions of the lawsuit on which the plaintiff prevailed "also forbids multiplying attorney fees so as effectively to compensate counsel for other, losing claims which may be brought." *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 27 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 3488 (1985).

242. See *Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983).

243. For a discussion of judicial efforts to achieve an accommodation when the American Rule and a party's private contractual fee arrangement provide competing bases for fees, see M. DERFNER & A. WOLF, *supra* note 10, ¶ 6.03(2).

244. See *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 660 (7th Cir. 1985); *Murray v. Weinberger*, 741 F.2d 1423, 1431-32 (D.C. Cir. 1984). But see *Lamphere v. Brown Univ.*, 610 F.2d 46, 47 (1st Cir. 1979). The client's fee liability, however, is not the limit of fee recovery. See *Sisco v. J.S. Alberici Constr. Co.*, 733 F.2d 55, 57 (8th Cir. 1984).

245. See *Jones v. Central Soya Co.*, 748 F.2d 586, 592-93 (11th Cir. 1984).

5. *Assessing the Conflict in Contingency Enhancements.* In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*,²⁴⁶ the Court did not resolve the question whether it is appropriate to use a contingency or risk multiplier to raise the base fee; instead, it ordered reargument of that issue. The implications of *Blum* may suggest an appropriate answer. *Blum* was predicated on a principle of compensation²⁴⁷ measured by the market value of services rendered.²⁴⁸ The Court explicitly held that the reasonable hourly rate multiplied by the number of hours reasonably invested is *prima facie* the extent of liability. The plaintiff has the burden of proving grounds for an adjustment based on quality.²⁴⁹ The proof must show that the hourly rate awarded does not adequately compensate the lawyer for the quality of services rendered.²⁵⁰

Unless there is some reason to believe that *Blum* represents an isolated rule rather than a general principle, it seems that courts should apply the same approach to fee enhancements based on the risk factor.²⁵¹ Thus the plaintiff making such a claim should be required to show that the fee based on hourly rates does not reflect the true market value of the services. Presumably this would also necessitate a showing that the re-

246. 106 S. Ct. 3088, 3100 (1986). The Court did not have occasion to consider the contingency multiplier in *Blum*, 465 U.S. at 901 n.17 (1984), but Justice Brennan, concurring in *Blum*, took the position that contingency adjustments are appropriate in the civil rights context. *Id.* at 903 (Brennan, J., concurring).

247. Justice Powell, who wrote the majority opinion in *Blum*, has emphasized in a variety of cases that compensation should be a limit of liability. See, e.g., *Carey v. Piphus*, 435 U.S. 247, 254 (1978).

248. The Court in *Blum* expressly adhered to the prevailing-market-rates test of the fee in two distinct contexts. First, the Court held that fee awards to legal services attorneys must be calculated according to the prevailing market rate, not according to a cost-related standard. 465 U.S. at 895-96. Second, the Court held that prevailing market rates presumably reflect the quality of counsel's work, and enhancement is ordinarily inappropriate. *Id.* at 899-900.

249. *Id.* at 897.

250. *Id.* at 898-900. See also *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088, 3099-100 (1986) (enhancement of fee award for quality of work inappropriate where there was no showing that work was of superior quality).

251. In *Wildman v. Lerner Stores Corp.*, 771 F.2d 605 (1st Cir. 1985), the court discussed the contingency issue at length, see *id.* at 611-14, but never cited Professor Leubsdorf's analysis. The court also ignored the arguments made in *McKinnon* and *Laffey*. See *supra* notes 238, 241. The court suggested that any problems associated with increasing the award as the case becomes less meritorious are purely practical and not grounded in principle. *Wildman*, 771 F.2d at 611-13. See also *Sierra Club v. Clark*, 755 F.2d 608, 620 (8th Cir. 1985) (multiplier approved on unclear grounds).

The Third Circuit's task force, though critical of the discrimination that occurred because of the quality multiplier, dispatched all problems with the contingency multiplier in these words:

In contrast to its views on the quality factor, the Task Force feels that the contingency factor, which it defines simply as 'the risk of winning or losing,' *should be considered in all cases*. Plaintiffs' attorneys always face the prospect of receiving no compensation in statutory fee cases. Accordingly, even modest risks in cases in which liability is reasonably certain to be established should be recognized in the fee-setting process.

108 F.R.D. at 265 (emphasis added, footnotes omitted).

quested enhancement *would* be compensatory as measured in the market.

But if *Blum* rules out enhancements based on quality or novelty, it does so because the hourly fee charge is already calculated to cover such elements. This is not necessarily so in the case of the contingency enhancement. On the contrary, it seems unlikely that most lawyers in private practice set hourly rates adjusted to the contingency of nonpayment; most lawyers charging hourly fees do not also charge on a contingency of success. *Blum's* market principles do not, then, necessarily exclude a contingency enhancement. If the hourly fee charge claimed by the plaintiff is already adjusted to account for the risk of losing, a contingency enhancement would be inappropriate under *Blum*. If it is not so adjusted, a contingency enhancement would be logically possible. But *Blum* imposes another rule that may preclude the enhancement as a practical matter: *Blum* requires the plaintiff to show any grounds for an adjustment to the lodestar. Implicitly at least, this rule would seem to require proof in objective, market terms. Most plaintiffs probably cannot meet this requirement. If these implications are followed, as a practical matter the contingency multiplier will be eliminated in most cases.²⁵²

E. *Compensation for Delayed Payment.*

1. *Delay in Payment: Interest.* In light of the fact that the plaintiff—or counsel—is not paid until the conclusion of litigation, one can argue that courts should add a charge to compensate for the delay. Because lawyers do not collect in advance fees based on hourly charges, calculation of interest would require a determination of appropriate billing periods and a separate calculation of interest for each period.²⁵³ Given the market-oriented approach advanced in *Blum*, the court presumably would be required to determine when each portion of the fee

252. Applying a standard multiplier in all cases, as Professor Leubsdorf suggests, see Leubsdorf, *supra* note 228, at 511-12, might circumvent some of the problems outlined above. Yet it would not solve the problem altogether. Leubsdorf proposes a standard multiplier of 2.0. Under such a regime, both very promising and very risky cases would be encouraged. To the extent that the standard multiplier would encourage very marginal cases, it is highly undesirable. Leubsdorf believes that a multiplier of 2.0 would be desirable because, in theory, it would encourage only those cases with a fifty-fifty chance of success. Given the glut of lawyers, I think it is unlikely that only such good cases would be brought. Furthermore, the lawyers who can command the best cases are subject to virtually no contingencies because they select only winners and high-value cases. They would get the multiplier of 2.0 in any event under Leubsdorf's proposal. The riskier cases will sift to the bottom level of legal services and will keep marginal lawyers in business.

253. See *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 923 (3d Cir. 1985).

would have been billed to a fee-paying client in a similar private case,²⁵⁴ and how much of a delay in payment lawyers would ordinarily tolerate before charging interest to a fee-paying client.²⁵⁵

Courts have allowed interest actually earned on portions of a common fund already allocated to attorney fees.²⁵⁶ In addition, one court since *Blum* has approved the principle of awarding some other kind of adjustment for delay in payment.²⁵⁷ Interest charges,²⁵⁸ however, are not the preferred means of making the adjustment, partly because of the difficulties in calculation.²⁵⁹ Rather than try to calculate delay costs, some courts have used a subjectively selected multiplier to enhance the fee award.²⁶⁰

Some courts have attempted to reflect delay costs in a fee award by using current billing rates—as opposed to the rates that prevailed when the services were actually rendered—to calculate the award.²⁶¹ The idea is that the increase in billing rates will reflect inflation, which is a substantial component of interest rates. Applying current billing rates to services rendered many months or years ago would to a large extent serve as a substitute for applying the old rate and adding delay costs.²⁶² Using current billing rates is more convenient than calculating delay

254. *Cf. Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983) (“[A]warding compensation at current rates . . . will obviate the necessity of guessing when periodic billings would have been made . . .”).

255. *See id.* (noting that private attorneys do not recover full interest for late payments).

256. *See, e.g., Boston & Maine Corp. v. Moore*, 776 F.2d 2, 13 (1st Cir. 1985).

257. *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1138 (11th Cir. 1984) (noncommittal direction to the trial court to “take into account the long delay in any payment to the plaintiff or his counsel”).

258. The court may be willing to charge interest in lieu of contempt sanctions, however. *See Association for Retarded Citizens v. Olson*, 713 F.2d 1384, 1396 (8th Cir. 1983) (interim award not paid as ordered; court of appeals upheld trial court’s subsequent *in terrorem* order of interest at 14% and all interest charges incurred by plaintiffs in borrowing).

259. *See Wojtkowski v. Cade*, 725 F.2d 127, 129 (1st Cir. 1984); *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983). Yet in *Shaw v. Library of Congress*, 747 F.2d 1469 (D.C. Cir. 1984), *rev’d on other grounds*, 106 S. Ct. 2957 (1986), the court upheld a 30% enhancement even though the enhancement was a delay-compensation factor based on the average yield the lawyer would have received had he invested the fee when services were rendered.

260. *See, e.g., Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 922-23 (3d Cir. 1985) (1.25 multiplier upheld); *cf. Grendel’s Den, Inc. v. Larkin*, 749 F.2d 945, 955 (1st Cir. 1984) (costs of delayed payment cited as consideration in approving fee).

261. *See Murray v. Weinberger*, 741 F.2d 1423, 1433 (D.C. Cir. 1984); *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983); *cf. Jones v. Central Soya Co.*, 748 F.2d 586, 593 (11th Cir. 1984) (noting that trial court may have used current rates to calculate basic fee award and affirming a denial of interest).

262. The relationship between interest and inflation is increasingly a part of the proof in claims for future damages. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 547-49 (1983). As a matter of judicial administration and convenience, a “total offset” of interest and inflation in fee award cases would be the easiest solution.

costs, because it makes it unnecessary to determine when billing would have taken place in a hypothetical similar case.²⁶³

2. *Delay in Payment: Inflation.* One component of interest is a charge for expected inflation. An investor who expects to be repaid with highly inflated dollars will demand more interest than one who expects to be repaid with only moderately inflated dollars. The interest rate also reflects the risk of nonpayment and the cost of delayed access to the money. At least one court has held that even though a court may not add interest to the fee award, it can adjust the fee award to reflect the fact that the lawyer is recovering dollars that are worth less.²⁶⁴

3. *Delay Adjustments and Contingency Multipliers.* Obvious parallels exist between the risk of nonpayment and delay costs. Delayed payment is in a sense the short-term version of nonpayment. But courts can make adjustments for delay costs without resorting to the kind of subjective process involved in determining a contingency multiplier; there is no need to assess the risk involved in the case itself. Thus an adjustment to reflect delay costs, if properly calculated, could be both practical and consistent with the compensatory, market-oriented approach advanced by the Supreme Court in *Blum*.

But because delay and risk of nonpayment are closely related, it might be inappropriate to both use a contingency multiplier *and* make a delay adjustment, even if it would otherwise be appropriate to use a multiplier. The United States Court of Appeals for the Third Circuit took this view in a class action case in which the fee award was based on common fund principles.²⁶⁵ The court reasoned that the risk of not being paid at all included the risk of not being paid before judgment, and hence overlapped substantially with the cost of delay. Adjustment for the larger risk by way of a contingency multiplier, then, was also adjustment for the smaller risk of delay.²⁶⁶ Once the court has fixed the fee, or once the fund is in court, some adjustment, quite possibly interest on the

263. See *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983). But an award calculated on this basis may be inaccurate because it would include increased charges due solely to the lawyer's increased skill, experience, or productivity. See *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 654 (7th Cir. 1985) (using weighted average of historical hourly billing rates).

264. See *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 663-64 (7th Cir. 1985).

265. See *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 588 (3d Cir. 1984) (noting in dictum that during initial litigation aimed at creation of common fund, delay and risk of lack of success are interrelated).

266. *Id.* Cf. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 660 (7th Cir. 1985) (contingency enhancement would operate to compensate lawyer for both risk of nonpayment and time value of money).

amount of the fee, is of course appropriate.²⁶⁷

F. *Other Elements of the Fee Claim.*

1. *Fees for Work on the Fee Claim Itself.*

a. Recovery in Statutory Cases. In the common fund and substantial benefit cases, courts have denied fee awards for work on the fee claim itself on the ground that such work does not generate the benefit that lies at the heart of the common fund claim.²⁶⁸ Similarly, courts have denied awards for work on fee claims in cases where the right to a fee award is based on contract or indemnity.²⁶⁹ But it is well settled that a lawyer's work on the fee claim itself is compensable in civil rights²⁷⁰ and other statutory cases.²⁷¹

As with all other fee claims, the time and rate must be reasonable.²⁷² Even so, litigation over the award for work on the fee claim can be extensive, and the fee petition and record of time expended is sometimes extremely complex.²⁷³ Furthermore, the parties may engage in substantial adversary work—such as discovery—in connection with the fee claim litigation.²⁷⁴ When discovery is disallowed, parties may engage in litiga-

267. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 588 (3d Cir. 1984) (holding that court below committed legal error in disregarding delay factor in calculating contingent multiplier; after common fund has been established, during period while court determines litigant's share of fund, there is no risk of lack of success, and delay factor is precisely measurable).

268. *See City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1102 (2d Cir. 1977); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 111 (3d Cir. 1976). Insofar as prevailing lawyers are usually paid for the case as a whole, this view depends on whether the fee claim is in some significant way separable from the remainder of the case. It might be deemed separable because it comes after the merits determination. This goes too far, however; post-trial monitoring of the decree, for example, is compensable. *See infra* notes 281-83 and accompanying text. If it is deemed separable because it deals with fees, not with the merits, the argument assumes that which is in question.

269. *See, e.g., Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 306, 319 (2d Cir. 1985).

270. *See, e.g., Cruz v. Hauck*, 762 F.2d 1230, 1233 (5th Cir. 1985); *Devine v. Sutermeister*, 733 F.2d 892, 899 (Fed. Cir. 1984); *Manhart v. City of Los Angeles*, 652 F.2d 904, 909 (9th Cir. 1981), *vacated and remanded*, 461 U.S. 951 (1983) (remanded for reconsideration in light of *Hensley*).

271. *See, e.g., Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 656 (7th Cir. 1985) (antitrust); *In re Nucorp Energy, Inc.*, 764 F.2d 655, 662 (9th Cir. 1985) (bankruptcy).

272. *See Cruz v. Hauck*, 762 F.2d 1230, 1233-34 (5th Cir. 1985).

273. *See, e.g., Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 657-58 (7th Cir. 1985) (noting that an item-by-item analysis would take too much time and "be neither practical nor desirable").

274. *See Naismith v. Professional Golfers Ass'n*, 85 F.R.D. 552, 563 (N.D. Ga. 1979); *Stastny v. Southern Bell Tel. & Tel. Co.*, 77 F.R.D. 662, 663 (W.D.N.C. 1978). This tertiary litigation can be extensive and can even move into other stages. For example, if some of the plaintiff's claimed hours are denied, the defendant may assert that the fee claim itself was in bad faith. In such case, the defendant would have a fee claim to litigate. *See Jaquette v. Black Hawk County*, 710 F.2d 455, 461-62 (8th Cir. 1983).

tion over whether it should have been permitted.²⁷⁵ All this adds new hours to the work and engenders new fee claims. Consequently, the fee award for work on the fee claim may be substantial.²⁷⁶

b. Adjustments for Risk on the Petition. Courts may adjust this portion of the fee, as they may any other, for duplication or excessive hours.²⁷⁷ Should courts also adjust for contingency or partial success? Once the plaintiff has won the case, the amount of the fee is contingent but the right to the fee is not. Thus no contingency multiplier should be applied to the hours devoted to the fee claim itself, because there is no contingency as to recovery for those hours. At least one court has suggested a contrary view, apparently without considering this point.²⁷⁸

c. Adjustments for Partial Success on the Fee Petition. The Supreme Court held in *Hensley* that a court should reduce the fee award by some amount if the plaintiff achieves a significantly limited success.²⁷⁹ This rule presumably applies with equal force to fees for work on the fee claim when the fee claim itself is only partly successful. At least one case has approved a *Hensley* reduction based on lack of total success on the fee claim.²⁸⁰

2. Fees for Posttrial Work and Appellate Work. Courts have also allowed fees for posttrial monitoring of a party's compliance with the court's decree.²⁸¹ Such posttrial work is particularly important in cases involving institutional restructuring where those who benefit from the restructuring may be unable to observe and report violations of the decree on their own.²⁸² Posttrial administrative work aimed at protecting

275. See, e.g., *Samuel v. University of Pittsburgh*, 80 F.R.D. 293, 294 (W.D. Pa. 1978) (deuymg motion to compel discovery).

276. See, e.g., *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 9 (D.C. Cir. 1984) (claim of \$358,000 in fees for handling the fee claim), *cert. denied*, 105 S. Ct. 3488 (1985); cf. *Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 306, 314 (2d Cir. 1985) (three day trial on fee issue in case that involved only \$30,000 on the merits).

277. Cf. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646 (7th Cir. 1985) (15% reduction for vague fee petition).

278. See *Yates v. Mobile County Personnel Bd.*, 719 F.2d 1530, 1534 (11th Cir. 1983) (enhancement added to fees earned for work done on appeal involving fee issue); see also *Cruz v. Hauck*, 762 F.2d 1230, 1238 (5th Cir. 1985) (approving use of *Johnson* factors, one of which is risk of nonsuccess, in assessing fees earned in presenting fee claim).

279. See *Hensley v. Eckerhart*, 461 U.S. 424, 434-37 (1983).

280. See *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 924-25 (3d Cir. 1985).

281. See, e.g., *Garrity v. Sununu*, 752 F.2d 727, 738-39 (1st Cir. 1984).

282. See *id.* (approving award for monitoring decree giving relief to mentally retarded persons); *Willie M. v. Hunt*, 732 F.2d 383, 387 (4th Cir. 1984) (approving allowance of award for monitoring consent judgment requiring state to provide appropriate treatment and education to emotionally

rights adjudicated in the action on the merits may also be fully compensable.²⁸³

Finally, the prevailing plaintiff is entitled to fees for work done on appeal. The appellate court may either set this fee itself²⁸⁴ or instruct the trial court to set it.²⁸⁵ One problem with the latter approach is that it may result in yet another appeal.²⁸⁶ Courts have applied both kinds of adjustments—the contingency multiplier and the *Hensley* reduction—in calculating fee awards for appellate work.²⁸⁷

G. *Overhead and Special Cost Items.*

Courts have traditionally awarded "costs" only when specifically authorized by statute.²⁸⁸ The civil rights fee award statutes and some others list attorney fees as "costs."²⁸⁹ A few courts once read this combination of statutes to mean that the prevailing plaintiff could recover costs specified in the cost statutes and a reasonable attorney fee, but nothing

disturbed children); *Northcross v. Board of Educ.*, 611 F.2d 624, 637 (6th Cir. 1979) (approving award for monitoring school desegregation decree), *cert. denied*, 447 U.S. 911 (1980). There are, however, important limitations on the amount that may be awarded in such cases. *See Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 915-16 (3d Cir. 1985) (no fee for monitoring consent decree providing procedural safeguards for admission of mentally retarded or mentally ill juveniles to mental health facilities after "last benefit" earned).

283. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088, 3094-96 (1986).

284. *See, e.g., Craik v. Minnesota State Univ. Bd.*, 738 F.2d 348, 348-49 (8th Cir. 1984) (*per curiam*).

285. *See, e.g., In re Kansas Congressional Distrs. Reapportionment Cases*, 745 F.2d 610, 614 (10th Cir. 1984); *Holsey v. Armour & Co.*, 743 F.2d 199, 218 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1395 (1985).

286. *See Shimman v. International Union of Operating Eng'rs*, 744 F.2d 1226 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1191 (1985). For a discussion of other difficulties involved in selecting an appropriate procedure for fee awards and appeals, see Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207 (1984).

287. *See Craik v. Minnesota State Univ. Bd.*, 738 F.2d 348, 350-51 (8th Cir. 1984) (*per curiam*) (*Hensley* reduction of fee on appeal, coupled with offsetting enhancement for contingency); *Yates v. Mobile County Personnel Bd.*, 719 F.2d 1530, 1534 (11th Cir. 1983) (contingency a factor in decision to enhance fee for appellate work).

288. Six categories of costs are specified in 28 U.S.C. § 1920 (1982). These include fees for the clerk and marshal, fees for the court reporter, fees and disbursements for witnesses, and docket fees. Some of the costs are specified in dollar amounts in other sections. For example, 28 U.S.C. § 1821 (1982) provides dollar amounts for witness fees (\$30 per day), with allowances for travel and a subsistence allowance.

289. Dissenting in *Marek v. Chesny*, 105 S. Ct. 3012, 3036-39 (1985), Justice Brennan listed sixty-four statutes that referred to attorney fee awards as part of "costs," forty-nine that allowed attorney fees but did not specify them as "costs," and seven that referred to "costs and expenses, including attorney's fees."

for any related litigation expense items.²⁹⁰ This view has gained no widespread acceptance. Instead, courts have looked to the policies underlying the fee award statutes²⁹¹ and have generally awarded all reasonable litigation costs.²⁹²

Thus, the plaintiff can recover many items of special expense in addition to the attorney fee itself. These may include the costs of paralegals and law clerks,²⁹³ travel expenses and long distance phone calls,²⁹⁴ secretarial overtime,²⁹⁵ and any other expense that lawyers normally bill separately.²⁹⁶ There is no rule about particular items; instead, the rule is to follow the market. If private attorneys do not bill a given item separately because it is part of overhead, then that item is not recoverable as a cost in a fee award case. This is another way of saying that the reasonableness of the hourly fee rate depends on what overhead it must absorb.²⁹⁷

H. *Actual Calculation Under the Market Method.*

In accordance with the market orientation adopted in *Hensley* and *Blum*, courts assessing fee awards have mainly considered the number of hours reasonably invested in the case and the appropriate billing rate for those hours. These two elements are necessarily considered together. Hours billed at partner rates may be reasonable if not numerous; hours billed at paralegal rates might be quite numerous and still be considered

290. See *Roe v. City of Chicago*, 586 F. Supp. 513, 516 (N.D. Ill. 1984), *rev'd on other grounds*, *Levka v. City of Chicago*, 748 F.2d 421 (7th Cir. 1984); *Scheriff v. Beck*, 452 F. Supp. 1254, 1261 (D. Colo. 1978). In neither case did the court address the question whether firms normally bill these expense items separately or absorb them as overhead costs.

291. See *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir. 1984) ("The Act would . . . fall short of its goal if it excluded those expenses."); *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983) (policy considerations justify "reimbursement of reasonable and necessary attorneys' expenses"); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1189 (11th Cir. 1983) ("The issue of which expenses are properly chargeable to the defendants under section 1988 is . . . governed by the purposes of the governing statute . . .").

292. See *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir. 1984) ("[C]ost includes the out-of-pocket expenses for which lawyers normally bill their clients separately . . ."); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1192 (11th Cir. 1983) ("[W]ith the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under section 1988.").

293. See *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984); *Lamphere v. Brown Univ.*, 610 F.2d 46, 48 (1st Cir. 1979).

294. See *Boston & Maine Corp. v. Moore*, 776 F.2d 2, 11 (1st Cir. 1985).

295. See *Cherry v. Rockdale County*, 601 F. Supp. 78, 81-82 (N.D. Ga. 1984) (costs of secretarial services recoverable if not absorbed as overhead covered by hourly rates).

296. See *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir. 1984).

297. Fact should play a greater role than precedent in determining the recoverability of expense items. Cf. *Cherry v. Rockdale County*, 601 F. Supp. 78, 81 (N.D. Ga. 1984) ("[C]ounsel for the plaintiffs are obliged to demonstrate whether the attorneys whose fees are being relied upon separately bill their clients for the kinds of things for which recovery is sought . . .").

reasonable because the rate is relatively low and a less effective use of time can be expected.²⁹⁸ If paralegals or associates could have done the work, the court may want to limit the rates for work partners bill.²⁹⁹ Such a limitation would be appropriate if the hourly rate is fixed by considering the rates of other lawyers who use the more efficient staffing patterns. But if the hourly rate has already been set at a level appropriate to the inefficient staffing, no further reduction would be required.³⁰⁰

Although courts consider time and rate in fixing a market-based fee, there is no rule requiring that the fee award be somehow proportionate to the recovery on the merits.³⁰¹ *Hensley* requires no such rule; it only requires that the court adjust the fee to reflect partial failures on issues independent of those on which the plaintiff won. *Blum*'s insistence on a market standard seems to imply that proportionality would be of interest only as evidence of whether the hourly rates were too high or whether too much time was invested in the case.

Because no rule of proportionality is imposed, parties pursue some cases with more gusto than they would otherwise. In *City of Riverside v. Rivera*,³⁰² the plaintiffs recovered \$33,000 in damages and a \$245,000 attorney fee award. In *Cunningham v. McKeesport*,³⁰³ the plaintiff purchased a house for \$2700 and the city negligently destroyed it. The plaintiff's attorney claimed almost 250 hours in pretrial discovery in the suit against the city and ultimately recovered \$17,000 for the plaintiff—as well as a fee of almost \$36,000.³⁰⁴ One of the judges, dissenting from the denial of a motion for a rehearing, pointed out that 250 hours of discovery would be the equivalent of six full weeks of legal services and that the property had been found at trial to be worth no more than \$17,000.³⁰⁵

298. See *Blum v. Stenson*, 465 U.S. 886, 898 (1984) ("[T]he special skill and experience of counsel should be reflected in the reasonableness of the hourly rates."); *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 25 (D.C. Cir. 1984) ("Hourly rates . . . are to some degree a function of productivity."), *cert. denied*, 105 S. Ct. 3488 (1985); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 589 (3d Cir. 1984) ("quality multiplier" permitted if attorney has worked "with unusual efficiency, and with little expenditure of . . . time").

299. See *Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir. 1980).

300. See *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 26 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 3488 (1985).

301. See, e.g., *City of Riverside v. Rivera*, 106 S. Ct. 2686 (1986) (\$33,000 recovery, \$245,000 fee award); *Easley v. Empire, Inc.*, 757 F.2d 923, 932 (8th Cir. 1985) (\$1,800 recovery, \$30,000 fee award).

302. 106 S. Ct. 2686 (1986). See *infra* notes 306-10 and accompanying text.

303. 753 F.2d 262 (3d Cir. 1985), *vacated and remanded*, 106 S. Ct. 3324 (1986) (remanded for further consideration in light of *Rivera*).

304. *Id.* at 265-69.

305. *Id.* at 270 (Adams, J., dissenting).

Disproportionate fee awards may often seem unpalatable, but the alternatives so far identified may be even more so. In cases involving only injunctive relief, for example, a proportion rule would be very difficult if not impossible to apply. More fundamentally, the civil rights fee award statutes are based on the premise that market incentives are inadequate to permit prosecution of civil rights cases—this is the very reason why the fee award is authorized. Thus, a client's unwillingness to pay a fee higher than the potential benefit should be irrelevant, at least in civil rights cases. More fundamentally, the civil rights fee award statutes are based on the premise that legal fees at market rates are inadequate to foster an appropriate level of civil rights suits. One reason for the inadequacy is that the benefit a single civil rights plaintiff can recover is often so limited that the plaintiff will be compelled to forgo the suit. But forgoing the suit means forgoing the external benefits that it will bring—the public benefits resulting from civil rights enforcement. It is to avoid loss of these public benefits, which are in no way measured by the benefit to the individual plaintiff, that the fee-shifting statutes were enacted. For these reasons, a private client's unwillingness to pay a fee higher than his own personal benefit furnishes no good guide to the appropriate fee.

However, the Supreme Court's recent decision in *City of Riverside v. Rivera*³⁰⁶ raises some practical concerns about the external benefits analysis. In a much-divided Court, four Justices, voting to uphold a fee award nearly eight times as large as the relief on the merits, held that in civil rights fee litigation, the fee award need not be limited to the amount of the damages recovery, although the success of the plaintiff would remain a factor under *Hensley*.³⁰⁷ Four other Justices, voting to reverse the award, took the position that it was unreasonable and that the fee awards should not exceed the amount a fee-paying client would invest in attorney fees, except where the interest vindicated was nonpecuniary or when external benefits were significant and identifiable.³⁰⁸ Justice Powell concurred with the first four to uphold the award.³⁰⁹ Like the Justices in dissent, Powell was unwilling to assume externalized benefits, but in his view the district court's finding that the litigation actually served the public interest as well as the interests of the individual plaintiffs supported the disproportionate award.³¹⁰

On its facts, *Rivera* permitted a fee award in excess of the recovery on the merits. But it does not augur well for civil rights lawyers. The

306. 106 S. Ct. 2686 (1986).

307. *Id.* at 2694.

308. *Id.* at 2704-05 (Rehnquist, J., dissenting).

309. *Id.* at 2700 n.3 (Powell, J., concurring).

310. *Id.* at 2700 (Powell, J., concurring).

fee-shifting statutes appear to rest on the belief that all cases within their ambit entail public benefits; but five of the Justices in *Rivera* expressed a view that except with respect to wholly nonpecuniary claims, a disproportionate fee could be justified only if external benefits could in some way be discerned. It is too soon to say whether this will induce a new level of fee litigation in which fee claimants attempt to prove the level of external benefits.

1. *The Time Element in Calculating Fees Under the Market Method.* Assuming the billing rates claimed are reasonable, the question then arises whether the amount of time expended was reasonable. The fee claimant has the burden of proving the number of hours expended.³¹¹ A court may reduce the fee if this proof is unclear,³¹² but courts frequently give the claimant more than one opportunity to carry its burden.³¹³ Courts initially encouraged fee claimants to keep contemporaneous time records and to present those records to the court.³¹⁴ This did not prove successful, however, and several courts have consequently announced an intention to make the submission of contemporaneous time records a prerequisite to fee recovery.³¹⁵ In addition, reviewing courts have insisted that trial judges furnish a clear statement explaining how the fee award was calculated.³¹⁶

Three distinct problems prevent reliable determination of the number of hours for which compensation is appropriate. First, it is impossible to tell how much time the lawyer actually spent working on the case. Second, it is difficult to judge whether that amount of time was reasonable. Third, it is difficult to hypothesize what fee the market would bear. Because determining the number of hours expended is likely

311. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 585 (3d Cir. 1984).

312. *See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 651, 657-58 (7th Cir. 1985); *Lynch v. City of Milwaukee*, 747 F.2d 423, 427-28 (7th Cir. 1984).

313. *See McCann v. Coughlin*, 698 F.2d 112, 131 (2d Cir. 1983); *cf. Morris County Trust for Historic Preservation v. Pierce*, 730 F.2d 94, 96 (3d Cir. 1983) (plaintiff given further chance to document fee claim for appeal work).

314. *See Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir. 1984) (plaintiff "well advised to maintain detailed, contemporaneous time records"). *But cf. Johnson v. University College*, 706 F.2d 1205, 1207 (11th Cir.) (failure to keep contemporaneous time records does not justify automatic reduction), *cert. denied*, 464 U.S. 994 (1983); *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (details sufficient for evaluation required, but contemporary records not indispensable).

315. *See Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984); *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983); *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1147 (2d Cir. 1983).

316. *See Henry v. Webermeier*, 738 F.2d 188, 193 (7th Cir. 1984); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1447 (9th Cir.) (per curiam), *modified to permit fee award*, 742 F.2d 520 (9th Cir. 1984); *King v. McCord*, 621 F.2d 205, 206-07 (5th Cir. 1980).

to be more important than determining the hourly rate, the first two problems are critical.³¹⁷

As to the first problem, no standard method exists for determining the actual number of hours involved. Most tasks in litigation are not standardized. It might be reasonable for a lawyer to spend anywhere from five to ten hours on a given task. In such a case, it would be appropriate to award a fee for the number of hours actually worked up to ten. If a lawyer in fact works only five hours but claims ten, neither the judge nor the opposing counsel will be able to contradict the claim. There is always the potential that lawyers will overstate the number of hours worked. In the case of a paying client, the lawyer who wants to retain client satisfaction will have an incentive to limit the total fee. That incentive is not present in fee award cases.

The second problem, judging the reasonableness of the hours devoted to work, is also difficult. The lawyer should spend the time necessary to do a task well, without waste or duplication; it is not easy, however, to identify an appropriate amount of time because lawyers' styles of work differ. What works for one lawyer will not necessarily work for another. One lawyer will spend more time researching the law; another will spend more time developing the facts. A massive amount of time spent on motions may represent a massive amount of time saved at trial. Even if the judge were able to investigate the lawyer's style in detail, only a rough estimate of the appropriate time would be possible.

Finally, it is inherently difficult to apply market limitations on the fee. In private litigation there is a market limitation on the amount of time that can be invested at standard rates.³¹⁸ In many fee-shifting cases, however, the statutes are built on the conclusion that, considering the externalized benefits involved, the market fee rates are inadequate to induce an appropriate level of litigation. This implies that the private market limitations can furnish no guide at all in setting the fee, since the fee

317. Courts have made some efforts to address these problems. For example, courts have on occasion pared hours because of duplication of work by several lawyers. See *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 953 (1st Cir. 1984); *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983). Some courts have approved arbitrary percentage cuts for suspected but unproven duplication of services. See *Northcross v. Board of Educ.*, 611 F.2d 624, 636-37 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

Courts have also pared hours where the number of hours claimed is manifestly high. See *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 953-54 (1st Cir. 1984); *Louisville Black Police Officers Org., Inc. v. City of Louisville*, 700 F.2d 268, 279 (6th Cir. 1983). One study indicates that the amount of time invested in a particular case depends on a host of variables, including interaction with adversaries. See Kritzer, *supra* note 9, at 579-81. Although the size of the stake affects the amount of time a private practitioner would invest, *id.* at 581, courts cannot use this factor in civil rights cases.

318. This limitation may have little practical effect. Even sophisticated clients would find it difficult to challenge effectively any but the grossest hourly billing excesses.

award is granted in the first place to avoid those limitations, at least where there are in fact externalized benefits in the particular case.³¹⁹ Where the market is needed most—to help formulate appropriate limits on the number of hours than can be claimed—it cannot be used at all.³²⁰

2. *The Rate Element in Calculating the Fee Under the Market Method.* The Supreme Court advanced a market orientation in *Blum*, saying that fee awards were to be calculated “according to the prevailing market rates in the relevant community.”³²¹ But since the premise of the fee awards statutes, at least in civil rights cases, is that there is no market that will attract appropriate legal services, the “market” by which fees are measured must be not a market for the very services at issue, but an analogous market. Courts might seek to find the analogous market in either (1) the rates that lawyers in the community charge for services of comparable quality³²² or (2) the rates that other lawyers of similar skill, experience and reputation charge in the community. The fee-claiming lawyer’s own customary charges to fee-paying clients might be relevant under either heading.

The first approach seeks to identify a market value for services of a given quality, regardless of the identity of the provider of those services; the second approach seeks to identify a market value for the particular lawyer’s experience, reputation, and general skill, regardless of the level of the services actually rendered. Under the second approach, the lawyer whose experience or reputation is at the level of lawyers who are generally unable to command high fees would be compensated at a relatively low rate even for superb professional work. At the same time, the experienced lawyer with an established reputation would be compensated at a relatively high rate, even for poor work. Under the first approach, the

319. In *City of Riverside v. Rivera*, 106 S. Ct. 2686 (1986), five Justices favored requiring some indication of external benefits where the fee award exceeds the damages. See *supra* text accompanying notes 308-09.

320. See *Jaquette v. Black Hawk County*, 710 F.2d 455, 460 (8th Cir. 1983) (acknowledging difficulty of placing a monetary value on relief sought for infringement of civil or constitutional rights and recognizing that “market-place factors are often absent from civil rights litigation”).

321. *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

322. On the other hand, lawyers have not been permitted to import their higher rates to the forum if local, lower-priced lawyers could and would have done the job. See *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 141 (8th Cir. 1982). But when it is shown or assumed that it was reasonable to use nonlocal lawyers, courts have permitted lawyers to bill at their higher home rates. See *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768-69 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983). Legal services lawyers who receive a fixed salary are entitled to fee awards calculated at the same hourly rates used by their counterparts in private practice, but home location of the salaried lawyer in New York does not authorize importation of New York fee structures to Louisville. See *Louisville Black Police Officers Org., Inc. v. City of Louisville*, 700 F.2d 268, 277-78 (6th Cir. 1983).

positions of the two lawyers would be reversed, with the lawyer doing the better work receiving the higher rate of compensation. Both approaches are objective, but they attempt to measure different things.

And each approach has its own impracticalities. The first test would require the court to evaluate the lawyer's services and compare them with services "sold" at various rates by other lawyers in the community. As a first step this would require an assessment of the quality of the lawyer's services. Since quality is partly a function of efficient use of time, most of which is spent out of court, this estimate itself may be difficult. The second step would require comparison between the quality of services rendered by the fee-claimant and some other comparable services for which a rate can be established. Estimates on this score are also likely to be inaccurate, and certainly they place an added burden on the courts.

The second test treats the lawyer, not the services, as the commodity that is marketed. The attempt under this test would be to compensate the lawyer based on his experience and reputation in the relevant community, not on a hindsight evaluation of the particular services rendered. But this test has a serious distorting effect. One reason why less experienced lawyers might be paid lower rates is that they are less efficient in use of time; they may bill more hours than experienced lawyers who bill at a higher rate. Application of the second test would create inequities in the case of a relatively inexperienced lawyer who performs the highest quality work with highest efficiency. The lawyer's inexperience would lead to a lower rate of compensation; the efficiency in use of hours would be reflected not in a higher fee award but in a reduced one.

Blum appeared to adopt the second approach. The fee claimant, the Court said, had the burden of showing "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."³²³ Under this standard, the market rate for services of the same quality would apparently be irrelevant. But *Blum* may be deceptive. In another part of the opinion, the Court implied that the quality of services rendered should be considered in fixing the hourly rate. The lodestar award is not to be adjusted upward, the Court said, unless "the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged."³²⁴

323. *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984).

324. *Id.* at 899. If the hourly rate is too low, the most obvious thing to do would be to raise it to the market level. Cf. *Garrity v. Sununu*, 752 F.2d 727, 739-40 (1st Cir. 1984) ("[U]nder *Blum* certain of the qualities sought to be recognized by the bonuses might better have been recognized by means of more adequate hourly rates."). However, it may be that the *Blum* Court had in mind

The apparent conflict in *Blum* may be no conflict at all. It is far from clear that the Court definitively identified a single market to be considered. It is not clear, for example, whether reputation is important in itself, or whether it is important as proof of the lawyer's ability to market services, or whether it is important as proof of the quality of his services. The effect of *Blum*, in other words, might be to promulgate a list of factors, not a principle identifying a particular market.

If *Blum* is interpreted in this way, the Court has invited lower courts to look to a series of factors rather than to any identifiable or even theoretical market in assessing fee awards. Like the *Johnson* factors, these factors are highly subjective; it will not be easy to take proof or assign values to "comparable skill" and "reputation." But it would be paradoxical, to say the least, if the *Blum* Court, having established objective market valuations as the standard for fee claims, then returned to such subjective factors as the ultimate measure of compensation.

An alternative might be to use the lawyer's own customary rates, either on the ground that they reflect the market for similar services of similarly qualified lawyers in the community or on the ground that they *are* the market for that particular lawyer's services. In *Laffey v. Northwest Airlines, Inc.*,³²⁵ the United States Court of Appeals for the District of Columbia Circuit adopted this very solution. Although a historic rate rule is not an obvious application of the *Blum* "skill, experience, and reputation" test, it might nonetheless represent the best method for incorporating all those factors.³²⁶

The *Laffey* rule is problematic in some respects, however. The practical effect of the *Laffey* approach will vary quite a bit depending on

permitting a "quality enhancement" when the hourly rate *is* the historic market for the services of the particular lawyer. For example, the \$50 per hour charged by a recently admitted lawyer may be the same rate charged by other recently admitted lawyers. But that lawyer may have performed like a seasoned veteran. One of the ambiguities about the lodestar method is whether it calls for the lawyer's own historical rate or a rate that lawyers with identical skills could command. The Court in *Blum* may be taking a compromise position with regard to this ambiguity by suggesting that in such a case the lawyer should recover the personal hourly rate of \$50, but with an enhancement. If this is not the point, it is difficult to see why, having selected the hourly rate as the main means of access to the market evaluation, the Court would not simply call for an adjustment of the hourly rate to reflect the market value of the services.

325. 746 F.2d 4, 13-25 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 3488 (1985). *Cf. Levmore, Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771 (1982) (arguing that self-assessment can be useful in solving valuation problems in a variety of legal areas).

326. The *Laffey* court presented the historic rate test not as an application of the *Blum* test, but rather as an acceptable alternative. The court suggested that the Supreme Court adopted the prevailing market rate test in *Blum* as a matter of convenience since *Blum* involved legal aid lawyers who had no established billing rates. But the court did not interpret *Blum* as precluding the use of the "customary charges" or "historic rate" test in cases involving lawyers who had established rates. *Laffey*, 746 F.2d at 16-18.

whether the lawyer customarily charges more or less than the market rate charged for similar services or charged by similarly situated lawyers. The rates set by other firms arguably should limit the award under this approach.³²⁷ Awarding the lawyer's own customary fees might reinforce and encourage that lawyer's inefficiencies.³²⁸ Despite these problems, *Laffey* does offer a somewhat objective basis for fee awards in cases where the lawyer has a private practice and bills paying clients for similar work.

A historic rate test, however, would have no application in many fee-shifting cases. Publicly supported lawyers and salaried lawyers do not make charges to their clients, at least not in the same way that billing lawyers do. The Supreme Court has held that legal aid lawyers are entitled to the fees they or their services could command in the private market.³²⁹ The strongest argument against this was that public interest lawyers usually have lower overhead costs than do private practitioners. The Court rejected this argument, however, and asserted that the "reasonable fee" the statute commanded meant the market rate fee.³³⁰ The effect was to discard the *Laffey* solution for publicly supported lawyers. Their fees, like those of others, must be estimated by one of the other methods—each of which carries its own special disadvantage.

IV. CONCLUSION

The present fee-fixing process is not a very good one. Arriving at an accurate and reasonable fee award requires much time and effort. Thus after the first litigation comes a second, with added costs and fee awards of its own. Although full-scale litigation over the fee award is expensive, without it courts run the risk of unjustified fee awards with concomitant injustice to defendants. But even allowing full-scale litigation over the fee award is unlikely to solve every problem: it is extremely unlikely, for example, that a court in any proceeding can ever fairly assess the time claimed.

If we simply try to live with the present fee award system, expensive and demoralizing as it may be, we are confronted with a host of practical problems. The time and rate issues, for example, require extensive fac-

327. *Id.* at 24-25.

328. Given the low level of client understanding of the process, lawyers who staff cases inefficiently might charge just as much as lawyers who staff efficiently. The court in *Laffey* took the position that this was not a problem provided the lawyer staffs the case in the same way he staffs paying client cases. *Laffey*, 746 F.2d at 26. The combination of staffing patterns and hourly rates was still subject to a requirement that the overall bill be reasonable. *Id.*

329. See *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

330. *Id.*

tual development in every single case. Adopting a standardized hourly rate schedule would be of little help. Even if it were fair to all lawyers, which seems pretty optimistic, it would do nothing to control excessive claims for hours worked.

In this state of affairs, alternative means of financing litigation ought to be explored. Because we have a highly adversarial system that involves a great deal of creative work, it is very difficult to settle on fixed fees and standard charges. But those engaged in thinking about public finance may well come up with some solutions. Public entity defendants who are liable for fees of the prevailing plaintiff are already paying the plaintiff's lawyers. Since the government pays the lawyers, we ought to find a way to pay them more economically. It is at least possible to think of these lawyers as government lawyers who should be paid a salary like other government lawyers. This would attract lawyers who are at least of the same caliber as other government-paid lawyers, and it would save both the cost of fee shifting and the costs of excessive fees.

Other kinds of cases might lend themselves to completely different solutions. For example, grants from independent governmental corporations, or a combination of such grants and private foundation grants, could be used to finance institutional restructuring cases. A grant approach could permit advance budgeting and even the hiring of salaried legal staff. The costs of fee shifting could thus be entirely avoided.

A grant approach probably would not work well in private or commercial class action suits. But in such cases a flat percentage fee, based on a percentage known in advance, might be preferable to the present system. A different approach could likewise be formulated for cases involving litigation misconduct. Fee awards might be treated as punitive rather than compensatory, with the result that litigation fault, not compensation principles, would determine the size of the award. In cases likely to generate only meager damage awards, fee awards might be calculated by multiplying the damage award by some standard figure; using a single multiplier across the board might be preferable to litigating the fee issue case by case.

Some of these may turn out on analysis and comparison with other options to be poor choices. Perhaps there is no way that the present system can be improved. But it is too soon to say that. The options have not been identified, much less considered. This survey points out enough of the problems to indicate that it is time to explore other ways to finance litigation.