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THE EFFECTS OF HENSLEY v. ECKERHART ON THE AWARD OF ATTORNEY'S FEES

E. Wayne Powell*

I. Introduction

Under the American rule,\(^1\) prevailing litigants in the United States traditionally have not been entitled to collect attorney's fees from the unsuccessful party.\(^2\) However, Congress has enacted fee-shifting exemptions to this rule.\(^3\) These exceptions, which began with legislative provisions to allow federal courts to follow state practice in

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1. According to the "American Rule," attorney's fees are not generally recoverable as costs or damages in the absence of a statute or an agreement between the parties. Rather, parties are required to bear their own attorney's fees. See F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 128-31 (1974); Hall v. Cole, 412 U.S. 1, 4-9 (1973); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). In Fleischmann, the Supreme Court stated that:

   As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs. Rules governing administration of these and related provisions have developed over the years. It is now customary in England, after litigation of substantive claims has terminated, to conduct separate hearings before special "taxing Masters" in order to determine the appropriateness and the size of an award of counsel fees. To prevent the ancillary proceedings from becoming unduly protracted and burdensome, fees which may be included in an award are usually prescribed . . . . 386 U.S. at 717 (citations omitted).

Contrary to the "American Rule" is the "English Rule" which awards attorney's fees to prevailing litigants. See generally Goodhart, Costs, 38 YALE L.J. 849, 851-54 (1929); Note, Theories of Recovering Attorneys' Fees: Exceptions to the American Rule, 47 UMKC L. REV. 566, 566-67 (1979).

For a discussion of the reasons why the "English Rule" was never adopted in the United States, see generally Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 CALIF. L. REV. 792, 798-99 (1966); Goodhart, supra, at 873; Note, Attorneys' Fees: Where Shall the Ultimate Burden Lie?, 20 VAND. L. REV. 1216, 1220 (1967).


   In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318,
the award of attorney's fees, further allowed the Supreme Court to prescribe costs and resulted in standardization of costs in federal litigation. More recently, Congress has allowed the courts to award reasonable attorney's fees under selected statutes which are designed to protect various federal rights.

or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id.

The Act has been construed broadly to achieve Congress' remedial purpose of encouraging compliance with the civil rights laws. Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980); Mid Hudson Legal Servs., Inc. v. G & U, Inc., 578 F.2d 34, 36 (2d Cir. 1978).


4. See Act of March 1, 1793, § 4, 1 Stat. 333 which states "[t]hat there be allowed and taxed in the supreme, circuit and district courts of the United States, in favour of the parties obtaining judgments therein, such compensation . . . for attorneys [sic] and counsellors' fees, . . . as are allowed in the supreme or superior courts of the respective states." Alyeska, 421 U.S. at 248-49 n.19.

For an interesting approach to awards of attorneys' fees in the state law area, see Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977), which held that Alyeska did not preclude attorneys' fee awards in cases dealing with constitutional rights.

Several states have provided by statute for recovery of attorneys' fees. ALASKA STAT. §§ 09.60.010, 09.60.015(a) (1984); CAL. CIV. PROC. CODE §§ 1021.5, 1021.6 (West Supp. 1980); NEV. REV. STAT. § 18.010 (1977); N.D. CENT. CODE § 28-26-31 (1974); OR. REV. STAT. § 20.080 (1983).

5. See Act of August 23, 1842, § 7, 5 Stat. 518 which states, in relevant part:
That, for the purpose of further diminishing the costs and expenses in suits and proceedings in the said courts, the Supreme Court shall have full power and authority, from time to time, to make and prescribe regulations to the said district and circuit courts, as to the taxation and payment of costs in all suits and proceedings therein; and to make and prescribe a table of the various items of costs which shall be taxable and allowed in all suits . . . .

Id.


7. See, e.g., Civil Rights Act of 1964, Title II, § 204(b), 78 Stat. 261, 42 U.S.C. § 2000a-3(b) and Title VII, § 706K, 78 Stat. 261, 42 U.S.C. § 2000e-5 (1981). Section 2000a-3(b) states: "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000a-
Certain inherent equitable judicial perogatives have coexisted with these statutory provisions. For example, the Supreme Court has permitted a party preserving a fund or trust for the benefit of others as well as himself to recover a reasonable attorney's fee. A court also may assess attorney's fees for a party's willful disobedience of a court order or when the losing party acts in bad faith or for oppressive reasons. The Supreme Court first held in 1796 that the judiciary itself would not, independent of a statute, create a rule allowing awards of attorney's fees in actions brought in federal

3(b) (1981); see also Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (court held that one who succeeds in obtaining injunctive relief against racial discrimination under this statute should receive attorney's fees unless special circumstances render award unjust); Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 537 (5th Cir. 1970) (court noted that congressional purpose would be frustrated if attorney’s fees were only allowed in exceptional cases); Clayton Act, 15 U.S.C. § 15 (1981) (person injured by virtue of an antitrust violation “shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee”); Securities Exchange Act of 1933, 15 U.S.C. § 77k(e) (1981) (“court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees . . .’’); Trust Indenture Act of 1939, 15 U.S.C. § 77www(a) (1981) (“court may . . . require an undertaking for the payment of the costs of such suit and assess reasonable costs, including reasonable attorneys' fees . . .’’); Consumer Product Warranties Act, 15 U.S.C. § 2310(d)(2) (1982) (“consumer . . . may be allowed by the court to recover . . . (attorneys' fees based on actual time expended) . . .’’); Fair Housing Act of 1968, § 812(d), 42 U.S.C. § 3612(c) (1977) (“court may grant as relief, . . . reasonable attorney fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees’’); Clean Air Act, 42 U.S.C. § 7604(d) (1983) (“court . . . may not award costs of litigation (including reasonable attorney fees) to any party, whenever the court determines such award is appropriate’’).

8. The “common benefit” exception is detailed in Trustees v. Greenough, 105 U.S. 527 (1881). In Greenough, a bondholder, through expensive litigation, saved a substantial amount of security pledged to pay interest on the bonds, which created a fund in which other bondholders shared. The Supreme Court held that a court has discretion to allow reimbursement of the successful litigant from the fund “or by proportional contribution from those who accepted the benefit of his efforts.” Id. at 533. See generally Dawson, Lawyers and Involuntary Clients: Attorney Fees from Funds, 87 HARV. L. REV. 1597 (1974).


10. Alveska, 421 U.S. at 258-59; see F.D. Rich Co., 417 U.S. at 129. This exception, which is punitive in nature, requires a showing of bad faith on the part of the unsuccessful litigant. Hall v. Cole, 412 U.S. 1, 5 (1973). The question of whether the circumstances warrant invoking the exception is left to the discretion
The Court later reaffirmed the firmly established American Rule and the limited exceptions to it in *Alyeska v. Wilderness Society*. In *Alyeska*, the Supreme Court reversed the circuit court's award of attorney's fees to the respondent ecological groups which succeeded in obtaining permanent injunctive relief against the issuance of right of way permits for the construction of the Alyeska Oil Pipeline. The Court's rejection of the court of appeals' use of the "private attorney general" rationale to justify the fee award of the court. Resolution of the case against a party by itself, is insufficient to warrant a finding of bad faith. *Runyon v. McCrary*, 427 U.S. 160, 183 (1976).


13. *Alyeska*, 421 U.S. at 241-46. The plaintiffs in the case, citizens' environmental organizations, sued to prevent the issuance of permits by the Secretary of the Interior for the construction of the trans-Alaska oil pipeline and prevailed in the district court. *Wilderness Soc'y v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970). Subsequent to the litigation, however, congressional legislation was passed which allowed permits to be granted which were sought by an intervening pipeline corporation. *1920 Mineral Leasing Act*, 41 Stat. 449 (current version at 30 U.S.C. § 185 (1976)). The plaintiffs then requested and were granted expenses and attorney's fees based upon the court of appeals' equitable powers and the fact that the plaintiffs were performing the services of a private attorney general. *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974). The court stated that "[s]ubstantial benefits to the general public should not depend upon the financial status of the individual volunteering to serve as plaintiff or upon the charity of public-minded lawyers." *Id.* at 1030; see also infra note 14. The Supreme Court granted certiorari to determine the appropriateness of the award of attorney's fees.

14. *Alyeska*, 421 U.S. at 246. The private attorney general theory of awarding attorney's fees is designed to encourage private plaintiffs to vindicate policies which Congress has considered to be of the highest priority; to invoke such theory the court must be convinced that a policy is involved which Congress accords the highest priority and that an award of attorney's fees will further encourage the vindication of that policy. *Rappaport v. Little League Baseball, Inc.*, 65 F.R.D. 545, 550 (D.C. Del. 1975). Generally, three factors must be taken into consideration in determining propriety of employment of private attorney general theory as a vehicle to award attorney's fees: "(a) effectuation of a strong congressional policy; (b) necessity and financial burden of private enforcement, and (c) the number of individuals benefited by the plaintiff's efforts." *Lytle v. Comm'r of Election of Union County*, 65 F.R.D. 699, 704 (D.S.C. 1975). See generally Note, *Awards of Attorney's Fees in the Federal Courts*, 56 St. John's L. Rev. 277, 284-86 (1982); Note, *Theories of Recovering Attorneys' Fees: Exceptions to the American Rule*, 47 UMKC L. Rev. 566, 576-81 (1979) for a discussion of the private attorney general exception to the "American Rule."

15. The appellate court held that the ecological groups had expended considerable time and labor on behalf of the public to protect the environment. See *Alyeska*, 421 U.S. at 246.
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effectively destroyed the viability of this exception to the American Rule.

The Supreme Court stated that the Alyeska fee had not been awarded in accordance with any of the equitable or statutory exceptions to the American Rule.\(^1\) It further noted that congressional utilization of the “private attorney general” rationale did not impliedly grant power to the judiciary to disregard the traditional American Rule.\(^2\) The Court refused to apply the “private attorney general” theory absent congressional guidance in the form of fee-shifting statutes.\(^3\)

Congress responded by passing the Civil Rights Attorneys Fees Award Act of 1976 (CRAFAA),\(^4\) which amended the Civil Rights Act of 1866 to “remedy anomalous gaps in our civil rights laws created by the United States Supreme Court’s recent decision in Alyeska Pipeline Service Co. v. Wilderness Society, . . . and to achieve consistency in our civil rights laws.”\(^5\) The legislature stressed the important public policy goal accomplished by promoting citizen or “private attorneys general” vindication of civil rights by allowing those citizen to recover the cost of their litigation.\(^6\)

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16. Id. at 258, 259, 260, 262, 269. See supra notes 4, 18 and accompanying text for discussion of the exceptions.
17. Alyeska, 421 U.S. at 262-63.
18. Id. at 247. See supra note 7 for a partial listing of federal statutes with fee shifting provisions.
The bill now before us . . . does not create any new legal remedies, nor does it expand our civil rights laws into new areas which Congress has not previously considered. It merely lends substance to the private enforcement of rights already authorized under existing civil rights laws . . . . It is a fundamental axiom of law that where there is a right the law should provide a remedy. Yet, without a provision to permit awards of attorneys’ fees to successful parties, the rights secured by those civil rights laws covered by this act are hollow rights indeed. Enactment of this legislation would do much to assure all the citizens of this Nation that the words “equal protection of law” mean what they say, and that Congress firmly intends that all our civil rights laws be vigorously enforced.
Since the passage of CRAFAA, courts have awarded substantial fees to prevailing plaintiffs.\textsuperscript{22} The "prevailing party" standard has been considerably less onerous for plaintiffs than for prevailing defendants who can obtain fees only when the plaintiff's actions are "frivolous, vexatious, or brought for harassment purposes."\textsuperscript{23}

For example, in the area of civil rights cases brought under section \textsuperscript{22} For examples of cases where plaintiffs success on the merits was a reason to award attorney's fees, see Kirchberg v. Feenstra, 708 F.2d 991, 995 (5th Cir. 1983); Busche v. Burkee, 649 F.2d 509, 521 (7th Cir.), cert. denied, 454 U.S. 897 (1981); Gates v. ITT Continental Baking Co., 581 F. Supp. 204, 210 (N.D. Ohio 1984). Complete success on the merits generally has not been a requirement for plaintiff to recover. \textit{See}, e.g., Larsen v. Sielaff, 702 F.2d 116, 117 (7th Cir. 1983), cert. denied, 104 S. Ct. 372 (1983) (failure to achieve clear victory did not preclude award of attorney's fees to prevailing party); De Mier v. Gondles, 676 F.2d 92, 93 (4th Cir. 1982) (need not obtain final judgment in order to be deemed prevailing party for purposes of obtaining attorney's fees); Thompson v. Penna. Parole Bd. Member Jefferson, 544 F. Supp. 173, 175 (E.D. Pa. 1982) (to be prevailing party for purposes of § 1988, it is not necessary to have received final judgment). \textit{But see} Powe v. City of Chicago, 664 F.2d 639, 652 (7th Cir. 1981) (party is not entitled to attorney fees until he has prevailed, at least partially, on the merits); Coalition for Basic Human Needs v. King, 535 F. Supp. 126, 129 (D. Mass.) (to recover attorney's fees, party must demonstrate that he prevailed in legal sense), \textit{vacated in part on other grounds}, 691 F.2d 597 (1st Cir. 1982).

However, the third, fifth and ninth circuits have interpreted CRAFAA to allow a fee award only where a party has prevailed on the central issue. \textit{See}, e.g., Robinson v. Kimbrough, 652 F.2d 458, 465-67 (5th Cir. 1981); Watkins v. Mobile Hous. Bd., 632 F.2d 565, 567 (5th Cir. 1980) (per curiam); Swietlowich v. County of Bucks, 620 F.2d 33, 34 (3d Cir. 1980) (per curiam); Bagby v. Beal, 606 F.2d 411, 414-15 (3d Cir. 1979); Iranian Students Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979); Sethy v. Alameda County Water Dist., 602 F.2d 894, 897-98 (9th Cir. 1979), cert. denied, 444 U.S. 1046 (1980).

23. Senate Report, supra note 19, at 4-5, \textit{reprinted in} 1976 \textit{U.S. Code Cong. & Ad. News} at 5912; \textit{see, e.g., Christiansburg Garment Co. v. EEOC}, 434 U.S. 412, 421 (1978) ("district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"); United States v. Davis, 747 F.2d 440, 448 (8th Cir. 1984) (recovery of fees allowed where suit is vexatiously brought); Latz Realty Co. v. U.S. Dep't of Housing and Urban Development, 717 F.2d 929 (4th Cir. 1983) (in order to receive attorney's fees, prevailing defendant must show that plaintiff's claim was frivolous, unreasonable or groundless); Fonti v. Petropoulous, 656 F.2d 212, 219 (6th Cir. 1981) (where plaintiff's action was frivolous, unreasonable and without foundation, award of attorney's fees against plaintiff was proper); Molgaard v. Town of Caledonia, 539 F. Supp. 571, 572 (E.D. Wisc. 1982) (standard of allowance of attorney's fees for prevailing defendant in civil rights action is stricter than for prevailing plaintiff); Life Science Church v. Vocke, 531 F. Supp. 790, 792-93 (E.D. Wisc. 1982) (prevailing defendant may recover upon finding that plaintiff's claim was frivolous, unreasonable or without foundation).
1983, state employees may be subject to few provable damages but may face staggering attorney's fees. In civil rights litigation as well as other areas involving federally protected rights, the federal courts have developed varying standards for determining prevailing parties and reasonable fees. Consequently, defendants may be hampered by their inability to gauge total liability in cases where a fee award bears little relationship to the value of the prevailing party's case on the merits or the degree of success attained.

The Supreme Court's decision in *Hensley v. Eckerhart,* focused on the correlation between the degree of success of prevailing plaintiffs and the amount of the attorney's fees awarded. Specifically, the issue in *Hensley* was whether a "partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims." This Article discusses the effects on fee awards of the concepts of "reasonableness" in the circuits employing the elements set forth in *Johnson v. Georgia Highway Express, Inc.* and other criteria between the time of *Alyeska* and *Hensley.* Next, it sets forth the special circumstances which may preclude the granting of awards, examines the *Hensley* decision, and considers some recent trends in fee awards resulting from *Hensley.* This Article concludes that *Hensley* fails to clarify the problem of attorney's fees for the partially prevailing plaintiff but is important as a reaffirmation of *Alyeska* and the *American Rule.*

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26. *See supra* note 25. See also 42 U.S.C. § 1983 which provides for a cause of action resulting from the deprivation of rights secured both by the U.S. Constitution and the "laws of the United States."
27. *See infra* Section II.
29. *Id.* at 438.
30. *Id.* at 426.
31. 488 F.2d 714, 717-19 (5th Cir. 1974).
32. *See infra* notes 36-45 and accompanying text.
33. *See infra* Section III.
34. *See infra* Section IV.
35. *See infra* Section V.
II. Status of Attorneys’ Fees Awards From 1976-1983

A. Reasonableness of Fee Award

*Johnson v. Georgia Highway Express, Inc.* was among the seminal federal cases dealing with the “reasonableness” of the size of fee awards prior to *Hensley*. In *Johnson*, a class of employees alleging employment discrimination successfully sued under Title VII of the Civil Rights Act of 1964. Under section 706(k) of Title VII, which is almost identical to the CRAFAA, the prevailing plaintiffs argued that the amount of time an attorney spent justified the $30,145.50 award requested. The district court found that, given counsel’s experience, the “reasonable” attorney rate for that geographical area merited a fee award of $13,500.

The appellate court, acknowledging the district court’s discretion in setting the award, stated that congressional policy supporting the fee-shifting statute required the court to elaborate on the basis for its decision. Without questioning the appropriateness of the amount awarded, the appellate court cautioned that the court should not utilize section 706(k) to make the prevailing counsel rich.

The court remanded with instructions for the lower court to consider the following elements in its decision on fees: (1) time and labor required; (2) novelty and difficulty of the questions; (3) skill required to perform the legal service properly; (4) preclusion of other employment by the attorney due to acceptance of the case; (5) customary fee in the community; (6) whether the fee was fixed or contingent; (7) time limitation imposed by the client or the circumstances; (8) amount involved and the results attained; (9) experience, reputation, and ability of the attorneys; (10) “undesirability” of the

36. 488 F.2d 714 (5th Cir. 1974).
37. *Id.* at 715.
39. Section 706(k) of Title VII of the Civil Rights Act of 1964 provides that “[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party... a reasonable attorney’s fee as part of the costs” of litigation. 78 Stat. 261, 42 U.S.C. § 2000e-5(k) (1981).
40. *Johnson*, 488 F.2d at 714. See *infra* note 43 and accompanying text for listing of relevant factors. The *Johnson* elements are derived from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106.
41. *Id.* at 716.
42. *Id.* at 719-20. The court noted that “[t]he statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economic burden of Title VII litigation.” *Id.* at 719.
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case; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases within or without the circuit.43

The Johnson elements have been adopted unanimously by the federal courts.44 Since an attorney fee award will not be overturned absent a clear abuse of discretion by the district court,45 there has been no occasion for the circuits to adopt consistent methods for determining reasonable fee awards.

B. Fee Enhancement

In Lindy Brothers Builders, Inc. of Philadelphia v. American Radiation & Standard Sanitary Corp.,46 the third circuit developed the concept of the “lodestar”47 as a means to provide a basis for the valuation of attorney’s fees.48 The court defined the “lodestar” concept as the amount determined to constitute reasonable compensation for the attorney’s services, computed by multiplying the

43. Id. at 717-19.
48. Lindy I, 487 F.2d at 167-68.
amount of hours worked by a reasonable rate of compensation.\textsuperscript{49} In addition, the court found that two other factors must be considered to properly compute the value of the attorney's services: the contingent nature of success and the quality of the attorney's work.\textsuperscript{50} These factors established in *Lindy*\textsuperscript{51} have been combined and used throughout the circuits in labor, antitrust, freedom of information and Title VII cases.\textsuperscript{52}

Following the *Lindy* decision, the third circuit reversed and remanded a district court's award of an attorney fee in part because the district court failed to consider the quality of the attorney's work when establishing the hourly rate.\textsuperscript{53} The circuit court instructed

\begin{itemize}
\item \textsuperscript{49} Id.
\item \textsuperscript{50} See id. at 168 (these two factors are considered by the court in adjusting lodestar amount in order to properly compensate attorney for his services).
\item \textsuperscript{51} The court in *Lindy* vacated the district court's award of attorney's fees and remanded the case to the district court. 487 F.2d at 170. On remand, the district court entered new awards. 382 F. Supp. 999 (E.D. Pa. 1974). These awards were appealed. 540 F.2d 102 (3d Cir. 1976).
\item The court in *Lindy* expounded on the issues to be considered in analyzing the two factors to be applied to the lodestar amount. 540 F.2d at 117-18. Under the category of "the contingent nature of success," a court may increase the "lodestar" computation by carefully evaluating the following criteria: (1) the plaintiff's burden (complexity of case, probability of defendant's liability, evaluation of difficulty of proving damages); (2) risks assumed in developing the case (number of hours risked without guarantee of remuneration, amount of out-of-pocket expenses advanced, prior expertise in area of litigation); and (3) delay in receipt of payment for services rendered. 540 F.2d at 117.
\item Under the category of "quality of attorney's work," the court should appraise the way in which the attorney discharged his professional responsibilities. Id.
\end{itemize}

\begin{itemize}
\item \textsuperscript{53} Baughman v. Wilson Freight Forwarding Co., 583 F.2d 1208, 1217 (3d Cir. 1978). In *Baughman*, the court considered an attorney's fee award in a case involving the alleged black-listing of a truck driver in violation of the Sherman Antitrust Act. Id. at 1209-10.
\end{itemize}
the district court to include a consideration of the quality of the attorney's work when determining the lodestar.\textsuperscript{54}

In \textit{Copeland v. Marshall},\textsuperscript{55} the District of Columbia Circuit considered both the \textit{Johnson} elements and the \textit{Lindy} factors in affirming a reduced fee in a Title VII case.\textsuperscript{56} The \textit{Copeland} court emphasized that the contingency element espoused in \textit{Lindy} did not refer to a contingent fee arrangement between plaintiff and plaintiff's counsel but rather to a percentage increase in the "lodestar" which reflected the risk taken by counsel that no fee would be obtained.\textsuperscript{57} The court proposed that the quality of representation considered when determining the lodestar amount takes into account the level of skill normally expected of an attorney commanding the desired hourly rate.\textsuperscript{58} The court stressed that a quality adjustment of the lodestar is appropriate only when the representation has been unusually good or unusually bad.\textsuperscript{59}

In addition, the court admonished plaintiff's counsel to document adequately the amount of work performed before requesting a fee award and to exercise the same "billing judgment" when billing the adversary that they would employ in billing a client.\textsuperscript{60} The court also indicated, in a footnote, that a prevailing party should not include time spent on unsuccessful claims in the list of billable hours.\textsuperscript{61}

In 1984, in \textit{Blum v. Stenson}, the Supreme Court, relying extensively on \textit{Hensley}, emphasized that computing a lodestar figure and then adjusting it based on other considerations is an established practice.\textsuperscript{62} The Court indicated that "[b]ecause acknowledgement of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee it normally should not provide an independent basis for increasing the fee award."\textsuperscript{63}

\textsuperscript{54} \textit{Id.} at 1217. The court further determined that both the contingency and quality factors in this case did not justify the augmentation of the lodestar. \textit{Id.} at 1217-19.


\textsuperscript{56} \textit{Id.}

\textsuperscript{57} \textit{Id.} at 892-93.

\textsuperscript{58} \textit{Id.} at 892.

\textsuperscript{59} \textit{Id.} at 893.

\textsuperscript{60} \textit{Id.} at 891-92.

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} 104 S. Ct. 1541, 1543-44 (1984); see also Ursic v. Bethlehem Mines, 719 F.2d 670, 676-77 (3d Cir. 1983); White v. City of Richmond, 713 F.2d 458, 460-61 (9th Cir. 1983); Ramos v. Lamm, 713 F.2d 546, 552 (10th Cir. 1983).

\textsuperscript{63} 104 S. Ct. at 1549.
C. Degree of Success Analysis

In *Nadeau v. Helgemoe*, inmates of the New Hampshire State Prison brought a class action alleging unconstitutionally harsh conditions at the New Hampshire State Prison. While the New Hampshire district court initially awarded them injunctive relief by ordering expansion of the plaintiff’s access to library facilities, it dismissed various other allegations concerning the conditions of confinement. The circuit court affirmed the award of injunctive relief granted by the district court and remanded the case for closer scrutiny of the conditions of confinement.

Before a retrial, the parties agreed to a consent decree which resulted in changed conditions of confinement. On the basis of this limited success, plaintiffs' counsel moved for an award of attorney's fees under CRAFAA. The district court denied the award on the grounds that plaintiffs were not prevailing parties; improved conditions in the state prison resulted from the good faith efforts of the state's assistant attorney general and warden as well as those of plaintiffs' counsel.

In an opinion which sought to analyze the "prevailing party" and "reasonableness" issues, the appellate court remanded the case to the district court, noting that while the plaintiffs did not succeed on all issues, their lawsuit was a "catalyst" which improved prison conditions. Since the plaintiffs succeeded on a "significant issue in

64. 581 F.2d 275 (1st Cir. 1978).
65. Id.
67. Id. at 1266-76.
68. 581 F.2d at 279.
69. The CRAFAA makes clear that only a prevailing party may be awarded attorney fees. However, it fails to provide meaningful guidelines as to who may qualify as a prevailing party, stating only that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." Senate Report, supra note 19, at 5.

The Senate Report further states that "[s]uch awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues." Id. See supra note 22 for selected cases allowing fee awards to parties who have enjoyed only limited success on the merits. See generally L. Bartell, Federal Court Awards of Attorney's Fees 1111-27, reprin ted in Civil Practice in Federal and State Courts (ALI-ABA Course of Study Materials 1984); S. Nahmad, Civil Rights & Civil Liberties § 1.19 (Supp. 1984).
70. 581 F.2d at 278-79.
71. See supra notes 22, 31 and accompanying text for discussions of prevailing party and reasonableness concepts.
litigation which achieve[d] some of the benefit the parties sought in bringing the suit,’” they were entitled to receive a fee award as prevailing parties. Although the circuit court acknowledged the lower court’s discretion to adjust the amount of the award, it cautioned that plaintiff’s counsel should receive fees only for the work performed on successfully litigated issues and then only if their claims were supported by adequate documentation.

III. Special Circumstances Which May Preclude Awards of Attorney’s Fees

The circuit courts have limited attorney’s fee awards based upon a finding of special circumstances. The court in Nadeau v. Helgemoe stated that, if the plaintiffs’ filing is superfluous or if the plaintiffs’ allegations already have been favorably resolved prior to filing, a denial of fee awards would be justified. Likewise, if the court determined that the defendants took action beneficial to the plaintiffs

72. 581 F.2d at 278-79.
73. See supra note 45 and accompanying text.
74. 581 F.2d at 279. The second circuit has most closely adhered to Nadeau’s “degree of success” rationale. See McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983). The seventh circuit also has adopted the “degree of success” rationale. See Busche v. Burkee, 649 F.2d 509, 521 (7th Cir.), cert. denied, 454 U.S. 897 (1981).

Although the fourth circuit adopted the Johnson elements, particularly emphasizing the first five, it has applied a “discretionary” approach to the district court’s determination of reasonableness of fee awards. See Anderson v. Morris, 658 F.2d 246, 249 (4th Cir. 1981). As with the majority of circuits prior to Hensley, the fourth circuit emphasized the prevailing party aspect of fees, measuring the degree of the benefit received against the “benchmark” benefit sought. See Bonnes v. Long, 599 F.2d 1316, 1318-19 (4th Cir. 1979).

The third, fifth, and eleventh circuits prior to Hensley demonstrated more concern for the determination of the prevailing party than in directing the discretion of the district courts. In the third circuit, a plaintiff who obtained only some of the relief sought prevailed. See NAACP v. Wilmington Medical Center, 689 F.2d 1161, 1166-67 (3d Cir. 1982), cert. denied, 460 U.S. 1052 (1983). The third and eleventh circuits applied the Johnson elements but also required the prevailing plaintiff to acquire the primary benefit sought, either formally or informally. See Taylor v. Sterrett, 640 F.2d 663, 669 (5th Cir. 1981); Doe v. Busbee, 684 F.2d 1375, 1381 (11th Cir. 1982); see also supra note 22 and accompanying text.

75. While the legislative history of the CRAFAA does not indicate what would constitute “special circumstances,” several circuit courts have attempted to invest the terms with meaning. See infra notes Section III. The CRAFAA’s legislative history indicates that the prevailing civil rights litigant “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” Senate Report, supra note 19, at 4-5, quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).
76. 581 F.2d 275 (1st Cir. 1978).
77. Id. at 281.
when not legally required to do so, the plaintiffs could not have prevailed.78

Similarly, in Chastang v. Flynn and Emrich Co.,79 the fourth circuit determined that the district court80 had not abused its discretion in refusing to award attorney's fees to prevailing plaintiffs since the circumstances of the case did not warrant such a grant.81 In Chastang, retired male employees of the defendant companies successfully brought a sex discrimination case alleging that the retirement plan in which they participated discriminated in favor of female employees.82 In affirming the district court's denial of attorney's fees, the circuit court stated that in view of the fact the defendant company had amended its retirement plan to eliminate sex discrimination before the plaintiffs' suits were filed, the plaintiffs could not be said to have derived any benefits from the litigation.83 Also, it was apparent that the company had not intentionally violated the civil rights law as its retirement plan was formulated before the Equal Employment Opportunity Commission84 held that compulsory retirement ages based on sex were illegal.85

According to the "bright prospects" standard of the second and ninth circuits,86 courts may deny attorney's fees in cases in which

78. Id. Recently, the fifth circuit stated that
a plaintiff who achieves the goal sought in a civil rights suit by voluntary action of the defendant prevails within the meaning of the Act if she demonstrates that the suit caused the defendant to act, unless the defendant proves that the plaintiff's claim had no colorable merit and the defendant made the change gratuitously for reasons unrelated to the potential merit of the suit.

Hennigan v. Ouachita Parish School Bd., 749 F.2d 1148, 1149 (5th Cir. 1985).

79. 541 F.2d 1040 (4th Cir. 1976).


81. 541 F.2d at 1042-45.

82. Id. The plaintiffs brought the case under Title VII of the Civil Rights Act of 1964 and, therefore, sought to recover attorney's fees pursuant to that statute's attorney's fees provision. 42 U.S.C. § 2000e-5(k) (1981). See supra note 39 for text of the statute.

83. 541 F.2d at 1045.


85. 541 F.2d at 1045. "Notwithstanding that the Act became effective on July 2, 1965, EEOC did not take the position that differences in optional or compulsory retirement ages based on sex violated Title VII until February 21, 1968. See 29 C.F.R. § 1604.31." Id.

86. Buxton v. Patel, 595 F.2d 1182 (9th Cir. 1979); Zarcone v. Perry, 581 F.2d 1039 (2d Cir. 1978), cert. denied, 439 U.S. 1072 (1979); see Comment, Attorney's
the prospects of success are sufficiently high to attract competent private counsel without the incentive provided by CRAFAA. The second circuit, affirming the denial of attorney's fees in Zarcone v. Perry, asserted that the district court did not abuse its discretion in denying fees. It reached this conclusion after examining the benefits conferred by the plaintiffs' action on the public or other non-parties, the nature and extent of the rights and interests at stake in his suit, the presence or absence of bad faith on the part of either party, and any unjust hardship that a grant or denial of fee-shifting might impose.

The seventh circuit, in Pigeaud v. McLaren, affirmed the denial of attorney's fees in an action in which a defendant made an offer of judgment that included nominal damages of one dollar to the plaintiff without making an admission of liability. The plaintiff unconditionally accepted the offer of judgment without any mention of attorney's fees. The court found that this unconditional acceptance of the settlement offer despite its conspicuous lack of admission of liability prevented the plaintiff from qualifying as a prevailing party. The court reasoned that the district court properly

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For an explanation and application of Zarcone, see generally Wheatley v. Ford, 679 F.2d 1037, 1040-41 (2d Cir. 1982); Milwe v. Cauvoto, 653 F.2d 80, 82-83 (2d Cir. 1981).
87. Zarcone v. Perry, 581 F.2d 1039, 1044 (2d Cir. 1978), cert. denied, 439 U.S. 1072 (1979). The court, referring to the statute's goal of encouraging injured parties to sue to vindicate their rights, see supra note 3, stated that
the Supreme Court has made it clear that in determining whether attorneys' fees should be awarded to a prevailing civil rights plaintiff, the principal factor to be considered by the trial judge in exercising his discretion is whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without an assurance that his attorneys' fees would be paid if he were successful.
Id.
The court added that where a plaintiff's "prospects of success are sufficiently bright to attract competent private counsel on a contingent fee basis," the rationale underlying the statute "may be inapplicable, since no financial disincentive or bar to vigorous enforcement of civil rights may exist." Id.
89. Zarcone, 581 F.2d at 1044.
90. 699 F.2d 401 (7th Cir. 1983).
91. Id. at 402. The offer provided in part that "[n]othing in this Offer shall be construed as an admission of liability. To the contrary, this Offer is made in the interest of judicial economy to the Court, the parties, and their attorneys." Id.
92. Id.
denied the plaintiff’s subsequent motion for attorney’s fees.\textsuperscript{94} In yet another case,\textsuperscript{95} plaintiffs who were successful in having a local curfew declared unconstitutional were denied attorney’s fees because the court decided that their complaint did not rise to a level of national priority or constitutional dimension necessary to justify such an award.\textsuperscript{96} The district court decided that if the fee award were made on such an insubstantial basis, it would encourage the “wholesale scramble by lawyers to challenge possibly thousands of ancient and ineffectual municipal ordinances, on the expectation that counsel fees must be awarded automatically.”\textsuperscript{97}

The “special circumstances” cases discussed in this section, constitute an exception to the general rule permitting recovery. With the exception of the “bright prospects”\textsuperscript{98} standard in the second and ninth circuits, no federal circuit adheres to a specific “special circumstance” test. A practitioner can benefit from this analysis by using the facts of a “special circumstance” case to buttress a defense against a fee award or to distinguish a “special circumstance” case from a case in which a prevailing party requests a fee award.

IV. The Supreme Court Reevaluates Attorney’s Fee Awards in Civil Rights Cases: \textit{Hensley v. Eckerhart}

A. Background and Lower Court Decision

In 1972, the plaintiffs, representing a class of all persons involuntarily confined at the Forensic Unit of the State Hospital in Fulton, Missouri, filed an action against unit officials at the unit and members of the Missouri Mental Health Commission alleging unconstitutional treatment and conditions in the hospital.\textsuperscript{99} The court

\begin{itemize}
  \item \textsuperscript{94} 699 F.2d at 402.
  \item \textsuperscript{95} Naprstek v. City of Norwich, 433 F. Supp. 1369, 1371 (N.D.N.Y. 1976).
  \item \textsuperscript{96} Id.
  \item \textsuperscript{97} Id. at 1371.
  \item \textsuperscript{98} See supra notes 80-89.
  \item \textsuperscript{99} Eckerhart v. Hensley, No. 75-CV-87-C, slip op. (W.D. Mo. Jan. 23, 1981), \textit{aff’d without opinion}, 664 F.2d 294 (8th Cir. 1981). Count I complained of six areas of treatment or conditions in the forensic unit which the respondents alleged were unconstitutional. Count II alleged procedural due process violations in patient placement at the Biggs Building of the forensic unit. Count III alleged that patients who performed institutional labor should be compensated for their work. Count II was settled by consent decree in December 1973 and Count III was rendered moot when the petitioners began compensating patients for their maintenance labor at the institution. Hensley v. Eckerhart, 461 U.S. 424, 426-27 (1983).
\end{itemize}
found constitutional violations in five of the six areas of treatment or conditions at the forensic unit. The petitioners did not appeal the district court's decision on the merits.

Attorneys for the class sought fees at a standard hourly rate ranging from forty to sixty-five dollars per hour, amounting to $150,477.85 plus a thirty to fifty percent enhancement of the award and costs in the amount of $15,177.40. In response to objections by state officials that the class had not succeeded in every claim, the court stated that the class had received substantial relief and rejected a "mechanical division" of claimed hours between those issues on which the class prevailed and those in which the state officials prevailed. The court rejected an apportionment approach of fees as failing to consider "the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party may prevail on various issues." According to the court, the significance of the case could not be measured solely in terms of dollars and cents, and the class of involuntarily confined patients at the forensic unit had obtained "substantial" relief. Although the court granted no fee enhancement, it awarded attorney's fees in the amount of $133,332.25 in addition to the costs requested. The court reduced the fee of one attorney by thirty percent because of his lack of experience and failure to keep contemporaneous records.

B. The Supreme Court's "Partially Prevailing Party" Analysis

The Supreme Court, in Hensley, stated that the CRAFAA's legislative history did not establish a standard for setting the amount of a fee award where the plaintiff achieved only partial success.

The class subsequently voluntarily dismissed its action and filed a two-count complaint seeking damages equalling the value of past patient labor and reiterating the allegations of unconstitutional treatment and conditions at the forensic unit. The plaintiffs dismissed the count seeking back-pay. See Hensley v. Eckerhart, 461 U.S. 426-27 (1983).

100. Id.
101. Id. at 428.
102. See id.
103. Eckerhart v. Hensley, No. 75-CV-87-C, slip op. at 7-8.
104. Id. at 7.
105. Id. at 6.
106. See supra notes 46-60 and accompanying text for a discussion of Lindy.
108. 461 U.S. at 429-30. See Senate Report, supra note 19, at 6, indicating that factors such as those enumerated in Johnson, see supra note 43 and accompanying
The Court also noted that standards adopted varied among the circuits regarding fee awards which would be granted when a plaintiff did not succeed on all claims.\(^9\)

Although the Court was satisfied that the district court had adequately justified Nadeau's\(^{10}\) threshold requirement that the plaintiffs were prevailing parties for purposes of fee awards, the majority felt that the district court did not clearly answer two relevant questions: "First, did the plaintiffs fail to prevail on claims that were unrelated to the claims in which they succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?"\(^{11}\)

In the majority's opinion, unrelated claims which could be treated as though they were raised in separate lawsuits might be infrequent.\(^{12}\) Under these circumstances, it might become difficult for an attorney to divide the hours expended in that litigation on a claim-by-claim basis. The Court decided that the district court should focus on the overall relief obtained in relation to the hours expended.\(^{13}\) Litigants could pursue alternative legal grounds to achieve the desired outcome, and the trial court should not reduce a fee because of a litigant's failure to prevail on every issue. On the other hand, the "lodestar"\(^{14}\) might be excessive even when a plaintiff's claims were "interrelated, text, should be employed in determining a fee award. For a general discussion of Hensley, see Casenote, In an Action Brought on the Basis of the Deprivation of Constitutionally Protected Civil Rights, the Extent of a Plaintiff's Success is a Crucial Factor in Determining the Proper Amount of an Award of Attorneys' Fees under the Civil Rights Attorneys' Fee Act of 1976, 42 U.S.C. § 1988—Hensley v. Eckerhart (U.S. Sup. Ct. 1983), 34 Drake L. Rev. 241 (1984-85).

\(^{10}\) 461 U.S. at 424-32.
\(^{11}\) 581 F.2d 275, 278-79. The Nadeau court stated that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Id.
\(^{111}\) Id.
\(^{112}\) at 434.
\(^{113}\) Id. at 435.
\(^{114}\) The Court stated that:

Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. . . . [T]he district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

\(^{114}\) See supra notes 46-60 and accompanying text for a discussion of Lindy.
nonfrivolous and raised in good faith." The critical factor in either case is the extent of success.

In an effort to clarify contradictory approaches about the relationship between claims, the Court stated that in complex civil rights litigation the range of possible success is often broad and there is no certain method to determine when claims are related. Although parties requesting fees probably will not be required to keep a detailed minute-by-minute accounting of attorney time expended on interrelated claims, the responsibility to provide a cogent explanation of its reasons for a fee award remains with the district court. This explanation must clarify the relationship between the amount of the fee awarded and the party's degree of success.

The Court agreed with the district court's refusal to apportion the fee award, stating that the lower court's decision might be consonent with the Supreme Court's opinion. However, since the district court failed to consider the relationship between the extent of success and the amount of the fee award, the Supreme Court refused to affirm. The Court indicated that the degree of prevailing party's success is crucial to the amount of fees to be awarded.

V. The Effect of Hensley on the Federal Courts

A. Impact on the Prevailing Party Issue

In cases concerning a variety of fee-shifting statutes, the circuit and district courts have applied Hensley in many different ways. Particularly interesting are the varying interpretations of Hensley's

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115. Hensley, 421 U.S. at 436.
116. Id. at 437 n.12.
117. Id. at 437.
118. Id. at 438. The district court, noting that the recovery obtained at trial was substantial: declined to divide the hours worked between winning and losing claims, stating that this fails to consider "the relative importance of various issues, the interrelation of the issues, or the extent which a party may prevail on various issues." [Record] at 220. Finally, the court assessed the "amount involved/results obtained" and declared: "Not only should [respondents] be considered prevailing parties, they are parties who have obtained relief of significant import.

461 U.S. at 438.
119. Id.
120. Id.
121. See infra notes 124-63 and accompanying text.
approval of the threshold prevailing party test enunciated in *Nadeau*.

Cases involving the Equal Access to Justice Act cite *Hensley* to justify the award of attorney's fees to prevailing plaintiffs who succeed on any significant litigated issue thereby achieving some of the benefits sought. On the other hand, at least one circuit has used *Hensley*'s "results obtained" test to affirm the denial of fees where the plaintiffs had obtained some success but were unsuccessful in the central issue of the case.

B. Related v. Unrelated Issues

Most of the courts which have dealt with the issue of interrelated claims have tended to relate rather than disassociate claims in order to grant fees to prevailing plaintiffs. In a typical formulation, the Massachusetts District Court, in *Pinshaw v. Monk*, granted fees to a prevailing plaintiff, a physician, who alleged that the defendant police officer Monk and others deprived him of his civil rights. The jury awarded the plaintiff a verdict of $3,500 against Monk and exonerated Monk's supervisors. The plaintiff requested fees in the amount of $7,194.17 for the service of two lawyers, one of whom represented him in the civil rights action and the other in bankruptcy proceeding in which Monk attempted to discharge Pinshaw's judg-

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123. Pub. L. No. 96-431, 94 Stat. 2325 (Title 5, § 504; Title 15, § 634b; Title 28, § 2412; Title 42, § 1988) (1980).


After considering all of the pertinent factors, the court granted an attorney's fee of only $5,356.17. After considering all of the pertinent factors, the court granted an attorney's fee of only $5,356.17. The court rejected the defendant's position that it was inappropriate to grant attorney's fees to plaintiff's representative in the bankruptcy proceeding. The court considered the determination of the bankruptcy issue to be inextricably intertwined with vindication of the plaintiff's civil rights claim. Compensation would have been diluted unjustly had the bankruptcy proceeding discharged the ultimate judgment debt.

The defendant also sought to have the court apportion the fee award according to the plaintiff's success since it prevailed on other issues including culpability of Monk's superiors and the issue of punitive damages against the officer. The court acknowledged Monk's incomplete success, but maintained that, "although there were successful and unsuccessful claims, the attorneys' [efforts] necessarily overlapped on all. The claims then were not distinct in all respects."

C. The "Billing Judgment" Rule

In spite of the trend not to exclude fees for unsuccessful related claims, many cases emphasize "billing judgment" as a means to moderate the amount of attorney's fee award. In Capozzi v. City of Albany, the Northern District of New York court agreed that unsuccessful related claims should be included in fee awards but ultimately reduced the fee award with an "eye to moderation." Of the five claims made by the plaintiff ranging from federal civil rights violations to malicious prosecution, the jury returned a special verdict in the plaintiff's favor only on the issue of a section 1983

128. Id. at 45.
129. Id. at 46.
130. Id.
131. Id.
132. Id. at 47.
135. Id. at 774.
civil rights violation, false arrests, and abuse of process. Verdicts favorable to the defendants were returned on the claims of battery and malicious prosecution. Money damages amounted to $25,000. Although the defendants did not deny the plaintiff's status as a prevailing party, they felt that the $41,150 fee requested was exorbitant. In spite of the interrelationship between successful and unsuccessful claims, the court reduced the fee award requested from $41,150 to $14,516.

Other courts have used the duplication of attorney effort as justification for reducing the amount of attorney's fee awards. In Singer v. Hunt, decided in the Western District Court of North Carolina, a class of handicapped minors sued the Governor and other state officials in order to obtain certain services and treatment. As in the Pinshaw and Capozzi, the district court rejected the defendants' position that the 1339.10 legal hours spent on a case by eight different lawyers should have been reduced by the 307 hours of time spent litigating two issues which the plaintiffs ultimately lost. The court stated that the plaintiffs' unsuccessfully litigated claims were integrally related to the resulting consent decree which provided millions of dollars worth of services to class members. Consequently, the court did not reduce the recovery of attorneys' fees for time expended on unsuccessful claims but did reduce the total legal hours to 1,250 based on the possibility that some of the time spent was duplicative or unnecessary.

D. The Adequate Documentation Rule

Courts are concerned to a greater degree now that only well-documented requests for fees will be submitted. A review of district
court cases since *Hensley* reveals that often courts will list in detail the components of the "lodestar" before granting a fee.\(^{147}\) At least one circuit has held that contemporaneous time records are a prerequisite for the award of attorneys' fees.\(^{148}\)

**E. The Continuation of Enhancement**

Supported by *Hensley* dicta\(^{149}\) which approved the use of multipliers for "extraordinary success," the pre-*Hensley* trend to grant fees with multipliers continues.\(^{150}\) Although in some cases courts have reduced the fee enhancements as excessive or have offset them by reductions for duplication or lack of contemporaneous records, the award of multipliers probably will continue.\(^{151}\)

**F. Mathematical Approach**

In different cases, the eighth circuit used *Hensley* as the basis to award defendants attorney's fees and to grant a fee award to the prevailing plaintiff.\(^{152}\) In *Sisco v. J.S. Alberici Construction Co.*, 598 F. Supp. 1262, 1280 (D. Md. 1984).

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149. 461 U.S. at 435.

150. The *Hensley* dicta was reiterated by the Court in Blum v. Stenson, 104 S. Ct. 1541, 1550 (1984): "In sum, we reiterate what was said in *Hensley*: "where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhancement award may be justified." *Id.* (emphasis added); see New York Ass'n for Retarded Children, Inc., 711 F.2d at 1154; *National Trust for Historic Preservation*, 570 F. Supp. at 472; Chisholm v. United States Postal Serv., 570 F. Supp. 1044, 1050 (W.D.N.C. 1983); Martino v. Carey, 568 F. Supp. 848, 852 (D. Ore. 1983); *Powell*, 569 F. Supp. 1192, 1202, 1203 (N.D. Cal. 1983).

151. For an example of a case in which a multiplier was reduced as excessive, see *National Trust for Historic Preservation*, 570 F. Supp. at 472. For cases containing both percentage enhancements and deductions, see Coble v. Texas Dep't of Corrections, 568 F. Supp. 410, 413, 414 (S.D. Tex. 1983) (one lawyer fee was enhanced by 50% while another was reduced by 50%); *National Trust for Historic Preservation*, 570 F. Supp. at 471, 472 (both a reduction of enhancement requested from 100% to 25% and a 15% reduction in fee because of duplication of effort).

152. American Family Life Assurance Co. of Columbus v. Teasdale, 564 F. Supp. 1571 (W.D. Mo. 1983) (assessed fees against plaintiff based on frivolous
a construction company employee filed suit alleging that his employment was unlawfully terminated due to racial discrimination. He also alleged unlawful retaliation by the employer due to his opposition to what he perceived to be racial discrimination within the company.

The district court held that the employer had neither unlawfully discriminated nor retaliated against the plaintiff. On appeal, the circuit court affirmed the discrimination decision but remanded the adverse judgment on the retaliation issue holding that the plaintiff was entitled to trial by jury with respect to that claim. On remand, the parties settled prior to trial, and the plaintiff received $30,000 in settlement of his claim. The plaintiff then moved for attorneys’ fees in the amount of $64,562, the lodestar, plus an enhancement factor of fifty percent.

The court rejected any enhancement, stating that a multiplier was only justified in cases of exceptional success. The court further decided that the lodestar was not reasonably related to the results received because it more than doubled the damages awarded. The court granted an award of forty percent of the actual damages, the same percentage agreed to by the prevailing plaintiff and his attorney in their contingency contract. Significantly, the court noted that the award effectuated the congressional purpose of enabling plaintiffs to protect their civil rights while preventing a windfall to plaintiffs’ attorneys at the expense of defendants. This case may seem an anomaly to those familiar with the fees granted by courts prior to Hensley. In fact, Sisco echoed the admonition contained in the CRAFAA legislative history that the fee-shifting statutes were

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154. Id.
155. Id.
156. 655 F.2d 146 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982).
158. Id. at 767; Hensley, 461 U.S. at 435.
159. Sisco, 564 F. Supp. at 767.
160. Id. at 767-68.
161. Id. at 768.
162. S. REP. No. 1011, 94th Cong., 2d Sess. at 6, reprinted in U.S. CODE CONG. & AD. NEWS 5913. It must be noted, however, that the appellate court determined that the amount awarded by the district court was too high (since a contingency fee arrangement was involved). 733 F.2d 55, 57 (8th Cir. 1984).
designed to provide a *reasonable* fee to the prevailing party, thereby encouraging injured parties to act.

In the second appeal of *King v. McCord*, the Eleventh Circuit Court of Appeals affirmed an award of $11,954.94 in attorneys’ fees plus $6,963.17 in expenses to a plaintiff who had obtained a damage award of $6,504.60. The plaintiff brought the second appeal on the issue of attorney’s fees, alleging that the amount awarded was disproportionately low with respect to her level of success on interrelated claims. The court, engaging in a purely mathematical calculation to determine the extent of success, affirmed the district court’s award which corresponded to the proportion of the plaintiff’s success. Although this decision may be one logical extension of *Hensley*, the issue is significant as well. Instead of a defendant attempting to overturn a fee, a prevailing plaintiff was complaining that the fee award was not enough.

**VI. Conclusion**

Perhaps the only unambiguous effect of *Hensley* is its reaffirmation of the viability of the American Rule. In the final analysis, the most that a practitioner may glean from *Hensley* is a minor qualification of *Alyeska*. The latter case squarely placed the responsibility on the legislature for carving out exceptions to the American Rule. Congress listened, and by an amendment, placed the 1866 Civil Rights statutes on the same footing with more recently passed fee-shifting statutes. Unfortunately, in the post-*Alyeska* period, “reasonableness” sometimes became “exorbitance.” Emphasis changed from lodestar to enhancement. Degree of success often became enmeshed in the concept of the “catalyst” by which a private citizen might vindicate federally protected rights and receive a reasonable fee for all efforts, without regard to the extent of success.

*Hensley* declared its purpose to be clarification of the reasonableness of attorney’s fee awards in the case of the partially prevailing plaintiff. It failed in that purpose. While it sought to direct an award of fees only for unrelated claims upon which plaintiff prevailed, the Court understood that it might be impossible in a given case to distinguish between claims.

164. *Id.* at 467.
165. *Id.* at 468.
166. See supra note 1.
168. See supra notes 19-23 and accompanying text.
The effect of *Hensley* has been a variety of interpretations by the federal courts of the meaning and implications of the decision. The “partially prevailing” plaintiff either wins a complete fee if successful in a significant issue in controversy or may receive a reduced fee if a court can find distinct issues. Some courts now have developed billing judgment rules and strict documentation requirements to develop a reasonable lodestar while others continue to grant multipliers.

Contrary to the *Hensley* dissenters’ fears, *Hensley* has enhanced not intruded upon the lower court’s discretionary award of attorneys’ fees. The dissenters correctly feared an increase in litigation which the majority hoped would be discouraged by *Hensley*. The *Hensley* litigants chose to settle before beginning “*Hensley II,*” but it is likely that there will be more litigation.

Courts have become more conscious of the necessity to provide cogent reasons for the award or refusal to award attorneys’ fees. For the practitioner, defense counsel might feel justifiably that the “reasonable” pendulum is swinging towards moderation. Prevailing plaintiffs’ counsel should not expect unopposed fee requests when documentation and related and unrelated issues are subject to stricter scrutiny. Meanwhile, litigation over fee awards will increase.

169. See *supra* notes 115-16 and accompanying text.

169. *Hensley*, 461 U.S. at 433-34; see also *New York State Ass’n for Retarded Children, Inc.*, 711 F.2d at 1154.

170. See *Hensley*, 461 U.S. at 435.

171. See *id.* at 442.

172. See *id.*

173. See *id.* at 437.

174. After inquiring, I discovered that the *Hensley* parties had settled their dispute over the fee amount, but agreed not to disclose the amount of the settlement. In all likelihood, the prevailing plaintiffs did not receive as much as they sought, and the defendants paid more than they wanted. The parties apparently followed the *Hensley* majority’s recommendation.