Fordham Law Review

Volume 57 | Issue 1 Article 2

1988

Attorneys' Fees in Antitrust Litigation: Making the System Fairer

Edward D. Cavanagh

Attorneys’ Fees in Antitrust Litigation: Making the System Fairer

Cover Page Footnote

Professor of Law, St. John’s University School of Law; A.B. 1971, University of Notre Dame; J.D. 1974, Cornell Law School; L.L.M. 1986, Columbia University School of Law. This Article was written in partial fulfillment of the requirements for the degree of Doctor of Science of Law in the Faculty of Law, Columbia University.

ATTORNEYS' FEES IN ANTITRUST LITIGATION: MAKING THE SYSTEM FAIRER

*EDWARD D. CAVANAGH**

TABLE OF CONTENTS

* Professor of Law, St. John's University School of Law; A.B. 1971, University of Notre Dame; J.D. 1974, Cornell Law School; L.L.M. 1986, Columbia University School of Law. This Article was written in partial fulfillment of the requirements for the degree of Doctor of Science of Law in the Faculty of Law, Columbia University.

INTRODUCTION

SECTION 4(a)[1] of the Clayton Act entitles prevailing plaintiffs in private antitrust actions to recover, in addition to treble damages, their reasonable attorneys' fees. Unique when adopted as part of the Sherman Act in 1890,[2] this fee-shifting provision has been imitated, at least in part, in over 100 federal statutes.[3] In providing for attorneys' fees, Congress intended to promote private enforcement of the antitrust laws and to insulate the treble damages recovery from expenditures for legal fees.[4] Fee-shifting is mandatory where a plaintiff prevails,[5] but the court has some leeway in setting the amount of the fee. The controversy over the quantum of proof necessary to establish the fee award has been extensively litigated in the district and circuit courts. Although there is now widespread agreement on the principles for measuring fee awards, the criteria include a subjective component that may yield vastly differing results in cases involving similar facts.

Critics view the present fee-shifting system as overly generous to attorneys and as promoting lawsuits based not on intrinsic merit but rather on

1. 15 U.S.C. § 1 (1982).

2. Sherman Act of 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. § 1 (1982)). Section 7 of the Sherman Act was formally repealed as superfluous in 1955. *See* Pub. L. No. 84-137, 69 Stat. 283 (1955).

3. *See* Coulter v. Tennessee, 805 F.2d 146, 148, 152-55 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 3186 (1987); J. Goodstein, Attorney's Fees (1985). For a listing of federal fee-shifting statutes, see 9 Attorney Fee Awards Reporter 2-3 (1986).

4. *See* Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1312 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982); Perkins v. Standard Oil Co., 474 F.2d 549, 554 (9th Cir.), *cert. denied*, 412 U.S. 940 (1973).

5. *See* 15 U.S.C. § 15(a) (1982); *see also* Hydrolevel Corp. v. ASME, Inc., 635 F.2d 118, 130 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982).

their potential to yield a "golden harvest" of fees.[6] Academic criticism, the "new learning"[7] with respect to private enforcement, has focused on three concerns:[8] first, that the legal rules governing private enforcement, including rules relating to fee-shifting, create conflicts of interest between attorneys and their clients, creating misincentives that hinder private actions;[9] second, that incentives to litigate are excessive because private parties do not bear the public costs of litigation;[10] and third, that the social benefits of private enforcement actions are outweighed by their tendency to promote nuisance suits.[11] However, some scholars dispute the wisdom of the "new learning" and contend that the private enforcement system is underfunded rather than overfunded.[12]

The current one-way mechanism for fee-shifting in antitrust litigation provides that prevailing plaintiffs, but not prevailing defendants, are entitled to attorneys' fees. Dissatisfaction with this fee system has inspired proposals to permit two-way fee-shifting in certain cases. The Reagan Administration has sponsored legislation in both the 99th[13] and 100th[14] Congresses that would permit defendants to recover attorneys' fees where the claim is baseless or brought in bad faith. Moreover, the Supreme Court has apparently been attentive to criticisms of the present fee structure and has "cast an increasingly skeptical eye" on the rules governing fee awards.[15]

---

6. *See* Kramer v. Scientific Control Corp., 534 F.2d 1085, 1090-91 (3d Cir.) ("critics have challenged the altruism of some class action lawyers and charged that the paramount motivation for such litigation was counsel's desire to generate substantial fees"), *cert. denied*, 429 U.S. 830 (1976); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019 (2d Cir. 1973) (practical effect is to "generate more leverage and pressure on defendants to settle, even for millions of dollars . . . than did the old-fashioned strike suits made famous a generation or two ago"); *see also* Van Gemert v. Boeing Co., 573 F.2d 733, 735 (2d Cir.), *vacated*, 590 F.2d 435 (1978), *aff'd*, 444 U.S. 472 (1980); Kline v. Coldwell, Banker & Co., 508 F.2d 226, 237 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *In re* Fine Paper Antitrust Litig., 98 F.R.D. 48, 67 (E.D. Pa. 1983), *modified on other grounds*, 751 F.2d 562 (3d Cir. 1984).

7. "New Learning" refers to that loosely bound community of scholars who, applying economic principles such as efficiency and cost-benefit analysis, have been critical of the present scheme of private remedies. They fear, among other things, that the present system creates serious disincentives for litigation and inefficient overenforcement.

8. *See* Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 671-73 (1986).

9. *See id.* at 671; *see, e.g.*, Clermont & Currivan, *Improving on the Contingent Fee*, 63 Cornell L. Rev. 529 (1978); Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 Md. L. Rev. 215 (1983); Schwartz & Mitchell, *An Economic Analysis of the Contigent Fee in Personal-Injury Litigation*, 22 Stan. L. Rev. 1125 (1970).

10. *See* Coffee, *supra* note 8, at 672; Rosenberg & Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. Legal Stud. 333 (1982).

11. Coffee, *supra* note 8, at 672; *see* Rosenberg & Shavell, *A Model in Which Suits are Brought for Their Nuisance Value*, 5 Int'l Rev. L. & Econ. 3 (1985).

12. *See* Coffee, *supra* note 8, at 676-77.

13. S. 2162, 99th Cong., 2d Sess. (1986).

14. S. 539, 100th Cong., 1st Sess. (1987); H.R. 1155, 100th Cong., 1st Sess. (1987).

15. *See* Coffee, *supra* note 8, at 674 n.15.

In recent decisions interpreting fee statutes similar to the Clayton Act, the Court has developed standards that appear to limit applicants to a fee measured by the number of hours billed times a reasonable hourly rate. This, in effect, limits the trial court's discretion to adjust fees upward based on additional factors, such as complexity, quality of services, results obtained, administrative efficiency and the contingent nature of the suit.[16] By limiting the power of the lower courts to adjust fees upward, the Supreme Court may be creating significant disincentives to private enforcement, thereby undermining Congress' intent in enacting fee-shifting legislation.[17]

This Article begins with a review of current proposals for allowing prevailing defendants to obtain attorneys' fees and argues that any such provision may chill the vigor of private antitrust enforcement. It further analyzes the current mechanism for awarding fees in antitrust suits as well as in other areas and suggests how the system might be made fairer and more efficient.

I. Background

Under the so-called American Rule, each party must bear its own cost of litigation, including attorneys' fees.[18] The American Rule accords with common law principles but contrasts markedly with the practice in Great Britain, where for centuries courts have had statutory discretion to award attorneys' fees to prevailing parties.[19] Proponents of the American Rule defend it on three grounds: first, a party should not be penalized for merely defending or prosecuting a lawsuit since the course of litigation is uncertain; second, the impecunious may be discouraged from vindicating meritorious claims if the price of failure includes the fees of opposing counsel; and third, the time, expense and complexity of proving

16. *See, e.g.*, Pennsylvania v. Delaware Valley Citizens' Council For Clean Air, 107 S. Ct. 3078 (1987) [hereinafter Delaware Valley II]; Pennsylvania v. Delaware Valley Citizens' Council For Clean Air, 478 U.S. 546 (1986) [hereinafter Delaware Valley I]; Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

17. Professor Coffee has argued:

> The key legal rules that make the private attorney general a reality in American law today, however, are not substantive but procedural—namely, those rules that establish the fee arrangements under which these plaintiff's attorneys are compensated. Inevitably, these rules create an incentive structure that either encourages or chills private enforcement of law.

Coffee, *supra* note 8, at 669-70.

18. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796); C. Wright & A. Miller, Federal Practice & Procedure, § 2675, at 257-60 (2d ed. 1983). For an historical perspective on the American Rule, see Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 Law & Contemp. Probs. 9 (Winter 1984); Feinberg & Gomperts, *Agent Orange Litigation: Modifying the Lodestar Analysis for Mass Tort Cases*, 14 N.Y.U. Rev. L. & Soc. Change 613, 614-15 (1986); Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651; Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 Law & Contemp. Probs. 187, 188-90 (Winter 1984).

19. *See Alyeska Pipeline*, 421 U.S. at 247.

reasonable attorneys' fees would impose undue administrative burdens on the judiciary.[20] Critics of the American Rule argue that the burden of paying one's own fees discourages the poor from asserting meritorious claims, particularly where the amount of the claim would be too insubstantial to secure access to a lawyer on a contingency basis. In addition, because prevailing plaintiffs shoulder their own fees out of the proceeds of any recovery, they are not made whole by the judgment.[21]

Notwithstanding these arguments, the fundamental presumption that parties litigating cases in American courts should bear their own costs remains. This general rule, however, is subject to significant court-made and statutory exceptions. The most prominent court-made exception is the common fund doctrine, under which attorneys for class representatives may receive compensation from a fund created through their efforts for the benefit of others.[22] The common fund doctrine is frequently used in class action litigation. Like the class action, the common fund doctrine is rooted in the historic equitable jurisdiction of the courts and contemplates fair and just allowances for expenses and attorneys' fees.[23] The fee award under the common fund doctrine is a restitutionary device that prevents unjust enrichment of other fund beneficiaries at the expense of the class representative.[24] In modern parlance, the doctrine prevents the free-rider problem that would arise if others were able to obtain full benefits from the plaintiff's efforts without contributing equally to the litigation expenses. Thus, the existence of a benefit to the class is central to the common fund theory. Benefits must accrue to those against whom fees are assessed; those receiving no benefit from a particular lawyer's work ought not to be charged for it. Closely related to the common fund principle is the common benefit doctrine which empowers the courts to award fees to attorneys who have successfully attained a significant nonmonetary benefit for a class of litigants.[25]

A second court-made exception to the American Rule permits courts to invoke their inherent equitable powers by requiring fee-shifting where the losing party has conducted litigation " 'in bad faith, vexatiously,

---

20. *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Zemans, *supra* note 18, at 189.

21. *See* Zemans, *supra* note 18, at 189.

22. *See Alyeska Pipeline*, 421 U.S. at 257-58; Trustees v. Greenough, 105 U.S. 527 (1882); Berger, *Court Awarded Attorney's Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 295-303 (1977); Dawson, *Lawyers and Involuntary Clients: Attorney's Fees from Funds*, 87 Harv. L. Rev. 1597 (1974); Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 Duke L.J. 435, 440-41; Feinberg & Gomperts, *supra* note 18, at 615-17; Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 476 (1981).

23. *See* Berger, *supra* note 22, at 298-300; Dawson, *supra* note 22, at 1609-12; Feinberg & Gomperts, *supra* note 18, at 615-17; Leubsdorf, *supra* note 22, at 476-77.

24. *See* Boeing Co. v. Van Gemert, 444 U.S. 472, 478-81 (1980); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir.), *cert. denied*, 109 S. Ct. 66 (1988).

25. *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389-97 (1970).

wantonly, or for oppressive reasons.' "[26] This doctrine has been employed infrequently by the courts, its use limited primarily to cases where counsel acted in bad faith or interposed a claim or defense without merit.[27]

In addition, Rule 11 of the Federal Rules of Civil Procedure was amended to curtail more effectively the assertion of frivolous claims and defenses, thereby fostering judicial economy and preventing delay in litigating meritorious claims.[28] The amended rule explicitly extends the attorney's certification requirement beyond the pleadings to all papers filed with the court and imposes greater obligations on attorneys[29] than did the rule as originally promulgated.[30] Rule 11 further mandates sanctions for violations of the certification procedures, and fee-shifting is specifically authorized as a sanction.[31] Although the power to police the conduct of attorneys before the court is theoretically separate from the power to shift fees and costs, the two concepts have become inextricably intertwined and fee-shifting is the sanction most commonly imposed by courts.[32]

Perhaps even more important than the court-made exceptions to the American Rule and Rule 11 are the statutory exceptions enacted by Congress in diverse areas of the law.[33] The statutes vary in content and scope. For example, prevailing plaintiffs in treble damage actions are entitled to attorneys' fees as of right.[34] In contrast, the court has the

---

26. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975) (quoting F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974)); *see also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-67 (1980) (court has inherent power to award attorneys' fees against counsel who conduct litigation in bad faith).

27. *See, e.g.*, Dow Chem. Pac., Ltd. v. Rascator Maritime, S.A., 782 F.2d 329, 344 (2d Cir. 1986) (fee award vacated and case remanded for "clear and specific" finding of bad faith); Weinberger v. Kendrick, 698 F.2d 61, 80-81 (2d Cir. 1982) (same), *cert. denied*, 464 U.S. 818 (1983).

28. *See* Fed. R. Civ. P. 11 advisory committee's note; *See generally* Cavanagh, *Developing Standards Under Amended Rule 11 of The Federal Rules of Civil Procedure*, 14 Hofstra L. Rev. 499 (1986); Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313 (1986).

29. *See generally* Nelken, *supra* note 28, at 1317-25.

30. Under Rule 11, an attorney's signature on a pleading, motion, or other filing certifies that

> the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after *reasonable* inquiry it is well grounded in fact and is warranted by existing law, or a *good faith* argument for the extension, modification, or reversal of existing law, and that it is not interposed for any *improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Fed. R. Civ. P. 11 (emphasis added).

31. *See id.*

32. *See* Oliveri v. Thompson, 803 F.2d 1265, 1271 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987).

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

34. *See* 15 U.S.C. § 15(a) (1982).

discretion to award fees under the civil rights[35] and securities laws.[36] Still another variation appears in the patent laws, under which courts have discretion to award fees to prevailing parties in exceptional cases.[37]

The key distinction between awards under the common fund doctrine and statutory fee awards is that in statutory cases, attorneys' fees are paid by the defendant in addition to any judgment, while in common fund cases, the fees come from the fund itself.[38] Thus, only in statutory cases does true fee-shifting occur; in common fund cases, any payments to attorneys diminish the recoveries available to the beneficiaries of the fund, resulting in fee sharing.[39]

Because fees in common fund cases are extracted from a predetermined damage recovery rather than from the losing party, "common fund fees are neither intrinsically punitive nor designed to further any statutory public policy."[40] Statutory fees, on the other hand, are designed to advance congressional purposes by punishing non-prevailing parties and encouraging private enforcement of statutory rights.[41] The source of the attorneys' fees and the purpose in awarding them may vary depending on whether the award is based on a statute or the common fund doctrine; however, the law governing the amount of fees that may be awarded has evolved without attention to these distinctions, and courts today apply similar standards whether the basis for an award is statutory or court-made.[42]

II. Attorneys' Fees Under the Antitrust Laws

A. *Private Damage Actions*

The fee-shifting provisions embodied in the federal antitrust laws are among the most significant in the federal system and have served as a model for subsequent legislation in other areas. Section 4(a) of the Clayton Act entitles prevailing plaintiffs in private damage actions to recover as of right "the cost of suit, including a reasonable attorney's fee" in addition to treble damages.[43] The provision is asymmetric; prevailing antitrust defendants have no general right to attorneys' fees under section 4(a).[44] Congress purposely adopted this one-way fee shifting provision

35. *See* 42 U.S.C. § 1988 (1982).

36. *See* 15 U.S.C. §§ 77k(e), 78r(a) (1982).

37. *See* 35 U.S.C. § 285 (1982).

38. *See* Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 66 (1988).

39. *See id.*

40. *Id.*

41. *See id.*

42. Nevertheless, some courts continue to measure fee awards on a percentage of recovery basis. *See* Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984); *Brown*, 838 F.2d at 454.

43. *See* 15 U.S.C. § 15(a) (1982).

44. *See id.*; Byram Concretanks, Inc. v. Warren Concrete Prods. Co., 374 F.2d 649, 651 (3d Cir. 1967) ("The incentive which the prospect of treble damages provides for

favoring prevailing plaintiffs,[45] with the intention that the private civil damages remedy should benefit the "great mass of people" rather than "rich corporations and rich men."[46] Providing attorneys' fees for prevailing plaintiffs assures that impecunious victims will have access to counsel to redress antitrust violations.[47]

Because the federal government lacks the resources necessary to detect and prosecute all antitrust violations,[48] private enforcement actions serve as an important component of the antitrust enforcement scheme envisioned by Congress.[49] Fee awards offer obvious incentives for antitrust enforcement by private plaintiffs. In addition, antitrust cases frequently raise complex legal and factual issues; the added incentive of fee awards is necessary to encourage private parties to litigate these complicated matters.[50]

Given Congress' clear intent to favor plaintiffs on the attorneys' fees issue, there is some question as to whether antitrust defendants may recover fees on any grounds. One court, ruling that fee awards to defendants would conflict with the one-way fee-shifting provisions of the Clayton Act, has denied defendants attorneys' fees under the bad-faith exception.[51] Another court, rejecting this view, has recognized that, in

---

instituting private anti-trust actions would be dampened by the threat of assessment of defendant's attorneys' fees and other costs as a penalty for failure."). This is not to say that successful defendants may never recover attorneys' fees. Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(d)(2) and under the National Cooperative Research and Development Act of 1984, 15 U.S.C. § 4303, prevailing antitrust defendants may recover attorneys' fees where plaintiff has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Moreover, a prevailing defendant may recover attorneys' fees as sanctions where plaintiff's attorney has violated the provisions of 28 U.S.C. § 1927 (1982) or Rule 11 of the Federal Rules of Civil Procedure. Finally, a defendant who wins an antitrust counterclaim is viewed as a prevailing plaintiff and may recover attorneys' fees. *See* Gray v. Shell Oil Co., 469 F.2d 742, 752 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). *See generally*, E. Kintner, Federal Antitrust Laws, § 39.7, at 14-15 (1980).

45. *See* Note, *Attorneys' Fees In Individual And Class Action Antitrust Litigation*, 60 Calif. L. Rev. 1656, 1656 (1972).

46. 21 Cong. Rec. 2564 (1890); *see* Note, *supra* note 45, at 1656.

47. *See* 21 Cong. Rec. 2612 (1890); Note, *supra* note 45, at 1656.

48. *See The Antitrust Remedies Improvement Act of 1986: Hearings on S. 2162 Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986) [hereinafter *1986 Senate Hearings on S. 2162*] (statement of Douglas H. Ginsburg, Assistant Attorney General) (Justice Department transcript at 18-19, available in the files of the *Fordham Law Review*) ("Public resources alone are not sufficient to detect and prosecute all violations."). *See generally*, Coffee, *supra* note 8, at 669 ("Probably to a unique degree, American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies.").

49. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) (private actions have become the "bulwark of antitrust enforcement").

50. *See* H.R. Rep. No. 499, 94th Cong., 2d Sess. 19, *reprinted in* 1976 U.S. Code Cong. & Admin. News 2572, 2588; *see, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Poller v. Columbia Broadcasting Sys., 368 U.S. 464 (1962).

51. *See* Byram Concretanks, Inc. v. Warren Concrete Prods. Co., 374 F.2d 649, 651 (3d Cir. 1967) (refusing, in absence of specific statutory authorization, to award defendant's attorneys' fees after allegedly baseless antitrust suit had been dismissed).

theory, a prevailing antitrust defendant may recover attorneys' fees under the bad faith exception.[52] The significance of these divergent holdings is questionable in light of amended Rule 11[53] under which the courts have not hesitated to shift fees to prevailing antitrust defendants where the Rule has been violated.

The threshold question is whether the Clayton Act's asymmetric treatment of prevailing plaintiffs and prevailing defendants remains justified. No antitrust authority seriously contends that this asymmetry be addressed by allowing prevailing defendants to recover attorneys' fees in all cases, which would, in effect, adopt the British Rule on fee-shifting in antitrust cases. However, a more limited rule permitting fee-shifting to prevailing antitrust defendants where the litigation is shown to have been baseless or prosecuted in bad faith has some support. Critics of the existing private antitrust enforcement scheme[54] have argued that the present rule on attorneys' fees creates "lawyers' lawsuits" designed to generate large fees.[55] This, in turn, may foster serious misincentives to litigate and lead to imprudent over-enforcement, thereby deterring potentially procompetitive conduct. The Reagan Administration has proposed fee-shifting in antitrust actions "to a substantially prevailing defendant upon a finding that the plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith."[56] This proposal, specifically designed to address the perceived imbalance in the award of attorneys' fees under the antitrust laws,[57] would incorporate the same standard for fee-shifting implemented by Congress in the very narrow circumstances provided under the National Cooperative Research Act of 1984.[58] Proponents urge that the proposed legislation is necessary to deter abusive antitrust litigation, particularly strike suits filed to exact a quick settlement from a rival, or injunctive actions commenced to soften the competitive practices of a rival.[59]

Nevertheless, amending the antitrust laws to allow limited fee-shifting to prevailing defendants is unwise and unwarranted for several reasons. Such a provision would undermine the private treble damages remedy.

52. *See* Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18, 21 (2d Cir. 1980) (plaintiffs did not demonstrate requisite bad faith so court declined to award fees).

53. *See infra* notes 66-68 and accompanying text.

54. *See supra* notes 6-11 and accompanying text.

55. *See In re* Fine Paper Antitrust Litig., 98 F.R.D. 48, 67 (E.D. Pa. 1983), *modified on other grounds*, 751 F.2d 562 (3d Cir. 1984).

56. S. 539, 100th Cong., 1st Sess. (1987); H.R. 1155, 100th Cong., 1st Sess. (1987).

57. *See Antitrust Remedies: Hearings on S. 539, S. 635 and S. 1407 Before the Senate Subcomm. on Antitrust, Monopoly and Business Rights, Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988) [hereinafter *1988 Senate Hearings on Antitrust Remedies*] (statement of Charles F. Rule) (Justice Department transcript at 22-25, available in the files of the *Fordham Law Review*); *1986 Senate Hearings on S. 2162*, *supra* note 48, at 18 (statement of Douglas H. Ginsburg).

58. 15 U.S.C. § 4303(a)(2) (Supp. IV 1986).

59. *See 1986 Senate Hearings on S. 2162*, *supra* note 48, at 10-11 (statement of Charles B. Renfrew); *id.* at 19 (statement of Charles F. Rule).

Moreover, the amendment is unnecessary in light of the wider availability of fee-shifting in the form of Rule 11 sanctions. In addition, the standards for fee-shifting conflict with the criteria for sanctions under Rule 11 and would needlessly confuse and complicate this area of the law. Finally, an attorneys' fee provision may seriously alter the balance between antitrust plaintiffs and defendants that has already been disrupted by developments in the case law and by government enforcement policies beneficial to defendants.

1. Defendants' Fees and the Clayton Act

As previously discussed, Congress adopted fee-shifting provisions in favor of private plaintiffs to encourage private enforcement of the antitrust laws.[60] Permitting fee awards to successful antitrust defendants may chill the vigor of private enforcement. Before commencing an action, plaintiffs and their attorneys would have to consider not only the likelihood of not prevailing on the merits, but also the possibility that the court might rule that the action was, among other things, "unreasonable" or "without foundation" and assess attorneys' fees against the unsuccessful claimants. Prospective plaintiffs might thus be discouraged from prosecuting cases involving complex and conflicting economic evidence where the outcome is unpredictable, even though the claim itself may be meritorious. Since antitrust cases typically present complicated factual and legal issues and litigation is always unpredictable, private enforcement is likely to be adversely affected by a defendants' attorneys' fees provision. Plaintiffs who lack resources to pay for their own costs would be especially deterred from suing by the possibility of having to pay the fees of defendants' attorneys. Ironically, it may have been the defendants' unlawful conduct that left these plaintiffs financially drained.

Although Congress has authorized awarding of defendants' attorneys' fees under the National Cooperative Research Act of 1984[61] and the Hart-Scott-Rodino Antitrust Improvements Act of 1976[62] under a standard similar to that now under congressional review, this does not support the extension of fee-shifting in all antitrust cases. Under both laws, Congress had a narrowly specified purpose in providing for defendants' fees. The purpose of the National Cooperative Research Act of 1984 was to encourage joint research and development ventures by domestic companies.[63] Congress saw the defendants' attorneys' fees provisions in that statute as necessary to deter baseless litigation, the threat of which might discourage companies from entering into joint research ventures.[64]

---

60. *See supra* notes 48-49 and accompanying text.
61. 15 U.S.C. § 4304(a)(2) (Supp. IV 1986).
62. 15 U.S.C. § 15c(d)(2) (1982). Attorneys' fees may also be shifted under the Export Trading Company Act of 1982, 15 U.S.C. § 4016(b)(4) (1982).
63. *See* H.R. Rep. No. 656, 98th Cong., 2d Sess. 4-5 (1984); S. Rep. No. 427, 98th Cong., 2d Sess. 12, *reprinted in* 1984 U.S. Code Cong. & Admin. News. 3105, 3108-09.
64. *See* H.R. Rep. No. 656, 98th Cong., 2d Sess. 4-5 (1984).

In providing for a defendants' attorneys' fees provision in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Congress aimed to prevent overzealous antitrust enforcement by state attorneys general.[65] Under this law, attorneys general of the several states have broad powers to prosecute price-fixing violations in federal court *parens patriae* on behalf of natural persons. The availability of attorneys' fees for defendants where the action is adjudged baseless insures that this potentially awesome prosecutorial power will not be misused. Thus, these two statutes present narrowly targeted exceptions to prevent specified abuses and do not threaten private antitrust enforcement generally, unlike the current proposal to allow attorneys' fees to defendants in limited circumstances in all antitrust cases.

2. Impact of Rule 11

A statutory provision allowing fee-shifting to defendants in antitrust cases is unnecessary following the 1983 revisions to Rule 11 of the Federal Rules of Civil Procedure. Rule 11 applies to all civil cases, and courts have not hesitated to impose sanctions, where appropriate, in antitrust cases.[66] There is no indication in the flood of reported cases under Rule 11 of any special test for imposition of sanctions in antitrust cases. The proposition espoused by some courts, that fee-shifting to prevailing defendants in antitrust cases is inappropriate absent specific statutory authorization, may have had some vitality prior to the adoption of amended Rule 11,[67] but that view finds no support in the cases decided under the amended rule. Rule 11 as revised thus provides an adequate deterrent to baseless antitrust suits; indeed, some scholars argue that the impact of Rule 11 has been too strong and that it chills meritorious actions in federal courts.[68] Consequently, even the proposed *limited* fee-shifting provisions favoring prevailing antitrust defendants are unwarranted and unwise.

3. Confusion in the Law

Adopting the pending legislation allowing prevailing defendants to recover attorneys' fees in certain limited circumstances is likely to complicate and confuse legal standards for fee-shifting. The recently promulgated Rule 11 adopted more stringent standards for pleadings in all federal actions, imposing on attorneys an affirmative obligation to make some prefiling inquiries with respect to both the facts and the

---

65. *See* S. Rep. No. 803, 94th Cong., 2d Sess. 21 (1976).

66. *See, e.g.*, *In re* TCI Ltd., 769 F.2d 441 (7th Cir. 1985); Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987).

67. *See, e.g.*, Byram Concretanks, Inc. v. Warren Concrete Prods. Co., 374 F.2d 649, 651 (7th Cir. 1967) (based on policy considerations reflected in the Clayton Act, attorneys' fees may not be awarded to defendants in the absence of legislative authorization).

68. *See* Nelken, *supra* note 28, at 1338-39.

law.[69] To comport with Rule 11, an attorney's conduct must be "reasonable under the circumstances."[70] Thus, pleadings are no longer measured by the subjective bad faith criteria applicable under the old Rule 11, but rather must meet an objective standard of reasonableness. In describing the conduct violative of Rule 11, the courts have employed a number of terms, "frivolous" perhaps most frequently being invoked as the Rule 11 standard.[71] This measure is synonymous with "less than a scintilla"[72] or "manifestly insufficient or futile"[73] or "absolutely no chance of success under existing precedents."[74]

The proposed legislation would award fees to "substantially prevailing defendants" where plaintiffs' actions have been "frivolous, unreasonable, without foundation or in bad faith."[75] This standard is borrowed from the National Cooperative Research Act of 1984,[76] which in turn borrowed from criteria set forth in *Christianburg Garment Co. v. EEOC*.[77] Although the proposed legislation includes a subjective bad faith standard that Rule 11 sought to eliminate, its language is sufficiently close to Rule 11 to render it redundant, since any violation of the statute would also transgress the rule. In addition, the legislation would chill the vigor for private enforcement and encourage harassment of private antitrust plaintiffs. Moreover, prevailing antitrust defendants would routinely seek fee awards both under Rule 11 and under this statute. In any event, the existence of two similar standards for fee-shifting is likely to create confusion in the law for a considerable period. Antitrust litigants would be better served by uniform standards for fee-shifting and that uniformity is best provided by Rule 11 and the existing standards under section 4 of the Clayton Act.

Even worse, the enactment of a defendants' fee-shifting provision could result in a double penalty for unsuccessful plaintiffs. Although such a result is unlikely, courts could conceivably shift fees under the statute and at the same time impose additional penalties of a non-monetary character under Rule 11.[78] This development would further chill

69. *See* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985), *cert. denied,* 108 S. Ct. 269 (1987).

70. *Id.*

71. *See* Zaldivar v. City of Los Angeles, 780 F.2d 823, 831, n.7 (9th Cir. 1986).

72. Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 565 (E.D.N.Y. 1986), *modified on other grounds,* 821 F.2d 121 (2d Cir.), *cert. denied,* 108 S. Ct. 269 (1987).

73. *Id.*

74. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), *cert. denied,* 108 S. Ct. 269 (1987); *see Zaldivar,* 780 F.2d at 831.

75. S. 539, 100th Cong., 1st Sess. 242 (1987); H.R. 1155, 100th Cong., 1st Sess. 242 (1987).

76. 15 U.S.C. § 4304(a)(2) (Supp. IV 1986).

77. 434 U.S. 412, 421 (1978).

78. As discussed above, fee shifting is the most frequently imposed sanction under Rule 11. *See supra* note 32 and accompanying text. Nevertheless, Rule 11 does not mandate fee-shifting; the precise sanction to be imposed is left to the sound discretion of the court. *See* Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 565

private antitrust enforcement.

B. *Defendants' Attorneys' Fees and Antitrust Equilibrium*

Permitting prevailing defendants to recover attorneys' fees, even under limited circumstances, may further alter the balance of power between antitrust plaintiffs and defendants. This balance has already been disrupted by pro-defendant developments in the case law and by minimal federal government enforcement. In the past decade several Supreme Court decisions have reflected a pronounced anti-plaintiff tilt[79] and have resulted in a concomitant impact on antitrust enforcement distinctively favorable to defendants. First, the Court established a more rigorous standard for plaintiffs to defeat a motion for directed verdict in vertical price-fixing conspiracy cases.[80] Next, it liberalized the standards for granting summary judgment in horizontal conspiracy cases and, contrary to widespread perception, made it clear that summary judgment is as appropriate in antitrust cases as it is in any other field of law.[81] Third, the Court enunciated the doctrine of "antitrust injury,"[82] under which plaintiffs must show that defendants' antitrust violation caused their injury and that the injury was of the "type the antitrust laws were intended to prevent,"[83] thereby placing another obstacle in the path of recovery. Fourth, the Court has added to the burden and expense of recovery by moving away from predictable, bright-line per se rules in favor of more complicated and less predictable "rule of reason" standards necessitating inquiries into complex economic data. Finally, apart from unfavorable case law developments, private plaintiffs have been disadvantaged by the policy of minimal enforcement pursued by the Department of Justice Antitrust Division in this decade.

1. More Rigorous Standards in Vertical Conspiracies

In *Monsanto Co. v. Spray-Rite Service Corp.*,[84] the Supreme Court addressed the issue of whether complaints to a manufacturer by its dealers about a rival dealer's price-cutting activities, followed by the manufacturer's termination of the discounting dealer, were sufficient to raise a triable issue of fact on a claim of conspiracy to fix resale prices. The case law in this area has been hopelessly confused in the wake of the conceptional strains created by the early Supreme Court decisions in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[85] and *United States v. Colgate &*

(E.D.N.Y. 1986), *modified on other grounds*, 821 F.2d 121 (2d Cir.), *cert. denied*, 108 S. Ct. 269 (1987).

79. *See* Coffee, *supra* note 9, at 219. (In antitrust, "a significant anti-plaintiff tilt appears evident in recent decisions on standing, attorneys' fees, and class certification.").

80. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

81. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

82. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

83. *Id.* at 489.

84. 465 U.S. 752 (1984).

85. 220 U.S. 373 (1911).

Co.[86] In *Dr. Miles*, the Court held that agreements to set the resale price of a product are illegal per se under section 1 of the Sherman Act.[87] In *Colgate*, the Court ruled that absent purpose or intent to create a monopoly, a trader is free to deal with whomever it pleases and free to announce unilaterally the terms on which it will deal, including the price at which it wishes its goods to be resold.[88] Thus, under *Colgate*, a trader may suggest a minimum resale price. Dealers who subsequently refuse to honor the suggested retail price could be lawfully terminated.[89] However, it is not always clear when a dealer is unilaterally and hence lawfully terminated under *Colgate* and when it is unlawfully terminated pursuant to a conspiracy for failing to abide by an implicit resale price maintenance agreement.[90]

On a showing of rivals' complaints to the manufacturer about the price-cutting activities of a discounter followed by termination of the discounter, some courts had permitted the issue of conspiracy between the manufacturer and the complaining dealers to go to the jury.[91] Other courts had not.[92] In *Monsanto*, the Supreme Court sought to clarify the standard of proof necessary to avoid a directed verdict in alleged vertical price-fixing conspiracy cases. The Court held that complaints to the manufacturer by rival dealers about discounting activity followed by termination of the discounter were not sufficient to raise a jury question on the price-fixing issue.[93] Using language later reaffirmed in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[94] the Court stated that the plaintiff must adduce evidence that tends to exclude the possibility that the manufacturer and non-terminated dealers were acting independently[95] and must establish that the manufacturer and others had a "conscious commitment to a common scheme designed to achieve an unlawful objective."[96] Thus, *Monsanto* imposes a double burden on plaintiffs. They must not only produce evidence that tends to show a

86. 250 U.S. 300 (1919).

87. *See Dr. Miles*, 220 U.S. at 408-09.

88. *See Colgate*, 250 U.S.at 307.

89. *See id.* at 307.

90. *See id.*

91. *See, e.g.*, Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207, 1213-15 (4th Cir. 1983), *cert. denied*, 465 U.S. 759 (1984); Battle v. Lubrizol Corp., 673 F.2d 984, 990-92 (8th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984).

92. *See, e.g.*, Bruce Drug, Inc. v. Hollister, Inc., 688 F.2d 853, 856-57 (1st Cir. 1982); Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1199 (6th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984); Schwimmer v. Sony Corp. of Am., 677 F.2d 946, 952-53 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982); Roesch Inc. v. Star Cooler Corp., 671 F.2d 1168, 1172 (8th Cir. 1982), *cert. denied*, 466 U.S. 926 (1984); Blankenship v. Herzfeld, 661 F.2d 840, 844-45 (10th Cir. 1981); Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 110 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

93. *See Monsanto*, 465 U.S. at 758-59.

94. 475 U.S. 574 (1986).

95. *See infra* notes 103-11 and accompanying text.

96. *Monsanto*, 465 U.S. at 764 (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).

conspiracy existed, but must also demonstrate that there was no proper unilateral basis for the termination.[97]

Proving conspiracy by inference is difficult enough, but the newly enunciated standard requiring disproof of unilateral activity makes that task even more burdensome.[98] Although the quantum of evidence needed to meet the *Monsanto* standard is unclear, it is obviously far more demanding than a mere showing of complaints about pricing followed by termination of a discounter. Indeed, the Court stated that to prove a "conscious commitment to a common scheme," plaintiffs must adduce evidence "both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer,"[99] which suggests that "something akin to a formal offer and acceptance is necessary."[100] Clearly, plaintiffs must show "something more" than complaints followed by termination, but precisely what constitutes "something more" remains elusive.[101] Not surprisingly, the lower courts in the wake of *Monsanto* have granted summary judgment to defendants much more readily than had previously been the case.[102]

2. Liberalized Summary Judgment Standards in Horizontal Cases

In *Matsushita*,[103] the Supreme Court enunciated a rule that made it significantly more difficult for a plaintiff to defeat a summary judgment motion in horizontal conspiracy cases. Following its holding in *Monsanto*, the Court ruled that to survive a motion for summary judgment, the plaintiff must adduce evidence that "tends to exclude the possibility that the alleged conspirators acted independently."[104] Conduct that is as consistent with competition as with conspiracy will not support an inference of conspiracy.[105] Moreover, if the trial court finds that the factual context renders plaintiff's claims implausible, that is, if the claim makes no economic sense, the plaintiff must adduce more persuasive evidence to support the antitrust claim than otherwise would be necessary.[106] Again, the Court does not specify what "more persuasive evidence" means in

97. *See* H.R. Rep. No. 421, 100th Cong., 1st Sess. (1987), *reprinted in* 53 Antitrust & Trade Reg. Rep. (BNA) No. 1340, at 767 (November 12, 1987) [hereinafter House Vertical Price Fixing Report] (*Monsanto* has been read by some lower courts "as imposing a 'double barrel' burden on plaintiffs that does not exist in other areas of antitrust: Not only must a plaintiff seeking to reach a jury *prove* a conspiracy, but he must *disprove* the existence of any or all hypothetical explanations for the manufacturer's conduct that 'might justify a dealer termination.' ").

98. *See id.* ("[t]o many observers, such a test appears to be unnecessary and unfairly harsh").

99. *Monsanto*, 465 U.S. at 764, n.9.

100. House Vertical Price-Fixing Report, *supra* note 97, at 767.

101. *See id.*

102. *See* Flynn, *The "Is" and "Ought" Of Vertical Restraints After* Monsanto Co. v. Spray-Rite Service Corp., 71 Cornell L. Rev. 1095, 1102-03 (1986).

103. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

104. *See id.* at 588.

105. *See id.*

106. *See id.* at 587.

terms of quantum of proof, but suggests by example a situation in which an inference of conspiracy would be impermissible.[107] Thus, where a claim is perceived by the trial court as implausible, plaintiffs would have to show evidence of motive to enter into a conspiracy.

It is still too early to assess the overall impact of *Matsushita* on antitrust litigation.[108] Nevertheless, *Matsushita* appears to alter significantly the court's function in deciding summary judgment motions. Prior to *Matsushita*, the courts consistently held that the trial judge's role in deciding a summary judgment motion was "issue-finding," not "issue-resolution."[109] *Matsushita* permits the trial court to pass on the merits of a claim at the summary judgment stage to the extent necessary to determine whether plaintiff's claims are plausible and whether the evidence excludes the possibility of independent action.[110] Unquestionably, this standard facilitates summary disposition of antitrust claims, and hence favors defendants over plaintiffs.[111]

---

107. *Id.* The Court cites as an example First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253 (1968), wherein plaintiff claimed that defendant's refusal to deal was sufficient to raise an inference that defendant participated in an illegal group boycott. The Court found that since there was no rational economic motive for defendant to participate in the boycott and because the action was consistent with defendant's independent business interests, the inference of conspiracy was not permissible. *See id.*

108. For recent antitrust cases granting summary judgment on the authority of *Matsushita*, see Key Fin. Planning Corp. v. ITT Life Ins. Corp., 828 F.2d 635 (10th Cir. 1987); Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 707 (1988); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656 (7th Cir.), *cert. denied*, 108 S. Ct. 488 (1987); Michigan State Podiatry Ass'n v. Blue Cross and Blue Shield of Mich., 671 F. Supp. 1139 (E.D. Mich. 1987).

109. *See, e.g.*, United States v. One Tintoretto Painting Entitled "The Holy Family with Saint Catherine and Honored Donor," 691 F.2d 603, 606 (2d Cir. 1982); Jaroslawicz v. Seedman, 528 F.2d 727, 731 (2d Cir. 1975); Wells Fargo Asia Ltd. v. Citibank, N.A., 612 F. Supp. 351, 357 (S.D.N.Y. 1985); *see also* C. Wright, Law of Federal Courts, § 99, at 664 (4th ed. 1983) ("[o]n a motion for summary judgment, the court cannot try issues of fact. It can only determine whether there are issues to be tried").

110. *See Matsushita*, 475 U.S. at 587-88.

111. In addition, *Matsushita* clarified the confusion over the role of summary judgment in antitrust generated by the decision in Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962). The Court actually said that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Id.* This passage is susceptible to two readings: (1) that summary judgment is generally inappropriate in antitrust cases because motive and intent usually play leading roles in those cases; or (2) that summary judgment is not appropriate in any litigation, including antitrust, "where motive and intent play leading roles." *See* Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples Of Equilibrating Tendencies in the Antitrust System*, 74 Geo. L.J. 1065, 1119-20 (1986).

Despite the subsequent Supreme Court holding in First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 284-88 (1968), which seemed to embrace the latter view, the lower courts and scholars have frequently cited *Poller* as supporting the former view. This, in turn, has led to the widespread perception that summary judgment is ordinarily inappropriate in antitrust cases. As Professor Calkins has noted, the "felicitous words of *Poller* are ambiguous and acquired a charmed life of their own." Calkins, *supra*, at 1120. Since summary judgment motions are almost always made by defendants, the conventional view of *Poller* worked to give plaintiffs a distinct advantage. Denial of summary

3. The Antitrust Injury Doctrine

The antitrust injury doctrine, enunciated by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[112] places an additional hurdle in the plaintiffs' path of recovery. Under the *Brunswick* rule, the plaintiff must show not only that a violation of the antitrust laws by the defendant caused injury to the plaintiff, but must also show an "antitrust injury." The plaintiff must prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."[113] The Court further stated that the injury should reflect either the anti-competitive effect of the violation or the anti-competitive acts made possible by the violation.[114]

In *Brunswick*, a bowling alley challenged the acquisition of a failing rival by a large bowling equipment manufacturer. Plaintiff claimed that but for the illegal acquisition, the failing rival would have gone out of business and plaintiff's profits would have increased. As a result of the acquisition, however, its rival became revitalized and plaintiff's profits declined. The acquisition was presumed illegal because it created the possibility that the newly merged firm would engage in predatory pricing tactics—underselling plaintiff and driving it from the field.[115]

The plaintiff, however, did not contend that the defendant had engaged in predatory pricing. Rather it claimed damages based on the fact that its profits were less than they would have been but for the merger.[116] Put another way, the injury resulted from increased competition from the revitalized rival. The antitrust laws are designed to protect competition, not competitors, and do not compensate for losses suffered because of more intense rivalry.[117] Subsequent lower court cases have extended the doctrine of antitrust injury beyond merger cases to bar plaintiff's recovery at the pretrial stages of a proceeding.[118]

---

judgment means that the case proceeds to trial. Defendants faced with the additional costs of trial and the possibility of an adverse judgment would then have strong incentives to settle the matter. Succinctly put, automatic denial of summary judgment on the authority of *Poller* could very well lead to some recovery for plaintiffs by settlement. Relying on *Cities Service*, the Supreme Court in *Matsushita* debunked the *Poller* myth that summary judgment is generally inappropriate in antitrust cases, thereby placing the summary judgment procedure in antitrust cases on par with Rule 56 motions in other cases.

112. 429 U.S. 477 (1977).

113. *Id.* at 489.

114. *See id.*

115. *See id.* at 490.

116. *See id.*

117. *See id.* at 488.

118. *See, e.g.*, Triple M Roofing Corp. v. Tremco, Inc., 753 F.2d 242, 247 (2d Cir. 1985) (plaintiff not injured by rival bidder's artificially fixed higher prices); Walker v. U-Haul Co., 747 F.2d 1011, 1014-15 (5th Cir. 1984) (no antitrust injury resulting from elimination of competition); Power Draulics-Nielsen, Inc. v. Libbey-Owens-Ford Co., No. 82-1134 (S.D.N.Y. May 12, 1987) (LEXIS, Genfed library, Dist file) (termination of plaintiff for failure to enter into an exclusive dealership arrangement does not constitute antitrust injury where opportunities for other traders to enter into or remain in the market are not limited).

4. Movement Away From Per Se Rules

In the past decade, the courts have shifted away from bright-line, per se rules to a more flexible "rule of reason" approach.[119] While per se analysis focuses on whether certain acts were committed, the rule of reason approach requires a detailed analysis of the economic impact of such acts. This trend is typified by the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*[120] There, the issue concerned the validity of a location clause by which the manufacturer restricted the locations from which a franchised dealer could sell the manufacturer's product.[121] Overturning its decade-old decision in *United States v. Arnold Schwinn & Co.*,[122] the Court held that location clauses must be adjudged under a rule of reason standard.[123] *Schwinn* had held that vertically imposed restrictions on distribution, where the seller had parted with "title, dominion and risk," were unlawful per se.[124] Reconsidering its *Schwinn* decision, the *Sylvania* Court found the per se standard in *Schwinn* unnecessarily restrictive and inappropriate because it focused on the form of the transaction rather than the anticompetitive impact of the vertically imposed restriction.[125] The Court further ruled that the restrictions in question may yield procompetitive benefits by permitting the manufacturer to reap economies in distribution.[126] While location clauses may have limited intrabrand competition among Sylvania sellers, they may have simultaneously promoted interbrand competition by making Sylvania products more attractive than those of other manufacturers.[127]

Since the *Sylvania* holding arose in the context of location clauses, the Court did not address the legality of the more restrictive, airtight territorial limitations that might prohibit dealers from selling to any customers outside of a specified geographic area.[128] Nevertheless, the lower courts have read *Sylvania* quite broadly. Defendants usually win cases involving non-price vertical restraints.[129] One district court has gone so far as

119. *See generally* Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 Calif. L. Rev. 835 (1987).
120. 433 U.S. 36 (1977).
121. *Id.* at 37.
122. 388 U.S. 365 (1967).
123. *See Sylvania*, 433 U.S. at 59.
124. *See Schwinn*, 388 U.S. at 378-80.
125. *See Sylvania*, 433 U.S. at 56.
126. *See id.* at n.25.
127. *See id.* at 54-55.
128. *See* Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 28 (1978) (per se rule may be properly imposed to condemn "[a]irtight or substantially airtight territorial confinement and customer allocation").
129. *See, e.g.*, Three Movies of Tarzana v. Pacific Theaters Inc., 828 F.2d 1395 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1028 (1988); Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, 828 F.2d 1033 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 1753 (1988); Lomar Wholesale Grocery v. Dieter's Gourmet Foods, Inc., 824 F.2d 582 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 707 (1988); Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 751 (1988); Culberson, Inc. v. Interstate Elec. Co.,

to state that the logic of *Sylvania* mandates a rule of reason standard in cases involving vertically imposed price restraints.[130]

A similar erosion of per se analysis has arguably occurred in the tying area. In *Jefferson Parish Hospital v. Hyde*,[131] the Court reiterated the per se ban on tying arrangements. However, the Court held that, for the tying arrangement to run afoul of the antitrust laws, a plaintiff must prove sufficient economic power in the tying product to effectuate an anticompetitive forcing of the tied product on a buyer.[132] Courts must therefore apply a market share screen in passing on the legality of the alleged tying arrangement. As Justice O'Connor noted in her concurring opinion, tying is "illegal only if the seller is shown to have 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product.' "[133] Consequently, the "per se" doctrine of tying cases has always necessitated "an elaborate inquiry into the economic effects of the tying arrangement."[134] Justice O'Connor therefore suggested that the Court abandon the per se label in analyzing tying arrangements.[135] Thus, even if the per se rule in tying cases persists in theory, in reality the courts have taken a much harder look at underlying economic facts in determining legality and have imposed a *de facto* rule of reason.

Similarly, the Court has even retrenched somewhat from per se rules in the horizontal area, as the *Broadcast Music, Inc. v. Columbia Broadcasting System*[136] and *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*[137] decisions demonstrate. In *BMI*, the Court declined to apply a per se standard to blanket licensing arrangements by copyright clearinghouses whose membership consisted primarily of copyright holders.[138] Under the blanket licensing provisions negotiated by BMI on behalf of the copyright holders, prospective licensees who paid the proper fee were granted the right to use any composition in the BMI library as frequently as desired for a stated term.[139] BMI's right to license on behalf of its members was not exclusive; licen-

---

821 F.2d 1092 (5th Cir. 1987); MLC, Inc. v. North American Philips Corp., 671 F. Supp. 246 (S.D.N.Y. 1987); Gemini Concerts, Inc. v. Triple-A Baseball Club Assocs., 664 F. Supp. 24 (D. Me. 1987); *see also* ABA Antitrust Section, Antitrust Law Developments 65-74 (2d ed. 1984 & Supp. 1987) (discussing vertical non-price restrictions such as exclusive distributorships, territorial and customer restrictions, location clauses, area of primary responsibility clauses and profit pass-over arrangements); *id.* at nn. 484-485.

130. *See* Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978).

131. 466 U.S. 2 (1984).

132. *See id.* at 12.

133. *Id.* at 34 (O'Connor, J., concurring) (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958)).

134. *Id.* (footnote omitted).

135. *See id.* at 35.

136. 441 U.S. 1 (1978).

137. 468 U.S. 85 (1984).

138. *See BMI*, 441 U.S. at 19-20.

139. *See id.* at 5.

sees could also negotiate directly with the copyright holders. Although the blanket licensing technique arguably constituted price-fixing "in the literal sense" because one price was negotiated on behalf of rival copyright holders,[140] the Court found that the joint marketing of copyrights could reduce transaction costs, increase output and thus generate significant economies that would promote rather than hinder competition.[141] Any restraints resulting from the blanket licensing were thus ancillary to the primary goal of developing a system reasonably calculated to provide royalties for copyright holders.[142] Moreover, the Court further noted that the anti-competitive potential of the blanket license was minimal because the practice was under close scrutiny by the Department of Justice pursuant to an earlier consent decree.[143]

In *NCAA*, the Court declined to apply a per se prohibition to the plan whereby the National Collegiate Athletic Association sold the rights to televise football games of member institutions.[144] Analogizing the NCAA to a professional sports league, the Court held that some form of cooperation among member institutions was essential if the product of college football is to be available at all and that any restraint should be adjudged under the rule of reason.[145] Nevertheless, after analyzing the restraints under the rule of reason, the Court found that the NCAA had indeed violated section 1 of the Sherman Act.[146]

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,[147] the Court limited the application of per se analysis in group boycott cases. In that case, the plaintiff had been expelled from a wholesaler's buying cooperative for breach of the organization's by-laws, and had been afforded no opportunity to challenge the expulsion. Claiming that the expulsion was a mere pretext its rivals used to drive it from the field and hence an illegal group boycott, the plaintiff argued that the defendant's conduct had been per se unlawful. The trial court rejected the per se approach, but the Ninth Circuit reversed, viewing the case as a classic group boycott.[148] The Supreme Court, while noting that the type

140. *See id.* at 8.
141. *See id.* at 20-22.
142. *See id.* at 21-24.
143. *See id.* at 13.
144. *See NCAA*, 468 U.S. at 89-93. The NCAA plan required that during a given season the networks televise games featuring at least 82 schools over a two-year period and that an individual school could appear no more than six times in that period and no more than four times nationally with appearances equally divided between the two networks. *See id.* at 94. In effect, the plan limited the number of games available for telecast and artificially increased the price for television rights to each game. *See id.* at 99-100. The trial court found that the NCAA had acted as a "classic cartel" and hence found its conduct illegal per se. *See id.* at 95-96. The Supreme Court, however, rejected the per se analysis. *See id.* at 100.
145. *See id.* at 101.
146. *See id.* at 104-08.
147. 472 U.S. 284 (1985).
148. *See* Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc., 715 F.2d 1393, 1395 (9th Cir. 1983), *rev'd*, 472 U.S. 284 (1985).

of boycott subject to summary condemnation is far from clear, rejected the per se analysis and found that the cooperative's failure to provide due process for plaintiff could not convert an otherwise lawful restraint into a per se violation of the antitrust laws.[149] The Court reasoned that not every exclusion by a cooperative is per se unlawful and that, in this case, anticompetitive effects were not inevitable.[150]

Indeed, the cooperative in question had offered significant procompetitive benefits by increasing efficiency, allowing for economies of scale, permitting access to goods and enabling small firms to compete with larger companies.[151] In pursuit of these procompetitive benefits, cooperatives may create reasonable restrictions and rules; expulsion for breach of such restrictions and rules is not necessarily anticompetitive.[152] The Court concluded that a cooperative's expulsion of a member is per se unlawful only if the cooperative has market power or exclusive access to an element essential to effective competition, neither of which was demonstrated in the case.[153]

Most recently in *Business Electronics Corp. v. Sharp Electronics Corp.*,[154] the Supreme Court narrowed the application of the per se analysis even further. In holding that the termination of a dealer by a manufacturer at the request of a rival dealer because of the terminated dealer's aggressive pricing is not per se unlawful in the absence of proof of a vertical price-fixing arrangement between the manufacturer and the protected dealer, the Court ruled that, in light of *Sylvania* and *Monsanto*, there is now a presumption in favor of analyzing restraints of trade under a rule of reason standard.[155] Any departure from the rule of reason standard must be justified by the "demonstrable economic effect" of the restraint.[156] Thus, little room remains for per se analysis.

The movement away from per se rules by the courts in analyzing antitrust matters has had a twofold effect: significantly increasing the plaintiff's burden of proof and expanding the grounds upon which the defendant may justify its conduct. Courts must now consider more is-

149. *See Northwest Wholesale Stationers*, 472 U.S. at 293.
150. *See id.* at 295-97.
151. *See id.* at 295.
152. *See id.* at 296.
153. *See id.* at 296-97.
154. 108 S. Ct. 1515 (1988).
155. The Court stated:

> Our approach to the question presented in the present case is guided by the premises of *GTE Sylvania* and *Monsanto*: that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*. These premises lead us to conclude that the line drawn by the Fifth Circuit is the most appropriate one.

Id. at 1520-21.
156. *See id.*

sues, making antitrust litigation for plaintiffs lengthier, more costly, riskier and more complex. Additionally, defendants may now raise economic arguments, once foreclosed by the per se strictures, to justify anticompetitive conduct and thereby enhance the likelihood of their success on the merits. The narrowing of the per se spectrum has thus benefitted defendants at the expense of plaintiffs. Taking their cue from *BMI* and *NCAA*, the circuit courts have evidenced a new willingness to uphold horizontal restraints, once summarily condemned as per se unlawful, by analogizing them to joint ventures or, at least where market power is not shown, as ancillary restraints.[157]

5. Change in Federal Enforcement Policies

The changing attitudes of the Antitrust Division and the Federal Trade Commission in enforcing the antitrust laws have also contributed to the shift of power in favor of defendants and against plaintiffs. In the 1980s, the Justice Department has focused its enforcement efforts almost exclusively on criminal prosecutions of bid-rigging and price fixing in procurements of contracts from state and local governments.[158] The Antitrust Division has shown no interest in prosecuting vertical price fixing cases[159] and only token interest in merger enforcement.[160] Neither the

157. *See, e.g.*, Dimidowich v. Bell & Howell, 803 F.2d 1473, 1480-83 (9th Cir. 1986) (hybrid horizontal/vertical relationship due to dual distributorships warranted analysis under rule of reason approach), *modified*, 810 F.2d 1517 (9th Cir. 1987); Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 223-30 (D.C. Cir. 1986) (restraints were horizontal in nature, but were ancillary and clearly incapable of supressing market competition), *cert. denied*, 479 U.S. 1033 (1987); National Bancard Corp. v. Visa U.S.A., Inc., 779 F.2d 592, 601-02 (11th Cir.) (complex market relationship suggestive of a joint venture not subject to per se scrutiny because of its necessity to functioning of system), *cert. denied*, 479 U.S. 923 (1986); Polk Bros., Inc. v. Forest City Enters., 776 F.2d 185, 190 (7th Cir. 1985) (ancillary restraint made cooperation and increased production possible so rule of reason applies); Vogel v. American Soc'y of Appraisers, 744 F.2d 598, 602-03 (7th Cir. 1984) (lack of market power makes these horizontal retraints not subject to per se classification).

158. C. Rule, Criminal Enforcement of the Antitrust Laws: Targeting Naked Cartel Restraints, 9-25 (March 24, 1988) (address before the 36th Annual Antitrust Spring Meeting of the American Bar Association) (available in the files of the *Fordham Law Review*). Criminal antitrust enforcement is at an all-time high; in the Reagan era, criminal indictments have averaged 80 per year compared with 38 per year in the Carter Administration. *See id.* at 3.

159. The Antitrust Division during the Reagan Administration has not instituted any actions challenging vertical price-fixing. Indeed, as early as 1981, the leadership of the Antitrust Division urged abolition of the per se rule against resale price maintenance. *See Oversight Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 98th Cong., 1st and 2d Sess. 131 (1986) (testimony of William F. Baxter, Assistant Attorney General) ("[I]f there is no concentration either at the upstream level or at the downstream level . . . [a resale price maintenance] agreement cannot possibly have anticompetitive consequences."); House vertical Price Fixing Report, *supra* note 97, at 766. Congress, concerned that the Antitrust Division's views were clearly contrary to Supreme Court precedent, authorized appropriations for the Antitrust Division in the 1984 fiscal year, and specifically directed that no funds appropriated by Congress may be used to alter or overturn the restriction against resale price mainte-

Antitrust Division nor the Federal Trade Commission has demonstrated much effort in developing and implementing novel theories of antitrust liability. The current enforcement policies have yielded some impressive statistics—record numbers of convictions and sitting grand juries[161]—but have been of little assistance to private enforcers. Bid-rigging cases rarely give rise to significant numbers of private follow-up cases, such as the class actions that ensued in the wake of the *Corrugated Container*,[162] *Folding Carton*,[163] and *Fine Paper*[164] litigation in the 1970s and the *Antibiotics*[165] and *Electric Equipment*[166] cases in the 1960s.

Private enforcement, although in theory independent from government enforcement, is in practice strongly dependent on government prosecutions. Unless the federal government takes a leading role in identifying and prosecuting illegal conduct, private actions may not be economically feasible. While some major cases have proceeded without significant prior government participation,[167] these cases are the exception, not the rule. Few class action attorneys are willing to undertake the risks and enormous costs of prosecuting invariably complex antitrust cases without assistance in the form of a prior or contemporaneous gov-

---

nance. *See* H.R. 3222, 98th Cong., 1st Sess. (1983), *reprinted in* 1983 U.S. Code Cong. & Admin. News (97 Stat.) 1102.

160. The Antitrust Division has a similarly dismal track record in merger enforcement. In the 1987 fiscal year, the Division filed only six cases challenging mergers and acquisitions. *See Hearings Before the Subcomm. on Monopolies and Commercial Law, House Comm. on the Judiciary, Concerning the Antitrust Division's Fiscal Year 1989 Authorization*, 100th Cong., 2d Sess. (1988) [hereinafter *1988 House Hearing on the Antitrust Division's Fiscal Year Authorization*] (testimony of Charles F. Rule, Assistant Attorney General) (Justice Department transcript at 3, available in the files of the *Fordham Law Review*). This represents a continuation in the trend toward declining enforcement in the merger area. In 1979-80, the Antitrust Division made second requests for data under Hart-Scott-Rodino in 10.8 percent of the filings, and this resulted in enforcement actions in 2.5 percent of filings. During 1982-86, second requests were made in only 4.4 percent of filings and enforcement actions fell to 0.7 percent of filings. *See* 52 Antitrust & Trade Reg. Rep (BNA), No. 1305, at 452 (March 5, 1987); Pitofsky, *Antitrust in the Decade Ahead: Some Predictions About Merger Enforcement*, 57 ABA Antitrust L.J. 65 (1988).

161. *See* Rule, *supra* note 158, at 2-3 (Antitrust Division during the Reagan Administration has filed 555 criminal antitrust cases and there are more grand jury investigations underway at any time now than at any other time in this century). In the 1987 fiscal year, the Antitrust Division filed 92 criminal cases involving 119 corporations and 116 individuals. *See 1988 House Hearing on the Antitrust Division's Fiscal Year Authorization*, *supra* note 159, at 1.

162. *In re* Corrugated Container Antitrust Litig., MDL No. 310 (S.D. Tex.) (LEXIS, Genfed library, Dist file).

163. *In re* Folding Carton Antitrust Litig., MDL No. 250 (N.D. Ill.) (LEXIS, Genfed library, Dist file).

164. *In re* Fine Paper Antitrust Litig., 98 F.R.D. 48, 67 (E.D. Pa. 1983), *modified on other grounds*, 751 F.2d 562 (3d Cir. 1984).

165. *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, No. 71-435 (D. Minn.) (LEXIS, Genfed library, Dist file).

166. United States v. General Elec. Co., No. 28106 (E.D. Pa. 1962) (LEXIS, Genfed library, Dist file).

167. *See, e.g.*, *In re* Uranium Antitrust Litig., MDL No. 342 (N.D. Ill.) (LEXIS, Genfed library, Dist file).

ernment prosecution. Additionally, private enforcers may achieve significant economies where government pleadings and discovery are available. Private plaintiffs also benefit from the prima facie evidence standard under section 5 of the Clayton Act where the government has successfully litigated a claim against a given defendant, and from the doctrine of issue preclusion where applicable.[168] Perhaps the best indication of the negative effects of the government's minimalist enforcement policies on the private sector is that class action suits in antitrust have plummeted from 112 in 1980 to ten for the court year ending June 30, 1987.[169]

Equally troublesome is the Antitrust Division's amicus policy in recent years. The Division, in an effort to lead courts to the "right" decisions, has frequently intervened on the defense side to prevent recovery by plaintiffs in certain cases.[170] Rather than assist plaintiffs, who ordinarily could benefit significantly from government backing, the Antitrust Division has at times thrown its weight behind defendants, who typically have little real need for additional assistance. The Antitrust Division can thus no longer be viewed by plaintiffs as an ally in antitrust enforcement.

C. *Actions for Injunctive Relief*

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 amended section 16 of the Clayton Act to permit attorneys' fees awards in actions in which "the plaintiff substantially prevails."[171] The amendment was designed to put attorneys seeking to enjoin anticompetitive conduct on equal footing with those seeking treble damages caused by antitrust violations.[172] Since both remedies are aimed at stopping anticompetitive conduct, there is no reason to treat awards of attorneys' fees differently in damages actions and injunctive actions. Indeed, because damages are not at stake in actions for injunctive relief, the need for attorneys' fees in such cases is arguably greater than in damage cases.

Courts have applied the same standards in awarding fees in injunction cases as in actions for damages. Nevertheless, a critical distinction between injunctive actions and damages cases exists on the question of what constitutes a "prevailing" or "substantially prevailing" party. In damages cases, courts have tended to award fees where there has been some monetary recovery, even if the plaintiff did not prevail on all issues.[173] Where money is not at issue, it may be difficult to ascertain who "won" the litigation. Congress adopted the "substantially prevailing"

168. *See* 15 U.S.C. § 16(a) (1982).

169. *See* Martin, *The Rise and Fall of the Class Action Law Suit*, N.Y. Times, Jan. 8, 1988, at B7, col. 3.

170. *See, e.g.*, Jefferson Parish Hosp. v. Hyde, 466 U.S. 2 (1984); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752-53 (1984).

171. 15 U.S.C. § 26 (1982).

172. *See* H.R. Rep. No. 499, 94th Cong., 1st Sess. 19-20 (1975).

173. *See* B. Kellman, Private Antitrust Litigation 494 (CCH 1985).

standard to encourage actions for injunctive relief.[174] While the cases on this point are few, the courts facing this issue have given effect to congressional intent and awarded fees wherever plaintiffs succeeded in stemming anticompetitive conduct through the courts.[175] In determining whether a party has substantially prevailed within the meaning of section 16, the courts review the facts prior to suit, the situation at the time of the fee petition and the impact, if any, of the litigation on the two situations. Fee requests may be granted even though there is no formal "judicial declaration of victory" or where, as in the case of preliminary injunctions, the order is not final.[176]

III. Measuring Attorneys' Fees

The question whether prevailing defendants should be entitled to recover attorneys' fees in antitrust actions addresses only one aspect of the attorneys' fees debate. A second, more fundamental question is how fees actually awarded to plaintiffs or defendants should be measured. The efforts of courts to develop standards for measuring fees have generated only confusion. As Professor Berger has observed, "[t]he only truly consistent thread that runs throughout federal court decisions on attorneys' fees is their almost complete inconsistency."[177] Professor Berger has further noted:

> Given the frequency with which courts are confronted with the task of fee setting and the impact that it has upon the allocation of legal resources, one would expect a general consensus to have emerged on the manner in which reasonable attorneys' fees should be determined. On the contrary, there are nearly as many approaches to the issue as there are judges . . . . [M]any lower courts have confronted the problem with little or no analysis; those courts that have been more analytical have adopted widely varying approaches. To a great extent the outcome of these cases has depended upon "the roll of the dice"—from court to court and from case to case.[178]

The courts have applied two distinct yardsticks to measure attorneys' fees. In the early years, fees were set by a percentage of the total recovery. More recently, given the significant increases in recoveries in the litigation of large cases and the growing importance of injunctive relief,

174. *See* H.R. Rep. No. 499, 94th Cong., 1st Sess. 19-20 (1975).

175. *See, e.g.*, Virginia Academy of Clinical Psychologists v. Blue Shield, 543 F. Supp. 126, 130 (E.D. Va. 1982); Grumman Corp. v. LTV Corp., 533 F. Supp. 1385, 1387 (E.D.N.Y. 1982).

176. *See* B. Kellman, *supra* note 173, at 494-95.

177. Berger, *supra* note 22, at 292; *see* Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 12 (D.C. Cir. 1984) (pointing out the inconsistency of the Second Circuit awarding the law firm of Cravath, Swaine & Moore $60 per hour under 42 U.S.C. § 1988 in McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983) and the Supreme Court's upholding a fee of $150 per hour to the New York Legal Aid Society under the same statute in Blum v. Stenson, 465 U.S. 886 (1984)), *cert. denied*, 472 U.S. 1021 (1985).

178. Berger, *supra* note 22, at 283-84.

courts have begun to turn to time-based compensation formulas that seek to replicate the private market for attorneys' fees. These methodologies are discussed below.

A. *Percentage of Recovery Method*

Historically, fee awards in common fund cases were set by allowing the plaintiffs' attorneys a fixed percentage of the recovery.[179] The percentage of recovery method is similar to the method of fee measurement under a contingent fee contract. The major distinction is that under contingent fee contracts the parties agree on a percentage, while in common fund cases, the court imposes the percentage.[180] Courts have not developed a consensus as to what the percentage figure should be, but certain figures—20 percent and 25 percent—have been popular.[181] The percentage of recovery method has several significant advantages. First, it is simple to administer and inexpensive to enforce. Second, the fee award is a function of the total recovery and not of billable hours expended. Thus, arguably, conflict of interest between attorneys and clients is minimized because attorneys would have little incentive to delay resolution of the case in order to run up billable hours or to engage in make-work projects where total recovery is the basis of the award.[182] Attorneys under the percentage system have few incentives to sacrifice the client's interest by swapping a low settlement for a high fee.[183]

Nevertheless, the percentage of recovery measure has distinct disadvantages. First, it may give rise to enormously excessive fees.[184] Percentage recoveries make sense predominantly where the stakes are relatively modest. Thus, it would be reasonable for an attorney who has won a $600,000 judgment to seek one-third of the recovery as the fee. However, with the big case explosion in antitrust during the 1970s, which yielded settlements at unprecedented levels, percentage recoveries appeared to generate windfalls to attorneys that far exceeded the benefit conferred on the claimants or the fair value of services rendered. Second, percentage formulas do not work in cases where injunctive relief rather

179. *See* Coffee, *The Unfaithful Champion: The Plaintiff As Monitor In Shareholder Litigation*, 48 Law & Contemp. Probs. 5, 33, 40-48 (Summer 1985); Hornstein, *Legal Therapeutics: The "Salvage" Factor In Counsel Fee Awards*, 69 Harv. L. Rev. 658, 665 (1956).

180. *See* Hornstein, *supra* note 179, at 658-59.

181. *See id.* at 665; *see also* Coffee, *supra* note 179, at 33, n.91 (fee awards have historically fallen in the range of 20-30 percent of recovery.).

182. *See* A.L.I. Principles of Corporate Governance: Analysis and Recommendations, at 252-53 (Tent. Draft No. 6, October 10, 1986) [hereinafter ALI Principles].

183. *But see* Coffee, *supra* note 179, at 40 (awarding of a percentage fee does not necessarily align attorney's interests with the client's).

184. *See* Coffee, *supra* note 9, at 241 (pointing out the furor that arose when fees exceeding $10 million were awarded in a private action in the electrical equipment case which followed government prosecution); Dobbs, *supra* note 22, at 462-63; *see also* City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974) (courts must avoid awarding "windfall fees").

than money damages is sought.[185] Third, precisely because percentage formulas are inoperative where non-pecuniary relief is demanded, attorneys and their clients may choose to seek monetary damages, even though non-pecuniary relief may be the optimal remedy.[186] Fourth, as Professor Coffee has persuasively argued, the fact that the attorneys' fee is tied to the amount of recovery under a percentage fee scheme does not totally eliminate the possibility of conflict of interest between attorney and client.[187]

Professor Coffee argues that where attorneys' fees are measured as a constant percentage of any settlement, the client's interests are maximized by accepting only the highest possible settlement.[188] Profit-maximizing attorneys, however, are concerned primarily with the difference in the prospective fee and opportunity costs,[189] not with the absolute value of any settlement. Assuming that opportunity costs mount steadily over time in direct proportion to the total hours committed by the attorney to a particular case, the point in a case at which attorneys maximize their returns occurs far earlier than the point at which clients' returns are maximized.[190] Thus, attorneys have an economic incentive to effectuate settlements earlier in the litigation and may pressure clients to accept a settlement that is less than what could have been achieved if maximizing the clients' interests were their sole goal.[191] Other scholars have also urged that using the percentage method of calculating attorneys' fees may encourage early but inadequate settlements for plaintiffs, but there is no unanimity on this question.[192] The point is that making fees a proportion of the total recovery does not necessarily eliminate potential conflicts between attorney and client.

B. *Time-Based Formulas*

Appellate courts have allowed district courts broad leeway in award-

---

185. *See* Coffee, *supra* note 179, at 41.

186. *See id.* As Coffee explains:

> One can easily imagine cases in which the plaintiff's attorney has performed a substantial service in enjoining or otherwise preventing an impending fraud, but then finds that his early intervention caused him to be compensated less generously because no settlement fund was created. If the law were thus to reward the attorney who prevents a loss less well than the attorney who restores the same loss, a perverse incentive would arise under which the attorney would be better advised to wait until the loss had occurred before intervening. In fact, because the loss might often be only partially restorable, the consequence would be to justify a larger fee for the less complete victory.

Id.

187. *See* Coffee, *supra* note 8, at 688; Clermont & Currivan, *supra* note 9 at 569-70; Schwartz & Mitchell, *supra* note 9 at 1126.

188. *See* Coffee, *supra* note 8, at 686-90.

189. *See id.* (the economic value of opportunities foregone in order to work upon a particular case).

190. *See id.*

191. *See id.*

192. *See, e.g.*, Clermont & Currivan, *supra* note 9, at 544-45.

ing fees by the percentage of recovery method. As a result, the line between awards based on the exercise of sound discretion and arbitrary awards became indistinct and fee determinations were effectively unreviewable on appeal.[193] In the 1970s, Congress enacted a number of fee-shifting statutes.[194] Statutory fees could be awarded where there was no monetary recovery, and courts could not rely on percentage formulas in these cases. At the same time, as noted above, litigation became more complex and the amount of damage awards, whether by judgment or settlement, skyrocketed. The increasing frequency and size of attorneys' fees awards rendered the percentage recovery measure inadequate.

1. *Johnson*

Circuit courts sought to supplant percentage recovery schemes with what they perceived as a more principled basis for awarding attorneys' fees. In *Johnson v. Georgia Highway Express, Inc.*,[195] the Fifth Circuit enumerated twelve factors that courts should consider in setting attorneys' fees: the time and labor required; the novelty and difficulty of the questions; the skill required to perform the legal services properly; the preclusion of other employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation and ability of the attorney; the "undesirability" of the case; the nature and length of the professional relationship with the client; and awards in similar cases.

The *Johnson* approach is popular with judges because it permits a high degree of control over the fee but relieves them of the rather unpleasant task of number crunching.[196] This approach, however, is hardly an improvement over the percentage of recovery method and indeed may be a step backward:

> 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.[197]

Criticizing *Johnson*, Professor Berger stated:

> The fundamental problem with an approach that does no more than assure that the lower courts will consider a plethora of conflicting and

---

193. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1306 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 226 (2d Cir. 1987).

194. Perhaps the most important of these statutes was the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982). For a listing of federal statutes allowing fee shifting, see 9 Attorney Fee Awards Reporter 2-3 (1986).

195. 488 F.2d 714, 717-19 (5th Cir. 1974).

196. *See* Dobbs, *supra* note 22, at 466-67.

197. *Id.* at 466.

> at least partially redundant factors is that it provides no analytical framework for their application. It offers no guidance on the relative importance of each factor, whether they are to be applied differently in different contexts, or, indeed, how they are to be applied at all.[198]

The *Johnson* court borrowed these factors from the American Bar Association's Code of Professional Responsibility's guidelines for setting fees in cases of private representation.[199] Thus, as a threshold matter, the American Bar Association had a distinctly different purpose in mind than that of the *Johnson* court in listing the twelve factors set forth above. Use of the foregoing factors as a basis, *ex ante*, upon which to charge a client an agreed upon fee is quite different from utilizing them, *ex post*, as a basis for imposing a fee on a common fund or upon an unsuccessful defendant. The court in *Johnson* did little more than provide lower courts with a checklist of factors to consider in setting fees. It provided no guidelines on the relative importance of each factor nor on how the factors should be weighed against each other when they conflict. Far from promoting an objective and rational framework under which to analyze attorneys' fees issues, *Johnson* has encouraged subjective determinations based on snap judgments, and hence has only added to the confusion.

2. *Lindy-Grinnell*

A more objective approach to fee-setting has been adopted by the Third Circuit in *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*[200] and by the Second Circuit in *City of Detroit v. Grinnell Corp.*[201] Under the so-called lodestar multiplier approach, fees are determined by a two-step process designed to reflect more realistically the manner in which private attorneys and their clients negotiate fees. First, a lodestar is calculated by multiplying the number of hours reasonably expended by the attorneys providing legal services by a reasonable hourly rate.[202] Second, the lodestar may then be adjusted in light of "the contingent nature of the case, reflecting the like-

---

198. Berger, *supra* note 22, at 286-90 (footnote omitted). Berger observes that courts have applied the same factors in diametrically opposed ways. Thus, for example, one court held that benefits conferred on the public by litigation should be a factor in increasing the lodestar while another held that the same consideration should lower the fee. Compare the district court and circuit court opinions in Kiser v. Miller, 364 F. Supp. 1311, 1318, 1320 (D.D.C. 1973), *aff'd sub nom.* Kiser v. Huge, 517 F.2d 1237, 1254 (D.C. Cir. 1974); *see also* Berger, *supra* note 22, at 287.

199. *See* Model Code of Professional Responsibility, EC 2-18, DR 2-106 (1980); *see also* Dobbs, *Reducing Attorneys' Fees For Partial Success: A Comment on Hensley and Blum*, 1986 Wis. L. Rev. 835, 866 (ABA factors were developed "to assist lawyers in setting the fee for a client who might reject the fee if she so chose.").

200. 487 F.2d 161 (3d Cir. 1973) [hereinafter Lindy I], *on remand*, 382 F. Supp. 999 (E.D. Pa. 1974), *vacated*, 540 F.2d 102 (3d Cir. 1976) [hereinafter Lindy II].

201. 495 F.2d 448 (2d Cir. 1974), *on remand*, 1976-1 Trade Cas. (CCH) ¶ 60,913 (S.D.N.Y. 1976), *modified*, 560 F.2d 1093 (2d Cir. 1977).

202. Lindy I, 487 F.2d at 167-68.

lihood that hours were invested and expenses incurred without assurance of compensation and . . . the quality of the work performed as evidenced by the work observed, the complexity of the issues and the recovery obtained."[203] By emphasizing the number of hours worked and the reasonable billing rate, the *Lindy* formulation furnishes a more analytical framework for trial courts than is provided by the unguided "factors" approach in *Johnson*.[204]

At first blush, the *Lindy* lodestar approach appears to be a major improvement over the *Johnson* and the percentage of recovery methods of computing attorneys' fees. By focusing on the time actually expended as the basis of the fee award, the *Lindy* approach attempts to limit the virtually unbounded discretion the courts had exercised under *Johnson* and percentage of recovery cases. Because attorneys today typically charge clients by the hour for most forms of legal services, the *Lindy* method better mimics the legal services market. Moreover, unlike the percentage of recovery approach, the lodestar method can be utilized to measure fees in cases involving non-pecuniary relief. In further contrast to the percentage of recovery approach, it provides a basic methodology for measuring awards to defendants in circumstances where fee-shifting against plaintiffs is appropriate.

IV. Critique of the Lodestar Multiplier Approach

Closer scrutiny of the process of determining the number of billable hours reasonably spent and the reasonableness of the hourly fee reveals that the market rate approach is not entirely objective and may give rise to vastly differing views among lawyers and judges as to what is "reasonable."

A. *Hours*

Because time spent is a fundamental component of the fee award under the lodestar approach, plaintiffs' attorneys have strong economic incentives to bill as many hours as possible in a particular action. This gives rise to several adverse consequences in the litigation. First, the attorney is encouraged to perform unnecessary tasks, work inefficiently at necessary tasks or simply to fabricate hours. *In re Fine Paper Antitrust Litigation*[205] demonstrates how these perverse incentives operate in practice. *Fine Paper* involved a price-fixing action against the major manufacturers of quality paper products in the United States.[206] In 1980, a settlement of some $50 million (exclusive of interest) was reached.[207] Thereafter, the thirty-three firms and eight state attorneys general sought

203. Delaware Valley I, 478 U.S. 546, 563 (1986); *see also* Lindy I, 487 F.2d at 167-68.
204. *See* Delaware Valley I, 478 U.S. at 563-66.
205. 98 F.R.D. 48 (E.D. Pa. 1983), *modified*, 751 F.2d 562 (3d Cir. 1984).
206. *See id.*
207. *See id.* at 68.

legal fees totalling $21 million.[208]

The fee request was challenged as excessive and in bad faith by one of the lead plaintiffs' counsel and by a group of fifteen corporate beneficiaries of the fund who had been overcharged purchasers of fine paper.[209] A detailed audit by counsel for the corporate objectors revealed, among other things: duplicative work; make-work projects; a committee system designed to assure each participating attorney a lucrative fee; use of senior attorneys to perform tasks better suited to paralegals or junior attorneys; frequent committee meetings at which little or nothing was accomplished.[210] After forty-five days of hearings, the trial court slashed the award to plaintiffs by nearly 80 percent to approximately $4.3 million.[211]

At the same time, fee awards based on billable hours expended discourage the use of efficient techniques to keep the cost low because fees under the lodestar standard are directly proportional to hours spent on legal services performed. There is little, if any, *ex ante* restraint that can be exercised over the plaintiffs' attorneys in the typical class action/common fund case. As Professor Coffee observes, the client in such cases lacks any effective control over the attorney functioning as a "private attorney general" or "bounty hunter," who usually searches out violations of law first and then seeks a client, rather than vice versa.[212] Unlike a client who retains an attorney of his own choice, the plaintiff in a common fund case is an involuntary client who does not control the attorney, but rather is subject to the attorney's control.[213] Thus, the attorney, not the client, calls the shots in the lawsuit. Ultimately, the court, as guardian of the common fund, can restrain the attorney by disallowing hours for certain tasks, but this form of *ex post* rather than *ex ante* restraint is likely to operate at best as merely an indirect restraint on plaintiffs' attorneys. In statutory fee cases, however, the plaintiff has less incentive to control the attorney's tasks because the defendant will be liable for the fees if the plaintiff prevails after a trial. Plaintiffs will always have some incentive to limit attorneys' fees because of the possibility of settlement.

---

208. *See id.*; *Coffee, supra* note 9, at 253.

209. *See Coffee, supra* note 9, at 254-55.

210. *See* Report Of Class Member Objectors In Support Of Their Objections To The Petitions For Attorneys' Fees and Expenses Filed By Class Counsel, *Fine Paper*, 98 F.R.D. 48 (E.D. Pa. 1983), *modified*, 751 F.2d 562 (3d Cir. 1984). For a detailed discussion of the fee battle in *Fine Paper,* see Coffee, *supra* note 9, at 252-61.

211. *See Fine Paper*, 98 F.R.D. at 86. In so doing, the Judge stated: "I regret to say that my inquiry has given substance to the worst fears of the critics of the class action device—that it is being manipulated by lawyers to generate fees." *Id.* at 85. The court, among other things, disallowed or reduced time for the following tasks: (1) preparation and filing of joint pretrial memoranda; (2) time expended by attorneys reading and reviewing documents for which they were not responsible; (3) time consumed preparing the fee petition; (4) time billed for attending pretrial conferences as spectators; (5) work not adequately documented; and (6) the work of the Industrial Analysis Committee, which the court agreed was wasteful and "of no benefit to the class." *Id.* at 82.

212. *See* Coffee, *supra* note 9, at 218.

213. *See id.* at 218, 241.

Defendants, of course, can challenge excessive fee claims, but again that control is *ex post*, not *ex ante*.

Second, the lodestar system may discourage early settlement and may encourage delay and recovery by the plaintiffs. Generally speaking, the sooner settlement talks commence in a litigation, the less time the plaintiff's attorney has invested in the case. Earlier settlements mean less compensation for the attorney; therefore the tendency is for plaintiffs' attorneys to sit on settlement offers and proceed with discovery in order to increase fees.[214]

This delay in the settlement process may also exert negative effects on the judicial system as a whole. To the extent that a given case is not proceeding apace, the litigation pipeline becomes clogged and other cases are delayed. Not only is recovery in such cases postponed, but judicial resources may be spent unnecessarily.

By discouraging early settlements, the lodestar approach also tends to create a conflict of interest between the attorney and the client, for even if the early settlement offer is in the client's best interest, the attorney has strong economic incentives not to endorse it.

The attorney-client conflict may surface in a second context. The attorney may be willing to accept a low settlement in return for the guarantee of a high fee. For example, an attorney may be willing to accept a $500,000 offer that guarantees a $300,000 fee rather than a $1,000,000 settlement that would yield a $200,000 fee.[215] The fact that plaintiffs' attorneys might be vulnerable to a high fee/low settlement encourages overt collusion between counsel for plaintiffs and defendants.[216] The danger of such a collusive arrangement is especially great where settlement and attorneys' fees are contemporaneously negotiated as separate payments by defendants.[217] Some defendants maintain that this practice is acceptable and may be necessary to assure defendants of their total liability.[218] However, the obvious danger of collusion between attorneys for plaintiffs and defendants and the potential conflict of interest between plaintiffs' attorneys and their clients makes this practice unpopular with

214. *See* City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974); *see also* Feinberg & Gomperts, *supra* note 18, at 617-19 ("lodestar analysis involves a two-step process: an ostensibly objective calculation of the basic level of compensation, the 'lodestar' figure, followed by a more subjective calculation of the value of an attorney's services").

215. *See* Coffee, *supra* note 9, at 243.

216. *See* Coffee, *supra* note 8, at 714 ("At its worst, the settlement process may amount to a covert exchange of a cheap settlement for a high award of attorney's fees.").

217. *See, e.g.*, White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 454 n.15 (1982) (simultaneous negotiation of fee and settlement "may raise difficult ethical issues"); Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977) (court rejected a settlement agreement specifying the plaintiff's attorneys' fees and concluded that counsel should not simultaneously negotiate settlements and attorneys' fees).

218. Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237, 268 (1985) [hereinafter Third Circuit Task Force Report].

courts and scholars.[219]

Even if the collusion is not direct, Professor Coffee points out that the lodestar approach encourages a more subtle structural collusion between attorneys for plaintiffs and defendants.[220] It is not necessary for the defendants' attorneys to agree specifically not to make an early settlement offer. It is sufficient that defendants know that such an early offer is not likely to be sought or well-received.[221] The effects of this structural collusion can be every bit as negative as any overt collusion.

B. *Hourly Rates: What is Reasonable?*

The second component of the lodestar, the reasonable hourly rate, also appears to provide an objective basis upon which to determine a fee. Closer examination, however, reveals that in practice courts actually have significant leeway to impose subjective judgments.[222]

The courts have not established uniform criteria for determining a reasonable hourly rate. In *Lindy*, the Third Circuit stated that a reasonable hourly rate "generally is reflected in [an individual's attorney's] normal billing rate"[223] and that "counsel who possess or who are reputed to possess more experience, knowledge and legal talent generally command hourly rates superior to those who are less endowed."[224] The Second Circuit has defined a reasonable hourly fee as "the hourly rate normally charged for similar work by attorneys of like skill in the area."[225] Both these standards may be described as calling for "market rates," but they differ in a slight yet significant way. The Third Circuit definition looks to what this individual attorney actually charges, while the Second Circuit appears to require a uniform hourly rate for attorneys of similar skill and experience. Other courts have proposed that fees be based on the actual cost of legal services plus a profit.[226] The Supreme Court, in *Blum v.*

219. *See, e.g.*, Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Prandini*, 557 F.2d at 1021; Munoz v. Arizona State Univ., 80 F.R.D. 670, 672 (D. Ariz. 1978); Regalado v. Johnson, 79 F.R.D. 447, 451 (E.D. Ill. 1978); Coffee, *supra* note 179, at 71; Rhode, *Class Conflicts In Class Actions*, 34 Stan. L. Rev. 1183, 1207-09 (1982); Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 Law & Contemp. Probs. 293, 314 (Winter 1984). *But see* Third Circuit Task Force Report, *supra* note 218, at 268-70 (advocating guidelines that would provide safeguards to minimize conflicts of interest and thereby not impair litigants' ability to settle).

220. *See* Coffee, *supra* note 9, at 247-48.

221. *See id.* at 248 ("The only essential precondition to a collusive settlement is that both sides understand that the plaintiff's fee award will be a function of the time expended.").

222. *See In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1305-06 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 226 (2d Cir. 1987).

223. Lindy I, 487 F.2d 161, 167 (3d Cir. 1973).

224. Lindy II, 540 F.2d 102, 117 (3d Cir. 1976).

225. New York Ass'n for Retarded Children v. Carey, 711 F.2d 1136, 1140 (2d Cir. 1983) (quoting City of Detroit v. Grinnell Corp., 560 F.2d 1098 (2d Cir. 1977)).

226. *See* Copeland v. Marshall, 594 F.2d 244, 251 (D.C. Cir. 1978), *vacated*, 641 F.2d

Stenson,[227] recognized the inherent difficulty in determining a market rate for legal services and set forth criteria that would effectively harmonize the Second and Third Circuit standards:

> In seeking some basis for a standard, courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—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. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.[228]

Thus, the burden is on the applicant to establish that the requested hourly rate is in line with that charged by attorneys of similar skill in the geographical area. To the extent that an individual's rate is higher than rates charged by similarly situated attorneys, *Blum* suggests that the higher rate would be unreasonable. Conversely, if any attorney's rate is customarily below the market rate, he will be awarded fees at the higher market rate.

In addition, *Blum* considered the "cost-plus" method of setting fees.[229] The cost-plus standard has been urged as a way of preventing legal aid attorneys and others engaged in pro bono representation from obtaining legal fees at market rates that they do not charge in their normal practice.[230] The Court squarely held that fee awards should be based on market rates for all attorneys.[231]

The market rate approach as refined in *Blum*, however, is not a panacea.[232] Judge Weinstein has identified three additional problems with the *Blum* approach: first, whether fees in cases nationwide in scope should be based on what is reasonable in the district where the case is litigated or on what is reasonable in the area where a particular attorney practices; second, whether fee awards should be based on current rates or historic rates; and third, whether the hourly rate should take into account the many years which are likely to elapse between rendering of services and actual payment.[233]

---

880 (D.C. Cir. 1980) (en banc); Breger, *Compensation Formulas for Court Awarded Attorney Fees*, 47 Law & Contemp. Probs. 249, 254-55 (Winter 1984).

227. 465 U.S. 886 (1984).

228. *See id.* at 895 n.11.

229. *See id.* at 892-95.

230. *See id.*

231. *See id.* at 895.

232. As Judge Weinstein has observed: "Problems arise in applying this general standard in a complex multidistrict litigation that is national in scope, involves counsel from all over the country and extends over many years during which the rates for particular lawyers and classes of lawyers are changing." *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1308 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 226 (2d Cir. 1987).

233. *See id.*

1. Local Rates v. Home Base Rates

Under the so-called locality rule, a court in awarding fees to non-local counsel will normally consider the prevailing rates in the district where it sits.[234] The rule is simple to apply and places no special burdens on judges, who are likely to be more familiar with local rates than with rates charged outside the area.[235] Moreover, the rule is neutral because it does not work "to any clear advantage for either those seeking attorneys' fees or those paying them."[236]

This bright line rule, however, is subject to exceptions and is particularly inappropriate in multidistrict cases involving attorneys from many different districts.[237] For example, it would be especially unfair to penalize attorneys who file cases in their home districts, fully expecting to litigate there, but who subsequently find their case consolidated with others and transferred to another district for pretrial purposes, including settlement discussions, pursuant to statutory provisions governing multidistrict litigation.[238] Exceptions to the locality rule are also appropriate where "the special expertise of counsel from a distant district" is necessary[239] and where local counsel are not willing to undertake a matter.[240] In these instances, attorneys ought to be compensated at the rates prevailing in their home districts, rather than at forum rates. Normally, application of this standard should not prove burdensome for courts.

The locality rule would also be inappropriate in large multidistrict cases where non-local counsel form the majority. Looking to each attorney's home district rates is likely to be onerous for the courts. The presumption of familiarity with rates clearly does not apply in these cases, and a district-by-district investigation of rate structures would prove unwieldy. Finally, a home rate rule would negate the neutrality of the locality rule by consistently favoring fee applicants at the expense of the common fund, since high rate non-local attorneys would be compensated at their home rate, while low-rate non-local attorneys would be compensated at the forum's rate.[241]

One solution is to apply a uniform national rate.[242] Because multidis-

---

234. *See id.*

235. *See id.*

236. Donnell v. United States, 682 F.2d 240, 251 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983).

237. *See In re "Agent Orange,"* 611 F. Supp. at 1308 ("Obviously such a simple parochial rule is inappropriate in a multidistrict litigation requiring participation of attorneys from many districts.").

238. *See id.*

239. Polk v. New York State Dep't of Correctional Servs., 722 F.2d 23, 25 (2d Cir. 1983).

240. *See* Avalon Cinema Corp. v. Thompson, 689 F.2d 137, 140-41 (8th Cir. 1982) (en banc); *In re "Agent Orange,"* 611 F. Supp. at 1308.

241. *See In re "Agent Orange,"* 611 F. Supp. at 1308.

242. *See In re* Fine Paper Antitrust Litig., 98 F.R.D. 48, 83 (E.D. Pa. 1983), *rev'd*, 751 F.2d 562, 590-91 (3d Cir. 1984) (trial court in setting national rate had failed to examine available data); H. Newberg, Class Actions § 6924e (1977).

trict litigation essentially creates a national bar,[243] a uniform fee can be calculated by taking into account the customary fee of attorneys across the nation. Several classifications might be created, such as partners, associates and paralegals. Within each classification, the fee would be uniform. The task of rate setting is made easier because a national bar, featuring specialists who command substantial fees wherever they render services, has emerged.[244] Furthermore, a uniform national rate is easy to administer and provides neutrality of results as between fee applicants and common fund beneficiaries.[245]

Under an alternative method of setting the national hourly rate in common fund cases, the attorneys for the plaintiffs would negotiate a uniform, tentative hourly rate subject to court approval.[246] The rate would be presumptively applicable after a settlement is reached, but could be adjusted downward if fees would consume an inordinate share of the settlement proceeds. The advantage of this approach is the greater certainty of the fee award process—attorneys would know throughout the suit the award they can expect. This certainty may, however, encourage the padding of hours or other make-work projects to assure a high fee, thus offsetting any of the advantage. Nor is it clear that the additional certainty offered by this approach counterbalances the downside risk. Even when the fees are not determined in advance, experienced attorneys have a fairly accurate idea of the hourly rate that a court will ultimately approve.

2. Current Rates v. Historic Rates

Complex litigation may stretch over a number of years during which market rates rise dramatically.[247] The threshold question raised is whether the attorneys should be compensated at the current rate prevailing at the time of the fee award or in accordance with actual rates in effect when services were performed. The historic approach is obviously a more precise method by which to measure fees but it is cumbersome and has high administrative costs.[248] Use of current rates would not only ease the administrative burdens on courts but also would compensate for

243. *See In re "Agent Orange,"* 611 F. Supp. at 1309.

244. *See id.*

245. *See id.*

246. *See infra* notes 338-55 and accompanying text. *Cf.* Third Circuit Task Force Report, *supra* note 218, at 260-62.

247. *See* Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1096 n.26 (5th Cir. 1982) (en banc) (court may award fees to attorneys at current rates to compensate for inflation and delay in payment), *modified on other grounds*, 701 F.2d 542 (5th Cir. 1983) (per curiam); City of New York v. Darling-Delaware, 440 F. Supp. 1132, 1134 (S.D.N.Y. 1977).

248. *See* New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1152 (2d Cir. 1983) ("[h]istoric rates have the advantage of precision . . . [b]ut. . . do not reflect inflation or the cost of forgone interest").

inflation and foregone interest.[249] Nevertheless, current rates may result in windfall fee awards.[250] Thus, neither historic nor current rates provides an ideal solution.

One approach favoring administrative ease is to permit the court, employing its discretion, to use current rates, unless the resulting fee is unreasonably high.[251] Another approach segments the case into periods and assigns different rates to each period. For example, a six year old case may be divided into two periods. The current rate would apply to the past three years and a lower rate would apply to the first three years.

3. Inflation and Foregone Interest

In addition, historic fees do not compensate for inflation or for interest foregone.[252] Use of current rates provides a rough equivalent of compensation for inflation and foregone interest, since current rates are usually higher than historic rates. Alternatively, these costs might be considered by adjusting the multiple used to increase the lodestar. Neither option will be precise, although the latter choice may better permit fine-tuning.[253] In the end, the court must use its experience and judgment to arrive at a reasonable result.

C. *The Multiplier*

The second stage of the *Lindy* analysis allows the trial court to adjust the lodestar figure to account for the quality of representation and the contingent nature of the lawsuit.[254] The purpose of the adjustments to the lodestar is to ensure that the fee award is reasonable; that is, in statutory cases that the award is sufficient to encourage attorneys to undertake representation of victims seeking vindication of federally created rights[255] and in common fund cases to ensure that the beneficiaries of any settlement are not unjustly enriched.[256] The lodestar itself may not be adequate to meet these standards. In considering the quality component,

249. *See In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1309 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 226 (2d Cir. 1987).

250. *See id.*

251. *See In re "Agent Orange,"* 611 F. Supp. at 1310.

252. *See supra* notes 248-49 and accompanying text.

253. *See In re "Agent Orange,"* 611 F. Supp. at 1310.

254. *See* Lindy I, 487 F.2d 161, 168 (3d Cir. 1973).

255. *See, e.g.*, Delaware Valley I, 478 U.S. 546, 565 (1986) ("[T]he aim of [federal fee-shifting] statutes was to enable private parties to obtain legal help in seeking redress . . . from the actual or threatened violation of specific federal laws."); City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) ("Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit 'does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest importance.' ") (quoting Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968)); Blum v. Stenson, 465 U.S. 886, 897 (1984); S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976).

256. *See* Trustees v. Greenough, 105 U.S. 527, 532 (1881); Berger, *supra* note 22, at 296; Dawson, *supra* note 22, at 1607-08.

Lindy held that the trial court should review "the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained."[257] In reviewing the contingency factor, the district court should focus on "the professional burden undertaken—that is, the probability or likelihood of success, viewed at the time of filing suit."[258] Specifically, the court must evaluate the plaintiff's burden in prosecuting the case, the risks assumed in developing the case, particularly the number of hours spent without any guarantee of compensation and the amount of out-of-pocket expenses advanced, and the delay in payment for services rendered.[259] This exercise is necessarily more subjective than determining the lodestar. Professor Dobbs has suggested that the adjustment criteria could provide a "back door" to the *Johnson* factors.[260] Courts, however, still must specify those facts supporting any increase over the lodestar amount.[261] Nevertheless, prior to the Supreme Court's decision in *Blum v. Stenson*,[262] it was the rule rather than the exception for courts in both statutory fee and common fund cases to adjust the lodestar upward.[263]

---

257. Lindy I, 487 F.2d at 168.

258. Lindy II, 540 F.2d 102, 117 (3d Cir. 1976).

259. *See id.* The Court elaborated on how these factors should be evaluated:

> 1. Analysis of plaintiff's burden. Subsumed in this category are the following considerations: (a) the complexity of the case,—legally and factually; (b) the probability of defendant's liability,—whether it is clear or dubious; whether it has been previously suggested by other civil or criminal proceedings; whether it is asserted under existing case law or statutory interpretation, or is advanced as a novel theory; (c) an evaluation of damages,—whether the claims would be difficult or easy to prove.
>
> 2. Risks assumed in developing the case. This category subsumes consideration of: (a) the number of hours of labor risked without guarantee of remuneration; (b) the amount of out-of-pocket expenses advanced for processing motions, taking depositions, etc.; (c) the development of prior expertise in the particular type of litigation; recognizing that counsel sometimes develop, without compensation, special legal skills which may assist the court in efficient conduct of the litigation, or which may aid the court in articulating legal precepts and implementing sound public policy.
>
> 3. The delay in receipt of payment for services rendered.
>
> If, having considered the foregoing or other relevant criteria, the district court desires to increase the "lodestar" award, it should identify those factors supporting its conclusion, state the specific amount by which the basic fee should be increased due to the contingency of success, and give a brief statement of reasons therefor. We reiterate that any such increment in the "lodestar" award is to be considered and applied apart from the evaluation of the quality of services rendered in the particular proceedings.

Id.

260. *See* Dobbs, *supra* note 22, at 468-69.

261. *See* Lindy II, 540 F.2d at 117 ("Finally, we underscore that once a district court determines the 'lodestar' it should inquire *separately* into the contingency and quality factors, and make specific findings of fact as to each.").

262. 465 U.S. 886 (1984).

263. *See, e.g.*, *In re* Gas Meters Antitrust Litig., 500 F. Supp. 956 (E.D. Pa. 1980) (lodestar increased by a factor of 2.5 in antitrust common fund case); Charal v. Andes, 88 F.R.D. 265 (E.D. Pa. 1980) (adjustment by factor of 1.5 in securities fund settlement); Keith v. Volpe, 86 F.R.D. 565 (C.D. Cal. 1980) (lodestar enhanced by a factor of 3.5 in

1. Quality Adjustment

An examination of the factors that *Lindy* held relevant to adjusting the lodestar for quality of performance raises the question whether this exercise is duplicative of the initial process of determining the lodestar.[264] In statutory cases, the complexity and novelty of issues would normally be subsumed in the initial lodestar calculations because longer hours would be necessary in such cases.[265] Nor is the size of any recovery crucial. As previously discussed, in statutory fee cases, unlike common fund cases, the fee is paid to the prevailing plaintiff by the defendant, whatever the nature of the relief granted, whether monetary or non-monetary.[266] The fee award is, therefore, independent of the value of the settlement, and courts may shift fees in amounts far in excess of any monetary recovery.[267] Consequently, one may argue that the purpose of fee-shifting statutes—to assure that victims of wrongdoing will have access to attorneys to enforce statutory rights—is met where the attorney engaged can expect a "reasonable fee," that is, a reasonable number of billable hours times a reasonable hourly rate.[268] Therefore, a quality multiplier might be superfluous.

Nevertheless, two strong arguments for permitting a quality multiplier remain. First, enhancement for quality would be appropriate in cases achieving truly exceptional results.[269] Such cases encourage more vigorous enforcement of federally created rights by private parties. Clearly, quality adjustments on this basis would be rare. Second, a quality multiplier might be utilized to reward demonstrated efficiency and administrative skill in plaintiff's conduct of the litigation.[270] To the extent

---

civil rights statutory fees case); Cleverly v. Western Elec. Co., 450 F. Supp. 507, 512 (W.D. Mo. 1978) (lodestar augmented by 30% in statutory fees case), *aff'd*, 594 F.2d 638 (8th Cir. 1979).

264. *See, e.g.*, Blum v. Stenson, 465 U.S. 886, 898 (1984) ("The novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee based on the number of billable hours times reasonable hourly rates.").

265. *See id.*; Dobbs, *supra* note 22, at 469 ("Given a fee computation based on hourly fee charges, most of those [quality] factors would already be reflected in the determination of reasonable hours or in the determination of the reasonable rate.").

266. *See supra* notes 38-39 and accompanying text.

267. *See, e.g.*, City of Riverside v. Rivera, 477 U.S. 561, 564-65 (1986) (fee award of $245,456.25 granted in a civil rights case where damage recovery amounted to $33,350).

268. *See, e.g.*, Delaware Valley I, 478 U.S. 546, 565 (1986) (strong presumption that lodestar figure represents a reasonable fee is consistent with rationale of fee-shifting statute).

269. *See, e.g.*, Blum v. Stenson, 465 U.S. 886, 899 (1984).

270. *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1313 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 226 (2d Cir. 1987). In discussing quality adjustments, Judge Weinstein stated:

> Although not generally considered an aspect of proficiency, related criteria such as tenacity, demonstrated ability to bear strains attendant upon preparation of a difficult case for trial under the pressure of short time schedules, and skill shown in coordinating the work of many attorneys also may be taken into account. These qualities of character and administrative skill often make the dif-

attorneys are compensated on a straight time basis, they have little incentive to engage in efficient, time-saving behavior; instead, the incentive is quite the opposite. By rewarding efficiency and penalizing inefficiency, the quality multiplier encourages cost minimization by plaintiffs' attorneys. These quality multipliers ought not to be routinely awarded; an attorney urging their use should bear the burden of establishing with specificity the efficiencies achieved or the extraordinary nature of the results obtained.

The argument for quality multipliers is more persuasive in common fund cases. Indeed, quality of representation is important in common fund cases. One key indication of quality of representation is results obtained. Since in common fund cases, the fee award comes out of the settlement amount, the fee ultimately depends on the amount of recovery. Rarely would a fee award exceed 50 percent of the settlement.[271] Thus, if a large number of billable hours yields a low recovery, a negative multiplier would be appropriate. Conversely, if relatively few billable hours generate a large recovery, a positive multiplier ordinarily would be utilized. Otherwise, attorneys' compensation would not be commensurate with the benefit conferred on the fund participants. Attorneys may achieve outstanding results with relatively few billable hours because of efficiency, superior administrative abilities, extraordinary negotiating skills or experience. Neither component of the lodestar would adequately take these factors into account; billable hours in this case are fewer, not more. Nor can it be said that an attorney who has achieved extraordinary results will necessarily be compensated by a high hourly rate. In determining what constitutes a reasonable hourly rate, the court looks to prevailing rates in the legal community. It is highly unlikely that the court, in a community where the going rate is $150 per hour, would award a lodestar fee of $450 per hour to an attorney who by reason of superior administrative ability or experience is able to achieve favorable settlements in one-third the time that other attorneys in the community ordinarily would spend. Thus, use of a quality multiplier is essential in these cases.

In addition, the multiplier is necessary in common fund cases in order to encourage efficiency. If the lodestar were presumptively the appropriate fee, attorneys would not only lack incentives to develop efficient ad-

---

> ference between success and failure in a lawsuit. They are properly considered lawyer's skills.

Id.

271. The rationale for awarding fees in common fund cases is to prevent unjust enrichment of fund beneficiaries at the expense of the attorney creating the fund. Were attorneys to be awarded fees in amounts exceeding 50 percent of the fund, they would be receiving greater compensation than that received by all beneficiaries combined. It would be anomalous to countenance a fee structure that would permit attorneys to derive a greater financial benefit than those for whom the fund has been created. Historically, fee awards in common fund cases have fallen in the area of 20-30 percent of the total recovery.

ministrative techniques, they would have significant motivation to perform tasks inefficiently and engage in make-work projects. A second aspect of quality of results is the number of people benefitted by the fund created through the attorney's efforts. To the extent large numbers of individuals are compensated by the fund or obtain additional non-monetary relief, significant benefits are conferred that may not be reflected in the basic lodestar computation. It is not unreasonable for those benefitted to contribute to attorneys' fees. The larger the number of beneficiaries, the greater the aggregate size of contributions from each claimant. The multiplier enables the court to factor into the fee award the scope of the relief obtained and prevents unjust enrichment of fund beneficiaries.

2. Risk Adjustment

Under the traditional *Lindy* analysis, the risk of not prevailing is the second factor to be considered in adjusting the lodestar.[272] Critics of the contingency adjustment have assailed the *Lindy* standard, which permits courts to adjust the lodestar upward to account for the probability of success of the action. This criticism is grounded in the belief that risk adjustments promote baseless suits, permit large multiples of the lodestar, create conflicts of interest between attorneys and clients, are unfair to defendants with strong defenses, permit subsidization of unsuccessful suits contrary to the statutory policy of allowing fee-shifting only in successful litigation, and force courts to undertake a complex and perhaps speculative determination of the probability of success *ex ante*.[273] As discussed below, these criticisms possess some validity in statutory cases, but are largely irrelevant in common fund cases. Moreover, even in statutory fee cases, there is a principled basis for allowing risk adjustments that the above criticisms fail to address.

a. *Baseless Suits*

The contingency adjustment arguably provides a significant misincentive by increasing the fee as the likelihood of success decreases.[274] To the extent this is true, baseless suits would be promoted. As Professor Leubsdorf notes, where the reward increases as the probability of winning decreases, the attorney no longer has the incentive to favor strong cases over weak ones as long as there is some possibility of winning.[275]

272. *See* Lindy I, 487 F.2d 161, 168 (3d Cir. 1973).

273. *See, e.g.*, McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984); Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 26-28 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985); Murray v. Weinberger, 741 F.2d 1423, 1430-31 (D.C. Cir. 1984); Leubsdorf, *supra* note 22 at 482-97.

274. *See* Leubsdorf, *supra* note 22, at 491-92 ("As the chances of success become smaller, the fee will be multiplied by a growing contingency factor, so that uncertain claims will also be pressed.").

275. *See id.* at 492. The point is illustrated by the following example:

> Suppose a lawyer considers one hundred potential clients, each with a claim

Leubsdorf may be correct that, in theory, an attorney can determine *ex ante* the likelihood of success of a particular claim and select cases accordingly. Nevertheless, his analysis assumes a mechanical application of the contingency adjustment that is simply unrealistic. It is extremely difficult for an attorney to measure *ex ante* the probability of success of a case.[276] Although attorneys have developed realistic—if imperfect—methods of risk-weighing, litigation remains essentially unpredictable. The fine calculations suggested by Leubsdorf simply cannot be made by even the wisest attorney in the day-to-day practice of law. The argument also glosses over the fact that fees are shifted only when the plaintiff *prevails*.[277] If the claim is truly baseless, the likelihood of prevailing on the merits is near zero. It may be that even baseless suits have some nuisance settlement value, but where settlements are nominal, the likelihood of large contingency multiples is quite remote.[278]

Moreover, this position ignores the significant disincentives to bringing baseless suits. Rule 11 may be invoked and in frivolous cases can result in fee-shifting to the defendants, independent of any statutory remedy.[279] In the antitrust realm, high costs, complexity of issues and delay in judgment discourage even meritorious suits; *a fortiori*, these same obstacles discourage baseless suits.

b. *Large Multipliers*

Closely related to the problem of promoting baseless suits is the concern that a contingency multiplier could give rise to enhancements in every case. Since success in litigation is never guaranteed, there could theoretically be enormous adjustments in the lodestar. For example, if chances of success were deemed *ex ante* to have been one in fifty, a multi-

---

> having only a five percent probability of success. Each plaintiff claims damages of $1,000, and each claim would cost the plaintiff $2,000 in attorney time to try. Under the contingency bonus system, the lawyer should accept all these claims. He can expect to win five cases, for each of which he will receive $2,000, multiplied by a contingency factor of twenty because each claim had a chance of one in twenty of succeeding. His total winnings will be $200,000, precisely what he would have been paid had each of the hundred clients been willing to pay the costs of litigation.

Id.

276. *See* Berger, *supra* note 22, at 325-26.

277. *See* Brief of the American Bar Association as Amicus Curiae in Support of Respondent Delaware Valley Citizens' Council For Clean Air at 19, Pennsylvannia v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987) (No. 85-5) [hereinafter ABA Amicus Brief] (available in the files of the *Fordham Law Review*).

278. This is not to trivialize the problem of baseless litigation in the federal system. Indeed, the widespread perception that frivolous lawsuits were a significant problem in the federal courts led to the adoption of more stringent standards to deter and punish baseless action. *See* Fed. R. Civ. P. 11. Nevertheless, the notion that litigants and their attorneys will have significant incentives to conjure up wild and wooly lawsuits solely for their nuisance settlement value—in the face of the reinvigorated Rule 11—seems far-fetched.

279. *See* Fed. R. Civ. P. 11.

plier of fifty is arguably appropriate.[280] Yet, a look at how courts have in fact used the risk multiplier suggests that fears about use of inordinately large multipliers are unfounded. Indeed, as critics of risk adjustment concede, courts rarely employ multipliers in excess of two.[281] Hence, it is unlikely that risk adjustments would result in large windfalls for plaintiffs' attorneys.

c. *Conflict of Interest*

Opponents of the contingency multiplier claim that risk enhancement encourages attorney-client conflict of interest by encouraging the attorney to stress the weaknesses in a case to recover a larger bonus.[282] Consequently, the merits of the plaintiff's claim would be undermined before the trier of fact and the adversary. The risk of this scenario, however, is more imaginary than real. If a claim is truly vulnerable, it will undoubtedly be challenged by the defendant prior to trial either by a motion attacking the pleadings[283] or by summary judgment.[284] At this point, plaintiffs' attorneys must put forth their best case or face dismissal. The court will then have an opportunity to assess the true merits of the case in light of its strongest—not weakest—potential.

d. *Unfairness to Defendants With Strong Cases*

Critics further contend that is it unfair to force defendants with strong evidence and, hence, a solid basis for contesting liability, to pay the highest fees because of the contingency multiplier.[285] A defendant who has lost a strong case is adequately deterred from violating the law by paying actual attorneys' fees.[286] To the extent a risk adjustment is an appropriate vehicle for the goal of deterrence, that goal is better achieved by taxing defendants with the weakest cases, not the strongest.[287]

The primary goal of fee-shifting statutes, however, is to enable private parties to have access to attorneys and thereby to encourage private actions to vindicate rights granted under substantive law.[288] The contingency multiplier serves this goal. Weak proof and baseless claims are not synonymous. Where the plaintiff has a meritorious claim but weak proof or is faced with a strong defense, it may be very difficult to engage an

---

280. *See* Leubsdorf, *supra* note 22, at 481 (one in fifty chance of success would arguably justify a multiplier of fifty).

281. *See* Wildman v. Lerner Stores Corp., 771 F.2d 605, 613 (1st Cir. 1985) (enhancement in civil rights cases only exceeded 100 percent three times between 1980 and 1985); Leubsdorf, *supra* note 22, at 487-88; ABA Amicus Brief, *supra* note 277, at 17-18; *see also* 7B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 1803, at 508 (2d ed. 1986) (virtual absence of data showing any significant incidence of excessive fees).

282. *See* Leubsdorf, *supra* note 22, at 482-85.

283. *E.g.*, Fed. R. Civ. P. 12(b)(6).

284. Fed. R. Civ. P. 56.

285. *See* Leubsdorf, *supra* note 22, at 488-91.

286. *See id.* at 490.

287. *See id.*

288. *See supra* notes 45-47 and accompanying text.

attorney on a contingent fee basis without some promise of an enhanced reward should the claim succeed. Awarding the plaintiff an enhanced fee better measures the true cost of vindicating the rights in question than would applying a straight lodestar analysis.

e. *Subsidization of Unsuccessful Suits*

Opponents of risk enhancement argue that the contingency multiplier contradicts congressional intent by allowing fee-shifting to losing parties. They argue that, if the lodestar is adjusted upward to account for the risk of not prevailing and hence the risk of recovering no fee, plaintiffs' attorneys will no longer choose to prosecute cases based on their merits because the enhanced fee earned when victorious will make up for the unsuccessful cases where no fee is awarded. Simply put, risk enhancement enables the plaintiff's attorney to use fees earned in successful suits to subsidize unsuccessful suits. Indirectly, at least, the result is the same as allowing fee-shifting to unsuccessful plaintiffs.[289] This argument fails on two counts. First, as noted above, courts rarely grant multiples higher than two.[290] Therefore, it is unlikely that attorneys can use the multiplier to "average out" losses. Second, the risk multiplier does not contravene the statutory policy against compensating losing parties. Losing *parties* receive nothing even with risk enhancement.[291] Only *attorneys* who have represented winners as well as losers may have their financial losses eased by enhanced fees. This mitigation of risk provides the incentive for attorneys to handle cases where fees are uncertain.[292]

f. *Lack of Manageable Standards*

Finally, it has been argued that risk adjustment forces the courts to make complicated and costly *ex post* inquiries into the probability that plaintiff would have prevailed.[293] Fees are awarded at the end of the litigation, and hindsight only confuses the assessment of how likely the case was to succeed at the outset.[294] In a sense, the trial court is being asked to assess how likely it was to reach what it now views as the proper result.[295] As Professor Leubsdorf has observed, it is questionable "whether a judge should be called upon to look for the dust swept under the same rug on which he is standing."[296]

While the arguments against risk enhancement are forceful, they do not necessarily preclude utilization of a contingency adjustment. Oppo-

289. *See* McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984); Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 27-28 (D.C. Cir. 1984); Leubsdorf, *supra* note 22, at 491-92.

290. *See supra* note 281 and accompanying text.

291. *See* ABA Amicus Brief, *supra* note 277, at 19.

292. *See id.*

293. *See* Leubsdorf, *supra* note 22, at 485-88.

294. *See id.* at 486.

295. *See id.* at 487.

296. *Id.* at 487.

nents of risk enhancement, by urging that adjustments for risk are designed to equalize prospective returns among contingent cases with different degrees of merit, misconceive the underlying rationale of the contingency factor. Their argument is flawed because risk enhancement does not depend on the degree of risk in a given case, but rather, "is designed simply to place contingent employment *as a whole* on roughly the same economic footing as noncontingent practice, in order that such cases receive the equal representation intended by Congress."[297]

Normally, attorneys who accept a contingent fee case demand a higher fee than they would were payment guaranteed.[298] To the extent the lodestar reflects only what fee-paying clients are charged, it undervalues attorneys' services in contingent fee cases. Even Professor Leubsdorf, a leading critic of risk adjustments based on the likelihood of success of a particular case, recognizes that some enhancement for risk is essential if attorneys are to be compensated at fair market value for their services.[299] To the extent that the standardized hourly rate, discussed above,[300] reflects the rate fee-paying clients are charged, it does not fully compensate the attorney because he is not being paid the opportunity cost of foregoing a fee-paying client for a client whose payment is contingent on results obtained. Because attorneys are not fully compensated without a risk adjustment in contingency cases, they may shy away from these inherently risky cases.[301] Moreover, because contingent fee cases usually involve substantial delays between the rendering of services and the award of fees and may require the attorneys to advance certain costs such as salaries and disbursements, particular cases may impose special economic risks on attorneys.[302] Unless compensated for such risks, attorneys may lack sufficient economic incentives to take on contingent fee cases. This stymies the fundamental goals of fee-shifting legislation.[303] As a result, the legislative purposes underlying fee-shifting statutes—to permit access to attorneys to assure vigorous private enforcement of fed-

297. Delaware Valley II, 107 S. Ct. 3078, 3097 (Blackmun, J., dissenting) (emphasis in original).

298. *See id.* at 3091-92.

299. *See* Leubsdorf, *supra* note 22, at 480 ("A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the [legal services]. If he is paid no more, competent counsel will be reluctant to accept fee award cases."); Delaware Valley II, 107 S. Ct. at 3097 (Blackmun, J., dissenting).

300. *See supra* note 242 and accompanying text.

301. *See* Leubsdorf, *supra* note 22, at 480.

302. *See* Lindy I, 487 F.2d 161, 168 (3d Cir. 1973); ABA Amicus Brief, *supra* note 277, at 12.

303. *See* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983); Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc., 776 F.2d 646, 662 (7th Cir. 1985) (enhancement for risk "provides an inducement for lawyers to accept meritorious cases that might otherwise go unheard"); Yates v. Mobile County Personnel Bd., 719 F.2d 1530, 1534 (11th Cir. 1983) (busy and highly skilled attorneys are not likely to accept contingency cases if limited to the hourly rate; thus leaving advocacy of such cases to less successful lawyers).

erally granted rights—would be defeated.[304]

The arguments against risk adjustment do not apply with equal force in common fund cases. Indeed, the same argument exists for allowing the contingency bonus in common fund cases to prevent unjust enrichment of fund beneficiaries as in statutory cases: hourly rates charged to fee-paying clients are normally less than the compensation received in contingency cases. To the extent that the fee award reflects only the services actually rendered on an hourly basis and does not take into account opportunity costs, attorneys are not fully compensated for their economic costs and fund participants are unjustly enriched at their expense.

In addition, the economic risk of non-payment may be aggravated by the delay in payment even when the claim is successful. Attorneys may see no return on their investment in legal services for several years.[305] Delay in payment serves to increase the uncertainty in taking on a contingent case. The attorney is not only without the use of money but also may experience cash-flow problems.[306] Risk enhancement offsets this disincentive to handling contingency cases.

A second aggravating factor is the impact of the risk of non-recovery on a particular attorney.[307] Contingent cases may pose a greater risk to small firms that may have to turn away fee-paying clients after underaking contingent representation.[308] Larger firms can absorb these additonal fee-paying clients and thereby lessen the risk in undertaking contingent representation.

This does not mean that the same degree of risk adjustment is appropriate in every common fund case simply because all contingency cases involve some opportunity costs and delay in payment. The need for risk adjustment in some cases is minimal. For example, the risk to the attorney undertaking contingent representation is slight where the claim is part of a series of actions against the same defendants and those defendants have been settling, rather than trying the claim. Nor would the need for risk adjustment be significant where the plaintiff, invoking the doctrine of issue preclusion, is able to benefit from factual findings on liability issues from a prior litigation involving the defendant, leaving only damages issues to be resolved. Similarly, the lodestar should not be adjusted where the plaintiff, by statute, derives presumptive or conclusive effect from factual findings in prior litigation. Thus, findings made in a

304. *See Yates*, 719 F.2d at 1532.

305. *See* Delaware Valley II, 107 S. Ct. 3078, 3099 (1987) (Blackmun, J., dissenting); Graves v. Barnes, 700 F.2d 220, 222-23 (5th Cir. 1983); Parker v. Lewis, 670 F.2d 249, 250 (D.C. Cir. 1981); Copeland v. Marshall, 641 F.2d 880, 893 (D.C. Cir. 1980); ABA Amicus Brief, *supra* note 277, at 21.

306. *See* ABA Amicus Brief, *supra* note 277, at 21.

307. *See* Delaware Valley II, 107 S. Ct. at 3099 (Blackmun, J., dissenting); Craik v. Minnesota State Univ. Bd., 738 F.2d 348, 350-51 (8th Cir. 1984); ABA Amicus Brief, *supra* note 277, at 22.

308. *See* ABA Amicus Brief, *supra* note 277, at 22.

successful government prosecution are, under section 15(a) of the Clayton Act, entitled to prima facie effect in subsequent private actions involving the same facts under section 4 of the Clayton Act.[309] The need for risk enhancement is *de minimis* in these cases.

V. THE SUPREME COURT AND MEASUREMENT OF ATTORNEYS' FEES

The Supreme Court has endorsed the time-based compensation formula in four recent decisions interpreting federal fee-shifting statutes.[310] However, the Court has severely restricted the circumstances under which multipliers may be used to adjust the lodestar and has made it clear that any adjustments would have to be supported by specific record evidence.[311] By limiting the scope of the trial court's discretion, the Court has sought to provide a more objective and predictable basis upon which to determine fees and thereby eliminate arbitrary awards. However, in doing so, the Court may be acting at cross purposes with fee award statutes. Limiting the size of fees may well discourage private enforcement of federally created rights.

The process of setting fee standards has been an evolutionary one for the Court. In *Hensley v. Eckerhart*,[312] which arose under the Civil Rights Attorney's Fees Act of 1976,[313] the Court adopted a hybrid approach to measuring fee awards that shared aspects of both *Johnson* and *Lindy*.[314] Following the first step in *Lindy*, the Court stated that the calculation of a lodestar amount "provides an objective basis on which to make an initial estimate of the value of a lawyer's services."[315] The Court further stated that the lodestar amount may then be adjusted upward or downward by taking into account the *Johnson* factors, although it recognized that many of the *Johnson* factors are "subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate."[316]

The Court subsequently refined its expansive view of the factors available to adjust the lodestar in *Blum v. Stenson*.[317] In *Blum*, the Court stated that the lodestar amount is presumed to be the reasonable attorneys' fee and not merely a first approximation.[318] The Court also limited

309. *See* 15 U.S.C. § 15(a) (1982).

310. *See* Delaware Valley II, 107 S. Ct. 3078 (1987); Delaware Valley I, 478 U.S. 546 (1986); Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983).

311. *See Blum*, 465 U.S. at 898-99.

312. 461 U.S. 424 (1983).

313. 42 U.S.C. § 1988 (1982).

314. *See* Delaware Valley I, 478 U.S. at 563-64.

315. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); *see also* Dobbs, *supra* note 199, at 838 (first step in calculating attorney's fee is to multiply the number of hours worked by the appropriate rate).

316. *Hensley*, 461 U.S. at 434, n.9 (citing Copeland v. Marshall, 641 F.2d 880, 890 (1980) (en banc)).

317. 465 U.S. 886 (1984).

318. *See id.* at 898.

the factors that the trial judge may consider in adjusting the lodestar.[319] In particular, the Court noted that many *Johnson* factors, including novelty and complexity of issues, special skill and experience of counsel, quality of representation and the results obtained, are normally subsumed within the lodestar and therefore cannot serve as an independent basis for adjusting the basic fee calculation.[320] Adjustments to the lodestar are still permissible, but only in rare and exceptional cases "supported by both 'specific evidence' on the record and detailed findings by the lower courts."[321] The Court further held that quality of representation is a permitted adjustment when supported by "specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.' "[322] However, the Court left unresolved the issue whether the risk of not prevailing may serve as a basis for enhancing a fee award.[323]

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air ("*Delaware Valley I*"),[324] reiterated the view that the lodestar amount is presumed to yield a reasonable fee. The Court reversed the lower court's determination that the lodestar should be doubled to account for the "superior quality" of counsel's work and the "outstanding results" obtained because the plaintiff had failed to sustain its burden of showing that the results achieved were outstanding and did not show that the lodestar failed to reflect fully the quality and competence of legal services rendered by plaintiff's counsel.[325] The Court emphasized the need for the lower courts to make detailed findings on the unreasonableness of the lodestar amount and the appropriateness of an upward adjustment for quality.[326]

Delaware Valley I did not reach the question whether upward adjustments in the lodestar were appropriate to account for the risk of not prevailing.[327] That question was, at the direction of the Court, reargued the following term in *Delaware Valley II*,[328] but its decision has confused more than clarified the issue. In a 5-4 decision, the Court held that the trial court erred in applying a risk multiplier on the facts of the case. Four Justices in the plurality opinion expressed the view that "multipliers or other enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee-shifting

319. *See id.* at 898-902.
320. *See id.*
321. Delaware Valley I, 478 U.S. 546, 565 (1986); Dobbs, *supra* note 199, at 867-69.
322. *Blum*, 465 U.S. at 899.
323. *See id.* at 901.
324. 478 U.S. 546, 564 (1986).
325. *See id.* at 567-68.
326. *See id.* at 565, 568.
327. *See id.* at 568 ("We are of the view that our resolution of the issue [of risk enhancement] would be benefitted by reargument and hence we do not decide it now.").
328. 107 S. Ct. 3078 (1987).

statutes."[329] Four dissenters took the position that upward adjustments to account for the contingency factor were not only appropriate under federal fee-shifting statutes but also necessary to ensure that private citizens have a meaningful opportunity to vindicate statutory rights.[330] Justice O'Connor, casting the swing vote, agreed with the dissenters that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions such as that of the Clean Air Act, 42 U.S.C. § 7604(d), and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988."[331] Nevertheless, she concluded that the lower court erred in using a risk multiplier in the circumstances of the case.[332] Justice O'Connor expressed concern that allowing the distict courts to exercise unbridled discretion in adjusting the lodestar for risk factors might lead to arbitrary and inequitable results and recommended that certain constraints be imposed on the trial courts' discretion in setting fees.[333]

A majority of the Court in *Delaware Valley II*, however, appears to accept in theory the concept of a contingency multiplier in statutory fee cases. Similarly, the Court in *Blum* recognized that enhancement of the lodestar for quality of representation is also appropriate, but only in certain rare circumstances.[334] Nevertheless, the Court's approach to the quality multiplier appears unduly restrictive. It provides little incentive to employ efficient techniques to reduce hours; to the contrary, the Court's presumptive standard encourages padding of hours, waste and inefficiency. Furthermore, by not setting truly objective standards, these cases encourage trial courts to manipulate the lodestar to reach what appears to be a reasonable fee. Accordingly, trial courts may use current rather than historic billing rates to fully compensate for performance of repetitive tasks, or utilize premiums in determining the hourly rates

---

329. *Id.* at 3087.

330. *Id.* at 3091-102.

331. *Id.* at 3089 (O'Connor, J., concurring).

332. *Id.* at 3091.

> The [risk] enhancement is not supported by any findings of fact concerning the degree to which contingency is compensated in the relevant market. Neither the findings nor the evidence indicate that the large enhancements in this case were necessary to attract competent counsel in the relevant community. Moreover, it is clear that the District Court based the enhancement on "legal" risks and risks unique to the case. The considerations used by the District Court to justify the enhancement—the "new and novel issues" raised by the case, and the stubbornness of the defendants, 581 F.Supp. 1412, 1431 (1984)—should already be reflected in the number of hours expended and the hourly rate, and cannot be used again to increase the fee award.

Id.

333. *See id.* at 3090-91. Justice O'Connor proposed the following constraints: (1) courts should treat a determination of how a particular market compensates for risk as controlling future cases involving the same market; (2) fee applicants bear the burden of proving the degree to which a relevant market compensates for contingency; (3) the court shall not award any enhancement based on "legal" risk or risks peculiar to a case.

334. *See* Blum v. Stenson, 465 U.S. 886, 898-99 (1984).

rather than resorting to a multiplier. Hence, the Supreme Court standard may not only undermine congressional intent but also provide the illusion of objectivity rather than objectivity itself.[335] It is clear that the Court has not resolved the use of the risk multiplier. The Court should focus on the fundamental purpose of the risk multiplier—placing contingent practice on an equal footing with non-contingent practice. As discussed above, attorneys who accept contingent cases normally command a higher fee than those compensated on an hourly basis regardless of result; therefore a lodestar measuring hourly rates based upon what fee-paying clients are charged does not cover the contingency costs to attorneys. Therefore, a risk multiplier is appropriate to consider in contingent fee cases.

The foregoing cases all involve interpretation of federal statutory fee-shifting provisions, and this raises the question whether the *Lindy* approach, as refined by the Supreme Court, is now equally applicable in common fund cases. As previously discussed, the significant differences in the rationales suggest that principles developed with respect to statutory cases should not be applied automatically to common fund cases.[336]

Moreover, the Court itself in *Blum* suggested that common fund cases would be governed by different standards from statutory fee cases:

> Unlike the calculation of attorney's fees under the "common fund doctrine," where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under [42 U.S.C.] § 1988 reflects the amount of attorney time reasonably expended on the litigation.[337]

Consequently, the risk of non-payment is an appropriate factor to consider in determining the fees in common fund cases.

VI. Reform Proposals

The confusing case law and the lack of truly objective standards in fee award cases have given rise to several reform proposals. Set forth below is an analysis of the salient features of the most significant proposals.

A. *The Third Circuit*

Some ten years after its *Lindy* decisions, and in light of the Supreme Court decisions in *Blum* and *Hensley* and its own experience in *Fine Paper Litigation*, the Third Circuit appointed a special Task Force to revisit the question of the appropriate standards for awarding attorneys' fees.[338] The Task Force proposed significant modifications in the fee-setting process, although the changes were more far-reaching in common fund cases

---

335. *See In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1310 (E.D.N.Y. 1985) (examples of discretionary multipliers), *aff'd*, 818 F.2d 226 (1987).

336. *See supra* notes 40-42 and accompanying text.

337. *Blum*, 465 U.S. at 900 n.16.

338. Third Circuit Task Force Report, *supra* note 218.

than in statutory cases.[339]

1. Statutory Cases

In statutory cases, the Task Force accepted the basic framework of *Lindy* with several modifications.[340] First, it proposed standardizing hourly rates for attorneys to reduce the time spent in calculating the "customary" or "normal" billing rate for each attorney in the case.[341] At the same time, the Task Force recognized that attorneys' services are not fungible and therefore suggested standards based on the number of years experience.[342] Within each level of experience (for example, one to five years, five to ten years) the billing rate would be uniform for all attorneys. Out of town attorneys would be compensated at the forum rate, not at the rates applicable in their home districts.[343] Deviations from standard rates would be permitted in exceptional cases, but the Task Force clearly stated that any deviations should be few in number.[344]

Second, the Task Force proposed that the question of billable hours as well as standardized rates and multipliers be discussed at pretrial conferences[345] in light of the criticism that the *Lindy* standard requires monitoring the number of hours billed by attorneys. The court may ask for a proposed budget of hours or a stipulation on the projected range of hours.[346] The goal is for the court to estimate the maximum hours to be allowed in the lodestar so as to discourage excessive strategic discovery.[347] At the time of rendering the fee award the court would retain the right to eliminate hours it views as excessive.[348]

Third, the Task Force recommended revisions in the application of multipliers.[349] In light of *Blum* and *Hensley*, it proposed eliminating the quality multiplier in statutory cases since this factor should already have been accounted for in the standardized hourly rate and because the process of determining the quality factor is simply too subjective.[350] The Task Force, however, concluded that the contingency factor should be considered in all actions because attorneys always face the risk of receiv-

339. *See id.* at 254-60.
340. *See id.* at 259-66.
341. *See id.* at 260.
342. *See id.* at 260-61.
343. *See id.* at 261. This proposal departs from the existing practice in the Third Circuit. *See* Cunningham v. City of McKeesport, 753 F.2d 262, 267 (3d Cir. 1985) (requiring courts to compensate attorneys at the reasonable rates prevailing in the attorney's home district), *cert. denied*, 107 S. Ct. 2179 (1987).
344. *See* Third Circuit Task Force, *supra* note 218, at 261-62. The report, however, did not specify instances where the Task Force thought that any deviation would be appropriate.
345. *See id.* at 262-63.
346. *See id.*
347. *See id.* at 263.
348. *See id.*
349. *See id.*
350. *See id.* at 264-65.

ing no fee in statutory cases.[351]

In addition, the Task Force proposed several other adjustment factors, including the result obtained, the petitioning attorney's contribution to the expeditious resolution of the case, and the delay in receiving the fees.[352] The first factor obviously provides positive reinforcement to attorneys who have achieved successful outcomes despite the risk of no compensation if unsuccessful. The second factor rewards efforts to obtain early settlement and punishes dilatory tactics, thereby obviating the criticism that the lodestar method promotes delay and make-work projects by attorneys.[353] The third factor recognizes the time-value of money.[354] Where there has been a significant delay between the commencement of the action and the awarding of fees, the multiplier can compensate for loss of the use of money. The Task Force concluded that compensation for delay in payment might be accomplished either by upward adjustment to the hourly rate or by enhancing the lodestar.[355]

2. Common Fund Cases

In marked contrast to statutory fee cases, the Task Force recommended that the lodestar method be replaced by a percentage fee arrangement in traditional common fund cases and in statutory fee cases likely to settle.[356] The percentage fee would be determined at the "earliest practicable moment," preferably prior to discovery, and set at a level "agreeable to the [b]ench and to plaintiff's counsel."[357] The Task Force contemplated that the percentage would be subject to negotiation and not simply imposed by the court, but the specifics of the process would be left to the discretion of each judge.[358] Indeed, the Task Force recommended that in most instances, the fee should not be negotiated by the judge assigned to try the case but rather by another person who would, in effect, be the attorney for the fund.[359]

Generally, the percentage fee would decrease as the size of the fund

---

351. *See id.* at 265.
352. *See id.*
353. *See id.*
354. *See id.*
355. *See id.*
356. *See id.* at 255-56. The percentage fee would be based on a sliding scale and the percentage would decrease as the size of the fund increased.
357. *Id.* at 255.
358. *See id.* at 256.
359. *See id.* The Task Force stated that:

> Of critical importance is assuring that the compensation plan is negotiated in an open and appropriately arm's length manner. In most instances, particularly in complex cases, that task probably should not be undertaken by the district judge who will hear the case. When appropriate, it is recommended that the court appoint a non-judicial representative—who typically will be an attorney—for the then putative fund beneficiaries, who will negotiate the arrangement in the usual marketplace manner and submit the proposal for the court's approval.

Id.

increases and would include all features normally contained in similar arrangements negotiated between attorney and client.[360] When the negotiators could not reach an agreement on the percentage fee, the court would then set the percentage and seek assent of plaintiff's counsel.[361] To ensure that the fee is reasonable, the judge would retain authority to shift from a percentage fee to a lodestar basis, and to renegotiate the fee in the rare instances where the case raised issues not within the reasonable contemplation of the parties at the time the fee was set.[362]

This approach has several obvious advantages. The fee-setting process is simplified by eliminating the tortuous and unwieldy process of preparing and evaluating fee petitions. By setting the percentage fee at the outset, the problem of manipulating the lodestar will not arise because additional hours will not increase the size of the fee. In addition, early settlements would be encouraged because delays to build up the lodestar would not be rewarded. To the extent that the percentage is determined early in the litigation, the attorneys have a greater degree of predictability than is presently the case.

On the other hand, because rates are negotiated on a case by case basis, the negotiation process may result in some disparity between courts. The process still remains somewhat arbitrary because the Task Force offers no firm guidelines on what percentages ought to apply. This may give rise to "forum shopping" for the judges allowing the most favorable fees. Finally, there is a danger that plaintiffs' attorney may rush into a settlement that may not be in the best interest of the client to obtain a relatively favorable fee with little work invested.

B. *ALI Principles of Corporate Governance*

The American Law Institute, as part of its project on corporate governance, has proposed the following with respect to recovery of attorneys' fees in derivative actions:

> 7.18. Plaintiff's Attorneys' Fee and Total Expenses
>
> A successful plaintiff in a derivative action should be entitled to recover reasonable attorneys' fees and other litigation expenses from the corporation, as determined by the court having jurisdiction over the action, but in no event should this amount exceed a reasonable proportion of the value of the relief obtained by plaintiff.[363]

The thrust of this approach is to make attorneys' fees commensurate with the benefits conferred on the plaintiff while imposing a ceiling on fees proportional to the amount of recovery. The ALI approach is thus consistent with fee measurements based on percentage of recovery or the lodestar method (modified to allow a ceiling on fees based on the amount

360. *See id.* at 255-56.
361. *See id.* at 257.
362. *See id.*
363. ALI Principles, *supra* note 182, § 7.18, at 250.

of recovery). Indeed, citing what it perceives to be a "lack of consensus" among the courts, the ALI does not endorse either the percentage of recovery method or the lodestar framework.[364]

By linking the fee to benefits conferred, the ALI proposal discourages delays in settlement in order to run up billable hours; under a benefits concept, an attorney has no promise of compensation for every hour billed. Several devices might be used, alternatively or in combination, to implement the benefits conferred approach. First, introduction of the ceiling concept, even if it is not expressly fixed, would deter delay.[365] Second, the court may establish ground rules aimed at expediting litigation and preventing overstaffing the case.[366] Third, and perhaps most drastic, the court might decline to shift fees for services rendered after a settlement has been tendered and rejected if the eventual recovery did not exceed the settlement offer.[367]

The ALI benefits-conferred approach also permits raising the lodestar amount if that figure is less than the value of the benefit bestowed on plaintiffs, which is presumably a percentage of the ultimate recovery.[368] It may be that courts, under the guise of a lodestar analysis, may employ positive or negative multipliers to award a fee falling near a "just" percentage of recovery. Whether the courts utilize a lodestar or percentage approach, or some combination of the two, the question arises as to how to set the percentage to ensure that the fee award is reasonable. This exercise is obviously subjective and, in truth, more art than science. The ALI approach, although sound in broad outline, may produce widely divergent results. Nevertheless, it does address many of the perceived

364. *See id.* at 250-51 comment a. (Section 7.18 does not mandate either the lodestar or percentage methods; its only admonition is that the fee, however computed, "should not exceed a reasonable percentage of the total recovery.").

365. *See id.* at 257 comment f. In such circumstances, plaintiff's attorney would have little to gain by postponing settlement to run up billable hours, since there would be a set limit on the amount of any reward.

366. *See id.*; *In re* Continental Illinois Sec. Litig., 572 F. Supp. 931 (N.D. Ill. 1983). Among other things, the following limitations were imposed: (1) only one lawyer may appear for plaintiffs at pretrial conferences and at depositions in order to eliminate multiple billing for the same tasks; (2) senior partners will be compensated only for services that warrant their attention; (3) no fees will be allowed for legal research on the law that is well known to practitioners in that area; (4) attorneys will not be compensated for reviewing work-product of other lawyers; (5) attorneys for the class will not be compensated for conferences with attorneys for individual class members; (6) travel will be reimbursed only where necessary; and (7) time records will be kept chronologically by activity rather than by attorney. *Id.* at 933-34.

367. *See* ALI Principles, *supra* note 182, § 7.18, at 257-58, comment f. In effect, any settlement offer would have the potential to "stop the clock" on billable hours claimed by plaintiff's attorney. If the attorney subsequently is able to obtain a more favorable settlement offer or a more favorable judgment, he could still claim compensation for services provided after initial rejection of settlement; but if the recovery is ultimately not as favorable as the initial settlement offer, post-settlement services would not be compensable.

368. *See id.* at 253-54.

abuses of the *Lindy* regime, and for that reason the proposal is a major step forward in reforming the law on attorneys' fees.

C. *Manual for Complex Litigation*

The Manual for Complex Litigation,[369] was created as a device to assist the courts in managing complex cases and has been used by many judges presiding over complicated antitrust matters. Although specifically designed for complicated cases, many of the Manual's suggestions may be implemented in a variety of cases. The Manual adheres to the lodestar approach but proposes several specific mechanisms to control fees.[370] First, contemporaneous time records must be maintained and summaries of these records must be filed with the court periodically.[371] This procedure has two significant functions. First, attorneys will be precluded from seeking compensation for services not reflected in the periodic reports, unless they can show good cause. Second, the court is given the opportunity to monitor the services rendered and to determine whether excessive time and money are being expended.[372]

The Manual's approach is specifically targeted at the perceived abuses of the lodestar method. Its success depends in large part on the judge's diligence in monitoring the case and his innate sense of fairness, for the court is given much leeway in determining whether given tasks are to be compensated.[373] Again, where judges have wide latitude in allowing or disallowing hours, standards between courts may diverge, thereby creating unfairness and encouraging forum shopping. More importantly, the

369. Manual For Complex Litig. (2d. ed. 1985). The Manual is prepared under the auspices of the Federal Judicial Center. Its purpose is to set forth the basic principles that characterize fair and efficient resolution of complex litigation and describes procedures that have been successfully used in implementing those principles. *See id.* at 1.

370. *See id.* § 24.12 at 180-84.

371. *See id.* § 24.21 at 188.

372. *See id.* In addition, the Manual proposes guidelines for the conduct of pretrial litigation that the court may issue at the outset of the litigation.

1. *Court appearances.* Attendance of all counsel in a multiparty case at pretrial conferences is rarely necessary and perhaps appropriate only at the first and final pretrial conferences. The court may choose to excuse counsel from participation or, alternatively, specify the maximum number of attorneys who will be compensated for attendance.

2. *Depositions.* The Manual also discourages excessive attendance at depositions and suggests that rarely should more than three attorneys with a common interest be present. The Manual further recommends that in deciding which attorneys are to attend particular depositions, the time and expense of travel should be minimized.

3. *Drafting and reviewing documents.* The Manual urges counsel to exercise restraint in the number of hours spent drafting, reviewing and revising discovery requests, pretrial briefs and motions. No standard is proposed for determining the number of attorneys needed to draft a given document, but where the number exceeds that which a court deems reasonable, excessive hours will not be compensated.

4. *Rates.* The Manual recommends that attorneys be compensated by function performed. Ordinarily, senior partners should be spending time on significant matters. If a senior partner does the work normally done by a junior associate, compensation would be at junior associate rates. *Id.*, § 24.22, at 189.

373. *See id.*

cost of monitoring the activities of counsel during the pretrial stage may prove both too cumbersome and too costly to remedy the identified evils of the lodestar method.

VII. Prescriptions

A. *Lodestar v. Percentage Fee*

The above discussion has catalogued the strengths and weaknesses of the competing regimes for measuring attorneys' fees. Ideally, the fee determination calculus should have elements of both the lodestar and percentage recovery approaches. The lodestar should serve as the basic measuring rod because the hourly rate approach better mimics the market for attorneys' services than does the percentage recovery, since most attorneys bill by the hour. Moreover, the lodestar method has wider application than the percentage method, which cannot be used when non-monetary relief is sought or where defendants are claiming fee awards.

In addition, the lodestar method, unlike the percentage recovery approach, can be utilized in statutory fee cases involving non-monetary relief as well as in common fund cases. In no event, however, should fee awards in common fund cases exceed a reasonable share of the fund. Therefore, a percentage cap on any lodestar recovery is appropriate in common fund cases. The key in determining the cap is measuring the benefit conferred on the fund beneficiaries. Rarely, if ever, would the benefit conferred exceed 50 percent of the value of the fund. Typically, courts in common fund cases have awarded fees in the range of 20 percent to 30 percent of recovery.[374] Therefore, a cap of 33⅓ percent of the recovery ordinarily ought to assure a fee commensurate with the benefit conferred. Nevertheless, courts in cases where the recovery is relatively small should have leeway to award fees up to 50 percent of the fund. It would be quite difficult to make a case for recoveries greater than 50 percent. This is not to say that plaintiffs should be precluded as a matter of law from seeking fees in excess of 50 percent of the fund. Perhaps the courts should follow a strong presumption that a fee of this magnitude is excessive absent a showing to the contrary by clear and convincing evidence.

Of course, percentage caps arguably are not needed in statutory fee cases; the underlying rationale for fee-shifting in these cases is not to confer a benefit on plaintiffs, but rather to encourage private enforcement of statutory rights. Therefore, the reasonable fee need not necessarily relate to the amount of recovery. Indeed, courts in statutory cases have awarded fees disproportionate to amounts actually recovered in damages.[375] It is questionable, however, whether the fee incentive *should* be used to encourage enforcement of statutory rights at *any cost*. The

374. *See supra* note 181.

375. *See* City of Riverside v. Rivera, 477 U.S. 561 (1986); *see also* Dobbs, *supra* note 199, at 849 ("The proportionality rule would seem to violate the premises of the private

argument that fee awards should be proportional to the amount in controversy is not without merit.

However, for a lodestar-based measurement to operate fairly and effectively, several modifications of the present system should be adopted. First, hourly rates for attorneys and paralegals should be standardized. Within districts, the gradation might be senior partner, junior partner, associate and paralegal. The rates should reflect the billing practices of attorneys within the district in which the court sits and should be updated periodically. Second, as part of the initial pretrial conference, attorneys should be required to submit proposed estimates of the total number of billable hours needed to try the case and a proposed breakdown as to how time will be spent by various classes of attorneys and paralegals. This process may at first glance seem cumbersome, but it is not unlike the budgeting exercises that corporate clients now demand of attorneys prior to agreeing to representation. As the case develops, attorneys should be permitted to revise their time estimates upward or downward. The budgeting process will discourage make-work projects designed to boost hours.

Third, as the litigation progresses, plaintiffs' attorneys should be required to file confidential summaries of their services with the court. The summaries should include all billable services. Work not reflected in these filed summaries should normally not be compensable. This process will also serve as a check on unnecessary work thereby easing the potential conflict of interest between attorney and client and lessening the significance of any structural collusion between attorneys for plaintiffs and defendants.

B. *Multipliers*

1. Quality Factors

Upward adjustments to the lodestar to reflect quality should be permitted, in the sound discretion of the court, in both common fund and statutory cases. Quality adjustments are especially appropriate in common fund cases. The lodestar figure may not reflect the benefit conferred on the fund recipients and without adjustment, the beneficiaries will have been unjustly enriched. In augmenting the lodestar, the courts should look to the size of the fund created, the numbers benefitted, and the administrative and negotiating skills that lead to a relatively large settlement after relatively few billable hours. Attorneys will thus be encouraged to litigate efficiently, for example, by taking advantage of work-product from prior cases, and be discouraged from reinventing the wheel in each case.

The case for the quality multiplier in statutory fee cases is not as compelling as in common fund cases, but nevertheless quality adjustments

---

attorney general fee awards statutes if it limits the fee award by considering only the actual recovery obtained for the plaintiff herself.").

should be available in statutory fee cases as well. Ordinarily, a number of factors normally considered under the "quality" rubric, such as novelty and complexity of issues, will be subsumed in the lodestar calculation. However, to the extent standardized rates for attorneys at various levels of experience are utilized, the hourly rate component of the lodestar will not necessarily reflect the special skills that particular attorneys bring to a case. These special skills might include superior organizational and managerial skills or prior experience in similar cases that, in turn, has led to the more efficient and effective conduct of the litigation. The quality multiplier gives the attorneys incentives to control their hours without fear that their fee will be automatically reduced. Quality multipliers in both statutory and common fund cases ought not to be awarded routinely, but only on a showing of the special skills that attorneys have utilized to litigate their cases more efficiently.

2. Risk Adjustment

The courts have the leeway to adjust the lodestar amount to reflect the contingent nature of the claim in both statutory and common fund cases. Risk enhancement should be considered in virtually every case because rates paid by fee-paying clients do not reflect the opportunity costs incurred by attorneys undertaking contingency representations. The catalogue of horrors conjured up by critics of risk adjustment is more imaginary than real and misrepresents the purpose of the contingency multiplier.[376] Risk enhancement is designed to put attorneys who accept cases on a contingency basis (and who therefore can demand a higher fee than attorneys billing on an hourly basis) on equal footing with attorneys representing paying clients. Hence, determination of the risk adjustment places no additional material burden on the courts, for there is no need to undertake a costly *ex post* review of the likelihood of prevailing on the merits at the outset. Defendants have ample opportunity to challenge what they perceive as baseless claims either by motion to dismiss or by summary judgment. Nor are defendants with strong cases penalized, since the relative strength of cases is not a proper factor to consider in awarding risk enhancement.

This is not to say that a contingency adjustment is appropriate in every case. If the attorney is being paid regardless of outcome, no adjustment should be awarded. The need for any enhancement is also lessened if the attorney is guaranteed some payment, for example, a retainer. Risk enhancement may also be unnecessary if the attorney has procured a contingency fee arrangement with the client that is likely to pay him an amount greater than the value of the lodestar.[377] Similarly, where sev-

376. *See* Leubsdorf, *supra* note 22, at 492-93.

377. *See, e.g.*, Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc., 776 F.2d 646, 660 (7th Cir. 1985) (no enhancement where fee arrangement is not contingent); Stanford Daily v. Zurcher, 64 F.R.D. 680, 685-86 (N.D. Cal. 1974) (need for enhancement reduced where plaintiff pays a retainer), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436

eral law firms are sharing the risk of not being paid, the need for risk enhancement is diminished.

Finally, in unusual cases, particularly in antitrust cases, which are inherently complex and expensive to litigate, the courts should be permitted to adjust upward for risk where the legal risks of undertaking that particular case are significant and important questions of public policy are addressed. Without this additional upward adjustment, the mere complexity of the case may be a sufficient disincentive to filing suit. Because complexity would normally be reflected in the number of hours billed, it would be a rare case that would merit this additional enhancement. Nevertheless, where the litigation results in the vindication of significant statutory rights and has a far-reaching impact, additional enhancement is appropriate.

These prescriptions do not purport to provide a yardstick for measuring attorneys' fees with scientific accuracy. To suggest that this could or should be done is self-deluding, for, as Judge Weinstein has observed, "courts must recognize that the entire process of fee fixing is so imprecise and has so many arbitrary and subjective aspects that pretensions of exactitude about any element leads to illusory accuracy."[378]

No mathematical formula can be developed to meet the particular needs of each case. The trial courts should have sufficient latitude to do justice in the cases before them.

CONCLUSION

The statutory provisions granting attorneys' fees to prevailing antitrust plaintiffs provide a significant and necessary incentive for private antitrust enforcement. Any effort to dilute this incentive by permitting fee-shifting to defendants may further undermine private enforcement, which has already been hampered by a series of pro-defendant decisions in the past decade and by a lack of leadership by public enforcers at the federal level. Emerging Supreme Court jurisprudence on attorneys' fees, which has taken a rigid market-based approach in statutory fee cases and severely limited the trial court's discretion to enhance the lodestar, may also undermine private enforcement. The basic guiding principles in awarding fees are that the fees be measured by objective criteria, thereby assuring fairness in each case and at the same time preventing windfall fee awards. "Fairness" in common fund cases means simply that the fee be commensurate with the benefit conferred. "Fairness" in statutory cases means that the fee, consonant with the will of Congress, be sufficiently high to attract attorneys to represent those whose federal rights have been violated. The lodestar method with the modifications pro-

---

U.S. 547 (1978); *see also* Areeda & D. Turner, Antitrust Law, ¶ 331(d), at 152 (award of attorneys' fees need not be commensurate with fee privately agreed upon between plaintiff and attorney).

378. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1310 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 226 (2d Cir. 1987).

posed herein, provides an objective basis for fee determination while giving the courts leeway to do justice in individual cases, and hence best achieves the overriding goals of fairness in common fund and statutory fee litigation.