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ATTORNEY'S FEES IN COMMON FUND ACTIONS

INTRODUCTION

Lodestar,¹ a method of calculating attorney's fees based on time expended, is fast becoming a relic of common fund² litigation. More and more courts have turned to the percentage-of-recovery³ method because it is easy to administer and encourages attorneys to seek larger recoveries. Yet less than two decades ago, courts abandoned the percentage method in favor of lodestar because the former often led to windfall fee awards and premature settlements. Frustrated with lodestar and left without any clear guidance from the appellate courts, the trial courts have recently begun to experiment with different fee-setting structures based on a percentage of the recovery amount. This experimentation has only added to the confusion and unpredictability that already characterizes fee-setting under the lodestar regime. In their haste to find a simpler, more efficient means of calculating fees, many of these courts are confusing mere change with reform.

Part I of this Note examines the history of fee-setting in common fund actions, with particular emphasis on the mid-1970s to 1980s—an era in which courts relied heavily on lodestar analysis and multipliers. Part II analyzes the abuses and inefficiencies inherent in the lodestar method. In the mid-1980s, a series of Supreme Court decisions created confusion regarding the continued validity of lodestar and multipliers in common fund actions; as a result, courts have experimented with a variety of percentage-based approaches. Part III examines these percentage techniques and analyzes their effectiveness in correcting both lodestar's deficiencies and those of the percentage method itself. This Note concludes by arguing that federal courts must adopt a uniform method of setting fees in common fund actions, whether a percentage or lodestar approach. Such uniformity would facilitate case management and promote predictability. This Note recommends that all federal courts adopt a sliding fee scale that discounts any recovery achieved in less than twelve months. Such a method would prevent windfall fee awards while discouraging the premature settlements normally associated with diminishing fee schedules.⁴

I. BACKGROUND

Under the traditional American no-fee rule, each party to a lawsuit is

1. Lodestar is the number of hours an attorney expends multiplied by a reasonable hourly rate for that attorney's services. For further discussion of the lodestar method, see *infra* notes 22-25 and accompanying text.

2. See *infra* notes 7-17 and accompanying text.

3. Under the percentage method, attorney's fees are calculated according to a fixed percentage of the settlement award or judgment.

4. See *infra* notes 204-12 and accompanying text for a discussion of the problems associated with diminishing fee schedules.

responsible for its own attorney's fees, regardless of the outcome of the case. This rule has engendered much criticism,⁵ however, in part because its failure to make whole a successful plaintiff discourages less affluent claimants from bringing potentially meritorious suits.⁶ To compensate for the shortcomings of the traditional no-fee rule, courts have developed a number of exceptions to the American rule.

One of the best known exceptions to the American rule is the "common fund" or "fund-in-court" doctrine. When an attorney in a class action suit helps to create, increase or maintain a fund or benefit for all class members, the attorney may receive fees and expenses directly from that common fund.⁷ Common funds arise in a variety of contexts, ranging from securities class actions⁸ to products liability cases⁹ to antitrust litigation.¹⁰ In addition, cases brought under statutes containing fee-shifting provisions¹¹ are frequently converted into common fund cases, provided the court releases the defendant from both damage and statutory fee liability upon payment of the settlement.¹²

The common fund exception recognizes that an attorney "who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."¹³ Grounded in equity, this exception "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to

5. See Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 241 (1985) [hereinafter Third Circuit Task Force].

6. See *id.* Despite its failure to compensate the plaintiff adequately, the American rule was strongly reaffirmed by the Supreme Court in *Alyeska Pipeline Services v. Wilderness Society*, 421 U.S. 240, 247 (1975).

7. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Alyeska Pipeline*, 421 U.S. at 257-59; *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970).

8. See *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 873-77 (N.D. Ill. 1990); *Harman v. Lyphomed, Inc.*, 734 F. Supp. 294, 295 (N.D. Ill. 1990).

9. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 229, 232 (2d Cir. 1987) ("*Agent Orange II*").

10. See *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 568 (3d Cir. 1984); *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 122 (N.D. Ill. 1990).

11. Congress has granted federal courts the power to award attorney's fees absent a common fund or benefit by including fee-shifting provisions in certain statutes. See, e.g., Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1988) (granting courts discretionary authority to award attorney's fees in securities fraud cases); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1988) (granting courts discretionary authority to award attorney's fees in public accommodation and employment discrimination cases).

12. See *Skelton v. General Motors Corp.*, 860 F.2d 250, 256 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 53 (1989); *In re Fine Paper*, 751 F.2d at 582-83.

13. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); see also *Alyeska Pipeline Servs. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975) ("historic power of equity" permits recovery of attorney's fees from fund); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393 (1970) (same); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-66 (1939) (same); *Central R.R. & Banking v. Pettus*, 113 U.S. 116, 126-27 (1885) (same); *Trustees v. Greenough*, 105 U.S. 527, 532-37 (1882) (same).

its cost are unjustly enriched at the successful litigant's expense."¹⁴ Class actions are normally initiated by an attorney or class representative on behalf of a largely absent group of similarly situated individuals.¹⁵ Despite the representative nature of such litigation, the named plaintiffs and their attorneys are not allowed to bill the absent class members for attorney's fees and expenses.¹⁶ Rigid application of the American no-fee rule in this context would unfairly enrich the class members at the expense of their attorneys and representatives. Thus, in keeping with the traditional equitable principle of preventing unjust enrichment, all those who benefit share the burden of litigation expenses.¹⁷

Attorneys in common fund cases originally received a fixed percentage of the total recovery amount.¹⁸ The percentage method fell into disrepute in the 1970s, however, because its tendency to promote excessive fee awards created public image problems for both judges and attorneys.¹⁹ In 1973, the Third Circuit responded to mounting public concern over windfall fees by adopting what came to be known as the "lodestar" method of calculating attorney's fees.²⁰ A number of other circuits quickly followed suit.²¹

14. *Van Gemert*, 444 U.S. at 478.

15. See Bono, *Percentage Approach On the Rise*, Nat'l L.J., Sept. 3, 1990, at 15, col. 1.

16. See *id.*

17. See *Van Gemert*, 444 U.S. at 478.

18. The percentage approach stubbornly endured for almost a century. It was first used in the 1880s at the inception of the common fund doctrine. See *Central R.R. & Banking v. Pettus*, 113 U.S. 116, 128 (1885).

19. Solovy & Kaster, *Re-Examining the Lodestar*, Nat'l L.J., Apr. 9, 1990, at 13, col. 2. Mounting concern over windfall fee awards prompted one court to comment that "unless time spent and skill displayed be used as a constant check on applications for fees there is a grave danger that the bar and bench will be brought into disrepute." *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973) ("*Lindy I*") (quoting *Cherner v. Transitron Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963)), *aff'd in part and vacated in part*, 540 F.2d 102 (3d Cir. 1976) ("*Lindy II*").

20. See *Lindy I*, 487 F.2d at 167-69.

21. See *Copeland v. Marshall*, 594 F.2d 244, 251-53 (D.C. Cir. 1978); *Grunin v. International House of Pancakes*, 513 F.2d 114, 127 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470-73 (2d Cir. 1974) ("*Grinnell I*").

The Fifth and Ninth Circuits, in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976), and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), adopted a twelve-factor scale that, like the Third Circuit's lodestar method, requires the court to examine the time and labor expended by the plaintiff's attorney. The *Johnson-Kerr* fee-setting standard also weighs eleven other criteria: (1) the novelty and difficulty of the issues involved; (2) the degree of skill required to properly perform the legal service; (3) the preclusion of other employment by the attorney during the pendency of the action; (4) the customary fee; (5) whether the fee is normally fixed or contingent; (6) time limitations imposed by the client or the circumstances; (7) the amount involved and the result obtained; (8) the experience, reputation and ability of the attorney; (9) the "undesirability" or risk in accepting the case; (10) the nature and duration of the attorney-client relationship; and (11) the size of awards in similar cases. See *Johnson*, 488 F.2d at 718-19. This list of

II. THE LODESTAR METHOD

The "lodestar" amount is the number of hours expended by the plaintiff's attorney that reasonably contributed to the fund, multiplied by a reasonable hourly rate.²² The hourly rate is determined by examining the status of plaintiff's counsel.²³ The lodestar figure is then increased or decreased by a multiplier, or fee enhancer.²⁴ Depending on the court, the multiplier might reflect the contingent nature of the litigation, its com-

factors was based upon the American Bar Association's guidelines for private fee arrangements. See Model Code of Professional Responsibility DR 2-106(B) (1979).

Because these additional factors are often subsumed by the court's analysis of the time and labor expended, most courts and commentators equate the *Johnson-Kerr* approach with the *Lindy* lodestar method. See, e.g., *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir. 1983) (modifying *Johnson* method by first multiplying attorney's time and rate, then adjusting lodestar upward or downward in light of other relevant *Johnson* factors); *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 840 (9th Cir. 1982) (endorsing a blend of lodestar and *Kerr* approaches); Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 286 & n.26 (1977) (discussing *Johnson* method's "partially redundant factors") (footnote omitted); Third Circuit Task Force, *supra* note 5, at 244-45 ("most commentators consider *Johnson* to be little different from *Lindy* because the first criterion of the *Johnson* test, and indeed the one most heavily weighted, is the time and labor required").

22. See *Lindy I*, 487 F.2d at 167-68. This description, unfortunately, is a gross simplification of lodestar. Indeed, the only common theme found in federal courts' approaches to the lodestar method of fee-setting is their almost complete inconsistency. As one commentator has observed, "[s]ome courts have rigorously reviewed the time asserted by the attorneys and the manner in which it was expended; others have engaged in wholesale markdowns with little explanation of why the time claimed was excessive." Berger, *supra* note 21, at 290 (footnotes omitted). Moreover, in deriving the hourly rate to be multiplied by the time allowed, some courts use the attorney's current billing rate, while others prefer historical hourly rates—the attorney's rate at the time the litigation was underway—with an adjustment for interest to compensate for the delay in payment. The difference between the two methods can be dramatic, especially where the attorney has advanced from associate to partnership status in the interim. See *In re Telesphere Int'l Sec. Litig.*, 753 F. Supp. 716, 718 (N.D. Ill. 1990). The *Telesphere* court reduced the hourly rate of an attorney only recently promoted to partnership status from \$250 to \$225, resulting in a savings to the class of \$8,680. See *id.* at 721.

23. See *Lindy I*, 487 F.2d at 167. In evaluating an attorney's status, the court must take into account legal reputation, experience and whether the attorney is a partner or associate.

The court must also account for the delay in payment. Because many plaintiff's attorneys litigate without any private fee arrangement, they are often forced to use their own funds to cover the fees and expenses that accrue during the class action and risk receiving no fee award at all where no recovery is obtained. Thus, the court normally adjusts the hourly rate to reflect this delay in payment. See *infra* text accompanying notes 96-102.

24. Enhancement for risk or quality of attorney performance is accomplished via a "multiplier." In employing a multiplier, the court simply selects a number—for example, 2.5—that it believes accurately reflects the risk of nonpayment or quality of services performed, and multiplies that number by the lodestar.

In adjusting the fee, the court must first consider the contingent nature of success. See *Lindy I* 487 F.2d at 168. Second, the court must consider the quality of the attorney's work in light of the novelty and complexity of the issues presented in the case and the amount of the recovery. See *id.* at 168-69.

As with time expended and hourly rates, the process of selecting a multiplier, whether for contingency or for results achieved, is entirely arbitrary. See Berger, *supra* note 21, at 290.

plexity, the quality of the attorney's performance or even the size of the total recovery.²⁵

A. Problems With the Lodestar Method

From the mid-1970s to the mid-1980s, lodestar was the fee-setting standard of choice in common fund cases in the federal court system. Despite its widespread use, however, attorneys and commentators complained that the method was inefficient and subject to abuse.²⁶ In recent years, a growing number of courts have expressed their dissatisfaction with lodestar's time-rate formula by experimenting with a variety of alternative fee-setting standards based on a percentage of the recovery amount.²⁷

1. Lodestar Increases Courts' Administrative Burden

One source of dissatisfaction is the extent to which the lodestar method wastes scarce judicial resources. In the ordinary common fund case, the plaintiff's attorney secures a settlement and then petitions the court for a fee award from that same fund. The attorney is thus transformed from the clients' fiduciary to a claimant against the clients' own fund.²⁸ The court must then act as fiduciary for the fund's beneficiaries and closely scrutinize the fee petition to determine whether every hour claimed was reasonably spent for the benefit of the class.²⁹ Unfortunately, the court receives little help in performing this cumbersome task.³⁰ Settling defendants and class members rarely offer a response to the fee petition, and thus, the court alone must either second-guess or

25. See *infra* notes 116-32 and accompanying text.

26. See, e.g., 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, 724 (1986) (lodestar exacerbates problem of collusive settlements that are beneficial to plaintiff's attorney but not class); Third Circuit Task Force, *supra* note 5, at 246-49 (lodestar wastes judicial resources, discourages early settlement and leads to inconsistent results); J. Solovy & R. Mendillo, *Calculating Class Action Awards: Is It Time to Unload the Lodestar?*, Nat'l L.J., May 2, 1983, at 20, col. 2 (lodestar should be abandoned for more expeditious percentage method).

27. See, e.g., *In re First Fidelity Bancorporation Sec. Litig.*, 750 F. Supp. 160, 162-63 (D.N.J. 1990) (rejecting lodestar in favor of sliding scale approach); *Breiterman v. Roper Corp.*, No. 88 Civ. 2138 (S.D.N.Y. Jan. 12, 1990) (LEXIS, Genfed library, Dist file, 328 at *9-10) (rejecting straight lodestar approach in favor of percentage-of-recovery method, compared with lodestar to ensure reasonableness of fee); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378-79 (N.D. Cal. 1989) (abandoning lodestar method in favor of percentage approach); see also Bono, *supra* note 15, at 15, col. 2 (criticism of lodestar has precipitated recent shift to percentage approach); Solovy & Kaster, *supra* note 19, at 13, col. 2 (movement away from lodestar in common fund cases is turning into a "stampede").

28. See *Skelton v. General Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988), cert. denied, 110 S. Ct. 53 (1989).

29. See *id.*

30. "It is at this point . . . that the court is abandoned by the adversary system and left to the plaintiff's unilateral application and the judge's own good conscience." *In re Activision*, 723 F. Supp. at 1374.

defer to the attorney's judgment regarding time expended.³¹ Contemporaneous recordkeeping may ease the court's attempt to ferret out duplicative hours, but hours already billed to other matters are practically impossible to detect. Catch-all descriptions of tasks such as "review of work" or "conferences with co-counsel" provide an easy opportunity for attorneys to pad their hours.³² Without any guidelines to distinguish between fictitious hours and time actually spent on behalf of the class, however, the court often has no choice but to make arbitrary across-the-board reductions in the fee award.³³

2. Lodestar Encourages Attorneys to Bill Excessive and Padded Hours

a. Time Spent

Another criticism of the lodestar approach is that it encourages attorneys to bill excessive hours.³⁴ Critics insist that plaintiff's attorneys often keep litigation alive simply to maximize the number of hours used to calculate the lodestar.³⁵ This emphasis on the number of hours expended has spawned a whole range of dilatory tactics, such as motion practice and lengthy discovery, designed to frustrate an early resolution of the case.³⁶ Such tactics increase costs to the defendant, the plaintiff class members and the public.³⁷

Moreover, there are few checks on an attorney's dilatory behavior. Because of their comparatively small share in the litigation's outcome, few, if any, common fund beneficiaries take time to scrutinize the fee petition and object to the requested award.³⁸ Because the settlement size

31. *See id.*

32. *See Harman v. Lyphomed, Inc.*, 734 F. Supp. 294, 297 (N.D. Ill. 1990); *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 735-36 (D. Utah 1987).

33. *See In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.*, 724 F. Supp. 160, 165 (S.D.N.Y. 1989).

34. *See, e.g., In re First Fidelity Bancorporation Sec. Litig.*, 750 F. Supp. 160, 162 (D.N.J. 1990) ("awarding compensation based on hours spent is likely to increase the time devoted"); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374 (N.D. Cal. 1989) (describing the "all too familiar path of large securities cases," including "lugubrious" pleading contests and "massive" discovery). *But see In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 126 (N.D. Ill. 1990) (concern that lodestar encourages long hours is "grossly exaggerated" because "nature of deferred fees in itself discourages excessive hours").

35. *See In re Activision*, 723 F. Supp. at 1375; Third Circuit Task Force, *supra* note 5, at 247-48. Any fee-setting approach that relies on the number of hours worked "creates an incentive to run up hours, to do too much in relation to the stakes of the case." *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986).

36. *See In re Activision*, 723 F. Supp. at 1374.

37. "Class actions would not be possible without the use of scarce public judicial resources, and lawyers use such resources free of charge." *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 691 n.5 (N.D. Cal. 1990).

38. *See, e.g., Brown v. Steinberg*, Nos. 84 Civ. 4654, 4665, 8001 (S.D.N.Y. Oct. 12, 1990) (LEXIS, Genfed library, Dist file, 13516 at *6) ("no class member . . . opposed the fee application"); *Harman v. Lyphomed, Inc.*, 734 F. Supp. 294, 295 (N.D. Ill. 1990) ("One member of the class appeared at the settlement hearing and raised objections to the

is constant no matter what the attorney's fees, defendants gain nothing by opposing the petition. Judicial scrutiny is, therefore, the only means of assuring a reasonable attorney's fee while protecting against unnecessary depletion of the absent class members' fund.

The courts have been only partially effective in stemming the tide of lodestar hours because their ability to evaluate attorney time fairly in hindsight is inevitably distorted.³⁹ The nature of the courts' ex post scrutiny also may prompt the attorney to log longer hours than necessary in order to justify receiving a large fee award.⁴⁰ "[P]laintiffs' lawyers cannot but be affected by the prospect that their compensation will be determined by some flinty-eyed judge second-guessing their every move."⁴¹ Thus, judicial scrutiny may in fact discourage early settlement and efficient prosecution of the class action.

b. *Judicial Responses to the Problem of Excessive Hours*

In an attempt to minimize the large number of hours logged in common fund cases, some courts actively monitor attorney activity early on in the litigation. Some warn counsel at the outset that charges for duplicative work will not be tolerated.⁴² Requiring "fairly definite information as to the hours devoted to various general activities,"⁴³ such as discovery, settlement negotiations and hearings may also pinpoint excesses.⁴⁴

Some courts focus on those areas of attorney activity that are particu-

fee petition."); *Kronfeld v. Transworld Airlines*, 129 F.R.D. 598, 601 (S.D.N.Y. 1990) ("[n]o objections . . . to the proposed fee award were made"); *In re First Jersey Sec., Inc. Sec. Litig.*, MDL No. 681 (E.D. Pa. June 23, 1989) (LEXIS, Genfed library, Dist file, 7050 at *4-5) ("Only one class member has stated that he has a 'conditional objection' to a 25% award of fees because he does not yet know how much money he will personally recover."); *In re New York City Shoes Sec. Litig.*, No. 87-4677 (E.D. Pa. June 6, 1989) (LEXIS, Genfed library, Dist file, 7346 at *8) ("No objections to the fee application have been received by the court . . .").

39. See *In re Oracle*, 131 F.R.D. at 692-93.

40. See *id.* at 692. "For example, if counsel engages in only a limited amount of discovery and motion practice, a judge's perception of how much compensation is due plaintiffs' lawyers is likely to be diminished—even if a large and early settlement is produced. Conversely, lengthy discovery and numerous motions will always seem deserving of significant recompense, even if the settlement is smaller and long in coming." *Id.*

41. *Id.*

42. The *Lymphomed* court "warned counsel that fees would not be awarded for duplicative work." *Harman v. Lymphomed, Inc.*, 734 F. Supp. 294, 296 (N.D. Ill. 1990).

43. *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973) ("*Lindy I*"), *aff'd in part and vacated in part*, 540 F.2d 102 (3d Cir. 1976) ("*Lindy II*").

44. This is especially true if the court is familiar with the type of case before it and thus can estimate the appropriate number of hours each stage of the litigation should take. See *Brown v. Steinberg*, Nos. 84 Civ. 4654, 4665, 8001 (S.D.N.Y. Oct. 12, 1990) (LEXIS, Genfed library, Dist file, 13516 at *2-3) (asserting its role as fiduciary to absent class members, court disallows 130.9 hours of unallocated time). *But see In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 130 (N.D. Ill. 1990) (requiring indicia of duplication or excessive hours before penalizing attorney for "vague" entries).

larly susceptible to padding,⁴⁵ such as reviewing,⁴⁶ conferring,⁴⁷ legal research,⁴⁸ travel,⁴⁹ reading⁵⁰ and overstaffing.⁵¹ Other courts scrutinize fee petitions to ensure that each task was performed by an individual with the appropriate level of skill and experience.⁵² Still other courts, recognizing that "a delay in recording time often leads to its expansion," require contemporaneous recordkeeping and penalize those attorneys who fail to conform to the requirement.⁵³

45. The court in *In re Continental Illinois* went as far as advising counsel of the areas that would be subject to "particular scrutiny": time spent on legal research, review of others' work and conferring with co-counsel. *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 880 (N.D. Ill. 1990).

46. See, e.g., *In re Superior Beverage*, 133 F.R.D. at 130 (review time allowed only where counsel specifically responsible for reading certain documents because counsel should not be compensated for satisfying their curiosity."); *In re Continental Ill.*, 750 F. Supp. at 880 (excessive time spent reviewing others' work subject to particular judicial scrutiny); *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 735-36 (D. Utah 1987) (review is a "catchall category with great versatility in counsels' application" and "a signal for the padding of hours").

47. See, e.g., *In re Continental Ill.*, 750 F. Supp. at 881 ("Counsel who are not able to work independently should not seek to represent the class.") (quoting *In re Continental Ill. Sec. Litig.*, 572 F. Supp. 931, 933 (N.D. Ill. 1983)); *Harman v. Lyphomed, Inc.*, 734 F. Supp. 294, 297 (N.D. Ill. 1990) (proportion of time spent conferring signals excessive number of attorneys involved in case, resulting in duplication of effort); *In re Wicat*, 671 F. Supp. at 735 (meetings and telephone calls discounted by 50% where conference not recorded by both attorneys).

48. See, e.g., *In re Continental Ill.*, 750 F. Supp. at 882-83 (disallowing fees for research on law that is already well known to practitioners in that field); *In re Superior Beverage*, 133 F.R.D. at 130 (court has discretion to reduce fee for time spent researching irrelevant issues).

49. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 238 (2d Cir. 1987) ("*Agent Orange II*") (quasi-administrative items, such as travel time, should be compensated at lower rates); *In re Continental Ill. Sec. Litig.*, 750 F. Supp. at 882 (court skeptical that "every moment in transit was apparently spent working on the case"); *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 130 (N.D. Ill. 1990) (limiting hours worked to eight hours on travel days).

50. See, e.g., *Agent Orange II*, 818 F.2d at 237 (district court did not abuse its discretion by discounting time spent reading scientific materials by 50%); *In re Superior Beverage*, 133 F.R.D. at 130 (time spent reading documents for which attorney had no specific responsibility disallowed).

51. See, e.g., *In re Superior Beverage*, 133 F.R.D. at 130 (regarding overstaffed conferences and status call, court credited attorney with higher billing rate while deducting hours of second attorney); *Kronfeld v. Transworld Airlines*, 129 F.R.D. 598, 602 (S.D.N.Y. 1990) (quoting *Seigal v. Merrick*, 619 F.2d 160, 164 n.9 (2d Cir. 1980)) ("[a]mple authority supports reduction in lodestar figure for overstaffing"). See generally Third Circuit Task Force, *supra* note 5, at 248 (phenomenon of overstaffing is the "inevitable by-product of a fee-setting scheme based on hours worked regardless of the number of lawyers involved").

52. See *In re Superior Beverage*, 133 F.R.D. at 130; *Kronfeld*, 129 F.R.D. at 602. A common ploy is to take advantage of higher billing rates by assigning a partner to perform associate's work, an associate to perform paralegal's work and so on. See *In re Superior Beverage*, 133 F.R.D. at 130; *Kronfeld*, 129 F.R.D. at 602.

53. *Dutchak v. International Bhd. of Teamsters*, Nos. 76-C-3803, 78-C-342, 79-C-1725 (N.D. Ill. April 6, 1989) (LEXIS, Genfed library, Dist file, 3877 at *19). The court in this case responded to one attorney's failure to abide by this requirement by reducing his firm's lodestar hours by ten percent.

Most courts take a more passive approach, however, and intervene only at the end of the litigation. At this point, courts must confront a "mountain of computerized billing records"⁵⁴ equipped with little more than a vague sense of what reasonably benefitted the class. These passive courts are not entirely to blame for their inability to allocate fees accurately. Certain problems are endemic to the lodestar method whether or not the court actively monitors counsel or possesses sufficiently detailed time records.⁵⁵ Duplicative efforts and exaggeration of actual time spent are difficult to prove because the bulk of an attorney's activity is conducted outside the courtroom. Other than an occasional brief, the only tangible product that lends itself to judicial evaluation is the common fund, which may be the result of factors other than the attorney's hard work and skill. Consequently, courts are often forced to act on intuition in deciding that the claimed hours are too numerous given the nature of the case.⁵⁶

Even when they can identify routinely troublesome activities,⁵⁷ courts may still experience difficulty in deciding precisely which increments of time are excessive or unproductive. A number of courts employ across-the-board percentage reductions "as a practical means of trimming fat from a fee application."⁵⁸ The percentage reduction method is far sim-

54. *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374 (N.D. Cal. 1989).

55. As one court correctly observed, "acceptance of the proposition that the time spent was no more than necessary, and that it produced something useful for the client, is often an act of faith." *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 879-80 (N.D. Ill. 1990).

56. *See id.* at 21; *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.*, 724 F. Supp. 160, 165 (S.D.N.Y. 1989).

Moreover, most common fund cases do not originate as class actions, but rather are brought as individual lawsuits that are eventually consolidated. This multiplicity of suits necessarily causes some duplication of threshold activity. *See In re Telesphere Int'l Sec. Litig.*, 753 F. Supp. 716, 717 (N.D. Ill. 1990). As a result, any lodestar accepted at face value is inflated by an unknown amount. *See id.* The *Telesphere* court acknowledged that the true measure of a reasonable attorney's award would be the fees earned by a single firm handling the case from its inception. Nevertheless, the court did not cleave any of the duplicative hours from the total requested, recognizing "the familiar problem of trying to reconstruct matters in hindsight and looking from the outside in." *Id.* at 717.

57. *See supra* notes 46-52 and accompanying text.

58. *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983) (allowing percentage reductions where "voluminous" fee petitions are filed); *see also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 237 (2d Cir. 1987) ("*Agent Orange II*") (district court did not abuse its discretion in reducing time spent reading, travelling, reviewing and conducting postsettlement work by 50%); *Tommazzoli v. Sheedy*, 804 F.2d 93, 98 (7th Cir. 1986) (noting that it is "unrealistic to expect a trial court to evaluate and rule on every entry"); *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 881-85 (N.D. Ill. 1990) (percentage reductions range from 25% to 100%, with particular emphasis on conferences, generalized research and duplicative work by two or more firms); *Harman v. Lymphomed, Inc.*, 734 F. Supp. 294, 297-98 (N.D. Ill. 1990) (percentage reductions of 49%, 51% and 39%); *Dutchak v. International Bhd. of Teamsters*, Nos. 76-C-3803, 78-C-342, 79-C-1725 (N.D. Ill. April 6, 1989) (LEXIS, Genfed library, Dist file, 3877 at *20) (reducing lodestar by 10% for failure to keep contemporaneous records); *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 734-36 (D. Utah 1987) (trimming individual categories of fee petitions 25% to 50%).

pler than the item-by-item accounting of disallowed hours that some courts still employ.⁵⁹ Nevertheless, the selection of a percentage is "necessarily impressionistic and, to a degree, arbitrary."⁶⁰ Although more convenient than an individual determination, the percentage reduction method unfairly penalizes those attorneys who do accurately record expenditures of time. Moreover, a result-oriented judge could easily manipulate this method of trimming lodestar excesses to achieve a predetermined percentage or dollar amount,⁶¹ thereby defeating one of the principal merits of the lodestar regime—its objectivity.⁶²

Although certain limited categories of litigation activity are routinely disallowed,⁶³ there is generally no uniform approach to calculating the number of hours applied to the lodestar figure. Individual courts differ in their tolerance of various practices. If the court does not clearly state its fee-setting guidelines at the outset of litigation—and apparently few do—the attorney is left in the dark as to the fee petition's proper form of presentation and which activities the court is likely to disallow. Such unpredictable treatment produces other ills such as padded hours and voluminous fee petitions. With no means of accurately gauging the probable fee award, the plaintiff's attorney may keep the case alive longer than necessary in order to ensure sufficient payment.⁶⁴ Similarly, without some kind of directive defining reasonably expended time, the attorney is apt to flood the court with information, hoping that at least some of it will apply to the lodestar. This practice further aggravates the court's administrative burden and is one of the reasons the lodestar method has fallen into disfavor in recent years.

59. See, e.g., *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 594-95 (3d Cir. 1984) (inefficient prosecution, without more, is not enough to justify across-the-board percentage cuts); *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 130 (N.D. Ill. 1990) (choosing "not to assume that there was fat in every application").

60. *In re Continental Ill.*, 750 F. Supp. at 880.

61. Cf. Third Circuit Task Force, *supra* note 5, at 247 (lodestar variables, such as hours allowed, are subject to manipulation by judges who prefer to calculate fees in terms of percentages or amounts recovered).

62. Lodestar is considered an objective approach because it strips the court of much of its discretion in setting attorney's fees. Under lodestar, the court must multiply the time spent by the hourly rate and then adjust that figure by a number of predetermined factors. Under the percentage method, on the other hand, the court is free to fix the fee award at whatever percentage of the recovery it deems appropriate.

63. Publicity is normally disallowed. See *Purdy v. Security Sav. & Loan Ass'n*, 727 F. Supp. 1266, 1270 (E.D. Wis. 1989). Because all time claimed must be supported by contemporaneous records or other reliable evidence, such as the sworn statement of the attorney, see *Hensley v. Eckerhart*, 461 U.S. 424, 438 n.13 (1983), projected hours are also disallowed. See *Purdy*, 727 F. Supp. at 1270. Finally, attorneys are not compensated for time spent preparing the fee petition or collecting the fee. See, e.g., *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 130 (N.D. Ill. 1990) (disallowing time spent preparing fee petition); *Purdy*, 727 F. Supp. at 1270 (disallowing hours expended collecting fee). But see *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1203-04 (N.D. Ill. 1989) (45.4 hours spent recording and reporting time allowed because it helps control waste and duplication).

64. See *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 692 (N.D. Cal. 1990).

3. Lodestar Produces Inconsistent Results

a. Problems in Setting the Hourly Rate

In addition to computing the hours reasonably expended, the court must also calculate the petitioning attorney's hourly rate. Normally, the court looks to the rate customarily charged in the community for equivalent services by an attorney of comparable status and skills.⁶⁵ Yet even this approach produces divergent views. Despite the apparent simplicity of determining the appropriate community, different courts have used such varying locations as the attorney's base of operations,⁶⁶ the forum city or state,⁶⁷ a "national" community⁶⁸ and an average of all the attorneys' bases of operations.⁶⁹ As for the value of the individual attorney's services, the court must choose between the attorney's current billing rate and the historic rate with interest to compensate for the delay in payment.⁷⁰ These rates, however, vary tremendously for the same attorney within the same judicial district.⁷¹ Thus, the notion of a prevailing market rate that provides a consistent means of measuring the value of an attorney's services is extremely misleading.

First, a plaintiff's attorney's hourly rate is difficult to calculate because most common fund cases are prosecuted on a contingency basis.⁷² Many courts simply disregard this dilemma and fix the hourly rate according to the attorney's court-approved rates in prior cases or to the rates awarded to co-counsel of similar status and experience. But because the court, rather than a competitive market, usually generates the hourly rates, these rates do not accurately reflect the actual value of an attorney's services.⁷³ A better method compares the fees defendant's attorneys custom-

65. See *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984); *Lightfoot v. Walker*, 826 F.2d 516, 524 (7th Cir. 1987); *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983); *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980); *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1098 (2d Cir. 1977) ("*Grinnell II*"); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

66. See *Purdy*, 727 F. Supp. at 1272-73.

67. For cases adhering to "forum rate" approach, see cases cited *infra* note 87.

68. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 233 (2d Cir. 1987) ("*Agent Orange II*").

69. See *Harman v. Lyphomed, Inc.*, 734 F. Supp. 294, 301 (N.D. Ill. 1990).

70. Other courts compensate for delay in payment through the use of a risk multiplier. See *Purdy v. Security Sav. & Loan Ass'n*, 727 F. Supp. 1276, 1276 (E.D. Wis. 1989).

71. See *infra* notes 75-83 and accompanying text.

72. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 234; *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 716 (E.D.N.Y. 1989); *Berger*, *supra* note 21, at 322-24. Under a contingent fee arrangement, the attorney is paid one lump sum at the end of the litigation if successful. This fee is not based on an hourly rate. See *Weseley*, 711 F. Supp. at 716.

73. In the context of class and derivative suits, "it is the lawyers who choose themselves for all practical purposes—true enough, there is a one-to-one relationship between the lawyer and the individual class representative, but that relationship cannot equate to a bargained-for retainer by the entire class." *In re Telesphere Int'l Sec. Litig.*, 753 F. Supp. 716, 719 (N.D. Ill. 1990) (footnote omitted). Because the court—and not the client—sets the final fee award, few plaintiff's attorneys negotiate private fee arrangements

arily charge in similar cases.⁷⁴

Second, variations in rates are relatively commonplace, even within the same judicial district.⁷⁵ For example, a prominent New York-based plaintiff's attorney was awarded hourly rates ranging from \$250 to \$450 in the Southern District of New York in 1990.⁷⁶ In 1990 in the Northern District of Illinois, a plaintiff's attorney received rates of \$175⁷⁷, \$247,⁷⁸ and \$250⁷⁹ per hour. Another well-known plaintiff's attorney was awarded \$350 per hour in the Eastern District of Pennsylvania in 1989,⁸⁰ only to receive a more moderate hourly rate of \$175 in another judicial district one year later.⁸¹ Similarly, another attorney was awarded hourly rates of \$285 and \$175 during a one-year period in the Northern District

with class members. See *Weseley*, 711 F. Supp. at 716. Without an independent, client-driven market for plaintiff's attorneys, hourly rates are "at levels much higher than are necessary to provide quality representation to the class." *In re Telesphere*, 753 F. Supp. at 719. But see *Lynk, The Courts and the Market: An Economic Analysis of Contingent Fees in Class-Action Litigation*, 19 J. Legal Stud. 247, 250 (1990) (arguing that class action fee awards "approximate the outcome that would be observed had the transaction been settled in the market rather than the courtroom").

Moreover, private fee arrangements do not necessarily provide a reasonable basis upon which to determine the hourly charge. "[P]rivate clients may by their own choosing pay slightly higher hourly rates than a court would reasonably award counsel in a class action, where most of the class members are not individual clients of their attorneys . . ." *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 131 (N.D. Ill. 1990).

74. See *In re Superior Beverage*, 133 F.R.D. at 131; *Weseley*, 711 F. Supp. at 716. The *Superior Beverage* court took a similar approach to calculating the reasonable number of hours expended, "ask[ing] for and receiv[ing] statements from defense counsel revealing the hours their firms . . . spent on this case." *In re Superior Beverage*, 133 F.R.D. at 130.

75. See Third Circuit Task Force, *supra* note 5, at 260.

76. Compare *Brown v. Steinberg*, Nos. 84 Civ. 4654, 4665, 8001 (S.D.N.Y. Oct. 12, 1990) (LEXIS, Genfed library, Dist file, 13516 at *3 n.2) (awarding admittedly high hourly rate of \$350-\$450 because of Harvey Greenfield's vast experience) with *Kronfeld v. Transworld Airlines*, 129 F.R.D. 598, 606 (S.D.N.Y. 1990) (approving special master's recommendation of \$250/hour for 1983-85 and \$300/hour for 1986-89); see also *In re Telesphere Int'l Sec. Litig.*, 753 F. Supp. 716, 720 & n.8 (N.D. Ill. 1990) (describing Greenfield's requested rate of \$425 as a "striking instance of excessiveness" and capping all hourly rates at \$250). Only two years earlier, the *In re Wicat* court rejected Mr. Greenfield's request for \$325 per hour, awarding a more reasonable \$175 per hour. See *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 732-33 (D. Utah 1987).

77. See *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 889 & n.13 (N.D. Ill. 1990) (rejecting Lawrence Walner's requested \$265/hour and instead capping rates at \$175/hour).

78. See *Harman v. Lyphomed, Inc.*, 734 F. Supp. 294, 301 (N.D. Ill. 1990) (awarding counsel the average of all hourly rates requested").

79. See *In re Telesphere*, 753 F. Supp. at 720-21 (capping all hourly rates for attorneys at \$250); see also *Dutchak v. International Bhd. of Teamsters*, Nos. 76-C-3803, 78-C-342, 79-C-1725 (N.D. Ill. April 6, 1989) (LEXIS, Genfed library, Dist file, 3877 at *19) (awarding \$250/hour, but noting court's willingness to reduce this rate "were this case of a more recent vintage").

80. See *In re New York City Shoes Sec. Litig.*, No. 87-4677 (E.D. Pa. June 6, 1989) (LEXIS, Genfed library, Dist file, 6346 at *8).

81. See *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 889 & n.13 (N.D. Ill. 1990) (rejecting Richard Greenfield's request for \$315/hour).

of Illinois.⁸² Widespread rate variations cast suspicion on the integrity and objectivity of the lodestar method⁸³ by encouraging forum shopping for the highest hourly rate and by allowing result-oriented judges to manipulate the rate to award a predetermined amount of money.

b. *Judicial Responses to the Problem of Rate Setting*

Courts have experimented with a variety of approaches to ensure an hourly rate that fairly compensates the attorney while preventing unnecessary depletion of the class fund. Some courts employ a schedule of hourly rates scaled according to levels of experience and responsibility.⁸⁴ This approach respects the individuality of attorneys, while promoting uniformity and administrative efficiency by doing away with the time-consuming task of setting the appropriate rate for each attorney.⁸⁵ Uniform application of the fee schedule to both local and visiting counsel, however, tends to overcompensate or undercompensate visiting counsel.⁸⁶ Misallocation of legal resources might result, with attorneys overcrowding those districts awarding the highest hourly rates while other districts remain unable to attract outside counsel with special expertise.

82. Compare *id.* (awarding Michael Freed a maximum rate of \$175/hour) with *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1205 (N.D. Ill. 1989) (awarding "benchmark" rate of \$285/hour for partners who customarily charge \$285/hour or more).

83. See Third Circuit Task Force, *supra* note 5, at 246-47.

84. See *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 734 (D. Utah 1987). The court in *In re Wicat* based its rate scale on the hourly rates requested by the attorneys, the rates in other jurisdictions for similar kinds of litigation, the standardized rates in the Third Circuit Task Force Report and the court's 30 years of experience:

<u>Category</u>	<u>Rate</u>
Attorneys with 0-5 years experience.....	\$80
6-10 years experience.....	\$95
11-15 years experience	\$110
16-25 years experience	\$150
25 years experience or more	\$175
Paralegals	\$40

Id.; see also Third Circuit Task Force, *supra* note 5, at 260 (recommending use of scaled rates in statutory fee-shifting cases). The Task Force gives as an example the rate schedule adopted by Community Legal Services, Inc. of Philadelphia:

<u>Category</u>	<u>Rate</u>
Law Students	\$30-\$50
Attorneys with less than 2 years experience	\$60-\$85
Attorneys with 2-5 years experience.....	\$80-\$120
Attorneys with 6-10 years experience	\$100-\$160
Attorneys with more than 10 years experience	\$125-\$180
Supervising Attorneys, Project Heads, Managing Attorneys, Deputy Director, Executive Director	\$130-\$200
Paralegals I and II.....	\$30-\$40
Senior and Supervisory Paralegals	\$40-\$60

Id. at 260 n.70. But see *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583-84 (3d Cir. 1984) (hourly rate must be individually determined for each attorney); *Waldner v. Shulman*, No. 86-7381 (E.D. Pa. Aug. 25, 1989) (LEXIS, Genfed library, Dist file, 10094 at *8) (same).

85. See Third Circuit Task Force, *supra* note 5, at 260-61.

86. Cf. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 235 (2d Cir.

As fiduciary for the absent class members, the court should have discretion to set the hourly rate according to the availability and cost of equivalent services in the forum community.⁸⁷

A few courts have experimented with ceilings on hourly rates.⁸⁸ Attorneys often request hourly rates well in excess of what would be necessary to obtain competent counsel. "[T]he special skill and experience of counsel should be reflected in the reasonableness of the hourly rate"⁸⁹ where this store of knowledge contributes to a speedy result. Counsel should not, however, command top rates where less talent or experience suffices.⁹⁰ Some courts have responded by awarding different rates for different types of work.⁹¹ Such an approach, however, is possible only where the fee petition clearly segregates and describes the different categories of work. Most litigation activity, however, does not lend itself to this type of analysis.⁹²

Some courts have established maximum hourly rates for attorneys' services. Maximum rates protect against unreasonable fee awards and

1987)("Agent Orange II") (in large class action, national rates reduce risk of overcompensating or undercompensating non-local counsel).

Nevertheless, courts often disregard the possibility of overcompensation and undercompensation and fix the hourly rate according to what is reasonable in the forum, rather than what is reasonable in the attorney's home base of operations. *See, e.g.,* Donnell v. United States, 682 F.2d 240, 250-51 (D.C. Cir. 1982) (advocating "forum rate" approach), *cert. denied*, 459 U.S. 1204 (1983); Chrapliwy v. Uniroyal Inc., 670 F.2d 760, 768 (7th Cir. 1982) (same), *cert. denied*, 461 U.S. 956 (1983); Avalon Cinema Corp. v. Thompson, 689 F.2d 137, 140-41 (8th Cir. 1982) (same); Dutchak v. International Bhd. of Teamsters, Nos. 76-C-3803, 78-C-342, 79-C-1725 (N.D. Ill. April 6, 1989) (LEXIS, Genfed library, Dist file, 3877 at *23) (reducing attorney's requested rate of \$300/hour to \$225/hour because "[h]is work was done in Chicago," not New York). *But see In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 590-91 (3d Cir. 1984) (using rate applicable in locale in which attorney practices); Purdy v. Security Sav. & Loan Ass'n, 727 F. Supp. 1266, 1272 n.8 (E.D. Wis. 1989) (Chicago counsel not limited to Milwaukee rates).

87. *See In re Telesphere Int'l Sec. Litig.*, 753 F. Supp. 716, 719 (N.D. Ill. 1990). The *Telesphere* court capped rates for all attorneys at \$250 per hour, remarking that "Chicago is scarcely a benighted backwater with little or no experience in dealing with sophisticated securities litigation." *Id.*; *see also* Polk v. New York State Dep't of Correctional Servs., 722 F.2d 23, 25 (2d Cir. 1983) (court may use attorney's own community rate if "special expertise of counsel from a distant district" is needed).

88. *See, e.g., In re Telesphere*, 753 F. Supp. at 719 (scaling back all hourly rates higher than \$250 to that amount); *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 889 (N.D. Ill. 1990) (capping attorneys' rates at \$175/hour).

89. *Blum v. Stenson*, 465 U.S. 886, 898 (1984).

90. *See In re Continental Ill.*, 750 F. Supp. at 885.

91. *See, e.g., In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 591-93 (3d Cir. 1984) (reducing hourly rates from partner to associate level for activities that could have been performed by associates); *Whitley v. Seibel*, 676 F.2d 245, 253-54 (7th Cir.) (court may distinguish between office and trial time in fixing hourly rate), *cert. denied*, 459 U.S. 942 (1982); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974) (different rates appropriate for legal work and non-legal work such as investigation, clerical work and compilation of facts).

92. Recognizing this dilemma, the *In re Continental Illinois* court refused to apply different rates because of the "mixed" nature of the fee petition's entries. *See In re Continental Ill.*, 750 F. Supp. at 888.

ensure that senior attorneys are not overcompensated for menial tasks.⁹³ In addition, setting a maximum rate does not require the intense judicial scrutiny and line-drawing that task-based rates require. Ceilings, however, reduce the spread of hourly rates between senior partners and their more junior colleagues.⁹⁴ Instead of a single ceiling, some courts fix separate benchmark rates for partners and associates, thereby recognizing the higher market value accorded an attorney with partnership status.⁹⁵ But even these categories are too general and undercompensate associates with extensive experience and overcompensate those only recently promoted to partnership status.

c. Compensation for Delay in Payment

Selection of a reasonable hourly rate is further complicated by the need to compensate the plaintiff's attorney for the delay in payment inherent in contingent cases.⁹⁶ Because straight hourly rates do not compensate the attorney for the time value of money, the court must adjust the hourly rate or apply a risk multiplier to the lodestar figure.⁹⁷ Courts that adjust the hourly rate often differ as to whether current rates or historical rates with interest more accurately compensate for delay. Most courts favor the current rate approach, probably because it is simpler and more convenient than determining the attorney's rate for each year the litigation was in progress.⁹⁸ This approach simply applies today's hourly rates to all the time expended by counsel over the course of the litigation.

Historical hourly rates combined with an adjustment for interest are more burdensome but provide a more precise means of compensating for delay in payment.⁹⁹ Current rates tend to be higher than historical rates

93. See *id.* at 885-89.

94. See *id.* at 889.

95. See, e.g., *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 405 (D.C. Cir. 1986) (setting hourly rate for partner and lead counsel at \$160 and for associates at \$85); *Harman v. Lyphomed, Inc.*, 734 F. Supp. 294, 301 (N.D. Ill. 1990) (setting average rate at \$247/hour for partners and \$190/hour for associates); *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1205 (N.D. Ill. 1989) (awarding benchmark rates of \$285/hour for partners charging \$285/hour or more; \$220/hour for partners charging less than \$285/hour; and \$150/hour for associates).

96. A contingent contract "refer[s] to [a] fee arrangement with [an] attorney who agrees to accept his fee on the contingency of a successful outcome." *Black's Law Dictionary* 320 (6th ed. 1990).

97. For a discussion of multipliers, see *infra* notes 103-32 and accompanying text.

98. See *Skelton v. General Motors Corp.*, 860 F.2d 250, 255 n.5 (7th Cir. 1988), *cert. denied*, 110 S.Ct. 53 (1989); *Copeland v. Marshall*, 641 F.2d 880, 893 n.23 (D.C. Cir. 1980); *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 885 (N.D. Ill. 1990); *Purdy v. Security Sav. & Loan Ass'n*, 727 F. Supp. 1266, 1271 n.5 (E.D. Wis. 1989); *Dutchak v. International Bhd. of Teamsters*, Nos. 76-C-3803, 78-C-342, 79-C-1725 (N.D. Ill. April 6, 1989) (LEXIS, Genfed library, Dist file, 3877 at *20-21); *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 747 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

99. See, e.g., *Waldner v. Shulman*, No. 86-7381 (E.D. Pa. Aug. 25, 1989) (LEXIS, Genfed library, Dist file, 10094 at *10) (lodestar calculation based on historic billing

with interest and therefore overcompensate the attorney for the delay in collection.¹⁰⁰ Current rates also inadequately protect against windfalls when the attorney advances from associate to partner at some point during the litigation.¹⁰¹ The historical rate approach, on the other hand, tracks the attorney throughout each phase of the litigation and compensates a given level of responsibility and experience at each point in time.

A few courts have adopted a dual approach, employing both current and historical rates.¹⁰² Although somewhat less burdensome than a straight historical approach, this hybrid method still tends to overcompensate the attorney for delay in payment.

d. *Inconsistent Use of Multipliers*

Like hourly rates, multipliers are notoriously inconsistent, ranging anywhere from zero to four.¹⁰³ The Seventh Circuit in *Skelton v. General Motors Corp.*¹⁰⁴ has suggested limiting multipliers to 2, a 200% increase in the lodestar figure. The majority of courts impose no limits, however, and only recently have become sensitized to the problem of disproportionate fees.¹⁰⁵ In most instances, the court is free to manipulate the

rate); *Carbone v. Gulf Oil Corp.*, No. 85-361 (E.D. Pa. July 27, 1989) (LEXIS, Genfed library, Dist file, 8805 at *19) (same); see also *In re Telesphere Int'l Sec. Litig.*, 753 F. Supp. 716, 718 & n.4 (N.D. Ill. 1990) (historical rate with interest is more precise means of compensating delay, but court bound to follow circuit decision advocating current rate approach).

100. See *In re Telesphere*, 753 F. Supp. at 718. In that case, the partners' hourly rates increased from \$350 to \$450 (28% increase), \$225 to \$310 (38%), \$275 to \$345 (25%), \$250 to \$345 (38%) and \$215 to \$285 (33%) over the two and one-half years duration of the litigation. See *id.* The difference between the recovery at current rates (\$107,458.50) and the recovery at historical rates (\$92,397) amounted to more than 16 percent — a difference which an adjustment for interest would not entirely erase. See *id.*

101. In *In re Telesphere*, for example, the court reduced a recently promoted attorney's rate to \$225 per hour, resulting in savings to the class of \$8,680. See *id.* at 721.

102. See, e.g., *Brown v. Steinberg*, Nos. 84 Civ. 4654, 4665, 8001 (S.D.N.Y. Oct. 12, 1990) (LEXIS, Genfed library, Dist file, at 13516 at *3) (time spent prior to July 1987 billed at July 1987 rate and time spent after July 1987 billed at present rate); *Kronfeld v. Transworld Airlines*, 129 F.R.D. 598, 605 (S.D.N.Y. 1990) (applying historical rates for the period 1983 through 1985 and 1988 current rates for work done after 1985).

103. See, e.g., *In re Telesphere*, 753 F. Supp. at 722 (109%); *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 132 (N.D. Ill. 1990) (awarding multipliers ranging from 1.5 to 2.5, depending on each attorney's contribution); *In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 896 (N.D. Ill. 1990) (no multiplier allowed); *Purdy v. Security Sav. & Loan Ass'n*, 727 F. Supp. 1266, 1278 (E.D. Wis. 1989) (awarding multiplier of 2, in accordance with *Skelton* ceiling); *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1209 (N.D. Ill. 1989) (1.75 for lead counsel; 1.25 for non-lead counsel); *In re Cenco Inc. Sec. Litig.*, 519 F. Supp. 322, 327 (N.D. Ill. 1981) (multipliers of 2 and 4 awarded).

104. 860 F.2d 250, 258 (7th Cir. 1988) cert. denied, 110 S. Ct. 53 (1989). "It may be that a doubling of the lodestar would provide a sensible ceiling. It would certainly address the concern that extremely risky cases (those bordering on the frivolous) not warrant extremely large risk multipliers." *Id. Contra In re Superior Beverage*, 133 F.R.D. at 132 (awarding maximum multiplier of 2.5).

105. See Schmitt, *Shareholders Suits Pay Attorneys Less*, Wall St. J., Feb. 1, 1991, at B1, col. 4.

lodestar on the basis of a plethora of arbitrary factors.¹⁰⁶

Moreover, a series of Supreme Court cases severely restricting the use of multipliers in statutory fee-shifting cases has created confusion regarding the multiplier's applicability in the common fund context.¹⁰⁷ In *Blum v. Stenson*,¹⁰⁸ the Supreme Court rejected novelty and complexity of the issues presented as appropriate enhancement factors on the presumption that these factors are already reflected in the number of hours expended by counsel.¹⁰⁹ The *Blum* Court also rejected adjustments for "quality of representation" and "results obtained," noting that these factors are subsumed by the reasonable hourly rate used to compute the lodestar.¹¹⁰ Upward adjustments for attorney performance are justified "only in the rare case where the fee applicant offers 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.'"¹¹¹

In another fee-shifting case, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*,¹¹² the Supreme Court affirmed the *Blum* ruling on quality multipliers, finding it unnecessary to enhance the fee for superior performance because the lodestar itself includes all the relevant factors comprising a reasonable attorney's fee. *Delaware Valley II*,¹¹³ a plurality opinion involving a fee-shifting statute, extended the Court's restrictions to risk-of-loss, or contingency, multipliers.¹¹⁴

The Supreme Court failed to address whether the restrictions on multipliers set forth in *Blum* and its progeny also apply to common fund

106. See Berger, *supra* note 21, at 290.

107. Courts and commentators have recognized the need to distinguish between common fund and statutory fee-shifting cases. See *Blum v. Stenson*, 465 U.S. 886, 900 n.16; Third Circuit Task Force Report, *supra* note 5, at 250-51. For a definition of statutory fee-shifting litigation and a discussion of the policy differences between it and common fund cases, see *infra* notes 154-57 and accompanying text.

108. 465 U.S. 886 (1984).

109. See *id.* at 898-99. Nevertheless, a good argument can be made in favor of rewarding the plaintiff's attorney for devoting extra time on a complicated issue. Mere reimbursement for the number of hours expended on the litigation may not be a sufficient incentive for attorneys to take on cases involving novel or complex legal questions.

110. *Id.* at 899.

111. *Id.*

112. 478 U.S. 546 (1986) ("*Delaware Valley I*").

113. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987).

114. Chief Justice Rehnquist, and Justices White, Powell and Scalia would reserve risk-of-loss multipliers for exceptional cases where the need for such enhancement is supported by specific evidence in the record. See *id.* at 728. These four justices determined that contingency is not an appropriate criterion for enhancement because it tends to compensate attorneys not only for their successful efforts in the case at hand, but also for their unsuccessful efforts in related cases. See *id.*

In her concurrence in the judgment, Justice O'Connor determined that an enhancement for contingency might be valid if "based on the difference in market treatment of contingent fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case." *Id.* at 731 (emphasis in original). In order to receive such an award, however, the petitioner would be required to show that "without an adjustment for risk

cases. The lower courts' attempts to answer this question have been inconsistent and their myriad responses have compounded the inconsistencies and imprecision that plague the lodestar regime.

Some courts seemingly disregard the Supreme Court's directives, awarding both quality and risk multipliers with little explanation why the attorney merited such enhancements.¹¹⁵ Some courts follow the restrictions in certain instances but not in others.¹¹⁶ Others create their own standards for applying multipliers. The District of Columbia Circuit in *Bebchick v. Washington Metropolitan Area Transit Commission*,¹¹⁷ for example, examined the percentage of the recovery comprised by the fee;¹¹⁸ the levels of contingency counsel had to overcome;¹¹⁹ the public interest nature of the suit;¹²⁰ and finally, the quality of representation.¹²¹ The courts in *In re Terra-drill Partnerships Securities Litigation*¹²² and *Purdy v. Security Savings & Loan Association*¹²³ examined all the *Johnson* factors¹²⁴ except time and rate to be applied.¹²⁵ The *In re Wicat Securities Litigation*¹²⁶ court examined five factors—the magnitude and complexity of the litigation;¹²⁷ the quality of the representation;¹²⁸ contingency;¹²⁹ public policy;¹³⁰ and the reaction by the class.¹³¹ Finally,

the prevailing party 'would have faced substantial difficulties in finding counsel' " in the relevant market. *Id.* at 733.

Justices Blackmun, Brennan, Marshall and Stevens concluded that the risk of loss is an appropriate enhancement factor. Unlike Justice O'Connor, they would base enhancement for contingencies on both the market as a whole and on the particular risks of the case.

115. *See, e.g., In re Telesphere Int'l Sec. Litig.*, 753 F. Supp. 716, 722 (N.D. Ill. 1990) (awarding multiplier of 1.09, despite failure to indicate whether it was for quality or risk and why counsel merited enhancement); *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 131 (N.D. Ill. 1990) (court noted that "care must be taken to avoid double compensation" for novelty and complexity, but otherwise did not justify level of multiplier in light of Supreme Court restrictions).

116. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 234 n.2, 235 (2d Cir. 1987) ("*Agent Orange II*") (noting that, although the Supreme Court restrictions apply to quality multipliers, "equitable fund cases may afford courts more leeway" in awarding quality multipliers in a "close case"); *Kronfeld v. Transworld Airlines*, 129 F.R.D. 598, 608-09 (S.D.N.Y. 1990) (although the strictures of *Blum* and *Delaware Valley I* must be considered, "courts in this circuit retain some discretion to award multipliers in equitable fund cases").

117. 805 F.2d 396 (D.C. Cir. 1986).

118. *See id.* at 406-07.

119. *See id.* at 407.

120. *See id.* at 408.

121. *See id.* at 407-08.

122. *In re Terra-drill Partnerships Sec. Litig.*, 733 F. Supp. 1127 (S.D. Tex. 1990).

123. 727 F. Supp. 1266, 1274 (E.D. Wis. 1989).

124. *See supra* note 21.

125. *See In re Terra-drill*, 733 F. Supp. at 1131; *Purdy*, 727 F. Supp. at 1274.

126. *In re Wicat Sec. Litig.*, 671 F. Supp. 726 (D. Utah 1987).

127. *See id.* at 739.

128. *See id.* at 739-40.

129. *See id.* at 740-41.

130. *See id.* at 741.

131. *See id.* at 741.

the *Agent Orange* court approved application of a quality multiplier, "find[ing] that the use of a [single] national hourly rate skews the normal lodestar analysis enough to require consideration of quality factors."¹³²

4. Lodestar Creates Agency Problems Between the Attorney and Class Members

Lodestar's emphasis on time spent rather than the amount of the settlement fails to harmonize the interests of the class members and those of their agent, the plaintiff's attorney. Because the attorney's recovery is not tied to the size of the class fund, the lodestar method provides no incentive for attorneys to seek a larger settlement. In the typical class action, the individual class member has only a nominal stake in the litigation's outcome and gains little by monitoring the attorney's conduct. As a result, the plaintiff's attorney enjoys free rein to define the litigation's objectives and it is the attorney's anticipated recovery, not that of the class, that determines the commencement of the suit and its duration.¹³³ The attorney, however, has little incentive to press for a larger fund because the number of hours expended is likely to be the same regardless of the size of the recovery.¹³⁴

III. CONFUSING CHANGE WITH REFORM?: THE RETURN OF THE PERCENTAGE-OF-RECOVERY APPROACH

A. *The Blum Decision as Impetus for Change*

Despite some early signs of dissatisfaction,¹³⁵ most courts continued to use lodestar until the Supreme Court's decision in *Blum v. Stenson*¹³⁶ sparked reconsideration of this approach in 1984. In *Blum*, the plaintiffs filed a request for an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976.¹³⁷ The district court awarded the plaintiff's attorney the lodestar plus a fifty percent bonus¹³⁸ to compensate for the case's complexity and novelty and for the benefit afforded the class. In a brief footnote, the Supreme Court observed that "[u]nlike 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 § 1988 reflects the amount of attorney time reason-

132. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 235 (2d Cir. 1987) ("*Agent Orange II*").

133. See Coffee, *supra* note 26, at 685-90.

134. See *In re Folding Carton Antitrust Litig.*, 84 F.R.D. 245, 262-63 (N.D. Ill. 1979).

135. See, e.g., *Blank v. Talley Indus., Inc.*, 390 F. Supp. 1, 5 (S.D.N.Y. 1975) ("[t]o give [hours spent] prime importance may at times result in rewarding inefficiency"); *Arenson v. Chicago Bd. of Trade*, 372 F. Supp. 1349, 1356 (N.D. Ill. 1974) ("value of a lawyer's services is not merely measurable by time").

136. 465 U.S. 886 (1984).

137. 42 U.S.C. § 1988 (1988). The Civil Rights Attorney's Fees Awards Act of 1976 provides that the court may grant the prevailing party "a reasonable attorney's fee." *Id.*

138. A 50% bonus is the equivalent of a 0.5 multiplier.

ably expended on the litigation."¹³⁹ This statement has been given varying interpretations.¹⁴⁰

A growing number of courts contend that the *Blum* footnote clearly endorses the percentage-of-recovery method in common fund cases.¹⁴¹ Viewing the Supreme Court dictum as legal authority for abandoning lodestar entirely, these courts have begun experimenting with alternative fee-setting standards based on a percentage of the fund. Others reject the notion that *Blum* was a considered dismissal of lodestar. These courts view *Blum* as modifying traditional lodestar analysis to include consideration of the size of the fee award in relation to the size of the common fund.¹⁴²

139. *Blum*, 465 U.S. at 900 n.16 (emphasis added). The *Blum* footnote distinguishes between the appropriate method of calculating attorney's fees in common fund litigation and that properly employed in statutory fee-shifting cases. A number of statutory causes of action, such as those created by federal securities, antitrust and civil rights laws, include provisions that reasonable attorney's fees may be awarded to the prevailing party. These cases are normally characterized as "fee-shifting" cases because they shift the burden of paying the attorney's fees from the plaintiff (who ordinarily would bear his own costs under the American rule) to the losing defendant. In contrast, common fund cases are based upon the equitable purpose of avoiding the unjust enrichment of those who benefit from the fund that is created. See Third Circuit Task Force, *supra* note 5, at 250. The legislative history of fee-shifting statutes, however, "makes it clear that the intent of Congress was to encourage private enforcement of the statutory substantive rights, whether they be economic or noneconomic, through the judicial process." *Id.* The number of individuals benefited and the size of the recovery, therefore, are of little import in calculating the statutory fee award. See *Blum*, 465 U.S. at 900 n.16. It is the enforcement of the right that is to be promoted.

140. For a discussion of the various readings of the *Blum* footnote, see *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 730-31 (D. Utah 1987).

141. See, e.g., *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) (Supreme Court endorsed percentage-of-recovery method in *Blum*); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (reasonable fee under common fund doctrine calculated as a percentage of recovery as per *Blum*); Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989) (same); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.) (same), *cert. denied*, 488 U.S. 822 (1988); *In re Smithkline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 532-33 (E.D. Pa. 1990) (same); *In re First Fidelity Bancorporation Sec. Litig.*, 750 F. Supp. 160, 162 (D.N.J. 1990) (same); *In re Oracle Sec. Litig.*, 132 F.R.D. 538, 546 (N.D. Cal. 1990) (same); *In re Savings Inv. Serv. Corp. Loan Commitment Litig.*, No. Civ. 87-560 (W.D. Okla. Jan. 22, 1990) (LEXIS, Genfed library, Dist file, 7728 at *7-8) (same); *Breiterman v. Roper Corp.*, No. 88 Civ. 2138 (S.D.N.Y. Jan. 12, 1990) (LEXIS, Genfed library, Dist file, 328 at *8-9) (same); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) (same); *In re TSO Fin. Litig.*, Nos. 87-7903, 87-7961, 87-8142, 87-8302 (E.D. Pa. July 17, 1989) (LEXIS, Genfed library, Dist file, 8253 at *12) (same).

142. See, e.g., *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 406-07 (D.C. Cir. 1986) (percentage of recovery is an "important factor" in deciding that the lodestar figure is not the maximum award); *In re Telesphere Int'l Sec. Litig.*, 753 F. Supp. 716, 721-22 (N.D. Ill. 1990) (percentage approach is included in lodestar); *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 132-33 (N.D. Ill. 1990) (percentage of recovery is final factor in determining lodestar calculation); *Kronfeld v. Transworld Airlines*, 129 F.R.D. 598, 602 (S.D.N.Y. 1990) (same); *Brown v. Steinberg*, Nos. 84 Civ. 4654, 4665, 8001 (S.D.N.Y. Oct. 12, 1990) (LEXIS, Genfed library, Dist file, 13516 at *6-7) (same); *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.*, 724 F. Supp. 160, 167-68 (S.D.N.Y. 1989) (same); *Waldner v. Shulman*,

In *Blum*'s wake, courts have split into three separate camps, each employing a different approach to fee-setting in common fund cases. Adherents of lodestar have long had to wrestle with inconsistency and imprecision in determining time, hourly rates and multipliers. Experimentation with variations on the percentage-of-recovery approach and with the hybrid lodestar-percentage method has added to this chaos. Apart from the Ninth Circuit, which is currently leading the percentage-of-recovery movement, the federal appeals courts have remained relatively silent regarding the current state of fee-setting law in common fund cases. Left unguided, the district courts have adopted a wide range of approaches, often within the same judicial district. This continued uncertainty and diversity of approach will increase the courts' administrative burden—exactly the opposite of what lodestar's critics had hoped to achieve.

B. *Percentage-of-Recovery Method*

After *Blum*, many courts that had become frustrated with the vagaries of the lodestar method abandoned it entirely and instead adopted the percentage-of-recovery approach to common fund fee awards. Proponents of the percentage-of-recovery method regard it as a panacea for the delays and abuses inherent in lodestar. It is worth noting, however, that lodestar was itself an alternative fee-setting method, designed to respond to the abuses precipitated by the percentage method. If the percentage method is again applied as a fixed portion of the fund, the problems that led to its first demise, such as windfall awards, appear likely to recur. Advocates of percentage fee arrangements seem to be confusing change with reform.

Courts differ in their willingness to acknowledge the inherent deficiencies of the percentage approach. Some courts are so anxious to be free of burdensome lodestar calculations that they appear to have given little thought to the potential problems posed by the alternative. These courts often award the same percentage no matter what the size of recovery or the complexity of the case. Other tribunals are painfully aware of the problems that led to the percentage method's first demise¹⁴³ and, as a result, have constructed intricate sliding scales,¹⁴⁴ auctioned litigation

No. 86-7381 (E.D. Pa. Aug. 25, 1989) (LEXIS, Genfed library, Dist file, 10094 at *9-13) (same); *In re New York City Shoes Sec. Litig.*, No. 87-4677 (E.D. Pa. June 6, 1989) (LEXIS, Genfed library, Dist file, 6346 at *10) (same); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 718 (E.D.N.Y. 1989) (same); *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 731 (D. Utah 1987) (lodestar is starting point for determining attorney's fees); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 746-47 (S.D.N.Y. 1985) (same), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

143. As Professor Coffee recently observed, "There is tremendous fear on behalf of judges that they will be seen as giving unjustified windfalls to plaintiff attorneys." Schmitt, *supra* note 106, at B1, col. 4.

144. See *In re First Fidelity*, 750 F. Supp. at 163.

rights,¹⁴⁵ and even reduced fee awards.¹⁴⁶ Yet many of these more intricate techniques fail to correct lodestar's inefficiencies or to avoid the pitfalls inherent in the traditional percentage approach.

1. The Fixed Percentage-of-Recovery Award

Frustration with lodestar has prompted a "stampede"¹⁴⁷ back to setting attorney's fees according to a fixed percentage of the class' common fund.¹⁴⁸ The main feature of this method — and its appeal for many overworked judges—is its simplicity and ease of administration. Unlike the lodestar method, which requires courts to wrestle with such "surrealistic"¹⁴⁹ concepts as reasonable number of hours expended, reasonable hourly rates or multipliers that reflect a variety of circumstances, the percentage approach simply requires judges to determine what portion of the fund reasonably compensates the attorney's work.¹⁵⁰ The number of hours spent on the litigation is irrelevant to this calculation. Rather, the size of the fund measures the attorney's success because "the fund would not exist except for the attorneys' unpaid work."¹⁵¹

a. Rationales for the Percentage Method In Common Fund Cases

The notion that attorney's fees should be proportional to the size of the fund reveals important policy differences between common fund and statutory fee-shifting cases—differences that seem to support use of the percentage approach in the common fund context.¹⁵² First, the common

145. See *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 697 (N.D. Cal. 1990).

146. See Schmitt, *supra* note 106, at B1, col. 4.

147. Solovy & Kaster, *supra* note 19, at 13, col. 2.

148. See, e.g., *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (25%); *Paul Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir. 1989) (25%); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 455 (10th Cir.) (16.5%), *cert. denied*, 488 U.S. 822 (1988); *Lubliner v. Maxtor Corp.*, No. C-89-1807 (N.D. Cal. Feb. 14, 1990) (LEXIS, Genfed library, Dist file, 3930 at *9-10) (30%); *Breiterman v. Roper Corp.*, No. 88 Civ. 2138 (S.D.N.Y. Jan. 12, 1990) (LEXIS, Genfed library, Dist file, 328 at *9) (less than 14%); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1379 (N.D. Cal. 1989) (32.8% including expenses); *In re TSO Fin. Litig.*, Nos. 87-7903, 87-7961, 87-8142, 87-8302 (E.D. Pa. July 17, 1989) (LEXIS, Genfed library, Dist file, 8253 at *20) (23%); *Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 679, 702 (M.D. Ala. 1988) (19.5%); *Howes v. Atkins*, 668 F. Supp. 1021, 1027 (E.D. Ky. 1987) (40%); *In re GNC Shareholder Litig.*, 668 F. Supp. 450, 451 (W.D. Pa. 1987) (25%).

149. Third Circuit Task Force, *supra* note 5, at 258.

150. Moreover, at least one court has argued that the lodestar method cannot withstand a cost-benefit analysis. See *In re Activision*, 723 F. Supp. at 1375. Because the result of lodestar calculations is almost always an award of around 30%, the court's lengthy analysis of the attorney's fee petition is an inefficient use of judicial resources and may even reduce the size of the class' fund through delay or the cost of using a special master. See *id.* But see *infra* notes 168-71 and accompanying text (discussing lack of consistency in percentage fee awards).

151. Solovy & Kaster, *supra* note 19, at 13, col. 2.

152. Taking their cue from *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), a growing number of courts have recognized the need to distinguish between common fund and statutory fee-shifting cases for the purposes of fee-setting. See, e.g., *Skelton v. General Motors Corp.*, 860 F.2d 250, 252-53 (7th Cir. 1988) (noting policy differences in common

fund doctrine is rooted in the equitable principle that those who benefit from a fund should share its costs.¹⁵³ This cost sharing is possible because such a large number of people benefit and their monetary recovery is relatively substantial. Statutory fee-shifting cases, on the other hand, do not usually generate large class funds from which attorney's fees could be subtracted. Intended to promote private enforcement of substantive rights,¹⁵⁴ statutory causes of action often produce only nominal damages or declarative judgments—the kind of results that do not have monetary equivalents.¹⁵⁵ Use of a percentage fee arrangement in such cases would not sufficiently promote the availability of legal services because the small recovery barely covers reasonable compensation for the attorney, let alone for individual class members.¹⁵⁶ In the common fund context, however, a fee award reflecting the number of hours worked is not necessary to induce attorney participation because the ordinary common fund case gives rise to a recovery large enough to accommodate a percentage-based award.

Moreover, differences in who must bear the burden of compensating the plaintiff's attorney mandate that different policies govern common fund and statutory fee-shifting cases. In statutory fee cases, attorney's

fund and statutory fee cases, but nonetheless applying lodestar formula to common fund case), *cert. denied*, 110 S. Ct. 53 (1989); *Brown v. Phillips Petroleum*, 838 F.2d 451, 454 (10th Cir.) (language of *Blum* "implicitly recognize[s] basic differences in the rationale for calculating attorneys' fees in common fund cases"), *cert. denied*, 488 U.S. 822 (1988); *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 406-07 (D.C. Cir. 1986) (that the case is based upon common fund doctrine is "an all important factor in deciding that the lodestar is not the maximum award"); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 n.19 (3d Cir. 1984) (noting that the "public policy considerations in the two situations are not obviously identical"); *In re Smithkline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 532-33 (E.D. Pa. 1990) (applying different fee-setting methods to common fund and statutory fee-shifting cases best achieves their differing policy objectives); *In re TSO Fin. Litig.*, No. 87-7903, 87-7961, 87-8142, 87-8302 (E.D. Pa. July 17, 1989) (LEXIS, Genfed library, Dist file, 8253 at *11-14) (discussing "need to treat fund in court and statutory fee cases in variant ways to best achieve their policy objectives"); *In re New York City Shoes Sec. Litig.*, No. 87-4677 (E.D. Pa. June 6, 1989) (LEXIS, Genfed library, Dist file, 6346 at *3-4) ("a different rule should govern attorneys fees awards under the common fund doctrine" than in statutory fee-shifting cases); *Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 679, 689 (M.D. Ala. 1988) (interpreting *Blum* footnote as recognition of differences between common fund and statutory fee-setting).

153. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-66 (1939); *Central R.R. & Banking v. Pettus*, 113 U.S. 116, 127 (1885); *Trustees v. Greenough*, 105 U.S. 527, 532 (1882).

154. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) ("*Delaware Valley I*"); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); Third Circuit Task Force, *supra* note 5, at 250.

155. See *In re Smithkline Beckman*, 751 F. Supp. at 532.

156. See *City of Riverside v. Rivera*, 477 U.S. 561, 586 (1986) (Powell, J., concurring).

Lodestar is the most appropriate means of calculating attorney's fees in statutory fee cases because it allows "counsel [to] spend as much time and [to] be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the . . . rights of a single individual." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

fees are assessed against the unsuccessful defendant. Because the extent of the defendant's liability is tied to the size of the plaintiff's attorney's fees, the defendant actively participates in the determination of the fee award.¹⁵⁷

Conversely, in common fund cases, the defendant is released from liability for attorney's fees upon payment of the settlement fund.¹⁵⁸ Left to grapple with the fee petitions alone, the courts' attempts to determine whether the lodestar hours were reasonable and beneficial to the class are invariably frustrating and inadequate.¹⁵⁹ The percentage approach introduces proportionality and predictability into the common fund fee-setting process and does away with many of the time-consuming administrative tasks that presently burden the courts. In effect, the percentage approach conserves scarce judicial resources currently devoted to scrutinizing the fee petition because it relies on "incentives rather than costly monitoring."¹⁶⁰

Finally, because the attorney's fee is paid by the plaintiff class members and not the defendant, the court does not "face the prospect that the fee award that accounts for the difficulties and risks faced by the plaintiffs and their attorneys will perversely penalize defendants who have the strongest and most reasonable defenses."¹⁶¹

b. *Advantages of the Fixed Percentage Method
In Common Fund Cases*

These policy rationales for the percentage approach in common fund cases illustrate the benefits that accrue from using such a method. In aligning the interests of the attorney and the absent class members, the percentage approach creates a powerful incentive for the attorney to press for a larger recovery. At the same time, percentage fee arrangements do not penalize the attorney for an early settlement and may even reward an efficient resolution. Conversely, lodestar compensates the attorney according to the amount of time expended on the action, not according to the size of the recovery. Under this time-based formula, the attorney earns the same fee whether he settles the case or achieves a much larger recovery at trial.¹⁶²

157. "Arguably, all the judge need do is rule on the fee application based on the competing presentations of the adversaries." Third Circuit Task Force, *supra* note 5, at 251.

158. *See Skelton v. General Motors Corp.*, 860 F.2d 250, 256 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 53 (1989).

159. "Such efforts produce much judicial papershuffling, in many cases with no real assurance that an accurate or fair result has been achieved." *In re Union Carbide Consumer Prods. Business Sec. Litig.*, 724 F. Supp. 160, 165 (S.D.N.Y. 1989).

160. *Coffee*, *supra*, note 26, at 724; *see also Kirchoff v. Flynn*, 786 F.2d 320, 324-25 (7th Cir. 1986) (by aligning the interests of class members with their attorney, the percentage approach monitors the attorney's performance more effectively than the court itself could do); *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 694 (N.D. Cal. 1990) (same).

161. *Solovy & Kaster*, *supra* note 19, at 13, col. 2.

162. *See In re Folding Carton Antitrust Litig.*, 84 F.R.D. 245, 262-63 (N.D. Ill. 1979); *Coffee*, *supra* note 26, at 717. According to Professor Coffee, even if victory at trial

By making the attorney's fee award a function of the recovery, the fixed percentage approach resolves the principal-agent conflicts inherent in time-based formulae.¹⁶³ The attorney is more likely to press for a large recovery. Early settlement also becomes a viable option because the attorney's award is determined by the amount of the fund and not by the number of hours spent clogging the court's docket with needless busy work.¹⁶⁴

Advocates of the fixed percentage (either the benchmark variety¹⁶⁵ or a percentage individually negotiated at the outset of each case) also insist that it gives class action fee-setting a much needed aura of consistency¹⁶⁶ — something sorely lacking in lodestar calculations.¹⁶⁷ Predictability exerts a positive influence on the fee-setting process by enabling both the class members and their attorney to rationally decide the propriety of pursuing an action based on a prediction of their expected recoveries. Thus, individual plaintiffs would be less likely to opt out of the class action in favor of bringing a separate suit. Moreover, the attorney would be less inclined to drag out the litigation in order to ensure an optimal fee. Both of these results would lighten the administrative burden on the courts.

c. *Problems With Fixed Percentage Method*

Notwithstanding the handful of courts advocating a benchmark approach, "the wide range of choices that courts have made, even in similar cases, strongly suggests the essentially arbitrary nature of 'percentage picking.'" ¹⁶⁸ In recent years, percentage fee awards have spanned from nineteen to thirty-three percent, with no apparent relationship to the to-

yielded a fund five times greater than the proposed settlement, the attorney "would have had to accept a significant risk that his substantial investment of time would go uncompensated [if the plaintiffs' suit was unsuccessful]. In effect, under the lodestar formula, a plaintiff's attorney shares his clients' downside risk, but not their upside gain, by rejecting a settlement and proceeding to trial." *Id.* at 717-18. Thus, lodestar acts as a disincentive to vigorous prosecution even where the plaintiffs' case is unusually strong.

163. For a discussion of the agency problems exacerbated by the lodestar method, see *supra* text accompanying notes 133-34.

164. Taken to its logical extreme, however, the percentage approach is likely to encourage premature settlements, especially where marginally decreasing fee scales are employed. See *infra* notes 210-12 and accompanying text.

165. A benchmark is a single percentage figure used over and over again, regardless of the type of litigation or the size of the recovery.

166. See, e.g., *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (approving application of a 25% "standard award"); *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 273 (9th Cir. 1989) (mandating award of 25% benchmark absent "reasonable explanation of why the benchmark is unreasonable under the circumstances"); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) ("absent extraordinary circumstances," rate should be set at 30% to provide predictability); see also Third Circuit Task Force, *supra* note 5, at 258 (negotiated fee procedure "offers attorneys a degree of predictability that many believe currently is lacking").

167. See *Berger*, *supra* note 21, at 283-92; Third Circuit Task Force, *supra* note 5, at 258.

168. *Berger*, *supra* note 21, at 317.

tal settlement or damages awarded.¹⁶⁹ Many courts justify their choice of percentage by asserting that it falls within a "normal range" of fee awards.¹⁷⁰ The difference in fees made by a ten percent range or "even a single percentage of large recovery, however, can have a substantial impact upon the fee recovery."¹⁷¹

In addition, there is nothing inherently reasonable about one percentage as opposed to another. A percentage is a relative concept and one court's award of twenty-five percent of a \$19.3 million recovery does not mean that the percentage continues to be reasonable when applied to a \$4.7 million recovery. Thus, the notion that a percentage falling within a certain range is reasonable is inherently misleading. As one court observed, "[f]ifty percent is neither a lot nor a little, until one knows what the underlying whole is. Half of one cookie isn't much. Half of a full cookie jar may well be a lot."¹⁷² Thus, while a fixed percentage might add to the consistency and predictability of common fund fee-setting, because it has no logical connection to the underlying recovery, it will tend to overcompensate or undercompensate the attorney in relation to the time and effort expended.¹⁷³

169. See, e.g., *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (25% of \$850,000 in damages); *Paul, Johnson, Alston & Hunt v. Graully*, 886 F.2d 268, 272 (9th Cir. 1989) (25% of a \$4,736,000 recovery); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 453, 455 (10th Cir.) (16.5% of lessee producers' \$75,000,000 share of common fund), cert. denied, 488 U.S. 822 (1988); *In re Smithkline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 534 (E.D. Pa. 1990) (25% of \$22,769,000); *Lublinter v. Maxtor Corp.*, No. C-89-1807 (N.D. Cal. Feb. 14, 1990) (LEXIS, Genfed library, Dist file, 3930 at *9-10) (30% of 208,450 shares of Maxtor common stock, excluding costs); *In re Savings Inv. Serv. Corp. Loan Commitment Litig.*, No. 87-560 (W.D. Okla. Jan. 22, 1990) (LEXIS, Genfed library, Dist file, 7728 at *15) (awarding 20% of \$10,230,000); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1379 (N.D. Cal. 1989) (32.8% of \$4,756,470, 22% of which is attorney's fees); *Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 679, 696 (M.D. Ala. 1988) (19.5% of \$17,425,000); *Pavlidis v. New England Patriots Football Club*, 675 F. Supp. 707, 709 (D. Mass. 1987) (26% of recovery in excess of \$6,500,000).

170. The conventional wisdom currently considers a range of 20% to 30% to be reasonable. See *Paul, Johnson, Alston & Hunt*, 886 F.2d at 272; *In re Smithkline Beckman*, 751 F. Supp. at 534; *Breiterman v. Roper Corp.*, No. 88 Civ. 2138 (S.D.N.Y. Jan. 12, 1990) (LEXIS, Genfed library, Dist file, 328 at *9); *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.*, 724 F. Supp. 160, 167 (S.D.N.Y. 1989); *Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 679, 692 (M.D. Ala. 1988). But cf. *In re TSO Fin. Litig.*, Nos. 87-7903, 87-7961, 87-8142, 87-8302 (E.D. Pa. July 17, 1989) (LEXIS, Genfed library, Dist file, 8253 at *21) (fee awarded in similar cases in federal system range from 19% to 45%); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) ("Traditionally, courts in this Circuit and elsewhere have awarded fees in the 20%-50% range in class actions."), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *Berger, supra* note 21, at 288 n.34 (survey of private antitrust cases revealed fee awards ranging from 5% to 67% of the treble damages or settlement).

171. *Berger, supra* note 21, at 317.

172. *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 125 (N.D. Ill. 1990); *accord In re Continental Ill. Sec. Litig.*, 750 F. Supp. 868, 878 (N.D. Ill. 1990) ("There is nothing about 22 percent that strikes me as more reasonable than an amount properly computed on a time basis with appropriate adjustments.").

173. See *In re Superior Beverage*, 133 F.R.D. at 124.

Without an inquiry into the hours expended by the attorney and a reasonable rate, excessive fee awards are inevitable.¹⁷⁴ Proponents of percentage fee arrangements argue that because the only accurate measure of the attorney's value to the class is the size of the fund itself, awarding the attorney a percentage of that fund is never disproportionate. The percentage approach, however, tends to promote large recoveries with minimum effort. The favorable result is often due more to the number of class members or the defendant's past acts than to the attorney's actual skill.¹⁷⁵ This method may also result in disproportionate fees where the plaintiff's attorney "piggybacks" the class action on a government indictment or civil enforcement action.¹⁷⁶ In such instances, the plaintiff's attorney need only duplicate the government attorneys' efforts in order to secure a settlement.¹⁷⁷

Windfall fee awards seem particularly inappropriate in the context of a class action. Unlike personal injury cases, where victims routinely make contingent fee arrangements to secure representation, class members have little influence over their attorney and must depend on the court to act as fiduciary in ensuring an equitable result.¹⁷⁸ As claimant against the fund, the attorney's financial interests directly conflict with those of the class because the attorney is likely to press for the largest fee award the court is willing to give. Without an adversarial proceeding, a hybrid time-percentage approach appears more reliable than the fixed percentage-of-recovery method in setting a fee award that is fair to the class.¹⁷⁹

2. Hybrid Approaches

Some courts have recognized that the percentage approach is less apt to generate windfall fees when applied in conjunction with other factors, namely the number of hours worked. In *In re TSO Financial Litigation*,¹⁸⁰ for example, the court based the fee award on a percentage of the fund, but also considered the efficient resolution of the case, the attorney's skill, the complexity of the issues and the total number of hours devoted to the case.¹⁸¹ In *Lubliner v. Maxtor Corp.*,¹⁸² another percentage-of-recovery case, the court similarly examined the reasonableness of

174. See *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977) ("*Grinnell II*"); *Lindy Bros. Builders, v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973) ("*Lindy I*"), *aff'd in part and vacated in part*, 540 F.2d 102 (3d Cir. 1976) ("*Lindy II*").

175. See *Grinnell II*, 560 F.2d at 1099.

176. See generally *Coffee*, *supra* note 26, at 682 & n.37 (suggesting tendency of securities class and derivative actions to follow SEC or bankruptcy proceedings).

177. *Cf. id.* at 682 n.37 (prior "governmental proceedings reduce the private enforcer's search costs").

178. See *Van Gemert v. Boeing Co.*, 573 F.2d 733, 735 (2d Cir. 1978); *supra* notes 28-31 and accompanying text.

179. See *infra* text accompanying notes 191-98.

180. Nos. 87-7903, 87-7961, 87-8142, 87-8302 (E.D. Pa. July 17, 1989) (LEXIS, Genfed library, Dist file, 8253).

181. See *id.* at *17-19.

the number of hours billed, the rates charged, the extent of the staffing, the contingent nature of the case and the fact that no member of the class objected to the proposed fee award.¹⁸³ *In Brown v. Phillips Petroleum Co.*,¹⁸⁴ the appellate court approved of the district court's hybrid approach. The lower court considered no less than eleven factors, including time, the number of adverse parties, the number of "hotly contested" issues and the amount of legal research required.¹⁸⁵ The *In re Savings Investment*¹⁸⁶ court considered the twelve *Johnson* factors¹⁸⁷ in setting its percentage fee award. Because it grounds the fee in something more meaningful than the size of the recovery,¹⁸⁸ consideration of these factors seems to guarantee a more fair and reasonable fee award. The problem with this approach, however, is that like the *Johnson-Kerr* formula, no objective standards aid in its application.¹⁸⁹ The courts mentioned here considered a plethora of disparate factors. Even courts using similar analytic frameworks are given "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."¹⁹⁰ Courts are able to exercise an inordinate amount of discretion, emphasizing certain factors to the virtual exclusion of others. Such an approach, therefore, simply perpetuates the current confusion and unpredictability in common fund fee-setting.

Another approach that is rapidly gaining popularity is the combined lodestar-percentage method.¹⁹¹ This hybrid method first appeared after

182. No. C-89-1807 (N.D. Cal. Feb. 14, 1990) (LEXIS, Genfed library, Dist file, 3930).

183. *See id.* at *10.

184. 838 F.2d 451 (10th Cir. 1988).

185. *See id.* at 455.

186. *In re Savings Inv. Serv. Corp. Loan Commitment Litig.*, No. Civ. 87-560 (W.D. Okla. Jan. 22, 1990) (LEXIS, Genfed library, Dist file, 7728).

187. *See supra* note 21.

188. *See supra* notes 175-77 and accompanying text, suggesting the size of the fund is not always a result of the attorney's hard work and skill.

189. *See Berger, supra* note 21, at 286.

190. *Id.* at 286-87.

191. *See, e.g.,* *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 407 (D.C. Cir. 1986) ("That this is a 'common fund' case . . . is an important factor in deciding that the lodestar figure is not the maximum award."); *Puerto Rico v. Heckler*, 745 F.2d 709, 714 (D.C. Cir. 1984) (quoting *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)) (Although lodestar is the normal starting point, "[o]ther indicia of overall reasonableness control, 'under the "common fund doctrine," where a reasonable fee is based on a percentage of the fund bestowed on the class.'"); *In re Telesphere Int'l Sec. Litig.*, 753 F. Supp. 716, 722 (N.D. Ill. 1990) (rejecting requested fee of 25% where it exceeded lodestar, adding that "[t]here is certainly nothing sacred about a 25% figure"); *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 128 (N.D. Ill. 1990) (ruling that "no final fee determination can reasonably be made without considering the size of the settlement"); *Brown v. Steinberg*, Nos. 84 Civ. 4654, 4665, 8001 (S.D.N.Y. Oct. 12, 1990) (LEXIS, Genfed library, Dist file, 13516 at *6) (after calculating lodestar, "[a]n additional method in which to assess the reasonableness of attorney's fees is by determining the percent of the settlement fund that such fees would comprise"); *Kronfeld v. Transworld Airlines*, 129 F.R.D. 598, 602 (S.D.N.Y. 1990) (Although Sec-

Blum, which stated that "under the 'common fund' doctrine, . . . a reasonable fee is based on a percentage of the fund bestowed on the class."¹⁹² Many courts interpreted this footnote not as a clear endorsement of the percentage approach, but rather as permission to use percentages to gauge the reasonableness of the lodestar calculation.¹⁹³ Thus, under this hybrid approach, the lodestar is the starting point and focus of the fee determination.¹⁹⁴ Having arrived at the lodestar figure and applied a multiplier to reflect quality or risk, the court then calculates the portion of the class' recovery that the proposed fee comprises. If the fee falls within an acceptable range for that type of action,¹⁹⁵ the proposed fee is awarded as is.¹⁹⁶ The court may exercise its discretion, however, and adjust the lodestar to achieve the percentage the court deems most reasonable.¹⁹⁷ This approach minimizes the likelihood that the attorney

ond Circuit jurisprudence makes clear that analysis begins with lodestar, "[p]ercentage-based calculations may . . . be used to demonstrate that the fee awarded is reasonable, given the size of the jury verdict or settlement fund."); *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.*, 724 F. Supp. 160, 167-68 (S.D.N.Y. 1989) (advocating use of percentage approach in conjunction with lodestar or *Kerr* factors); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 718 (E.D.N.Y. 1989) ("courts often assess the reasonableness of counsel's fees by comparing them with the total recovery"); *Waldner v. Shulman*, No. 86-7381 (E.D. Pa. Aug. 25, 1989) (LEXIS, Genfed library, Dist file, 10094 at *13 n.3) (refusing to award full lodestar because that would have exceeded agreed-upon limit of 25% of total recovery); *In re New York City Shoes Sec. Litig.*, No. 87-4677 (E.D. Pa. June 6, 1989) (LEXIS, Genfed library, Dist file, 6346 at *10) (noting favorably that requested fee of 33% is less than lodestar); *Zacharjasz v. Lomas & Nettleton Co.*, No. 87-4303 (E.D. Pa. Apr. 18, 1989) (LEXIS, Genfed library, Dist file, 4213 at *8) (lodestar equalling 28% of fund is "reasonable, fully justified, and well within the range of fees typically awarded in this type of litigation"); *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 700 F. Supp. 208, 209 (S.D.N.Y. 1988) (noting that lodestar comprises 15.7% of fund, an amount "well within the customary range in cases of this nature"); *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 731 (D. Utah 1987) ("cases which analyze footnote 16 of *Blum* nevertheless have considered both the percentage of recovery calculation and a lodestar calculation in ascertaining reasonable fees"); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749-50 (S.D.N.Y. 1985) ("the Supreme Court has . . . stated that the fee request must be looked at in terms of the percentage it represents of the total recovery"), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

192. *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

193. See *In re Wicat*, 671 F. Supp. at 731.

194. See *id.*

195. Current fee law seems to favor a range of 20% to 30% of the fund, regardless of the type of action or the size of the recovery. See *supra* note 170.

196. See, e.g., *Kronfeld v. Transworld Airlines*, 129 F.R.D. 598, 610 (S.D.N.Y. 1990) (lodestar and multiplier total 31.1% of settlement fund, "well within the acceptable range of 20%-50%"); *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.*, 724 F. Supp. 160, 170 (S.D.N.Y. 1989) (lodestar and multiplier comprise 27% of recovery, in keeping with typical range of 15%-30% in the Southern District of New York); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 750 (S.D.N.Y. 1985) (requested fee (lodestar plus 2.26 multiplier) equalling less than 25% of fund "is quite reasonable in relation to the fees typically awarded in complex class actions"), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

197. See, e.g., *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 409 (D.C. Cir. 1986) (increasing lodestar to 25%); *Brown v. Steinberg*, Nos. 84 Civ. 4654, 4665, 8001 (S.D.N.Y. Oct. 12, 1990) (LEXIS, Genfed library, Dist file, 13516 at *5) (reducing requested multiplier of 1.14 to 1.13 to hold award to 30% of settlement).

could effectively deplete the class' fund simply by logging excessive hours. Similarly, it curbs the windfall fee awards that fixed percentages tend to generate.¹⁹⁸

Despite these benefits, this hybrid approach has several troublesome disadvantages. It does little to alleviate the administrative strain placed on the courts by the lodestar regime. The court still must struggle to decipher the fee petition, a process that "no matter how conscientious, often seem[s] to take on the character of so much Mumbo Jumbo."¹⁹⁹ Furthermore, the hybrid approach does not offer any of the incentives for an early and efficient resolution of the litigation that other percentage-based formulae provide. Because the court continues to make an *ex post* fee determination, attorneys are just as likely to engage in dilatory behavior as they were under a traditional lodestar approach.²⁰⁰ Therefore, this approach gives attorneys little confidence in the ultimate fee, except that it is likely to fall somewhere between twenty and thirty percent of the total recovery.

3. Sliding Scales

Another approach that has appeared with increasing frequency in recent years is the sliding scale. In its most basic form, a sliding scale is a fee schedule in which the percentage award marginally decreases as the size of the fund increases.²⁰¹ Some courts have employed formal fee scales to arrive at a reasonable percentage award.²⁰² Other courts, while agreeing with the policies behind sliding scales, have adopted a more flex-

198. See Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215, 268 (1983). Professor Coffee has suggested that comparison of an appropriate percentage with that level of lodestar-calculated compensation would curb the problem of windfall fees. See *id.*

199. *In re Union Carbide*, 724 F. Supp. at 170.

200. See *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 692 (N.D. Cal. 1990). "The idea that a retrospective award of attorney fees—in judicial parlance, 'weighing the issues in light of a fully developed record'—protects the class against overreaching lawyers assumes that lawyers who prosecute class actions are unaffected by the uncertainty surrounding their compensation which stems from an *ex post* determination." *Id.* at 692 n.8. Uncertainty regarding the fee award, Judge Walker concludes, prompts the attorney to drag out the litigation at the expense of the absent class members and the court. See *id.* at 692.

201. See Third Circuit Task Force, *supra* note 5, at 256.

202. See, e.g., *In re First Fidelity Bancorporation Sec. Litig.*, 750 F. Supp. 160, 163 (D.N.J. 1990) (30% of the first \$10,000,000; 20% of the next \$10 million; and 10% of any monies over \$20 million); *In re Oracle*, 132 F.R.D. at 541 (N.D. Cal. 1990) (see fee scale which follows). The *Oracle* court's selection is a basic fee scale with a discount for early settlement. It includes a \$325,000 cap on litigation expenses.

Recovery	Time for Resolution (months)	
	0-12	13 or more
Up to \$1M	24%	30%
\$1M-\$5M	20%	25%
\$5M-\$15M	16%	20%
\$15M or more	12%	15%

Id.

ible stance that simply awards a smaller percentage fee where the fund is large.²⁰³ Both approaches respond to a major defect in the straight percentage approach—windfall fee awards. Increasing the amount of the recovery does not require correspondingly increased levels of attorney effort.²⁰⁴ Often, the increase in recovery is due to the scope of the defendant's past acts or to the number of people in the class.²⁰⁵ Thus, "[e]quity and good conscience" require that the attorney not be rewarded for circumstance or economies of scale.²⁰⁶

Courts must take care, however, not to construct percentage fee scales that decline too sharply, or they might curb attorney incentive as well as windfall fees.²⁰⁷ Thus, the reduction in the percentage awarded must not correspond too closely to the changing level of recovery.²⁰⁸ Rather, the attorney must continue to earn higher fees for higher recoveries, although at a diminished rate of increase in comparison with the recovery. "This differential preserves the incentives for lawyers inherent in percentage fees while at the same time addressing the enduring criticism that they lead to attorney windfalls."²⁰⁹

Any fee-setting standard that diminishes the attorney's award as the amount of the recovery increases is bound to exacerbate the problem of premature, or "sell-out," settlements.²¹⁰ In general, litigation costs

203. See, e.g., *In re Smithkline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 534 (E.D. Pa. 1990) (recognizing that "the percentage of recovery fee should decrease as the size of the common fund increases," court awards 25% because "in situations involving funds comparable in magnitude . . . , courts have awarded percentage of recovery fees comprising 20 to 27% of the fund"); *In re Savings Inv. Serv. Corp. Loan Commitment Litig.*, No. Civ. 87-560 (W.D. Okla. Jan. 22, 1990) (LEXIS, Genfed library, Dist file, 7728 at *15) ("We find that a percentage award of 20% is in keeping with the sliding scale approach."); see also *In re TSO Fin. Litig.*, Nos. 87-7903, 87-7961, 87-8142, 87-8302 (E.D. Pa. July 17, 1989) (LEXIS, Genfed library, Dist file, 8253 at *16-17) (advocating sliding scale approach, but noting that "because the total recovery to the class is ascertainable at this point, there is no need to employ a sliding scale in determining the proper percentage of recovery award of atto[r]ney's fees").

204. "Obviously, it is not ten times as difficult to prepare, and try or settle a ten million dollar case as it is to try a one million dollar case, although the [fixed] percentage contingent fee will return ten times as much." *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.*, 724 F. Supp. 160, 166 (S.D.N.Y. 1989).

205. See *supra* note 175 and accompanying text.

206. *Milstein v. Werner*, 58 F.R.D. 544, 551-52 (S.D.N.Y. 1973).

207. Cf. *In re Oracle Sec. Litig.*, 132 F.R.D. 538, 543-44 (N.D. Cal. 1990) (differential in decline of percentages preserves attorney incentive but promotes windfall fees).

208. See *id.*

209. See *id.* at 543. But see *Lynk, supra* note 73, at 259 & n.23 ("in the private market, a plaintiff with a bigger case will be able to attract lawyers with a smaller contingent percentage than will one with an otherwise identical small claim"). This theory suggests that the court may not need to use a fee award-recovery differential in order to preserve incentives for the attorney.

210. See *Coffee, supra* note 26, at 725. Sell-out settlements occur when the attorney settles the client's claim for less than it is worth to the client. "Suppose a defendant offers \$100,000, the contingent fee [or percentage of the common fund promised by the court] is 30 percent regardless of when the litigation ends, and the lawyer is sure he can get a judgment for \$120,000 if the case is tried but knows that it will cost him, in time and other expenses, \$8,000 to try it. [The class] will be better off if the case is tried, for after

mount in proportion to the amount of time expended by the attorney.²¹¹ As the class action progresses from one stage to the next, the attorneys compensated under percentage fee arrangements are likely to achieve steadily diminishing returns. The sliding scale approach aggravates this situation because not only do the attorneys' costs increase over time, but their fee awards will decrease upon securing larger recoveries. Thus, the sliding scale may promote the most expeditious, but not necessarily the best, results. Because it encourages attorneys to seek the highest return possible on the time expended, attorneys are more likely to settle prematurely to the detriment of the class.²¹²

The *In re American Continental/Lincoln Savings and Loan Securities Litigation*²¹³ court dealt with the problem of premature settlements in a similar, albeit more explicit, manner. The court in that case designed an inverse sliding scale that awarded fees of twenty-five percent for the first \$150 million and twenty-nine percent for any excess amount, plus a small bonus for early resolution of the case.²¹⁴ Although the increasing percentage approach appears likely to end the problem of premature settlements, it might do so for the wrong reasons. An increasing fee scale rewards additional recovery but not necessarily additional attorney effort.²¹⁵ As previously discussed, the amount of recovery can be influenced by a plethora of factors having nothing to do with the attorney's own hard work and skill.²¹⁶ The increasing percentage approach creates an incentive for the attorney to drag out the litigation in the hope of increasing the defendant's costs and thereby raising the settlement value of the case.²¹⁷ Moreover, this approach robs class members of the savings generated by the economies of effort that characterize larger recoveries.²¹⁸

The winning bid in the *In re Oracle* litigation, for instance, constructed an alternative means of controlling the sell-out settlements implicit in sliding fee scales. The winning bid ("the Lowey bid"), featured a sliding scale with a discount of twenty-five percent for resolution in one year or

paying the lawyer's fee [class members will still collect] \$84,000—rather than \$70,000 if it is settled. But the lawyer will be worse off, since his additional fee, \$6,000 (\$36,000 minus \$30,000) will be less than the trial costs of \$8,000" *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 124 (N.D. Ill. 1990) (quoting Chesny v. Marek, 720 F.2d 474, 477 (7th Cir. 1983)).

211. See Coffee, *supra* note 26, at 688-89.

212. Savvy defendants can exploit the plaintiff's attorney's tendency to settle early by "compelling their adversar[ly] to incur litigation expenditures beyond the level at which the plaintiff's attorney can expect to profit." *Id.* at 690. Tactics include excessive motion practice and lengthy discovery. See *id.*

213. MDL No. 834, fee order (D. Ariz. July 24, 1990).

214. See *id.*

215. See *In re Oracle Sec. Litig.*, 132 F.R.D. 538, 544 (N.D. Cal. 1990).

216. See *supra* note 175 and accompanying text.

217. Cf. *In re Oracle*, 132 F.R.D. at 544 ("One can easily imagine a scenario in which the increasing percentage fee arrangement actually discourages, not encourages, additional attorney effort and aggravates the agency problem.").

218. See *id.*

less.²¹⁹ The Lowey bid included a \$325,000 cap on litigation expenses. This discount for early settlements effectively counterbalances the propensity of attorneys operating under sliding fee arrangements to settle prematurely to the detriment of the class. Further, because it reduces the award by twenty-five percent of the fee available after thirteen months or more, the discount does not unfairly penalize an efficient resolution of the case.²²⁰

In contrast to the early settlement discount, the cap on litigation expenses may actually prompt attorneys to settle regardless of the merits of the case. Attorneys who reach the litigation expense limit are given little incentive not to settle for whatever the defendant is willing to offer.²²¹ Some defendants might take advantage of this dilemma by engaging in conduct designed to lengthen the litigation while running up the plaintiff's attorney's costs.²²² Thus, limits on attorney expenses should be avoided. The court, in an *ex post* proceeding, may exercise its discretion to refuse to reimburse part of these expenses if it does not believe they were necessary or beneficial to the class.

CONCLUSION

No matter what elaborate formulae courts manage to construct, fee-setting in common fund litigation will always retain its surrealistic quality. Although the task may be difficult and at times frustrating, there is no reason that a determination of attorney's fees totalling, for example, three million dollars or more should be any less deserving of the court's attention than a suit for three million dollars in damages. Both affect the plaintiff directly.

The court should announce at the outset of the litigation which fee-setting standard it will use to determine the attorney's award. By making its fee-setting standard known before the commencement of the case, the court enables both the class members and their attorney to predict their likely recoveries, thereby facilitating rational decisions regarding whether to pursue the litigation and for how long. Consistent, predictable treatment leads to more efficient litigation, which in turn reduces the court's administrative burden.²²³

The court should give attorneys for the class the opportunity to negotiate their choice of fee-setting standard, subject to its final approval. By giving the attorney a voice in the selection of the fee regime, the court

219. See *supra* note 202.

220. Efficient prosecution of class litigation is to be encouraged, not penalized as under the traditional time-based formulae. See *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 748-49 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d cir. 1986).

221. See Schmitt, *supra* note 105, at B1, col. 6.

222. See Coffee, *supra* note 26, at 690; Schmitt, *supra* note 105, at B1, col. 6.

223. See Third Circuit Task Force, *supra* note 5, at 258. "By establishing the fee agreement early in the litigation, any and all inducement or inclination to increase the number of . . . hours will be reduced, since the amount of work performed will not be permitted to alter the contingent fee." *Id.*

ensures that, whatever technique is applied, the attorney will have sufficient incentive to earn the largest recovery possible for the class. Auctioning the right to litigate²²⁴ might also be an effective means of selecting the fee-setting method, provided that the court does not base its decision solely on price. "Stressing price alone could . . . loosen the grip that 'the same old gang' of plaintiff attorneys has over these cases."²²⁵ If quality of representation is sacrificed to considerations of price, however, the interests of the class might suffer.

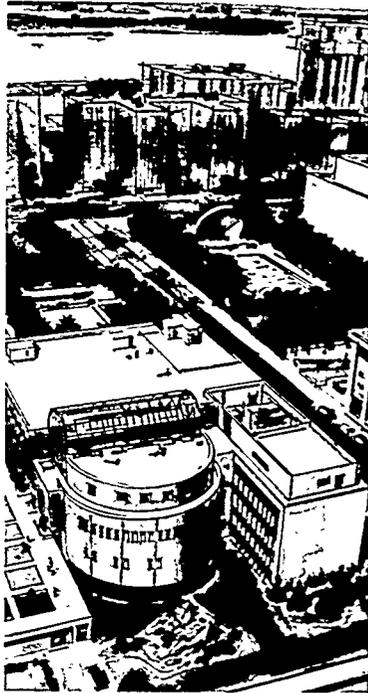
Courts would do well to use a fee-setting approach similar to that employed by the *In re Oracle* court: a sliding scale with a discount for cases resolved in twelve months or less. Use of a percentage-based approach will promote judicial efficiency by eliminating the fruitless, time-consuming calculations of the lodestar regime. By decreasing the attorney's fees as the size of the recovery increases, the court will put to rest the problem of windfall fee awards. Moreover, in applying a modest discount (twenty-five percent or less) to an early resolution of the case, such an approach counteracts the sliding scale's tendency to promote sell-out settlements. Like "old wine in a new bottle,"²²⁶ this approach has the predictability and efficiency of the traditional fixed percentage method while correcting the deficiencies that led to its initial demise.

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224. See *In re Oracle* Sec. Litig., 131 F.R.D. 688, 697 (N.D. Cal. 1990).

225. Schmitt, *supra* note 105, at B1, col. 6.

226. *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.*, 724 F. Supp. 160, 170 (S.D.N.Y. 1989).



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