# STATUTORY FEE SHIFTING IN CIVIL RIGHTS CLASS ACTIONS: INCENTIVE OR LIABILITY?

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Professor Greenberg has spoken of the backlash from the courts and Congress imposing restrictions on the ability to successfully litigate certain types of class actions to enforce civil rights. Congress placed a further impediment some months ago when it barred federally financed lawyers from bringing class actions.[1] Dire consequences were predicted.[2] What would happen to the hundreds of class actions then pending? Would they somehow evaporate for lack of legal representation? Would the actions charging civil rights violations of those seeking wheelchair accessible entrances to buses and subways be discontinued? What of the class actions pending in Arizona to speed collection of child support payments from parents and the cases seeking to redress racial discrimination in public housing projects?

Undoubtedly to the chagrin of those seeking to curtail civil rights class actions—these actions survived.[3] Some lawyers working for federally funded programs became solo practitioners one day a week and attempted to escape the

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1. Under the 1996 Budget Act, lawyers receiving federal funding cannot participate in class action litigation, represent prisoners, illegal aliens or people being evicted from public housing for alleged drug activity, cannot litigate abortion or redistricting issues and cannot challenge the legality of state or federal welfare law. *See* David Cole, *The Price of Limiting Legal Services*, CONN. L. TRIB., Feb. 3, 1997, at 24.

The constitutionality of Congress' restriction was recently challenged. On December 24, 1996, in Varshavsky v. Perales, 40767/91 (unpublished decision), New York State Justice Beverly Cohen declared the law invalid under the First Amendment. *See* Cole, *supra*, at 24. On January 9, 1997, five legal aid organizations filed an action in the District Court of Hawaii challenging the restrictions on operations and funding. *See* Kathryn Ericson, *Restrictions on Legal Services Funding Face Legal Challenge from East and West*, LEGAL INTELLIGENCER, Jan. 14, 1997, at 4. *See also* Rinat Fried, *Nonprofits' Suit Challenges Curbs on LSC Funding*, RECORDER, Jan. 10, 1997, at 1.

2. *See* Jan Hoffman, *Counseling the Poor, But Now One by One*, N.Y. TIMES, Sept. 15, 1996, § 1, at 47; *See also* Robin Topping, *Around the Island/Crime & Courts/Law and Order/Legal Help for the Poor Takes a Trimming, Too*, NEWSDAY, Aug. 13, 1996, at A19.

3. *See* Hoffman, *supra* note 2.

restrictions in that fashion. Many cases were taken on by public interest centers not receiving federal money. Some publicly funded law centers have reconstituted themselves creating separate entities—one which receives state, local and other funding to handle class actions—and another, which receives federal funding to handle only non class matters. An issue that should be discussed further is whether it can be expected that the private bar will now take a more active role in the prosecution of civil rights class actions and what incentive there is for it to do so.

By and large, the private class action bar has not focused on these cases. A change appears to be in the making with respect to race and sex discrimination cases. Professor Greenberg has referred to a few of these recent cases. But there are many more that involve very large sums of money.[4] The private class action plaintiffs' bar is as high-minded and socially conscious as any other segment of the bar. And not unlike defense attorneys, plaintiffs' counsel operate cost intensive practices and are concerned with enhancing their revenues.[5] Will the fees generated by civil rights cases attract private class action lawyers who in the past have focused primarily on securities, antitrust, mass tort and other cases where the fee is typically paid out of the recovery obtained for the class? Ultimately, the answer to this question may be found in the difference which underlies the basis of fee

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4. A discrimination case against Texaco recently settled for $176 million. *Avis Owners to Cut Ties with Franchise Accused of Racism*, Agence France Presse, Nov. 27, 1996, *available in* LEXIS, News Library, AFP File. Other large sums have been recovered by plaintiffs in actions brought against Denny's Restaurant ($46 million), Patricia Manson, *2 Women File Suit in LR Against Denny's, Alleging Racial Slurs*, ARKANSAS DEMOCRAT–GAZETTE, Nov. 23, 1996, at 12A; Lucky Stores Inc. ($107 million), Albertsons ($29.5 million), State Farm Insurance ($250 million), John D. McKinnon, *Retailers Beware!*, FLORIDA TREND, June 1996, at 20; Shoney's Restaurant ($132.5 million), Lara Wozniak, *A Law Firm's Commitment to a Cause*, ST. PETERSBURG TIMES, Mar. 24, 1996, at 1H; Caulkins Indiantown Citrus Co. ($13.5 million), Heather Graulich, *Indiantown*, PALM BEACH POST, Aug. 8, 1996, at 1D; Southern California Edison ($18.25 million), Stuart Silverstein, *Edison Will Pay $18.25 Million to Settle Racial Bias Class Action; Courts: Agreement, One of the Largest in Such a Discrimination Case, Will Cover Up to 2,500 Current and Former Workers*, L.A. TIMES, Oct. 2, 1996, at D1; and American Family Insurance Groups ($14.5 million), James A. Carlson, *$14.5 Million Settlement Reached in Insurance Suit*, Associated Press, Mar. 29, 1995, *available in* LEXIS, News Library, AP File.

Recently, cases were filed against R.R. Donnelley & Sons, Co., Andrew Stern, *Rev. Jackson Presses Donnelley with Jan. 15 Deadline*, Reuters Fin. Serv., Dec. 9, 1996, *available in* LEXIS, News Library, REUFIN File; Avis, *Avis Owners to Cut Ties*, *supra*; Publix Supermarket, Wozniak, *supra*; Fleet Bank, James T. Madore, *10 More Workers Want to Join Fleet Lawsuit*, BUFFALO NEWS, July 2, 1996, at 3E; and Smith Barney, Lorraine LaFemina, *LI Sexual Harassment File*, LI Bus. News, July 1, 1996, at 23, *available in* LEXIS, News Library, LIBN File.

5. In Evans v. Jeff D. 475 U.S. 717, 758 (1986) (Brennan, J. dissenting), Justice Brennan stated that "[i]t does not denigrate the high ideals that motivate many civil rights practitioners to recognize that lawyers are in the business of practicing law, and that, like other business people, they are and must be concerned with earning a living."; *see also* Mark D. Boveri, Note, *Surveying the Law of Fee Awards Under the Attorney's Fee Act of 1976*, 59 NOTRE DAME L. REV. 1293, 1309 (1984) ("The size of...fee awards will directly affect the private bar's willingness to litigate...[civil rights] suits.").

awards in various areas of the law.

In civil rights cases, statutory fees may be awarded to the prevailing party.[6] The legislative history of section 1988, the statutory fee shifting provision of the civil rights laws, makes clear that the purpose of statutory fee awards is to encourage plaintiffs' attorneys to take on cases that might otherwise not be economically feasible or attractive.[7] It explains that a reasonable attorney's fee is one that is adequate to attract competent counsel but that does not produce a windfall to attorneys.[8] Although the existence of the statutory fee shifting provision can and does encourage counsel to bring civil rights cases, as it provides for reasonable fees even when modest financial recovery is achieved,[9] it may in fact lessen plaintiff counsel's incentive to bring class actions with the potential for large monetary recovery for class members.

The statutory fees awarded to plaintiffs in civil rights actions and the methodology applied in determining the fee, differs from those typically awarded in class actions. The basis for fees in securities, antitrust and other actions where there is a monetary fund created, goes back to equitable doctrines of quantum meruit and unjust enrichment expounded by the Supreme Court over 100 years ago.[10] In short, attorneys are entitled to an award of fees from funds created, obtained or preserved for the benefit of others. In essence, there is no free ride by the class. If the lawyer has created a benefit—he is entitled to a portion of it as his fee.[11]

As we know, there has been a tremendous amount of litigation over the last twenty-five years as to how these fees are to be calculated.[12] At one time fees were

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6. *See, e.g.*, 42 U.S.C. § 2000e–5(k) (1994); *see also Civil Rights Attorney's Fees Awards Act of 1976* (codified as amended at 42 U.S.C. § 1988 (1994)) ("In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, or Title VI of the Civil Rights Act of 1964, the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

7. The Civil Rights Attorney's Fees Awards Act of 1976 was enacted to remedy the shortage of civil rights counsel. *See* H.R REP. No. 94–1588, at 3 (1976).

8. S. REP. No. 94–1011, at 6 (1976).

9. *See* Robert A. Diamond, *The Firestorm over Attorney Fee Awards*, 69 A.B.A. J. 1420 (1983).

10. *See* Trustees v. Greenough, 105 U.S. 527 (1882); *see* also Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885).

11. Under the common law doctrine, "a litigant or lawyer 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." Boeing v. Van Gemert, 444 U.S. 472, 478 (1980). *See also* Mills v. Electric Auto-Lite, 396 U.S. 375 (1970). This proposition stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorneys' fees unless there is express statutory authorization to the contrary. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257–58 (1975). *See also* 1 ALBA CONTE, ATTORNEY FEE AWARDS § 2.01, at 22 (2d ed. 1993).

12. CONTE, *supra* note 11, at 22; *see* Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 242 (1985).

awarded primarily as a percentage of the recovery.[13] Then various circuit courts determined that the lodestar approach—using ordinary non-contingent billing rates—was the starting point.[14] Finding this latter approach time consuming and subject to much criticism, most courts rely primarily on the percentage of the fund method.[15] Whatever approach was utilized, the award almost always involved some multiple of the lodestar to compensate the lawyer, for among other things, the risk assumed in taking on litigation where if there was no success there would be no compensation. This is certainly not a principle that should be subject to much dispute.

In contrast, under the fee-shifting statutes, a prevailing party may recover a reasonable fee from the other party.[16] The extent of a plaintiff's success is a crucial factor in determining the proper award of attorney's fees.[17] "Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee."[18] Then, an initial estimate of the fee is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate.[19] In some cases of exceptional success, an enhanced award may be justified.[20] However, in statutory fee cases, the Supreme Court has now made it clear that the typical fee-shifting statute does not allow fee enhancement for contingency (i.e., risk of nonpayment).[21] Such a restriction could prove to be a

13. *See* Central R.R. & Banking Co. v. Pettus, 113 U.S. at 116.

14. *See* Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973); *see also* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The lodestar often uses large multipliers in order to reach a fee award comparable to a percentage of recovery fees. HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 14–5 (1992).

15. *See* CONTE, *supra* note 11, § 2.07. *See also* 108 F.R.D. at 237.

16. Plaintiffs are the prevailing party if they succeed on a "significant" issue in the litigation, even if it settles prior to trial. Maher v. Gagne, 448 U.S. 122 (1980); *see also* Hewitt v. Helms, 482 U.S. 755 (1987). Fees to defendants prevailing in civil rights actions have typically been reserved for cases involving frivolous actions. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

17. Hensley v. Eckerhart, 461 U.S. 424, 440 (1983). *See also* CONTE, *supra* note 11, § 10.03, at 531.

18. *Hensley*, 461 U.S. at 440.

19. *Id.* at 433; *See also* Blum v. Stenson, 465 U.S. 886, 888 (1984). This calculation is known as the "lodestar."

20. *Hensley*, 461 U.S. at 435. If plaintiff has achieved only partial or limited success, the product of hours expended times a reasonable hourly rate may be excessive, even if the claims were interrelated, nonfrivolous and in good faith. *Id.* at 436. However, "results obtained" will generally be subsumed within other factors used to calculate a reasonable fee, and alone does not constitute a basis for increasing a fee award. *Blum*, 465 U.S. at 900.

21. City of Burlington v. Dague, 505 U.S. 557, 567 (1992). The Court reasoned that a primary consideration in upward adjustment of the lodestar amount is the risk assumed by a plaintiff. Thus, the riskier the case, the greater the multiplier should be. The converse, of course, to the riskiness of a plaintiff's case, is the strength of the case for the defendant. Accordingly, a defendant who had a greater justification for defending a case would be penalized more than one who had a weak case if the prevailing plaintiff had a multiplier attached to the lodestar amount. Currently, statutory fee awards may only properly be

liability on the commencement of civil rights class actions. Obviously, there is a limit to the number of class cases a law firm can assume. Other things being equal, given the choice between a case involving a straight lodestar or one with a multiplier, the latter might tend to attract the lawyer's attention. However, the statutory fee should not serve as the sole compensation to plaintiff's counsel. Although that is the fee charged against the losing party, the fee to the plaintiff's counsel need not be so limited.

In common fund cases, plaintiff's counsel should be entitled to a portion of the benefit resulting from his efforts—just as in securities, antitrust, and other common fund cases. Indeed, in other areas of the law where statutory fee-shifting is provided, fee awards based on the common fund doctrine—allowing upward enhancements to the lodestar—have been routinely made. Section 4 of the Clayton Act provides for a successful plaintiff who has been damaged by an act forbidden under the antitrust laws to "recover threefold the damages...[he] sustained, and the cost of the suit, including a reasonable attorney's fee."[22] Countless fee awards in such class actions have been made on the common fund basis over the years.[23] Similarly, in class actions brought under the Magnuson Moss Act and ERISA, both of which provide for statutory fee shifting, fees have been awarded out of the common fund created.[24]

A recent fee decision causes some concern for whether the common fund approach may be utilized in civil rights cases. In *Evans v. City of Evanston,* the Seventh Circuit Court of Appeals refused to apply the common fund doctrine in a civil rights litigation.[25] After the district court denied an enhanced lodestar in determining the statutory fee after trial, plaintiff's counsel sought a percentage of the recovery determined for the class. The district court denied the application and the court of appeals affirmed. The court noted that recent Supreme Court decisions suggest that

> common fund recoveries should not be allowed in Title VII and civil rights cases, because...allowing recoveries from a common-fund would place "an undesirable emphasis on the importance of the recovery of damages," [thus] contradict[ing] Congress's purpose in providing for

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enhanced for delay in payment. Missouri v. Jenkins, 491 U.S. 274, 284 (1989).

22. 15 U.S.C. § 15(a) (1914).

23. *See, e.g., In re* Anthracite Coal Antitrust Litig., 81 F.R.D. 499 (M.D. Pa. 1979).

24. Skelton v. General Motors Corp., 860 F.2d 250 (7th Cir. 1988), *cert. denied,* 493 U.S. 810 (1989) (common fund recovery allowable in class actions brought under Magnuson–Moss Act, 15 U.S.C. §§ 2301–2312, despite that Act's fee-shifting provision, 15 U.S.C. § 2310(d)(2)). *See* also Florin v. Nationsbank of Georgia, 34 F.3d 560 (7th Cir. 1994) (awarded fees from common fund in action where ERISA statutory fees were available and held that *Dague* did not bar the use of a risk multiplier where the fee was taken from a common fund). *See also* McLendon v. The Continental Group, Inc., 872 F. Supp. 142 (D.N.J. 1994) (H. Lee Sarokin, U.S. Circuit Judge sitting by designation). In *McLendon,* defendants violated ERISA and RICO and settled after trial with a $400 million settlement fund. The court characterized the proceeding as a common fund case and declined to extend *Dague*'s prohibition on multipliers for risk enhancement of lodestar amounts in statutory fee cases.

25. 941 F.2d 473 (7th Cir. 1991).

> fee-shifting in these cases, which was "to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek injunctive and declaratory relief."[26]

Additionally, the court opined that use of the common fund method would encourage counsel to bring class rather than individual actions since fees paid out of a common fund are only available in multi-plaintiff actions.[27]

The Seventh Circuit in *Evans* seems to have singled out civil rights actions for this unfavorable treatment. Just three years earlier, in *Skelton*, the Seventh Circuit upheld the allowance of a fee taken from the common fund in a case settlement under the Magnuson Moss Act which has a fee shifting provision similar to those in civil rights cases. Then, three years after *Evans*, in *Florin*, the Seventh Circuit held that plaintiff counsel's fee should be measured under common fund principles where an action was brought under ERISA, which has a fee shifting provision, and settled with the creation of a common fund.[28] Specifically, the court noted that ERISA's fee-shifting provision did not purport to control cases settled with the creation of a common fund. This rationale is equally applicable in civil rights cases.

"The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances."[29] However, if under section 1988 counsel will be awarded fees that are quite small in comparison to those awarded in other federal class action litigation, Congress' stated purpose behind the statute may fail to achieve its desired result.

> The strategy of the fee-shifting provisions is to attract competent counsel to selected federal cases by ensuring that if they prevail, counsel will receive fees commensurable with what they could obtain in other litigation. If federal fee-bearing litigation is less remunerative than private litigation, then the only attorneys who will take such cases will be underemployed lawyers—who likely will be less competent than the successful, busy lawyers who would shun federal fee-bearing litigation—and public interest lawyers, who, by any measure, are insufficiently numerous to handle all the cases for which other competent attorneys cannot be found.[30]

Additionally, the Court has recognized that "without the promise of risk enhancement some lawyers will decline to take cases."[31]

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26. *Id.* at 479 (citations omitted).

27. *Id.*

28. *Florin*, 34 F.3d at 563.

29. Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

30. Burlington v. Dague, 505 U.S. 557, 568–69 (1992) (Blackmun, J., dissenting); *see also* Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 742–43 (1986) (Blackmun, J. dissenting).

31. *Delaware Valley*, 483 U.S. at 727. Although in *Delaware Valley*, the court doubted that "the bar will so often be unable to respond that the goal of fee-shifting statutes will not be achieved," *id.*, in light of Congress' recent restriction on federal funding of organizations that had previously brought such actions, the incentive to the private bar takes

Congress' stated purpose can be achieved by awarding fees based on the common fund doctrine. Nothing in the legislative history to section 1988 suggests that statutory fee shifting is inconsistent with the common fund approach. Thus, perhaps courts must begin reshaping the judicial landscape to provide stronger incentives for competent private attorneys to bring civil rights class actions.

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on even greater significance.