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Essays

THE MARKET TEST FOR ATTORNEY FEE AWARDS: IS THE HOURLY RATE TEST MANDATORY?

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INTRODUCTION

The "American Rule" requires each party to pay his or her own attorney's fee in litigation; the loser does not pay the winner's fee.[1] This rule has been subject to several discrete exceptions,[2] but it remains the rule for the great majority of cases. A different trend, however, is becoming apparent. In recent years a great many cases have entailed fee awards, either against adversaries in the litigation or against a common fund created by the litigation. In addition, there are now over 100 federal statutes allowing fees.[3] Many of these are major statutes involving civil rights,[4] environmental law,[5] antitrust,[6] and litigation with the government.[7] Some of the exceptions to

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1. *See generally*, D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.8 (1973).

2. Fees were traditionally allowable against an adversary in cases where a contract between the parties so provides; where the attorney fee is an element of damages for a particular cause of action, as in malicious prosecution cases; in certain cases of contempt; in domestic relations cases; in certain cases of vexatious litigation; and where statutes so provide. *See* D. DOBBS, supra note 1.

3. *See* Marek v. Chesny, 105 S. Ct. 3012, 3035 (1985) (Brennan, J., dissenting).

4. 42 U.S.C. § 2000e-5(k) (1982) (employment discrimination); 42 U.S.C. § 1988 (1982) (covering § 1983 and similar cases).

5. *E.g.*, 16 U.S.C. § 1540(g) (1982). *See* Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).

6. 15 U.S.C.A. § 15 (West Supp. 1985).

the rule, especially those based on vexatious or other improper litigation,[8] have grown, too. States, also have expanded liability for fees, both through statutes[9] and through judicial decisions.[10] The result is that we are in the midst of a radical change in the way that we finance litigation. Quite possibly the award of fees against adversaries is not a very good way to finance such litigation.[11] The misincentives to overcharge, perhaps never much under control even with clients, are wholly without controls when the lawyer's adversary will pay the overcharge. Only the investment of added judicial supervision—litigation over the fee itself—can keep incentives in line. Judges have been most reluctant to accept this as a legitimate part of litigation. When they have shunned the fee litigation or used wide discretionary powers to shortcut it, they have often failed to control the overcharges.[12] Even when judges actually treat the fee litigation as itself a serious matter, they are led to complain about this use of judicial time[13] as if it were illegitimate—an understandable but perhaps not a productive reaction.

The methods for calculating the fees, the requirements of evidence, and the need for objective factors present a core group of problems. If evidence is not required as to the appropriate fee, discretion reigns, and with it the likelihood of serious misestimates of the fee—either too high or too low. Since fees are not a trivial part of the litigation costs and in some instances are, for the client, very high indeed,[14] a casual "eyeballing" of the fee claim is no more appropriate than a casual treatment of the damages issues or the substantive rights. If evidence is required about the appropriate level of the fee, however, the fee litigation itself may become a costly addition to the process.

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7. Chiefly through the Equal Access to Justice Act, 5 U.S.C.A. § 504, 28 U.S.C.A. § 2412 (West Supp. 1985).

8. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). There is also an increasing prospect of attorney liability under rules and statutes, *e.g.*, FED. R. CIV. P. 11.

9. *E.g.*, ARIZ. REV. STAT. ANN., § 12-341.01 (1982) (contract actions).

10. Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977) (adopting private attorney general theory). The private attorney general theory was essentially codified in CAL. CIV. PROC. CODE § 1021.5 (West 1980).

11. I have argued elsewhere that litigation finance should be studied more carefully, both as to public and private costs, and that alternative means of finance should be considered. *See* Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435. But this essay deals only with the forms of fee assessment permitted under the current decisions of the Supreme Court.

12. The use of discretion may also result in underpayment. In either case, discretion can mask bias or ideological antagonism to one side, but I think the use of discretion very often results from failure to get sufficient information about justifications for the fee claims made. In some instances, judges have expressed a belief that there is no especially rational way to assess a fee claim. "[T]he trial judge is cast adrift in a sea of judicial discretion," said one judge. Black Gold, Ltd. v. Rockwool Industries, Inc., 529 F. Supp. 272, 279 (D. Colo. 1981).

13. *See* REPORT OF THE THIRD CIRCUIT TASK FORCE, COURT AWARDED ATTORNEY FEES (October 8, 1985), 108 F.R.D. 237, *reprinted in* 771 F.2d No. 2, 1 (Advance Sheet), [hereinafter THIRD CIRCUIT REPORT]. An unpublished Ninth Circuit survey, with partial returns in, suggests that judges there do not believe they spend a great deal of time in fee matters, but this may be due to the Ninth Circuit's long adherence to subjective factors which do not necessarily require evidence. *See* Kerr v. Screen Extras Guild, 526 F.2d 67 (9th Cir. 1976). These are the "Johnson factors" discussed below. *See infra* text accompanying note 18.

14. "The defendants' potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits." Evans v. Jeff D., 106 S.Ct. 1531, 1541 (1986).

The process can require evidence and a rational explanation of reasons for an award only if there is some kind of objective standard by which to measure an appropriate fee. A standard that leaves it wholly to the trial judge's discretion does not give you much guidance about the evidence to put on, pro or con, and certainly does not tell the trial judge what evidence to use or how to weigh it.

The Supreme Court has spoken, for federal statutory fee cases at least, on the test or method to be used for figuring fees.[15] Since then, the Third Circuit Task Force, a group of judges and lawyers formed to propose methods for fee-setting, has reported recommendations for a different method.[16] The Ninth Circuit has established a similarly constituted committee to consider the matter.[17] It seems to be a good time to consider just what is permissible under the Supreme Court's decisions.

THE SUBJECTIVE APPROACHES TO FEE FIGURING

Two circuit court decisions of the early 1970s set up two different fee-figuring systems. One, *Johnson v. Georgia Highway Express*,[18] set up a totally subjective system based on twelve factors.[19] Considered individually, most of the factors were subjective. The *Johnson* court could have made some of the factors objective, but the case did not contemplate taking evidence in any ordinary courtroom sense. The *Johnson* factors were duplicative and overlapping, and if a court used all of them independently, they would in effect have considered the same elements of the fee several times over. Highly subjective fee awards—biased fee awards might be a more accurate word in many instances—were possible under *Johnson*.

The other case was the *Lindy*[20] case in the Third Circuit. *Lindy* attempted to provide an objective, evidence-based starting point in fee figuring. The court was to ascertain a reasonable hourly rate for the services, then to multiply this by the reasonable number of hours spent. Judge Seitz called this the "lodestar."[21] It clearly contemplated objective assessments of both time and rate, and in many, if not all, cases it would require the trier to spend some time assessing evidence on both points. *Lindy,* however, added

15. *See infra* text accompanying notes 24-30.

16. THIRD CIRCUIT REPORT, *supra* note 13.

17. This writer is a member of the Ninth Circuit Committee, but this essay does not necessarily reflect any views of the committee or any of its other members. At this writing the committee has not drafted any document or report.

18. 488 F.2d 714 (5th Cir. 1974).

19. *Id.* at 717-19. The factors were mostly derived from the American Bar Association's MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-18, DR 2-106 (1980). *See also* ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5. The factors included not only the "customary fee" but also a number of items that almost certainly would go into fixing the customary fee, such as the novelty and difficulty of the case, nature of the client relationship, and many others.

20. Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), *appeal of remand*, Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976). The second *Lindy* case elaborated on the additional factors to be used in developing the multipliers which could increase or reduce the loadstar amount. The two additional factors, the contingent nature of success and the quality of the attorney's work, had been set forth in the first *Lindy* case. 487 F.2d at 168-69.

21. *Lindy*, 487 F.2d at 168.

subjective elements not unlike those in *Johnson*.[22] Courts could use these to modify the basic or "lodestar" award. Thus, although *Lindy* began by an effort to set up a more objective system of fee awards, it ended with the possibility of substantial subjective modifications.

Both these cases were highly influential. The courts, following the subjective elements of each, often found themselves "enhancing" or multiplying the fee. There was not much lawyerly skepticism about these awards for some time, even though either system on its face seemed to permit the judge to find a reasonable fee and then add to (or occasionally subtract from) it. "Multipliers" not infrequently brought fees up to one and one-half times the amount the court already determined to be reasonable under the *Lindy* lodestar test,[23] sometimes as much as four times the "reasonable fee."[24] Under the *Johnson* test the enhancement could not even be identified, since there was no basic lodestar calculation to begin with, but the calculation was equally subjective.

THE SUPREME COURT SPEAKS: MARKET AND HOURLY RATES

In 1983 the Supreme Court in *Hensley v. Eckerhart*[25] spoke to the fee-figuring issue. The main issue before the Court was whether the fee should be affected at all when the plaintiff prevailed in the case but lost some of the claims, and if so, how.

The Court began with an approach similar to the *Lindy*-loadstar: "[T]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."[26] The reason for the adoption of this rate/time formula was that: "[T]his calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed."[27] *Hensley* thus saw the rate/time formula, based on hours worked, as both an objective test and one that called for evidence, not merely "eyeballing" by the trier of fact. It seems clear enough that this was a market-based test, one that sought to place the fee award at a market-equivalent level. This is much the way you would value services, goods or property in figuring other remedies. If there was any doubt about the market-orientation in *Hensley*, the Court cleared up that doubt the next year in *Blum v. Stenson*.[28]

Blum added a very specific statement that the "prevailing market" should control the fee award. The Court reiterated the rate/time formula

22. *Compare Johnson*, 488 F.2d 717-19 *with Lindy*, 540 F.2d 117.

23. The court in Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985), reported that its survey found most multipliers ranged only up to two in civil rights cases, with only three cases in the last five years using a multiplier of two. *Id.* at 613.

24. *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 680 (D. Minn. 1975) (Judge Miles Lord) (total fees of $4.5 million).

25. 461 U.S. 424 (1983).

26. *Id.* at 433.

27. *Id.*

28. 465 U.S. 886 (1984).

and elaborated and reinforced it.[29] For example, the rate was the market rate even though the fee claimant was a salaried lawyer working for a legal services organization or a public interest law firm. This remained so even though that firm's overhead cost, which in private cases would be paid out of fee charges, was considerably less than the overhead of private law firms.[30]

Blum and *Hensley*, taken together, established three important characteristics for fee figuring, characteristics that serve different purposes.

(1) *The standard for figuring the fee had to be objective.* This removed the large blocks of discretion or bias available under both the *Johnson* and the *Lindy* tests, and it also facilitated review because it provided a basis for establishing the second characteristic.

(2) *There had to be evidence.* This went hand in hand with the objective test and brought the matter within normal judicial cognizance. Although the trier's discretion gets a formal bow in all these cases, the requirement of evidence makes the fee claim a case like others, subject to factual analysis and rational arguments. And most important, this makes the fee figuring subject to meaningful review by appellate courts.

(3) *The fee had to be based on the market.* Other objective bases for figuring fees would be possible, but the market—what private lawyers would charge—provided a test that was both objective and susceptible to evidentiary proof. Furthermore, the market might be, independent of these process advantages, the fairest means of estimating a "reasonable fee" required by statutes. It is likely that no more than a market basis is necessary to attract competent counsel to accept representation in, say, civil rights cases. And no more ought to be paid by a losing defendant.

This regime is unpopular with some trial judges. It requires them to accept the fee figuring, not merely as an administrative chore on the side, but as a judicial matter requiring evidence and reasons for the judge's response. Although some trial judges might get results just as good if they were allowed complete discretion and were not required to give reasons or adhere to objective rules, other trial judges might not be so successful. The predictability of objective rules and the reviewability of the trier's determinations is important if you must have a system of law for large aggregates of people. So from the public point of view, the three characteristics required by the Supreme Court seem desirable.

Nevertheless, they have their costs; the costs of added judicial time (no one knows for sure how much this is) and the costs of added attorney time devoted to the fee matter itself. The rate/time formula also gives fuel to the misincentives already existing because even though the rate, based as it is on the market, may be relatively objective and stable, the formula permits the attorney to inflate the number of hours worked.[31] The opportunity to claim more hours than you work, and against your vanquished adversary at that, makes the fee hearing and the evidence even more significant in providing limits on the misincentive—and this brings added costs.

29. *Id.* at 893-95.
30. *Id.* at 895.
31. *See* THIRD CIRCUIT REPORT, *supra* note 13, at 247-48.

THE THIRD CIRCUIT TASK FORCE PROPOSALS

The Third Circuit Task Force indulged in a number of criticisms of the *Lindy*-lodestar approach, which to a large extent is a criticism of the Supreme Court's adoption of a similar but more objective rule. The Third Circuit committee was worried in part about the added burden on judges.[32] Like many trial judges, the committee did not entirely accept the fee determination as a really central judicial task, and it sought to ameliorate the burden of fee determinations or to shift it to others. The Third Circuit committee also was concerned with the misincentives to inflate the claim of hours worked and other problems of the hourly rate.[33]

The most radical proposal by the Third Circuit group was to depart from the hourly rate in cases it called fund-in-court cases. These are common fund cases it which the plaintiff has by litigation or settlement secured a fund to be distributed both to the individual plaintiff and usually to many other beneficiaries as well. Typically it is formally or informally a class action. One or more individual plaintiffs will retain an attorney to bring the suit. When the plaintiff prevails the defendant pays the judgment into court; this provides funds for the plaintiff's claim and also many similar claims by others. On restitutionary principles, the courts long ago held that the beneficiaries of such a fund should share in the costs of producing it, including the costs of the lawyers.[34] This sharing is done by simply taking the fee from the fund before it is distributed to the beneficiaries. Since the lawyer's only real client contact may be with the initial single client or single group of clients, the lawyer's incentives to claim high fees are not controlled in the way they would be if the claim ran directly against a client with whom the lawyer was personally involved. Indeed, most members of a large class may have little or no understanding, much less control, over the fee claims against the fund. Consequently, the misincentives are similar to those in the statutory fee cases.

In this situation the Third Circuit proposed to depart from fees based on an hourly rate times the number of hours worked. Instead, it proposed to use a fee based on a percentage of the fund, the percentage to be negotiated in advance.[35] The negotiation of the percentage itself presented some problems. For example, you might have to retain still another lawyer to negotiate on behalf of the unrepresented clients, or you might let a judge do it.[36] But the point I want to focus on here is the first one: The Third Circuit proposal to set aside the hourly rate method of fee figuring set up in *Hensley*

32. *Id.* at 246.

33. *Id.* at 247-248.

34. Trustees v. Greenough, 105 U.S. 527 (1881). *See* Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).

35. THIRD CIRCUIT REPORT, *supra* note 13 at 255.

36. Professor John Leubsdorf has already noted the conflict of interest problem that can arise when attorneys claim a "contingency multiplier" under *Lindy* or *Johnson*, since the attorney will want to urge that the case is difficult and may, to substantiate this claim, reveal matters that may hurt his client on the merits. Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L. J. 473 (1981). The same problem arises in setting the amount of the contingent fee and suggests that it should be mandatory to exclude the judge who tries the merits from the fee-setting itself. The Third Circuit does not, however, make it mandatory. THIRD CIRCUIT REPORT, *supra* note 13 at 256.

and *Blum* in favor of a percentage fee. Assuming that the percentage fee arrangement is in some ways better than the hourly rate fee, is it permissible under the decisions of the Supreme Court?

The Third Circuit answered[37] that this arrangement was permissible because, in a footnote in *Blum,*[38] the Supreme Court had casually mentioned that in common fund cases percentage fees were used. This was regarded by the Third Circuit's committee as a Supreme imprimatur on the contingent percentage fee in common fund cases. As imprimaturs go, this one was not much; it was an entirely collateral matter in the case, and it was mentioned only by way of contrast. If it was a considered sanction for percentage fees, it was well disguised. However, I believe that there is a broader reason why the Third Circuit's solution—adoption of percentage fees—might be permissible. That broader reason would also affect statutory fee cases, such as those brought under civil rights acts.

The broader reason why courts can use a percentage fee is that the Supreme Court has never actually required use of the rate/time formula as the sole acceptable method of figuring the fee. This statement is true simply as a matter of the Court's syntax. The Court does not say the rate/time formula is required. In *Hensley* the Court said only that the rate/time formula was "[t]he most useful starting point. . . ."[39] This is the strongest single statement about the rate/time formula in either *Hensley* or *Blum*. In *Blum*, this statement is in fact moderated to say that the rate/time formula "normally" provides the reasonable attorney fee.[40]

But if *Blum* moderated the rate/time formula, it stepped up the emphasis on the market as a source of the objective measure of the fee. The issue is cast, not in terms of the rate/time structure, but in terms of prevailing market rate. "Market rate" or "prevailing market rate" is stated and re-stated over and over again in discussion of the issue.[41]

The point I wish to make from this is a simple and a limited one. What the Court seems to require is not an unvarying adherence to the rate/time formula, but an unvarying adherence to *some* market formula coupled with an unvarying adherence to the requirements of a judicial proceeding—an objective rule capable of proof and argument, together with evidence about the factual matters in issue.

If I am right about this, then the Third Circuit is not limited by the existing decisions of the Supreme Court in choosing some other market test for a fee, so long as it is in fact a market test and can meet the objectivity and evidential requirements imposed by the Court. I believe the Third Circuit's percentage fee proposal can do this, though of course it may be thought undesirable or even impermissible on other grounds. I believe that to meet

37. THIRD CIRCUIT REPORT, *supra* note 13 at 250-51.

38. 465 U.S. 886, 900, n.16. The footnote read in pertinent part: "Unlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation."

39. Hensley v. Eckerhart, 461 U.S. at 433.

40. Blum v. Stenson, 465 U.S. at 897.

41. *Id.* at 892, 893, 894, 895.

the requirements that seem to inhere in the Supreme Court's decisions, the Third Circuit need only require that the negotiated fee be negotiated at market-level. This implies that there must be *in fact* at least as much of an objective basis for pricing the percentage as there is for pricing hourly rates. If this is established, perhaps by the negotiator's report to the court, and if the negotiation attempts to produce a market-level percentage, the objectivity, evidence, and market requirements are all met.

WHERE TO GO FROM HERE

Alternative Markets

If I read the Supreme Court's decisions correctly, the rate/time formula could be bypassed not only in common fund cases of the kind the Third Circuit committee described, but also in statutory fee cases. If what is central is objectivity, evidence and market guidelines, then whatever market in fact exists for a given kind of case could be shown in evidence and could become the basis for the fee award, subject only to practical constraints.

The point, though a narrow one, can be important for several distinct reasons. Those who find that the rate/time formula is likely to encourage even more inflated fee claims and to require more judicial supervision in order to avoid the inflation, might find more streamlined substitutes that also reflect the market. It is even conceivable that in some individual cases, a flat fee could be a market-based fee for which objective evidence could be produced. And since, in this interpretation, it is the market, not the rate/time structure, that is essential, this would be permissible.

Since lawyers may price their services in different ways under different conditions and at different times, recognition that the *market* is more essential than the rate/time rule would allow courts to adjust readily to the pricing that actually exists in private practice. Indeed, lawyers seem to be experimenting with various ways of pricing their services, and fee awards might be easier to handle under some of the methods developed in the private market.

This point might turn out to be more important than you would first expect, for at least two reasons. The first is that though *Hensley* and *Blum* set up market-tests, the rate/time formula does not itself perfectly reflect the market. This is so because the normal rate/time charge is not a contingent one; it is a charge traditionally made for the time spent regardless of whether the client prevails or not. In fact, the rate/time charge of the lawyer is often modified if the lawsuit was not successful; "billing judgment" and client relations demand this in private practice. But the fee itself is not contingent on success. For some statutory fee cases, notably civil rights cases, the lawyer's fee recovery is highly contingent. The client in many of these cases will pay little or nothing, and the lawyer will be paid only if the court awards a fee. This means that in many instances the lawyer will receive no fee unless the plaintiff prevails. There is normally no market for *contingent* hourly fees. Consequently, many have argued that courts must use some mathematical

multiplier to augment the rate/time fee to reflect the contingency.[42] The actual market, then, is not very well reflected in a combination of rate/time and contingency multipliers since that is a combination that does not ordinarily appear in private practice.

A second reason to permit proof of other modes through which legal services are priced is that the rate/time formula contains some ambiguities and creates some special difficulties so that it may not be worth the effort it takes to manage them if alternatives exist. I have pointed out elsewhere that the rate might be fixed either by estimating the market value of *lawyers* themselves or by estimating the market value of their *services*.[43] One mode would rate the lawyer's ability to sell services in the market, considering age, experience, and time in practice. The other would ignore such objective qualifications of the lawyer and instead attempt to estimate the value of the work she actually performed in the particular case. The two might not be different in some cases, but in many cases the differences could be striking. This has led at least one court to consider using the lawyer's own customary fee as a mode of estimating that value,[44] but whether this will be held permissible is uncertain.[45] If there are other ways of pricing legal services in practice, some of them might provide a better reflection of a market; and they might actually provide a less subjective method for evaluating the services. For example, a contingent fee, if it is used in comparable cases, would minimize the post-hoc effort to rate the particular services of the particular lawyer. A flat fee would too, provided there were in fact similar cases on which a flat fee was charged.

Some lawyers say that fee practices are changing rapidly. Even if this is not so, there is undoubtedly a variety of modes by which lawyers themselves value their services. Some of them might provide a better alternative to putting a value on those services in court. The difficulties of using the rate/time version of the "market" suggest that alternatives are worth at least some exploration in particular cases. This Essay suggests that such an exploration is permissible under the *Hensley* and *Blum* cases.

A Case of Court Awarded Percentage Fees

A lawyer successfully represents plaintiffs in an employment discrimination suit resulting in millions of dollars of backpay. Actual time invested by the lawyers at the highest "market" rates possible would yield a fee of $250,000. However, a contingent fee of one-third would come to almost ten times that much—$2 million.

This is a troubling scenario for several reasons, though it is based on

42. *See* Leubsdorf, *supra* note 35. The actual discussions in the Circuit Courts since *Blum* are limited, and the cases divided as to the propriety of the multiplier for contingency. *Blum* dealt with quality and other multipliers, but not directly with the contingency multiplier.

43. Dobbs, *supra* note 11 at 486.

44. Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984).

45. *Blum's* own formula required the plaintiff to prove that the fee rates claimed "are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum*, 465 U. S. at 896, n.11. But *Blum* can also be read to seek the market value of the services judged independently of the lawyer's ability to sell them. *See* Dobbs, *supra* note 11 at 487.

some real cases. It is troubling in the first place because you might conclude, if it is accurate, that there is some substance in the claim that percentage fees produce windfalls; after all, if the regular hourly rate, which is fair compensation, produces a fee of a quarter of a million, the much larger $2 million fee seems excessive.

It is also troubling because it suggests—rightly, I think—that the basis assumed by Congress for fee awards against adversaries is not always present in the real cases. The basis was a supposed inability of the private market to provide fees adequate to attract competent lawyers to civil rights claims.[46] But in many such cases, the private market might actually be more attractive than the court awarded fee. If the court will award a $250,000 fee and the private market would have provided a fee of $2 million, the private market would be far more attractive, even allowing for the fact that some private market contingent fee cases might be lost altogether with the result of a zero fee. This line of reasoning suggests that the court-awarded hourly rate fee would be inadequate to attract competent counsel but that the private market would be quite adequate.

Would there be any basis under the suggestions made in this Essay for departing from the hourly or rate/time fee structure in such a case? If the private market really would pay, and pay legally[47] $2 million in fees, you can say that this meets the market test and also the objective test. If evidence were introduced—by affidavit, admission or otherwise—to show that in fact there is such a market means of pricing legal services in similar cases, and that recovery of a $2 million contingent fee in private cases would not merely be an isolated instance, then the principles I suggest lie behind *Hensley* and *Blum* are met.

But there are some serious questions about whether the court ought to adopt the higher contingent fee in such a case. If the contingent fee market is the only market—unlikely—then the court should adopt it. If there are two markets in the community, one in which the plaintiffs could obtain competent hourly fee counsel and one in which they could obtain competent percentage fee counsel, and if the fee charges differ as much as suggested here, then the plaintiff should be expected to use the most economic resource—in this case, the hourly fee lawyers. Although the plaintiff would be free to choose the more expensive lawyer, there is no reason to saddle the

46. This is the first premise of civil rights fee awards. The House Committee considering the bill that became 42 U.S.C. § 1988, the general civil rights attorney fees statute, thought the "vast majority" of civil rights victims could not afford legal counsel and thought the award of fees necessary to "attract competent counsel. . . ." H.R. REP. No. 94-1558, 94th Cong., 2d Sess. at 1, 9 (1976). *See also* S. REP. No. 94-1011, 94th Cong., 2d Sess. at 6 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS (94 Stat.) 5913. The second premise is that the public will benefit from civil rights enforcement, even if that enforcement is too costly in comparison with direct results to enlist the aid of private counsel.

47. This is a year in which defense interests have pushed much "tort reform" in personal injury cases, generating, among other things, some renewed doubts as to the way contingent fees are used. One trouble with the market test is that there really is very little open market in attorney services because of client ignorance and, in many cases, lack of choice. Some contingent fees (and some hourly fees) that actually can be found "in the market" might represent improper fees, either ethically or under limiting statutes. An improperly high contingent fee would of course not be one the court could award.

defendant with the excess cost. If the judge feels punitive toward the defendant then the judge can award punitive damages separately where they are permitted; and if they are not permitted,[48] the limitation on punitive damages should not be circumvented by charging the defendant with a needlessly high fee. Such a rule would be similar in purpose and effect to the rules for minimizing damages.[49] These reasons would limit the number of cases in which a contingent fee should be adopted.

There is another reason why contingent fees should not be adopted wholesale. A portion of the contingent percentage fee must represent the fact that the lawyer may lose some contingent fee cases altogether or that recovery will be so low that the lawyer will be compensated much less than she would be at an hourly rate. Yet if the lawyer could opt for a percentage fee when success was high and an hourly fee when the monetary returns were not so high, some portion of the contingency would be eliminated. The contingency eliminated, the justification for the high percentage is also eliminated pro tanto. This means that the contingent percentage fee, when combined with an opportunity to pursue an hourly rate fee in relatively unrewarding cases could significantly overcompensate the lawyer in a case like the one just supposed. Indeed, that may be a characteristic of the contingent percentage fee in general since the most successful lawyers acquire the large and winning cases as to which there is no contingency at all but they often charge percentage fees that are intended to reflect a substantial chance of losing.

Some of these considerations suggest that if a judge were to permit a contingent fee as an alternative to the hourly rate fee, careful scrutiny would be required as to the real contingency. This would represent a minimum degree of protection against excess. Perhaps more importantly, the judge should prohibit counsel from switching back and forth between a contingent and an hourly fee basis. All cases in similar categories should be treated in one fee pattern or the other, for example. In addition, and in line with a recommendation of the Third Circuit Task Force,[50] the fee basis should be set in advance of trial if possible.

These reasons all suggest that the contingent fee, even though evidence may show it to represent one market method of fee calculation, should not be too quickly utilized, at least where there is a significant difference between the apparent rate/time fee and the contingent fee, as in the illustrative case.

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48. Punitive damages are held not to be permitted in Title VII employment discrimination cases. 2 J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE, § 5.22 (1985 Supp.), C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 9.3 (1980). And they are not usually available against public entities in other civil rights claims. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

49. Hornbook rules deny the plaintiff recovery of any special damages he could have avoided by reasonable effort. *See* D. DOBBS, *supra* note 1, at § 3.7 (1973). Many other remedial rules share a similar principle, in effect forbidding the plaintiff to impose costs upon the defendant that could be reasonably avoided. The attorney fee rule for "imported" attorneys in several courts matches this, too. The plaintiff's attorney imported from another area, cannot recover a fee at his usual, higher-than-forum rate, *see* Avalon Cinema Corp. v. Thompson, 689 F.2d 137 (8th Cir. 1982), unless there was some special need to import the higher priced attorney. *See* Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982).

50. THIRD CIRCUIT REPORT, *supra* note 13, at 256.

However, the illustration given here, though based on some real cases, is likely to represent an uncommon pattern. Much more likely is the case in which the hourly rate fee will be difficult to establish or uncertain, or one in which a ball-park estimate of the rate/time fee would place it somewhere near the contingent fee. In that kind of case, use of the contingent fee rate, where there is actually evidence of a market based on such fees, would often be the shortest route to a conclusion. If the advance-of-trial estimate suggested that rate/time and contingent fees would come to similar figures, adoption in advance of a contingent fee would probably promote efficiency in fee figuring. But again, it will distort the fee considerably if the court allows counsel for plaintiffs to opt freely for one system of fee figuring or the other.

A Case of Quality

If I am right about the essential qualities required by *Blum* for fee determinations, the most important result may not be that you can occasionally find some market handier to use than the hourly rate market. The most important part may turn out to be the requirement of objective evidence. This will affect the character of the fee determination as a judicial procedure and shape the nature of proof and argument in that procedure. If, for example, a circuit or district attempted to set standardized hourly rates, as the Third Circuit has suggested,[51] this would be in accord with the rate/time formula, but not necessarily in accord with the requirements that the fee be based on the actual market and that there be evidence. Standardized hourly rate schedules would seem to be permissible only if the court setting such schedules heard appropriate evidence about rates in the first place and reviewed the rates periodically so that they always reasonably approximated the market.

The requirement of objective evidence may also affect the way you deal with the much-disputed matter of providing compensation for quality of legal services. I read *Blum* as expressly forbidding fee enhancements based on the quality of legal services provided. The reason for this is that the quality is already taken into account when the judge sets the basic rate for the hourly charges. *Blum* recognizes one "exception"—the case in which there is specific evidence that the hourly charge claimed does not in fact represent the market rate for such services.[52] In such a case, given *Blum's* preference for the rate/time formula, one would expect that the easy adjustment would be to reset the rate so that it does, after all, reflect the appropriate market value; but if for some reason this is not or cannot be done, then *Blum* accepts some other form of adjustment. As that case emphasizes, however, this is to be done on the basis of specific evidence about the market values involved.

Some judges have been troubled by this reading of *Blum*. They appear

51. *Id.* at 260.

52. *Blum*, 465 U.S. at 899. This point was reaffirmed in Pennsylvania v. Delaware Valley Citizens' Council for Clear Air, 106 S.Ct. 3088, 3099 (1986), holding that no enhancement for superior work was permissible, since there was no specific evidence to show that the "reasonable fee" was not in fact "reasonable."

to feel that if a lawyer does quality work, some fee enhancement is "only fair." Yet no lawyer should be awarded a fee greater than the market rate. If the market rate takes the quality of legal services into account, then to take that quality into account a second time is to pay the lawyer *more* than market rate.

What *Blum* assumes, in other words, is that in setting the market rate in the first place, the judge will set a rate that reflects something about the market value of the lawyer or the lawyer's services.[53] Judges accustomed to using the *Johnson* factors or other subjective measurements—including quality, novelty of the case, difficulty and the like—may feel that they are free to continue this practice, since *Blum*, like *Johnson*, takes quality into account. But there is a difference, and I think a very large one, and it is found in the theme of this Essay.

The difference between the *Blum* method of considering quality (and other factors) and the *Johnson* method lies in the requirements central to both *Blum* and *Hensley*—the requirements of objectivity, evidence and market guides. While *Johnson* permits a subjective, free-floating estimate of value, *Blum* requires that value be determined from evidence—pretty much the way it is determined from evidence in the law of remedies generally. There is to be a finding—based on evidence—as to an appropriate, objective, market rate, not merely a subjective estimate. If quality of legal services is to be considered, there must be evidence about what that quality is worth in the market.[54]

The difference between *Blum's* rule and *Johnson's* is important. The use of objective tests,[55] of evidence, and of reasons that can be stated and argued[56] represents not merely what is best about the judicial process but what is essential to it. Some judges have seemed reluctant to invest the efforts of the judicial process in figuring the fee. What *Blum* and *Hensley* most centrally require is that the fee award itself be subjected to judicial scrutiny, not to mere guesswork.

The difference also answers another argument sometimes made—that the trial judge, compelled by *Blum* to use a rate/time formula, is free to use *Johnson* factors to arrive at a figure and then work backward to set up an appropriate rate/time formula to achieve the result she wishes. Thus, the argument is, you may as well let judges use *Johnson* factors or any other subjective measure they prefer. I am pretty sure from reading fee cases that indeed many trial judges and some appellate judges would happily subvert the rules established by the Supreme Court. But this Essay suggests two lines of thought about that. The first is that, after all, the trial judge may be

53. As to the ambiguity about what is valued—the lawyer or her services—*see supra* text accompanying note 44.

54. The evidentiary requirement was reaffirmed in Pennsylvania v. Delaware Valley Citizens' Council for Clear Air, 106 S.Ct. 3088 (1986).

55. Compare Cardozo: "[T]he traditions of our jurisprudence commit us to the objective standard. . . . A jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of degenerating into what the Germans call 'Die Gefuhlsjurisprudenz,' a jurisprudence of mere sentiment or feeling." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 106 (1921). Or, one might add, if not sentiment or feeling, then bias or whimsey.

56. *See* Fuller, *Adjudication and the Rule of Law*, 1960 PROC. AM. SOC'Y INT'L. LAW 1.

bound by the market but not necessarily by the rate/time formula. The second is that under *Blum* the judge may indeed decide what fee she wishes to award and then reason backward to get it; but she is constrained now, as she was not under *Johnson*, by a fundamental of civilized justice: she must have some evidence before her to justify the award even if that evidence is not what motivates her decision in a psychological sense.

In short, what is most essential in the *Hensley* and *Blum* cases is not the rate/time formula, but the market and the requirement of objective evidence. If the emphasis on market rather than on rate/time may sometimes open up the fee award for a more convenient assessment, the requirement of objective evidence puts the fee dispute well within the limits of civilized adjudication.