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Limit Legal Fee Awards

Funding

	($ in millions)						
	1981	1982	1983	1984	1985	1986	1987
BUDGET AUTHORITY	—	112	129	149	20	20	20
OUTLAYS	20	89	135	146	40	20	20

General Description

Many laws authorize or require the Federal Government to pay attorney's fees to prevailing parties in court or agency proceedings. Most of these fee-shifting statutes provide for an award of a "reasonable attorney's fee" based on a "prevailing market rate"; the latter is now largely pegged to private, commercial bar rates and often exceeds $100 per hour even where the applicant attorneys receive low salaries from law firms and attorneys representing parties not obligated to pay for their representation. A literal industry has arisen for attorneys dependent on federal fee awards.

Proposed Change

- While maintaining "core" recoveries to individuals and small business under the Equal Access to Justice Act ["the Act"], a maximum hourly rate for fee awards under other Federal fee-shifting statutes would be established. The fee cap would be primarily calculated on the basis of the mean hourly rate paid to Government attorneys, plus a constant factor to pay for overhead costs.
- "Core" recoveries under the Act would be exempt from the fee cap provision. The Act permits fees of $75 per hour to individuals and small businesses, and requires a showing that the Government was not substantially justified in the position it took in litigation.
- In all cases, the client would be required to certify that the fee is owed to the attorney, was determined on an arm's length basis, and will be paid to the extent not covered by the fee award.
- In all cases, the fee awarded must bear a reasonable relation to the result achieved in the proceeding.

Rationale

- Several Federal statutes authorize or require the Federal Government to bear attorneys fees for private parties. This reverses the standard "American rule," under which parties bear their legal costs, win or lose.
- Federal fee awards often exceed $100 per hour, invariably at multiples of the cost of the Federal attorneys involved in the same cases.
- In many instances, fee awards are based upon time spent by attorneys on the case and may exceed the amount recovered by the client in the case.
- Where damages are recoverable from the government, clients should pay their attorneys from the sums recovered.
- Oversubsidization of attorneys unduly encourages recourse to the courts; the cost to the Federal Government of defending suits without merit is substantial.

Effects of the Proposed Change

- Restricting attorney's fees will decrease Federal outlays and will reduce the Federal civil case load, which has grown over 100% since 1975.
- The proposal will restrict contingency fee litigation against the Federal Government, brought by and on behalf of attorneys whose "notational" clients bear no litigation risks or costs, and who are merely the means by which attorneys satisy nominal standing requirements.
- The proposal maintains protections for individuals and small businesses who have been subjected to overreaching Federal actions.

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FEDERAL ATTORNEY FEE AWARDS REPORTER

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NEW AND NOTEWORTHY

According to the *New York Times* (May 31, 1981), the court of claims has awarded $10,600,000 to attorneys who won $106,000,000 for the Sioux Indian Nation in a 2-year lawsuit against the government for its seizure, in 1877, of the Black Hills of South Dakota. Full details in upcoming issue.

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The District of Columbia Court of Appeals has announced the standards to be applied in determining eligibility for a fee award under the Clean Air Act. *Metropolitan Wash. Coal., Etc. v. Dist. of Col.* (D.C. Cir. 1981), p. 12.

• • •

The Fifth Circuit has spelled out the proper standards and procedures for awarding fees in bankruptcy proceedings. *Matter of U.S. Golf Corp.* (5th Cir. Unit B, 1981), p. 15.

• • •

The use of a "ceiling" on a fee award, or any formula representing the equivalent of such a limitation, has again been rejected by the First Circuit. *Furtado v. Bishop* (1st Cir., 1980), p. 9.

• • •

Inflation is not a factor to be considered in calculating a fee award, it has been held, where the hourly rates applied are the current rates rather than the rates in effect when the services were rendered. *Mader v. Crowell* (M.D. Tenn., 1981), p. 11.

• • •

A civil rights suit rendered moot by the action of the legislature in amending the statute, which the suit attacked, has been held an appropriate case for a fee award, provided that the plaintiffs can demonstrate a causal connection between their suit and the amendment of the statute. *COYOTE v. Roberts* (D. R.I., 1980), p. 5.

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TO OUR READERS

We welcome news of any recent decisions or developments in the field of federal attorney fee awards. Please send your suggestions and comments to: FEDERAL ATTORNEY FEE AWARDS REPORTER, Law & Business, Inc., Harcourt Brace Jovanovich, Publishers, Dept. PR, 757 Third Avenue, New York, N.Y. 10017.

COMMENTARY

TIMELINESS OF FEE APPLICATIONS: Supreme Court to Resolve Issue

by E. Richard Larson*

One of the major unresolved issues in attorney's fees litigation involves the timing of post-judgment fee applications. Must a fee application be filed within a prescribed number of days, such as within the 10 days allowed by Rule 59(e) of the Fed. R. Civ. P.? Last summer, this question was answered affirmatively by the U.S. Court of Appeals for the First Circuit. The U.S. Supreme Court granted *certiorari* in this case in May. *Employment Security*, 629 F.2d 697 (1st Cir. 1980), *cert. granted*, 49 USLW 3863 (U.S., May 18, 1981) (No. 80-5887).

Overall, the courts have characterized fee applications in *four* different ways, and each has an impact on the timing of a fee application. Fee applications have been characterized: (1) as a collateral and independent claim subject to no time limits; (2) as part of a request for costs subject to no time limits under Rules 54(d) and 58 of the Fed. R. Civ. P.; (3) as a claim integral to the merits without time limits, since the underlying judgment is not final or applicable until fees are decided; and (4) as a claim integral to the merits, which is subject to the 10-day time limit under Rule 59(e) for motions to alter or amend a judgment.

▶ The characterization of a fee application as a collateral and independent claim dates from *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1947), and *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). In *Sprague*, the court addressed a timeliness issue similar to that being raised today. In the Court's view, the common fund fee application at issue was not untimely under the then-existing rules of equity, since the application involved "an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree." 307 U.S. at 170. *Sprague* thus means, at a minimum, that there should be no specific time limits governing a fee application at least in common fund cases.

▶ Many statutory fee-shifting provisions—such as in 42 U.S.C. §1988—direct that fees should be awarded "as part of the costs." In view of Congress' chosen definition, see *Hutto v. Finney*, 437 U.S. 679 (1978), three courts of appeals have now held that fee applications are subject only to Rules 54(d) and 58—which have no timing requirements—and are not subject to the 10-day limitation in Rule 59(e). The Fifth Circuit initially reached this conclusion in *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980); see also,

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Jones v. Dealer Tractor and Equipment Co., 634 F.2d 180 (5th Cir. 1981); *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980). The Sixth and Seventh Circuits have agreed. *Johnson v. Snyder*, 639 F.2d 316 (6th Cir. 1981); *Bond v. Stanton*, 639 F.2d 1231 (7th Cir. 1980).

▶ Where fees are requested in the pleadings, several courts have now held that a claim for fees is so integrally related to the merits that the underlying judgment is not final and appealable until fees are determined. *Gurule v. Wilson*, 635 F.2d 782 (10th Cir. 1980); *Johnson v. University of Bridgeport*, 629 F.2d 828 (2d Cir. 1980); *Obin v. District No. 9 of the International Association of Machinists*, 623 F.2d 521 (8th Cir. 1980); *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977). *Cf. Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976) (an underlying judgment on liability is not final and appealable because injunctive relief, back pay and fees had not been addressed). Under this line of cases, there necessarily is no time limit within which a fee application must be filed for the simple reason that there is no final judgment until fees are determined.

▶ A similar characterization of a request for fees led the First Circuit to a quite different result in *White v. New Hampshire Department of Employment Security*, 629 F.2d 697 (1st Cir. 1980), *cert. granted*, 49 USLW 3863 (U.S., May 18, 1981) (No. 80-5887). There, the court of appeals held that an award is integrally related to the underlying judgment, but that any request for fees is separate from the judgment in that the fee request must be filed within the 10 days allowed by Rule 59(e) for a motion to alter or amend a judgment.

As is apparent, these differing characterizations have led to a deep division among the courts. There also is a division on a number of subsidiary issues. For example, although the First Circuit in *White* held that the 10-day limitation in Rule 59(e) is jurisdictional under Rule 6(b) and that the timeliness argument thus could be raised for the first time on appeal, the Fourth Circuit in *Fox v. Parker*, 626 F.2d 351 (4th Cir. 1980), held that the Rule 59(e) timeliness argument could not for the first time on appeal. *Cf. Hirschkop v. Snead*, No. 79-1480 (4th Cir., April 14, 1981), *aff'g on other grounds* 475 F.Supp. 59 (E.D. Va. 1979) (the Fourth Circuit affirmed a denial of fees because of defendants' immunity and not due to the Rule 59(e) timeliness argument).

Another subsidiary issue involves the ethical impropriety of conducting simultaneous negotiations over fees and over the underlying judgment. Although the First Circuit in *White* saw nothing wrong with this—indeed, encouraged it—the Third Circuit in *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977), directed that settlements on the merits should be reached separate from and prior to any discussion of fees. See also *Mendoza v. United States*, 623 F.2d 1338 (9th Cir. 1980).

Running through several of these disparate decisions is the judicial worry about piecemeal appeals. The answer to this concern, however, is not necessarily the imposition of restrictive time limits on fee requests. Instead, the best answer seems to be the approach adopted by the Seventh Circuit in *Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980). There, the Seventh Circuit responded to the piecemeal appeal worry by holding that "district courts in this circuit should proceed with attorneys' fees motions [where the fees are not settled], even after an appeal is filed, as expeditiously as possible. Any party dissatisfied with the court's ruling may then file an appeal and apply to this court for consolidation with the pending appeal of the merits." 623 F.2d at 34 (footnote omitted). In fact, under Rule 3(b) of the Fed. R. App. P., "[a]ppeals may be consolidated by order of the court of appeals upon its motion."

Despite the analytically sound underpinnings of *Terket*, the timeliness issues arising from the deep division among the courts of appeals will no doubt be resolved by the Supreme Court in *White*. Until such a resolution, counsel should closely follow the decisions in their circuits. Better, counsel and the courts should try to avoid this timeliness issue altogether by adding a paragraph to every judgment, consent decree and settlement reserving the fee issues for subsequent resolution by the courts.

CASE DIGESTS

Church of Scientology of California v. Gazares, 638 F.2d 1272 (5th Cir. Unit B, 1981)—Kravitch, J.

An award to a prevailing defendant, under the Civil Rights Attorney's Fees Awards Act of 1976, was affirmed in this civil rights-defamation action. The court held that fees were properly awarded for the entire case rather than being limited to the civil rights claim, that the defendant's insurance coverage did not preclude an award in his favor, and that there was no error in refusing to allow the plaintiff to depose the defendant's attorneys on their hours and services. (Although the opinion does not so indicate, this case appears to have been decided by the Fifth Circuit's Unit B. See the SPECIAL NOTE in the April, 1981 issue of this Reporter explaining the Administrative Units of the Fifth Circuit Court of Appeals.)

Basis for Award

This action had been brought by the plaintiff church against the defendant, the mayor of Clearwater, Florida, alleging that certain statements made by the mayor, critical of the church, were in violation of the civil rights of the church and its members, and constituted defamation. The district court had granted summary judgment in favor of the defendant on the civil rights claim, had dismissed the defamation claim, and had awarded attorney fees to the defendant. On appeal, the court of appeals agreed with the district court and affirmed its decision on the merits, then turned its attention to the fee award.

The district court had directed the parties to submit affidavits or other evidence on the amount of the fees to be awarded, and had conducted an evidentiary hearing in which it had considered and made findings with regard to each of the criteria suggested in *Johnson v. Georgia High-*

way Express, 488 F.2d 714 (5th Cir. 1974). The district court had then determined that the amount of the award should be $36,021.75.

On appeal, the court first noted that under the Fees Awards Act, a prevailing defendant can recover only if the plaintiff's claim was frivolous, unreasonable, or groundless, or if the plaintiff continued to litigate after it clearly became so.

Here, the plaintiff argued that the action was not frivolous, unreasonable, or groundless since: (1) the district court had sustained the complaint for over two years, (2) evidence supported the claim, and (3) the district judge himself had stated that the action presented novel legal issues.

The court pointed out that, during the two-year period referred to by the plaintiff, the complaint had been amended three times, primarily to clarify the defamation claims. Under these circumstances, said the court, the fact that the district court sustained the complaint during that period was a tribute to the trial judge's patience and fairness, and not an indication of his view of the merits. As to the evidentiary support for the plaintiff's assertions, the court simply disagreed, saying there was no material, admissable evidence to support the plaintiff's civil rights claim. Finally, the court said that the fee award would not be precluded by the trial judge's statement that the action presented novel legal issues. It explained that the question of standing presented the difficult legal issues, which had little to do with the merits of the claim.

The court concluded that the plaintiff's civil rights action was indeed frivolous, unreasonable and groundless, and that an award to the defendant was justified.

Pendent Claim

The court noted that there was no statute providing for attorney fee awards in diversity defamation actions, so that if this suit had been brought only on the theory of defamation, attorney fees would not have been recoverable. But fees were recoverable on the civil rights claim, and on that basis, the district court had made an award covering both the civil rights and the defamation action.

Expressing its concurrence with the holding below, the court pointed out the several circuits had permitted awards on pendent claims arising out of the same nucleus of facts. Here, the first complaint had alleged the defamatory statements as part of the civil rights claim. Since a defamation claim may not serve as the basis of a civil rights action under 42 U.S.C. §1983, the plaintiff was required to amend its complaint and plead the alleged defamation as a separate count. But the amended complaint was not filed until two years after the original complaint. Under these circumstances, the court concluded, it would be impossible to apportion accurately the time spent by the defendant's attorneys on the civil rights claim and on the nonfederal defamation claim. For this reason, it was held that the district court had not erred in granting fees for the entire case.

Insurance Coverage

The plaintiff also contended that attorney fees could not be awarded to the defendant since he was covered by insurance. The plaintiff relied on *Johnson v. Georgia Highway Express, Inc.* for the proposition that a party cannot be awarded a higher fee than he is contractually obligated to pay. The plaintiff reasoned that since the defendant was covered by insurance, he was not contractually obligated to pay any fee, and thus should not be the recipient of a fee award.

But the court disposed of this contention by saying that the plaintiff's argument ignored the statement of the defendant's attorney that the defendant's insurance was one of indemnity; thus, the company was not obligated to pay unless the defendant was obligated to pay after termination of the case.

Right to Depose Attorneys

The plaintiff also argued that it was error to award attorney fees without allowing the plaintiff to depose the defendant's attorneys on the time and nature of their services.

But the court pointed out that the plaintiff had interrogated the defendant's attorney at length (presumably, this interrogation occurred at the evidentiary hearing), and that the defendant's attorney had submitted an affidavit providing a detailed record of the time spent and the duties performed.

Moreover, it was noted that the district court had indicated it was intimately familiar with the litigation, and was satisfied with the correctness of its award, which it considered to be extremely low. The court of appeals saw no abuse of discretion under these circumstances.

COYOTE v. Roberts, 502 F. Supp. 1342 (D. R.I. 1980)—Pettine, C.J.

In this action, brought by a prostitute and a national organization seeking reform of sex laws, challenging the constitutionality of a Rhode Island criminal statute, it was held that the plaintiffs would be entitled to a fee award under the Civil Rights Attorney's Fee Awards Act of 1976 if they could demonstrate a causal connection between their suit and the actions of the state legislature in amending the statute, as well as the actions of the Providence police department in changing its patterns of enforcement.

As construed by the Rhode Island Supreme Court, the statute prohibited all extramarital sexual intercourse, and all "unnatural" methods of copulation, regardless of whether the participants were married. The plaintiffs' claimed that the statute violated the constitutional right of privacy by punishing private consensual conduct between adults and private solicitation for prostitution.

After trial, but before the court had rendered its decision, the Rhode Island legislature amended the statute, substantially curing the alleged constitutional infirmities.

With the consent of all parties, the court dismissed the complaint, reserving the question of attorney fees.

The defendants in the action were the Rhode Island attorney general and the police chief of the City of Providence, both of whom were sued in their official capacity. The court first dealt with the propriety of a fee award against the state defendant.

Termination of Action Before Judgment

The court noted that the plaintiffs' fee request was not foreclosed by the fact that the case had been terminated without an entry of judgment in their favor. The Fees Award Act was said to encourage the vindication of federal rights by alleviating the financial burdens of litigation, and the court observed that federal courts have uniformly recognized that the intent and purpose of the Act mandated a fee award to plaintiffs who had obtained some significant part of the relief they sought without completing the full course of litigation. If this were not the rule, the court remarked, a defendant could put a plaintiff to the expense of engaging in discovery, pre-trial motions and memoranda, and other preparatory efforts until the strength of the case became clear. Then, by reforming its ways before the court the defendant could act on the merits and preclude the plaintiff's recovery of fees for labor that in fact accomplished the desired objective.

Although the court conceded that it had found no previous case in which a challenged state statute was amended by the legislature after trial but before a decision had been rendered, it said that the policy considerations were essentially the same as those involved in any other fee award case.

Accordingly, the court ruled that if the plaintiffs had achieved some substantial part of the benefit they sought, and if they otherwise met the criteria for a prevailing party, as discussed below, they were entitled to a fee award even though the statutory amendment came about without formal judicial involvement.

Objectives of Action

In order to recover attorney fees in the absence of a clear-cut judgment in their favor, the court said that the plaintiffs must show that the basic objectives of the lawsuit had been achieved or at least furthered in some significant way. The court explained that the plaintiffs need not have accomplished all their goals; partial success would be sufficient so long as it involved some significant issue in the litigation.

Here, the core of the plaintiffs' claim was that the state could not constitutionally bar consenting adults from engaging in purely private sexual activity, regardless of whether the motivation of one of the participants was economic. As the court now read the amended statutes, such activity no longer constituted a crime, thus indicating that the amendments afforded the plaintiffs a very substantial portion of the relief they had sought.

Nevertheless, the court noted that the defendants' objection appeared to be that since many of the plaintiffs were prostitutes, and because law enforcement personnel would continue to arrest and prosecute prostitutes under the new statutes, the plaintiffs had not, in reality, gained anything. But the court pointed out that the defendants' argument ignored the fact that the former statute encompassed far more than sex for pay, and that the removal of a clause prohibiting the commission of "indecent acts" benefitted any of the plaintiffs, prostitutes or not, who wished to engage in nonremunerative sexual activity of the type barred by the former statute.

However, the court conceded that the defendants' argument presented a difficult question with regard to prostitution itself. It was true that the plaintiffs might find it difficult to engage in the now decriminalized act of prostitution with impunity, since all the preparatory activity, such as solicitation, remained felonious. But the court pointed out that the plaintiffs had consistently conceded the state's ability to regulate public aspects of prostitution and had litigated this case in the belief that decriminalization of the act of prostitution, regardless of the continued vitality of anti-solicitation laws, would further their campaign to insulate private consensual adult activity from state control. Although it would appear that the plaintiffs would have been more satisfied with an amendment exempting from criminal sanctions any private solicitation, the court viewed the plaintiffs' consent to the order dismissing this case as an indication that the point was not considered to be of any great importance. Under these circumstances, the court felt that the defendants' argument was, essentially, that regardless of whether the plaintiffs had obtained a substantial part of what they sought through litigation, and despite their apparent satisfaction with the result, the court still must decide if they had "really" benefited from getting what they wanted. In response to this contention, the court stated:

> In evaluating this argument, the Court has found little guidance in cases from this, or other, circuits. It is well established that even when a plaintiff obtains in large part the object of her suit, a court must independently assess the substantiality of her claim to ensure that she has prevailed in a *legal* sense.... Whether a plaintiff who believes that she has achieved something of value must also satisfy an objective test of benefit in a *factual* sense is not at all clear. To some extent, the law does not attempt independently to appraise the degree of real advantage that accrues to a plaintiff from a lawsuit. The doctrine of standing and principles of justiciability that weed out hypothetical questions establish a minimum quantum of objectively-defined benefit that a suit must offer: the sincerest subjective expectation of advantage will not avail the plaintiff who cannot meet those standards. Those criteria ensure that a suit will possess a certain degree of legally-cognizable value to the litigant.

> Once they have been satisfied, the Court does not know by what more rigorous scale it could purport to gauge the 'real' worth of a plaintiff's getting substantially what she wanted. Nor am I sure that a court's judgment of what is worth fighting for should be substituted for that of the litigant who saw fit to institute and prosecute the suit. Therefore, absent a clear indication from a higher court that a different test is required, this Court concludes that the extent of actual benefit to plaintiffs is to be measured by the degree to which defendant's subsequent actions afforded them the relief they sought. Here, as defendant agrees, the statutory amendments satisfy the plaintiffs' principal objection ... The court therefore finds that the recquisite benefit-in-fact exists in this case.

Prevailing Party

The court next took up the question whether the plaintiffs had met "the two-prong test" for becoming prevailing parties, as established by *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978) (digested in the April, 1979 issue of this Reporter). First, the court explained, no award may be made if the plaintiffs' action was found to be completely superfluous in bringing about the change; rather their efforts must have been a necessary and important factor in achieving the result. Second, the court must determine whether the plaintiffs had prevailed in a legal sense; that is, a fee award would not be appropriate if the claims were so frivolous, unreasonable, or groundless that the defendants' conduct would be presumed to have been gratuitous.

Evaluating the substantiality of the plaintiffs' claim in light of existing case law, the court concluded that their challenge to the alleged overbreadth of the statute was not patently frivolous or unreasonable, and thus was sufficiently substantial to meet the standard required of a prevailing party.

The remaining question (the role played by the lawsuit in achieving the objective) was said to be one of causation. The defendants argued that the amendment of the statute was a response to angry community outcry against a high incidence of prostitution in a particular area of the city of Providence. According to the defendant, the amendments were designed to streamline the prosecution process, in the hope that quicker convictions would stem the increase in solicitation and pandering which outraged neighborhood residents. The court pointed out that this explanation might account for the statutory amendments insofar as they made loitering and solicitation petty misdemeanors tried to the court and subject to a truncated appeals procedure, but it did not shed any light on why the amendments also deleted from the former statute phrases which had outlawed the *commission* of acts of prostituion and other indecent acts. The court concluded:

"It is obvious to the Court that the subtle workings of causation in this case cannot be discerned through the media of legal memoranda and affidavits. An evidentiary hearing, with its opportunity for direct observation of witnesses and cross-examination, is required and will be ordered."

Legislature as "Third Party"

The defendant attorney general argued that, whatever the motivation for the statutory amendments, the actions of the legislature were independent of his control and should not be imputed to him. He contended that fees could not be assessed against a defendant on the basis of actions taken by a third party, no matter how beneficial they may have been to the plaintiff.

But the court pointed out that, to obtain judicial review of the constitutionality of a state statute, the plaintiffs had used the appropriate device of suing a responsible state official in his official capacity. The real target of the plaintiffs' suit was the state, which was exercising its police power through the challenged statute. Any award of fees in this case would be assessed against official funds.

The court said that the attorney general's role in this case was to serve as a surrogate for the state of Rhode Island. Thus, in substance, the attorney general was arguing that it was improper to award fees against the executive branch of the state on the basis of activity that was really within the bailiwick of the legislative branch. But the court declined to adopt so rigidly compartmentalized an approach to state government actions, saying that the state in its role as law enforcer could not disavow all connection with the state in its role as law maker.

Thus, with regard to the propriety of a fee award against the state defendant, it was held:

"This Court therefore concludes that there is no legal bar to plaintiffs' recovery of at least a portion of their attorney's fees from the State defendant in his official capacity if they establish the necessary actual basis—i.e., causation—at a subsequent hearing."

Award Against City

The nature of the plaintiffs' claim against the city police department defendant was that its enforcement of the statute in question was geared toward the predominantly female sellers of sexual services, while the predominantly male purchasers were ignored, even though equally culpable under the statute. Plaintiffs' evidence tended to show that more females than males were arrested and charged under the statute, and that the police department used more male undercover officers than female undercover officers, thus indicating that its efforts were primarily against women.

Again, the court emphasized that it need not determine whether the plaintiffs were likely to have succeeded in this portion of their case, since the plaintiffs need only establish that their claim was not frivolous, unreasonable, or groundless in light of the plaintiffs' efforts, and the police department's failure to offer an explanation for its enforcement

strategy, the court concluded that the requisite legal substantiality was present in the plaintiffs' claim.

The defendant police chief also argued that a fee award would be inappropriate since the public had no interest in protecting and legitimizing prostitution. But the court said this argument ignored the fact that the plaintiffs' complaint was basically one of sex discrimination, and remarked: "The Court assumes that defendant is not suggesting that a charge of gender-based discrimination is less meritorious when made by avowed prostitutes than other women."

The court concluded that there was no legal bar to the plaintiffs' recovery of fees from the defendant police chief in his official capacity, if evidence adduced at the subsequent hearing revealed a causal connection between this lawsuit and a change in the police department's pattern of enforcing the statute.

The court ordered that the case be added to the trial calendar.

Farris v. Cox, 508 F. Supp. 222 (N.D. Cal. 1981)—Williams (Spencer), J.

All hours claimed for compiling time records, and in preparing and presenting the fee application, were disallowed in this civil rights class action contesting prison regulations, as the court awarded nearly $10,000 less than plaintiffs' attorneys had requested under the Civil Rights Attorney's Fees Awards Act of 1976.

By the terms of a settlement agreement approved by the court, the plaintiffs had won a partial victory, gaining for prisoners the rights to written notice and preliminary hearings in connection with certain disciplinary matters. However, the plaintiffs did not prevail on claims for money damages and for a preliminary injunction.

In the case in chief, the plaintiffs had been represented primarily by one legal assistance group, although certain local appearances had been made by another legal assistance group. The settlement agreement provided for an attorney fee award, and the plaintiffs' attorneys retained a private firm to prepare their fee petition. The petition requested total fees of $31,995.

The court said it would be guided by the criteria established in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The Fees Awards Act, the court noted, was intended to effectuate the strong federal policy of fully redressing civil rights violations by enabling litigants to obtain competent counsel. The court added that while the award is not to be used to make attorneys rich, it must nevertheless be sufficient to make civil rights representation financially attractive to highly qualified attorneys.

Hours Devoted to Case

The defendants did not challenge the accuracy of the time records submitted by the plaintiffs' attorneys, but contended that the attorneys had spent an unreasonable number of hours on the case.

Scrutinizing the time sheets of the plaintiffs' attorneys, the court found two relatively minor instances of duplication of effort, and reduced the claimed hours accordingly.

The court then turned its attention to the hours spent preparing the fee petitions, referring to its obligation to ensure that the total was reasonable and did not represent a windfall.

By the court's "most conservative estimate," it was said that the total hours claimed for preparation of time records and the plaintiffs' brief on the fee application was 76.1 hours, characterized by the court as "an obviously inflated figure which comprises more than twenty percent of hours spent on the entire case," which the court said "represents a clear case of overreaching."

In discussing this point, the court apparently drew an analogy to common fund cases saying:

> (S)everal courts flatly reject the concept of billing hours for time spent preparing fee applications at all, soundly reasoning that resolution of fees issues 'enures only to the benefit of counsel, as distinguished from the plaintiff class.' As such, services rendered solely for the purpose of securing fees are not compensable. While an award for time spent on fees issues is singularly inappropriate in common fund cases since such efforts do not benefit the class, this rationale is less persuasive where fees are provided for by a settlement agreement. When defendants pay plaintiffs' attorneys' fees directly, such as done in the present case, section 1988 permits a nominal award for charges reasonably incurred in preparing time sheets. However, these compensable hours must be strictly limited so as to discourage attorneys from spending an excessive amount of time on the fee petition itself when, in fact, these hours are spent solely for their own benefit. Moreover, billing hours typically are treated as an item of the attorney's overhead and absorbed as an operating cost by the petitioning firm. (Footnotes and paragraphing omitted.)

[Editor's Note: It is well settled that the time spent in preparing the fee application is not compensable in common fund or equitable fund cases. See, for example, *Seigal v. Merrick* (S.D.N.Y. 1979), digested in the August, 1979 issue of this Reporter. Such has not been the rule, however, in cases governed by statute, where the fee award will be paid by the losing party, and not out of the recovery of the prevailing party. The language of the court in the present case, quoted in the preceding paragraph, might be regarded as an indication that a "common fund case" philosophy was permitted to play a part in a case governed by statute. If so, the standard applied by the court might be inconsistent with the frequently-expressed rationale that the denial of compensation for time spent on the fee application would be inconsistent with the purpose of the Fees Awards Act, since it would dilute the overall award,

and to that extent, defeat the purpose of the Act. See *Bond v. Stanton* (7th Cir. 1980), digested in the February, 1981 issue; *Weisenberger v. Huecker* (6th Cir. 1979), digested in the October, 1979 issue; and *Lund v. Affleck* (1st Cir. 1978), digested in the August, 1979 issue of this Reporter. Courts have generally not regarded the Fee Awards Act as permitting merely a "nominal" award for time spent in preparation of the fee application, although in at least one instance, a court refused to apply to such hours a multiple factor which was applied to time spent on the case in chief. *Bolden v. Pennsylvania State Police* (E.D. Penn. 1980), digested in the December, 1980 issue.]

The court held that in cases involving statutory fee requests in a class action, the parties should present only time records and a short memorandum of controlling law. The court said it was convinced that the fee application in such a case was not designed to be an adversarial process, but rather an informational aid to the court in determining reasonable fees. Adversarial briefs were condemned as "both inappropriate and unnecessary."

Describing the presentation of a fee petition as a "routine task," the court criticized the legal assistance group representing the plaintiffs because they had "curiously and, in this court's opinion unnecessarily" engaged the services of a private law firm to prepare a "boiler-plate" brief. Under these circumstances, the court ruled that the private firm's request for 49.5 hours was "patently unreasonable," and the request of the legal assistance group for 26.6 hours on the same task "represents a grossly inflated claim which cannot stand." The court concluded:

"Even in civil rights cases, fees may be denied in their entirety when petitioning lawyers are guilty of overreaching in seeking outrageously unreasonable fees.... The present situation is an appropriate occasion for the court to exercise its discretion and deny *all* fees relating to work on the fee petition because the request here represents a grossly inflated bill." (Emphasis by the court.)

Hourly Rates

The plaintiffs sought compensation of $125 per hour for an attorney who had "impressive credentials," with over seventeen years of trial experience, many of them in the field of civil rights litigation. With respect to three other attorneys, the plaintiffs sought hourly rates of $75. To support these rates, the affidavit of a local attorney was submitted, indicating that the rates claimed were within normal range.

The defendant challenged these rates as excessive, pointing out that the senior partner in one of the defense firms also had seventeen years of trial experience and similar achievements, and charged only $60 for the services rendered in this case, and that the main defense litigator in this action had been admitted for eight years, and billed his client only $55 per hour.

The court held, based on its experience and on awards in similar cases in the district, that the requested fee of $125 would be reduced to $100, and the requested fees of $75 would be reduced to $70.

Multiple Factor

The plaintiffs suggested that the application of a multiple factor would be justified because of the difficulty of the legal issues presented in the case, the risk of litigation, and the quality of the attorneys' work.

But the court disagreed, saying that the issues in this case were neither novel nor particularly complex, that there was no long and complicated trial, that a clear *prima facie* case had been established by the defendant's own records, and that the risk involved in this litigation was not high. The court pointed out that a settlement was negotiated just seven months after the complaint was filed.

Moreover, although the plaintiffs had achieved "an admirable result," the court rules that the result was not extraordinary, and that the fee award should reflect this fact.

Conclusion

Based on the hours and rates it had adopted, the court concluded that $22,001.50 should be awarded to the legal assistance group which had served as chief counsel, that $525 should be awarded to the other legal assistance group, and that no award would be made to the private firm.

Furtado v. Bishop, 635 F.2d 915 (1st Cir., 1980)—Coffin, C.J.

In its second review of the fee award in this civil rights action brought by prisoners against prison officials for damages resulting from the officials' use of excessive force, false reporting, and suppression of communication, the First Circuit Court of Appeals again disapproved of the district court's use of a ceiling on the award, and made its own calculations, increasing the district court's award of $13,750 to $22,905, plus certain uncontested amounts allowed for appellate work.

As we reported in the April, 1980 issue of this Reporter, the trial judge had originally awarded fees of $13,750, a figure representing half of the damages which the plaintiffs had recovered, on the basis that it would be unfair to require the defendants to pay more than the plaintiffs' counsel could have earned on a contingent fee basis. However, in recognition of the fact that this decision might not be accepted on appeal, the trial judge had made the alternative finding that the plaintiffs' attorneys had "legitimately put $20,000 worth of work into the case, timewise." The court of appeals had reversed, rejecting the idea that there should be a ceiling on the award based on the damages recovered, and also declining to approve the figure of $20,000, since the trial judge's use of the word "timewise" left the implication that the only factor considered was the time spent on the case.

On remand, the trial judge again awarded the same amount, $13,750. The trial judge explained that he had arrived at the figure by applying the "one third rule," allowing counsel one third of the "recovery," with "recov-

ery" defined as damages plus fee award. (This ruling on remand was covered in our June, 1980 issue.)

On this second appeal, the court said that the percentage approach discounted one key object of the legislative intent behind the Civil Rights Attorney's Fees Awards Act of 1976: the encouragement of private enforcement of civil rights laws.

The court explained that under the traditional "American rule," requiring successful plaintiffs to bear the expenses vindicating their rights, plaintiffs typically will not act to redress injury unless the expected recovery exceeds the expected costs. Thus, suits involving invasion of civil rights, but promising only modest or highly uncertain recovery, would usually not be pursued. Through the Fees Awards Act, Congress had sought to alter this pattern of prohibitively costly vindication. The court declared: "It therefore is precisely the civil rights lawsuits whose prospect of modest recovery would not justify the expense of a difficult or acromonious legal fight—the 'marginal' suits, in the words of the district court—that Congress intended to make practicable."

The district court had proposed that its ceiling be used in cases which are brought for money damages, but do not serve to establish a principal or "to serve as a public warning beyond the damages themselves." The court of appeals said this reading of the Act would finance cases that create legal rules, but not cases that apply them. The problem with this approach, the court said, is that path-breaking holdings which will not be enforced are of limited public value. Moreover, the court pointed out that "the 'principle' of enforcement *is* served by suits that 'merely' seek damages." (Emphasis by the court.)

Although the court of appeals felt that the district court had evinced a laudible desire to guard against meritless civil rights suits and undeserved attorney fees, it noted that these ends can be achieved by less drastic means. Particularly, the Act's limitation of fees to prevailing parties was regarded as a deterrent to the bringing of cases with little chance of success. And the court also pointed out that meritless suits can support a fee award against an unsuccessful plaintiff suing on a frivolous, unreasonable, or groundless claim.

The goal of avoiding awards of undeserved fees, the court said, would be better advanced by close and systematic scrutiny than by special formulas such as the one-half recovery rule. Although broad discretion and subjective views would weigh significantly in such scrutiny, the court remarked that it found "the most hopeful approach to date" to be the approach developed by the Third Circuit in the Lindy cases. (See discussion of *Lindy Bros. Builders, Inc. of Philadelphia, et al. v. Am. Radiator & Sanitary Corp. et al.*, 540 F.2d 102 (3d Cir. 1976), in Vol. 1, No. 1 of this Reporter.)

The court concluded that the amount of recovery should not present a limitation on a fee award, but should be considered as only one factor among many others.

The court next considered whether to remand to the trial judge for a redetermination of the fee award in light of its holding, or instead proceed itself to determine the appropriate award for this case. It was pointed out that, ordinarily, the amount of a fee award is to be determined by the trial court, and the role of an appellate court is to review for errors of law or abuse of discretion. However, in the distinctive circumstances of the present case, the court concluded that, in the interests of expediting the final disposition of the fee issue, which had already been twice before the district court and twice before the court of appeals, it was appropriate for the court of appeals to proceed to determine the appropriate award without another remand to the district court.

After considering the evidence in detail, the court of appeals concluded that the plaintiffs were entitled to a fee award of $22,905, in addition to an uncontested amount of $1,000 which the trial court had allowed for preparation and delivery of oral argument, and a further uncontested amount of $2,000, allowed for opposition to an earlier petition for *certiorari*.

Iranian Students Ass'n v. Sawyer, 639 F.2d 1160 (5th Cir. Unit A, 1981)—Ainsworth, J.

Because of conflicting pleadings and affidavits as to whether the plaintiffs' suit was a factor in bringing about the result they had sought, it was held in this civil rights action that the district court had erred in refusing to grant an evidentiary hearing to determine which party had prevailed under the Civil Rights Attorney's Fees Awards Act of 1976.

Following a campus disturbance, the defendant university president issued a ban on marches and demonstrations, and created a panel of inquiry to review the disturbance and recommend appropriate action. The plaintiff student association filed this action for an injunction, damages, and attorney fees, claiming that the ban was unconstitutional. One day after this suit was filed, the ban was lifted. The defendants asserted that the decision to lift the ban was based on the panel's findings, was made before the suit was filed, and was made at a time when they had no knowledge of the plaintiffs' intention to file suit. The defendants also contended that when they learned of the plaintiffs' plans, they notified plaintiffs' counsel of their decision to lift the ban, but the plaintiffs filed the suit nonetheless. The plaintiffs denied these assertions, contending that they were never given firm assurance that the ban would be lifted promptly.

In a conference attended only by the district judge and counsel, the district judge found the plaintiffs' position "more plausible," held that the plaintiffs were prevailing parties under the Act since the decision to lift the ban was precipitated by the plaintiffs' suit, and that the plaintiffs' suit was not frivolous. From the district court's order granting the plaintiffs' motion for attorney fees, the defendants appealed.

The court of appeals acknowledged that a party may prevail and be entitled to fees under the Act when remedial action by the defendant effectively moots the controversy subsequent to the filing of the action. However, it was said

that although the litigation has been rendered moot by the defendant's actions, the record must reflect ample evidence of a link between the litigation and the defendant's action before the district court can award fees under the Act. There must be evidence showing the existence of a causal relationship between the suit and the relief received, and this relationship must be more than simple knowledge that litigation may occur. The court cited its previous decision in *Robinson v. Kimbrough*, 620 F.2d 468 (5th Cir. 1980), digested in the October, 1980 issue of this Reporter, for the proposition that plaintiffs may recover fees under the Act if they can show that their lawsuit was a significant catalytic factor in achieving the primary relief sought through litigation, despite their failure to obtain formal judicial relief.

In this case, it was pointed out that the district court had found a causal connection between the plaintiffs' suit and the lifting of the ban by reviewing the chronology of relevant events and weighing the plausibility of each counsel's version of events. However, the court stated that although the chronological sequence of events is a factor to be considered, it is not definitive. And although the district court found the plaintiffs' argument more plausible, the contradicting pleadings and affidavits were insufficient evidence upon which the district court could make such a determination.

The court stated that if the decision to lift the ban was made before the defendants became aware of the suit, the proper conclusion would be that the litigation was neither a substantial factor nor a significant catalyst in terminating the ban. Furthermore, since the record was inadequate to permit review of the district court's decision, it was ruled to be "clearly error" on the part of the district court to deny a full evidentiary hearing on the merits as to which party was the prevailing party. Accordingly, the case was vacated and remanded.

Mader v. Crowell, 506 F. Supp. 484 (M.D. Tenn. 1981)—Morton, C.J.

In this reapportionment action, in which fees were requested under the Civil Rights Attorney's Fees Awards Act of 1976, the court held, *inter alia*, (1) that a single judge could properly award fees, although the case was tried on the merits to a three-judge court; (2) that the plaintiffs had prevailed within the meaning of the Act even with respect to a motion that was decided against them; and (3) that where the hourly rates requested and awarded were apparently current, no inflation factor would be applied for services rendered in previous years.

The court had previously held that the plaintiffs were entitled to fees, and the only issue to be determined was the proper amount to be awarded.

Single-Judge Determination

The case had been tried on the merits to a three-judge court, as required by statute. Apparently, neither party objected to the determination of the fee issue by a single judge, but the court felt compelled to consider the propriety of such procedure.

As a general proposition, it was said, once a three-judge court has entered judgment, the single judge before whom the action was initially filed may take subsequent actions necessary to enforce the judgment. The court noted that this rule had been applied with respect to fixing time for compliance with a desegregation order, and assessing damages. The court felt the rule was fully applicable in this instance, and concluded there was no need to reconvene the three-judge court. Accordingly, the court proceeded to determine the amount of fees, pointing out that it would be guided by *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), digested in the April, 1980 issue of this Reporter.

Prevailing Party Status

The plaintiffs had initially prevailed in their apportionment challenge, as the three-judge court had held the questioned statute unconstitutional, expressly retaining jurisdiction over the cause pending enactment of a constitutional plan of apportionment. After further proceedings, both judicial and legislative, the plaintiffs later filed a motion for further relief, challenging the constitutionality of a new apportionment plan which had been enacted by the legislature. This motion was denied, and the defendants contended that no award should be made for work on that motion, since the plaintiffs, in that respect, were not prevailing parties under the statute.

However, it was held that when the three-judge court retained jurisdiction pending enactment of a constitutional plan of apportionment, the plaintiffs' counsel became obligated to determine whether the newly enacted legislation was, in fact, constitutional. It was necessary for counsel to conduct discovery concerning the new legislation, and ultimately, to challenge the statute. Under these circumstances, the court said it was irrelevant that this later attack was based on grounds different from the original complaint, and that it proved unsuccessful. The motion for further relief was neither frivolous nor brought in bad faith, the court said, and was properly regarded as part of the same case on which the plaintiffs were clearly the prevailing parties. Under *Northcross*, it was concluded, the plaintiffs were entitled to fees for time reasonable spent on the motion, as well as time devoted to the original case.

Inflation Factor

For work done during 1978 and 1979, the plaintiffs requested an upward adjustment to accommodate the decreased purchasing power of current dollars. But the court pointed out that the hourly rates being requested and approved were characterized by the plaintiffs as the "standard" rates charged by the firm with which they were associated. The court remarked that these rates were apparently the current rates, and were being applied to all hours claimed, regardless of the year in which they occurred. The court said: "It can only be assumed that the rates charged by a law firm rise from time to time to reflect

inflation, and it would result in a windfall to plaintiffs' counsel to once again adjust the figures." The court concluded that an award for all hours incurred, based on the current hourly rate, achieved a just result.

Multiple Factor

The plaintiffs requested on the application of a multiple factor of one-third, based on the contingent nature of success in this case.

But the court replied that the law in this area was well-settled, and the facts not particularly uncertain. Thus, although there was some risk that the plaintiffs would not prevail, the court noted that some such risk is inherent in every case. Unless the risk of nonpayment is substantially higher than was evident in this case, the court held, an adjustment for the contingent risk is not merited.

Amount of Award

The court allowed the plaintiffs to recover for all the time claimed in their application, at the rates they requested, $75 per hour for attorney's time, and $20 per hour for the time of legal assistants. It was noted that "defendants do not question the reasonableness of the $75 per hour rate and obviously that rate is reasonable for this type of service."

The court also decided, "to avoid further litigation," to accept the plaintiffs' counsel's estimate of $1,000 as the amount reasonably incurred on the fee application.

The total fee award was accordingly set at $34,091.

Metropolitan Wash. Coal., Etc. v. Dist. of Col., 639 F.2d 802 (D.C. Cir. 1931)—Per Curiam.

In this suit brought under the Clean Air Act, it was held that the standard to be applied in determining eligibility for an award is whether the suit is a prudent and desirable effort to achieve an unfulfilled objective of the Act, and not necessarily the outcome or practical effects of the litigation.

This action was brought under the citizen-suit provision of the Act to contest the implementation of a plan calling for closing certain solid-waste incinerators. Following approval by the Environmental Protection Agency of a revised plan, the suit was dismissed as moot.

The district court denied the plaintiffs request for a fee award on the grounds that the action was relevant, but not determinative, that it was not in the public interest, that it could not have tangibly benefited the public, and that it had questionable legitimacy since the EPA was already considering proposed revisions.

But on appeal, it was held that the district court had incorrectly focused its attention on the outcome and practical effects of the litigation, to the exclusion of a more relevant consideration: whether the suit was of the type that Congress intended to encourage when it enacted the citizen-suit provision.

Turning to the legislative history of the Act, the court pointed out that Congress had believed that the federal government had been restrained and notoriously laggard in exacting obedience to pollution control requirements. The purpose of the citizen-suit provision was to aid enforcement of the Act while motivating governmental agencies charged with the responsibility to bring enforcement and abatement proceedings. Courts, therefore, were empowered to award fees without regard to the outcome of the litigation, whenever such an award was deemed to be in the public interest. On the basis of this background, the court concluded that Congress considered a fee recovery to be consonant with the public interest whenever the underlying suit was "a prudent and desirable effort to achieve an unfulfilled objective of the Act." It was said that the attorney fee provision was offered as an inducement to citizen suits, which Congress deemed necessary. Under these circumstances, the court stated that decisions on fee awards should not make wholesale substitutions of hindsight for the legitimate expectations of citizen plaintiffs.

From this perspective, the court said, the district court accorded the public interest too narrow a scope. It was held that none of the factors the district court relied on was pertinent with regard to the question of whether, in light of what was known when the suit was instituted, the action was of the type Congress sought to encourage when it authorized fee awards. Thus, the district court departed from the fundamental purpose of the citizen-suit provision by confining itself to a post hoc exploration for actual and tangible effects of the litigation.

Accordingly, the order appealed from was reversed and remanded.

Richerson v. Jones, 506 F. Supp. 1259 (E.D. Pa. 1981)—Ditter, J.

In this Title VII employment discrimination case, fees of $12,236.84 were awarded under 42 U.S.C. §2000e-5(k) to the plaintiff, the court holding that he was a prevailing party under the Act despite a reversal and remand from the court of appeals.

Plaintiff was a federal employee, alleging racial discrimination. A trial court initially found in plaintiffs favor, awarding retroactive promotions with backpay and interest, but denying punitive damages. On appeal, the court o appeals affirmed the denial of punitive damages and two o the retroactive promotions, but reversed that part of th trial court's order providing for a third promotion, estab lished certain backpay provisions, awarded interest, an awarded counsel fees. Following remand, and in accorc ance with the opinion of the court of appeals, the distric court made certain modifications in its original judgmen as well as reinstating the original award of attorney fee without prejudice to the plaintiff's right to file a supplemental petition for further fees in connection with the additional proceedings.

The case was now before the court on plaintiff's supp mental petition for fees in connection with the appeal a the proceedings on remand.

Prevailing Party Status

The government argued that none of the time spent on the appeal should be included in the present fee award, since all of the issues raised on the appeal were determined in the government's favor, and against the plaintiff. But the court regarded the government's view as "plainly incorrect," since a prevailing party is one who essentially succeeds in obtaining the relief he seeks in his claims on the merits, and the plaintiff in this case had essentially succeeded on his employment discrimination claim on appeal and remand, and was awarded the relief he sought.

The court explained that, on appeal, the government had failed in its assertion that the retroactive promotion ordered by the district court was not supported by the evidence. Instead, the court of appeals had held that the district court failed to make the findings necessary to justify its order, and directed the district court on remand to make specific findings in order to support the retroactive promotion. The court of appeals had simply been unable to determine the basis for the district court's decision from the record before it, and had accordingly remanded for clarification. But the government had not prevailed on its claim, on appeal, that the district court's job classification award was not predicated on a sufficient evidentiary basis.

Hours of Service

The court next turned its attention to the task of determining the lodestar figure for the fee award, under the procedure established by *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), and 540 F.2d 102 (3d Cir. 1976), as discussed in Vol. 1, No. 1 of this Reporter.

The court pointed out that the hours of service required a determination of the number of hours actually devoted to claims that ultimately proved successful. In this connection, the court said that credit should be given only for hours "reasonably supportive" of such claims, although it proceeded to hold in this case that the hours claimed by the plaintiff's attorney satisfied this requirement.

The next task, which the court regarded as more difficult, was to determine whether it was reasonably necessary to spend that number of hours in support of these claims. The government objected to the hours claimed in this case, on the basis that (1) some of the time claimed for the appeal was for work already performed, and compensated, during trial on the merits; (2) the time claimed for simple tasks was unnecessary and repetitive; and (3) there was not a complete and exact itemization of the number of hours required to perform the precise tasks claimed.

The court rejected the government's first two contentions, but conceded that the final contention had some merit, since certain claims for telephone calls and correspondence were too vague to satisfy the requirements imposed by the *Lindy* case. For this reason, the court disallowed several of the hours claimed.

Hourly Rate

Turning to the next ingredient in the lodestar calculation, the reasonable hourly rate for the services performed, the court observed that the plaintiff's attorney had been a member of the bar for approximately twelve years, and had considerable experience in the field of equal opportunity matters. The court said that he had directed this litigation with the skill and expertise of an experienced practitioner in the field, and had demonstrated "established legal talent." The plaintiff's attorney had submitted a table of "historical rates" for his services, reflecting an increasing rate during the years of this litigation. He claimed $60 per hour for 1976; $75 for 1977; $85 for 1978; $95 for 1979; and $115 for 1980. The court found that these rates were reasonable for an attorney in the Philadelphia legal community, in view of counsel's status and experience, and commented: "I believe that the use of historical rates best reflects the value of the services performed."

The court also rejected the government's contention that the hourly rates should be reduced in relation to the various types of work performed on the case. The court said the tasks performed by counsel for the plaintiff were not merely ministerial or clerical but were necessarily devoted to the preparation of the appeal and subsequent remand, and were properly the function of counsel.

Time Spent on Fee Application

The court separated the hours spent by counsel on the fee petition, saying that the time claimed was reasonable, but that much of the work did not require great legal skill. For this reason, the court held that the hourly rate allowable for work on the fee petition should not be equal to the hourly rate permitted for the case in chief, but rather should be compensated at a rate equal to two-thirds of the rates allowed for the case in chief.

Lodestar Figure

Using the hours and rates it had determined reasonable, the court calculated the lodestar figure for the case in chief at $8,928.75, and the lodestar figure for the fee petition at $2,238.43.

Multipliers

The court noted that the lodestar figure for the case in chief could be adjusted to account for exceptional circumstances. It said that two significant factors identified by the Third Circuit as exceptional circumstances, which might justify adjustment of the lodestar figure, were the contingent nature of the case and the quality of the work performed.

With regard to the contingent nature of the case, the court regarded this consideration as consisting of three separate factors: (1) the complexity of the case and the probability of success; (2) the risks assumed in developing the case; and (3) the delay in receipt of payment. Since each of these factors was present in this case, the court granted plaintiff's request for a 7½ percent increase.

However, the court declined to grant any increase for the quality of the work, saying that although a high caliber

legal skill had been exhibited, this high quality was adequately reflected in the hourly rate charged.

Purposes of Act

The court noted that *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978), digested in the December, 1978 issue of this Reporter, had emphasized that the fee award should be evaluated in light of the important substantive purposes of the Civil Rights Act, and that this evaluation required the district court to decide whether the calculated fee, including the portion that reflected compensation for work performed on the fee application, was reasonable in light of the legislative history of the fee statute and the substantive purposes of the underlying civil rights statute involved. In this connection, the court noted that some of the factors in gauging the reasonableness of the fee award were the importance of the vindicated constitutional right, the congressional policy behind the statute, the number of citizens benefiting, the extent of the civil rights violation remedied, the novelty of the theory of recovery, and the service to the public.

Considering the fees now being awarded, as well as the fees previously awarded in this case, the court ruled that while there was no doubt that the substantive purposes of Title VII had been furthered through the substantial efforts of counsel in this case, the fees awarded were fair and reasonable, and no further increase was warranted.

Services of Paralegal

The plaintiff claimed compensation for twenty hours devoted to the case by a paralegal, at a rate of $40 per hour.

The court recognized that compensation could be awarded for the services of a paralegal if the services consisted of work traditionally done by an attorney. In this case, the hours claimed were for the paralegal's services in preparing exhibits to accompany the affidavit on plaintiff's counsel in support of the fee petition. The court held that this work was clearly work an attorney traditionally would have performed, and was therefore recoverable.

Because of the detail involved in the paralegal's work, the court found the number of hours to be reasonable, but held the hourly rate should be reduced to $20, and accordingly awarded $400 for the work of the paralegal.

Conclusion

Including the paralegal time, the court awarded a total attorney fee of $12,236.84, in addition to the $27,500 which had previously been awarded for work in connection with the original trial.

Staten v. Housing Authority, 638 F.2d 599 (3d Cir. 1980)—Hunter, J.

A housing authority was held not to be immune, under 28 U.S.C. §2412, from a fee award in this civil rights case. The court ruled that the housing authority was not an "agency" or "official" of the United States within the meaning of the statute.

This suit stemmed from the action of the Housing Authority of the City of Pittsburgh, which had allegedly evicted tenants without sufficient notice, and in violation of the Fourteenth Amendment. The district court granted a preliminary injunction, and after a hearing, enjoined the housing authority from evicting tenants until it complied with federal regulations, and directed it to institute a system of notices in compliance with the regulations. The plaintiff's motion for fees, under the Civil Rights Attorney's Fees Awards Act of 1976, was denied by the district court.

On appeal, the court observed that the Fees Awards Act is not a waiver of the sovereign immunity of the United States, and does not permit an award of counsel fees against the United States. Fee awards against the federal government are generally prohibited, the court pointed out, by the express assertion of sovereign immunity in 28 U.S.C. §2412: "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States, or any agency or official of the United States acting in his official capacity...."

Under this statute, the court said it must determine whether the housing authority was an "agency" or "official" of the United States, and thus shielded from a fee award.

The housing authority was said to be a public corporation created under the Pennsylvania Housing Authorities Law, and in accordance with the United States Housing Act. The Pennsylvania legislature explicitly created the authority "to cooperate with and act as agent of the Federal Government." But the court pointed out that other parts of the Pennsylvania Act portrayed the housing authority as a creature of state statute, with a state identity for many purposes. Thus, the Pennsylvania legislature's intentions with regard to the housing authority's status as a federal agency were "at best, unclear."

Moreover, the question of whether the housing authority was an "agency" or "official" of the United States, and thus immune under §2412, was said to be a question of federal law, and not a decision for the states.

The court described the housing authority as a creature of state law which, by federal law, has a unique relationship with the federal government. Although the housing authority received substantial funding from the federal government, the court ruled that funding alone did not establish an agency relationship between the housing authority and the federal government. Rather, if the state agency qualified for federal assistance, the federal government became a guarantor of the housing authority's obligations. The federal funds merely guaranteed housing authority projects; they were not segregated funds exposed to attorney fee actions.

The court explained that the decentralized public housing program worked through a dual network of federal and state agencies, not through the federal government's sole and direct control over the housing projects. Although funding was said to be one indication of whether a housing authority is an extension of the United States government,

the court insisted that funding, alone, was not determinative. The court said that it must also take into consideration the housing authority's exclusive control over the federal grant funds, its freedom from federal involvement or control over the daily management and operation of the housing authority, plus the fact that the housing authority was created by, and continued to be governed in accordance with state law.

Given both the federal and state statutory schemes for housing authorities, the court found that the defendant housing authority was not an "agency" of the United States, immune from fee awards under §2412.

The district court had also indicated that, even if the housing authority were not immune, it would nevertheless decline to exercise its discretion in favor of a fee award.

However, the court of appeals ruled that the district court had failed to apply the proper standard for exercising its discretion. The basis for the district court's opinion was that the case was "simple" and should be "handled routinely." But on appeal, the court referred to the well-settled principle that a party seeking to enforce civil rights, if successful, should ordinarily recover fees unless special circumstances would render such an award unjust. The simplicity of a case, the court ruled, is not a "special circumstance" justifying a denial of fees in a civil rights action. Rather, it is merely one of the factors to be considered in determining the amount of fees to be awarded. The case was remanded for redetermination of the fee issue based on the proper standard.

Matter of U. S. Golf Corp., 639 F.2d 1197 (5th Cir. Unit B, 1981)—Randall, J.

The standards and procedures for awarding fees in bankruptcy proceedings were discussed in detail in this appeal from a fee determination, the court holding there had been an abuse of discretion by the bankruptcy judge in this case, and the fee he had awarded should be substantially increased. (Although the opinion does not so indicate, this case appears to have been decided by the Fifth Circuit's Unit B. See the SPECIAL NOTE in the April, 1981 issue of this Reporter, explaining the Administrative Units of the Fifth Circuit Court of Appeals.)

The attorney had first been appointed as receiver for a bankrupt corporation, had then been appointed as trustee for the corporation, and finally as attorney for the trustee. He served both as trustee and as attorney for the trustee throughout the procedings.

Following administration of the bankruptcy estate, the attorney filed an application for fees of over $36,000, claiming he had devoted some 580 hours to the case in his capacity as attorney for the trustee.

The bankruptcy judge initially determined that only about 270 hours could be compensated as "attorney time," that reasonable hourly rates would be $30 for out-of-court time and $50 for in-court time, and that the total allowable fee would be $8,750. On the attorney's petition for rehearing, the bankruptcy judge increased the attorney's compensable time to 310 hours out of court and 16 hours in court, but refused to change the hourly rates. On this basis, the attorney fee was increased to $10,100, an award upheld by the district court.

On appeal, the court of appeals held that the bankruptcy judge had abused his discretion by applying a ceiling or maximum limitation on the hourly rate, and that the district court had placed undue emphasis on the principle of economy to the exclusion of other considerations. But the court rejected the attorney's contention that the bankruptcy judge had abused his discretion by reducing the compensable hours without giving the attorney the opportunity to respond to the judge's reason for making the reductions.

Proper Standards and Procedure

Since this case had been filed before October 1, 1979, the court noted that it was decided under the former Bankruptcy Act, and was not affected by the Bankruptcy Reform Act of 1978.

Explaining the standards to be applied in setting attorney fees under the former Bankruptcy Act, the court said that bankruptcy judges have wide discretion in determining fees, and that they should be reversed only for an abuse of discretion, which can occur only when the bankruptcy judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award on findings of fact which are clearly erroneous. Referring to its earlier ruling, *In re First Colonial Corp.*, 544 F.2d 1291 (5th Cir.), *cert. den.*, 431 U.S. 904, 52 L.Ed.2d 3288, 97 S. Ct. 1696 (1977), the court observed that there was a specific set of factors to be considered by bankruptcy judges in determining fee awards. These factors consisted of the criteria spelled out in the leading civil rights case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), plus two additional considerations: (1) bankruptcy estates are to be administered as economically as possible, and (2) a policy against duplicative fees and compensation for nonlegal services.

The court also noted that the *First Colonial* decision had spelled out the proper procedure to be followed by bankruptcy judges in determining fees. First, the judge should determine the nature and extent of the services supplied by the attorney, aided by the attorney's written statement and description of the hours worked, and (if there are any disputed factual issues) an evidentiary hearing. Second, the judge must assess the value of the services rendered, and in this connection the court noted that because judges are familiar with legal fees, expert testimony may be taken, but is not required. Third, the judge must explain the basis of his award by briefly describing his findings of fact and explaining how an analysis of the appropriate factors led to his decision. The court stressed that the judge must indicate how each of the twelve *Johnson* factors affected the decision.

Ceiling on Award

In this case, the bankruptcy judge had examined each of the *Johnson* factors. All of the factors he found to be relevant weighed in favor of a higher fee. He found that some of the questions involved in litigation which had been brought by the attorney in connection with his duties to the estate were difficult; that some of these suits required a lawyer of exceptional skill; that a customary fee in comparable work in the community was $40 per hour; that the results obtained were significant (over $135,000 in assets recovered and over $92,000 in claims defeated); that the attorney was "accomplished"; that this suit was undesirable, requiring the attorney to challenge the largest bank in the town where he practiced, despite the personal interest of certain officers and directors of the bank; and that an award in a closely analogous previously decided case was $40 per hour.

The court remarked that none of the individual factors, taken alone would have led to the conclusion that the bankruptcy judge abused his discretion, since each of the factors, no matter how favorable or persuasive, must be evaluated in light of the other factors and considerations, and a genuine balance should be struck. But in this case, all of the relevant factors were in the attorney's favor. The bankruptcy judge had systematically discussed each of these factors, finding most of them favorable to the attorney and none of them unfavorable, and then awarded an hourly fee substantially below the amount he found to be reasonable for comparable work.

The basis for the reduction in the hourly rate made by the bankruptcy judge was a "policy of the District Court for the Middle District of Alabama in bankruptcy" which limited attorney fees to $30 per hour for out-of-court time and $50 per hour for in-court time. Regardless of the balance struck through a genuine examination of the *Johnson* factors, this policy set an absolute limit to attorney fees in bankruptcy cases. Thus, the court said, the policy served to override the *Johnson* analysis and was accordingly inconsistent with the procedure spelled out in the *First Colonial* case.

The court concluded: "It is simply not possible to seriously weigh the *Johnson* factors in the face of an absolute maximum fee. Therefore the bankruptcy judge abused his discretion insofar as he relied on the district court's maximum fee policy."

Policy of Economy

In upholding the bankruptcy judge's award, the district court had not relied on the maximum fee. Instead, the district court had relied on the policy of economy expressed in the First Colonial case, under which the fee awarded should be set "at the lower end of the spectrum of reasonableness."

The court of appeals conceded that the policy of economy was to be considered in determining a proper fee, but said that the relevance of this consideration did not authorize the bankruptcy judge to ignore the impact of the other factors. Thus, while it was true that an attorney's fee should be set at the lower end of the spectrum of reasonableness when all else is equal, this case presented a situation where all the other factors weighed in favor of a higher fee. In other words, "all else is *not* equal." (Emphasis by the court.) The court explained that economy is an additional consideration, but it should not serve to displace the *Johnson* factors.

Sufficiency of Hearing

The bankruptcy judge had reduced or eliminated a large portion of the hours claimed by the attorney on the basis that much of the work should have been done in less time or by nonlegal employees. On this appeal, the attorney argued that the judge abused his discretion by disallowing particular hours on this basis without giving him an opportunity to respond. None of the creditors had challenged the hours disallowed by the judge, and the judge had not stated at any time before his decision that he believed much of the claimed time was excessive or nonlegal. For these reasons, the attorney took the position that he had not been given an opportunity to explain to the judge why the specific items reduced or eliminated were reasonable uses of attorney time.

The court first noted that the attorney was, of course, entitled to an evidentiary hearing on disputed factual issues pertaining to the nature and extent of his services. However, the bankruptcy judge held a hearing, at which the attorney testified about the reasonableness of the hours claimed. Nevertheless, the judge did not ask the attorney to explain why any of his hours were necessary or why a nonlegal employee could not have done the work. Accordingly, the attorney contended that if he had known the judge would reduce or disallow particular hours on this basis, he could have adequately justified those hours to the judge. The attorney argued that he was entitled to know the specific basis of the judge's objections so that he might specifically respond during the evidentiary hearing.

On this point, the court said that the better practice would have been for the judge to confront the attorney at least with his general objections to the claimed hours, and perhaps with particular items the judge thought unnecessary or nonlegal. Had this been done, the court remarked, the judge could have focused the evidentiary hearing on the specific deficiencies in the attorney's application, which might have facilitated a more informed determination on the fee.

However, the court refused to regard the bankruptcy judge's failure to follow its recommended procedure as an abuse of discretion. The court explained that the burden was on the attorney claiming a fee in a bankruptcy proceeding to establish the basis of his services. Since an attorney may be awarded fees in a bankruptcy proceeding only to the extent that the hours claimed are indeed compensable as valid attorney time, it is incumbent upon the attorney to demonstrate that his hours represent work that was reasonably necessary and could not have been done by nonlegal employees. Since the burden was on the attorney to demonstrate that the hours claimed were compensable

and since the attorney was afforded an evidentiary hearing in this case, the court concluded that the judge committed no abuse of discretion by failing to inform the attorney during the evidentiary hearing of the specific grounds on which he objected to the allowance of certain hours.

Redetermination of Fees

The court of appeals pointed out that appellate courts, like trial courts, are themselves experts as to the reasonableness of an attorney fee, and that appellate courts may set such fees themselves. Here, since all the *Johnson* factors were adequately spelled out in the bankruptcy judge's opinions, the court felt sufficiently informed to make its own determination of a reasonable fee in this case. Weighing all the factors, the court concluded that the attorney should be compensated at a rate of $45 per hour for his out-of-court time; it left undisturbed the judge's decision to compensate in-court time at a rate of $50 per hour. Using these figures, the court recalculated the proper award for time spent before the bankruptcy court at $14,750, added a fee of $1,000 for appellate work, and arrived at a total fee of $15,750. The case was remanded to the district court for entry of an order consistent with the court of appeals' opinion.

NOTED BRIEFLY

In an action brought by seven individuals and a 930 member union local, contesting certain aspects of a pension plan, a court held that the defendant employers, upon dismissal of the plaintiff's action, were entitled to a fee award under the fee provisions of the Employment Retirement Income Security Act (ERISA). But because of the plaintiff's inability to pay, the court ruled that the award would be made only against the union, not against the individuals. It reduced the total claim of $25,647.12 for fees and costs to $6,000. *American Communications Assoc. v. Retirement Plan*, 507 F. Supp. 922 (S.D. N.Y. 1981)—Weinfeld, J.

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In an action by a police union challenging a city's affirmative action program to achieve racial balance on the police force, a court held that parties who intervened as defendants in the case were entitled to a fee award under the standard by which plaintiffs are ordinarily judged, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. The court acknowledged the rule of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 54 L.Ed.2d 648, 98 S. Ct. 694 (1978), digested in Vol. 1, No. 2 of this Reporter, which held that a prevailing plaintiff should ordinarily be awarded fees in all but special circumstances, whereas a prevailing defendant could collect fees only if the suit brought against him was frivolous, unreasonable, or without foundation. But here, the intervenor-defendants were black police officers seeking to defend the affirmative action program by showing past discrimination. Under these circumstances, the court said that the procedural posture of the case was not dispositive, that the *Christiansburg* rule was inapplicable, and that the intervenors, who had vindicated their rights, were entitled to collect attorney fees from the plaintiffs, despite the fact that the plaintiff's action was not frivolous, unreasonable, or without foundation. *Baker v. City of Detroit*, 504 F. Supp. 841 (E.D. Mich. 1980)—Keith, J. (Circuit Judge, sitting by designation.)

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Hourly rates ranging from $250 for partners' time to $55 for the time of junior associates were adopted in a securities class action in which a fund of $6,100,000 had been created through settlement, and the court also applied a multiple factor of 1.5. The court found the hourly rates reasonable because of the specialized problems involved in the case, the experience and reputation of plaintiff's counsel, and the fact that counsel had avoided excess use of partners' time and needless expenditure of time, generally. The court applied the multiple factor because counsel had developed a theory of liability based on difficult and subtle accounting principles which would have been presented to a jury at plaintiff's peril if these principles were not adequately distilled and clarified, but counsel were nevertheless able to develop a large settlement fund. The total fee award was $1,384,798.50. *Charal v. Andes*, 88 FRD 265 (E.D. Pa. 1980)—Bechtle, Jr.

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Where the Ku Klux Klan, denied use of a school athletic field for a rally, filed this civil rights suit against the school board, and after trial but before judgment the Klan, at the suggestion of the district court, made a new application including assurances that it would post a bond for costs and damages, and would not burn crosses, carry firearms, or wear hooded robes, thus prompting the school board to grant the application with no judgment by the court on the merits, it was held that the Klan was not a prevailing party under the Civil Rights Attorney's Fees Awards Act of 1976. As a realistic matter, the court said, the Klan had not gained anything from this suit that it could not have obtained without litigation. *Coen v. Harrison County School Board*, 638 F.2d 24 (5th Cir. Unit A, 1981)—*Per Curiam*.

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In an action against a city for sex discrimination in the hiring of police officers, where the plaintiffs contended that the fee awarded them under the State and Local Fiscal Assistance Act was inadequate, the fee determination was reversed and remanded. The district court's consideration of the city's ability to pay the award may have been improper, said the court of appeals. It pointed out that the district court had been unclear as to whether it considered the city's wealth as compared with that of the plaintiffs

(which would have been permissible), or the city's general assertions of impecuniosity. Ordinarily, it said, a court should not focus exclusively on the financial conditions of one party unless that party appeared to be *in extremis*. *Cohen v. West Haven Bd. of Police Com'rs.*, 638 F.2d 496 (2d Cir. 1980)—Kearse, J.

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On remand from the Supreme Court of the United States of an action by a consumer's association, complaining that a state bar disciplinary rule hindered its publication of a lawyer directory, a three-judge district court has held, under the Civil Rights Attorney's Fees Awards Act of 1976, that special circumstances existed which would render unjust any fee award against the defendant bar association. But no such circumstances existed with respect to the defendant Supreme Court of Virginia, which was ordered to pay fees to the plaintiff in an amount to be determined. The Supreme Court's opinion had dealt primarily with issues of judicial and legislative immunity. On remand, all three judges wrote opinions, one judge concurring, and one judge concurring in part and dissenting in part. *Consumers Union of U. S. v. American Bar Ass'n*, 505 F. Supp. 822 (E.D. Va. 1981)—Bryan, Sr. Cir. J. (For previous opinions in this litigation, see the digests in our issues of December, 1979, and August, 1980.)

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Under the fee provisions of the Motor Vehicle Information and Cost Savings Act, a court held that a plaintiff who prevailed at the trial level and successfully defended its judgment (including a fee award) on appeal, was entitled to an additional fee award for services rendered on appeal and on the present fee application. The court also held that under 28 U.S.C. §1961, providing that interest "shall" be allowed on money judgments, the plaintiff was entitled to interest on the original judgment, including the attorney fees and costs awarded in that judgment. *Fleet Investment Co. v. Rogers*, 505 F. Supp. 522 (W.D. Okla. 1980)—Daugherty, C.J. (The ruling on appeal in this case was digested in the October, 1980 issue.)

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Under the Employee Retirement Income Security Act of 1974 (ERISA), it has been held that a fee award to prevailing plaintiffs is not precluded by the fact that the plaintiffs' action did not benefit any general class of beneficiaries of the retirement fund involved. The court said that the common benefit rule is an exception to the general rule against fee shifting, but that it has no bearing in cases governed by statutes which expressly authorize fee awards. *Ford v. New York Central Teamsters Pension Fund*, 506 F. Supp. 180 (W.D. N.Y. 1980)—Elfvin, J.

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In a case of first impression, it was held that a prayer for attorney fees under the Fair Labor Standards Act should be included in determining the amount in controversy for purposes of jurisdiction under the Tucker Act, 28 U.S.C. §§1346(a)(2), 1491, so that where the fee request brought the claim to over $10,000, exclusive jurisdiction rested in the court of claims. The court said that settled law developed in the context of analogous jurisdictional statutes strongly supported its decision, and concluded that this action by federally-employed firefighters for overtime compensation, liquidated damages, and attorney fees, should be transferred to the court of claims. *Graham v. Henegar*, 640 F.2d 732 (5th Cir. Unit A, 1981)—Williams (Jerre S.), J.

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Noting that the fee provisions of the Longshoreman's and Harbor Workers' Compensation Act do not address the question, the Fifth Circuit has held that a claimant who is unsuccessful before the Benefits Review Board, but then succeeds in persuading the court of appeals to reverse the board's order, is entitled to an award for legal services rendered both before the board and the court of appeals. The court discerned a congressional intention that when an employer contests its liability for compensation in whole or in part and the claimant is ultimately successful, the employer and not the claimant must pay the claimant's attorney fees for services necessary to that success, regardless of how close a case might be which is litigated but finally lost by the employer. *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. Unit B, 1981)—Godbold, C. J.

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In a securities fraud case, it was held that the bad faith or vexatious conduct inherent in the fraudulent acts constituting the basis of an action under Rule 10b-5 cannot be the basis for an award of attorney fees under the "bad faith" exception to the American Rule. Rather, the bad faith necessary to justify a fee award must occur during the litigation process. Since the district court in the present case found bad faith only in the conduct of the defendant giving rise to the action itself, and not in the litigation proceedings, it was held that fees should not be awarded. *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. Unit A, 1981)—Rubin, J. [Editor's Note: For a different view, see *Wright v. Heizer Corp.*, infra, p. 19]

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The Sixth Circuit has aligned itself with the Fifth Circuit (saying that the Fifth Circuit's opinion was "better reasoned" than that of the First Circuit) and has held that a motion for fees under the Civil Rights Attorney's Fees Awards Act of 1976 is not subject to the time limitations of Rule 59(e) of the Federal Rules of Civil Procedure. The court agreed that fees under the Act are awarded as costs and are therefore unaffected by the civil rule imposing

ten-day limit on motions to alter or amend judgments. *Johnson v. Snyder*, (6th Cir. 1981)—*Per Curiam*.

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Finding "overgenerosity" in the district court's award of $2,721,650.40 fees in a securities fraud class action, the Eighth Circuit Court of Appeals has reduced the award to $1,019,634. The district court had used hourly rates of $125 for senior attorneys and $60 for associates, finding these rates consistent with those charged in securities litigation around the country. The court of appeals held that the application of this "national standard" was an abuse of discretion. It applied hourly rates of $80 and $40, respectively, saying these rates were much more in line with the hourly rates normally charged by the attorneys involved. *Jorstad v. IDS Realty Trust* [1981] Fed. Sec. L. Rep. (CCH) ¶97,902 (8th Cir.)—Ross, J. (The district court's decision in this case is briefed in the June, 1980 issue of this Reporter.)

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The standards for awarding appellate fees under the Age Discrimination in Employment Act (ADEA) were spelled out in this action for job discharge in violation of that Act. The court said it was clear that appellate fees could be awarded under the ADEA, which incorporates the remedial rights and procedures of the Fair Labor Standards Act. While statutory authorization thus exists for fees at the trial level, said the court, a fee award on appeal is in the discretion of the appellate court. In exercising this discretion, an appellate court should grant fees "when the complexity of the issues and the time necessary to master those issues warrants reimbursement to the prevailing party." Finding merit in the prevailing plaintiff's request for fees in the present case, the court remanded to the district court to determine the amount of the award, saying that the factors which the district court should consider are the number of hours spent in preparation, the experience of the attorneys, the number and complexity of the issues, the degree of wasted or duplicated effort, and the customary fees charged for equivalent litigation services in the community. *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981)—Boochever, J.

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Agreeing with the Third and Fifth Circuits, the Ninth Circuit has held that a legal services organization representing a plaintiff in a Truth-in-Lending Act case is entitled to a fee award under the Act, despite the fact that it does not charge the plaintiff a fee. The court reasoned that such an award would presumably facilitate enforcement of the Act, and noted that a similar rule applies to civil rights cases. *Kessler v. Associates Financial Services, Co.*, 639 F.2d 495 (9th Cir. 1981)—Pregerson, J.

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The fee provisions of the Endangered [illegible] the Outer Continental Shelf Land Act, both of which provide for fee awards whenever "appropriate," have been construed to require a determination of (1) whether Congress intended to encourage the particular type of litigation involved, and (2) if so, whether an award of attorney fees would be in the public interest. While observing that no courts had yet delineated the parameters of "appropriateness" under the two acts, the court relied on the construction of identical language in the Clean Air Act by the District of Columbia Court of Appeals in *Metropolitan Wash. Coal., Etc. v. Dist. of Col.*, digested in this issue, *supra* p. 11. Finding both requirements satisfied in this environmental suit, the court entered a fee award in favor of the plaintiffs, although the defendants ultimately prevailed on the merits. *North Slope Borough v. Andrus*, 507 F. Supp. 106 (D. D.C. 1981)—Robinson, J.

• • •

In a reapportionment case brought against a city council, it was held that the plaintiffs were prevailing parties under the Civil Rights Attorney's Fees Awards Act of 1976, despite the fact that the city council was already attempting to devise a new apportionment plan at the time the suit was filed, and the fact that the district court eventually adopted the city council's new plan, rather than the plaintiff's. The court of appeals said that the good faith of the city council was of no consequence, nor was the issue settled by the acts of the council in admitting the unconstitutionality of the former plan, and consenting to the entry of an injunction against its use. The court held that a party need not prevail on all issues to prevail under the Act; it is only necessary that it prevail on the main issue. Here, the principal relief prayed for was an injunction against future elections under the former apportionment plan, "precisely the relief ordered by the district court". *Ramos v. Koebig*, 638 F.2d 838 (5th Cir., Unit A, 1981)—Johnson, J.

• • •

Despite deliberate infringement, a jury award of punitive damages, time consuming and allegedly dilatory tactics by the defendant, and considerable expense of litigation for the plaintiff, a fee award has been denied under the Copyright Act and Rule 37 of the Federal Rules of Civil Procedure. The court said the substance of the defendant's contentions in the case demonstrated its conduct was not in bad faith, the behavior of the defense counsel was not deliberately or unnecessarily dilatory, and although the plaintiff had taken substantial risk and had incurred approximately $250,000 in expenses in prosecuting the suit, its rewards from the litigation, including $410,000 in punitive damages, were proportionate. *Roy Export Co. v. Columbia Broadcasting System*, 503 F. Supp. 1137 (S.D. N.Y. 1980)—Lasker, J.

• • •

An arbitration ruling, made pursuant to a grievance under a collective bargaining agreement, has been held not to be an "action or proceeding under" Title VII of the Civil Rights Act, and hence not an event that could qualify the prevailing party for a fee award under the Act. Although the arbitrator's award, in favor of an employee claiming sex discrimination, furthered the general objectives of Title VII, the court stressed that the course pursued by the employee was separate from a Title VII remedy. The Supreme Court's ruling in *New York Gaslight Club Inc., v. Carey*,—U.S.,—64 L.Ed.2d 723, 100 S.Ct. 2024 (1980), digested in the August, 1980 issue of this Reporter, was distinguished, since it dealt with administrative proceedings which were a prerequisite to court action. *Sullivan v. Bureau of Vocational Rehab.*, 504 F. Supp. 582 (E.D. Pa. 1980)—Pollak, J.

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In awarding appellate fees under the Civil Rights Attorney's Fees Awards Act of 1976, it has been held that the following factors, in addition to those listed in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), should be considered: (1) the quality of briefs and oral arguments; (2) the amount of time necessary to prepare briefs and oral arguments; (3) the difficulty of the issues on appeal; and (4) the complexity and importance of the case from the view of the appellate court. *Suzuki v. Yuen*, 507 F. Supp. 819 (D. Hawaii, 1981)—King, C.J.

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Where fees had been requested and denied prior to the effective date of the Civil Rights Attorney's Fees Awards Act of 1976, with only supplemental enforcement proceedings remaining unresolved at that time, it was held that fees could be allowed only for the pending supplemental proceedings, not for the entire case. If the question of fees for the initial case had not yet been decided, the court said, such an unresolved issue would "apparently" suffice to render the entire case "pending" on the effective date of the Act, and an award for the entire case would have been proper. But if all issues, including fees, have been resolved before the Act's effective date, the fact that supplemental proceedings continue beyond that date was held not to make the entire case "pending" so as to justify a more comprehensive award. *Taylor v. Sterrett*, 640 F.2d 663 (5th Cir. Unit A, 1981)—Coleman, J.

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In awarding hourly rates of $50 and $40 respectively, for the plaintiffs' two attorneys, rather than the requested rates of $105 and $75, the court in this civil rights action held that the ability of the defendants to pay an award should be considered "in all cases." Awarding a total of $9,867.50 fees under the Civil Rights Attorney's Fees Awards Act of 1976, the court remarked that "this rural school district and its supporting taxpayers with very modest incomes would be hard-pressed to pay an award substantially greater than the amount of fees awarded herein." *Thomas v. Board of Education*, 505 F. Supp. 102 (N.D. N.Y. 1981)—Foley, J.

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In a case of first impression, it has been held that administrative agencies are authorized to award attorney fees to prevailing parties under the fee provisions of the Rehabilitation Act. The court relied on similar holdings under Title VII of the Civil Rights Act of 1964, noting "virtually identical language" in the two statutes. *Watson v. United States Veterans Administration*, 88 FRD 267 (C.D. Cal. 1980)—Tashima, J.

• • •

The fact that the prevailing plaintiffs' attorneys were from a large law firm which had provided and would continue to provide *pro bono publico* services regardless of a fee award, while the defendant was a department of the state government suffering budgetary limitations, was held not to constitute "special circumstances" which would justify the denial of fees to the plaintiff under the Civil Rights Attorney's Fees Awards Act of 1976. The court concluded that there was "simply no basis in the statute, legislative history or case law for the defendants' argument here." *Witherspoon v. Sielaff*, 507 F. Supp. 667 (N.D. Ill. 1981)—Crowley, J.

• • •

In a shareholder derivative suit, it was held, under the "bad faith" exception to the American Rule, that a court in awarding fees should not foreclose the possibility that a plaintiff, under Rule 10b-5, could prove that a defendant's bad faith behavior in the conduct giving rise to the cause of action was so outrageous as to justify a fee award. The court recognized this view as being consonant with Seventh Circuit precedent, and at odds with holdings in the Third Circuit. However, in the context of this case, the court found that the conduct inherent in the 10b-5 claim did not support a fee award, and made its award on other grounds. *Wright v. Heizer Corp.*, 503 F. Supp. 802 (N.D. Ill. 1980)—Marshall, J. [Editor's Note: For a different view, see *Huddleston v. Herman & MacLean, supra*, p. 17 this issue.]

UPDATE

Fleet Investment Co. v. Rogers, digested in the October, 1980 issue. Additional fee award for postjudgment services: see p. 18, *supra*.

Furtado v. Bishop, briefed in the June, 1980, issue. Fee recalculated on appeal: see p. 9, *supra*.

Gates v. Collier, digested in the August, 1980 issue. Petition for rehearing by panel granted: 636 F.2d 942.

Jones v. United States, digested in the June, 1980 issue. Fee award on remand: 505 F. Supp. 781.

Jorstad v. IDS Realty Trust, briefed in the June, 1980 issue. Award reduced on appeal: see p. 19 *supra*.

Saunders v. Claytor, digested in the February, 1981 issue. *cert. den., sub nom Saunders v. Lehman*, 49 USLW 3662.

Supreme Court of Va. v. Consumers Union, digested in the August, 1980 issue. Fee award on remand: see *Consumers Union of U.S. v. American Bar Ass'n*, p. 18, *supra*.

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BINGHAM KENNEDY
BARRY J. TRILLING

(202) 223-1577

June 29, 1982

Executive Director
Capital Legal Foundation
1101 17th St., N.W., Suite 810
Washington, D.C. 20036

Dear Sir or Madam:

Awards of attorneys' fees have received increasing attention in recent months, especially in the context of public interest litigation under Federal statutes. As a result, your organization may have considered the possibility of seeking attorneys' fees in its litigation. I am writing to offer the services of this firm in evaluating the question whether to seek attorneys' fees, in establishing the procedures necessary to document a claim, and in actually litigating claims.

This firm has considerable experience in attorneys' fees litigation. Before my partner and I left the Department of Justice, each of us had defended attorneys' fee claims against the government. More recently, we successfully litigated two fee applications on behalf of the Environmental Defense Fund in the D.C Circuit Court of Appeals. In that litigation, the Court characterized the work of this firm as "first-rate", described our documentation as "clear and thorough" and our experience in civil litigation as "extensive". Without discussing the decisions in detail, it is sufficient to note that in EDF v. EPA, 672 F.2d 42 (D.C. Cir. 1982), we were able to obtain a total award for EDF of $90,000 for 825.4 hours of attorney time, thus yielding an average hourly rate of roughly $109. As a result, we thought that other public interest organizations might benefit from our experience in handling those cases, and we envision three ways in which we might be of service.

First, in deciding whether to seek attorneys' fees in a matter which has been litigated by in-house counsel, we can offer a "second opinion" concerning the merits of a potential claim. Equally important is the fact that this evaluation can usually be accomplished at a single initial conference, for which we charge $50 per hour.

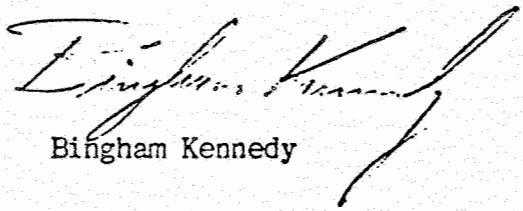
Second, if a decision is made to seek attorneys' fees, we are available to handle the application for fees and the related briefing of the issues. Our experience in handling the EDF cases indicates that use of retained counsel offers several advantages to the client. First, it is easier for outside counsel to advocate the excellent performance of in-house staff

attorneys in handling the merits of the case than it is for the staff attorneys to do so themselves. Second, it eliminates the need for in-house counsel to litigate issues which are not generally of interest to public interest attorneys and which would divert them from other cases. Third, the arrangement offers the possibility of substantial financial rewards for your organization.

The third area in which we may be useful is in counselling organizations in establishing the record-keeping practices necessary to litigate a claim for attorneys' fees successfully. It has been our experience that many public interest organizations lose the opportunity to apply for fees for much of their attorneys' time simply by failing to provide the minimal documentation required. On the other hand, any change in record-keeping practices poses the risk of increased administrative expense and disruption of established office procedures. Accordingly, it is necessary to tailor any recommendations to the particular needs and structure of the law office involved, taking into consideration the number of attorneys, the nature and volume of the litigation handled by it, etc. Our goal is to suggest a time record system which meets the requirements for an award of attorneys' fees, while minimizing overhead expense and diversion of attorneys and secretarial staff to ministerial functions. In addition to suggesting record-keeping practices, we may also be able to offer suggestions on how to minimize duplication of attorney time so as to maximize potential fee awards.

We would be happy to discuss these services further with you at your convenience. In addition, I have enclosed a copy of our firm brochure, which you may find to be of interest. If you have any questions, please give me a call.

Sincerely yours,



Bingham Kennedy

BK:gms

Enclosure

The purpose of this brochure is to introduce the law firm of Trilling & Kennedy and to acquaint you with the legal and consultant services which the firm offers, as well as the background and experience of its attorneys. Trilling & Kennedy was recently opened in downtown Washington, D.C., by two former Justice Department attorneys, Bingham Kennedy and Barry J. Trilling. The firm offers a diversified mix of consultation and litigation services, concentrating in environmental law and federal employee rights, based upon extensive experience of its attorneys in both areas. In addition, the location of the firm, in downtown Washington, D.C., provides ready access to federal agencies, federal courts, and the headquarters of national trade associations and organizations.

PROFESSIONAL EXPERIENCE

Environmental Law

Barry Trilling and Bingham Kennedy have wide experience in the field of environmental regulation. Each has spent much of his professional career working in the area. As a trial lawyer with the Department of Justice and as an Assistant United States Attorney, Mr. Trilling has supervised litigation concerning:

- The Clean Air Act
- The Clean Water Act
- Federal hazardous waste laws.

While with the Justice Department, Mr. Trilling was the federal government's lead counsel in the litigation concerning the "Love Canal" hazardous waste disaster.

Mr. Kennedy, during his experience in EPA's Office of General Counsel and the Department of Justice, has conducted litigation in federal trial courts and courts of appeals involving:

- The Clean Air Act
- The Clean Water Act
- The Federal Toxic Substance Control Act
- Federal Pesticide laws
- Federal Noise Pollution laws.

Mr. Trilling and Mr. Kennedy have each been involved in legal actions concerning a wide variety of Federal environmental laws. They have prepared federal enforcement cases and have defended Federal regulatory actions carried out under these laws. Since the firm was opened, it has been retained by the United States Environmental Protection Agency to provide advice concerning implementation of the federal hazardous waste program.

Federal Employee Rights

Both Mr. Kennedy and Mr. Trilling have provided counselling services with respect to the rights of federal government employees under federal law, including issues concerning Reductions in Force, Merit System Principles, Performance Appraisals, and Merit Pay under the Civil Service Reform Act of 1978. Since the firm opened, it has worked with the Bipartisan Congressional Task Force on Federal Employees and has represented several individuals and groups of federal employees. Moreover, while he was an Assistant United States Attorney in Los Angeles, Mr. Trilling conducted extensive litigation involving federal employees' rights on behalf of the United States government, taught courses on Equal Employment Law, and served as an Equal Employment Opportunity representative for federal employees.

Individual Background and Education

Bingham ("Toby") Kennedy has been practicing law for 12 years. He graduated from Yale University and the University of Virginia Law School,

where he was a member of the Board of Editors of the Virginia Law Review. His experience includes a judicial clerkship, private practice in his home state of New Jersey, service with the Environmental Protection Agency and, more recently, the Department of Justice. He is a member of the Bars of New Jersey, Pennsylvania, and the District of Columbia, as well as various federal courts.

After graduating from UCLA and the Law School of the University of California at Berkeley (Boalt Hall), Barry Trilling served as an attorney for the Federal Government for almost ten years, including terms as an Assistant United States Attorney in Los Angeles and as a Trial Attorney in the Department of Justice. Mr. Trilling has written articles, delivered speeches, and participated in several symposia on the subjects of environmental law and federal employment litigation. He is admitted to practice in California, the District of Columbia and various federal courts.

Federal laws and regulations in the areas of environmental protection and government employees' rights have become increasingly complex. If you have a question in any of these areas, an attorney from Trilling & Kennedy would be pleased to discuss it with you.

There is no charge for an initial consultation. The firm may be reached by telephone at (202) 223-1577.

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Mr. & Howard

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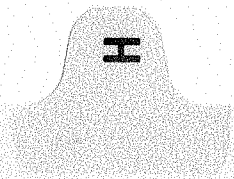
Trial Lawyers for Public Justice is a public interest law firm which utilizes trial litigation as an instrument of social change and for vindication of individual rights. The Firm works with the Trial Lawyers Founders to identify individuals and situations which merit legal action in the public interest.

The Firm's network of trial lawyer members serves as the backbone of all out-of-state litigation, and trial lawyers may contribute their service through sabbaticals taken in Washington.

The Firm will work closely with other public interest groups to stay abreast of current issues, maintain an open flow of information exchange, and heighten awareness of instances in which citizens have suffered injuries or losses due to the conduct of government or private companies and for which trial litigation would be appropriate.

Trial Lawyers for Public Justice owes its existence to the time, efforts, and contributions of many. It is especially indebted to Joan Claybrook for her help in raising funds and organizing the firm, and to Ralph Nader for inspiration and guidance; their involvement has been vital to the founding of the firm.



Paying Lawyers to Sue the Government—An Expense That OMB Could Do Without

The Office of Management and Budget complains that generous attorneys' fee awards by the courts enable "public interest" lawyers to push their ideology.

BY DAWN P. JACKSON

The Environmental Defense Fund Inc. won a split decision in federal court in February when it sought stricter regulation by the Environmental Protection Agency (EPA) of a class of toxic chemicals known as polychlorinated biphenyls (PCBs). A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit upheld the environmental group on two counts and ruled against it on a third.

But when it came to getting EPA to pay its legal fees, the environmental group won hands down. For the time spent on the case—825 hours spent by its own attorneys and 82 hours by a private law firm—the Environmental Defense Fund was awarded $99,534.50. That's a rate of nearly $110 an hour, far more than any government lawyer is paid.

The three-judge panel acted on the authority of the 1976 Toxic Substances Control Act, which allows such fee awards whether the party challenging the government wins, loses or draws. "The decision of the court . . . may include an award of costs of suit and reasonable attorneys' fees . . . if the court determines such an award appropriate," the law says.

The Toxic Substances Control Act is only one of more than 100 laws that in effect require the government to pay the legal fees of the parties that take it to court. To the Reagan Administration, these awards represent a subsidy that enables "public interest" lawyers to push their ideology at public expense.

"The notion that government should subsidize discrete segments of the bar for ideological purposes is unjustified and dangerous," said Michael J. Horowitz, special counsel of the Office of Management and Budget (OMB).

The government does not keep track of how much it spends each year to pay the lawyers for those who take it to court. OMB estimates that the total is about $20 million a year, but Horowitz says the recent court practice of awarding fees to attorneys of non-prevailing clients could drive up that figure.

Now the Administration is preparing to ask Congress to restrict such fees. In its fiscal 1983 budget, it outlined a proposal to limit the hourly rate that can be used in computing fee awards to the rate that government lawyers are eligible to be paid. To stop frivolous suits based solely on the hope that the government would have to foot the bill, the Administration would require plaintiffs to certify in advance that they would pay their lawyers themselves, with the possibility of being reimbursed by the government later. Finally, the proposal would make fee awards somehow proportional to the judgments won by the plaintiffs against the government. OMB and the Justice Department are still working out the details of the proposal they will submit to Congress.

Already, the proposed changes have met with strong opposition not only from public interest lawyers and the American Civil Liberties Union but from the American Bar Association (ABA) as well. In testimony to the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, the ABA denounced the proposal as an attempt to "undermine the intent" of laws that make provision for attorneys' fee awards. And Alan Houseman, director of the Center for Law and Social Policy, said in an interview that the proposal would reduce "our ability to represent those groups who otherwise would not be represented because of a lack of funds."

A 'LITERAL INDUSTRY'

The Administration's 1983 budget message complains that a "literal industry" of public interest law firms has developed as a result of the legal fee awards.

Public interest groups have come to regard the awarding of attorneys' fees as "a permanent financing mechanism for them," Horowitz said in an interview. The Administration, he added, does not accept these groups' argument that as the level of litigation rises, so does the level of justice.

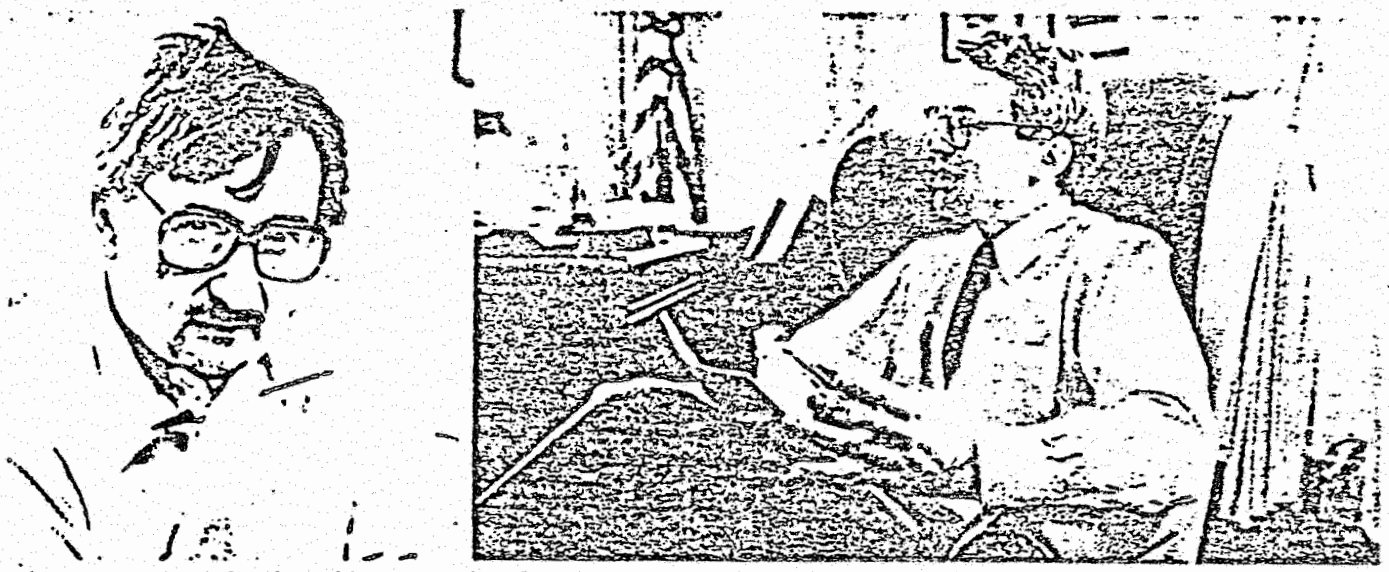
The General Accounting Office, which audits legal fee outlays for Congress, says that in fiscal 1977, the most recent year for which it has data, three laws resulted in more attorneys' fee awards than any others. They are Title VII of the 1964 Civil Rights Act (which forbids discrimination in employment), the 1966 Freedom of Information Act and the 1974 Privacy Act.

Looming is the 1980 Equal Access to Justice Act, which OMB feels has the potential to be by far the costliest of all. The act authorizes the federal government to pay attorneys' fees for individuals and small businesses that defend themselves against "overreaching" government actions.

A bookkeeping wrangle over which federal budget account should be used to make payments under the act has so far prevented any payments. But OMB estimates that when payments begin, the annual costs of attorneys' fees will mushroom from $20 million last year to $135 million in 1983 and $146 million in 1984, the last year for which the Equal Access to Justice Act is now authorized.

Horowitz said that for fiscal 1983, the Administration intends to establish a tracking system that will provide a breakdown of which laws are the costliest. For now, he can only point to specific cases that illustrate his displeasure with the fee system.

One case that helped to generate the Administration's proposal to curb attor-



Alan Houseman (left) of a public interest law firm takes issue with the Reagan Administration's proposal to curb attorneys' fees for parties that take the government to court. Michael J. Horowitz of OMB says, "For those who have their noses at the troughs screaming about our proposal being some vendetta or a lack of justice, I think it is a lot of bunk."

neys' fees is *Copeland v. Marshall*, a discrimination suit brought against Labor Secretary Ray Marshall. Using Title VII of the 1964 Civil Rights Act, a group of women employees of the Labor Department charged that the department denied them promotions and excluded them from training programs on the basis of sex.

Less than a week before the U.S. Court of Appeals for the District of Columbia Circuit was scheduled to hand down its verdict in 1980, the Labor Department conceded the plaintiffs' charge and agreed to pay the women back pay totaling more than $31,000. The court then awarded attorneys' fees to the prestigious Washington law firm of Wilmer & Pickering, which represented the women. The law firm received $160,000 in fees plus $11,000 in overhead costs—more than five times what the plaintiffs got from the Labor Department.

To reduce the chances of this kind of outcome, the Administration proposed a maximum rate of $25 an hour for plaintiffs' lawyers, approximately the top salary of civil service lawyers. Attorneys' fees could additionally include payments to cover expenses.

The budget says that as now granted by the courts, attorneys' fees depend on a "prevailing market rate" that is "pegged to private, commercial bar rates and often exceeds $100 per hour even where the applicant attorneys receive low salaries from law firms." Most laws that authorize attorneys' fees place no limit on those fees, although the Equal Access to Justice Act has a $75-an-hour limit that would not be changed by the Administration's proposal.

Another case cited by Horowitz, again from the U.S. Court of Appeals for the District of Columbia Circuit, is *Sierra Club v. Gorsuch*. In February, the court ruled against the Sierra Club, which had sought to force EPA administrator Anne M. Gorsuch to review EPA's standards for sulfur dioxide and particulates from coal-fired generators under the Clean Air Act.

But at the same time, the court decided to grant legal fees to the Sierra Club, which is still negotiating with EPA over what the amount should be. The court held that under the Clean Air Act, such fees are not limited to "substantially prevailing or prevailing parties" provided that the case makes a "substantial contribution to the interpretation and development of the act."

The Administration argues that losing plaintiffs should not be able to win awards of legal fees, although the Justice Department says that the Clean Air Act is only one of 14 environmental laws that permit losers to collect. Under the Administration's proposal, "the fee awarded must bear a reasonable relation to the result achieved in the proceeding."

To ensure that plaintiffs' lawyers would be paid by their clients if the court did not grant them legal fees, the Administration would require plaintiffs to state in writing that they would pay their own attorneys' fees and then, if the court so ruled, collect reimbursement from the government. That would convert fee awards from a subsidy for lawyers to a benefit for their clients, Horowitz said.

Even OMB is far from certain of the budgetary impact of the Administration's proposals. Horowitz said the $20 million a year that is being spent now would be shaved substantially, although he declined to estimate by how much. In addition, he said, the cost of the Equal Access to Justice Act, which OMB says will cost more than $100 million a year, would be trimmed by 15 to 25 per cent.

THE PUBLIC INTEREST BAR

Indeed, Horowitz seems interested in the Administration's proposal not so much for its promise to save the government money as for its potential to reduce a form of litigation that he says does more harm than good to all involved.

"Take a look at the record of the past 10 years," Horowitz said. "These programs have hurt, not helped, the poor."

The lawyers who benefit the most from attorneys' fee awards, Horowitz said, are "public-sector vendors" whose main concern is not for their clients but for their own points of view. "One can think of hundreds of instances in which, in the service of some kind of ideology, a bunch of middle-class lawyers have left the poor holding the bag," he said. "So for those who have their noses at the troughs screaming about our proposal being some vendetta or a lack of justice, I think it is a lot of bunk."

Horowitz said public interest lawyers should have to compete in the marketplace for clients and fees. "I have no doubt that once [public interest lawyers] get off the dependence on government money, they are going to find that they can, if they are worth supporting, get support from a public which agrees with their advocacy," he said.

Public interest lawyers take issue. Frederick S. Middleton III of the Sierra Club Legal Defense Fund said that legal fee awards enable his group and others like it to initiate important legal action that otherwise would be left undone.

"The point isn't that we are the good or bad guys, the point is representing issues

Meanwhile, Back in the States

Not only the federal government finds itself saddled with millions of dollars in bills from the attorneys who do battle with it in the courts. Thanks in large part to a 1976 federal law, states are finding themselves increasingly burdened by fees they must pay to opposing lawyers in civil rights cases.

Consider the case of *Skehan v. Board of Trustees of Bloomsburg State College*, in which Joseph T. Skehan, a non-tenured professor at the Pennsylvania college, charged that he had been fired without due process and in violation of his 1st Amendment right of free speech. The U.S. Court of Appeals for the 3rd Circuit rejected the 1st Amendment charge but ordered Skehan reinstated on a "suspended with pay" basis so that he could receive a fair hearing. He was dismissed again after the hearing and received less than $25,000 for the suspension period. The court, meanwhile, awarded his lawyers $50,000, to be paid by the state of Pennsylvania.

In response to such cases, Sen. Orrin G. Hatch, R-Utah, chairman of the Judiciary Subcommittee on the Constitution, has introduced amendments to whittle down the impact of the 1976 Civil Rights Attorneys' Fees Awards Act. That law provides that lawyers for persons who successfully go to federal court to defend their civil rights may be awarded their fees from the defendants, which are frequently state or local governments.

When the law was enacted, many recent federal civil rights laws already included such provisions, but those enacted before 1964 generally did not. Congress held that without such a law, many persons whose civil rights had been violated could not afford to seek redress in court. States have been complaining ever since that the law has dealt a blow to their treasuries. A March 1981 survey by the National Association of Attorneys General found that Florida had paid $778,090 under the act since its enactment in 1976. Of 22 states responding to the association's survey, Washington had paid more than $400,000 and ranked highest with $4.5 million in pending fee requests.

"Many local officials I have spoken to have expressed concern about the substantial fee awards they have already paid, the increasing amounts of money that are being diverted from public services to legal defense and their view that a number of these suits are simply brought to collect attorneys' fees," Hatch said at the outset of March 1 hearings before his subcommittee.

His bill (S 585) would authorize payment of legal fees by losing plaintiffs to winning defendants if the courts determined that they brought "frivolous suits at the taxpayer's expense." Hatch said such a provision would eliminate the "dual standard" that now makes only plaintiffs eligible for fee awards.

Hatch would deny attorneys' fee awards to plaintiffs who rejected settlement offers comparable to the awards ultimately granted in court. This provision, Hatch said, would encourage settlements and "result in . . . a reduction of the terrible congestion that now exists in our courts."

A third provision of Hatch's bill would limit the hourly rate received by lawyers in fee awards to the market rate prevailing in the local area.

Finally, Hatch would try to stop the practice of attaching claims not covered under the attorneys' fee act to those that are covered so that lawyers receive fees for the entire claims. His proposal would instruct judges to determine whether the claims would have been eligible individually under the act.

Although Hatch emphasized that he supports the 1976 act's goal of providing incentives for lawyers to represent clients who otherwise could not afford them, he has run into opposition from the civil rights lobby, which says his bill would weaken a law that has helped the poor defend their civil rights.

Former Rep. Robert F. Drinan, D-Mass., now a professor at the Georgetown University Law Center, testified before Hatch's subcommittee on behalf of the Alliance for Justice and the Leadership Conference on Civil Rights. "Many of the proposed amendments," Drinan said, "would undermine the fundamental purpose of the act: to allow civil rights plaintiffs to vindicate their rights and thereby to enforce the laws."

The Administration has taken no formal position on Hatch's bill. Michael J. Horowitz, special counsel of the Office of Management and Budget, said the Administration might incorporate some of Hatch's provisions into its own bill to limit attorneys' fee awards by federal agencies.

Hatch's subcommittee is expected to vote on his bill later this month. Peter Ormsby of the subcommittee staff said the bill has a good chance of clearing the panel but it is "too tough to call" in the full Judiciary Committee.

that the market system does not provide for," he said. "No one has an economic interest in stopping pollution, but it is in the interest of the public to protect the environment regardless of the cost."

At the Center for Law and Social Policy, Houseman called the Administration's proposal an effort to keep unwelcome cases out of the courts. "Essentially, the proposal would deny low-income people and environmentalists redress," he said. "This is attacking the heart of the constitutional system."

The ABA rejects the proposals to require plaintiffs to certify that they would pay their lawyers if attorneys' fees are not awarded. The effect, it says, would be to prevent those who can't otherwise afford to go to court from turning to public interest lawyers who hope to get their compensation from the government.

Liberal public interest law firms would be more deeply affected by the Administration's proposal than would the newer generation of conservative firms, most of whose revenue comes from private foundations, association grants and businesses. Bob Best of the Pacific Legal Foundation, established in Los Angeles in 1973, said that less than 5 per cent of his group's income comes from fee awards.

Best said he favors requiring all litigants to pay their attorneys' fees, regardless of the outcome in court. The awarding of fees, he said, should be approached "very carefully because it has tremendous and significant room for abuse."

At OMB, Horowitz says that conservative public interest groups would ultimately be affected by the proposed changes just as surely as liberal groups would. "Conservative groups will have their noses at the troughs just the same as any other sort of group," he said. "As they begin to achieve the same kind of critical mass as the traditional public interest groups, that's where they'll get their money from."

How public interest law firms would be affected by the proposal will have to await submission of a bill. The Cabinet council on legal policy may have an opportunity to review whatever proposal emerges from the current discussions between OMB and the Justice Department.

For his part, Horowitz is determined that something be done. "One of the things this Administration has got to do," he said, "is move beyond the rhetoric by which people intimidate a political process into subsidizing them and look at the reality of what the political system can do and afford."

Public interest firms are watching carefully. "The proposal was buried deep in the budget," Middleton said, "and it is not going to slip by without the light of day shining on it." ❑

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Regulation

May/June 1982 AEI Journal on Government and Society

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Competition among the States

The Ethics of Regulatory Competition

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A Response

Walter Olson

Perspectives
on current developments

The Private Attorney General Industry: Doing Well by Doing Good

A good idea tends to get run into the ground. Take the idea that certain sorts of litigation against the government ought to be made easier. In the bad old days, when a federal agency went beyond its assigned powers, even persons directly affected by its actions frequently could not challenge them. If, for example, the Tennessee Valley Authority began selling electricity beyond its legally prescribed area, the private utilities that were undersold at public expense did not necessarily have standing to sue. Since they had no "right" to be free from competition, governmental or otherwise, the harm done to them was no different as a legal matter from that done to the public at large. And the public's "right" to have agencies behave in accordance with law was to be vindicated through Congress and the Executive rather than through the courts.

This view of the world changed radically during the 1940s and 1950s as Congress (and ultimately the courts, without benefit of explicit legislative mandate) set about conferring standing on new classes of litigants. Any person "adversely affected or aggrieved" was given a right to be free of unlawful agency action. The theory advanced to support the new approach was that these plaintiffs were being enlisted as "private attorneys general" to benefit the society at large by keeping the agencies in line.

After a couple of decades the thought occurs: Gee, the *public* attorney general doesn't have to dig into his own pocket to do the public's work. Why should the private attorney general? Thus there arise federal statutes in various fields compensating private litigants for their attorneys' fees when they are successful in correcting agency malfeasance.

Time goes by and another inconsistency becomes apparent: The public attorney general isn't out of pocket even when he *loses*, presumably on the theory that it benefits the public to have these things sued out even when he turns out to be on the wrong side. So why not the same for the private attorney general? Enter provisions for the award of attorneys' fees to some litigants who sue the agencies and *lose*!

The inexorable logic marches on: Come to think of it, the public attorney general is not merely compensated for his out-of-pocket expenses; he's paid a *salary* for all the benefits his litigiousness brings to the Republic. So why not the same for the private attorney general as well? Thus, the *ne plus ultra* of attorneys' fees: awards to the loser based not upon what the nominal private attorney general (the plaintiff) is charged by his lawyers, but rather upon what the real private attorney general (the lawyers themselves) *could* have charged for their services on the open market.

That this is not all a bad dream is demonstrated by several cases recently decided by the U.S. Court of Appeals for the District of Columbia Circuit. On February 5, that court awarded attorneys' fees to the losers in three cases under the Clean Air Act—which, like other environmental statutes, specifies that the court may award attorneys' fees "where appropriate." In *Sierra Club* v. *Gorsuch*, the court noted that the Sierra Club and the Environmental Defense Fund had "extended great efforts to perform their advocacy tasks well" and had assisted the court in construing the statute—even though they had lost on all counts. In *Environmental Defense Fund* v. *Environmental Protection Agency*, the court awarded fees to the Environmental Defense Fund, which had lost on eleven of the thirteen issues in the case. And in *Alabama Power Co.* v. *Gorsuch*, the court awarded fees to the Sierra Club and the Environmental Defense Fund, which had lost on about half the issues, and to the government of the District of Columbia, which had lost on the *other* half (since it had taken the opposite position).

In the second of these cases, the court awarded fees adding up to more than the Environmental Defense Fund's lawyers had actually been paid. This was in accord with a standard of "adjusted market value" that the court had adopted in *Copeland* v. *Marshall*, a 1980 employment discrimination suit brought under Title VII of the Civil Rights Act, which permits "the court, in its discretion, [to] allow the prevailing party, other than the . . . United States, a reasonable attorney's fee." (The courts have managed to interpret this, by the way, to apply only to a prevailing *plaintiff*, and not to a prevailing *defendant*.) The plaintiff, Copeland, had been represented by the prestigious Washington law firm of Wilmer, Cutler and Pickering. The court ordered the Labor Department, Copeland's employer, to promote her, and awarded her and several other plaintiffs a total of $33,000 in back pay. It then awarded her lawyers $160,000 in attorneys' fees, basing the amount not on what Copeland had agreed to pay the law firm, nor even on what the law firm actually paid its partners and associates who worked on the case, but on the "market value" of their work. This was calculated by multiplying the number of hours the attorneys had worked by the hourly rate Wilmer, Cutler and Pickering usually charged its corporate clients—plus some adjustment upward for the high quality of the service it had provided.

There is of course another rationale for the awarding of attorneys' fees against the government, quite different from the "private attorney general" concept: It might simply be thought fair to compensate the citizen for what it actually costs him to extract justice from his government. This notion is to some extent embodied in the 1980 Equal Access to Justice Act, which provides for the award of fees in administrative and court litigation against agencies by (1) individuals with less than $1,000,000 net worth and (2) companies and associations with less than 500 employees and (except for tax-exempt entities such as most public-interest law firms) less than $5,000,000 net worth. (It is a relatively stingy fee provision, containing a limitation of $75 per hour, a requirement that the person seeking the fee be the "prevailing party," and even an exception where the agency's position was "substantially justified.")

But not only will a direct personal injury not help a litigant under the more liberal fee provisions of such statutes as the Clean Air Act; it may even categorically disqualify him! In *Alabama Power Co.* v. *Gorsuch*, the D.C. circuit court suggested that it might not be "appropriate" (the statutory standard, if it can be called a standard) to award fees to those with economic motives, since the fee provisions were meant to encourage litigation by persons who would not sue otherwise. Never mind that this conclusion rests on the questionable assumption that groups like the Sierra Club will be less likely to litigate than profit-seeking corporations and loss-averse individuals for whom compliance may be cheaper than litigation. And never mind even the inverted equity of a rule that covers your costs only if you are *not* suing to obtain something of value that has been wrongfully withheld. The important point is that the effect of the rule is to establish a policy directing the flow of litigation subsidies primarily to ideologically motivated law-reform or anti-law-reform organizations.

The D.C. circuit's view on this last point may well be in accord with the statutory intent. Whether it is or not, any change in the current situation will have to be sought in Congress; and the Reagan administration proposes just that. It has submitted legislation that will limit attorneys' fees under all statutes to the level provided for in the Equal Access to Justice Act. In addition, the award would have to bear a reasonable relation to the result achieved in the case. Only winners would qualify, and the client would have to certify that the fee was owed, was determined on an arm's-length basis, and will be paid to the extent not covered by the fee award. The proposal is sure to encounter vigorous opposition from the private attorney general industry, from the smallest San Francisco legal-aid storefront to the deep-pile conference rooms of Washington law firms.

What is ultimately involved here, however, may go far beyond the "private attorney general" issue. The law governing the award of attorneys' fees in federal litigation—not only against the government but against private parties as well—is an expanding wasteland of confusion. Such chaos often accompanies the initial attempt to abandon important and long-standing legal traditions. The accelerating pace of statutory change, one suspects, has more to do with the "individual justice" rationale than the "private attorney general" rationale. In an

age when corporations are tempted to describe their annual profits in multiples of annual attorney's fees instead of percentages of annual sales, the cost of obtaining justice, whether from the government or from a private party, is more often than not prohibitive. While we are not yet prepared to abandon in wholesale fashion the American rule that each party to litigation pays his own attorneys, and to adopt the English rule that loser pays all, we are gradually moving in that direction for federal claims through a disorganized and often inconsistent spate of preferential statutes. As one would expect, the earliest of these favor litigants whose causes society regards as particularly "just," or (to put it more cynically) whose numbers, cohesiveness, and political influence make the justice of their cause more readily apparent to elected officials. Civil rights claims were among the first; small business suits against agencies the most recent; and many more can be expected to follow, until the exception gobbles up the rule.

A New Deal for Utilities?

A holding company, said Will Rogers, is a "thing where you hand an accomplice the goods while the policeman searches you." For most large businesses now, it is something a lot more innocuous: a single corporate roof under which they may conveniently house all the various businesses they own or control, often in unrelated industries, without mingling their actual operations. Almost all businesses can diversify as much as they like, with or without a holding company structure. The biggest exceptions are utilities and banks, which face restrictions on both participation in holding company structures and diversification generally.

With the rise of such "near-banks" as Sears Roebuck and American Express, the banking exception may not last long. Now the utility industry too has decided that it wants to play on the same terms as everyone else. It is calling for the reform, if not the full repeal, of the Public Utility Holding Company Act of 1935, the old New Deal statute that limits the use of holding companies and confines utility diversification within very narrow bounds. And it has mustered some impressive support, including the Securities and Exchange Commission (which is responsible for enforcing the act), the Department of Energy, and a Reagan administration interagency working group studying the financial health of the electric utility industry. Moreover, while parts of the industry are seeking only to reform the act, the administration is reportedly leaning toward total repeal. Committee hearings on several repeal and reform bills are under way on Capitol Hill.

Utility holding companies date back to the 1890s, but their real heyday was the 1920s, when demand for electrical power was growing rapidly in a largely unregulated environment. By 1932, according to a Federal Trade Commission report, 78 percent of electric power and 80 percent of interstate natural gas were controlled by holding company systems. Most criticism of the holding companies focused on a few big systems — examples of the so-called Power Trust. The system operated by Samuel Insull is the classic example. Insull's empire spread across thirty-two states and included not only electric companies but ice houses, textile mills, a paper mill, and a hotel. Through "pyramiding," the layering of one holding company on top of another, Insull controlled large amounts of capital with a relatively small investment. Before it collapsed in 1929, his system was more than ten layers deep. Pyramiding was alleged to abet various financial abuses, among which were "self-dealing," in which a holding company charged exorbitant management and engineering fees to its operating companies, and "write-ups," in which it misrepresented the value of newly issued securities.

Public discontent with both the size and structure of such operations led to the Public Utility Holding Company Act of 1935. The act required all utility holding companies, defined as companies that control or own at least 10 percent of the voting securities of a gas or electric utility, to register with the SEC, to simplify their corporate structure by removing such complexities as subholding companies, and to divest themselves of all facilities outside a contiguous geographic area or region. The act also empowered the commission to regulate many of the firms' financial practices and placed restrictions on utility diversification (see below).

The more jerry-built of the utility holding companies did not withstand the Depression anyway, since their pyramid structure made even a small loss at the operating level devastat-

Reagan Stalks Public Interest Lawyers' Fees

By STUART TAYLOR Jr.
Special to The New York Times

/ASHINGTON, Feb. 16 — When
s city's mostly liberal "public inter-
" lawyers were riding high a few
rs ago, they asked Congress to put
ttle old-fashioned American finan-
l incentive into their mission of rep-
enting the poor, the downtrodden
l the environment.

Congress responded in the way char-
eristic of it then. It authorized
ges to order the Federal and state
rernments to pay legal fees to pri-
e lawyers who sued them and won
ler almost 100 laws dealing with
il rights, poverty, environmental
tection and consumer rights.

n the process, according to Presi-
nt Reagan's budget cutters, Con-
ss created a $20 million-a-year liti-
us monster at the taxpayers' ex-
nse, a monster the Reagan aides
rpose to tame by striking at its pock-
ook.

'A literal industry has arisen for at-
neys dependent on Federal fee
ards," the Administration's Budget
ssage said, going on to propose
arp cutbacks on the authority of the
rts to award fees to lawyers victori-
over the Federal Government, as
ll as a cap on some of the fees.

Lawyers See Political Diversion

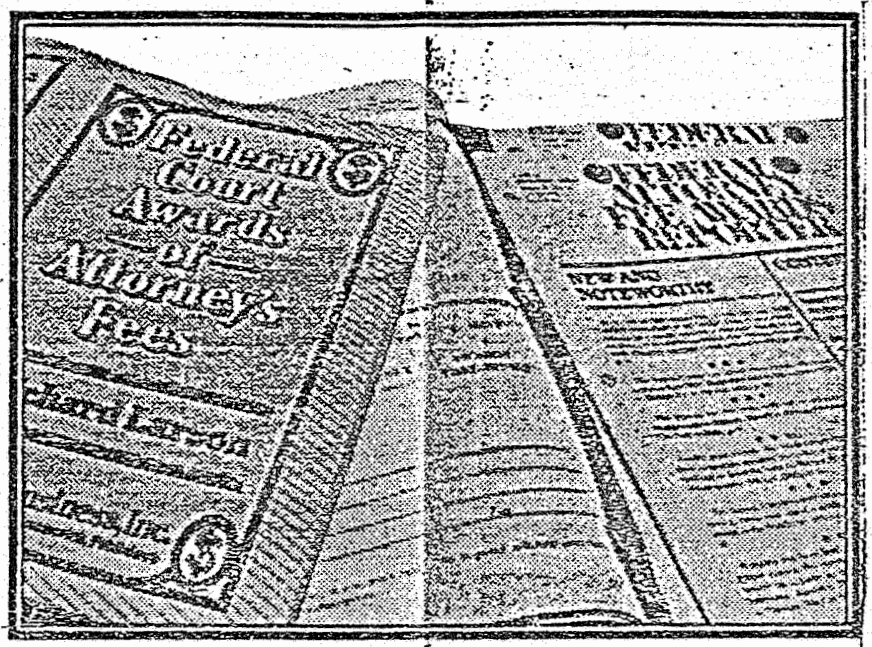
Lawyers who sue the Government
a cause or for profit depict the Ad-
nistration proposal as a political di-
rsion aimed at stripping poor peo-
, minority groups and environmen-
ists of their legal protections and
nying them access to the courts.

The Budget Message said the laws,
ich lawyers refer to as "fee-shift-
;" had resulted in "oversubsidiza-
n" of lawyers with fees often ex-
eding $100 a hour. Budget officials
er reported that there was so much
gation over claims for fees that
ny lawyers paid $20 an issue for a
weekly publication called "Federal
torney Fee Awards Reporter."

As an example of what the Govern-
nt apparently thinks is wrong, a
ree-judge panel of the Federal ap-
als court here recently ordered the
vironmental Protection Agency to
y $99,534.50 in attorneys' fees to the
vironmental Defense Fund, which
d obtained a court order forcing the
ency to go back to the drawing
ard with some new regulations on
e of polychlorinated biphenyls, the
emicals known as PCB's.

The payment was based on hourly
es of $110 for the most experienced
vironmental Defense Fund lawyer
d included $9,534.50 "for time spent
preparing the application for fees,"
dge Harry T. Edwards's opinion
d.

Budget officials say that such deci-
ns encourage lawyers bent on clog-



ging the courts with unnecessary litigation. The lawyers respond that they rarely get fees of this size, even when they win, that they do not always win and that, unlike lawyers who get retainers or clients' fees, they have to make the victories pay for the losses.

Joseph L. Rauh Jr., a prominent Washington civil rights lawyer, said of the Government: "They don't want to enforce the civil rights laws, they don't want anybody else enforcing them, and they try to get the courts not to enforce them."

Peter Coppelman, a lawyer with the Wilderness Society here, said, "This clearly is an effort to choke off people's redress through the courts, consistent with the attempt to destroy the Legal Services Corporation." He was referring to the Reagan proposal to abolish, as of March 31, the $241 million Federal program that underwrites legal aid for the poor.

A Budget Office spokesman, who requested anonymity, countered, "These guys equate the national commitment to justice with the extent to which the taxpayers subsidize them personally. When we look at the kinds of budget problems we're having, the notion of subsidizing a bunch of free-standing ideologues of the right and of the left is just outrageous."

The Reagan proposal to modify fee-shifting laws would have Congress establish a cap based on "the mean hourly rate paid to Government attorneys, plus a constant factor to pay for overhead costs." That would apparently come to $25 an hour or so, about one-third the amount that the Government now pays in settlement of fee award claims here, and less than one-fifth what experienced lawyers in big Washington firms charge corporate clients.

Client's Ability a Factor

The Reagan proposal would also keep courts from awarding fees to lawyers whose clients cannot certify that they will pay the fees "to the extent not covered by the fee award." This would apparently prevent fee awards to lawyers who win suits against the Government on behalf of poor clients who do not expect to win large monetary damages, such as those seeking court orders to stop pollution or to obtain documents under the Freedom of Information Act.

If the proposal was broadened to apply to lawsuits not only against the Federal Government but also against state and local governments, which the budget official said might be considered, it would apparently prevent civil rights lawyers from winning fee awards in school desegregation lawsuits.

The budget proposal would exempt most claims for legal fees under the Equal Access to Justice Act of 1980, which was enacted with conservative support primarily for the purpose of allowing small businesses that are subjected to unjustfied Federal regulatory actions to recover up to $75 an hour for legal fees in contesting them.

The budget message estimated the total cost to the Federal Government of court-awarded legal fees at $20 million in 1981. But a budget official acknowledged that this was based on guesswork, and Alan B. Morrison, director of the Ralph Nader-affiliated Public Citizen Litigation Group here, said it sounded much too high.

"If it's $20 million, I don't know who's getting it," he said.

Wall Street Journal

February 26, 1981

Ambulance Chasers?

"Public interest" groups and "consumer advocates" are finding themselves in tough financial straits. Foundation grants—which provided seed money for many of these groups, are in short supply, and the Reagan administration is unlikely to provide the kind of "public interest" largess which became commonplace under President Carter. Since small private donations are incapable of taking up the slack, these advocacy groups are turning to new potential sources of funding.

Their answer is called the Alliance for Justice. It will be a coalition of public interest and civil rights groups, of which 17 have already joined, including N.O.W. Legal Defense Fund, Native American Rights Fund, Natural Resources Defense Council, Consumers Union and Center for Law in the Public Interest. The new alliance will replace the existing Council for Public Interest Law.

A recent council letter to its members says that the decision to establish the alliance is based "on the ever growing need to pool our ideas and resources to develop some common strategies around issues essential to our survival." Executive Director Nan Aron explains that these groups are in financial trouble and fear that their major issues "may go down the drain" as a result of November's elections. Therefore, she says, public interest groups hope to supplement their revenues from legal fees *paid by the government.*

Although non-profit "public interest" law firms are barred by the tax code from accepting fees from "clients," these firms can accept payment of legal fees from the federal government. The Equal Access to Justice Act, ostensibly passed by Congress last year to assist small businessmen defending themselves against the likes of OSHA inspectors, allows parties who prevail in lawsuits or in adversary hearings generally to recover attorney fees against the government. The Carter Justice Department enacted a ceiling on settlement fees to public interest lawyers of $60 per hour. In addition, the Equal Employment Opportunity Commission proposes federal payment of attorneys fees in complaints about federal hiring discrimination.

Federal programs to pay attorneys fees for public interest groups—along with the established practice of "intervener funding" for participation in federal hearings — could make the American taxpayer the largest single contributor to the "public interest" movement. The vision of some advocacy lawyers chasing after suits, not just on principle but to earn a living, creeps into our minds.

Consumer advocates, OMB director David Stockman said this week, have "created this whole facade of consumer protection in order to seize power in our society. I think part of the mission of this administration is to unmask and discredit that false ideology."

Maybe a good place to start would be in having a look at this novel approach to funding, forcing this group to return to more traditional means of financing a political movement, by finding people who believe enough in what it espouses to contribute voluntarily.

LOUIS RUKEYSER

A government of the lawyers, by the lawyers and for lawyers?

NEW YORK — Have we become a government of the lawyers, by the lawyers and for the lawyers?

You might think so if you look at the results of a number of recent, protracted cases in which the real big winner appears to have been not the "public" interest or not the "corporate" interest — but the "legal" interest.

—It is not clear what we taxpayers gained from the Justice Department's 13-year harassment of IBM, one of the most successful and productive companies in U.S. history, but it is manifestly clear what the lawyers gained.

Before the government finally admitted its case was groundless and bowed out, the Justice Department's legal costs reached an estimated $13.4 million — and IBM's are believed to have run into hundreds of millions. Thomas Barr, a senior partner of the New York law firm of Cravath, Swaine & Moore, who managed IBM's defense (and trained a whole generation of young antitrust lawyers in the process) acknowledges: "We made a lot of money on this case."

Lawyers Plainly Victorious

— Perhaps even more of a bonanza for the attorneys was the 7½-year tussle with AT&T, whose crimes include giving Americans the best telephone service in the world. Precisely who came out ahead in every aspect of this settlement is still being argued, with one exception: the lawyers were plainly victorious.

As the case meandered through the courts, the communications giant's costs mounted to an estimated $360 million, and the government's to $15 million. No wonder AT&T President William Ellinghaus thought it was worthwhile to settle with the government and eliminate the uncertainty that had been "hanging over our heads and those of our stockholders." Only the lawyers had reason to be sad — over what was getting to be quite a comfortable annuity.

— Though no official figures are available, industry observers estimate that contested rulings of such federal regulatory bodies as the Securities and Exchange Commission, Federal Communications Commission, Federal Trade Commission, Food and Drug Administration and Environmental Protection Agency have provided fees to corporate law firms over the past decade totaling hundreds of millions of dollars — all paid for by stockholders, of course, and representing one more disincentive to the ownership of corporate shares.

Still continuing, for example, is what may well be the longest-running litigation suit in history: the FCC determination to deny renewal of RKO General licenses to operate television stations in New York, Boston and Los Angeles and 12 other broadcasting stations. A recent court decision narrowed the 13 year battle to the question of whether RKO should be permitted to retain its Boston Station, WNAC-TV.

Alleged Past Misdeeds

The case against RKO now appears to center on the lawyer's-delight question of whether the company lacked candor in failing to report to the FCC some alleged past misdeeds by its corporate parent, the General Tire & Rubber Company. Such a standard, it is held, would represent a radical change from any past rulings concerning corporate parents and broadcast children — and could open up opportunities for a whole generation of new lawsuits.

A visitor from another planet might find it ironic — or at least suspicious — that a U.S. Congress itself dominated by lawyers seems incapable of writing legislation that does not lead to endless, costly litigation.

Yet the long drawn-out lawsuits that have become characteristic of our excessively litigious society have not left everybody unhappy. Stockholders (and, ultimately, consumers) may be penalized, but top lawyers now charge their corporate clients as much as $400 an hour — and beginning attorneys in prestigious Manhattan law firms can pull down $43,000 a year.

Even the government has grown uneasy. President Reagan's budget message this year complained about "oversubsidization" of lawyers who make a living from suing the federal government. When the Reagan administration's proposals for cutbacks in what it said had become a $20 million-a-year bill for taxpayers produced predictable cries of outrage from "public interest" lawyers, a Budget Office official commented wryly: "These guys equate the national committment to justice with the extent to which the taxpayers subsidize them personally."

Couldn't we settle this out of court?