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THE MISGUIDED APPLICATION OF TRADITIONAL FEE DOCTRINE TO THE EQUAL ACCESS TO JUSTICE ACT†

JUNE CARBONE*

INTRODUCTION

Step by step, Congress and the courts have been moving away from the "American rule" that each party in litigation must bear its own fees. Once the Supreme Court called a halt to the expansion of common law fee awards in *Alyeska Pipeline Service Co. v. Wilderness Society*,¹ Congress increased the tempo of statutory authorizations, selectively extending fee availability to encourage litigation in areas deemed to be of special importance, such as civil rights and environmental suits.² The Equal Access to Justice Act (EAJA or Act), which permits litigants prevailing against the United States to recover fees where the government position is not substantially justified, is the most recent and far reaching extension of fee liability.³

In interpreting this myriad of fee shifting laws, the courts have devoted considerable attention to delineating fee eligibility, closely reviewing the legislative history to construe the particular provisions of each statute.⁴ Yet, under these same statutes, the courts have

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*Assistant Professor, George Mason University; A.B., Princeton University, 1975; J.D., Yale Law School, 1978. As a Department of Justice attorney, the author represented the Department of Housing and Urban Development in *Underwood v. Pierce*, No. 79-1318 (C.D. Cal. 1983) and *Dubose v. Pierce*, 579 F. Supp. 937 (D. Conn. 1983). The views expressed in this article are those of the author and do not necessarily reflect the positions of the Departments of Justice or Housing and Urban Development.

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¹ 421 U.S. 240 (1975).

² See *infra* note 147.

³ Pub. L. No. 96-481, tit. II, 94 Stat. 2329 (1980) (codified as amended at 28 U.S.C. § 2412 (1982)).

⁴ See, e.g., *Christianburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978); *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974); *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

set fees under a "common law"⁵ formula more dependent on the ways fees were determined in the last type of award than on the dictates of the present one.⁶ The Supreme Court is only now beginning to reconcile fee calculation with the statutory authorization on which the awards must be based.⁷

The EAJA, even more than its fee shifting predecessors, requires that fee calculation be treated as a matter of statutory construction. While other fee statutes have sought to vindicate narrowly defined rights of special significance, the EAJA seeks to alter the economic calculus underlying decisions to litigate. In order to enhance access to the courts and to deter government misconduct, Congress enacted a wholesale waiver of sovereign immunity to permit the award of fees to any party prevailing against the United States in a suit where the government position is not "substantially justified" and where special circumstances do not make an award unjust.⁸ At the same time, Congress sought to limit the potential cost and chilling effect of such fees by imposing restraints on the amount of fees and the manner in which they are to be calculated.⁹ While most fee shifting statutes provide for the award of "reasonable fees," the EAJA specifies that fees are to be limited to "fees . . . incurred by that party in any civil action,"¹⁰ that they be calculated in accordance with "prevailing market rates for the kind and quality of the services furnished,"¹¹ and that "fees shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."¹² Thus, under the EAJA, fee calculation as well as fee availability is central to accomplishment of the Act's objectives.

Despite the EAJA's distinctive provisions governing fee calculation, the courts have more often looked to non-EAJA precedents to set fees than to the statutory guidelines.¹³ Under most other fee shifting statutes, the courts multiply time spent by prevailing hourly rates and then adjust the result, by a factor as high as four, to compensate for factors such as risk or quality.¹⁴ The EAJA, however, insists on the award of prevailing market rates not to exceed \$75 per hour.¹⁵ Even under the statutory exception which allows courts to award higher hourly rates in certain instances, no recognition of non-market factors such as quality is permitted. Moreover, awards enhanced to reward risk conflict with congressional intent to accord the highest priority to the most egregious

⁵ The formula originates with common law cases, but it is also a "common law" formula in the sense that it is a judicially created doctrine which has evolved on a case by case basis.

⁶ In true common law cases, the courts shifted fees among the beneficiaries of a common fund in accordance with the guidelines for private attorney-client disputes. See *infra* notes 42-47 and accompanying text. In later cases, the appellate courts expanded the common fund awards to parallel contingent fee arrangements, then curtailed them as class action recoveries multiplied the fees out of proportion to the legal effort. See *infra* notes 46-73 and accompanying text. Statutory cases used the formula intended to restrain common fund fees to expand civil rights and environmental awards. See *infra* note 79.

⁷ See *infra* notes 122-45 and accompanying text.

⁸ 28 U.S.C. § 2412(d)(1)(A) (1982).

⁹ See *infra* notes 157-58 and accompanying text. See also Section II *passim*.

¹⁰ 28 U.S.C. § 2412(d)(1)(A) (1982).

¹¹ 28 U.S.C. § 2412(d)(2)(A) (1982).

¹² 28 U.S.C. § 2412(d)(2)(A)(ii) (1982).

¹³ See *infra* text accompanying notes 179-97.

¹⁴ See *infra* notes 63-67, 70-73, 91 and accompanying text.

¹⁵ See *supra* notes 11 and 12.

government action.¹⁶ The wholesale incorporation of traditional fee standards into the EAJA thus violates express statutory provisions, threatening the EAJA's balance between fee incentives and fee restraint and diluting the statutory priorities established by Congress.

This article examines EAJA fee calculation against the background of the evolving "common law" formula for fees. The first section of the article traces the origins of existing doctrine and documents the course of judicial expansion and restraint as the courts have adapted traditional methods of fee calculation to serve new types of awards. The article then reviews the legislative history of the EAJA, setting forth the statute's provisions and purposes and evaluating their implications for fee calculation. To demonstrate the conflicting statutory constructions which traditional doctrine dictates, the third section of the article compares two recent EAJA cases which run the gamut of fee calculation issues. Finally, the article argues that the courts should carefully limit application of section 2412(b) of the Act, a relatively narrow section stating only that the "United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award."¹⁷ The article concludes that the calculation of EAJA fees — like that of all statutory awards — is a matter of statutory construction. Congress has found reason to depart from the American rule that each party must bear its own fees in an increasing number of areas, but the reasons are not identical. The size of fee awards as well as their availability should be tailored to advance the particular purposes they were intended to serve. There is no place for a common law of fee calculation obliterating statutory distinctions.

I. THE EVOLVING "COMMON LAW" OF FEE CALCULATION

The rational study of attorneys' fee calculation, like the rational study of the rest of the common law, is the study of history.¹⁸ To understand the fees now being awarded under the Equal Access to Justice Act, one must look to statutory civil rights determinations. To explain the civil rights awards, one must examine common fund fees in complex class actions. To justify the common fund awards, one must evaluate contingent fee recoveries. To understand these awards, one must begin with judicial resolution of private attorney-client disputes.

In examining the judicial resolution of private fee disputes, the remarkable thing is that the actual cost to the client — the starting point for determining court costs, medical

¹⁶ 28 U.S.C. § 2412(d)(1)(A) (1982). See also *infra* note 187 and accompanying text.

¹⁷ 28 U.S.C. § 2412(b) (1982).

¹⁸ In the words of Justice Holmes:

The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, towards a deliberate reconsideration of the worth of those rules . . . It is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it is laid down have vanished long since, and the rule simply persists from blind imitation of the past.

O.W. Holmes, Jr., *The Path of the Law*, in *THE GREAT LEGAL PHILOSOPHERS* 421, 428 (Morris ed. 1959).

fees, and most other compensable expenses¹⁹ — has never been the primary focus of judicial calculation of attorneys' fees. Historical accident supplies at least part of the reason:²⁰ the first occasions for judicial fee calculation were to supply terms missing from the attorney-client agreement,²¹ cases in which the clients, by definition, had incurred no fixed expenses before the court award.²² Judging from the reported opinions, legal representation could be secured with agreement only that such representation would be provided. The fee — indeed, the method by which the fee was to be calculated — could be left for later resolution, if not by the parties, then by the courts.²³ The judicial determination of quantum meruit, in principle no different from the determination of the compensation due any other employee, established guidelines for "reasonable fees" in the profession generally.²⁴ The courts in these cases typically listed the considerations deemed appropriate, and then struggled to balance the result of the attorney's endeavors against the services rendered and the lawyer's professional standing.²⁵ The New York Court of Appeals in *Randall v. Packard* explained:

¹⁹ Cf., e.g., *Winkleman v. General Motors Corp.*, 48 F. Supp. 504, 511-14 (S.D.N.Y. 1942) (the assessment of accountants' fees on a time spent basis), *aff'd per curiam sub nom. Singer v. General Motors Corp.*, 136 F.2d 905 (2d Cir. 1943). See also Breger, *The English System of Reimbursing Costs*, 47 L. & CONTEMP. PROBS. 249, 250 n.12 (1984).

²⁰ See Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597, 1607-08 (1974) [hereinafter cited as Dawson, *Lawyers and Involuntary Clients I*]; Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 862 (1975) [hereinafter cited as Dawson, *Lawyers and Involuntary Clients II*]. Professor Dawson also suggests that judicial sympathy for the income of the bar may be part of the explanation. But see Dawson, *Lawyers and Involuntary Clients I*, *supra*, at 1600, noting that the articulated purpose of most fee shifting legislation is to hold the client harmless, not benefit the lawyer.

²¹ See *infra* note 23.

²² Indeed, in many attorney-client disputes, the only issue for resolution was the amount of the fee. See, e.g., *Randall v. Packard*, 142 N.Y. 47, 36 N.E. 823 (1894). Further, in common fund cases, the benefiting nonclient necessarily had no contractual relationship with the attorney. See generally Dawson, *Lawyers and Involuntary Clients I & II*, *supra* note 20.

²³ See, e.g., *Stanton v. Embrey*, 93 U.S. 548 (1876) (amount of compensation not fixed); *Taylor v. Scarborough*, 66 F.2d 589 (2d Cir. 1933) (defendant retained plaintiffs as counsel without discussion of fees); *Woodbury v. Andrew Jergens Co.*, 37 F.2d 749 (S.D.N.Y. 1930) (attorneys discharged during case, amount of compensation not fixed); *In re Rude*, 101 F. 805, 807 (D. Ky. 1900) (where there was no express contract between attorney and client, attorney was only entitled to a reasonable compensation under an implied contract); *Leitensdorfer v. King*, 7 Colo. 436, 4 P. 37 (1884) (agreement that compensation should be for the reasonable value of services rendered); *Robbins v. Harvey*, 5 Conn. 335 (1824) (plaintiff attorney represented destitute defendant without prior fee arrangement); *Smith v. Couch*, 117 Mo. App. 267, 92 S.W. 1143 (1906) (attorney retained at such compensation as his services should be reasonably worth); *Randall v. Packard*, 142 N.Y. 47, 36 N.E. 823 (1894) (dispute as to agreement for compensation).

²⁴ See, e.g., *Robbins v. Harvey*, 5 Conn. 335 (1824), brought as an action in *indebitatus assumpsit* for quantum meruit. See also Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 L. & CONTEMP. PROBS. 9, 15-16 n.45 (1984) (cases cited therein) [hereinafter cited as Leubsdorf, *American Rule*]. Cf. *Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907) (doctors); *Vickery v. Ritchie*, 202 Mass. 247, 88 N.E. 835 (1909) (construction contractor). Professor Leubsdorf also documents the practice during the colonial period and the early years after independence, when legislatures regulated the amount of fees lawyers could collect both from their clients and from a defeated adversary. Leubsdorf, *American Rule*, *supra*, at 10-17.

²⁵ See *Leitensdorfer v. King*, 7 Colo. 436, 442, 4 P. 37, 40-41 (1884). The court stated: In estimating the value of an attorney's services where no special contract exists fixing the same, they are to consider a variety of facts and circumstances, such as the character of the litigation in which the services were rendered; the novelty, difficulty and im-

The general rule is that an attorney, in the absence of an agreement, deserves compensation according to the reasonable worth of his services. Of that the jury are the sole judges and, to arrive at their value, they may consider the nature of the services rendered, the standing of the attorney in his profession for learning, skill and proficiency, the amount involved and the importance to his client of the result. The reason why the result is one of the important factors in the consideration must be obvious. It not only is some evidence of the usefulness of the services; but, for its effects upon the situation of the client, relative to what it had been, it must be conceded a degree of influence, in fixing the amount of the attorney's compensation proportioned to the nature and incidents of the result, in connection with the other considerations adverted to.²⁶

While later courts warned against undue reliance on the result,²⁷ most courts continued to insist that reasonable fees could not be based solely on time spent.²⁸ The majority

portance of the questions involved; the value of the rights or property in controversy; the attorney's position in the case, as leading or assistant counsel, and the degree of responsibility resting upon him; the length of time necessarily consumed by the trial and other court proceedings; the fact, if it be a fact, that compensation is wholly contingent upon success; the manner in which his duties are performed, etc.

Id. See also *Taylor v. Scarborough*, 66 F.2d 589, 591 (2d Cir. 1933) ("No doubt the value of the result attained is one of the elements to be considered. Other elements are the complexity of the problems and the amount of time devoted to them."); *Campbell v. Goddard*, 17 Ill. App. 385, 385 (1885) ("In determining the reasonableness of an attorney's fee, regard must be had to the amount involved as well as to the labor and skill required to perform the services charged for . . ."); *Holly Springs v. Manning & Watson*, 55 Miss. 380, 388 (1877) ("What sum that should be is determinable by the importance of the contest, the labor and responsibility of counsel, and every circumstance attending the cause which, according to established usage, serves to guide to a conclusion as to what is a proper professional charge in such a state of circumstances."); *O'Neill v. Crane*, 65 A.D. 358, 360, 72 N.Y.S. 812, 813 (1901) (nature and importance of litigation, the standing of the attorney in his profession for "learning, skill and proficiency," and the importance to the client of the result).

²⁶ 142 N.Y. 47, 56, 36 N.E. 823, 824 (1894). The court further counseled that although the result is:

unquestionably . . . very important, . . . [t]here are several other elements, which must be equally considered in determining the amount of an attorney's compensation, and unless the jury were instructed as to the importance of their consideration; or if they were so instructed, concerning the importance of the result attained for the client, as to mislead them into the belief that they were at liberty to base their estimate entirely, or principally, upon that result, there would have been distinct error."

Id. The other factors the court mentioned included "the nature of the services rendered, the standing of the attorney in his profession for learning, skill and proficiency [and] the amount involved . . ." *Id.*

²⁷ See *Taylor v. Scarborough*, 66 F.2d 589, 591 (2d Cir. 1933) (court of appeals reversed lower court decision, finding that the fee awarded below was excessive because it equalled one third of total award, emphasizing that result alone should not determine amount of fees); *In re Rude*, 101 F. 805, 807 (D. Ky. 1900); *Robbins v. Harvey*, 5 Conn. 335, 342 (1824) ("The enquiry under a *quantum meruit* is not, what benefits, immediate and remote, have been derived from the services . . . But the question is what is the general worth of certain services rendered or goods sold."). See also *Leubsdorf, American Rule*, *supra* note 24, at 23 n.98 (practice of jury determinations of lawyers' suits against their clients).

²⁸ See *Woodbury v. Andrew Jergens Co.*, 37 F.2d 749 (S.D.N.Y. 1930). The court stated: The value of a lawyer's services is not measured by time or labor merely. The practice of law is an art in which success depends as much as in any other art on the application of imagination — and sometimes inspiration — to the subject matter . . . In order,

agreed that the result provided a primary measure of the value of the attorneys' service to the client reasoning that a reasonable person would not incur fees exceeding a reasonable proportion of the amount in controversy.²⁹

The increasing use of contingent fees in private fee arrangements formalized reliance in the legal profession generally on the result as an appropriate measure of legal fees.³⁰ Barred in the early days of the republic as champertous,³¹ contingent fees became increasingly popular by the turn of the century as a way of securing representation for those whose greatest asset might be their legal claim.³² In some areas of practice, percentage of recovery awards became the standard fee measure, although the courts remained wary of imposing contingent fees involuntarily.³³ Nonetheless, the widespread

therefore, accurately to chancer the value of the lawyer's services, one must almost always examine them in light of the event.

Id. at 750. In *Smith v. C. & N.W. Ry. Co.*, 60 Iowa 515, 522-23 (1883), the court stated:

While the labor of an attorney in conducting a case wherein great values are involved may be no greater than would be required in a case of trifling importance, yet the responsibility would be greater In cases of great magnitude, not only is the responsibility greater, but the resistance is always more formidable We are authorized to say that under the general custom of the profession, values in controversy always control charges for professional services.

Id. at 522-23. See *Harland v. Lilienthal*, 53 N.Y. 438, 441 (1873) ("It surely was material, to show the nature and importance of the controversy, and what results hung upon it in other matters, and how other matters affected it and increased its gravity."). See also *Lombard v. Bayard*, 15 F. Cas. 791, 796 (E.D. Pa. 1848) (No. 8,469), *aff'd*, *Bayard v. Lombard*, 50 U.S. (9 How.) 530 (1850); *Adair Lumber Co. v. Atchison, T. & S.F. Ry. Co.*, 19 F. Supp. 415 (W.D. Mo. 1937); *Succession of Roth*, 33 La. Ann. 540, 542 (1881); *Babbitt v. Bumpus*, 73 Mich. 331, 337 (1889).

²⁹ Even in those cases where the courts admonished against undue reliance on the result, they limited their approvals to fees that did not constitute an undue percentage of the clients' recovery. See *Taylor v. Scarborough*, 66 F.2d at 591 (approving one-third award); *Randall v. Packard*, 142 N.Y. at 57, 36 N.E. at 824 (the trial court instructed the jury that "[u]ndoubtedly a lawyer — and every lawyer is governed by that consideration — will not charge a client as much if the client be unsuccessful"). See also *City of New Orleans v. Malone*, 12 F.2d 17 (5th Cir. 1926); *Straus v. Victor Talking Machine Co.*, 297 F. 791 (2d Cir. 1924); *Campbell v. Goddard*, 17 Ill. App. 385 (1885); *Standard Cotton Seed Oil Co. v. Excelsior Refining Co.*, 108 La. 74, 32 So. 221 (1902); *Rutland v. Cobb*, 32 La. Ann. 857, 859 (1880) (considering "the amount involved and ultimately realized by the plaintiffs, and to some extent appreciating the fee proportionally to the amount recovered or received by plaintiffs").

³⁰ Contingent fees classically involve a lawyer-client agreement that the attorney will receive a fee only if successful, and that the legal fee will consist of a fixed percentage of the client's recovery. A fee can be "contingent," however, in the sense that the lawyer will receive no compensation if unsuccessful, or even in the sense that the lawyer undertook a case without assurance of payment, without necessarily implying that payment must be a percentage of the recovery. E. WEEKS, A TREATISE OF ATTORNEYS AND COUNSELLOR AT LAW 721 (2d ed. 1892). In this article, references to "contingent fees" will refer to classical percentage contingent arrangements unless noted otherwise.

³¹ See *Robbins v. Harvey*, 5 Conn. 335 (1824); *Walbridge v. Barrett*, 118 Mich. 433, 76 N.W. 973 (1898); *O'Neill v. Crane*, 65 A.D. 358, 72 N.Y.S. 812 (1901); Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 475 (1981) [hereinafter cited as Leubsdorf, *The Contingency Factor*]; E. WEEKS, *supra* note 30, at 716-20.

³² See Leubsdorf, *The Contingency Factor*, *supra* note 31, at 476; Leubsdorf, *American Rule*, *supra* note 24, at 16 & nn.46-48; E. WEEKS, *supra* note 30, at 716-18, 720.

³³ In *Stanton v. Embrey*, 93 U.S. 548 (1876), the parties had agreed that the attorney would not be paid unless successful, but were silent on the amount. The Court, noting that "the amount of compensation to be paid was not fixed," ruled that the plaintiff was entitled to introduce testimony from other attorneys in order to prove "what is ordinarily charged in such cases . . ." *Id.* at 557.

use of contingent fee agreements increased the profession's use of percentage of recovery calculations even in noncontingent cases and introduced a new concept to private fee agreements — premium for risk.³⁴

This contingent fee model found fertile ground with the expanded availability of common fund fee awards.³⁵ The seminal common fund fee award case, *Trustees v. Greenough*,³⁶ involved a straightforward claim by the client for reimbursement from the fund for the legal fees he incurred in eleven years of litigation involving misuse of over ten million acres of land and resulting in substantial payments to his fellow bondholders. The Supreme Court ruled for the client, noting that if the trustees themselves had incurred the expenses in retrieving the assets for the trust, the expenses would have been recoverable. To deny the client reimbursement, the Court explained:

would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; . . . they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.³⁷

- The Court's ruling in *Greenough* thus introduced a new type of fee award, one that shifted fee liability to nonclient beneficiaries by deducting a portion of their benefits.

Three years later, in *Central Railroad & Banking Co. v. Pettus*, the Supreme Court expanded *Greenough* to permit attorneys who had already been fully paid by their clients to recover additional fees from the benefits flowing to nonclient class members.³⁸ The *Pettus* attorneys claimed that they had always intended to charge fees to all parties who took advantage of the decree; otherwise they would have charged their own clients

Testimony established that the usual fee was 20–25% of the award and the Court upheld a jury verdict of \$9,185.18 on a recovery of \$45,925.01. *Id.* at 553. *But see* E. WEEKS, *supra* note 30, which states:

But the law never implies, from the rendition of services by an attorney, a promise to pay what is known as a "contingent fee," — and such a promise, if it exist at all, is the creation of an express contract. And in an action upon a quantum meruit, to recover for services rendered by an attorney, evidence of other attorneys as to what would be reasonable contingent fee is inadmissible. (*Ellis v. Woodburn*, 89 Col. 129 [sic]).

See also Merchants' Fire Ins. Co. v. McAdams, 88 Ark. 550, 115 S.W. 175 (1908) (declining to include contingent award in assessing fees against insurance company); Southland Life Ins. Co. v. Norton, 5 S.W.2d 767 (Tx. 1928).

³⁴ *Cf. infra* notes 51, 52 and accompanying text (concept of premium for risk developed in the common fund context).

³⁵ "Common fund" awards are fee awards assessed against a fund recovered in litigation as a way of redistributing legal fees to nonclients who have benefited from the fund without otherwise incurring the legal expenses necessary to create the fund. Professor Dawson discusses the means of creating such funds, *see* Dawson, *Lawyers and Involuntary Clients I*, *supra* note 20, at 1612–36, and analogous suits, such as stockholders derivative actions, *see generally* Dawson, *Lawyers and Involuntary Clients II*, *supra* note 20. He has also ably documented the legal profession's enthusiastic embrace of an attorney's right — independent from his client's — to recover a share of nonclient beneficiaries' benefits. Dawson, *Lawyers and Involuntary Clients I*, *supra* note 20, at 1607; Dawson, *Lawyers and Involuntary Clients II*, *supra* note 20, at 851.

³⁶ 105 U.S. 527 (1881).

³⁷ *Id.* at 532.

³⁸ *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

more.³⁹ The Supreme Court found that the lack of assent from either the client or nonclients did not bar attorneys' fees, stating that "every ground of justice" required payment for those who "accepted the fruits of the labors of" others.⁴⁰ The *Pettus* decision opened the door to further expansion of common fund awards. Under *Greenough*, the measure of fees was that which the original client had agreed to pay limited by the amount in the fund.⁴¹ After *Pettus*, prevailing attorneys could claim a share of the nonclients' profits with no contractual guidance as to the amount.⁴² The result was to subject common fund fees to the same quantum meruit determinations applicable to other fee awards.

In determining common fund awards, the courts initially followed the standards devised for voluntary clients.⁴³ They listed the applicable factors, balancing the time

³⁹ *Id.* at 125. See also Dawson, *Lawyers and Involuntary Clients I*, *supra* note 20, at 1603.

⁴⁰ 113 U.S. at 127.

⁴¹ Dawson, *Lawyers and Involuntary Clients II*, *supra* note 20, at 851.

⁴² Dawson, *Lawyers and Involuntary Clients I*, *supra* note 20, at 1608.

The widespread use of contingent fees in litigation of [this type] . . . has not only accustomed lawyers to this notion of profit sharing but helps to explain why *Greenough*-type applications by clients for contribution have been so rare. The *Greenough* mechanism cannot operate until the client's liability to his lawyer has been determined. If a claim is made that nonclient beneficiaries of the litigation should contribute to its cost, the amount to be charged to them, through a charge on the fund or otherwise, will clearly have to be determined by the court. The valuation process will then be pushed back one stage, to determine what fee could reasonably be charged by the lawyer for conducting the litigation to its ultimate success. This becomes indistinguishable from the court's decision whether the client can fairly ask the beneficiaries for contribution in that amount. Two mental processes thus coalesce into one . . . [with] the conclusion . . . that when a lawyer has agreed on a gamble with his own client by contracting with his client for a contingent fee, he has thereby bought a share in the winnings of strangers.

Dawson, *Lawyers and Involuntary Clients II*, *supra* note 20, at 852-53. Professor Dawson writes that such a conclusion shows the misdirection of such reasoning since the lawyer's share in the benefits that the litigation has produced for nonclients is "not a cost to be spread, it is irrelevant and should be excluded, whether the lawyer served on a retainer with a fixed fee or a contingent fee agreed to by his client." *Id.* at 852.

⁴³ See, e.g., *Blackhurst v. Johnson*, 72 F.2d 644, 648 (8th Cir. 1934) (trust) (considering "the character, ability and experience of the attorneys, the amount involved, the time necessary to prepare for trial, the difficulties and intricacies of the propositions involved, and the results obtained"); *City of New Orleans v. Malone*, 12 F.2d 17, 19 (5th Cir. 1926) (corporate receivership) (court considered "the amount realized, as well as the labor and skill needed or expended"); *Graham v. Dubuque Specialty Machine Works*, 138 Iowa 456, 463, 114 N.W. 619, 622 (1908) (considering "time necessarily employed in and the success of the litigation; the amount of values involved; and recovered; the ability, learning, and experience of the attorney, and his standing in the profession" (citations omitted)); *Standard Cotton Seed Oil Co. v. Excelsior Refining Co.*, 108 La. 74, 77, 32 So. 221, 222 (1902) (bankruptcy) ("While the evidence shows that valuable services were rendered by eminent counsel, involving much labor and time, there must, in insolvent estates, be taken into consideration, in estimating fees, the practical results achieved in the way of moneys realized for creditors, and care is always to be had not too greatly to deplete by charges the small store of funds constituting the common stock out of which all are to be paid."); *Becht v. Miller*, 279 Mich. 629, 640, 273 N.W. 294, 298 (1937) (considering "time spent, the amount involved, the character of the services rendered, the skill and experience called for in the performance of the work, and the results obtained"); *Forrester & MacGinness v. Boston & Montana Consol. Copper & Silver Mining Co.*, 29 Mont. 397, 409, 74 P. 1088, 1093 (1904) (considering "the amount and character of the services rendered, the labor, time and trouble involved, the character and importance of the

spent against the amount in controversy, with the result, measured by the amount of the fund,⁴⁴ as the ultimate test of the reasonableness of the fee award.⁴⁵ With the growing reliance on contingent fees, however, particularly in the type of actions most likely to result in common fund awards, successful lawyers sought to be awarded a percentage of recovery fees commensurate with the one-quarter to one-third payments they were receiving from their clients.⁴⁶ As Professor Dawson has astutely identified, the "bridge . . . across the wide gulf between contingent fees based on consent, and those imposed without consent by court order" was constructed by the decisions of Judge Woolsey of the United States District Court for the Southern District of New York during the 1930's.⁴⁷

In the seminal case of *In re Osofsky*,⁴⁸ Judge Woolsey considered the compensation due attorneys employed by a bankruptcy trustee with no fixed compensation. The lawyers

litigation in which the services were rendered, the amount of money or the value of the property to be affected, the professional skill and experience called for, the character and standing in their profession of the attorneys. * * * The result secured by the service of the attorneys may be considered as an important element in determining their value." See also *Lombard v. Bayard*, 15 F. Cas. 791 (E.D. Pa. 1848) (No. 8,469), *aff'd*, *Bayard v. Lombard*, 50 U.S. (9 How.) 528 (1850). Cf. similar standards applied to determine statutorily authorized fees, *Universal Film Manufacturing Co. v. Copperman*, 218 F.2d 577, 582 (2d Cir. 1914) (copyright case, inquiring into "not only into the extent of professional labor known to the court, but the importance of the litigation, both as to the principle involved and the pecuniary magnitude of the case"); *Lewys v. O'Neill*, 49 F.2d 603, 618 (S.D.N.Y. 1931) (Copyright Act, 17 U.S.C. § 40) (considering the amount involved, for that measures the attorney's responsibility, "the amount of work necessary, the amount of work done, the skill used, and the result"); *Adair Lumber Co. v. Atchison, T. & S.F. Ry. Co.*, 19 F. Supp. 415, 417 (W.D. Mo. 1937) (fee authorized by 49 U.S.C. § 16; "[t]he compensation of a lawyer cannot be fixed necessarily by the time he was actually engaged." The court also considered "the importance of the case, . . . the results, . . . the skill, experience, and professional standing of the attorney, together with the amount and nature of his professional business," and awarded a fee equal to 25% of the recovery).

⁴⁴ Professor Dawson concluded that there was no "clear evidence that among all the variables to be considered the benefits conferred on nonclient strangers supplied the principal measuring rod." Dawson, *Lawyers and Involuntary Clients* II, *supra* note 20, at 871 & n.79. The result, however, was routinely considered and often determined to be of major importance as the test of value to the client, see *supra* notes 25, 28 and 43. Of course, Dawson is correct that so long as the courts simply listed the relevant factors and then the final amount, it is impossible to determine what weight the courts gave to any single factor. The only evidence is the special emphasis given to the result in a few, not necessarily representative cases. See, e.g., *Marlin v. Marsh & Marsh*, 189 Ark. 1157, 76 S.W.2d 965 (1935); *Standard Cotton Seed Oil Co. v. Excelsior Refining Co.*, 108 La. 74, 32 So. 221 (1902); *Forrester & MacGinness v. Boston & Montana Consol. Copper & Silver Mining Co.*, 29 Mont. 347, 74 P. 1088 (1904).

⁴⁵ The courts in early common fund cases refused, however, to impose a client's contingent fee agreement on benefiting nonclients. See, e.g., *McCartney v. Guardian Trust Co.*, 280 F. 64, 71 (8th Cir. 1922) (stockholders' derivative action) ("the fee allowed claimant should not be estimated upon a contingent basis"); *Graham v. Dubuque Specialty Machine Works*, 138 Iowa 456, 460, 114 N.W. 619, 621 (1908) (stockholders' derivative action) (stockholders had no right to enter into contingent fee contract on behalf of corporation); *Becht v. Miller*, 279 Mich. 629, 634-41, 273 N.W. 294, 296-99 (1937) (common fund, recovery of funds for estate). But see *Trautz v. Lemp*, 334 Mo. 1085, 1098, 72 S.W.2d 104, 110 (1934) (common fund, recovery of funds for trust, considering contingency of recovery).

⁴⁶ See Dawson, *Lawyers and Involuntary Clients* I, *supra* note 20, at 1608; Dawson, *Lawyers and Involuntary Clients* II, *supra* note 20, at 871.

⁴⁷ Dawson, *Lawyers and Involuntary Clients* II, *supra* note 20, at 871.

⁴⁸ 50 F.2d 925 (S.D.N.Y. 1931).

had successfully increased the assets of the estate while lowering the claims against it.⁴⁹ The court began by listing the familiar factors in the attorneys' fee analysis including the time reasonably spent, the skill demanded and employed, the amount in controversy and the result of the case.⁵⁰ Judge Woolsey, however, then went on to explain that in bankruptcy cases such as the one at issue, "the quest for assets may be futile," and that:

[i]t is thus a question, as in salvage at sea, of no cure, no pay. When the efforts of attorneys cause a material increase in the bankruptcy estate, or, as here, created it, they should be well rewarded; otherwise there will not be any incentive to attorneys to put forth their best efforts in cases which may be unpromising.⁵¹

Judge Woolsey thus endorsed the premise underlying contingent recoveries, that lawyers should be rewarded for risk — and extended it to clients who had never agreed to a contingent fee arrangement.

Seven years later in *Murphy v. North American Light & Power Co.*, Judge Woolsey applied the concept developed in *Osofsky* to stockholders' derivative actions, awarding a fee of \$200,000, or 22% of the recovery. Judge Woolsey reasoned that such awards "should not be niggardly for appetite for effort in corporate therapeutics should, as in salvage and bankruptcy cases, be encouraged."⁵² Calculation of attorneys' fees as a percentage of the recovery could hardly be described as novel; the Supreme Court had endorsed such recoveries in common fund cases as early as 1885 in the *Pettus* case.⁵³ Judge Woolsey's analysis in *Osofsky* and *Murphy*, however, completed the transformation of common fund fees to awards mirroring private contingent fee arrangements.⁵⁴

In employing a percentage of recovery calculation,⁵⁵ the courts did not abandon the

⁴⁹ *Id.* at 927.

⁵⁰ *Id.*

⁵¹ *Id.* The court considered: (1) that which was fairly and properly to be used in dealing with the case, because this represents the amount of work necessary; (2) the quality of skill which the situation facing the attorney demanded; (3) the skill employed in meeting that situation; (4) the amount involved, because that determines the risk of the client and the commensurate responsibility of the lawyer; (5) the result of the case, because that determines the real benefit to the client; and (6) the eminence of the lawyer at the bar, or in the specialty in which he may be practicing. *Id.* Professor Dawson emphasizes Judge Woolsey's inclusion of the result, but the formulation is little different from that in the many other cases discussed above. Dawson, *Lawyers and Involuntary Clients II*, *supra* note 20, at 872. See, e.g., *Randall v. Packard*, 142 N.Y. 47, 56, 36 N.E. 823, 824 (1894). See also Dawson, *Lawyers and Involuntary Clients I*, *supra* note 20, at 1608-09.

⁵² *Murphy v. North American Light & Power Co.*, 33 F. Supp. 567, 571 (S.D.N.Y. 1940).

⁵³ See *Pettus*, 113 U.S. at 128. See also cases cited in Dawson, *Lawyers and Involuntary Clients II*, *supra* note 20, at 871 n.79.

⁵⁴ See Cole, *Counsel's Fees in Stockholders' Derivative and Class Actions — Hornstein Revisited*, 6 U. RICH. L. REV. 259 (1972); Dawson, *Lawyers and Involuntary Clients II*, *supra* note 20, at 876-78 (Dawson's critique of Hornstein); Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784, 814 (1939) [hereinafter cited as Hornstein, *The Counsel Fee*]; Hornstein, *Problems of Procedure in Stockholder's Derivative Suits*, 41 COLUM. L. REV. 574 (1942); Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658, 660-61 (1956).

⁵⁵ The same analysis employed in calculating common fund and stockholders' derivative award was transferable to class actions, bankruptcies, trusts, decedents' estates and other cases involving recovery of sizable funds. See, e.g., *Angoff v. Goldfine*, 270 F.2d 185, 191 (1st Cir. 1959); *In re Detroit International Bridge Co.*, 111 F.2d 235, 237 (6th Cir. 1940) (corporate reorganization, considering the extent and nature of the services; the labor, time and trouble involved; the results achieved; the character and importance of the matter in hand; the value of the property or the

lists of factors used as guidance in earlier cases.⁵⁶ Like Judge Woolsey, judges continued to list considerations relevant to a determination of the particular percentage. They simply added the "risk" or "contingent nature" of the recovery to the list.⁵⁷ The result in large class actions, antitrust and securities litigation, and corporate reorganizations was to justify enormous fee awards.⁵⁸ Moreover, the district courts entered these multimillion dollar awards, expressed as percentages which varied from 2½% to 49%,⁵⁹ with little

amount of money involved; the learning, skill and experience exercised; whether the fee is absolute or contingent; and the ability to pay); *Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221, 223 (N.D. Ill. 1972) (emphasizing relation to benefit conferred); *Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 47 F.R.D. 557, 559 (E.D. Pa. 1969) (antitrust class action imposing 25% contingent fee entered into by some members on entire class); *Trautz v. Lemp*, 334 Mo. 1085, 1098 (1934) (calculating fee for attorneys to trustee in accordance with contingency of recovery).

⁵⁶ The courts also began to apply the same method in calculating statutorily authorized fees. Congress had permitted fees in certain antitrust, copyright and insurance actions since the turn of the century. The courts in these cases generally looked toward other fee determinations to determine what was reasonable, with the early cases insisting on a reasonable sum for a competent attorney, "not a speculative or contingent fee based upon the uncertainty of the result of the litigation." *Davilla v. Brunswick-Blake Collender Co. of New York*, 94 F.2d 567, 570 (2d Cir. 1938), *modifying* 19 F. Supp. 819, *cert. denied*, 304 U.S. 572 (1937) (copyright case, considering "the services necessarily rendered and the success obtained" and reducing award from 40% to 20% of the result because few issues were in dispute). *See also* *Straus v. Victor Talking Machine Co.*, 297 F. 791, 806 (2d Cir. 1924) (antitrust, considering "character of the services rendered, the time occupied and the result obtained" and reducing fee on appeal because of reduction in amount of judgment); *Universal Film Mfg. Co. v. Copperman*, 218 F. 577, 581-82 (2d Cir. 1914) (copyright case); *Adair Lumber Co. v. Atchison, T. & S.F. Ry.*, 19 F. Supp. 415, 417 (W.D. Mo. 1937) (fee authorized by 49 U.S.C. § 16); *Merchants' Fire Ins. Co. v. McAdams*, 88 Ark. 550, 557, 115 S.W. 175, 178 (1908); *Southland Life Ins. Co. v. Norton*, 5 S.W.2d 767, 768-69 (Tx. 1928). *Cf.* *Mutual Life Ins. Co. v. Owen*, 111 Ark. 554, 571, 164 S.W. 720, 726 (1914) (considering amount sued for).

With emphasis on percentage recoveries to reward risk in other cases, the courts began to adopt similar methods of calculation in determining statutorily authorized fees — at least in those cases producing sizeable funds. Professor Dawson characterized as "[m]ore strange still," the transfer of these methods of appraisal to antitrust treble damage actions, where fee awards are authorized by the federal statute to be added to the liabilities of defendants. 15 U.S.C. § 815 (1970). Where damage recoveries (*i.e.* defendants' liabilities) are large, percentage formulas are used for the evident purpose of increasing the fees awarded

....
On the other hand, where damage recovery for antitrust violations is low the courts have taken as the base for calculation the reasonable value of time and effort spent with the result that the fee often exceeds by a considerable margin the simple damages recovered.

Dawson, *Lawyers and Involuntary Clients* II, *supra* note 20, at 924 n.311.

⁵⁷ *See, e.g.*, *Angoff v. Goldfine*, 270 F.2d 185, 189 (1st Cir. 1959). The percentages also continued to vary, from 11½% to 45% according to Professor Hornstein in 1939, and from 2½% to 49% in 1972. Cole, *supra* note 54, at 283-85; Hornstein, *The Counsel Fee*, *supra* note 54, at 814.

⁵⁸ *See, e.g.*, *New York v. Darling-Delaware, Inc.*, 440 F. Supp. 1132 (S.D.N.Y. 1977) (\$1,279,027); *Labbee v. Wm. Wrigley Jr., Co.*, 719 ANTITRUST & TRADE REG. REP. (BNA) A-29 (W.D. Wash. 1975) (\$4,348,706); *In re Gypsum Cases*, 386 F. Supp. 956 (N.D. Cal. 1974) (\$8,846,393); *West Virginia v. Chas. Pfizer & Co., Inc.*, 1973-2 Trade Cas. (CCH) ¶ 74,749, ¶ 74,827 (S.D.N.Y.) and *Philadelphia v. Chas. Pfizer & Co., Inc.*, 345 F. Supp. 454 (S.D.N.Y. 1972) (\$10,406,984); *Hartford Hospital v. Chas. Pfizer & Co., Inc.*, 1972 Trade Cas. (CCH) ¶ 74,112 (S.D.N.Y.) (\$2,122,500); *Philadelphia v. International Pipe & Ceramics Corp.*, No. 43,008 (E.D. Pa. June 30, 1971) (unpublished opinion) (\$1,250,000); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 47 F.R.D. 557 (E.D. Pa. 1969) (\$5,443,750); *In re Master Key Antitrust Litigation*, 1978-1 Trade Cas. (CCH) ¶ 61,887 (\$3,963,173).

⁵⁹ Cole, *supra* note 54, at 283-85. *See also* Berger, *Court Awarded Attorneys' Fees: What is "Reason-*

explanation and minimal evidentiary review. Appellate courts reviewed the awards under a deferential "abuse of discretion" standard, rarely overturning the awards and articulating no satisfying criteria for review.⁶⁰

In the mid-seventies, the United States Courts of Appeal for the Second and Third Circuits decided to call a halt to what they termed the "contingent fee syndrome." In *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp.*,⁶¹ the Third Circuit articulated a new fee formula in an action which produced a \$26 million settlement fund.⁶² Under this new formula the court first required a determination of how many hours the lawyers spent "in what manner by which attorneys."⁶³ Next, the court multiplied those hours by a reasonable rate of compensation for the particular attorney and/or activity to form a "lodestar."⁶⁴ As the final step in the calculation, the court examined the contingent nature of success and the quality of representation.⁶⁵ Thus, in determining the amount of an award, the *Lindy I* court required the productive hours spent to be multiplied by the reasonable rate of compensation⁶⁶ and

able?", 126 U. PA. L. REV. 281, 288, & nn.34, 35 (1977) (citing percentages in antitrust cases varying from 5 to 67%); Note, *The Nature of a "Reasonable" Attorneys' Fee Private Antitrust Litigation*, 1966 WASH. U.L.Q. 102, 122 (concluding that "there is no indication that a rational development toward an acceptable percentage has occurred, or that the later awards bear any relation to their predecessors").

⁶⁰ Berger, *supra* note 59, at 284 & n.12, 285 & n.17, 296-97. See *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) ("[M]ore is needed than a mere listing of factors. Such a list standing alone, can never provide meaningful guidance."); *Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166-67 (3d Cir. 1973) ("The mere listing of four factors for consideration by the court makes meaningful review difficult and gives little guidance to attorneys and claimants.").

⁶¹ 487 F.2d 161 (3d Cir. 1973) (*Lindy I*).

⁶² *Id.* at 165 (citing *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); and *Trustees v. Greenough*, 105 U.S. 527 (1881)). The court awarded attorneys' fees under the equitable fund doctrine. *Id.* The lower court had calculated the fee award in accordance with the percentage of claimant's recovery awarded as attorneys' fees in other cases, the amount of the recovery, the amount the attorneys received from their clients and the time spent. *Id.* at 166 (citing 341 F. Supp. 1077, 1089-90 (E.D. Pa. 1972)). The lower court had indicated that the percentage of a recovery awarded as fees should decline as the amount of the recovery increased, and that time spent was less important in this case than in most cases. *Id.*

⁶³ *Id.* at 167. The court stated that: "without some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e.g., senior partners, junior partners, associates, the court cannot know the nature of the services for which compensation is sought." *Id.* Later courts, however, have permitted lawyers to charge a single rate regardless of activities or staffing patterns, but they often evaluate the reasonableness of the rate charged in light of such considerations. See, e.g., *Dubose v. Pierce*, 761 F.2d 913 (2d Cir. 1985), and *Underwood v. Pierce*, 761 F.2d 1342 (9th Cir. 1985), discussed *infra* notes 198-281 and accompanying text.

⁶⁴ 487 F.2d at 167. The court indicated that:

[t]he value of an attorney's time generally is reflected in his normal billing rate. A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time — taking account of the attorney's legal reputation and status (partner, associate) . . . Similarly, the court may find that the reasonable rate of compensation differs for different activities.

Id.

⁶⁵ *Id.* at 168.

⁶⁶ The court called this figure the "lodestar" and concluded that it "provides the only reasonably objective basis for valuing an attorney's services." *Id.* at 167-68. In a later en banc hearing, the Third Circuit emphasized that any adjustment to the lodestar "reflects exceptional services only; it

the total then adjusted upward or downward to reflect the contingency and quality factors.⁶⁷ The Third Circuit thus rejected a percentage of recovery analysis while still permitting, indeed requiring, a premium to be paid for risk.⁶⁸

Less than six months later, the United States Court of Appeals for the Second Circuit announced a similar ruling in *City of Detroit v. Grinnell Corporation*.⁶⁹ Denouncing undue reliance on the size of the recovery, the court of appeals reversed a \$1.5 million district court attorney fee award.⁷⁰ The court remanded the case, ordering the district court to recalculate the fees to be awarded in accordance with the time spent,⁷¹ appropriate hourly rate⁷² and "risk of litigation."⁷³ The Second Circuit defined the "risk of litigation" as:

may be considered in the nature of a bonus or penalty." *Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 118 (3d Cir. 1976) (en banc) (*Lindy II*).

⁶⁷ The court defined "the contingent nature of success" as a factor of "special significance where, as here, the attorney has no private agreement that guarantees payment even if recovery is obtained." The *Lindy* attorneys had contingent fee agreements. *Lindy I*, 487 F.2d at 168. The court then assessed the amount of the increase in terms of the probability of success in the litigation. *Id.* In *Lindy II*, the court defined "the contingent nature of success" in terms of "the probability or likelihood of success, viewed at the time of filing suit;" and specified three elements of that determination: 1) analysis of the plaintiff's burden in the case; 2) the risks assumed in developing the case, including the number of hours without guarantee of payment; and 3) delay in receipt of payment. 540 F.2d at 117. See Comment, *Adjusting Attorney Fee Awards Through Multipliers in Antitrust Class Actions*, 21 Hous. L. Rev. 801, 839-40 (1984) [hereinafter cited as Comment, *Adjusting Attorney Fee Awards*].

The *Lindy I* court defined the quality of attorney's work in terms of "the complexity and novelty of the issues presented, the quality of the work the judge has been able to observe, and the amount of the recovery obtained." 489 F.2d at 168. In the *Lindy II* proceeding, the court emphasized that the "quality of an attorney's work in general is a component of the reasonable hourly rate." 540 F.2d at 117 (emphasis in original). To avoid double counting, any increase or decrease must reflect "an unusual degree of skill," "exceptional services only." *Id.* at 117-18; *Lindy I*, 487 F.2d at 168. In *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975), the Third Circuit further defined "quality" in terms of "the work observed, the complexity of the issues and the recovery obtained. In settled cases, the . . . [quality] factor is reflected largely in the benefit produced." *Id.* at 168. Accord *Lindy II*, 540 F.2d at 112.

⁶⁸ In permitting consideration of the amount of the recovery in the assessment of quality, however, the court appeared to do so in the older sense that degree of success reflected the efficiency of the legal efforts, not the lawyer's share of the profits. See *supra* note 44. See also *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677-78 (3d Cir. 1983) ("Care must be exercised to assure that the statutory purpose of encouraging access is not achieved at the price of a fee award so out of proportion to the severity of the defendant's violation that it amounts to an excessively punitive sanction.").

⁶⁹ *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468 (2d Cir. 1974) (*Grinnell I*). See generally White, *Attorneys' Fees in Antitrust Actions: Fee Applications in the Second Circuit*, 48 BROOKLYN L. REV. 497 (1982).

⁷⁰ The case involved three consolidated antitrust class actions resulting in a \$10 million settlement. 495 F.2d at 452.

⁷¹ *Id.* at 470.

⁷² *Id.* at 471. The court stated: "Valuation obviously requires some fairly definite information as to the way in which that time was spent (discovery, oral argument, negotiation, etc.) and by whom (senior partners, junior partners or associates)." *Id.*

⁷³ *Id.* As in *Lindy*, the court multiplied "the number of hours that each lawyer worked on the case by the hourly amount to which attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation" to determine the lodestar. *Id.* The court then described the "risk of litigation" as the "foremost" among the "less objective factors" which could be used to adjust the calculation, without identifying any other factors. *Id.* In *City of*

the fact that, despite the most vigorous and competent of efforts, success is never guaranteed. The greater the probability of success, of either ultimate victory on the merits or of settlement, the less the consideration should serve to amplify the basic hourly fee. The tangible factors which comprise the "risk of litigation" might be determined by asking the following questions: has a relevant government action been instituted by others; and, are the issues novel and complex or straightforward and wellworn? Thus determined, the litigation risk factor might well be translated into mathematical terms.⁷⁴

The court adopted the Third Circuit formula of hours spent, while placing an even greater emphasis on the risk of defeat.⁷⁵

The *Lindy* and *Grinnell* cases were designed to rationalize and restrain common fund fees. Billing hours times hourly rates had long been an established practice within the profession.⁷⁶ The multiplier prescribed by the courts offered the possibility of adjustment for contingency and quality without overwhelming the "objective" part of the determination. The courts' insistence on evidentiary support and clearly articulated standards preserved the opportunity for effective review.⁷⁷ Moreover, by eschewing reliance on the

Detroit v. Grinnell Corp., 560 F.2d 1093 (2d Cir. 1977) (*Grinnell II*), the court stated that "[e]ven when making allowance for such subjective factors such as the 'risk of litigation,' the courts must be mindful that an attorney will receive an otherwise reasonable compensation for his time from the lodestar figure alone." *Id.* at 1099.

⁷⁴ 495 F.2d at 471.

⁷⁵ The court in *Grinnell I* emphasized the risk of defeat, not the lawyer's risk of nonrecovery. *Id.*; see *supra* note 69 and accompanying text. See also *Grinnell II*, 560 F.2d at 1100 (rejecting "as having no relevant precedential value cases involving contingent fees arranged by agreements with clients; stockholders' derivative actions; and antitrust cases for which section 4 of the Clayton Act, 15 U.S.C. § 815, expressly provides an award of counsel fees against the losing defendant."). Cf. *Lindy I*, 487 F.2d at 168 (formulation where the court defined the "contingent nature of success" to be "of special significance where, as here, the attorney has no private agreement that guarantees payment even if no recovery is obtained").

⁷⁶ The three major models for attorneys' fees are: (1) fixed fees, e.g., a set fee of \$40 for drafting a simple will; (2) hourly rates for hours worked; and (3) contingent fees determined as a percentage of the recovery. Steele & Rothe, *Pricing Behavior of Attorneys: An Empirical Study*, 14 FORUM 1060, 1066 (1979). Fixed fees are clearly inappropriate for the large, complex, risky and unpredictable litigation most likely to generate common fund awards.

⁷⁷ In *Grinnell I*, the court emphasized that:

[w]hen it sets a monetary value on a lawyer's services, the District Court must be in possession of an enormous amount of information . . . [that] this information is . . . vital . . . [a]nd, since resolution of disputed factual issues necessitates the hearing of testimony . . . , and is particularly facilitated by cross-examination . . . [that] an evidentiary hearing is required.

495 F.2d at 472. Accord *Lindy I*, 487 F.2d at 169-70. Similarly, the Second Circuit carefully reviewed the second district court fee award in *Grinnell II*. In its decision, the court of appeals affirmed the hourly rate awarded, reversed the allowance of any compensation for fee applications, and eliminated the multipliers of 2 and 3 applied. 560 F.2d at 1103. The result was to reduce the fee award from \$870,607.00 to \$333,073.25. *Id.* The court reserved its strongest criticism for calculation of the multiplier, noting that "the court offered only a brief, rather conclusory analysis of the efforts of appellee in this litigation, constituting little more than the type of mere listing of factors which, we pointed out in *Grinnell I*, 'standing alone, can never provide meaningful guidance,'" and concluding that "the district court's opinion entirely fails to justify the vast increase with the express factual findings and firm record support which *Grinnell I* requires." 560 F.2d at 1100. In practice, however, evidentiary hearings remain rare, though the courts continue to insist on other forms of documentation.

result,⁷⁸ the new formula adopted by the Second and Third Circuits tied compensation to attorney time rather than the combination of claims.⁷⁹

For this formula to effectively limit fee awards, however, appellate courts must be unrelenting in their review of lower courts' awards. The Second and Third Circuits have

⁷⁸ The court in *Grinnell II* stated that: "[e]specially in class actions, judges determining fee awards should not be unduly influenced by the monetary size of the class settlement or judgment; a large settlement can as much reflect the number of potential class members or the scope of a defendant's past acts as it can indicate the prestige, skill and vigor of class counsel." 560 F.2d at 1099. See also *Grinnell I*, 495 F.2d at 471. Cf. *supra* note 68.

⁷⁹ The major alternative analysis is the Fifth Circuit's list of unweighted factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), requiring consideration of (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability of the case," (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

The circuits split at first. Initially, the First Circuit mandated application of the *Johnson* factors to civil rights cases, citing the legislative history of the Civil Rights Attorney's Fees Awards Act. See *King v. Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). But in *Furtado v. Bishop*, 635 F.2d 915, 919 (1st Cir. 1980), the court adopted *Lindy I* in a prisoners' rights case as "the most hopeful approach to date." The Eighth Circuit also embraced *Lindy I* in *Grunin v. International House of Pancakes*, 513 F.2d 114, 127 (8th Cir. 1975), but nonetheless continued to apply *Johnson* in other cases. See, e.g., *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); *Doe v. Poelker*, 515 F.2d 541 (8th Cir. 1975), *rev'd on the merits*, 432 U.S. 519 (1977), *reh'g denied*, 434 U.S. 880 (1977) (class action). The D.C. Circuit adopted a lodestar/multiplier analysis without specifically following either *Lindy* or *Grinnell*. See *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982); *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 672 F.2d 42 (D.C. Cir. 1982); *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc). The Fourth, Ninth and Eleventh Circuits followed *Johnson*. See *Johnson v. University of Alabama in Birmingham*, 706 F.2d 1205, 1207 (11th Cir.), *cert. denied*, 464 U.S. 994 (1983); *Anderson v. Morris*, 658 F.2d 246, 249 (4th Cir. 1983); *Wheeler v. Durham City Bd. of Educ.*, 585 F.2d 618, 624 (4th Cir. 1978); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). The Seventh Circuit applied the standards set forth in the ABA Code of Professional Responsibility, Disciplinary Rule 2-106 in *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 502 F.2d 1309, 1322 (7th Cir. 1974), and *Strama v. Peterson*, 689 F.2d 661, 664-65 (7th Cir. 1982). Cf. *Everett Plywood Corp. v. United States*, 3 Ct. Cl. 705, 712 (1983). The Tenth Circuit issued inconsistent opinions sometimes following *Johnson* and sometimes not. Compare *Ramos v. Lamm*, 539 F. Supp. 730 (D. Colo. 1982) (reviewing Tenth Circuit history), with *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) (setting forth current standard).

In 1980, the Sixth Circuit used the lodestar/multiplier analysis to apply the *Johnson* factors to a school desegregation case. *Northcross v. Board of Educ. of the Memphis City Schools*, 615 F.2d 624, 642-43 (6th Cir. 1980). In 1982, the Ninth Circuit adopted what it called a "blended" approach, employing the *Lindy* lodestar analysis as "a procedure for ordering the examination of factors listed in *Johnson* and adopted by the Ninth Circuit in *Kerr v. Screen Extras Guild, Inc.*" *Moore v. Matthews*, 682 F.2d 830, 840 (9th Cir. 1982). The Eighth Circuit also embraced *Johnson* while applying those factors in the lodestar/multiplier context. *Jacquette v. Black Hawk County*, 710 F.2d 455, 457-59 (8th Cir. 1983); *Ladies Center, Nebraska, Inc. v. Thone*, 645 F.2d 645, 647 (8th Cir. 1981).

Since then, even the Fifth Circuit has recognized that the twelve *Johnson* factors may overlap, concluding that the "existence of twelve items, varying in relevance and weight, some at odds with others, imposes on a district judge the burden of clear articulation of the basis for his award of fees." *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 584 (5th Cir. 1980). The result in more recent cases has been greater use of the lodestar analysis to order the *Johnson* factors, with

insisted on separate⁸⁰ — and modest — calculation of the contingency and quality bonuses.⁸¹ The Second Circuit has monitored not only the size of the multipliers, but reliance on reconstructed records,⁸² indiscriminate use of Wall Street rates in determining community rates,⁸³ and application of contingency increases to nonprofit organizations.⁸⁴

the Fifth Circuit now insisting on evidentiary hearings, adequate documentation and the "clear articulation of the basis" for fee awards. *Id.*; *Matter of First Colonial Corp. of America*, 544 F.2d 1291, 1300-01 (5th Cir. 1977). Courts applying the *Johnson* factors continue to differ, however, in defining which of the *Johnson* factors pertain to the multiplier. Compare *Northcross v. Board of Educ. of the Memphis City Schools*, 615 F.2d 624, 643 (6th Cir. 1980) (permitting adjustment for "the contingency of the fee, unusual time limitations, and the 'undesirability' of the case"), with *Moore v. Matthews*, 682 F.2d 830, 841 (9th Cir. 1982) (applying the contingency and quality factors). See generally *Attorney's Fees in Class Actions*, A Report to the Federal Judicial Center, at 74-184 (1980) (Professor Miller's 1980 review of the approaches taken by the different circuits).

⁸⁰ In *Lindy II*, the Third Circuit reversed the district court determination on remand requiring that "once the district court determines the 'lodestar' it should inquire *separately* into the contingency and quality factors, and make specific findings of fact as to each." 540 F.2d at 117 (emphasis added). See also *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1333 (D.C. Cir. 1982); *Cohen v. West Haven Bd. of Police Comm'rs*, 638 F.2d 496, 506 (2d Cir. 1980); *Grinnell II*, 560 F.2d at 1100.

⁸¹ See *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1217 (3d Cir. 1978). In *Baughman*, the district court had awarded a multiplier of 2.0 for contingency and 1.5 for quality. The court of appeals reduced the former, recognizing that the risk of nonpayment and the substantial delay in payment justified some increase, but emphasizing that the case was not legally or factually complex, that damages were relatively easy to prove, and that, where the fees are a substantial percentage of the recovery, increases for contingency should be minimal. *Id.* at 1218. In reducing the multiplier for quality, the court emphasized that quality was a major component in the determination of hourly rates and that increases to the lodestar are for "exceptional services only." *Id.* See *Merola v. Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974) (*Merola I*); *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975) (*Merola II*); see also *Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978); *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

⁸² *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1147-48 (2d Cir. 1983). See also *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983); *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982). In *Hughes v. Repko*, the Third Circuit further indicated that the hours the attorney claimed to work "should not be taken at face value," but rather, that the district court should only consider those hours reasonably supportive of and necessary to the prevailing claim. 578 F.2d 483, 487 (3d Cir. 1978).

⁸³ In *New York Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1150-51 (2d Cir. 1983), the court of appeals held that "this recognition of equivalence between civil rights cases and other complex cases does not necessarily imply equivalent fees for profit-making and nonprofit attorneys." The *Carey* court concluded that the use of hourly Wall Street rates to compensate legal services attorneys constituted "a large windfall that must be considered unreasonable" because legal services organizations' costs and overhead are so much less than those of major corporate firms. To avoid such windfalls, the court required lower courts:

to award fees to nonprofit law offices at billing rates of comparable attorneys in the general run of cases as long as the billing rates are not so high that their use risks significant windfalls, and to permit nonprofit law offices to receive fees calculated at higher hourly rates only when such rates are justified to permit the offices to recover their costs.

Id. Cf. *Blum v. Stenson*, 104 S. Ct. 1541 (1984).

⁸⁴ *Carey*, 711 F.2d at 1154. The court of appeals reduced the quality bonus from 25% to 10%, finding 10% sufficient to recognize the "exemplary nature of the services rendered," and eliminated the contingency bonus altogether, ruling that:

[a]lthough a component of a bonus for risk of failure may be appropriate in some cases to entice private firms to undertake difficult cases in which victory is uncertain,

The courts in both circuits have also continued to insist that the lower courts provide detailed explanations of the bases for the fee awards, ordering further evidentiary hearings where appropriate.⁸⁵ As a result, the appellate courts in these circuits have almost never approved a multiplier above two,⁸⁶ while higher awards are not uncommon in other circuits.⁸⁷

we believe that the promise of such rewards is not needed to induce nonprofit organizations like the Legal Aid Society and the Civil Liberties Union to take on such cases. These organizations exist to represent groups like the Willowbrook class, with constitutional claims at the cutting edge of the law. We join those courts that have found it unreasonable to add contingency bonuses to fee awards for nonprofit law offices. See *McManama v. Lukhard*, 464 F. Supp. 38, 43 (W.D. Va. 1978), *aff'd*, 616 F.2d 727 (4th Cir. 1980); *Cole v. Tuttle*, 462 F. Supp. 1016, 1019 (N.D. Miss. 1978); *McCormick v. Attala County Bd. of Educ.*, 424 F. Supp. 1382, 1388 (N.D. Miss. 1976).

Carey, 711 F.2d at 1154.

⁸⁵ See, e.g., *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983) (vacating district court award of 100% bonus for, *inter alia*, failure to make specific findings); *Cohen v. West Haven Bd. of Police Comm'rs*, 638 F.2d 496, 505 (2d Cir. 1980) (whenever the district court augments or reduces the lodestar figure, it must state its reasons for doing so "as specifically as possible"); *Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978) (rejecting arbitrary percentage reduction and requiring specific findings to support court's conclusion that hours were duplicative) (*Prandini II*); *Hughes v. Repko*, 578 F.2d 483, 486 (3d Cir. 1978). *But see Carey*, 711 F.2d at 1146 (permitting percentage reductions in some cases).

⁸⁶ See *In re Fine Paper Antitrust Litigation*, 751 F.2d 562 (3d Cir. 1984); *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir. 1983) (vacating multiplier of 2); *New York Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983) (discussed *supra* notes 83-84); *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208 (3d Cir. 1978) (contingency multiplier as high as 2 "most unusual"); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978); *Beazer v. New York Transit Auth.*, 558 F.2d 97 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 568 (1979) (eliminating "premium" of approximately 15% because legal issues relatively simple and few, despite complex factual issues, and because benefits not concrete); *Merola II*, 515 F.2d 165 (3d Cir. 1975); *Institutionalized Juveniles v. Secretary of Public Welfare*, 568 F. Supp. 1020 (E.D. Pa. 1983); *WATCH v. Harris*, 535 F. Supp. 9 (D. Conn. 1981); *Marci v. City of New Haven*, 503 F. Supp. 6 (D. Conn. 1980); *Smith v. Fussenich*, 487 F. Supp. 628 (D. Conn. 1980); *Gagne v. Maher*, 455 F. Supp. 1344 (D. Conn. 1978), *aff'd in relevant part*, 594 F.2d 336 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980); *Firebird Soc'y v. Members of the Bd. of Fire Comm'rs*, 433 F. Supp. 752 (D. Conn. 1976), *aff'd*, 556 F.2d 642 (2d Cir. 1977); *Blank v. Talley*, 390 F. Supp. 1 (S.D.N.Y. 1975); *Torres v. Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975); *but see Municipal Auth. of Bloomsburg v. Commonwealth of Pennsylvania*, 527 F. Supp. 982 (M.D. Pa. 1981) (award of multiplier of 4.5); *In re Gas Meters Antitrust Litigations*, C.A. MDL No. 360 (E.D. Pa. January 17, 1980) (award of multiplier of 2.57); *Beecher v. Able*, 435 F. Supp. 397 (S.D.N.Y. 1977); *Fried v. Utilities Leasing Corp.*, [1976-77 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,695 (E.D. Pa. 1976) (award of multiplier of 4). These cases, however, do not appear to have been reviewed by their respective circuits. *Mowrey, Attorneys' Fees in Securities Class Action and Derivative Suits*, 3 J. CORP. L. 267 (1978) (indicating that fees in securities cases declined after *Lindy* and *Grinnell*). See, e.g., *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980) (award of 3.5 multiplier to public interest attorneys challenging freeway project; case filed in February 1972, preliminary injunction issued in July, 1972; contingency defined by absence of fee-paying client, length and complexity of case, probability of success and probability of fee award); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 680 (D. Minn. 1978) (award of multiplier of 3, antitrust class action settlement; multiplier justified principally by risk, and to a lesser degree, by length of litigation, magnitude of recovery, quality of effort); *In re Gypsum Cases*, 386 F. Supp. 959 (N.D. Ga. 1974) (award of multiplier of 3, antitrust class action settlement; list of seven *Johnson, Lindy* and *Grinnell* factors; multiplier justified by need to encourage private antitrust enforcement, complex litigation, contingency fee, magnitude of recovery); *Arenson v. Board of Trade of Chicago*, 372 F. Supp. 1349 (N.D. Ill. 1974) (award of multiplier of 4, antitrust class action settlement; fees

At the same time that *Lindy* and *Grinnell* served to restrain common fund fees, the decisions opened the door to expansion of the growing body of statutory awards.⁸⁸ Civil rights and environmental cases were often brought by altruistic attorneys seeking to vindicate nonmonetary principles. Awards linked to a percentage of the recovery or to the fees actually charged the client would result in nominal awards.⁸⁹ The *Lindy-Grinnell* emphasis on prevailing market rates, enhanced to compensate for the common factors

examined "in light of the outstanding result achieved in this complex, multidistrict litigation which was keenly contested"). *Cf.* *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982) (affirms 10% contingency bonus in complex class action involving seven years of protected litigation without compensation; reverses 40% quality bonus because of overlap with quality factor in high hourly rates awarded); *Brewster v. Dukakis*, 544 F. Supp. 1069 (D. Mass. 1982) (10% lodestar adjustment based on findings that case was highly contingent, quality of work was excellent and significance of results unusually impressive); *Keyes v. School District No. 1, Denver, Colo.*, 439 F. Supp. 393 (D. Colo. 1977) (awarding no multiplier to public interest groups in case involving "complex, novel issues," "extensive factual base," results of major importance, and considerable risk); *Foster v. Boise, Cascade, Inc.*, 420 F. Supp. 674 (S.D. Tx. 1976) (no award of multiplier, Title VII class action).

⁸⁷ Other circuits have been less inclined to police the district court tendency to calculate hours, hourly rates and multipliers through the time honored method of listing the appropriate factors and announcing the result. *See, e.g., Easley v. Anheuser-Busch, Inc.*, 572 F. Supp. 402, 410-17 (E.D. Mo. 1983) (awarding multiplier of 33% based "upon the entire record in this case and in particular the skills of plaintiff attorneys and the acknowledged expertise of counsel required for the successful prosecution of this case, the results obtained on behalf of plaintiffs, the clear vindication of the public interest . . . , the contingent character of the compensation available, and the thorough and diligent efforts made"); *Willie M., By Singer v. Hunt*, 564 F. Supp. 363 (W.D.N.C. 1983) (court reviewed each of the *Johnson* factors, then announced total award without explanation of which factors contributed to the lodestar, which to the multiplier); *Keith v. Volpe*, 501 F. Supp. 403, 414 (C.D. Cal. 1980) (award of multiplier of 3.5 to reflect "the contingent nature of the case," the "quality of counsel's efforts," "the effect of delay" and "inflation" without any indication of what portion of the multiplier was attributable to each factor); *see also supra* note 86 and cases cited therein; *Bertrand v. United States*, 562 F. Supp. 222 (D. Or. 1983). Even where the listing of factors involves detailed analysis, it can be impossible to determine which factors influenced which amounts. Multipliers, inherently subjective under the strictest review, have varied from zero to four, without clear or consistent definition of the bases for such increases.

The result in these circuits is fee awards as unpredictable and as resistant to effective review as the percentage of recovery awards *Lindy* and *Grinnell* attempted to replace. *See Northcross v. Board of Educ. of Memphis*, 611 F.2d 624, 636 (6th Cir. 1979), where the court stated:

This Court has been disturbed by the variations in fee awards that have come before it on review, and by a marked failure on the part of the district courts to explain their reasoning, make necessary findings of fact, or demonstrate the calculations used to arrive at a fee. Such awards may well constitute an abuse of discretion while rendering such awards virtually unreviewable.

Id. *See Comment, Adjusting Attorney Fee Awards, supra* note 67, at 810, 836-37.

⁸⁸ Following the Supreme Court's strict limitations of the courts' equitable power to award fees in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), Congress expanded the statutory basis for fee shifting. With passage of the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), in particular, fees became available in a host of nonmonetary cases. Indeed, civil rights cases now account for more than one-sixth of all federal suits. *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983).

⁸⁹ *See, e.g., Ramsey, Calculation of Attorney's Fee Awards in Title VII Actions Against Private Defendants*, 58 U. DET. J. URB. L. 609 (1981); *Berger, supra* note 59, at 292 & n.56, 310. The Tenth Circuit in *Cooper v. Singer*, 719 F.2d 1496, 1503 (10th Cir. 1982) (rehearing en banc), held that an attorney-client contingent fee arrangement did not limit fees under 42 U.S.C. § 1988. The court concluded, *inter alia*, that a fee limit would overemphasize the importance of damages in civil rights cases. 719 F.2d at 1503; *but see Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir. 1983).

of contingency and quality, offered the opportunity to place all fee awards — common fund and statutory, antitrust and civil rights, private practitioner and legal aid attorney — on the same footing.⁹⁰ The circuits quickly extended the lodestar/multiplier analysis to every type of fee award.⁹¹

Extension of the *Lindy-Grinnell* analysis outside the common fund context, however, created new difficulties and anomalies. In fixing hours and hourly rates, the Supreme Court recently recognized that lawyers, in billing paying clients, exercise "billing judgment," and discount hours worked to produce a reasonable total, proportionate to the amount at issue.⁹² Lawyers whose fees are assessed by the court, on the other hand, have little incentive to discount hours worked.⁹³ In common fund cases, the amount of the fund provided some guidance as to the reasonableness of the requested fees.⁹⁴ In cases where the monetary recovery is small or nonexistent, there is no external check on the reasonableness of fees.⁹⁵ The result is to place the courts between the Charybdis of

⁹⁰ The Senate Report accompanying the Civil Rights Attorneys' Fees Awards Act stated that "[i]t is intended that the amount of fees awarded under [the act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." S. REP. NO. 1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908, 5913. The Report provided that counsel should be paid, "as is traditional with attorneys compensated by a fee-paying client, 'for time reasonable [sic] expended on a matter.'" *Id.* (quoting *Davis v. County of Los Angeles*, 8 EMPL. PRAC. DEC. (CCH) ¶ 9444 (C.D. Cal. 1974)). The Report cited, with approval, three cases awarding "fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Id.* In the first case, *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), the court, citing both *Lindy* and *Johnson*, provided fees for time spent at \$50 per hour, and then enhanced the amount to compensate for "the contingent nature of the representation, the quality of the attorneys' work, and results." In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975), the court awarded a lump sum after considering nine factors which included the result, the time and labor involved and the contingency of the fee. In *Davis v. County of Los Angeles*, 8 Fair Empl. Prac. Cas. (BNA) 224 (D.C. Cal. 1973), the court relied on *Johnson* to award a lump sum reflecting "a balancing of many factors" including the time spent and the results achieved. The contingency of the representation was not mentioned. The Senate Report thus insisted that the fee standards under the Civil Rights Attorneys Fees Awards Act be the same as those applied to "other types of equally complex Federal litigation" without choosing between the different approaches employed in other cases. Indeed, the Report, which itself seems to place the primary weight on hours spent, nonetheless cited three cases which gave significant weight to "the results achieved" and which did not agree among themselves whether and how the contingent nature of the representation was to be recognized.

⁹¹ See *supra* note 79.

⁹² *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (citing *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc)). See also *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983) ("In sum, the district court must carefully scrutinize the total number of hours . . . much as a senior partner in a private firm would review the reports of subordinate attorneys when billing clients whose fee arrangement requires a detailed report of hours expended and work done.").

⁹³ See, e.g., *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136 (2d Cir. 1983); *Merola I*, 493 F.2d 292 (3d Cir. 1974); *Harris v. Chicago Great W. Ry.*, 197 F.2d 829 (7th Cir. 1952). Indeed, the judicial tendency to reduce to some degree whatever hours are claimed tends to encourage inflation simply to ensure full compensation for reasonable hours. *In re Fine Paper Antitrust Litigation*, 98 F.R.D. 48, 77 (E.D. Pa. 1983); Comment, *Adjusting Attorney Fee Awards*, *supra* note 67, at 810.

⁹⁴ See, e.g., *Lindy II*, 540 F.2d at 118 (defining the result obtained as an important factor in assessing the quality of the work performed). See also *Dawson, Lawyers and Involuntary Clients I*, *supra* note 20 (noting that the common fund, in any event, set an absolute limit on recovery).

⁹⁵ *Jacquette v. Black Hawk County, Iowa*, 710 F.2d 455, 460 (8th Cir. 1983) ("The same market-

extensive, time consuming review and the Scylla of inflated, unnecessary claims.⁹⁶ Similar problems arise in the calculation of billing rates. The courts, setting hourly rates for the private attorneys most likely to handle common fund cases, have depended primarily on those attorneys' established billing rates. For the public interest and legal services attorneys often involved in statutory fee cases, however, the courts have had to approximate prevailing market rates. In selecting the most analogous market, the courts have sometimes chosen rates at the highest end of the spectrum, that is, those charged corporate clients by major firms, and sometimes set low rates solely because the claims vindicated involved little monetary value.⁹⁷

The difficulties in determining the inherently discretionary multipliers are more fundamental. The very notion of a contingency bonus assumes that the market compen-

place factors are often absent from civil rights litigation."). See also *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc) (rejecting the argument that the amount of the recovery should limit the available fees in favor of a "market value" approach).

⁹⁶ See *Ursic v. Bethlehem Mines*, 719 F.2d 670, 676 (3d Cir. 1983), where the court held:

In all phases of the fee determination, the district judge must cast a critical eye on the award request.

Calculation of the lodestar provides an excellent example. Speaking through Chief Judge Seitz, we have cautioned that determining the base figure is not a mere mathematical calculation.

The Second Circuit in *Grinnell I* similarly recognized that fee setting requires "an enormous amount of information" and invited discovery, cross examination and evidentiary hearings. 495 F.2d at 472.

At the same time, many courts have decried the amount of judicial time now devoted to resolving attorney fee disputes. For example, see *Blum v. Stenson*, 104 S. Ct. 1541 (1984), where the Court addressed this issue:

As we stated in *Hensley*, a "request for attorney's fees should not result on a second major litigation . . ." Parties to civil rights litigation in particular should make a conscientious effort, where a fee award is to be made, to resolve any differences. A district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness. The court, with its ultimate knowledge of the litigation, has a responsibility to encourage agreement.

Id. at 1550 n.19 (citing *Hensley v. Eckerhart*, 461 U.S. 437 (1983)). Similarly, the court in *Ashton v. Pierce*, 580 F. Supp. 440 (D.D.C. 1984) observed:

The United States District Court for the District of Columbia processes a large number of . . . cases where fees may be awarded under statutes As a result its workload has been significantly increased in recent years by contested applications for attorney's fees. Often these fee requests consume more court time and involve more paperwork than the underlying case. Unable to settle the question of fees outside the court, lawyers make excessive claims and then must defend their work against charges of waste, overstaffing, ineffectiveness and lack of competence. The court is too often called upon to determine such questions as whether taxi or subway was the proper mode of transportation for particular errands, or whether certain research was necessary or a specific office or client conference should have taken place. These squabbles may be as degrading for the lawyers involved as they are distasteful for the courts which may resolve them.

Id. at 444. See also Comment, *Adjusting Attorney Fee Awards*, *supra* note 67, at 811 n.70.

⁹⁷ See *supra* note 88. See also *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 13-15 (D.C. Cir. 1984); *White v. City of Richmond*, 713 F.2d 458, 461 (9th Cir. 1983) (taking judicial notice "of the fact that many civil rights practitioners do not bill their clients at an hourly commercial rate"); *Diamond, The Firestorm Over Attorney Fee Awards*, 69 A.B.A. J. 1420, 1421-22 (1983); Comment, *Adjusting Attorney Fee Awards*, *supra* note 67, at 810 ("some antitrust attorneys handle such a large volume of contingent work that they might not have a fixed hourly rate"); Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Award Act of 1976*, 13 J. MAR. L. REV. 331 (1980).

sates for risk,⁹⁸ and that guaranteed payment can be equated with contingent fees by multiplying standard hourly rates by a factor accounting for risk.⁹⁹ In fact, however, there is no necessary relationship between clients willing to pay fees on an hourly basis and those desiring contingent representation. Different types of legal representation lend themselves to particular types of fee arrangements.

Major law firms, for example, often refuse as a matter of policy to handle any contingent fee cases except occasional pro bono suits.¹⁰⁰ At the same time, segments of the bar specializing in the representation of plaintiffs in cases such as personal injury suits and antitrust actions may handle the major part of their caseload on a contingent fee basis.¹⁰¹ Public interest and legal services organizations and some private practitioners exist primarily, often exclusively, to handle non-fee generating cases concerning specific and often particularly unsettled areas of law.¹⁰² Other lawyers are underemployed and are therefore willing to handle cases where payment will be delayed or where the fees will be less than their "normal" billing rates.¹⁰³ To the extent the market for legal services is in fact so segmented, any equation between contingent recoveries and noncontingent hourly payment will vary for each market segment complicating any precise determination of an appropriate multiplier.¹⁰⁴

⁹⁸ See *Grinnell I*, 495 F.2d at 471; *Lindy I*, 487 F.2d 161, 168-69 (3d Cir. 1973); Leubsdorf, *The Contingency Factor*, *supra* note 31, at 480-81; Berger, *supra* note 59, at 324-25. At the same time, quality bonuses and adjustments tailored to the particular purposes of the statutory authorization may bear no relationship to market incentive. See Leubsdorf, *The Contingency Factor*, *supra* note 31, at 480 n.41.

⁹⁹ Berger has argued that rational, profit-seeking attorneys should be indifferent between certain fees at \$100 per hour and a 50% chance to recover fees of \$200 per hour. Berger, *supra* note 59, at 324-25. See also Leubsdorf, *The Contingency Factor*, *supra* note 31, at 480-81 and authorities cited at 481; Sprinder, *Fee Awards in Antitrust Litigation*, 44 ANTITRUST L.J. 97, 103 (1975). Cf. *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 26-29 (D.C. Cir. 1984).

¹⁰⁰ These pro bono suits are rarely motivated by profit considerations. Therefore, it would require substantially larger fees to persuade a firm able to secure ample noncontingent work to take more of these cases because of enhanced fee prospects. See Leubsdorf, *The Contingency Factor*, *supra* note 31, at 493; see also *infra* note 109.

¹⁰¹ See Leubsdorf, *The Contingency Factor*, *supra* note 31, at 491, and authorities cited therein; Steele & Rothe, *supra* note 76, at 1066.

¹⁰² See *White v. City of Richmond*, 713 F.2d 458, 461 (9th Cir. 1983); Leubsdorf, *The Contingency Factor*, *supra* note 31, at 492-93 nn.91 & 95. Indeed, one of the striking differences between common fund and statutory litigation is that in the former the lodestar/multiplier analysis is replacing a contingent, percentage of recovery fee, while for the latter, this lodestar analysis is replacing noncontingent hourly rates, altruistic representation, or some combination of the two such as a sliding scale of noncontingent hourly rates dependent on the client's ability to pay. *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 14-15 n.69 (D.C. Cir. 1984). See also Breger, *supra* note 19, at 251 n.16.

¹⁰³ See generally Greene, *Lawyers Versus The Marketplace*, FORBES, January 16, 1984, at 72. See also Clermont & Curriuan, *Improving On the Contingent Fee*, 63 CORNELL L. REV. 529, 551-55 (1978).

¹⁰⁴ For example, common fund cases typically involve complex antitrust or stockholders' derivative actions, large funds, plaintiff's counsel relying on percentage awards, and defense lawyers charging rates among the highest in the profession. In civil rights cases, on the other hand, where the monetary stake is more likely to be small, the plaintiffs' bar consists of profit-motivated practitioners relying on a mixture of adjustable hourly rates and statutory awards and more altruistic attorneys supported by grants or separate profit oriented practices, and the defendants' lawyers vary from high priced corporate firms to small practitioners or in-house counsel. For judicial comment on the structure of the civil rights' legal market, see *New York State Ass'n of Retarded Children v. Carey*, 711 F.2d 1136, 1148-53 (2d Cir. 1983); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d

Moreover, the impact of contingency bonuses may vary with particular classes of cases. In common fund cases, the courts were attempting to eliminate the abuses of percentage recoveries while preserving the fee incentives for plaintiffs' lawyers accepting cases on a contingent basis.¹⁰⁵ Under both private fee arrangements and court ordered awards, the benefiting client paid fees in accordance with the risks taken on the client's behalf and the benefit received. In statutory fee cases, however, contingent fee arrangements are far more rare¹⁰⁶ and, in any event, it is the defendant, not the plaintiff, who pays the fees. Multipliers tied to the prevailing plaintiff's risk of defeat therefore penalize most severely those defendants with the relatively strongest cases, the most justifiable conduct, or the most reasonable basis for pursuing the litigation.¹⁰⁷

760, 770 (7th Cir. 1982); *Armstrong v. Reed*, 462 F. Supp. 496, 503 (N.D. Miss. 1978); *Keyes v. School District No. 1, Denver, Colo.*, 439 F. Supp. 393, 405 (D. Colo. 1977). For the structure of the antitrust bar, see Sprinder, *supra* note 99, at 118-19; *Developments*, 7 CLASS ACTION REP. 167 (May-June 1981); *Developments*, 6 CLASS ACTION REP. 82 (March-April 1980); *Developments*, 5 CLASS ACTION REP. 331 (July-August 1978); Comment, *Adjusting Attorney Fees Awards*, *supra* note 67, at 810, 822-23 & nn.133, 137. See also *Blum v. Stenson*, 104 S. Ct. 1541, 1547 n.11 (1984) (the Supreme Court noted that: "[w]e recognize, of course, that determining an appropriate 'market rate' for the services of a lawyer is inherently difficult").

¹⁰⁵ But see Leubsdorf, *The Contingency Factor*, *supra* note 31, at 489 (noting that even in common fund cases, the defendant may effectively bear the cost of the fee award).

¹⁰⁶ Indeed, the Civil Rights Attorneys' Fees Awards Act has been applauded precisely because the low monetary recoveries common in civil rights actions make contingent fee arrangements improbable. Generally, fee arrangements in this area are noncontingent hourly rates, altruistic representation by a firm acting pro bono or a legal services organization, a sliding noncontingent hourly fee tied to ability to pay, or a contingent agreement based on the availability of a statutory fee award. See *supra* notes 90 and 104.

¹⁰⁷ The court in *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977) (*Prandini I*), observed:

We are aware of the differences in rationale underlying the awards of fees from a fund produced for the benefit of a class and those provided by statute. In the former case, the court exercises its equitable jurisdiction over the relationship between an attorney and his amorphous client, and factors which would appropriately have influenced the fee arrangement made between private parties, such as the contingency of the litigation, are relevant. In the latter case, the statutory fee is often part of the defendant's penalty for violating the applicable law. Contingency may be of little significance in that situation if the result is to give a smaller fee to the plaintiff's lawyer who recovers from a defendant in flagrant violation than the attorney who succeeds in establishing liability in a very close case. The contingency factor would be less where the liability is easily proved than where it is questionable. Hence, the penalty fastened on the defendant would vary in inverse proportion to the strength of the case against him.

Id. at 1020. See *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir. 1983), in which the court stated: "Where, as in this case, the award is statutory, the assessment of a counsel fee is to some extent a penalty for violating the law. From the defendant's standpoint, then, it is inconsistent to increase the fee when the defendant's liability was doubtful, but reduce it when the violation was flagrant and easily proved. The contingency factor loses its legitimacy when the penalty imposed on the party at fault is in inverse proportion to its culpability."

Id. at 673. See also *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 27 n.138 (D.C. Cir. 1984) ("Supplying a bonus for accepting marginal or risky cases . . . could attract competent counsel away from prosecuting clear violations of rights in favor of cases with a higher potential award."); *Hughes v. Repko*, 578 F.2d 483, 491 (3d Cir. 1978) (Garth, J., concurring); Herzel & Hagen, *Plaintiff's Attorneys' Fees in Derivative Class Actions*, 7 LITIGATION 25 (1981); Leubsdorf, *The Contingency Factor*,

Determination of the utility and optimal size of multipliers requires the courts to start with the objectives the fee award was intended to serve. With common fund awards, the test is benefit to the client; thus, rewarding risk and quality are appropriate.¹⁰⁸ In determining statutory fees, the courts must balance plaintiff's incentives against the penalty imposed on defendants. Lodestar adjustments to compensate for risk and to reward quality are still facially appealing, but there is an empirical question as to whether such adjustments increase the availability of representation,¹⁰⁹ and a policy question as to whether the least meritorious cases should be encouraged.¹¹⁰

supra note 31, at 488, *et seq.*; Note, *Promoting the Vindication of Civil Rights Through the Attorneys' Fees Awards Act*, 80 COLUM. L. REV. 346 (1980); Comment, *Adjusting Attorney Fee Awards*, *supra* note 67, at 812 (noting distinctions between common fund awards and Clayton Act fees assessed against defendants). *Accord*, *Vecchoine v. Wohlgemuth*, 481 F. Supp. 776, 794 (E.D. Pa. 1979). *But see* Hall v. Borough of Roselle, 747 F.2d 838, 842-43 (3d Cir. 1984); *infra* note 117.

¹⁰⁸ Since the involuntary client benefited directly from the degree of risk and the quality of services, it is appropriate that the fee in such cases be fixed accordingly. As Professor Leubsdorf has pointed out, however, this increases the conflict of interest for the attorney arguing that his fees should be increased at the expense of an unconsenting client with no other representation. Leubsdorf, *The Contingency Factor*, *supra* note 31, at 501-12. Rewarding risk may also encourage attorneys to bring less meritorious cases. *See infra* note 110.

¹⁰⁹ Breger argues that an after-the-fact discretionary bonus is unlikely ever to influence an attorney to take an otherwise undesirable case. He suggests that the availability of such bonuses may only enhance the incentive to work harder on a case once the decision to handle it is made. Breger, *supra* note 19, at 259. Professor Leubsdorf also found that retroactive evaluation of the prospects of success is "burdensome, complicated and often of doubtful propriety," while unpredictable or inaccurate bonuses may fail to act as an incentive at all. Leubsdorf, *The Contingency Factor*, *supra* note 31, at 485-88, 493-97. At the same time, some recognition of risk and delay in payment may be necessary to ensure the availability of competent representation. *See id.* at 493; Berger, *supra* note 59, at 324-25. The conclusion again depends on an analysis of the particular market. Professor Leubsdorf points out that the prospect of an accurate contingency bonus may be insufficient to persuade a lawyer who must forego a percentage of recovery arrangement to take the case. Leubsdorf, *The Contingency Factor*, *supra* note 31, at 493. At the same time, such a bonus may be more than sufficient to persuade an altruistic or underemployed attorney to handle the case. *See, e.g.,* New York Ass'n of Retarded Children v. Carey, 711 F.2d 1136, 1154 (2d Cir. 1983) (contingency bonuses are a "windfall" for institutions whose *raison d'être* is to represent the indigent in cases on the cutting edge of the law).

¹¹⁰ *See supra* note 103. To resolve these difficulties, Professor Leubsdorf recommends a standard contingency multiplier, set by the courts or the legislature for particular classes of cases, or simply set at two for all cases. Leubsdorf, *The Contingency Factor*, *supra* note 31, at 501-12. His proposal has considerable merit in the common fund context where contingency awards have traditionally been high, *see supra* notes 86 and 87, and the conflict of interest between attorneys and their beneficiaries is at its height. Indeed, such a standardized multiplier would have effects similar to the contingent fee agreements the *Lindy-Grinnell* analysis was intended to replace. Like contingent fees, the multiplier would be the same regardless of the degree of risk in a particular case. Such a standardized multiplier would encourage attorneys to evaluate cases more carefully before agreeing to take them, discouraging weaker suits. In statutory cases, contingency multipliers do not ordinarily serve as a substitute for a contingent fee award, *see supra* note 103, and multipliers as high as two are far more rare, *see supra* notes 86 and 87. The Leubsdorf proposal would institutionalize a doubling of the normal billing rates on which the courts are placing their primary emphasis. Blum v. Stenson, 104 S. Ct. 1541 (1984); *Grinnell II*, 560 F.2d at 1099; *Lindy II*, 540 F.2d at 118. Moreover, even if the standard rate for statutory cases were set at a lower figure, it would preclude a case-by-case balancing of the competing interests in those cases. To evaluate the utility of a standard multiplier for statutory cases — indeed, to determine whether there should ever be a contingency bonus in those cases — there must first be a determination of the purpose such a bonus would serve. Is it to ensure the availability of representation in every case, to give the greatest priority to

Concerned with the growth in both the number and size of statutory awards, the appellate courts have recently begun to deal with these difficulties.¹¹¹ The courts have paid surprising attention to the calculation of hours and hourly rates, determinations that in other contexts might be treated as findings of fact.¹¹² In these decisions, the courts have insisted on the detailed articulation of the basis for fee awards¹¹³ and they have imposed a measure of moderation in lodestar enhancements.¹¹⁴ Moreover, they have demonstrated greater, though not always consistent, sensitivity to the differences between statutory and common law awards.¹¹⁵

elimination of the most flagrant abuses, to encourage novel and risky cases at the cutting edge of the law, to penalize defendants, to reimburse plaintiffs, or to provide a bounty for fortune seeking attorneys? I believe that contingency bonuses, if they are allowed in statutory cases, should remain circumspect (below 1.5) and should be tied primarily to delay in payment or a finding that the noncontingent compensation provided would otherwise be so far below contingent market rates as to preclude nonaltruistic representation.

¹¹¹ See, e.g., *Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983) (court of appeals agreed with district court that "more specific guidelines [for district courts to apply in setting fee awards] are necessary, and we proceed to set forth standards for district court to follow"). See also *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982); *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 672 F.2d 42 (D.C. Cir. 1982); *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980); *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc); *Northcross v. Board of Educ. of the Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

¹¹² See, e.g., *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 215, 217-18 (3d Cir. 1983); *Johnson v. University of Alabama in Birmingham*, 706 F.2d 1205, 1207-08 (11th Cir. 1983); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768-69 (7th Cir. 1982). But see *Ursic v. Bethlehem Mines*, 719 F.2d 670, 674-75 (3d Cir. 1983) (insistence that district court, not appellate court, "possesses the authority to exercise fee setting discretion").

¹¹³ See, e.g., *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983); *Donnell v. United States*, 682 F.2d 240, 250 (D.C. Cir. 1982) (where the opponent of a fee application raises specific and substantial questions about the number of hours worked, the court must state specifically why the claims lack merit), *cert. denied*, 459 U.S. 1204 (1983); *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 584 (5th Cir. 1980); *Northcross v. Board of Educ. of the Memphis City Schools*, 611 F.2d 624, 636 (6th Cir. 1979) (requiring that "the district court make clear and adequate findings of fact on the record"); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (vacating fee award because of district court failure to make "detailed findings of fact with regard to the factors considered"), *cert. denied*, 439 U.S. 934 (1978); *Matter of First Colonial Corp. of America*, 544 F.2d 1291, 1300 (5th Cir. 1977). At the district court level, the courts have in turn insisted on thoroughly documented hours, with close judicial review. See, e.g., *Institutionalized Juveniles v. Secretary of Public Welfare*, 568 F. Supp. 1020, 1032 (E.D. Pa. 1983); *Hall v. City of Auburn*, 567 F. Supp. 1222, 1227-29 (D. Me. 1983).

¹¹⁴ See e.g., *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 28-29 (D.C. Cir. 1984) (contingency bonus in exceptional case only; not "exceptional" where chance of prevailing is 50%); *Murray v. Weinberger*, 741 F.2d 1423, 1428 (D.C. Cir. 1984); *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983); *New York Ass'n for Retarded Children v. Carey*, 711 F.2d 1136 (2d Cir. 1983); *In re Illinois Congressional Districts Reapportionment Cases*, 704 F.2d 380, 384 (7th Cir. 1983) (reducing multiplier of 3 to 20% bonus); *Strama v. Peterson*, 689 F.2d 661, 665 (7th Cir. 1982) (the contingent nature of the fee "alone does not justify the use of the multiplier"); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 777 (7th Cir. 1982) (instruction to district court to consider possibility of double counting in high hourly rates and quality increase); *Kamberos v. GTE Automatic Electric, Inc.*, 603 F.2d 598, 604 (7th Cir. 1979) ("Although the district court found that counsels' representation was commendable and the fee contingent in nature, these two factors alone do not warrant an award fifty percent in excess of normal hourly rates."); *Hall v. City of Auburn*, 567 F. Supp. 1222, 1230 (D. Me. 1983).

¹¹⁵ See, e.g., *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 14-15 n.69 (D.C. Cir. 1984); *Johnson*

The greatest continuing difficulty¹¹⁶ in setting attorneys' fees is the lack of agreement among the circuits on the appropriate bases for lodestar adjustments. The circuits have split on the question of whether contingency bonuses are ever appropriate in statutory fee cases.¹¹⁷ While the appellate courts which allow for such increases agree that contingency is to be defined in terms of risk,¹¹⁸ some describe the risk as that of defeat while other courts are more concerned with the risk of nonpayment.¹¹⁹ Later cases have added

v. University of Alabama in Birmingham, 706 F.2d 1205, 1211-12 (11th Cir. 1983) ("In the last analysis, however, the fulfillment of the congressional purpose depends upon the ultimate judgment of the district court, not just the mechanical application of established principles The fees awarded . . . should reflect the congressional purpose in enacting the Fees Act and Title VII."); *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911, 917 (11th Cir. 1982) (adjustment of *Johnson* guidelines to take into consideration financial ability of losing plaintiff to pay attorneys' fees in Title VII cases); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 766-67 (7th Cir. 1982) ("[T]he statute [Title VII] should be liberally rather than restrictively interpreted with respect to fees for services not performed, in the ordinary sense, in proceedings before the Title VII court. The Supreme Court expressly recognized that a liberal view toward fees would further Congress' goal of '[making] it easier for a plaintiff of limited means to bring a meritorious suit.'" (citations omitted)); *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 583, n.19 (3d Cir. 1984) ("With little or no analysis of the substantial differences between the two situations, this court transferred to litigated disputes over liability for statutory fees many of the standards for judicial scrutiny of the fee awards first developed in the fund in court cases The public policy considerations in the two situations are obviously not identical."). See also *supra* note 107; *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42, 59 (D.C. Cir. 1982) (adding "benefits to the public" as an additional factor to consider based on the legislative history of the statute).

In restraining the size of contingency bonuses, some courts have emphasized the anomalous role of such bonuses in statutory fee cases while still permitting relatively large upward adjustments in common fund awards. Compare *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir. 1983), with *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 680 (D. Minn. 1978); *In re Gypsum Cases*, 386 F. Supp. 959 (N.D. Ga. 1974); *Arenson v. Board of Trade of City of Chicago*, 372 F. Supp. 1349 (N.D. Ill. 1974).

¹¹⁶ That is, the greatest difficulty aside from the inevitable one of the increasing judicial resources necessary to provide the close scrutiny, and detailed findings mandated by these cases. See *supra* notes 77 and 96.

¹¹⁷ The early cases following *Lindy* and *Johnson* awarded contingency bonuses in statutory cases with little analysis. See, e.g., *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 770 (7th Cir. 1982); *Northcross v. Board of Educ. of the Memphis City Schools*, 611 F.2d 624, 643 (6th Cir. 1979). Later, the Third Circuit criticized such bonuses, emphasizing the anomalies arising from the imposition of such bonuses at the defendants' expense. See *supra* note 107 and Third Circuit cases cited therein. Since *Blum v. Stenson*, 104 S. Ct. 1541 (1984) (discussed *infra* notes 129-31 and accompanying text), however, the appellate courts have had to face directly the issue of whether contingency increases are ever permitted in statutory cases, and the Third Circuit has upheld, at least in principle, the availability of such increases under 42 U.S.C. § 1988. *Hall v. Borough of Roselle*, 747 F.2d 838, 842-43 (3d Cir. 1984). The Seventh and District of Columbia Circuits, on the other hand, have questioned the appropriateness of contingency bonuses in § 1988 cases. See *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984) ("The fundamental problem of a risk bonus is that it compensates attorneys, indirectly but effectively, for bringing unsuccessful civil rights suits, even though the attorney's fee statute is expressly limited to cases where the party seeking the fee prevails. See 42 U.S.C. Section 1988."); *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 26-28 (D.C. Cir. 1984); *Murray v. Weinberger*, 741 F.2d 1423, 1431 (D.C. Cir. 1984).

¹¹⁸ *Lindy I*, 487 F.2d at 168; *Cohen v. West Haven Bd. of Police Comm'rs*, 638 F.2d 496, 505 (2d Cir. 1980). See also *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1319 (D.C. Cir. 1982); *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc).

¹¹⁹ The greatest variation on this issue has involved treatment of legal services' fee prospects. As noted above, the court in *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980), found that case

inflation and delay in payment to the contingency factor, sometimes as a single item and other times calculated separately.¹²⁰ While the Second and Third Circuits have kept quality increases distinct from and more moderate than contingency increases, few other circuits have defined the relationship and many have included additional considerations.¹²¹ Yet, effective appellate review is illusory without limiting lodestar increases to a few clearly articulated factors.

The Supreme Court, a newcomer to fee calculation, has compounded this confusion in the recent decisions which it has handed down in this area. In the 1983 case of *Hensley v. Eckerhart*,¹²² a case brought under 42 U.S.C. § 1988, the Supreme Court ruled on the availability of fees for time spent on issues on which the plaintiff did not prevail. Addressing the manner of fee calculation for the first time, the Court embraced the *Lindy-Grinnell* emphasis on hours worked, explaining that:

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services.¹²³

After the Court noted its approval of the guidance provided by hours worked, it nonetheless cautioned that:

"extraordinarily contingent" in large part because of legal service's limited fee prospects. In contrast, the Second Circuit has barred contingency bonuses for legal services entirely because such firms "exist to represent groups like the *Willowbrook* class, with constitutional claims at the cutting edge of the law"; i.e. indigent clients with uncertain likelihood of success. *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1154 (2d Cir. 1983). *See Keyes v. School Dist. No. 1, Denver, Colo.*, 439 F. Supp. 393, 405 (D. Colo. 1977), finding for public interest groups involved that:

the concept of "risks involved" and inherent preclusion of other employment, as used in the usual sense, have no real significance. [These groups] exist for the express purpose of participating in school desegregation litigation and are funded for that purpose through private sources. The risks in this particular case were similar to the risks in other cases accepted by the two legal units.

See also Vecchoine v. Wohlgemuth, 481 F. Supp. 776, 794-95 (E.D. Pa. 1979); *Barrett v. Kalinowski*, 458 F. Supp. 689, 707 (M.D. Pa. 1978) ("The legal services organization [and, thus,] its resources including lawyers' time were not so risked."); *Lund v. Affleck*, 442 F. Supp. 1109, 1116-17 (D.R.I. 1977) (finding that all legal aid cases were "completely contingent on success," but declining to award multiplier). *Cf. Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir. 1983) (commenting that "[s]ome courts appear to give a multiplier or bonus simply because the lawyers would have received nothing had they not won and some chance of losing always exists").

¹²⁰ *Johnson v. University of Alabama in Birmingham*, 706 F.2d 1205, 1210-11 (11th Cir. 1983) (reversing district court opinion for failure to consider delay in payment); *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1328 (D.C. Cir. 1982); *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42, 59 (D.C. Cir. 1982); *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc); *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Ca. 1980); *see supra* note 87.

¹²¹ Nor do the courts always agree on the definitions of these terms. *Compare Lindy I*, 487 F.2d at 168 (complexity and novelty are treated as part of the definition of quality), *with Cohen v. West Haven Bd. of Police Comm'rs*, 638 F.2d 496, 505 (2d Cir. 1980) (the "risk and complexity of the litigation" as one factor and the "quality of representation" as a second factor). Novelty and complexity have also been treated as separate factors. *See Strama v. Peterson*, 689 F.2d 661, 665 (7th Cir. 1982); *Bonner v. Coughlin*, 657 F.2d 931, 936 (7th Cir. 1981); *Blum v. Stenson*, 512 F. Supp. 680 (S.D.N.Y.), *vacated*, 104 S. Ct. 1541 (1984).

¹²² 461 U.S. 424 (1983).

¹²³ *Id.* at 433.

The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained."¹²⁴

In dicta, the Court thus suggested that enhancements to the lodestar were appropriate, but it identified only one factor — results obtained — which could be used by the courts to adjust fees.¹²⁵

As the Supreme Court's then sole pronouncement on the subject of lodestar adjustments, the statement proved to be a misleading guide for the lower courts. By citing the *Johnson* factors rather than *Lindy* or *Grinnell*,¹²⁶ the *Hensley* decision triggered renewed emphasis on the size of the recovery, the very factor *Lindy* and *Grinnell* attempted to deemphasize.¹²⁷ Moreover, the emphasis on the "results obtained" without reference to the contingency or quality factors suggested that the results should be treated as an independent factor rather than as a single element within the larger context supplied by *Lindy*, *Grinnell* and their progeny.¹²⁸ The Supreme Court decision thus lent support to larger awards by the lower courts.

In *Blum v. Stenson*,¹²⁹ decided a year after *Hensley*, the Supreme Court joined in the call for fee restraint, without completing the framework for setting fees. Like *Hensley*, *Blum* involved a section 1988 fee award. Relying on this statute's legislative history, the Court ruled that fee awards under the statute could be calculated in accordance with prevailing market rates and that lodestar adjustments could be included as part of a

¹²⁴ *Id.* at 434.

¹²⁵ In *Blum v. Stenson*, 104 S. Ct. 1541 (1984), the Court observed that:

[r]esults obtained is one of the twelve factors identified in *Johnson v. Georgia Highway Express*, 488 F.2d at 718, as relevant to the calculation of a reasonable attorney's fee. It is "particularly crucial where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief." *Hensley*, 461 U.S. 424 (Fee award must be reduced by the number of hours spent on unsuccessful claims). Because acknowledgment of the "results obtained" generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award.

Blum, 104 S. Ct. at 1549–50. The *Hensley* reference to results obtained may reflect the Court's preoccupation with the question of fees assessed for time spent on losing issues more than it does the Court's assessment of the appropriate bases for lodestar adjustments.

¹²⁶ *Hensley*, 461 U.S. at 429–30.

¹²⁷ See *Grinnell II*, 560 F.2d at 1099; *Grinnell I*, 495 F.2d at 471. In *Attorneys' Fees in Class Actions*, A Report to the Federal Judicial Center (1980), Professor Miller conducted a study which indicated that the result continued to be important in the Second and Third Circuits.

¹²⁸ Cf. *Blum v. Stenson*, 104 S. Ct. 1541 (1984), see *supra* note 125. See, e.g., *Action on Smoking and Health v. Civil Aeronautics Bd.*, 724 F.2d 211, 219 (D.C. Cir. 1984) ("The Supreme Court has placed even greater emphasis on the outcome, stating that 'the most critical factor is the degree of success obtained,' and '[t]he result is what matters.'"); *Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983) (citing *Hensley* and treating "exceptional success" as an independent factor); *White v. City of Richmond*, 713 F.2d 458, 461 (9th Cir. 1983) (citing *Hensley* and stating that "the 'degree of success' or 'results' obtained is the most critical" factor in adjusting the fee upward or downward); *Institutionalized Juveniles v. Secretary of Public Welfare*, 568 F. Supp. 1020, 1030 (E.D. Pa. 1983) ("*Hensley* affects the *Lindy* analysis . . . [by emphasizing] an additional factor justifying adjustment of the lodestar, i.e., the relationship between the extent of success and the amount of the fee award.").

¹²⁹ 104 S. Ct. 1541, 1549–50 (1984).

"reasonable fee."¹³⁰ The Court reversed, however, the 50% lodestar increase awarded below, ruling that the district court, which referred to the complexity of the litigation, the novelty of the issues, the high quality of the representation, the "great benefit to the class," and the "riskiness" of the law suit, had failed to justify the increase.¹³¹

In reviewing the multiplier, the Court held, first, that "[n]either complexity nor novelty of the issues . . . is an appropriate factor in determining whether to increase the basic fee award" since these factors "presumably were fully reflected in the number of billable hours."¹³² The Court reasoned further that "the 'quality of representation' . . . generally is reflected in the reasonable hourly rate" and that it "may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'"¹³³ Accordingly, the Court concluded that the lodestar increase awarded by the district court in *Blum* justified by the same factors — the quality of representation and the complexity of the litigation — used to justify high hourly rates "is a clear example of double counting."¹³⁴ The Court also rejected any increase based on the "great benefit" to the class, explaining that "[b]ecause acknowledgement of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it should normally not provide an independent basis for increasing the fee award."¹³⁵

Finally, the Supreme Court found unsubstantiated the district court's conclusion that the "issues presented were novel and the undertaking therefore risky."¹³⁶ In reaching this decision, the Court declined "to consider whether the risk of not being the prevailing party in a section 1983 case, and therefore not being entitled to an award of attorney's fees from one's adversary, may ever justify an upward fee adjustment."¹³⁷

The *Blum* decision thus affirmed the availability of lodestar adjustments without finalizing the acceptable basis for such increases. The Court has not yet ruled on the propriety of the contingency factor in statutory cases while limiting quality increases to "the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one should reasonably expect in light of the hourly rates charged and that the success was exceptional."¹³⁸ Correcting the misimpression *Hensley* cre-

¹³⁰ *Id.* at 1546. The Court did not clearly indicate, however, whether multipliers were to be considered part of the determination of prevailing rates or adjustments to such rates undertaken for noneconomic reasons.

¹³¹ *Id.* at 1547-48.

¹³² *Id.* at 1548. The Court added that:

[t]here may be cases, of course, where the experience and special skill of the attorney will require the expenditure of fewer hours than counsel normally would be expected to spend on a particularly novel or complex issue. In those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates.

Id. Cf. *Lindy II*, 540 F.2d at 117 (definition of "quality" in terms of "the complexity and novelty of the issues presented, the quality of the work the judge has been able to observe, and the amount of the recovery obtained").

¹³³ *Blum*, 104 S. Ct. at 1549.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1550.

¹³⁷ *Id.* at 1550 n.17. Cf. *id.* at 1550 (Brennan, J., concurring) (concluding that "the risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee").

¹³⁸ *Id.* at 1549 (emphasis added).

ated, the Court rejected consideration of the "results obtained" except as part of the determination of extraordinary quality and rejected altogether consideration of "complexity" or "novelty."¹³⁹ The Court also gave renewed weight to the burden on the prevailing party to justify any lodestar increase, necessarily increasing the duty of the lower court to articulate the basis for such an increase.¹⁴⁰ Following *Blum*, the lower courts have a mandate to restrain quality increases. Yet the decision leaves the applicability of contingency bonuses to statutory fees unsettled.¹⁴¹

To determine whether contingency bonuses are ever appropriate in statutory cases, the courts will finally have to separate statutory awards from common fund fees. In determining common fund awards, contingency bonuses are firmly established as a substitute for the percentage of recovery fees charged paying clients.¹⁴² In civil rights and environmental litigation, Congress provided for fee awards precisely because contingent representation was unlikely to be sufficient to vindicate the nonmonetary principles involved. The "prevailing market rates" for most civil rights and other statutory cases is an hourly fee.¹⁴³ Thus, the availability of contingency bonuses in those cases is a question of statutory construction dependent on the statute's legislative history — did Congress intend "market rates" to include bonuses for contingent representation?¹⁴⁴ — and congressional policy — are hourly rates alone sufficient to secure competent counsel in civil rights and environmental cases?¹⁴⁵

Recognition of differences in fee calculation dictated by statutory differences would do much to slow, though probably not halt, the "common law" development of fee setting rules. Fee calculation, after all, should never have been a common law matter at all. The resolution of attorney-client disputes is a contract question dependent on the intent of the parties. The calculation of the fees which benefiting nonclients owe the creators of a common fund bear no necessary relationship to the fees a defendant owes a prevailing plaintiff. Civil rights and environmental fees should be determined in accordance with the provisions and purposes of the statute which authorized the award. Yet, deference to the nearest colorable precedent has been too deeply ingrained for the courts to ignore when confronted with a new type of fee award. With each successive provision authorizing attorneys' fees, the courts have applied — too often mechanically — the fee doctrine developed for the last award. In the meantime, the solutions to the problems posed by the last set of awards create the anomalies perpetuated in the calculation of the new

¹³⁹ *Id.*

¹⁴⁰ Throughout the *Blum* decision, the Court asserted that the "burden of proving that such an adjustment is necessary to the determination of a reasonable fee is on the fee applicant," *id.* at 1548, that the fee applicant must offer "specific evidence" to meet that burden, *id.* at 1549, that the district court must do more than conclusorily state its reasons to justify such an increase, *id.* at 1548–50, and that the cases "in which an upward adjustment to the presumptively reasonable fee of rate times hours" will be "appropriate" are "rare," *id.* at 1550 n.18.

¹⁴¹ Indeed, the Supreme Court has yet to address the propriety of contingency bonuses, much less their determinants or the scope of their applicability. See *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 26–29 (D.C. Cir. 1984). Following *Blum*, the circuits have split on the question. See *supra* note 117. See *supra* note 110 for a discussion of the merits of contingency bonuses.

¹⁴² After all, common fund awards are most likely to occur in antitrust, shareholder's derivative or other actions, where the "market rate" for plaintiffs' counsel's services is a contingent rate. See *supra* note 104.

¹⁴³ See *supra* notes 102–06 and accompanying text.

¹⁴⁴ See *supra* notes 90, 130, 137 and accompanying text.

¹⁴⁵ See *supra* note 110 and accompanying text.

awards. Only by treating statutory fee calculation as a matter of statutory construction and by honoring the distinctions between different types of awards can the courts hope to reconcile fee calculation with the purposes the awards were intended to service.

II. THE EXPANDED AVAILABILITY OF ATTORNEYS' FEES AGAINST THE UNITED STATES: THE EQUAL ACCESS TO JUSTICE ACT

The Equal Access to Justice Act, passed by Congress in 1979, was enacted within the changing landscape established by common fund and civil rights fee awards. Nonetheless, the Act was intended to serve different purposes through methods different from its fee shifting predecessors, common law and statutory.¹⁴⁶ The breadth of the statute itself is unprecedented. The EAJA enacts a wholesale waiver of sovereign immunity and of the American rule requiring each party to bear its own fees.¹⁴⁷ The Act permits any individual whose net worth does not exceed \$2 million or any corporation worth less than \$7 million to recover attorneys' fees from the United States for prevailing in a suit in which the court finds that the government's position is not "substantially

¹⁴⁶ The original act contained a sunset provision repealing the EAJA effective October 1, 1984. Act of Oct. 21, 1980, Pub. L. No. 96-481, 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 2329 (to be codified at 28 U.S.C. § 2412). On October 11, 1984, Congress unanimously passed H.R. 5479, which would have made the experimental legislation permanent. The President vetoed the bill on November 9, 1984, objecting to the new definition of "position of the United States," as the government's administrative position rather than its litigation position. The President explained that the new definition could lead to lengthier proceedings and extensive discovery. EQUAL ACCESS TO JUSTICE ACT AMENDMENTS, COMMITTEE ON THE JUDICIARY, H.R. REP. NO. 120, 99th Cong., 1st Sess. 6 (1985). Congress passed a compromise bill this session which eliminates the sunset provision. This legislation broadly defines the position of the United States to include both the government's administrative and litigation positions. The amendments limit the determination of those positions to "the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought." Pub. L. No. 97-248, tit. II, § 2(b), 96 Stat. 574 (amending 28 U.S.C. § 2412(d)(1)(B)). The legislative history indicates that in cases "conceded on the merits," the record "will consist of the pleadings, affidavits and other supporting documents filed by the parties in both the fee proceeding and the case on the merits." EQUAL ACCESS TO JUSTICE ACT AMENDMENTS, COMMITTEE ON THE JUDICIARY, H.R. REP. NO. 120, 99th Cong., 1st Sess. 13 (1985).

¹⁴⁷ The Supreme Court, in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), reaffirmed the "American rule" that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Id.* at 247. The Court recognized three exceptions to the rule. First, it recognized:

the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees from the fund or property itself or directly from other parties enjoying the benefit.

Id. at 257 (footnote omitted). Second, the Court recognized the inherent power of the courts to "assess attorneys' fees for the 'willful disobedience of a court order' . . . as part of the fine to be levied on the defendant . . . or when the losing party has 'acted in bad faith, vexatiously, wantonly or for oppressive reasons.'" *Id.* at 258-59 (citations omitted). Third, the Court recognized as an exception specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. *Id.* at 254-57.

The *Alyeska* Court further ruled that 28 U.S.C. § 2412 expressly barred taxation of fees against the United States. *Id.* at 267-68. The Court concluded that any additional fee shifting, including fee shifting under a private attorney general analysis must be authorized by Congress. *Id.* at 269.

justified."¹⁴⁸ An award may, however, be denied if a court finds that special circumstances exist which would "make an award unjust."¹⁴⁹

The focus of the EAJA, more than that of other fee shifting statutes,¹⁵⁰ is economic. Congress passed the legislation, not to vindicate narrowly defined rights deemed to be of special importance,¹⁵¹ but to alter the financial balance between the government and those with whom the government does business.¹⁵² If there is a prototypical person inspiring congressional passion, it is a small business executive, subject to unjust regulation, but unable to fight back because the legal fees would exceed the amount in controversy.¹⁵³ The legislation is thus more concerned with overturning egregious gov-

¹⁴⁸ 28 U.S.C. § 2412(d)(2)(B) (1982). The newly passed bill amends the definition of party to include individuals whose net worth did not exceed \$2,000,000 at the time the civil action was filed or corporations with a net worth of less than \$7,000,000 and not more than 500 employees. Pub. L. No. 97-248, tit. II, § 292(c), 96 Stat. 574 (1982) (amending 28 U.S.C. § 2412(d)(2)(B)(i) and (ii)). The bill also changes the definition of "position of the United States" which has been defined as the litigation by a majority of the courts, to include "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." *Id.*

¹⁴⁹ 28 U.S.C. § 2412(d)(1)(A) (1982).

¹⁵⁰ Federal statutes authorizing fees are set forth in *Federal Statutes that Authorize Awards of Attorneys' Fees Against the Federal Government, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Comm. on the Judiciary, 96th Cong., 2d Sess. 611-29 (1980) (Appendix 5) [hereinafter cited as *Hearings: Awards of Attorneys' Fees Against the Federal Government*].*

¹⁵¹ In hearings before Congress, Assistant Attorney General Alice Daniels stated:

Until about the mid-1960's, the Clayton Act (15 U.S.C. § 15 (1914)) was the basis for most statutory fee awards. Within the past dozen years or so, however, Congress has enacted a number of laws containing provisions for the recovery of attorneys' fees.

With each of these statutes, Congress has enacted specific standards to meet the particular needs of particular problems in discrete subject areas. Each represents the expression of congressional intent to encourage citizens to advance the interests of specific important social goals. As the legislative history to the Freedom of Information Act notes, "[t]he allowance of a reasonable attorneys' fee out of government funds to prevailing parties in litigation has been considered desirable where the suit advances a strong congressional policy. 93 U.S. CODE CONG. & AD. NEWS 6267, 6272 (1974)."

*Hearings Before the Subcommittee on SBA and SBIC Authority and General Small Business Problems, House Committee on Small Business Problems, House Committee on Small Business, 96th Cong., 2d Sess. 175 (1980) (prepared statement of Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice, Judicial Access/Court Costs) [hereinafter cited as *Hearings: Judicial Access/Court Costs*]. See also *Oguachuba v. Immigration and Naturalization Serv.*, 706 F.2d 93, 99 (2d Cir. 1983).*

¹⁵² See, e.g., 125 CONG. REC. S10915 (daily ed. July 31, 1979) (Sen. Dole) ("A balance needs to be established between the rights of Americans and Government regulations. This bill offers that balance . . ."); *id.* at S10922 (Sen. Nelson) (bill will "balance the scales of justice"); 126 CONG. REC. H588 (daily ed. Feb. 5, 1980) (statement of Rep. McDade) ("balance scales of justice"); 126 CONG. REC. H585 (daily ed. Oct. 1, 1980) (statement of Rep. Bereuter) ("corrects imbalance"). See also Act of Oct. 21, 1980, Pub. L. No. 96-481, § 202, 94 Stat. 2325 (1980) (setting forth statutory purposes).

¹⁵³ The congressional sponsors repeatedly referred to the plight of the small businessman, unable to challenge government misconduct because of prohibitive legal fees. See, e.g., *Equal Access to Justice Act of 1979, S.265, Hearings Before the Subcommittee on Improvements in Judicial Machinery, Senate Committee on the Judiciary, 96th Cong., 1st Sess. 1-2 (1979) (opening statement of Senator DeConcini, legislation sponsor) [hereinafter cited as *Hearings: Equal Access to Justice Act of 1979*]; *Hearings: Judicial Access/Court Costs*, *supra* note 160, at 52, 53 (opening statement of Hon. Joseph M. McDade, legislation sponsor). See also H.R. REP. NO. 1418, 96th Cong., 2d Sess. 12 (1980) ("S.265 provides individuals an effective legal or administrative remedy where none now exists"); S. REP. NO. 253, 96th Cong., 1st Sess. 1, 5 (1979); H.R. REP. NO. 1005, 96th Cong., 2d Sess. 6 (1980);*

ernment misconduct than with creating new law.¹⁵⁴ The congressional sponsors expressed greater concern about the aggrieved party's willingness to incur fees than the willingness of lawyers to take the cases.¹⁵⁵ In its methodology, the Act pays greater attention to the deterrent effect on federal agencies than to the vindication of any single interest. In short, the Act concentrates on the economics underlying both parties' decision to litigate.¹⁵⁶

Given the congressional concern with access and economic balance rather than vindication of a particular right, the statute pays special attention to fee calculation. Open ended fee awards could, on the one hand, magnify the cost to the United States

Hearings: Awards of Attorneys' Fees Against the Federal Government, *supra* note 150, at 32 (statement of Sen. DeConcini).

¹⁵⁴ The statute limits fees to cases in which the government's position is not substantially justified and grants the courts discretion to deny fees where "special circumstances" would "make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (1982). The latter provision is modeled after the standard developed under the Civil Rights Act. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

In defining "substantially justified," the committee reports provide that:

[t]he test of whether or not a government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis both in law and fact, no award will be made

The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

H.R. REP. NO. 1418, *supra* note 153, at 10-11; S. REP. NO. 253, *supra* note 153, at 6-7.

In 1982, Congress rejected proposed amendments which would have required that fees awarded not be disproportionate to the amount in controversy. *See Implementation of the Equal Access to Justice Act, Oversight Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary*, 97th Cong., 2d Sess. 12, 41, 77 (1982).

¹⁵⁵ In describing the plight of small businesses, the congressional sponsors emphasized the disproportion between legal fees and the amount in controversy rather than the parties' inability to secure counsel. *See supra* note 153. Of course, this is not to say that Congress was unconcerned with the latter.

¹⁵⁶ In *Oguachuba v. Immigration and Naturalization Serv.*, 706 F.2d 93, 98 (2d Cir. 1983), the Second Circuit recognized that:

[t]he EAJA differs from other statutes, such as the Sherman Act and Civil Rights Legislation, which authorize an award of counsel fees to a party prevailing on claims arising under the particular legislation. Awards pursuant to such legislation are usually the result of Congress's perception of the importance of the underlying statutory policies, of the need to encourage litigation as a means of enforcement of those policies or of a desire to see that the damages awarded plaintiffs in such cases are not diminished by a need to pay counsel. The EAJA differs in that it is not tied to particular governmental policies but applies generally to civil litigation involving the government. The purpose of the EAJA is not to enhance enforcement of affirmative governmental policies but to deter the government from bringing unfounded suits or engaging in arbitrary or unjust administrative behavior. That goal is in part achieved by rectifying the "disparity in resources and expertise of . . . individuals and their government."

Id. (citation omitted).

Treasury¹⁵⁷ and chill federal regulation and law enforcement.¹⁵⁸ Niggardly awards could, on the other hand, defeat the purpose of the act by discouraging the client from risking nonreimbursement or the attorney from risking underpayment. Consequently, to ensure an appropriate balance, the EAJA, unlike other fee shifting statutes, specifies eligible activities, hourly rates, and methods of computation.

Where other statutes permit the award of "reasonable fees,"¹⁵⁹ the EAJA limits awards to "fees . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action . . ."¹⁶⁰ Fees are thus restricted to activities necessary to representation of *that* party, in *that* action, before *that* court. Although the "fees incurred" language does not limit fee awards to fees actually owed by the client,¹⁶¹ Congress barred fees for intervenors and friends of the court.¹⁶² By including such restrictions in the statute, Congress invited judicial scrutiny of the claims submitted.¹⁶³

¹⁵⁷ The legislative history is replete with testimony as to the potential cost and efforts to estimate and limit that expense. See, e.g., H.R. REP. NO. 1418, *supra* note 153, at 7; *Hearings: Equal Access to Justice Act of 1979*, *supra* note 153, at 51-52; *Hearings: Awards of Attorneys' Fees Against the Federal Government*, *supra* note 150, at 32, 52, 412; *Equal Access to Courts, Hearing before the Subcommittee on Improvements in Judicial Machinery, Comm. on the Judiciary*, 95th Cong., 2d Sess. 35-36 (1978) [hereinafter cited as *Hearing: Equal Access to Courts*]; *The Awarding of Attorneys' Fees in Federal Courts, Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. 74-76, 83-92, 299 (1977-1978) (statement of Mary Frances Derfner, Director, Attorneys' Fees Project) [hereinafter cited as *Hearings: The Awarding of Attorneys' Fees in Federal Courts*].

¹⁵⁸ See, e.g., *Hearings: Awards of Attorneys' Fees Against the Federal Government*, *supra* note 150, at 21, 27-28, 42, 71; *Hearings: Judicial Access/Court Costs*, *supra* note 151, at 178; *Hearings: Equal Access to Justice Act of 1979*, *supra* note 153, at 172; *Hearings: Equal Access to Courts*, *supra* note 157, at 31; *Hearings: The Awarding of Attorneys' Fees in Federal Courts*, *supra* note 157, at 71.

¹⁵⁹ See, e.g., Federal Contested Elections Act, 2 U.S.C. § 396 (1982) ("reasonable expenses of the contested election case, including reasonable attorneys' fees"); Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1982) ("[t]he court may assess against the United States reasonable attorneys' fees"); Privacy Act, 5 U.S.C. §§ 552a(g)(2)(B), (3)(B), (4) (1982); Government in the Sunshine Act, 5 U.S.C. § 552b(i) (1982); Commodities Futures Trading Commission Act of 1974, 7 U.S.C. §§ 18(f), (g) (1982); Bankruptcy Act, 11 U.S.C. § 303(i) (1982); Truth in Lending Act, 15 U.S.C. § 1640(a) (1982); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000b-1, 2000e-5(k) (1982). See also *Hearings: Awards of Attorneys' Fees Against the Federal Government*, *supra* note 150, at 611.

¹⁶⁰ 28 U.S.C. § 2412(d)(1)(A) (1982).

¹⁶¹ See, e.g., *Dubose v. Pierce*, 579 F. Supp. 937, 947 (D. Conn. 1984), *rev'd*, 761 F.2d 913 (2d Cir. 1985); *San Filippo v. Secretary of Health and Human Services*, 564 F. Supp. 173, 175-77 (E.D.N.Y. 1983); *Kauffman v. Schweiker*, 559 F. Supp. 372, 376 (M.D. Pa. 1983); *Hornal v. Schweiker*, 551 F. Supp. 612, 615-17 (M.D. Tenn. 1982). But see *Cornella v. Schweiker*, 552 F. Supp. 240, 245-48 (D.S.D. 1982).

¹⁶² "The definition of 'party' would exclude . . . those who do not have a direct and personal interest in the action. It is the belief of your committee that the act should not provide funds for intervenors, friends of the court, or others who have not been injured or likely to suffer irreparable harm." H.R. REP. NO. 1005, *supra* note 153, at 9.

¹⁶³ The statute defines "fees and other expenses" to include "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the party's case, and the reasonable attorneys' fees." 28 U.S.C. § 2412(d)(2)(A) (1982). The House committee report adds that "[y]our committee expects awards to include the reasonable costs incurred in adequately preparing for a prosecuting a case." H.R. REP. NO. 1005, *supra* note 153, at 11. Both the statutory and committee language suggests that fees should be limited to activities necessary to the litigation even if such activities are an otherwise reasonable part of representation of the client.

The EAJA further requires that fees be "based on prevailing market rates"¹⁶⁴ and that the party submit "an itemized statement from any attorney . . . stating the actual time expended and the rate at which fees and other expenses were computed."¹⁶⁵ Adopted well after the *Lindy*, *Grinnell*, and *Johnson* decisions eliminated percentage of recovery awards,¹⁶⁶ the statute envisioned an effort to duplicate prevailing hourly rates for time spent. Congress explained that:

In general, consistent with the above limitations, the computation of attorneys' fees should be based on prevailing market rates without reference to the fee arrangement between the attorney and client. The fact that attorneys may be providing services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services rendered is not relevant to the computation of compensation under the Act. In short, the award of fees is to be determined according to general professional standards.¹⁶⁷

These provisions reflect the concern with balance — an agency should not be spared legal fees because a particular client secured below market representation nor penalized because the client retained the most expensive counsel — and access — below market fee awards might discourage attorneys from charging less than market rates or from undertaking the case at all.¹⁶⁸

Perhaps most significantly, Congress set a maximum hourly rate, providing that "attorneys' fees shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceeding involved, justifies a higher fee."¹⁶⁹ Construed expansively, the exception could swallow the rule, but general rules of statutory construction favor a narrow interpretation. First, the statute generally, and the provision setting a maximum rate in particular, must be treated as waivers of sovereign immunity entitled to strict construction.¹⁷⁰ Second, the provision must be interpreted consistently with the statutory purposes, and with the itemized factors Congress desig-

¹⁶⁴ 28 U.S.C. § 2412(d)(2)(A) (1982).

¹⁶⁵ *Id.* at § 2412(d)(1)(B).

¹⁶⁶ See *Hearings: The Awarding of Attorneys' Fees in Federal Courts*, *supra* note 157, at 289.

¹⁶⁷ H.R. REP. NO. 1418, *supra* note 153, at 15. See also *Awarding of Attorneys' Fees*, *Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary*, 94th Cong., 1st Sess. 127-28, 146, 151-52 (1977) [hereinafter cited as *Hearings: Awarding of Attorneys' Fees*]; *Hearings: The Awarding of Attorneys' Fees in Federal Courts*, *supra* note 157, at 29, 289.

¹⁶⁸ Limiting fee awards to fees owed might discourage pro bono or reduced fee representation or encourage a client with a particularly strong case to use more expensive outside counsel. The reference to prevailing rates also provides a check on the employment of overpriced counsel. *Cf. Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984).

In *Walford v. Heckler*, 765 F.2d 1562 (11th Cir. 1985), the Eleventh Circuit ruled, correctly in my view, that a Social Security Act provision limiting contingent fee awards to 25% of the judgment did not limit EAJA awards to that amount. The court reasoned that such a result would be inconsistent with the EAJA legislative history precluding consideration of the specific attorney-client arrangement and the statutory emphasis on avoiding too heavy a reliance on the "amounts involved." *Id.* at 1567-69.

¹⁶⁹ 28 U.S.C. § 2412(d)(2)(A) (1982).

¹⁷⁰ *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683-85 (1983); see also *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. King*, 395 U.S. 1, 4 (1968); *Underwood v. Pierce*, 761 F.2d 1342, 1347-48 (9th Cir. 1985).

nated.¹⁷¹ In limiting hourly rates, Congress attempted to balance the exposure of the United States Treasury with the need to set fees sufficiently high to ensure access to the courts.¹⁷²

The provision for higher fees in the event of "special factors, such as the limited availability of qualified attorneys for the proceeding involved," illustrates that balance and defines the type of factors necessary to justify an exception. In a complicated tax or patent proceeding, for example, no attorney with expertise in that area, in essence, "no qualified attorney," might be available at \$75 per hour.¹⁷³ Insistence on a \$75 per hour maximum would thus discourage more technical litigation and defeat the purpose of the statute. Retention of the \$75 limit in a period of rampant inflation would similarly undermine the statute's effectiveness. At the same time, however, Congress indicated that neither higher prevailing local rates nor the fact that the best lawyers charged more could justify higher rates.¹⁷⁴ The *raison d'être* of the EAJA is to ensure access to the court. Congress's recognition that "special factors" could justify higher fees must be construed consistently with the economic focus of the Act.¹⁷⁵

¹⁷¹ *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("as in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve"); *United States v. Philipp Overseas, Inc.*, 651 F.2d 747, 751 (C.C.P.A. 1981). See also *City of Greenwood v. Peacock*, 384 U.S. 808 (1966); *In re Bradford*, 695 F.2d 409 (9th Cir. 1982).

¹⁷² See *supra* notes 152 and 157. See also *Action on Smoking and Health (A.S.H.) v. Civil Aeronautics Bd.*, 724 F.2d 211, 218 n.34 (D.C. Cir. 1984).

¹⁷³ See *Action on Smoking and Health v. Civil Aeronautics Bd.*, 724 F.2d 211, 217 (D.C. Cir. 1984). The House committee report defines the exception as applying where there is "a limited availability of qualified attorneys with expertise in the particular proceedings involved." H.R. REP. NO. 1418, *supra* note 153, at 15.

¹⁷⁴ During the hearings in the House of Representatives, Senator DeConcini, the major Senate sponsor of the legislation, testified before a subcommittee chaired by Congressman Kastenmeier, one of the chief House sponsors:

Mr. Kastenmeier: As far as fees and expenses, it has limitations, as well, which I gather, would prevent a party from engaging entirely an expensive law firm and being able entirely to cover all the expenses that might be charged, if they would otherwise qualify under the bill.

Senator DeConcini: We tried to strike some common ground realizing that the attorneys' fees per hour vary immensely wherever it may be. We have communities in my state that \$75 per hour would be almost twice what the going rate is; though in the large cities it's that or more.

The purpose of our bill, S.265, as before you today, does not do what Senator Domenici and Senator Nelson advocate; and that is, really make the taxpayers whole.

... But, as you know, Mr. Chairman, and members of the committee, when you get into the process of attempting to grind out legislation, you have to make some modifications and some compromises; and, indeed, that's what this bill represents.

Hearings: Awards of Attorneys' Fees Against the Federal Government, *supra* note 150, at 32. See also *Action on Smoking and Health v. Civil Aeronautics Bd.*, 724 F.2d 211, 219 (D.C. Cir. 1984) (\$75 per hour limit designed to constrain litigants from hiring high-priced lawyers); *Hearings: Equal Access to Justice Act of 1979*, *supra* note 153, at 88.

¹⁷⁵ The other exception to the statutory maximum, providing for judicial recognition of "an increase in the cost of living," is also consistent with that purpose, allowing for judicial adjustment of the statutory maximum in the event that inflation makes the \$75 per hour figure outdated. See *Hearings: Equal Access to Justice Act of 1979*, *supra* note 153, at 95.

In calculating any increase, however, the courts should determine the increase from October 1, 1981, the effective date of the statute (rather than from the date the services were performed) and they would do so on a nationwide basis. Otherwise, an increase in the cost of living could be used to justify higher rates in more expensive urban communities circumventing the EAJA's efforts

Reconciling the EAJA with established methods of fee calculation has proved troublesome for the courts. The statute's emphasis on hours multiplied by hourly rates appears to embrace a conservative lodestar analysis without providing for the lodestar adjustments that constitute the other half of the *Lindy-Grinnell* equation. In considering the application of multipliers, the courts have agreed only that lodestar adjustments cannot be used to push the effective hourly rate above \$75 per hour without an exception to the statutory cap on fees.¹⁷⁶ The courts have settled on no uniform analysis in deciding which factors might justify an exception to the \$75 per hour fee cap and, indeed, whether a multiplier is ever permitted under the statute.¹⁷⁷

The decisions of the United States Court of Appeals for the D.C. Circuit in *Action on Smoking and Health (A.S.H.) v. Civil Aeronautics Board* and of the United States Court of Appeals for the Ninth Circuit in *Underwood v. Pierce* underscore the difficulties which the courts have had in addressing these issues. In the *A.S.H.* case, the D.C. Circuit acknowledged the narrow purpose of the statutory exception, concluding that:

In enacting this fee limitation, Congress attempted to provide full market compensation for successful litigants while, at the same time, containing cost. The two special factors specifically enumerated in the statute — cost of living rises and limited availability of counsel — facilitate flexible adjustment to special economic circumstances. The cost of living language reflected congressional awareness that, with inflation, the fee limiting provision could defeat the purpose of the statute. The limited availability of counsel provision is directed at another unusual situation where specialized legal services cannot be obtained in the market for \$75 or less.¹⁷⁸

But the court of appeals, ignoring its own analysis of the economic purpose of the exception, went on to find that:

The Equal Access to Justice Act also gives the court discretion to consider other, unenumerated special factors. Courts have traditionally conducted this special factor inquiry in fee cases to insure that unusual circumstances have not rendered the lodestar formula an improper method of compensation. As this court held in *Copeland v. Marshall*, if such special factors as the contingent nature of success, delay in payment or quality of representation are present, an adjustment to the lodestar is appropriate. We hold that the provisions of EAJA are in no way incompatible with the special factor inquiry required by *Copeland*. Congress clearly intended that such an inquiry be undertaken in EAJA cases.¹⁷⁹

The *A.S.H.* court, however, offered no explanation and no legislative support for its conclusion that the "special factor" language should be construed independently from

to impose a national statutory maximum. *Action on Smoking and Health v. Civil Aeronautics Bd.*, 724 F.2d 211, 218 (D.C. Cir. 1984); *Dubose v. Pierce*, 579 F. Supp. 937, 958 (D. Conn. 1984), *rev'd*, 761 F.2d 913 (2d Cir. 1985); *see supra* note 174.

¹⁷⁶ *See, e.g., Underwood v. Pierce*, 761 F.2d 1342, 1347 (9th Cir. 1985); *Action on Smoking and Health v. Civil Aeronautics Bd.*, 724 F.2d 211, 218 (D.C. Cir. 1984); *Dubose v. Pierce*, 579 F. Supp. 937, 952-53, 958 (D. Conn. 1984), *rev'd*, 761 F.2d 913 (2d Cir. 1985).

¹⁷⁷ *See infra* note 179.

¹⁷⁸ 724 F.2d at 217 (footnotes omitted).

¹⁷⁹ *Id.* at 218 (footnotes omitted). The *Copeland* factors are very similar to the *Lindy-Grinnell* factors. *See supra* notes 79 and 118.

the statute's itemized factors and the specific statutory purposes.¹⁸⁰ The anomalous effect of the *A.S.H.* decision is to limit hourly rates strictly to \$75 per hour while permitting multipliers to increase those rates on the same bases as any other fee award.¹⁸¹

The United States Court of Appeals for the Ninth Circuit used similar reasoning to support the opposite methodology in *Underwood v. Pierce*. Without reference to the EAJA's legislative history, the Ninth Circuit concluded that "the consideration of *Kerr* [*v. Screen Extras Guild, Inc.*] factors is appropriate in determining the amount of fees to be awarded under the EAJA."¹⁸² The court of appeals further observed that:

The district court found that an hourly rate in excess of \$75 was justified by several special factors, including the novelty and difficulty of the issues, the contingent nature of the fee, the undesirability of the case, the expertise of counsel, the amount involved and the results obtained, and the customary fees and awards in other cases. The district court did not abuse its discretion in concluding that the hourly rates requested by the Western Center — ranging from \$80 per hour for work in 1976 to \$120 per hour for work in 1982 — were appropriate and reasonable under the EAJA.¹⁸³

But the court then prohibited use of a multiplier on the grounds that waivers of sovereign immunity must be strictly construed, and that given the precise statutory limit on fees, multipliers are inappropriate without a stronger indication of congressional intent.¹⁸⁴ Thus, the curious result of the Ninth Circuit's decision in *Underwood* is to prohibit the

¹⁸⁰ The *A.S.H.* court referred to legislative history indicating that the factors justifying an exception "are not limited to" those specified, but gave no explanation of why other factors should not be of a kind similar to those stated. 724 F.2d at 218 n.32.

¹⁸¹ For example, in analyzing the quality factor, the *A.S.H.* court ruled that the quality bonus is limited to performance beyond that expected of an attorney with such established rates. *Id.* at 219. Accordingly, an attorney charging \$150 per hour could not receive more than \$75 per hour for performance one would expect from an attorney able to command such rates, but an attorney ordinarily charging \$75 per hour could receive much higher rates for the same performance. In contrast, the statutorily mandated prevailing market rates make no provision for exceptional performance. An attorney who agreed to handle a case for \$75 per hour would receive only that; exceptional performance would be rewarded, if at all, by an ability to charge higher rates in subsequent cases.

¹⁸² 761 F.2d 1342, 1347 (9th Cir. 1985). See *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *supra* note 79. The *Underwood* court cited *Save Our Ecosystem v. Clark*, 747 F.2d 1240, 1251 (9th Cir. 1984), in support of this proposition, but the earlier Ninth Circuit case had referred to *Kerr* as generally relevant "to determine the amount of fees to be awarded". *Id.* The *Save Our Ecosystem* court did not specifically consider whether the *Kerr* factors were relevant to a waiver of the \$75 per hour fee cap. *Id.* See also *Bertrand v. United States*, 562 F. Supp. 222, 225 n.5 (D. Ore. 1983) (awarding a multiplier of 1.2 on the basis of the *Kerr* factors and concluding that "consideration of the special factors listed in *Kerr* obviously constitutes adequate justification for an increase in the 'target rate' [of \$75 per hour]") 562 F. Supp. at 225 n. 5.

¹⁸³ *Underwood v. Pierce*, 761 F.2d at 1347.

¹⁸⁴ *Id.* at 1348. Nonetheless, the Ninth Circuit affirmed the award of a multiplier in *LaDuke v. Nelson*, 762 F.2d 1318, 1333 (9th Cir. 1985), which was decided a few weeks after *Underwood*. The panel, which appears to have been unaware of the Ninth Circuit opinion in *Underwood*, did not mention the sovereign immunity issue. Instead, the *LaDuke* panel cited the D.C. Circuit's opinion in *A.S.H.* and a concurring opinion in *Blum v. Stenson* to "support the position that the inordinate risk of no fee award was sufficient to justify a multiplier." *Id.* Unlike the Ninth Circuit panel in *Underwood*, the *LaDuke* court undertook no independent analysis of the multiplier under the EAJA. See also *Local 3-98, Int'l Woodworkers of America v. Donovan*, 580 F. Supp. 714, 717 (N.D. Cal. 1984).

use of multipliers in calculating fees, yet to permit the factors determining multipliers to be used to justify exceptions to the \$75 per hour limit.¹⁸⁵

Moreover, the two appellate decisions, aside from their internal inconsistencies, ignore the letter and spirit of the EAJA. First, they eviscerate the effort to distinguish the EAJA from other fee awards. If the factors which permit multipliers — contingency, quality, result — justify fees above \$75 per hour, then fees can be awarded in EAJA cases on the same basis as in any other award. While the D.C. Circuit may limit hourly fees to market rates below \$75 per hour, lodestar adjustments may be used to multiply the fees to accommodate nonmarket factors. While the Ninth Circuit may prohibit multipliers, hourly rates may produce the same award on the same ground used to justify multipliers. Moreover, the construction of the statutory exception will differ for each circuit. If fees above \$75 per hour depend on the *Copeland* factors in the D.C. Circuit, they should turn on the *Lindy* analysis in the Third Circuit, the *Johnson* factors in the Fifth Circuit and the ABA standards in the Seventh Circuit. Thus, the interpretation of a national statute intended to influence federal action will depend more on geography than congressional intent. Under this type of analysis, the legislation's unique effort to cap fees would become no more than an exhortation to observe fee guidelines already in place.

Second, the individual factors identified in *A.S.H.* and *Underwood* violate the express statutory language requiring the award of prevailing market rates. The committee reports explain that fees are to be set in accordance with prevailing market rates "without reference to the fee arrangement between attorney and client."¹⁸⁶ Even the statutory exception permitting fees greater than \$75 per hour requires awards to be calculated solely on the basis of prevailing market rates.¹⁸⁷ Conversely, the purpose of many of the *Kerr* and *Copeland* factors is to adjust hourly rates to compensate for factors not reflected in prevailing market rates.¹⁸⁸ The quality factor has been defined to reward quality above that to be expected from an attorney commanding the market rate awarded; contingency turns on the risk borne by the attorney in accordance with the particular attorney-client arrangement. The legislative history of the EAJA precludes higher fees based on "expertise of counsel" alone.¹⁸⁹ Thus, the EAJA's emphasis on prevailing market rates,¹⁹⁰

¹⁸⁵ The district court based the hourly rates awarded on plaintiffs' affidavits establishing the noncontingent rates paid lawyers in corporate law firms with educational backgrounds similar to that of plaintiffs' counsel.

¹⁸⁶ H.R. REP. NO. 1418, *supra* note 153, at 15.

¹⁸⁷ The statute, in providing that the "amount of fees shall be based upon prevailing market rates . . . , except that . . . attorneys' fees shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee," creates an exception to the \$75 per hour maximum, not an exception to the more general rule requiring fees to be set in accordance with prevailing market rates. 28 U.S.C. § 2412(d)(2)(A) (1982).

¹⁸⁸ The *Copeland* factors cited in *A.S.H.* are the factors justifying multipliers, *viz.*, contingency, quality and delay. See *supra* note 179. The *Underwood* court failed to identify which of the *Kerr* factors mentioned — novelty and difficulty of the issues, the contingent nature of the fee, undesirability of the case, the expertise of counsel, the amount involved and the results obtained, and the customary fees and awards in other cases — justified an exception to the \$75 per hour fee cap. See *supra* note 183. The contingency of the fee, the undesirability of the case, and results obtained have generally been treated as the justifications for multipliers. See *infra* note 255.

¹⁸⁹ See *supra* note 174.

¹⁹⁰ Of course, the courts have not yet settled the question whether a multiplier can ever be considered part of "prevailing market rates." In *Blum v. Stenson*, 104 S. Ct. 1541 (1984), the Supreme Court characterized the issue presented as "whether, and under what circumstances, an upward adjustment of an award based on prevailing market rates is appropriate under § 1988." *Id.*

drafted during a period when the *Kerr* and *Copeland* factors were well established, is inconsistent with the *A.S.H.* and *Underwood* courts' justifications for their awards of attorneys' fees.¹⁹¹

Finally, in addition to inconsistencies with the statute, the D.C. and Ninth Circuits' emphasis on contingency, quality, and result creates its own anomalies. Contingency bonuses, by definition, reserve the highest fees for those cases in which the prospects for success are weakest. This necessarily means that the highest bonuses will be assessed against the losing parties with the relatively strongest cases; the opponent who loses after a hard fight where the complexity of the litigation, the uncertainty as to the facts and the unsettled nature of the law make the defense entirely reasonable. Conversely, Congress intended the EAJA to apply only to cases of "unreasonable governmental action"; the statute denies fees altogether in genuinely close, complicated cases where the unsuccessful government position is "substantially justified." The effect of a rule permitting the award of higher fees in contingent EAJA cases is therefore to reserve the highest fees for those cases where the government position is almost, but not quite, substantially justified. The result is clearly at odds with the statutory priority of deterring the least meritorious government cases.¹⁹² Thus, the D.C. and Ninth Circuits have merged the standards used to determine lodestar adjustments with the special factors necessary to permit awards above \$75 per hour only by ignoring the distinctive nature of the EAJA.

The better analysis is to interpret the EAJA exception to the \$75 per hour fee cap on its own terms, within the context of this statute's purposes and concerns. The contingent nature of the representation should justify higher fees where the court finds that

at 1544. The Court characterized the lodestar determination as the market rate calculus: multipliers are used to correct market rates for other factors. *Id.* at 1544, 1547. Justice Brennan's concurrence in that case, however, argued that contingency increases, if not other adjustments, are "entirely consistent with the market based approach to hourly rates that is today affirmed by the Court." *Id.* at 1551 (Brennan, J., concurring). But Justice Brennan also emphasized that "[c]ontingency adjustments . . . should not be confused with contingency fee arrangements that are commonly entered into by private attorneys representing plaintiffs in civil litigation." *Id.* at 1551 n.* (Brennan, J., concurring).

Since the market allows for contingent representation only through percentage of recovery fees, the courts in referring to "prevailing market rates" have used the term to describe noncontingent hourly rates. The EAJA, with its emphasis on "actual time expended" and dollars per hour almost certainly envisions a noncontingent hourly calculation.

¹⁹¹ Congressman Kastenmeier, one of the sponsors of the legislation, acknowledged:

In conclusion, I would like to emphasize that this bill does not alter the standards and methods of determining attorneys' fees under existing law, wherein attorneys' fees can be awarded. For example, the \$75 general citing in the bill for attorneys' fees should not be considered a maximum in other existing attorneys' fees statutes, such as those under the civil rights laws. Important public policies are served by the private enforcement of such laws, and reimbursement is not the main issue. Courts have considered other factors in such cases, and should continue to do so.

Hearings: Awards of Attorneys' Fees Against the Federal Government, *supra* note 150, at 413. Congressman Kastenmeier clearly distinguished other statutes, where "reimbursement is not the main issue" and where the courts properly "have considered other factors." *Id.*

¹⁹² See *supra* note 154. It is also anomalous to recognize an exception for large recoveries given Congress's assumption that the act was most needed in cases where the claim was too small to justify the fees charged or to support a contingent fee arrangement. See *supra* note 153. Conversely, it would be consistent with the purposes of the act and the factors specified to permit increases for inflation or delay in payment. Similarly, no statutory purpose can be served by preventing a litigant from recovering his full expenses for hiring the best qualified attorney in the area while rewarding a less qualified attorney who performed above expectations.

a particular client could secure representation only on a contingent basis, and that such representation was available for that particular case only at fees exceeding \$75 per hour. The court should then award not a multiplier,¹⁹³ but the minimum hourly fee necessary to attract competent counsel on a contingent basis.¹⁹⁴ Such an analysis would also preclude higher fees for extraordinary performance, but would endorse such fees if needed to retain counsel with special expertise essential to an unusually complicated or arcane claim. In such cases, the EAJA would permit the award to reflect market rates for such a specialty,¹⁹⁵ while still precluding the adjustment of market rates to compensate for nonmarket factors.¹⁹⁶

To date, however, the courts seem more determined to fit EAJA cases within the confines of traditional fee doctrine than to deal with the statute on its own terms.¹⁹⁷ Close examination of two recent district court opinions, illustrating almost dramatically opposed approaches to statutory construction, will demonstrate the difficulties the courts are experiencing in deciding EAJA cases within the traditional framework established by their respective circuits.

¹⁹³ As noted above, the exception authorizing fees above \$75 per hour permits the awards of prevailing market rates above \$75 per hour. See *supra* note 187. Multipliers do not express prevailing market rates. See *supra* note 190.

¹⁹⁴ Such a rule would not necessarily conflict with the requirement that prevailing rates be set without reference to "the particular attorney-client arrangement," since rates would be set with reference to the circumstances of a particular client, but not necessarily with reference to the particular arrangement he secured with his attorney. Since the determination of hourly rates would reflect risk, however, it would still result in the highest fees being awarded in the cases in which the government position was the least unreasonable. It would also mean that the courts could compensate the attorneys' risk of nonpayment but not the client's risk of nonreimbursement. See *supra* note 155.

¹⁹⁵ An interesting question is whether the EAJA would ever permit higher fees because no attorney in a particular locality is available at \$75 per hour. Cf. *supra* note 174. Presumably it would if the prevailing party could establish that a local attorney was necessary to fair representation or an out-of-town attorney's travel expenses would make such representation more expensive. If a specialty justifies fees above \$75 per hour, e.g., patent expertise, the question also arises whether the rate should be that for a lawyer in a locality charging high rates, e.g., New York, or for patent lawyers generally. It is anomalous to restrict a skilled New York litigator to fees of \$75 per hour while permitting a patent attorney to recover fees of \$200 per hour. The test ought still to be the minimum hourly rate necessary to attract an attorney qualified to handle the particular proceeding, not the customary fee for New York patent attorneys. Similarly, increases to the \$75 per hour rate justified by inflation should be on a national, not a local basis.

¹⁹⁶ In *Local 3-98, Int'l Woodworkers of America v. Donovan*, 580 F. Supp. 714, 717 (N.D. Cal. 1984), the court justified an award of fees above \$75 per hour on the grounds that counsels' expertise made them more efficient. According to the court, inexperienced counsel would have spent more hours to accomplish the same result. *Id.* While this analysis is facially appealing, it is in reality no different from the award of higher rates on the basis of any other expertise and it should be subject to the same analysis.

¹⁹⁷ Although the wholesale incorporation of the *Kerr* and *Copeland* factors into the standards used to determine exceptions to the \$75 per hour fee cap seems to invite large awards, the results to date have been circumspect. The *A.S.H.* court awarded, "[i]n view of the long delay . . . , inflation, the quality of representation and the successful result," a relatively modest upward adjustment of 10%. 724 F.2d at 219-20. In *Underwood*, the Ninth Circuit invalidated the multiplier of 3.5, while affirming the award of rates from \$80 to \$120 per hour. 761 F.2d at 1348. In *Battles Farm Co. v. Pierce*, No. 76-393 (D.D.C. April 25, 1985), an operating subsidy case related to *Underwood*, the district applied the *Blum* standards finding that plaintiffs had failed to justify a multiplier, but permitted fees of \$85 per hour to compensate for inflation after 1981. See *infra* note 256.

III. UNDERWOOD AND DUBOSE: STUDIES IN CONTRAST IN THE CALCULATION OF EAJA FEES

Although implementation of the EAJA has inspired extensive litigation over the statute's eligibility requirements,¹⁹⁸ the early fee awards have been calculated conservatively, postponing resolution of the potential calculation controversies.¹⁹⁹ The courts, in piecemeal fashion, are beginning to address these issues, but to date they have done so without a systematic examination of the statute's purposes or the larger issues concerning fee calculation.²⁰⁰ The case of *Underwood v. Pierce* manages — though more because of

¹⁹⁸ Indeed, interpretation of the eligibility requirements has produced at least one split in the circuits. In defining the statutory term "position of the United States," 28 U.S.C. § 2412(d), five circuits have ruled that only the government's litigation position must be substantially justified to preclude fees. *Ashburn v. United States*, 740 F.2d 843 (11th Cir. 1984); *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983); *Tyler Business Servs. v. NLRB*, 695 F.2d 73 (4th Cir. 1982); *Operating Eng'rs Local Union No. 3 v. Bohn*, 541 F. Supp. 486 (D. Utah 1982), *aff'd*, 737 F.2d 860 (10th Cir. 1984). See also *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426 (5th Cir. 1982). The Third and Ninth Circuits have ruled, however, that a prevailing party may be eligible for fees if the government position underlying the litigation is not substantially justified. *Rawlings v. Heckler*, 725 F.2d 1192 (9th Cir. 1984); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 703 F.2d 700 (3d Cir. 1983); *Moats v. United States*, 576 F. Supp. 1537 (W.D. Mo. 1984). Congress resolved the split in favor of requiring both positions to be substantially justified. See Pub. L. No. 97-248, 96 Stat. 574 (amending 28 U.S.C. § 2412(d)(1)(B)). See *supra* notes 146 and 148.

The courts have also split on the question of whether 28 U.S.C. § 2412(b) permits the award of attorneys' fees against the United States where 42 U.S.C. § 1988 would permit the award of fees against state officials for analogous actions. See *infra* notes 283-306 and accompanying text.

In addition, the government has challenged, largely unsuccessfully, fee awards for work performed before the effective date of the act. See, e.g., *Berman v. Schweiker*, 713 F.2d 1290, 1291 (7th Cir. 1983); *Natural Resources Defense Council v. Environmental Protection Agency*, 703 F.2d 700, 712-13 (3d Cir. 1983); *Kay Mfg. Co. v. United States*, 699 F.2d 1376, 1378 (Fed. Cir. 1983); *Tyler Business Servs., Inc. v. NLRB*, 695 F.2d 73, 77 (4th Cir. 1982); but see *Commissioners of Highways v. United States*, 684 F.2d 443, 444-45 (7th Cir. 1982); *Allen v. United States*, 547 F. Supp. 357, 360-62 (N.D. Ill. 1982); *Commodity Futures Trading Comm'n v. Rosenthal & Co.*, 537 F. Supp. 1094, 1096 (N.D. Ill. 1982).

For the definition of "pending" under the statute, see, e.g., *Commissioners of Highways v. United States*, 684 F.2d 443, 444-45 (7th Cir. 1982); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd.*, 679 F.2d 64, 67-68 (5th Cir. 1982); *United States ex rel. Heydt v. Citizens State Bank*, 668 F.2d 444, 446 (8th Cir. 1982). For an interpretation of "special circumstances which make an award unjust," see, e.g., *Matthew v. United States*, 526 F. Supp. 993, 1009 (M.D. Ga. 1981).

¹⁹⁹ The early cases involved relatively few fee calculation — as opposed to eligibility — controversies, and none involved fees above \$75 per hour. See, e.g., *Ocasio v. Schweiker*, 540 F. Supp. 1320, 1323 (S.D.N.Y. 1982); *United States v. Pomp*, 538 F. Supp. 513, 515 (M.D. Fla. 1982); *Photo Data, Inc. v. Sawyer*, 533 F. Supp. 348, 353 (D.D.C. 1982); cf. *Greater Los Angeles Council on Deafness (GLAD) v. KCET*, No. 78-4715R (C.D. Cal. Feb. 11, 1982) (awarding fees of \$175 per hour and a multiplier of it without addressing EAJA issues) *rev'd in part on other grounds*, 719 F.2d 1017 (9th Cir. 1982); see also *infra* note 200 and cases cited therein. In addition, because the early EAJA cases have moved so slowly through the courts, it is still impossible to gauge the full extent of federal liability. The *Underwood* fee litigation, for example, has been pending since shortly after the EAJA became effective. See H.R. REP. No. 120, *supra* note 146, at 8-9 (reporting that \$3.899 million had been awarded as of October 1, 1984).

²⁰⁰ See *Action on Smoking and Health v. Civil Aeronautics Bd.*, 724 F.2d 211 (D.C. Cir. 1984); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 703 F.2d 700 (3d Cir. 1983); *Ashton v. Pierce*, 580 F. Supp. 440 (D.D.C. 1984); *Dubose v. Pierce*, 579 F. Supp. 937 (D. Conn. 1983), *rev'd*, 761 F.2d 913 (2d Cir. 1985); *Glick v. United States Civil Serv. Comm'n*, 567 F. Supp. 1483 (N.D. Ill. 1983).

the lower court's obscurity than its insight — to bring together almost the full range of EAJA calculation issues. The related Connecticut case of *Dubose v. Pierce* illustrates a different view of the same issues. Although both opinions have been modified on appeal, the district court opinions continue to provide the most comprehensive treatment of the fee calculation issues presented by the EAJA. Accordingly, the analysis in this portion of the article will rest on the structure established by the district court awards in these two cases.²⁰¹

A. The Factual Background

In the largest EAJA award to date, the district court in *Underwood v. Pierce* granted \$1.129 million in fees to the Western Center on Law and Poverty for its representation of a nationwide class challenging the failure of the Department of Housing and Urban Development ("HUD") to implement a housing subsidy program authorized by the Housing and Community Development Act.²⁰² In a virtually identical case, the district court in *Dubose v. Pierce* awarded \$140,000 to legal services' attorneys for similar activities.²⁰³ Both actions had been settled in 1979 with HUD making available a \$60 million fund to provide rent rebates for subsidized housing tenants.²⁰⁴ The rent rebates were to be administered by Price-Waterhouse, subject to the supervision of a committee of counsel consisting of the two plaintiffs' counsel in *Underwood*, one of plaintiffs' counsel in *Dubose* and two lawyers from private firms in Los Angeles.²⁰⁵

²⁰¹ The *Underwood* district court decision on fee eligibility is set forth at 547 F. Supp. 256 (C.D. Cal. 1982), and the fee award in an unpublished opinion, C.A. No. 79-1318-HP (C.D. Cal. Feb. 3, 1983). The *Dubose* decision is set forth in a single opinion, at 579 F. Supp. 937 (D. Conn. 1983). The two appellate decisions are reported in *Underwood v. Pierce*, 761 F.2d 1342 (9th Cir. 1985); *Dubose v. Pierce*, 761 F.2d 913 (2d Cir. 1985).

²⁰² See *supra* note 201.

²⁰³ See *supra* note 201.

²⁰⁴ *Underwood v. Pierce*, 547 F. Supp. 256 (C.D. Cal. 1982), *aff'd in part, rev'd in part*, 761 F.2d 1342 (9th Cir. 1985).

²⁰⁵ When the nationwide class in *Underwood* was certified, members of classes previously certified, including the *Dubose* class, were excluded. See *Dubose v. Harris*, 82 F.R.D. 582, 584 n.8 (D. Conn. 1979). The settlement in both *Underwood* and *Dubose* had been entered at the time when a common fund recovery offered the only possibility for fees and the parties expected the settlement distribution to exhaust the fund. Deposition of James C. Sturdevant at 50-51, *Dubose v. Pierce*, 579 F. Supp. 937 (D. Conn. 1983). The legal services attorneys had insisted on barring fees which would diminish their clients' recovery and opposed appointment of a special master whose fee would come from the settlement fund. Memorandum of *Underwood* Plaintiffs Re: Status of Settlement at 20-21, *Underwood v. Pierce*, 547 F. Supp. 256 (C.D. Cal. 1982). Instead, they volunteered to supervise the distribution on a pro bono basis and agreed to the appointment of two private attorneys to the Committee of Counsel on the condition that they serve without fee. Memorandum on Behalf of Statewide Tenant Class Certified in *Dubose v. Harris* Re: Appointment of a Fourth Member to the Committee of Counsel at 6-7, *Dubose v. Harris*, 82 F.R.D. 582 (D. Conn. 1979). HUD maintained, *inter alia*, that the Stipulation of Settlement, which provided that "[n]one of the sums distributed may be used to pay attorneys' fees" and that "distribution of the settlement fund shall involve no other substantial costs or expenditures by HUD," barred fees, at least for settlement administration. Stipulation of Settlement, ¶¶ 3(f), 4(d), *Underwood v. Pierce*, 547 F. Supp. 256 (C.D. Cal. 1982). In *Underwood*, plaintiffs requested fees only from the settlement fund, but the court *sua sponte* awarded fees to be paid by HUD from other sources. *Id.* at 259. In *Dubose*, where the issue was fully briefed, the court agreed with HUD that the Stipulation of Settlement barred fees for settlement administration. 579 F. Supp. at 955.

On behalf of *Underwood* plaintiffs, the Western Center on Law and Poverty claimed compensation for 3672 hours, with approximately half of those hours devoted to settlement activities ranging from court appearances to publicity campaigns.²⁰⁶ Counsel established prevailing community rates of up to \$120 per hour by submitting affidavits from attorneys with similar educational backgrounds who testified to their hourly rate for traditional corporate practice in the Los Angeles area.²⁰⁷ The Western Center then asked for a multiplier of 4, arguing that, as legal services attorneys, their prospects for fees were extraordinarily contingent, that the size of the \$60 million fund justified a large bonus, that inflation since the case was filed in 1976 diminished the value of the historical rates they were requesting, and that the quality of the settlement distribution merited higher fees.²⁰⁸ To justify an exception to the \$75 per hour limit on fees, counsel argued that "[b]ecause indigents cannot pay their lawyers, in the ordinary course the pool of attorneys available to assist indigents even with simple legal problems is extremely limited."²⁰⁹ They therefore concluded that the availability of attorneys willing to represent indigent clients in a complex matter was nonexistent.²¹⁰

The district court granted almost the entire request. It reduced the compensable hours by 10% "[b]ecause Western Center's records are somewhat imprecise and because it is necessary to adjust for time spent in lobbying activities and for other work not directly related to this case."²¹¹ It accepted the historical rates of \$80 to \$120 per hour which plaintiffs' counsel claimed based on their "experience and expertise and on prevailing market rates."²¹² The court then ruled that "[a] multiplier of 3.5 properly reflects the contingent nature of this case, its complexity, and, most importantly, the high quality of Western Center's work and the excellent results achieved."²¹³ The Ninth Circuit, without scrutinizing the district court's calculations, affirmed the lodestar, and the district court finding that the "novelty and difficulty of the issues, the contingent nature of the fee, the undesirability of the case, the expertise of counsel, the amount involved and the

²⁰⁶ To document those hours, plaintiffs submitted (1) contemporaneous legal services times sheets for 1978-1982; (2) legal services summaries for one attorney for 1977-1978 which identified activities in general categories such as "research" or "conference"; and (3) an estimate that the other attorney spent at least as much time as the first attorney during 1977-1978. Declaration of Mary S. Burdick and exhibits, July 6, 1982, *Underwood v. Pierce*, C.A. No. 79-1318-HP (C.D. Cal. Feb. 3, 1983).

²⁰⁷ Counsel submitted the Declaration of Jerome C. Byrne, establishing the hourly rate *Underwood* counsel would have commanded at the firm of Gibson, Dunn and Crutcher, and the Declarations of Norman Davidson, III, Edmund J. Towle, III, John E. McDermott, III, and Charles F. Palmer, establishing billing rates for private firms with largely corporate practices.

²⁰⁸ Memorandum of Points and Authorities in Support of Motion for Award of Attorneys' Fees to Western Center on Law and Poverty at 28-33, *Underwood v. Pierce*, C.A. No. 79-1318-HP (C.D. Cal. Feb. 3, 1983).

²⁰⁹ *Id.* at 4.

²¹⁰ In their reply brief, the *Underwood* plaintiffs argued that they were entitled to higher fees because of their attorneys' "special qualifications" in "poverty law," and their "skill and patience" in dealing with a "large and unresponsive bureaucracy." On appeal, plaintiffs also argued that, independent of the availability of attorneys, the court could exceed the \$75 per hour limit for "the same special factors which justified a multiplier — contingency, exceptional quality of services, exceptional result of the case, and difficulty of the case." Appellee's Brief at 38, *Underwood v. Pierce*, 761 F.2d 1342 (9th Cir. 1985).

²¹¹ *Underwood*, C.A. No. 79-1318-HP, slip. op. at 6 (C.D. Cal. Feb. 3, 1983).

²¹² *Id.* at 4. The fees spanned the years 1976-82.

²¹³ *Id.* at 8.

results obtained, and the customary fees and awards in other cases" justified an exception to the statute's \$75 per hour fee cap.²¹⁴ At the same time, the court of appeals vacated the multiplier assigned by the district court on the grounds that the statute failed to authorize such enhancements.²¹⁵

In *Dubose v. Pierce*, a statewide tenant class, certified before and excluded from the nationwide *Underwood* class, had challenged HUD's failure to implement the housing subsidy program in Connecticut. The *Dubose* case was settled in accordance with a settlement identical in all important respects to the *Underwood* settlement and with the understanding that the *Underwood* court would supervise the settlement distribution to the *Dubose* class and that one of *Dubose* counsel would sit on the *Underwood* committee of counsel.²¹⁶

The *Dubose* counsel initially requested fees from the *Underwood* court, but after that court declined jurisdiction, these lawyers refiled in Connecticut requesting fees for over four thousand hours of work, at hourly rates up to \$150 per hour, with a multiplier of two to three.²¹⁷ The legal issues in the *Underwood* and *Dubose* cases were almost identical, the type and range of activities in the two cases were comparable, and the background and experience of the attorneys were similar.²¹⁸ Nonetheless, the district court in *Dubose* awarded the attorneys in this case a much smaller fee. In addition to declining to award a multiplier, the Connecticut court also found no basis for an exception to the \$75 per hour statutory maximum, awarded no compensation for settlement administration activities, for defending the settlement against project owners, or for litigating the fee issue, and otherwise reduced all reconstructed hours by ten percent.²¹⁹ The Second Circuit reversed the district court award, finding plaintiffs ineligible for fees without reviewing the lower court's calculations.²²⁰

While neither the district court nor the appellate opinions in these two cases provide models for fee resolution, the two lower court decisions squarely present the issues at the heart of fee calculation under the EAJA.²²¹

²¹⁴ 761 F.2d at 1347.

²¹⁵ *Id.* at 1348.

²¹⁶ *Dubose v. Harris*, 82 F.R.D. 582 (D. Conn. 1979).

²¹⁷ Order Denying Motions for Award of Attorneys' Fees to James C. Sturdevant and San Fernando Valley Neighborhood Legal Services as Attorneys for *Dubose v. Pierce*, November 29, 1982, *Dubose v. Pierce*, 579 F. Supp. 937 (D. Conn. 1983).

²¹⁸ Compare *Underwood v. Pierce*, 547 F. Supp. 256 (C.D. Cal. 1982), and *Underwood v. Pierce*, C.A. No. 79-1318-HP (C.D. Cal. Feb. 3, 1983), with *Dubose v. Pierce*, 579 F. Supp. 937 (D. Conn. 1983); see *supra* note 201.

²¹⁹ *Dubose*, 579 F. Supp. at 957.

²²⁰ The Second Circuit also reversed the district court's finding that the position of the United States was substantially justified. *Dubose*, 761 F.2d at 917. HUD's appeal primarily concerned fee eligibility rather than fee calculation, though HUD did challenge the award of fees for amicus briefs and other activities in actions not under the jurisdiction of the court. See Opening Brief for Appellants/Cross-Appellees, *Dubose v. Pierce*, 761 F.2d 913 (2d Cir. 1985). The cross-appeal challenged the lower court's decision not to award a lodestar adjustment, the failure to award fees for settlement administration and the disallowance of fees for work on the fee motion.

²²¹ A third operating subsidy case, *Battles Farm Co. v. Pierce*, No. 76-393 (D.D.C. April 25, 1985), is also the subject of a fee dispute. In a preliminary opinion, the court has indicated that it will award fees of \$85 per hour justified by inflation since 1981, but no multiplier on the grounds that plaintiffs failed to meet the burden established by *Blum*.

B. *The Issues in Controversy*

1. Compensable Hours

The overriding statutory question in determining compensable hours in *Underwood* was whether fees were to be restricted to those activities necessary for the litigation or extended to all activities advancing the prevailing parties' interests. The operating subsidy cases presented that issue in all its many facets because plaintiffs' counsel volunteered to play a role far beyond the adversarial one common in antitrust or civil rights settlements.²²² Unlike other committees of counsel, the *Underwood* committee not only monitored the settlement, it also administered it.²²³ It did not limit its participation to that necessary to protect clients' interests; the lawyers sat on appeals boards reviewing tenants' claims, decided project owners' rebate challenges, argued in favor of the eligibility of nonclient tenants, and conducted publicity campaigns directed to clients and nonclients alike.²²⁴ In pursuing these activities, counsel acted as accountants, public relations specialists, investment counselors and, to a smaller extent, secretaries and messengers. In short, the committee of counsel performed an administrative role ordinarily reserved to special masters — or to the Department of Housing and Urban Development ("HUD").²²⁵

If *Underwood* were a civil rights suit, plaintiffs could argue that such activities contributed to the statutory purpose of promoting civil rights and that the only issue, if any, should be one of valuation. In a common fund case, the test would be the benefit accruing to the client as a result of such services.²²⁶ The purposes EAJA awards are intended to serve, however, are different from those of civil rights or common fund awards. Moreover, to advance these purposes, Congress enacted statutory guidelines for EAJA fee calculation missing from other fee shifting statutes. First, the Act restricts fees to prevailing parties, not their attorneys.²²⁷ The district court in *Underwood* recognized that its jurisdiction was limited to the parties before it, and precluded awards to com-

²²² Cf. *Munsy Trust v. Sycor*, 457 F. Supp. 924 (S.D.N.Y. 1978) (fee treatment of settlement work); *City of New York v. Darling-Deleware*, 440 F. Supp. 1132 (S.D.N.Y. 1977) (fee treatment of settlement work); *Berger v. CPC International, Inc.*, 76 F.R.D. 183 (S.D.N.Y. 1977) (fee treatment of settlement work); *Barnett v. Pritzer*, 73 F.R.D. 430 (S.D.N.Y. 1977) (fee treatment of settlement work); *Frankenstein v. McCrory Corp.*, 425 F. Supp. 762 (S.D.N.Y. 1972) (fee treatment of settlement work).

²²³ See generally *Stipulation of Settlement, Underwood v. Pierce*, 547 F. Supp. 256 (C.D. Cal. 1982).

²²⁴ See HUD Appellant's Brief at 36-37, *Underwood v. Pierce*, 761 F.2d 1342 (9th Cir. 1985); Declaration of Mary S. Burdick and Patricia M. Tenoso, *Underwood v. Pierce*, 761 F.2d 1342 (9th Cir. 1985) (filed July 6, 1982 in support of the fee award) (time records attached to Declaration).

²²⁵ The settlement, after all, involved the retroactive implementation of a program which would ordinarily have been administered by HUD. The *Underwood* court did consider appointment of a special master, but rejected it in part because of *Underwood* counsel's argument that the "members of the Committee of Counsel, whose efforts would in large part be taken over by a special master, are all serving without fee." Memorandum of Underwood Plaintiffs Re: Status of Settlement, *Underwood v. Pierce*, 547 F. Supp. 256 (C.D. Cal. 1982).

²²⁶ See *supra* note 44 and accompanying text.

²²⁷ See 28 U.S.C. § 2412(d)(1)(A) (1982). Plaintiffs' attorneys in both cases argued that their activities were increased by HUD's failure to fulfill its obligations under settlement. HUD denied the allegations and they do not appear to be a basis for either court's decision.

mittee of counsel members representing nonparty beneficiaries.²²⁸ The court, however, did not extend the same analysis to *Underwood* counsel. It drew no distinction between work performed directly on behalf of the *Underwood* class and work either adverse to the interests of individual class members²²⁹ or benefiting other classes, such as those certified in *Dubose*.²³⁰ Even if the court regarded the settlement work as generally benefiting the class, that conclusion would not justify the award of compensation for those segregable activities which a paying client would disavow.²³¹

Second, the Act requires that compensable activities be "incurred . . . by that party in any civil action . . . in any court having jurisdiction of that action." The *Underwood* plaintiffs claimed compensation for time spent lobbying Congress, HUD and other federal agencies, for presenting amicus briefs before other courts, publicity efforts throughout the country, and settlement administration generally.²³² *Dubose* counsel further sought fees for assisting counsel in other cases and conducting pilot projects in Albuquerque, New Mexico and Peoria, Illinois.²³³ The district court in *Underwood* reduced the hours claimed by counsel by ten percent to account, for example, "for time spent in lobbying activities and for other work not directly related to the instant case," without identifying what work other than lobbying it had in mind or mentioning the statutory language.²³⁴ On the other hand, the district court in *Dubose*, acknowledging the statutory restrictions, disallowed fees for lobbying because it found that such fees, even if related to the operating subsidy litigation, were not "incurred in a civil action."²³⁵ The *Dubose* court, however, then permitted fees for presenting amicus briefs before other courts, finding that "the briefs were reasonably necessary to protect the interests of

²²⁸ Order Denying Motions for Award of Attorneys Fees to James Sturdevant and San Fernando Valley Neighborhood Legal Services as Attorneys for *Dubose v. Pierce* at 1, *Dubose v. Pierce*, 579 F. Supp. 937 (D. Conn. 1983). The member of the Committee of Counsel appointed because of his representation of the *Dubose* class filed for fees initially before the *Underwood* court, arguing that since the *Underwood* court had supervised the settlement, it was best qualified to evaluate counsel's performance. In declining to award fees, the *Underwood* court emphasized that the *Dubose* class had never become a party to the *Underwood* action.

The *Dubose* court, by ruling that the Stipulation of Settlement barred fees for settlement administration, never reached the issue of the compensability of *Dubose* counsel's activities, which did not challenge the jurisdiction of the *Dubose* court to award fees for activities supervised by the *Underwood* court because the *Dubose* court retained at least some jurisdiction over the activities directly affecting the *Dubose* class.

²²⁹ *Underwood* counsel, as members of the Committee of Counsel, served on an appeal board ruling on, and sometimes denying, tenant claims. It is difficult to imagine paying clients agreeing to compensate their counsel for ruling against them. Even if the EAJA did not otherwise limit fees, the *Hensley* ruling would preclude charging HUD for fees which a paying client would find unreasonable. See *supra* note 92 and accompanying text.

²³⁰ At the time of settlement, the parties incorrectly believed that eligible claims would more than exhaust the settlement fund. Deposition of James C. Sturdevant at 50-51, *Dubose v. Pierce*, 579 F. Supp. 937 (D. Conn. 1983). Accordingly, activities on behalf of eligible claimants outside the class were arguably in conflict with the interests of class members. See Opposition to Plaintiff's Motions for Awards of Attorneys' Fees, Part II, *Dubose v. Pierce*, 579 F. Supp. 937 (D. Conn. 1983).

²³¹ See *supra* note 92; *infra* note 243.

²³² See *supra* note 206.

²³³ Declaration of James C. Sturdevant in Support of His Motion and Supplemental Motions for an Award of Attorneys' Fees, Exhibit A, *Dubose v. Pierce*, 579 F. Supp. 937 (D. Conn. 1983).

²³⁴ C.A. No. 79-1318-HP, slip op. at 6 (C.D. Cal. Feb. 3, 1983). The court also indicated that the ten percent reduction was to account for the questionable documentation provided.

²³⁵ 579 F. Supp. at 956 (quoting the EAJA).

plaintiffs in this action and, as such, they were reasonably incurred in pursuing litigation before this court."²³⁶ The court thus inappropriately dispensed with the requirement that the court awarding the compensation have jurisdiction over the activities compensated.

In applying the "fees incurred" language, however, neither court decided a third issue: how strictly the EAJA limits fees to those necessary to the litigation.²³⁷ Settlement administration involved activities which were not the work of lawyers,²³⁸ not directed against HUD,²³⁹ not adversarial at all,²⁴⁰ or not before the court.²⁴¹ While these activities advanced the settlement, they were "unnecessary to the litigation."²⁴² A narrow reading

²³⁶ *Id.* at 958. *Cf. Battles Farm Co. v. Pierce*, No. 76-393 (D.D.C. April 25, 1985), in which the court commented, "If plaintiffs' attorneys contributed to the success in *Underwood*, they should have been reimbursed in the *Underwood* case." *Id.*, slip op. at 10. The legislative history indicates that Congress did not intend the EAJA to "provide funds for intervenors, friends of the court or others who have not been injured or are likely to suffer irreparable harm." H.R. REP. No. 1005, *supra* note 153, at 9. *Cf. Comment, Adjusting Attorney Fee Awards*, *supra* note 67, at 809 ("Time spent working on other cases or even lobbying Congress is compensable if it issues to the benefit of the class.").

²³⁷ The Act limits reimbursable costs to those reasonably "incurred in adequately preparing and prosecuting a case. This includes, but is not limited to, the reasonable fees for attorneys and expert witnesses, and the cost of reports, studies or tests reasonably needed to support the private party's case." H.R. REP. No. 1005, *supra* note 153, at 11. Arguably, therefore, the test of reasonable fees is the same test applied to reimbursable costs; *viz.*, those fees necessary for adequately preparing and prosecuting a case. *See also supra* note 163.

²³⁸ For example, the hours plaintiffs claimed for publicity campaigns, media training, and designing claims forms were largely administrative activities unrelated to the litigation. *See supra* note 206. Of course, such activities may not be compensable in any event. The courts have counselled that:

attorney's fees may be awarded for the performance of professional duties only and should not be awarded for the execution of duties more properly performed by persons other than attorneys such as trustees or receivers. . . . [I]f such awards are made, attorneys would be encouraged to perform nonprofessional duties in order to increase the size of the fee award.

In re Anthracite Litigation, 1979-1 Trade Cas. (CCH) ¶ 62,437 (M.D. Pa.), *aff'd in part, vacated and remanded in part, sub nom. Colonial Fuel Co. v. Blue Coal Corp.*, 612 F.2d 571 (3d Cir. 1979). *See also In re Cement and Concrete Antitrust Litigation*, 1980-1 Trade Cas. (CCH) ¶ 63,798, at 78,266 (D. Ariz. 1980).

²³⁹ Although there is no question that *Underwood* and *Dubose* were civil actions brought against the United States, plaintiffs' counsel sought compensation for time spent opposing motions by intervenors, quarreling among themselves and resolving other disputes in which HUD took no part. *See supra* note 206. The time spent on internecine quarrels could be dismissed as unproductive and other courts have discounted time spent on issues in which plaintiffs did not prevail against the fee paying party. *See, e.g., Firebird Soc'y v. Members of Bd. of Fire Comm'rs*, 556 F.2d 642, 644 (2d Cir. 1977). *Cf. Hensley v. Eckerhart*, 461 U.S. 424 (1983).

²⁴⁰ Once the settlement occurred, both parties and the court shared the same interest — to effectuate the agreement. Of the thousands of hours spent on settlement activities, few were spent on matters in dispute between the parties. In conducting publicity campaigns or pilot projects, for example, plaintiff's counsel participated in activities both parties agreed should be undertaken with few disputes as to the details. *See HUD Post-Hearing Brief, Dubose v. Pierce*, 579 F. Supp. 937 (D. Conn. 1983).

²⁴¹ The activities took place "in a civil action" in the sense that the Committee of Counsel submitted applications to the *Underwood* court detailing all expenses, bills and other settlement activities. The court signed them without review unless HUD objected. *See id.*

²⁴² The alternative procedure would have been to have HUD program officials, who are paid government salaries, or a special master paid from the settlement fund, perform the administrative

of the Act would find such activities unrelated to congressional concern that plaintiffs be able to afford their day in court; an expansive view would treat the EAJA on a par with civil rights legislation designed to vindicate plaintiffs' broader interests. The EAJA's "fees incurred" language and the limited statutory purpose of the Act suggest that the *Underwood* fees should have been more closely scrutinized. At the very least, the district court should have refused to compensate activities which a paying client would have disallowed.²⁴³

Fourth, in requiring that the party seeking fees "submit . . . an application which shows . . . the amount sought, including an itemized statement from any attorney . . . stating the actual time expended and the rate at which fees and other expenses were computed," the EAJA imposes a requirement for detailed documentation exceeding that of other fee shifting statutes.²⁴⁴ While the courts have not interpreted that provision to bar reconstructed records,²⁴⁵ the *Dubose* court reduced by ten percent the otherwise compensable fees claimed and barred all time for work on fee motions because the use of reconstructed records had substantially increased the argument, and the level of confusion on their motions.²⁴⁶ In *Underwood*, one of plaintiffs' attorneys had simply estimated that, for a two year period, her hours were equal to that of the other attorney on the case.²⁴⁷ The court also reduced these hours by ten percent, but did so to account not only for the difficulties in documentation, but challenges to compensability as well.²⁴⁸ If the statutory requirement of an "itemized statement" showing "the actual time expended" is to have meaning, it must be interpreted, at the very least, to disallow estimates rejected in other fee litigation.²⁴⁹ Yet, here again, the courts decided the issue without addressing the statutory language. The rigorous analysis required by the EAJA would bar "estimates" and would recognize only itemized reconstructions of the "actual time expended."

Although the district courts in *Underwood* and *Dubose* reached different conclusions about the compensability of counsel's activities, they did so without linking their conclu-

activities. Plaintiffs' lawyers performed these tasks because the legal services attorneys were in a position to volunteer their time and both parties were convinced that this provided the least expensive alternative. See *supra* note 205. The availability of attorneys' fees for the settlement activities was not essential to plaintiffs' ability to pursue the litigation or to vindicate their rights. Indeed, had plaintiffs been paying their attorneys it is questionable that they would have agreed to such high priced performance of administrative activities. See *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

²⁴³ The *Underwood* court's ten percent across the board reduction made it impossible to tell which activities the court compensated. While such an across the board reduction may be appropriate to deal with claims of excessive time spent or inadequate documentation, it frustrates itemized review of the fee eligibility of particular activities.

²⁴⁴ 28 U.S.C. § 2412(d)(1)(B) (1982) (emphasis added).

²⁴⁵ See *supra* note 82 and accompanying text.

²⁴⁶ 579 F. Supp. at 957.

²⁴⁷ See *supra* note 206. Although there was little real dispute as to whether the attorney spent the time claimed, there was no way to determine the compensability of those hours particularly since the other attorneys' time was set forth in broad categories which frustrated effective review. For non-EAJA cases rejecting "mere citing of hours" or "casual after the fact estimates," see *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982); *Lindy I*, 487 F.2d at 167; *Lockheed Minority Solidarity Coalition v. Lockheed Missiles and Space Co.*, 406 F. Supp. 828, 831 (N.D. Colo. 1976).

²⁴⁸ See *supra* notes 234 and 243.

²⁴⁹ Cf. *supra* note 247 and cases cited therein.

sions to the EAJA's specific requirements or limited purposes. The Act's express provisions, along with its legislative history, require at least a more rigorous application of existing principles, coupled with an insistence that fees be incurred by prevailing parties, for activities necessary to the instant litigation, and that the hours claimed be appropriately documented.²⁵⁰ The district court's opinion in *Dubose*, which acknowledged the limiting statutory language and scrutinized counsel's claims, made some effort in that direction; the two *Underwood* opinions gave no recognition that the EAJA differed from any other fee shifting statute.

2. Hourly Rates

Central to the EAJA's fee restrictions is the limitation of hourly rates to \$75 per hour "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."²⁵¹ The sharpest differences between the *Underwood* and *Dubose* district court decisions concerned these courts' treatment of the EAJA's exceptions to the \$75 per hour maximum rate. While the district court in *Underwood* expanded the exceptions to all but eliminate the rule, the lower court in *Dubose* narrowly circumscribed application of the exceptions.

In *Underwood*, the district court justified fees of up to \$120 per hour and a multiplier of 3.5 with the cursory observation that "[f]ew attorneys possess the special skills and qualifications needed to handle successfully the litigation and settlement activities required by the case" and concluded that "[o]ther special factors justify a fee award in excess of \$75 per hour."²⁵² In discussing "other special factors," the district court assumed that Congress intended the phrase to include all factors ordinarily considered in setting fees.²⁵³ The court listed the *Kerr* factors,²⁵⁴ adopted by the Ninth Circuit from *Johnson v.*

²⁵⁰ Many of the same issues arise in non-EAJA cases without specific statutory direction for resolution. See, e.g., *supra* note 82 and cases cited therein (limiting the use of reconstructed records and estimated hours). Nonetheless, the specific statutory language set forth above requires a determination within the context of the EAJA as a matter of statutory construction.

²⁵¹ 28 U.S.C. § 2412(d)(2)(A) (1982).

²⁵² C.A. No. 79-1318-HP, slip. op. at 2 (C.D. Cal. Feb. 3, 1983).

²⁵³ Plaintiffs argued on appeal that the term "special factors" is a term of art referring to the so-called "*Johnson*" or "*Kerr*" factors. Their argument is unpersuasive. First, the term "special factors" is too general a term to be treated as a term of art without some specific indication of congressional intent.

Second, the *Johnson* or *Kerr* guidelines — or for that matter the *Copeland* or *Lindy* guidelines — are not referred to as "special factors" sufficiently often or uniformly to be treated as a term of art. Indeed, the fact that they vary from circuit to circuit undercuts such treatment.

Third, the statutory formulation, referring to "special factors, such as limited availability of qualified attorneys for the proceeding involved," suggests that the relevant factors are to be of a kind like the "limited availability of qualified attorneys." See, e.g., *United States v. Phillipp Overseas, Inc.*, 651 F.2d 747, 751 (C.C.P.A. 1981), applying the doctrine of *ejusdem generis* to statutory construction.

Fourth, the proposed construction would frustrate the congressional efforts to restrain fees without advancing the congressional interest in enhancing access to the courts. See *supra* notes 172-75 and accompanying text.

²⁵⁴ See *Action on Smoking and Health v. Civil Aeronautics Bd.*, 724 F.2d 211 (D.C. Cir. 1984); *supra* notes 178-90 and accompanying text. See also *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976) (citing *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974)). The *Kerr* factors are:

Georgia Highway Express, and applied them without further reference to the EAJA.²⁵⁵

The *Kerr-Johnson* factors, unlike the *Copeland-Lindy-Grinnell* factors, do not distinguish between the lodestar and the multiplier, and the *Underwood* court did not identify which of the twelve factors justified fees above \$75 per hour, which justified the hours compensated, or which justified compensation at a basic hourly rate.²⁵⁶

In contrast, the district court in *Dubose* limited its deliberations to the statutorily specified exceptions of increases in the cost of living and the availability of qualified counsel, finding that neither justified an exception to the fee cap.²⁵⁷ Although the court did not specifically reach the issue of whether other "special factors" might justify higher rates, its consistently narrow construction of the act suggests that it would have rejected the wholesale incorporation of the *Grinnell* factors.²⁵⁸

(1) the time and labor required; (2) the novelty and difficulty of the question involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

526 F.2d at 70.

²⁵⁵ *Underwood*, C.A. No. 79-1318-HP, slip. op. at 2-4 (C.D. Cal. Feb. 3, 1983). Examination of the individual factors the district court considered demonstrates no sensitivity to EAJA concerns. First, the court considered the novelty and difficulty of the issues. The Supreme Court ruled in *Blum* that since this factor influences the hours compensated, it does not justify lodestar enhancements. See *supra* note 132 and accompanying text. The same reasoning should preclude use of this provision to justify fees above \$75 per hour unless tied to a demonstration that unusual expertise was required. See *infra* note 262. Second, the court cited the "contingent nature of the fee and the undesirability of the case," observing that "when this case was filed, a fee award . . . was speculative and contingent" and concluding that because of the poor fee prospects and the time needed to complete the case "most lawyers would view this case as undesirable." *Underwood*, slip op. at 3-4. The district court analysis applies to every case filed by indigents; the EAJA, with its \$75 per hour fee cap, was intended to remedy the problem. The court failed to explain why plaintiffs' indigency compelled fees above \$75 per hour. See *infra* note 259. Third, the court mentioned the work and ability of counsel, the amount involved, and the results obtained. Slip op. at 4. All three factors go to the hours compensated, and to a lesser extent to the prevailing hourly rates. None justify enhancements to the lodestar, see *Blum*, 104 S. Ct. at 1548-50 (discussed *supra* notes 129-37 and accompanying text), and none in itself justifies an exception to the \$75 per hour limit. Finally, the court considered the customary fees and awards in other cases to establish prevailing market rates. *Underwood*, slip op. at 4.

²⁵⁶ *Battles Farm Co. v. Pierce*, No. 76-393 (D.D.C. April 25, 1985), another related operating subsidy case. Here, the court, citing *Blum*, held, "[r]esults obtained and the quality of representation, like the novelty and complexity of the issues, will generally be subsumed within other factors used to calculate a reasonable fee and will not normally 'provide an independent basis for increasing the fee award.'" *Id.* (citing *Blum v. Stenson*, 104 S. Ct. 1541 (1984)). The *Battles Farm* court accordingly failed to award a lodestar adjustment while permitting fees of \$85 per hour justified by inflation since 1981.

²⁵⁷ 579 F. Supp. at 953, 958. The *Dubose* court concluded that "[s]ince fees are sought almost entirely for work done before the Act's effective date, it would be illogical to award a higher rate based on an increase in the cost of living." *Id.* at 958. *Accord*, A.S.H., 724 F.2d at 218.

²⁵⁸ The *Dubose* court characterized the *Underwood* opinion as finding an exception based on the scarcity of counsel, and it stated that *Dubose's* counsel did not raise any other "special factors," so it did not specifically reach the issue of whether the *Johnson* or *Kerr* factors could be considered.

Even in applying the statutorily specified provision for a scarcity of qualified counsel, however, the district courts in *Underwood* and *Dubose* demonstrated dramatically different approaches. In finding a limited availability of counsel, the *Underwood* court observed that "[f]ew attorneys possess the special skills or qualifications needed to handle successfully the litigation and settlement activities required by this case."²⁵⁹ In sharp contrast, the district judge in *Dubose* concluded:

I interpret the exception for "the limited availability of qualified attorneys" to apply only when the party, because of such limited availability, has actually paid in excess of \$75 per hour. Accordingly the exception does not apply here, where the clients are non-fee paying.²⁶⁰

Unlike the *Underwood* district court opinion, which makes no effort to assess the effect of the \$75 per hour limit on access to the courts, the lower court's ruling in *Dubose* is consistent with the congressional effort to limit the exception to those cases where the fee cap would interfere with the statute's purposes. But such a construction still conflicts with the congressional admonition that fees be set in accordance with prevailing market rates irrespective of the "fee arrangement between attorney and client."²⁶¹

The better construction is to limit the exception to cases where the prevailing party demonstrates that market rates for a particular proceeding preclude qualified, nonaltruistic representation except at fees greater than \$75 per hour. In a specialized antitrust or patent proceeding, for example, a party prevailing against the United States should be able to make such a showing, and the court could then award prevailing market rates even to an attorney acting pro bono. To justify fees like those awarded in *Underwood*, a court should have to find that the "special skills and qualifications" counsel possessed

579 F. Supp. at 953, 958. The court also rejected plaintiffs' claim that a multiplier was justified even if authorized by statute. *Id.* at 952, 953.

²⁵⁹ The full statement of the *Underwood* court observed that:

The litigation was complex and protracted. Few attorneys possess the special skills and qualifications needed to handle successfully the litigation and settlement activities required by this case. Thus, a fee in excess of \$75 per hour is justified.

C.A. No. 79-1318-HP, slip op. at 2 (C.D. Cal. Feb. 3, 1983). The *Underwood* plaintiffs had argued that they were entitled to higher fees because of their "special qualifications," principally in the area of "poverty law," and their "skill" and "patience" in dealing with "a large and unresponsive bureaucracy." See *supra* notes 208 and 210. Although they introduced affidavits from attorneys in corporate practice commanding rates above \$75 per hour, they made no effort to establish that attorneys with their special skills and qualifications were unavailable except at such rates. Instead, they tried to establish that there was a limited availability of attorneys willing to represent indigent clients without fee. See *supra* note 207. The court of appeals noted these district court findings and affirmed the hourly rates without analysis of the basis for the district court's conclusions. 761 F.2d at 1347.

²⁶⁰ 579 F. Supp. at 958. *Cf.* New York Ass'n for Retarded Children v. Carey, 711 F.2d 1136 (2d Cir. 1983).

²⁶¹ H.R. REP. NO. 1418, *supra* note 153, at 15. The *Dubose* limitation of the exception to cases where the client has actually paid in excess of \$75 per hour is analogous to the limitation of fee awards to clients who have actually incurred fees. The courts have overwhelmingly ruled that attorneys are entitled to prevailing market rates regardless of any fees their clients were actually charged. See, e.g., *Dubose*, 579 F. Supp. at 947; San Filippo v. Secretary of Health and Human Services, 564 F. Supp. 173, 174-77 (E.D.N.Y. 1983); Kauffman v. Schweiker, 559 F. Supp. 372, 376 (M.D. Pa. 1983); Hornal v. Schweiker, 551 F. Supp. 612, 615-17 (M.D. Tenn. 1982). *Cf.* Blum v. Stenson, 104 S. Ct. 1541 (1984).

were necessary to provide competent representation of their clients and unavailable to parties able to pay \$75 per hour.²⁶²

Even the determination of necessary skills, however, would place the *Underwood* and *Dubose* courts in conflict. Both cases raised the identical legal issue. Both cases were decided on motions without a trial or extensive discovery and both cases were resolved by the same settlement.²⁶³ Yet, the *Underwood* court found the case "complex and protracted" requiring "special skills and qualifications" while the *Dubose* court concluded that "the case presented a relatively simple question," that "HUD's unreasonable position made this an easy case for plaintiffs," and that "an unusually high degree of legal talent was not required."²⁶⁴

These diametrically opposed factual conclusions cloak an issue of statutory construction: in an otherwise straightforward legal action, can a complicated settlement justify an exception to the \$75 per hour maximum? Implicitly, the *Underwood* court answered, "yes." It characterized the case as a whole as "complex and protracted" by describing the settlement activities alone.²⁶⁵ The *Dubose* court reached the opposite conclusion. It rejected the settlement as irrelevant, observing that "the settlement administration, even if performed quite well, was not primarily the work of a lawyer."²⁶⁶

Again, a court should instead ask whether adequate representation of the prevailing party's interests required counsel with skills unavailable at \$75 per hour. In *Underwood*

²⁶² Alternatively, the court could have found that because *Underwood* plaintiffs were indigent, they could secure only contingent representation and contingent representation was unavailable at \$75 per hour. The *Underwood* plaintiffs did not attempt to make either showing. The court in *A.S.H.*, 724 F.2d at 217-18, discussed this issue, stating that: "[t]he limited availability of counsel provision is directed at another unusual situation: where specialized legal services cannot be obtained in the market for \$75 or less." The *A.S.H.* court then concluded that the appellant "does have particular expertise in the area of smoking regulation; nevertheless a challenge of the [Civil Aeronautics Board] regulations as arbitrary and capricious did not necessarily require the service of attorneys with [appellant's] subject matter expertise." *Id.* at 218.

²⁶³ Compare *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976), and *Underwood v. Pierce*, 547 F. Supp. 256 (C.D. Cal. 1982), with *Dubose v. Harris*, 82 F.R.D. 582 (D. Conn. 1979).

²⁶⁴ Compare *Underwood v. Pierce*, 761 F.2d 913 (2d Cir. 1985), with *Dubose*, 579 F. Supp. at 953. The *Dubose* court concluded that:

[t]his case presented a relatively simple question of whether HUD abused its discretion in refusing to put a housing subsidy program into operation. HUD's unreasonable position made this an easy case for plaintiffs, as evidenced by the unanimous rulings of lower courts against HUD in suits across the country Because an unusually high degree of legal talent was not required in this case, there was no dearth of lawyers who could have achieved similar results.

Id. at 953 (citation omitted). *Underwood* was more complicated only in that it was a nationwide rather than a statewide class action; it was easier in that it was filed later with more favorable precedent in support of plaintiffs' position and decided within three months of filing on the basis of cross-motions for summary judgment. *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976).

²⁶⁵ In describing the complexity of the case, the court found that:

[t]he overall plan of administration required counsel to develop a unique formula for distribution of funds, to create effective and fair claims processing procedures, to institute complex fraud control systems, to launch an extensive media campaign to locate class members, and to carry out other programs, all tailored especially to this case.

C.A. No. 79-1318-HP, slip op. at 3 (C.D. Cal. Feb. 3, 1983).

²⁶⁶ 579 F. Supp. at 955. The settlement activities in the two cases were identical since the *Underwood* Committee of Counsel, in which *Dubose* counsel participated, administered the settlement for all eligible tenants. See *supra* note 205.

and *Dubose*, vindication of plaintiffs' interests did not require that plaintiffs' attorneys administer the settlement nor did the settlement require extraordinary legal talent.²⁶⁷ Thus, the EAJA's purpose would not have been frustrated by observation of the \$75 per hour limit.

In reviewing the hourly rates awarded in *Underwood*, a final statutory question concerns the EAJA's admonition that the "amount of fees . . . shall be based upon prevailing market rate for the *kind and quality* of the services furnished . . ."²⁶⁸ To establish market rates,²⁶⁹ the *Underwood* plaintiffs introduced affidavits testifying to the prevailing rates for lawyers with their counsel's educational background engaged in traditional corporate practice and then uniformly applied these rates to counsel's varied settlement activities.²⁷⁰ The *Underwood* plaintiffs successfully maintained that most attorneys charge a uniform rate for their services.²⁷¹ Defendants observed that no paying client would have elected to have their attorneys, who had no experience in administering complex settlements, perform such tasks at rates reflecting their litigation expertise.²⁷² Given the fact that much of the work involved in *Underwood* would ordinarily have been performed by a special master or by nonlawyers, the statute — and the market — should have been interpreted to require a separate determination of prevailing rates for counsel's settlement activities.²⁷³

At the heart of the EAJA calculation of hourly rates is an effort to replicate prevailing market rates. Neither the expansive award of the California court nor the more rigorous calculations of the Connecticut court remained entirely true to the economic calculus that the statute compels. Instead both decisions demonstrated the tendency of the courts

²⁶⁷ Neither the *Underwood* court, see *supra* notes 259 and 265, nor the *Underwood* plaintiffs, see *supra* note 210, were able to establish that the settlement required extraordinary legal skills. Moreover, even if it did, plaintiff's counsel claimed no experience in administering complex settlements. Declarations of Mary S. Burdick and Patricia M. Tenoso, *Underwood v. Pierce*, C.A. No. 79-1318-HP, (C.D. Cal. Feb. 3, 1983). In contrast, the two members of the Committee of Counsel who could claim such superior qualifications agreed to serve pro bono. See Memorandum on Behalf of Statewide Tenant Class Certified in *Dubose v. Harris* Re: Appointment of a Fourth Member to the Committee of Counsel at 6-7, *Dubose v. Harris*, 82 F.R.D. 582 (D. Conn. 1979).

²⁶⁸ 28 U.S.C. § 2412(d)(2)(A) (1982) (emphasis added). The formulation appears to be taken from the non-EAJA cases using an hours times hourly rates formula. Cf. *Lindy I*, 487 F.2d at 167; *Grinnell I*, 495 F.2d at 471.

²⁶⁹ See *supra* notes 164-68 and accompanying text.

²⁷⁰ See *supra* notes 206 and 207 and accompanying text.

²⁷¹ See *supra* notes 64, 72 and accompanying text. While most attorneys charge a uniform rate for their services, there is a difference between the rates charged by senior lawyers from large law firms who would restrict their activities to more complex legal tasks and equally experienced lawyers from smaller practices who would undertake the full range of activities to be performed. The courts have sometimes applied uniform hourly rates and sometimes differentiated the rates for different tasks, recognizing that uniform rates should reflect the different activities performed. Compare *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 591-93 (3d Cir. 1984); *Brewster v. Dukakis*, 544 F. Supp. 1069, 1076 (D. Mass. 1982); *Cohen v. West Haven Bd. of Police Comm'rs*, 485 F. Supp. 958, 962 (D. Conn. 1980), *vacated and remanded*, 638 F.2d 496 (2d Cir. 1980); *Firebird Soc'y v. Members of the Bd. of Fire Comm'rs*, 433 F. Supp. 752, 755-56 (D. Conn. 1976), *aff'd*, 556 F.2d 642 (1977), all awarding different rates for different tasks, with *Jacquette v. Black Hawk County, Iowa*, 710 F.2d 455, 457 n.3 (8th Cir. 1983); *Blank v. Talley Industries, Inc.*, 390 F. Supp. 1, 5 (S.D.N.Y. 1975), awarding uniform rates.

²⁷² Brief for Appellant, *Underwood v. Pierce*, 761 F.2d 1342 (9th Cir. 1985).

²⁷³ The *Dubose* court did not address this issue since it awarded no fees for settlement administration. *Dubose*, 579 F. Supp. at 955 (citing *Dubose*, 82 F.R.D. at 595).

to shape their construction of the EAJA in accordance with the different philosophies of their respective circuits.²⁷⁴

3. The Multiplier

Only in addressing the issue of whether to apply a multiplier did the *Underwood* and *Dubose* courts begin to grapple with the issues of statutory construction posed by the EAJA — and in *Underwood* only on appeal. The United States District Court for the Central District of California, without acknowledging the statutory issue, had awarded the extraordinary multiplier of 3.5 with ritual reference to “the contingent nature of this case, its complexity, and, most importantly, the high quality of the Western Center’s work and the excellent results achieved.”²⁷⁵ The Ninth Circuit vacated this multiplier, ruling that:

Two important distinctions set EAJA apart from all the statutes which *Underwood* analogizes. The first is that EAJA alone places a specific dollar limit on the hourly rate to be awarded. Because the statutory limit is so precise, we refuse to inflate it by 350% without a stronger indication that Congress intended for us to do so.

Second, unlike the statutes that *Underwood* uses to illustrate her point, EAJA authorizes an award of fees against the United States. We must consider carefully the scope of the government’s waiver of its sovereign immunity. We cannot order an award that has not been “specifically and unequivocally authorized by Congress.” There is insufficient indication that Congress intended to expose the United States to compounds of the hourly rate. We therefore hold that a multiplier may not be applied to fees awarded under the EAJA.²⁷⁶

But in the same opinion, the Ninth Circuit upheld fees above \$75 per hour on the basis of “the novelty and difficulty of the issues, the contingent nature of the fee, the undesirability of the case, the expertise of counsel, the amount involved and the results obtained, and the customary fees and awards in other cases.”²⁷⁷ Thus, the court of appeals managed in a single opinion to say both that the EAJA prohibited use of multipliers to increase hourly rates and that hourly rates could be increased to compensate for the same factors justifying multipliers.²⁷⁸

²⁷⁴ The differences between *Dubose* and *Underwood* can be explained in part by the fact that their respective circuits represent polar extremes in fee calculation. The Second Circuit has been among the strictest of the circuits in awarding attorneys’ fees, closely reviewing district court awards, requiring detailed articulation of the basis for the fees awarded, and restraining the size of lodestar adjustments, see *supra* notes 82–86 and accompanying text. The Ninth Circuit, on the other hand, has been far more liberal, exercising less scrutiny over the lower courts and combining the *Johnson* and *Lindy* guidelines in a more flexible manner. See *supra* note 79.

²⁷⁵ 761 F.2d at 1347–48 (quoting *Underwood v. Pierce*, C.A. No. 79–1318–HP (C.D. Cal. Feb. 3, 1983)).

²⁷⁶ *Id.* at 1348 (citation omitted).

²⁷⁷ *Id.* at 1347 (emphasis added).

²⁷⁸ *Id.* at 1347–48. The *Underwood* district court opinion does not appear to reach this result. It based the hourly fees on a determination of prevailing market rates. *Underwood v. Pierce*, C.A. No. 79–1318–HP, slip op. at 6, 8 (C.D. Cal. Feb. 3, 1983).

The district court in *Dubose* adopted a very different approach. Without reaching the question of whether a multiplier could ever be awarded under the EAJA,²⁷⁹ the Connecticut court concluded that "[s]ince HUD's position was not substantially justified, there was no great risk of failure."²⁸⁰ The ruling suggests that it would be difficult ever to justify a multiplier under the EAJA since fees can be awarded only when the government's position is not "substantially justified." The district court also ruled that counsel's performance was not so extraordinary as to justify a multiplier without considering the standard to be applied under the EAJA.²⁸¹

While the Ninth Circuit opinion in *Underwood* and the district court opinion in *Dubose* acknowledge the statutory difficulties that multipliers pose, neither completes the analysis. For both the availability of multipliers and their method of calculation — both their procedure and substance — turn on issues of statutory construction. The EAJA mandates use of prevailing market rates; to the extent multipliers compensate for flaws in market calculations, they conflict with the statutorily prescribed methodology. If fee enhancement can be expressed as market adjustments, for example, used to translate a noncontingent hourly rate into a market rate for contingent services, then the issue becomes whether the statute permits differential treatment based on the particular attorney-client arrangement. The Ninth Circuit decision begs the ultimate statutory question so long as it permits higher hourly rates to accomplish the same end as multipliers.

IV. THE EFFECT OF SECTION 2412(b) ON FEE CALCULATION

The Equal Access to Justice Act coupled an unprecedented expansion in the government's liability for attorneys' fees with strict limitations on the availability and calculation of those fees. Both the expanded liability and the fee restrictions are essential to the statutory goal of deterring and correcting unreasonable government conduct.²⁸² At the same time, however, the EAJA enacted a separate, relatively narrow provision, Section 2412(b), waiving the government's immunity from the fees to which other litigants have long been subject. Unlike section 2412(d), section 2412(b) is neither novel

²⁷⁹ The *Dubose* court stated: "The statute does not specifically provide for a multiplier. I need not determine, however, if Congress intended to allow such an upward adjustment, because in my opinion one would not be justified." 579 F. Supp. at 952.

²⁸⁰ *Id.* The court specifically noted the "uniform success of plaintiffs against HUD across the country." *Id.* The court also implicitly rejected the *Underwood* court's assumption that the risk of litigation was irrelevant because of the unavailability of fees for prevailing counsel. *Id.*

²⁸¹ In contrast with *Underwood*, the *Dubose* court found that:

[t]he performance of counsel in this case, while quite sound, was not so extraordinary as to justify a multiplier or any higher fee Further, the extremely generous settlement which counsel obtained from HUD — amounting not to a true compromise, but rather an agreement by HUD to give plaintiffs *all* that they asked for — must have arisen not by reason of plaintiffs' especially skillful bargaining, but by HUD's realization that the adverse judicial decisions left it with no bargaining chips. Finally, the settlement administration, even if performed quite well, was not primarily work of a legal nature.

Id. at 952 (emphasis in original). See also *Battles Farms Co. v. Pierce*, No. 76-393 (D.D.C. April 25, 1985), another operating subsidy case in which a court denied a multiplier, applying the standard established in *Blum v. Stenson*, 104 S. Ct. 1541 (1984).

²⁸² See *supra* notes 146-77 and accompanying text.

nor visionary.²⁸³ It is intended only to place the United States on the same footing as any other litigant. In enacting this section, Congress explained that:

Section 2412(b) permits a court in its discretion to award fees and other expenses to prevailing parties in civil litigation involving the United States to the same extent it may award fees in cases involving other parties Thus, under this subsection cases involving the United States would be subject to the "bad faith," "common fund" and "common benefit" exceptions to the American rule against fee shifting. The United States would also be liable under the same standards which govern awards against other parties under Federal statutory exceptions, unless the statute expressly provides otherwise. This subsection clarifies the liability of the United States under such statutes as the Civil Rights Attorneys' Fees Awards Act of 1976, as well.²⁸⁴

Since awards under section 2412(b) are governed by the same standards applicable to any other party, none of the fee limitations in section 2412(d) apply.²⁸⁵ Any substantial expansion of section 2412(b) would therefore permit circumvention of the restrictions in section 2412(d) on the amount of fees.

In the *Underwood* appeal, plaintiffs argued that section 2412(b) should be read in conjunction with the Civil Rights Attorneys' Fees Awards Act²⁸⁶ to greatly expand its scope.²⁸⁷ Section 1988 of the 1976 act provides fees for parties prevailing under 42 U.S.C. sections 1981-1986, Title VI of the Civil Rights Act of 1964, and Title 14 of the Education Amendments of 1972.²⁸⁸ Section 1983, in turn, provides a statutory right of action against any person, acting under color of state law, who deprives another person of "any rights, privileges, or immunities secured by the Constitution and laws."²⁸⁹ Federal housing officials violating a federal housing act could not be held liable under section 1983 because they did not act "under color of state law." Nonetheless, *Underwood* plaintiffs argued that because a state violating the National Housing Act²⁹⁰ would be liable under section 1983 — and therefore for attorneys' fees under section 1988 — HUD should be

²⁸³ 28 U.S.C. § 2412(b) (1982) provides: The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

²⁸⁴ H.R. REP. NO. 1418, *supra* note 153, at 17.

²⁸⁵ For example, fees could be awarded even if the government position is substantially justified and they could be awarded at rates above \$75 per hour without special justification.

²⁸⁶ 42 U.S.C. § 1988 (1982).

²⁸⁷ This argument was not raised in the district court.

²⁸⁸ 42 U.S.C. § 1988 (1982) states:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

²⁸⁹ 42 U.S.C. § 1983 (1982) provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

²⁹⁰ The *Underwood* plaintiffs had challenged HUD's refusal to implement the Housing and Urban Development Act of 1974 amendments to the National Housing Act of 1937, then codified at 12 U.S.C. §§ 1701-1750jj (1976).

held liable for fees to the same extent as a state even though such a violation by HUD involves no state action and would not be actionable under section 1983.

The Seventh, Eighth, Ninth and Eleventh Circuits have since rejected such a far-reaching construction of section 2412(b). In *Lauritzen v. Secretary of the Navy*, the Ninth Circuit counseled that "[i]n construing a provision allowing fee awards against the government, we must take care not to enlarge the waiver of immunity beyond what a fair reading of the language of the statute requires."²⁹¹ The court of appeals then construed the phrase allowing fees against the government "to the same extent that any other party would be liable under the terms of any statute which specifically provides for such an award" to require that the terms of sections 1983 and 1988 be met.²⁹² The court thus concluded that, to recover fees, the prevailing party must satisfy section 1983's state action requirement. Had Congress intended otherwise, the court opined, it could have "amended section 2412(b) to make fees allowable 'in those circumstances where the court may award fees in analogous suits involving other litigants.'"²⁹³

In dismissing the *Lauritzen* plaintiffs' interpretation, the court of appeals paid particular attention to congressional policy, declaring that:

[t]he balance* struck by Congress would be upset if section 2412(b) were interpreted to allow fee awards under section 1988 in cases analogous to section 1983 suits Nearly every case alleging a constitutional or statutory violation by the federal government could be characterized as analogous to an imaginary section 1983 action. This observation applies to cases even in which it is clear that section 2412(d) is intended to be applicable.²⁹⁴

²⁹¹ 736 F.2d 550, 555-56 (9th Cir. 1984). *Accord*, *Martin v. Heckler*, 773 F.2d 1145, 1152-54 (11th Cir. 1985); *Premachandra v. Mitts*, 753 F.2d 635, 641 (8th Cir. 1985) (en banc). Since *Lauritzen* was decided while the *Underwood* appeal was pending, the Ninth Circuit rejected the *Underwood* plaintiffs' argument for fees under § 2412(b).

²⁹² 736 F.2d at 556. *Accord*, *Premachandra v. Mitts*, 753 F.2d 635, 641 (8th Cir. 1985) (en banc).

²⁹³ 736 F.2d at 556 (emphasis added). *Accord*, *Northwest Indian Cemetery Protection Ass'n v. Peterson*, 589 F. Supp. 921, 925-26 (N.D. Cal. 1983); *Unification Church v. INS*, 574 F. Supp. 93, 96 (D.D.C. 1983); *Venus v. Goodman*, 556 F. Supp. 514, 521 (W.D. Wis. 1983); *United States v. Miscellaneous Pornographic Magazines*, 541 F. Supp. 122, 129 (N.D. Ill. 1982). *See also* *League of Women Voters v. FCC*, No. 79-1562mml, (C.D. Cal. Aug. 24, 1983). One district court observed that:

Section 1988 changes the American rule only in specific instances and as to Section 1983 (unlike the other statutes Section 1988 incorporates by reference), it does so only to state actors. No private tortfeasor, even though infringing a plaintiff's rights in precisely the same way a party acting under color of state law might, is vulnerable under Section 1983 or thereby under Section 1988. Thus [plaintiff's construction] would actually render it worse off, at least to the extent that "other parties" are private citizens.

United States v. Miscellaneous Pornographic Magazines, 541 F. Supp. 122, 128 (N.D. Ill. 1982).

²⁹⁴ 736 F.2d at 557. *Accord*, *Premachandra v. Mitts*, 753 F.2d 635 (8th Cir. 1985) (en banc), where the court stated:

Adopting *Premachandra's* interpretation of section 2412(b) could render nugatory the "substantially justified" and "special circumstances" limits in section 2412(d) [W]hen section 2412 was passed, it was conceivable that all federal statutes could support section 1983 actions If so, parties could readily bypass the "substantially justified" requirement and evade the other substantive limits in subsection (d) under *Premachandra's* theory. A plain reading of the statute and its context does not support *Premachandra's* position.

Id. at 638-39 (citations omitted). *But see* *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980) (refusing to limit section 1983 to civil rights violations).

As the court acknowledged, the effect of such a broad interpretation of section 2412(b) would be to limit section 2412(d)'s fee restrictions to contract claims and government-initiated enforcement actions. Congress's careful effort to avoid the excessive cost and potential chilling effect of unbridled fees would be to no avail.

Finally, in *Lauritzen* the Ninth Circuit also refused to give "dispositive weight" to the congressional testimony of Armand Derfner of the Lawyers Committee for Civil Rights Under the Law and the American Civil Liberties Union.²⁹⁵ In order to extend section 1988 to the federal government, Mr. Derfner had proposed amending the original bill to change the section providing that the United States be liable to the same extent as "a private party" to read that the United States would be liable "in those circumstances where the court may award such fees in suits involving other litigants."²⁹⁶ Congress adopted the amendment providing for fees "to the same extent that any other party would be liable under the terms of any statute" without explanation. The court ruled that, particularly in the absence of any evidence that Congress — as opposed to Mr. Derfner²⁹⁷ — endorsed the *Lauritzen* plaintiffs' interpretation,²⁹⁸ congressional testimony could not override "a fair reading of the language of the statute."²⁹⁹

²⁹⁵ 736 F.2d at 555–56.

²⁹⁶ See S.265, 96th Cong., 2d Sess. (1980). See *Hearings: Awards of Attorneys' Fees Against the Federal Government*, *supra* note 159, at 1, 3, 9 (setting forth the bill as of August, 1979).

²⁹⁷ Armand Derfner had testified that:

[t]here is an area in which a slight drafting modification could carry out what I believe might be the intention of the committee; and that is to put the United States completely on a par as far as the enforcement of important constitutional and statutory rights.

In the Civil Rights Act of 1976 you provided that when someone, whether it be an individual or business, or whatever, sues a State or local government under 42 United States Code, section 1983, to vindicate a constitutional or Federal statutory right, that fees would be available under the *Newman v. Pegg* [*Piggie Park* sic] standard. These bills would say that the United States should pay fees — in the amendment to 28 United States Code 2412 — in those circumstances where the court may award such fees in suits involving private parties.

That doesn't say State or local government, but if the language were amended to read, in those circumstances where the court may award such fees in suits involving other litigants; it would achieve that purpose. And I think it would go even further toward putting the United States on a par with other governmental bodies.

Hearings: Awards of Attorneys' Fees Against the Federal Government, *supra* note 150, at 100. In fact, however, the language Congress adopted provided that the United States be liable to the same extent as "any other party;" language subject to a different interpretation. See *Premachandra v. Mitts*, 753 F.2d 635, 640–41 (8th Cir. 1985) (en banc); *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 589 F. Supp. 921, 925 (N.D. Cal. 1983).

²⁹⁸ An alternative reason for the amendment could have been to extend § 1988 liability to federal officials in those suits where the federal officials have been held liable for violations of title VI of the Civil Rights Act of 1964, title 14 of the Education Amendments of 1972, or for acting in concert with state officials violating § 1983. See *Shannon v. Department of Hous. and Urban Dev.*, 577 F.2d 854, 855–56 (3d Cir.), *cert. denied*, 439 U.S. 1002 (1978) (holding that sovereign immunity barred fees against the United States in title VI or title IX cases and that § 1988 did not waive that immunity). See also *NAACP v. Civiletti*, 609 F.2d 514 (D.C. Cir. 1979) (claims under §§ 1981 and 1985). Both titles apply to acts of discrimination "under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d (title VI); 20 U.S.C. § 1681(a) (title IX). Title VI and title IX and § 1983 are directed primarily at public entities. If § 2412(b) had retained the reference to "private parties," coverage under those provisions would have been questionable. See *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 589 F. Supp. 921, 926 (N.D. Cal. 1983).

²⁹⁹ *Lauritzen*, 736 F.2d at 555–56. *Accord*, *Premachandra v. Mitts*, 753 F.2d 635, 640 (8th Cir.

Although the courts initially split in their construction of section 2412(b),³⁰⁰ the weight of authority now rests with the *Lauritzen* position.³⁰¹ The most compelling reason is Congress's careful balance between fee expansion and fee restrictions.³⁰² Congress intended section 2412(d), not section 2412(b), to provide the major extension of federal fee liability. Congress had already authorized fees to encourage enforcement of federal civil rights laws and selected other federal statutes.³⁰³ There is no indication in the legislative history of a congressional effort to equate federal misapplication of federal law with state violations of civil rights.³⁰⁴ Rather, the legislative history is replete with references to the need to restrain federal regulation through the careful balance of fee incentives and restrictions in section 2412(d).³⁰⁵ Adoption of an expansive interpretation

1985) (en banc). See also *United States v. Miscellaneous Pornographic Magazines*, 541 F. Supp. 122 (N.D. Ill. 1982), in which the court stated:

It may well be that the change was motivated by a desire to expose the federal government to the same liability for a constitutional infringement (although obviously not cognizable under Section 1983) as a state government sued for the same violation under that section. But if so, Derfner was a better policy advocate than a draftsman. Such a limited revision of the language in Section 2412(b), without any explicit directive in the statute or any change in the clear thrust of Section 1988 cannot override the plain meaning of the latter provision. Arguable congressional intent must give way to unambiguous congressional language.

Id. at 129. See also *Unification Church v. INS*, 574 F. Supp. 93, 96 (D.D.C. 1983) ("To conclude that Congress intended to subject the United States to an award of attorneys' fees in any case in which federal officials are found to have misapplied federal law because states officials would be liable had they done the same thing would entail a pure implication of legislative intent which Congress was fully capable of expressing had it so meant to do."); *Venus v. Goodman*, 556 F. Supp. 514, 521-22 (D. Wis. 1983) ("Where the statutory language and its implications are clear, the court will not delve into the legislative history.")

³⁰⁰ The initial district court and Eighth Circuit panel decision in *Premachandra v. Mitts*, 548 F. Supp. 17 (E.D. Mo. 1982), *aff'd*, 727 F.2d 717, 726 (8th Cir. 1984), and the district court decision in *Lauritzen v. Secretary of the Navy*, 546 F. Supp. 1221, 1229 (C.D. Cal. 1982), have been reversed. See *Premachandra v. Mitts*, 753 F.2d 635 (8th Cir. 1985); *Lauritzen v. Lehman*, 736 F.2d 550 (5th Cir. 1984). The Second Circuit appears to have accepted an expansive interpretation of § 2412(b) in dictum, relying on the now vacated *Premachandra* and *Lauritzen* opinions. See *Boudin v. Thomas*, 732 F.2d 1107, 1114 (2d Cir. 1984). This leaves *Trujillo v. Heckler*, 587 F. Supp. 928, 931-32 (D. Colo. 1984), in support of the expansive interpretation.

³⁰¹ In addition to *Premachandra* and *Lauritzen*, see *Holbrook v. Pitt*, 748 F.2d 1168, 1176-77 (7th Cir. 1984); *Saxner v. Benson*, 727 F.2d 669, 673 (7th Cir. 1984) ("The plaintiffs' claims here, they argue, are virtually identical to the usual section 1983 action so that attorneys' fees should be allowed under color of federal as well as state law. That argument deserves credit for originality, but it is too original."); see also *supra* note 299, *infra* note 305 and cases cited therein.

³⁰² See *supra* note 294.

³⁰³ See, e.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (1982) (especially titles IV, VI and VIII).

³⁰⁴ Section 1983, after all, was adopted in 1871 to implement the mandate in the three year old fourteenth amendment "to place a restraint on the action of the states." *United States v. Harris*, 106 U.S. 629, 638 (1882). Section 1983 is the major civil rights law dealing with state actions, and state compliance with federal law is central to the act. A separate — and extensive — body of federal law governs civil rights violations by federal officials, with provisions for attorneys' fees. See *supra* note 303. Moreover, federal violations of federal law, particularly administrative agency misapplication of the laws that they are charged with administering, is a very different matter from state violations of federal law actionable under § 1983. The former involves enforcement of the supremacy clause; the latter does not. Indeed, in the *Underwood* case, it is difficult to imagine a state violation of the National Housing Act.

³⁰⁵ Indeed, an expansive interpretation of § 2412(b) would circumvent not only the limitations

of section 2412(b) would not change the law governing liability nor extend fee availability to many cases not covered by section 2412(d).³⁰⁶ Instead, such a construction would encourage wholesale circumvention of the Act's fee limitations, undercutting the careful balance at the heart of the EAJA.

CONCLUSIONS AND SPECULATION

The early indications are that the courts, in calculating fees under the Equal Access to Justice Act, are once again applying traditional doctrine to a newly authorized award. Only later will the courts adjust the rules to undo the inconsistencies.

At the time the EAJA was passed, "traditional doctrine" consisted of the lodestar/multiplier formula, developed to curb the excesses of common fund awards, adapted to aid the expansion of civil rights fees, and under appellate review to restrain the continuing multiplication of legal expenses. Traditional doctrine, however, in any of its many guises, is not well suited for EAJA fee calculation. The new statute enacted a legislative compromise balancing fee incentives for those wronged by government misconduct against the exposure of the United States Treasury and the potential chilling effect on federal action. Reflecting that balance, the Act specified that fees be set in accordance with prevailing market rates irrespective of the particular attorney-client arrangement, that fees be limited to \$75 per hour, unless "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee," and that fees be limited to the most egregious cases, in essence, those in which the government position was not "substantially justified."³⁰⁷

Despite these statutory limitations, in *Underwood v. Pierce*, a federal district court awarded hourly rates of \$120 per hour with a multiplier of 3.5 in an unthinking application of the Ninth Circuit's open-ended rules of fee calculation.³⁰⁸ In the *Underwood* appeal, the court prohibited multipliers in EAJA cases on statutory grounds, yet at the same time endorsed wholesale incorporation of traditional fee calculation factors into the EAJA. The D.C. Circuit in *A.S.H.*, which acknowledged the narrow purpose of the statutory exception providing for higher fees, nevertheless permitted the wholesale incorporation of that circuit's fee standards into the EAJA.³⁰⁹ Even in the carefully crafted *Dubose* decision, a Connecticut federal district court applied the statutory provisions more in accordance with the rigor required by the Second Circuit than with an overriding vision of the EAJA's particular purposes and concerns.³¹⁰

on the amount of fees in § 2412(d), but the provision that fees are limited to cases in which the government position is not "substantially justified." Under § 1988, fees would be available to almost every prevailing party. The most persuasive counterargument is the Derfner testimony, *viz.*, the elimination of anomalies such as the immunization of federal defendants jointly found liable with state officials under § 1983 for actions no private party could commit. See *United States v. Miscellaneous Pornographic Magazines*, 541 F. Supp. 122, 128 (N.D. Ill. 1982); *supra* note 298. Moreover, as the *Lauritzen* and *Premachandra* courts have emphasized congressional testimony by itself carries little weight. *Premachandra v. Mitts*, 753 F.2d 635, 640 (8th Cir. 1985) (en banc); *Lauritzen v. Lehman*, 736 F.2d 550, 555 (1984). See also *supra* notes 297-99.

³⁰⁶ For example, the United States could still not be held liable under § 1983 absent state action. It could only be held liable for fees in those cases where substantive liability was established under another provision.

³⁰⁷ 28 U.S.C. § 2412(b), (d) (1982). See *supra* notes 146-77 and accompanying text.

³⁰⁸ See *supra* notes 202-13 and accompanying text.

³⁰⁹ See *Action on Smoking and Health v. Civil Aeronautics Bd.*, 724 F.2d 211 (D.C. Cir. 1984).

³¹⁰ The court, for example, concluded that no multiplier was justified, that reconstructed

As EAJA fees mount, the courts are at a watershed: either they will reverse the wholesale application of existing fee guidelines to EAJA decisions, requiring a separate line of analysis consistent with the statute's distinctive provisions, or they will incorporate EAJA decisions into the mainstream of traditional fee doctrine. If the courts choose the former course, they will refine the Act's economic calculus, limiting fees to those activities necessary for adversarial representation, defining exceptions to the Act's \$75 per hour limit in terms of the market rates necessary to secure competent counsel, and awarding only higher prevailing rates, not bonuses for quality or contingency.

If the courts choose the latter course, the reasoning may bear no relation to the EAJA's peculiar concerns but the results may ultimately be similar. In guiding non-EAJA fees, the Supreme Court has reversed judgment on the propriety of contingency bonuses in statutory awards.³¹¹ If it decides the issue in the context of an EAJA case, it may well prohibit such bonuses altogether or restrict them to situations where it would be otherwise difficult to secure competent representation. Similarly, the Court has already restricted quality increases to "the *rare* case where the fee applicant offers *specific evidence* that the quality of service was *superior* . . . and that the success was *exceptional*."³¹² If the standard for quality increases becomes the standard for exceptions to the EAJA's \$75 per hour limit, the Court may well emphasize the limited nature of the quality increase and the heavy burden on the fee applicant to justify such an increase. The courts are already undertaking closer scrutiny of compensable activities, reconstructed records, estimated hourly rates and multipliers.³¹³ If EAJA cases decided under specific statutory provisions requiring such scrutiny contribute to the general body of attorneys' fee decisions, they may well accelerate the conservative trend.³¹⁴

The time is long overdue, however, for the courts to accept that attorney fee calculation is an issue of statutory construction. The Equal Access to Justice Act, more than any previous fee shifting statute, depends on fee calculations as well as fee availability to accomplish its objectives. The Act specifies the manner of calculation and the amount of the fees to be awarded. Its legislative history articulates priorities which require that fees be set in ways which depart from traditional doctrine. EAJA awards should not reflect the remedial purposes of the Civil Rights Attorneys' Fees Awards Act. Nor should conservatively calculated EAJA awards restrict the fees available to plaintiffs prevailing in antitrust class actions. The time has come for the courts to focus renewed attention on the relationship between fee calculation and the purposes each award was intended to serve.

records should be penalized, and that settlement administration should not be compensated under traditional fee doctrine. See *supra* notes 216-19 and accompanying text.

³¹¹ See *Blum v. Stenson*, 104 S. Ct. 1541 (1984); *supra* note 141.

³¹² *Blum*, 104 S. Ct. at 1549 (emphasis added).

³¹³ See *supra* notes 111-45 and accompanying text.

³¹⁴ Of course, even if the courts affirm the need for independent calculation of EAJA awards, those awards may influence non-EAJA calculations. The anomalies underlying application of contingency increases in EAJA cases afflict other statutory awards. The calculation of lodestar adjustments in terms of higher hourly rates could influence determination of such adjustments in other types of awards. Insistence on an economic rationale for exceptions to the \$75 per hour limit could determine the calculation of multipliers generally. Even acceptance of the \$75 per hour limit could set a new standard of "reasonable fees."