

Awarding Attorneys' Fees and
Managing Fee Litigation

Third Edition

Federal Judicial Center

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Alan Hirsch, Diane Sheehey & Tom Willging

Legal Editor
Kris Markarian

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Contents

Foreword, vii

Introduction, 1

I. Fee-Shifting Statutes, 5

A. Determining Whether a Fee Award Is In Order, 5

1. Was a timely fee request made?, 5
2. Is there a prevailing party or statutory discretion to award fees to a party that achieves some success?, 6
3. Is there standing to bring a claim for fees?, 17
4. Is there a liable party?, 18
5. Are there special circumstances militating against an award?, 19
6. Is there a fee waiver?, 21

B. Calculating the Amount of the Award, 23

1. What constitute fees?, 23
2. What is the method of calculating the amount of fees?, 25
3. What documentation is required?, 35
4. Should the lodestar be adjusted?, 37
5. Are there special considerations for awards to defendants?, 54
6. What are the procedural aspects of fee disputes?, 55

C. Issues on Appeal, 61

1. Timing of the appeal, 61
2. Scope of review, 64
3. May the court of appeals calculate the award?, 65

II. Common Fund and Substantial Benefit, 67

A. Common Fund, 67

B. Class Actions, 69

1. Determining whether an award is in order, 69
2. Calculating the amount of an award, 80
3. Issues on appeal, 98

C. Substantial Benefit, 98

1. Determining whether an award is in order, 101
2. Method for determining amount of award, 109
3. Issues on appeal, 109

D. Private Securities Litigation Reform Act of 1995, 110

1. Selecting class counsel, 110
2. Determining a reasonable percentage of amounts actually paid to the class, 115

III. Techniques for Managing Attorneys' Fees, 117

A. Facilitating Review of Fee Applications, 117

1. Establishing presumptively reasonable hourly rates and “no-look” fees, 118
2. Determining the appropriate percentage of a fund to award, 120
3. Sampling, 122
4. Selecting lead counsel by competitive bidding, 123
5. Requiring a pretrial estimate of fees, 125
6. Using computerized billing programs, 126
7. Requiring attorneys to categorize records and avoid inappropriate “block billing,” 126
8. Requiring defendants to submit records, 128

B. Eliminating or Streamlining Fee Hearings, 129

1. Tentative ruling, 129
2. Written declaration in lieu of testimony, 130
3. Informal conference, 131

C. General Techniques, 131

1. Setting a framework early in the case, 132
2. Local rules, guidelines, and written opinions, 132
3. Delegation, 133

For Further Reference, 137

Table of Cases (Alphabetical), 139

Table of Cases (by Court), 161

Foreword

Alan Hirsch and Diane Sheehey prepared the first edition of this monograph. Diane Sheehey prepared the second edition with assistance from Kris Markarian and Laural Hooper of the Federal Judicial Center. Tom Willging updated this third edition with assistance from Ezra Gale (University of California Hastings College of the Law, class of 2012) and Kris Markarian.

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Case law is covered through October 2014. All cites to the U.S. Code are to the 2012 edition unless otherwise specified.

Introduction

In the federal courts, attorney fee litigation arises in several contexts. Hundreds of federal civil statutes authorize fee awards to prevailing plaintiffs and, sometimes, to prevailing defendants. Bankruptcy courts must approve requests for fees for professional services, including attorneys' fees, in every Chapter 11 case and in other cases as well. In addition, common law permits courts to award fees when a suit results in a common fund or substantial benefit to a class of plaintiffs or non-parties. Judges also may award fees as a sanction against parties or attorneys for misconduct, under the court's inherent authority, or pursuant to several provisions in the Federal Rules of Civil Procedure. Finally, the Criminal Justice Act¹ authorizes compensation to court-appointed attorneys in criminal cases. Attorney fee matters constitute an important part of a federal judge's workload.

Fee awards were not always so prevalent in federal litigation. Under the traditional "American Rule," each party assumed its own legal costs.² In the nineteenth century, the Supreme Court carved out the common fund exception.³ Throughout the twentieth century, Congress and the courts created broader exceptions. Congress enacted statutes providing for the prevailing party to recover attorneys' fees from its opponent in particular kinds of actions.⁴ Invoking its inherent equity power, the Supreme Court held that attorneys' fees may be assessed against parties who act in bad faith or disobey a court order.⁵ Most significantly, in the early 1970s a number of courts ordered defendants to pay the attorneys' fees of victorious plaintiffs whose lawsuits advanced important public policies, such as environmental

1. 18 U.S.C. § 3006A(d).

2. For the history of this rule, and occasional minor departures from it, see *Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U.S. 240, 247–57 (1975).

3. See *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trustees v. Greenough*, 105 U.S. 527 (1881).

4. See, e.g., Clayton Act, § 4, 38 Stat. 731, 15 U.S.C. § 15; Truth in Lending Act, 82 Stat. 157, 15 U.S.C. § 1640(a); Fair Labor Standards Act, § 16(b), 52 Stat. 1069, as amended, 29 U.S.C. § 216(b); Civil Rights Attorney Fee Awards Act of 1976, § 2(b), 90 Stat. 2641, 42 U.S.C. § 1988(b).

5. See *Vaughan v. Atkinson*, 369 U.S. 527, 530–31 (1962) (bad faith); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426–28 (1923) (order disobeyed).

protection.⁶ But in the 1975 case of *Alyeska Pipeline Service Co. v. Wilderness Society*,⁷ the Supreme Court rejected the “private attorney general” doctrine, holding that courts may not shift a prevailing party’s fees to a losing party absent specific statutory authorization. (In dicta, the Court approved continued use of fee awards in common fund and substantial benefit cases and as a sanction for misconduct.⁸)

At the time of *Alyeska*, there were several dozen fee-shifting statutes. In its wake, such statutes proliferated, in particular, the Civil Rights Attorney’s Fees Awards Act of 1976⁹ and scores of less prominent fee-shifting statutes. Applying these statutes is often difficult. In many cases, it is unclear whether a party is entitled to a fee award. Even when an award is clearly in order, calculating the amount of the award can be complex and time-consuming. By 1983, disputes over attorneys’ fees were consuming substantial judicial resources. In the seminal case, *Hensley v. Eckerhart*,¹⁰ the Supreme Court warned lower courts not to let fee requests spawn “a second major litigation.”¹¹ However, neither the Court’s warning nor its attempted clarification of the law in *Hensley* and subsequent decisions has noticeably reduced the burden or complexity of fee awards.

This monograph addresses both statutory fee-shifting awards and common-fund/substantial-benefit awards. These awards call for distinct modes of analysis. Part I analyzes attorney fee awards under fee-shifting statutes and addresses the selection of class counsel under the Private Securities Litigation Reform Act. This part examines the procedures for requesting statutory fees; the core quest for statutory authority to make an award to a prevailing party or for a statutory grant of discretion to award fees; the type of fees or costs allowed under typical fee-shifting statutes; and the mode of calculating statutory fees, generally using a lodestar analysis and making adjustments as permitted by Supreme Court precedent.

6. See, e.g., *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Natural Res. Def. Council v. EPA*, 484 F.2d 1331 (1st Cir. 1973); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972).

7. 421 U.S. 240 (1975).

8. *Id.* at 259.

9. 42 U.S.C. § 1988.

10. 461 U.S. 424 (1983).

11. *Id.* at 437.

Introduction

Part II discusses fee awards based on the common fund doctrine and its offspring, the substantial benefit doctrine. This part explores the essential ingredients of the common fund and substantial benefit doctrines: the actions of the parties to create a fund or benefit that is valuable to a group or class. This part concerns calculating an award by identifying the benefits conferred by the litigation and, most often, choosing a percentage of the benefit to award to parties who generated that benefit.

Both Parts I and II include sections that examine procedural issues, including issues on appeal and the scope of appellate review.

Part III presents techniques for managing attorneys' fees.¹² It discusses innovative approaches judges use to facilitate review of fee applications and eliminate or streamline hearings. Broad techniques, such as the use of local rules to facilitate fact-finding and the delegation of duties to clerks and magistrate judges, are treated in this final part.

The monograph does not address compensation under the Criminal Justice Act or the Antiterrorism and Effective Death Penalty Act of 1996, or fees as a sanction for misconduct, which raise separate issues that warrant discrete treatment. Nevertheless, parts of the analysis concerning the amount of a fee award will apply to fees awarded as sanctions and fees awarded under the Criminal Justice Act.

12. The second edition of this monograph contained the section "The Obligation of Bankruptcy Courts to Examine Fee Petitions," which is not included in this edition. Review of bankruptcy fee petitions is more thoroughly covered, within a more complete discussion of bankruptcy rules and procedures, in Laura B. Bartell, *A Guide to the Judicial Management of Bankruptcy Mega-Cases* (Federal Judicial Center, 2d ed. 2009).

I. Fee-Shifting Statutes

Attorney fee disputes under fee-shifting statutes occur in numerous circumstances and raise many questions. Supreme Court and appellate court decisions establish some guiding principles for trial courts. Although the Supreme Court decisions arise in the context of a particular statute, they generally rely on principles applicable to most fee-shifting statutes.¹³ Drawing on case law, this part of the monograph addresses the questions a court must ask when analyzing a fee request.

A. *Determining Whether a Fee Award Is In Order*

The threshold question in an attorney fee case is whether any award is in order. The determination entails several discrete inquiries:

- Was a timely fee request made?
- Is there a prevailing party or statutory discretion to award fees to a party that achieves some success?
- Is there standing to bring a claim for fees?
- Is there a liable party?
- Are there special circumstances militating against an award?
- Is there a fee waiver?

1. Was a timely fee request made?

The Supreme Court has stated that a motion for fees is untimely only if it causes unfair surprise or prejudice, or violates a local rule.¹⁴ A post-judgment motion for fees is not a motion to amend or alter a judgment, and is thus not subject to the ten-day requirement of Federal Rule of Civil Procedure 59(e).¹⁵

13. See *Hensley*, 461 U.S. at 433 n.7 (“The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a ‘prevailing party.’”). With a few exceptions, the nuances unique to particular statutes (e.g., the Equal Access to Justice Act’s prohibition of fees if the government’s position was “substantially justified”) are beyond the scope of this monograph.

14. *White v. New Hampshire Dep’t of Emp’t Sec.*, 455 U.S. 445, 454 (1982).

15. *Id.* at 451–52.

Rule 54(d)(2)(B) requires motions for attorneys' fees to be filed no later than fourteen days after entry of judgment, absent a "statute or a court order."¹⁶ Five courts of appeals have held that local rules prescribing time periods for filing fee motions are court orders that preempt Rule 54's fourteen-day period.¹⁷ Another appellate court has held that Rule 54(d)(2)(B) motions are timely if filed no later than fourteen days after resolution of motions under Rules 50(b), 52(b), or 59.¹⁸

2. Is there a prevailing party or statutory discretion to award fees to a party that achieves some success?

The Supreme Court has articulated two approaches to interpreting statutes that allow awards of attorneys' fees. The first approach relates to statutes that expressly restrict awards to prevailing parties. The second approach relates to statutes that give courts discretion to award fees to parties who achieved "some degree of success on the merits"¹⁹ without necessarily meeting the standards posited for prevailing parties.

a. Prevailing plaintiffs

Interpreting a "prevailing party" statute, the Supreme Court has said that to be eligible for a fee award, a plaintiff must prevail on "any significant claim affording it some of the relief sought."²⁰ The relief cannot be merely procedural; it must reach the underlying merits of the claim and "affect[]

16. Rule 54(d)(2)(B) does not apply, however, when "the substantive law requires those fees to be proved at trial as an element of damages." Fed. R. Civ. P. 54(d)(2)(A).

17. See *Planned Parenthood of Cent. N.J. v. Attorney Gen. of State of N.J.*, 297 F.3d 253, 259 (3d Cir. 2002) ("Every Court of Appeals to have addressed the issue has decided that a local rule extending the time to file a motion for fees is a 'standing order,' and, therefore, not inconsistent with the federal rules."). See also *Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 253 F.3d 1332, 1335 (11th Cir. 2001); *Jones v. Cent. Bank*, 161 F.3d 311, 312–13 (5th Cir. 1998); *Eastwood v. Nat'l Enquirer*, 123 F.3d 1249, 1257 (9th Cir. 1997); *Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F.3d 726, 729 (7th Cir. 1995).

18. *Weyant v. Okst*, 198 F.3d 311, 315 (2d Cir. 1999).

19. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 254 (2010) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983)).

20. *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989) (rejecting law in some circuits that plaintiff must prevail on "central issue" and achieve "primary relief sought").

I. Fee-Shifting Statutes

the behavior of the defendant towards the plaintiff.”²¹ Thus, for example, the Court found that when the plaintiff’s success consisted of an appellate court decision reversing a directed verdict for the defendant and ordering a new trial (and making a favorable ruling for the plaintiff in requiring additional discovery), the plaintiff was not a prevailing party.²² In another illustrative case, the Eighth Circuit rejected a fee request when the plaintiff’s victory consisted solely of the district court’s finding that it had jurisdiction to hear the case.²³

The Supreme Court has “repeatedly held that an injunction or declaratory judgment, like a damages award, will usually” materially alter the legal relationship between the parties.²⁴ However, in *Sole v. Wyner*,²⁵ a unanimous Supreme Court held that “[p]revailing party status . . . does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case.”²⁶ Despite the temporary change, in the end there was no material change in the legal relationship of the parties.²⁷

Under the civil rights fee-shifting statute,²⁸ a plaintiff who prevails on a non-constitutional statutory claim brought pursuant to § 1983 is eligible for attorneys’ fees.²⁹

The Supreme Court has also held that an award of nominal damages confers prevailing party status on the plaintiff.³⁰ An award of nominal damages “modifies the defendant’s behavior for the plaintiff’s benefit by forcing the defendant to pay an amount of money he otherwise would

21. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (holding inmate who was improperly sentenced to disciplinary confinement by prison committee but later released on parole was not entitled to declaratory relief, and thus not a prevailing party). *See also Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (relying on *Hewitt*, holding there was no prevailing plaintiff where, by the time lower court granted formal declaratory relief, one plaintiff had died and the other was no longer in custody).

22. *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (stating “[t]he respondents have of course not prevailed on the merits of any of their [underlying] claims”).

23. *Huey v. Sullivan*, 971 F.2d 1362, 1367 (8th Cir. 1992).

24. *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012).

25. 551 U.S. 74 (2007).

26. *Id.* at 83.

27. *Id.* at 82.

28. 42 U.S.C. § 1988.

29. *Maine v. Thiboutot*, 448 U.S. 1 (1980) (per curiam).

30. *Farrar v. Hobby*, 506 U.S. 103 (1992).

not pay.”³¹ But a ruling that the plaintiff is not entitled to even nominal damages does not alter a plaintiff’s claim for fees based on obtaining an injunction.³²

In the lower courts, consensus has emerged with respect to the “prevailing party” question in certain recurring situations. The courts agree that when a party’s favorable judgment is vacated or reversed on appeal, the party ceases to be a prevailing party and a prior fee award must fall.³³ The same is generally true when the plaintiff is granted injunctive relief based on a likelihood of prevailing on the merits, but ultimately loses on the merits.³⁴

However, all circuits that have considered the question have held that the plaintiff is a prevailing party when it obtains a preliminary injunction based on its probability of success and the case becomes moot before a final judgment.³⁵ But if injunctive relief is granted only to preserve the status quo so that any eventual relief would not come too late, and the court makes no assessment of the merits of the case, the plaintiff is not a prevailing party if the case becomes moot.³⁶ In *Wyner*, the Court expressed no view on “whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees.”³⁷

31. *Id.* at 113.

32. *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012).

33. *See, e.g., Dexter v. Kirschner*, 984 F.2d 979, 987 (9th Cir. 1992); *Ladnier v. Murray*, 769 F.2d 195, 200 (4th Cir. 1985); *Harris v. Pirch*, 677 F.2d 681, 689 (8th Cir. 1982).

34. *Palmer v. Chicago*, 806 F.2d 1316 (7th Cir. 1986); *Ward v. Cnty. of San Diego*, 791 F.2d 1329 (9th Cir. 1986); *Doe v. Busbee*, 684 F.2d 1375 (11th Cir. 1982); *Smith v. Univ. of N.C.*, 632 F.2d 316 (4th Cir. 1980). *Cf. Frazier v. Bd. of Trustees of Northwest Miss. Reg'l Med. Ctr.*, 765 F.2d 1278 (5th Cir. 1985) (at least where eventual loss resulted from change in law after initial injunction was granted, plaintiff is entitled to fees).

35. *Dahlem v. Bd. of Educ.*, 901 F.2d 1508, 1512 (10th Cir. 1990); *Webster v. Sowders*, 846 F.2d 1032, 1036 (6th Cir. 1988); *Taylor v. Fort Lauderdale*, 810 F.2d 1551, 1557–58 (11th Cir. 1987); *Grano v. Barry*, 783 F.2d 1104, 1109 (D.C. Cir. 1986); *Bishop v. Comm. on Prof'l Ethics*, 686 F.2d 1278, 1290–91 (8th Cir. 1982); *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 600 (1st Cir. 1982); *Williams v. Alioto*, 625 F.2d 845, 847–48 (9th Cir. 1980); *Doe v. Marshall*, 622 F.2d 118, 119–20 (5th Cir. 1980).

36. *Libby v. Ill. High Sch. Ass'n*, 921 F.2d 96 (7th Cir. 1990).

37. *Sole v. Wyner*, 551 U.S. 74, 86 (2007).

I. Fee-Shifting Statutes

The Supreme Court has held that favorable settlements enforced through court-ordered consent decrees qualify plaintiffs for fee awards.³⁸ The key factor in the above-cited cases is that the court ordered the settlement in the form of a consent decree. In the absence of a consent decree, parties have sought fees by invoking a theory that the litigation served as a catalyst for the settlement. But the Supreme Court rejected this “catalyst theory” as a basis for awarding attorneys’ fees under two statutes granting fees to the “prevailing party” in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*.³⁹ The Court said that the term “prevailing party” is a legal term of art⁴⁰ and held that it does not “include[] a party that has failed to secure a judgment on the merits or a court-ordered consent decree”⁴¹ Furthermore, the Court stated that “[a] defendant’s voluntary change in conduct . . . lacks the necessary judicial imprimatur on the change.”⁴² Courts of appeals have extended rejection of the catalyst theory to other fee-shifting statutes that award fees to the prevailing party.⁴³

A corollary to the principle underlying *Buckhannon* is that once a consent judgment has been entered, thereby changing the legal relationship of the parties, fees incurred in enforcing a consent judgment are compensable.⁴⁴ In *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*,⁴⁵ the Supreme Court affirmed an award of fees for postconsent decree activity necessary to implement the decree. The court said that

38. *Maier v. Gagne*, 448 U.S. 122 (1980). *See also* *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546 (1986).

39. 532 U.S. 598 (2001) (holding catalyst theory not a permissible basis for attorney fee awards under Americans with Disabilities Act and Fair Housing Amendments Act).

40. *Id.* at 603.

41. *Id.* at 600.

42. *Id.* at 605.

43. *See* *Bennett v. Yoshina*, 259 F.3d 1097, 1100–01 (9th Cir. 2001) (Civil Rights Attorney’s Fees Awards Act of 1976); *Johnson v. Rodriguez*, 260 F.3d 493, 495 (5th Cir. 2001) (28 U.S.C. § 1988); *Griffin v. Steeltek, Inc.*, 261 F.3d 1026, 1029 (10th Cir. 2001) (Americans with Disabilities Act).

44. *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546 (1986). *Buckhannon*, of course, doesn’t apply to common fund cases in general and class actions in particular. Rule 23(e)’s procedure demands that a court review any class settlement, and court approval provides the judicial imprimatur demanded in *Buckhannon*.

45. 478 U.S. 546 (1986).

enforcement of the decree, whether in the courtroom before a judge or in front of a regulatory agency with power to modify the substance of the program ordered by the court, involved the type of work which is properly compensable as a cost of litigation under § 304 [of the Clean Air Act].⁴⁶

The Ninth Circuit held that attorney activity in pursuing a contempt motion was compensable in a context in which the motion, though arguably unsuccessful because it was mooted, appeared to serve as a catalyst for compliance with the original judgment.⁴⁷

With regard to Freedom of Information Act cases, Congress expressed its disapproval of the effect the *Buckhannon* case had on some administrative agencies' disclosure practices. In 2007, Congress enacted the OPEN Government Act and established in section 4 that the catalyst theory applies to Freedom of Information Act cases.⁴⁸

Plaintiffs who are successful before administrative agencies may be entitled to fees under a fee-shifting statute that refers to an "action or proceeding," provided (1) the plaintiff filed a claim in federal court, (2) the administrative proceeding was mandatory, and (3) the issue in the administrative proceeding was related to the claim that the plaintiff advanced in the judicial proceeding.⁴⁹ Seven courts of appeals have held that because the Employee Retirement Income Security Act (ERISA)'s fee-shifting provision refers only to an "action"—and omits "proceeding"—fee awards for success at the administrative phase are not allowed.⁵⁰

46. *Id.* at 558.

47. *Balla v. Idaho*, 677 F.3d 910 (9th Cir. 2012) (applying Prison Litigation Reform Act restriction on fee awards).

48. 5 U.S.C. § 552(a)(4)(E), *discussed in* *Davis v. Dep't of Justice*, 610 F.3d 750, 752 (D.C. Cir. 2010).

49. *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (interpreting terms "any action or proceeding" as used in § 706(k) of Title VII of the Civil Rights Act of 1964). *Cf. Webb v. Bd. of Educ.*, 471 U.S. 234 (1985) (holding award inappropriate because administrative proceeding was not mandatory). *See also* *N.C. Dep't of Transp. v. Crest St. Cmty. Council*, 479 U.S. 6 (1986) (holding award inappropriate when plaintiff prevailed in mandatory administrative proceedings but filed no judicial action, except to recover fees).

50. *Kahane v. UNUM Life Ins. Co. of Am.*, 563 F.3d 1210, 1215 (11th Cir. 2009); *Hahnemann Univ. Hosp. v. All Shore, Inc.*, 514 F.3d 300, 313 (3d Cir. 2008); *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1011 (8th Cir. 2004); *Rego v. Westvaco*, 319 F.3d 140, 150 (4th Cir. 2003); *Peterson v. Cont'l Cas. Co.*, 282 F.3d 112, 121 (2d Cir. 2002); *Anderson v. Procter & Gamble*, 220 F.3d 449, 455 (6th Cir. 2000); *Cann v.*

I. Fee-Shifting Statutes

Courts of appeals have consistently held that when plaintiffs lose a claim governed by a fee statute but prevail on another claim, they are not entitled to fees.⁵¹ However, these plaintiffs are entitled to fees if they prevail on another claim, and the fee-based claim is not reached (as long as it is not frivolous).⁵²

A plaintiff may be a prevailing party entitled to fees *pendente lite* rather than at the conclusion of the litigation. Courts have long had discretion to award interim fees where liability is established but no remedial order has been entered.⁵³ The Supreme Court has suggested in dicta that district courts have discretion to award interim fees whenever the plaintiff achieves success sufficient to make it a prevailing party—regardless of the stage of the litigation⁵⁴—for example, when the plaintiff receives a partial summary judgment establishing liability on one issue while other issues remain to be tried. However, interim fees generally should be granted only if they are necessary for the plaintiff to continue pursuing the lawsuit, or if the case has been unusually protracted.⁵⁵

If a plaintiff has received interim fees, but its victory on the underlying issue or issues is reversed on appeal, it may be directed to repay the money.⁵⁶ Several trial courts have conditioned interim fees on the posting of a security.⁵⁷

Carpenters' Pension Trust Fund for N. Cal., 989 F.2d 313, 316–17 (9th Cir. 1993) (ERISA).

51. *Skokos*, 440 F.3d at 962–63; *Mateyko v. Felix*, 924 F.2d 824, 828 (9th Cir. 1990); *Keely v. City of Leesville*, 897 F.2d 172, 176–77 (5th Cir. 1990); *Northeast Women's Ctr. v. McMonagle*, 889 F.2d 466, 476 (3d Cir. 1989); *Finch v. City of Vernon*, 877 F.2d 1497, 1507–08 (11th Cir. 1989); *McDonald v. Doe*, 748 F.2d 1055, 1057 (5th Cir. 1984); *Gagne v. Town of Enfield*, 734 F.2d 902, 904 (2d Cir. 1984); *Reel v. Ark. Dep't of Corr.*, 672 F.2d 693, 698 (8th Cir. 1982); *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980).

52. *Skokos*, 440 F.3d at 962–63. *See also* *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991); *Plott v. Griffiths*, 938 F.2d 164 (10th Cir. 1991); *Milwe v. Cavuoto*, 653 F.2d 80 (2d Cir. 1981).

53. *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696 (1974).

54. *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790–91 (1989).

55. *See Bradley*, 416 U.S. at 722–23; *McKenzie v. Kennickell*, 669 F. Supp. 529, 532–33 (D.D.C. 1987); *W. Side Women's Serv. v. Cleveland*, 594 F. Supp. 299, 303 (N.D. Ohio 1984).

56. There is precedent for the return of fees in common fund and bankruptcy cases. *See Mokhiber ex rel. Ford Motor Co. v. Cohn*, 783 F.2d 26 (2d Cir. 1986) (per curiam);

b. Discretionary fee-shifting under the Patent Act and other statutes

Some federal statutes explicitly grant the district court discretion to award fees to a prevailing party. For example, the Patent Act provides that “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.”⁵⁸ In *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*,⁵⁹ the Supreme Court reversed a Federal Circuit interpretation that restricted the term “exceptional cases” to those that either were litigated in a manner that would independently justify litigation sanctions or were totally baseless and litigated in subjective bad faith. The Court found the court of appeals’ approach to be “overly rigid” and unanimously held that “an ‘exceptional’ case is simply one that stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.”⁶⁰ The Patent Act gives discretion to the district court to award fees to prevailing parties in exceptional cases, and that grant of authority should not be rendered “largely superfluous” as the court of appeals’ approach would have done.⁶¹

Along similar lines, the Supreme Court interpreted a statute granting district courts discretion to award fees without mentioning the term “prevailing party” as granting the discretion to award fees to a plaintiff who achieved partial success in the litigation. In *Hardt v. Reliance Standard Life Insurance Co.*,⁶² the Court interpreted a provision in ERISA that

Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985); *In re Hepburn*, 84 B.R. 855 (Bankr. S.D. Fla. 1988); *In re Chin*, 31 B.R. 314 (Bankr. S.D.N.Y. 1984). Although the authors of this monograph found no reported cases in which parties were ordered to return fees awarded pursuant to fee-shifting statutes, courts apparently have such authority. See *People Who Care v. Rockford Bd. of Educ.*, 921 F.2d 132, 134 (7th Cir. 1991) (“court may . . . direct the plaintiffs to repay the money if they ultimately fail to establish an entitlement to relief”).

57. See *Feher v. Dep’t of Labor & Indus. Relations*, 561 F. Supp. 757, 768 (D. Haw. 1983); *Howard v. Phelps*, 443 F. Supp. 374, 377 (E.D. La. 1978); *Nicodemus v. Chrysler Corp.*, 445 F. Supp. 559, 560 (N.D. Ohio 1977), *rev’d on other grounds*, 596 F.2d 152 (6th Cir. 1979).

58. 35 U.S.C. § 285.

59. 134 S. Ct. 1749 (2014).

60. *Id.* at 1756.

61. *Id.* at 1758.

62. 560 U.S. 242 (2010).

I. Fee-Shifting Statutes

provided that “the court in its discretion may allow a reasonable attorney’s fee and costs . . . to either party.”⁶³ The plaintiff moved for a fee award based on her partial success in having her ERISA claim for disability benefits remanded to her employer’s disability insurance carrier for reconsideration. The district court awarded fees, but the court of appeals applied the “prevailing party” standard and reversed the fee award. In a unanimous opinion, the Supreme Court reversed, holding that a fee claimant need not be a prevailing party to be eligible for attorneys’ fees under ERISA. The only condition for awarding fees under the broad language of the statute is that a claimant achieve “some degree of success.”⁶⁴ In addition, the Court found that the plaintiff’s securing an order of remand of her claim to her employer’s disability insurance claims administrator after persuading the district court that there was compelling evidence of disability sufficed to meet the partial success standard.

In accord with but prior to *Hardt*, the Tenth, Eleventh, and D.C. Circuits declined to apply the *Buckhannon* rationale and applied the catalyst theory in interpreting fee-shifting statutes that award fees “whenever . . . appropriate.”⁶⁵

c. Prevailing defendants

In *Christiansburg Garment v. EEOC*,⁶⁶ the Supreme Court held that the Title VII fee-shifting statute⁶⁷ authorizes an award to prevailing defendants as well as to prevailing plaintiffs. The holding appears to apply to all fee-shifting statutes that refer to a prevailing party without specification.⁶⁸ However, the Court held that an award for the Title VII defendant

63. 29 U.S.C. § 1132(g)(1).

64. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 254 (2010) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983) (interpreting § 307(f) of the Clean Air Act, which authorizes a court to award fees “whenever it determines that such an award is appropriate.” 42 U.S.C. § 7607(f))).

65. *Sierra Club v. EPA*, 322 F.3d 718, 721–26 (D.C. Cir. 2003) (Clean Air Act); *Loggerhead Turtle v. Cnty. Council*, 307 F.3d 1318, 1325–27 (11th Cir. 2002) (Endangered Species Act); *Ctr. for Biological Diversity v. Norton*, 262 F.3d 1077, 1080 n.2 (10th Cir. 2001) (Endangered Species Act).

66. 434 U.S. 412 (1978).

67. 42 U.S.C. § 2000e-5(k).

68. See *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983) (generalizing *Christiansburg*’s holding).

requires more than a showing that the defendant is a prevailing party. The trial court must also find that the plaintiff's suit was "frivolous, unreasonable, or without foundation."⁶⁹ It need not find subjective bad faith on the plaintiff's part.⁷⁰

In *Fox v. Vice*,⁷¹ the Supreme Court held that when a plaintiff's suit involves both frivolous and non-frivolous claims, a court may grant reasonable fees to the defendant, but only for costs that the defendant would not have incurred but for the frivolous claims. The Court pointed to the district court's observations that the defendant's attorneys "would have done much the same work even if [the plaintiff] had not brought his frivolous claims," that the frivolous and non-frivolous claims "arose out of the same transaction," and that they were "inter-related."⁷² Consequently, the district court's decision to award full fees to the defendant was erroneous.⁷³

In *Fogerty v. Fantasy, Inc.*,⁷⁴ the Supreme Court rejected a requirement that a prevailing defendant under the Copyright Act of 1976⁷⁵ be held to a more stringent standard than a prevailing plaintiff. Although the language awarding attorneys' fees to a "prevailing party" under the Copyright Act and that under the Civil Rights Act of 1964 are "virtually identical," the Court stated that factors warranting different treatment of plaintiffs and defendants under Title VII were not at work under the Copyright Act.⁷⁶ The Court held that under the Copyright Act, "prevailing plaintiffs and prevailing defendants are to be treated alike . . ."⁷⁷

After the decision in *Fogerty*, the Fourth Circuit held that the more stringent *Christiansburg* standard applies to prevailing defendants under

69. *Christiansburg*, 434 U.S. at 421.

70. *Id.*

71. 131 S. Ct. 2205, 2213–17 (2011) (applying *Christiansburg* to defendant's claim for fees under 42 U.S.C. § 1988).

72. *Id.* at 2217.

73. *Id.* (vacating and remanding).

74. 510 U.S. 517 (1994).

75. 17 U.S.C. § 505.

76. The Court noted that, in contrast to the Civil Rights Act of 1964, there was no indication in the Copyright Act's legislative history that Congress intended plaintiffs and defendants to be treated differently, and that the purpose of the Copyright Act was not served by favoring plaintiffs over defendants. *See Fogerty*, 510 U.S. at 524.

77. *Id.* at 534.

I. Fee-Shifting Statutes

the Fair Housing Act,⁷⁸ and thus, in deciding whether to award attorneys' fees, a court may treat a prevailing defendant differently from a prevailing plaintiff.⁷⁹

d. Prevailing intervenors

Courts of appeals have held that fees may be awarded in favor of an intervenor.⁸⁰ The intervenor must "contribute[] importantly"⁸¹ or play a "significant role"⁸² in producing the favorable outcome. The Second Circuit rejected the contention that intervenors can recover fees only when they assert a violation of their own rights.⁸³ The fee award should reflect the intervenor's contribution; efforts that duplicate work of the original plaintiffs should not be compensated.⁸⁴

e. Prevailing pro se litigants

The Supreme Court held that under the civil rights fee-shifting statute, a pro se litigant, whether a lawyer or a layperson, is not eligible for an award of attorneys' fees.⁸⁵ The Court ruled that the word "attorney" in the Civil Rights Attorney's Fees Awards Act assumes an agency relationship.⁸⁶ Lower courts have since extended the prohibition to other fee-shifting statutes.⁸⁷ The First Circuit allowed an award of fees to a pro se

78. 42 U.S.C. § 3613(c)(2).

79. *Bryant Woods Inn, Inc. v. Howard Cnty., Md.*, 124 F.3d 597, 606 (4th Cir. 1997) ("proscriptions of the FHA draw on the same policies attending Title VII of the Civil Rights Act").

80. *Wilder v. Bernstein*, 965 F.2d 1196, 1202–04 (2d Cir.) (en banc); *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1535 (9th Cir. 1985); *Miller v. Staats*, 706 F.2d 336, 340–42 (D.C. Cir. 1983).

81. *United States v. Bd. of Educ. of Waterbury*, 605 F.2d 573, 574 (2d Cir. 1979).

82. *Donnell v. United States*, 682 F.2d 240, 246 (D.C. Cir. 1982).

83. *Wilder*, 965 F.2d at 1202.

84. *Id.* at 1204–05.

85. *Kay v. Ehrler*, 499 U.S. 432 (1991).

86. *Id.* at 435–36.

87. *See, e.g., Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1090–91 (9th Cir. 2006) (attorney–parent representing own child under Individuals with Disabilities Education Act); *Woodside v. Sch. Dist. of Philadelphia Bd. of Ed.*, 248 F.3d 129, 131 (3d Cir. 2001) (same); *Doe v. Bd. of Educ. of Baltimore Cnty.*, 165 F.3d 260, 263 (4th Cir. 1998) (same); *Burka v. HHS*, 142 F.3d 1286, 1290 (D.C. Cir. 1998) (pro se attorney litigant under Freedom of Information Act); *Ray v. U.S. Dep't of Justice*, 87 F.3d 1250, 1252

attorney litigant who also represented a co-plaintiff in a civil rights action,⁸⁸ and the Ninth Circuit held that fees may be awarded to a successful plaintiff who was represented by her spouse in a civil rights action.⁸⁹ Awarding attorneys' fees to pro se litigants who sought advice from outside counsel may be appropriate,⁹⁰ but a pro se attorney litigant is not entitled to fees for his colleagues' work.⁹¹

f. Amici curiae

Court-appointed amici curiae may be entitled to fees from a party. The D.C. Circuit set forth a two-part test: “the court must ‘appoint [] an amicus curiae who renders services which prove beneficial to a solution of the questions presented’” and “‘direct . . . (the fee) to be paid by the party responsible for the situation that prompted the court to make the appointment.’”⁹² The Fifth Circuit held that there was no common law or statutory basis for an award of attorneys' fees to amici curiae who voluntarily participated in a lawsuit.⁹³ The Ninth Circuit likewise held that amici curiae are not entitled to fees.⁹⁴ The Second Circuit has indicated in dicta that fee awards to amici curiae are not appropriate.⁹⁵ But at least

(11th Cir. 1996) (same); *SEC v. Price Waterhouse*, 41 F.3d 805, 808 (2d Cir. 1994) (pro se litigant under the Equal Access to Justice Act (EAJA)).

88. *Schneider v. Colegio de Abogados de Puerto Rico*, 187 F.3d 30, 32 (1st Cir. 1999).

89. *Rickley v. Cnty. of Los Angeles*, 654 F.3d 950 (9th Cir. 2011).

90. *Blazy v. Tenet*, 194 F.3d 90, 92 (D.C. Cir. 1999) (“pro se status does not by itself preclude the recovery of fees for consultations with outside counsel”). At least one appellate court has held that the pro se attorney litigant must demonstrate a “genuine attorney–client relationship” with outside counsel. *Kooritzky v. Herman*, 178 F.3d 1315, 1323–25 (D.C. Cir. 1999).

91. *Burka*, 142 F.3d at 1291 (no attorney–client relationship).

92. *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 854 (D.C. Cir. 1981) (quoting 4 Am. Jur. 2d *Amicus Curiae* § 7 (1969)).

93. *Morales v. Turman*, 820 F.2d 728, 731–33 (5th Cir. 1987) (noting that amici curiae never represented the class, never asked to intervene, and, in fact, would not have had standing to intervene).

94. *Miller-Wohl Co. v. Comm’r of Labor & Indus., State of Mont.*, 694 F.2d 203 (9th Cir. 1982) (no “common benefit” exception to American rule for amici curiae).

95. *Wilder v. Bernstein*, 965 F.2d 1196, 1203 (2d Cir. 1992) (“ruling that present intervenors are prevailing parties [for fee award] will not open the flood-gates to *amicus*

I. Fee-Shifting Statutes

one district court awarded fees to amici curiae who “contributed to the [p]laintiffs’ victory” and, “[h]ad th[e] case proceeded to trial, . . . could have chosen to seek leave to intervene.”⁹⁶

3. Is there standing to bring a claim for fees?

The Supreme Court has held that when a statute specifies that a fee award goes “to a prevailing party,” the award belongs to the party, not to counsel.⁹⁷ In most circumstances, who receives the award is a mere technicality. For example, the Seventh Circuit has said that a motion for fees may be made in the name of the attorney, and an award so directed. “[W]here the lawyer is acting in his capacity as the client’s representative . . . it would ‘exalt[] form over substance’ to deny the motion for fees ‘so that the ministerial function of substituting the plaintiff’ for the attorney could be accomplished.”⁹⁸

The matter is less straightforward if the court finds the attorney lacks standing to request fees. In one case, the counsel was discharged (because of the client’s displeasure with his services) before the case was settled. The Second Circuit said: “Were we to entertain [the attorney’s] claim, clients’ control over their litigation would be subject to a veto by former attorneys no longer under an obligation of loyalty”⁹⁹ In another case, the trial court granted a fee award, and ordered a check payable jointly to two attorneys and a legal services organization. The plaintiffs asked that

curiae, good samaritans, or even litigious meddlers so that they may ‘team up’ and overburden the nonprevailing party with excessive attorneys’ fees”).

96. *Russell v. Bd. of Plumbing Exam’rs*, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999). Awarding fees here “will not open the flood-gates to litigious meddlers”; requiring the amicus trade association “to move to intervene *nunc pro tunc* so as to get paid would be exalting form over substance.” *Id.* at 351 n.2.

97. *Astrue v. Ratliff*, 130 S. Ct. 2521, 2524 (2010) (interpreting § 204(d) of EAJA, 28 U.S.C. § 2412(d), and holding “a § 2412(d) fees award is payable to the litigant and is therefore subject to a Government offset to satisfy a pre-existing debt that the litigant owes the United States”). *See also* *Evans v. Jeff D.*, 475 U.S. 717 (1986), discussed *infra* text accompanying notes 129–34. Although the award of fees is to the party, the party does not have a right to keep the fees. *See* *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip.*, 89 F.3d 574, 577–79 (9th Cir. 1996).

98. *Lowrance v. Hacker*, 966 F.2d 1153, 1156 (7th Cir. 1992) (quoting *Ceglia v. Schweicker*, 566 F. Supp. 118, 120 (E.D.N.Y. 1983)).

99. *Brown v. GM*, 722 F.2d 1009, 1011 (2d Cir. 1983).

the check be made solely to the legal services organization, and the court so ordered. Over the plaintiffs' objection, one of the attorneys appealed the order. The First Circuit held that the attorney lacked standing because the appeal "was not only unauthorized by [the plaintiffs], but it was not made for their benefit."¹⁰⁰

The Seventh Circuit, although it agreed with those two decisions, permitted a fee request by an attorney who had successfully defended a judgment for his client on appeal, even though the client subsequently discharged him before the end of the litigation. There was no question that the attorney had acted with his client's approval during the appeal, and there was no ground for believing that his client objected to the fee petition.¹⁰¹

4. Is there a liable party?

Any losing defendant, including the government or government officials, can be liable for fees.¹⁰² However, plaintiffs who prevail only against government employees in their personal capacities may not recover fees from the government.¹⁰³

The Supreme Court has held that attorneys' fees may be awarded against an intervenor, but only on a showing of bad faith.¹⁰⁴ Three courts of appeals have considered whether fees may be awarded against a defendant to compensate the plaintiff for successful work in opposing an

100. *Benitez v. Collazo-Collazo*, 888 F.2d 930, 933 (1st Cir. 1989).

101. *Lowrance v. Hacker*, 966 F.2d 1153, 1157 (7th Cir. 1992) (fee claim based on state lien statute, not fee-shifting statute). *See also* *Samuels v. Am. Motor Sales Corp.*, 969 F.2d 573, 576–77 (7th Cir. 1992) (following *Lowrance*, upholding trial judge's permission for attorney to continue to represent himself with respect to fees after plaintiff won verdict and fee award, and attorney withdrew during pendency of post-trial adjudication over amount of damages and fees; attorney acted on client's behalf in securing verdict, and there was no evidence the client objected to attorney's efforts to enlarge fee award).

102. *See, e.g., Pulliam v. Allen*, 466 U.S. 522, 543–44 (1984) (holding state judges liable for fees incurred in obtaining an injunction). The basis for liability in *Pulliam* was abrogated by a 1996 amendment to 42 U.S.C. § 1983 providing that "injunctive relief shall not be granted" in an "action brought against a judicial officer for an act or omission taken in such officer's judicial capacity," with limited exceptions.

103. *Kentucky v. Graham*, 473 U.S. 159 (1985).

104. *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989).

I. Fee-Shifting Statutes

intervenor. The Fourth and Seventh Circuits affirmed a denial of fees.¹⁰⁵ The Eighth Circuit, however, affirmed an award of fees against a defendant for work by the plaintiffs in defending a court-ordered remedy against members of the plaintiff class who intervened to challenge the remedy in a desegregation case.¹⁰⁶ The Eighth Circuit distinguished this case from the Seventh Circuit case, noting that here “the plaintiffs incurred their fees in defending the remedy, which was crucial to their object in filing suit to begin with.”¹⁰⁷

5. Are there special circumstances militating against an award?

Fee awards for prevailing parties are generally discretionary under fee-shifting statutes. However, the Supreme Court has stated that an award should be given absent “special circumstances” that render one unjust.¹⁰⁸ When “discern[ing] the limits on a district court’s discretion[,]” judges should look at “‘the large objectives’ of the relevant Act, which embrace certain ‘equitable considerations.’”¹⁰⁹ In every Supreme Court case in which the defendants have argued that special circumstances exist, the Court has rejected the claim,¹¹⁰ with one notable exception involving a

105. See *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 177 (4th Cir. 1994) (“*Zipes* instructs us not to shift intervention-related expenses to the losing defendant”); *Bigby v. Chicago*, 927 F.2d 1426, 1429 (7th Cir. 1991) (affirming denial of fees where defendant had opposed intervenor’s position and issue raised by intervenors was ancillary to main litigation).

106. *Jenkins v. Missouri*, 967 F.2d 1248, 1250–52 (8th Cir. 1992) (defendant should pay expenses incurred in connection with intervenors because of “special nature of desegregation cases”).

107. *Id.* at 1251 n.2.

108. *Blanchard v. Bergeron*, 489 U.S. 87, 89 (1989) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)). *Accord* *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

109. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139–40 (2005) (quoting *Zipes*, 491 U.S. at 759).

110. See *Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 487 n.31 (1982) (plaintiffs were state-funded entities); *N.Y. Gaslight Club v. Carey*, 447 U.S. 54, 70–71 n.9 (1980) (plaintiffs were represented pro bono by public interest group); *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 710–22 (1974) (fee-shifting statute took effect after most of litigation was completed); *Newman*, 390 U.S. at 402 (defendants showed good faith).

case in which the plaintiffs recovered nominal damages.¹¹¹ Courts of appeals have followed this lead, rejecting most claimed special circumstances, including claims based on the defendant's willingness to enter into an early settlement;¹¹² the lawsuit's conferring a private benefit on the plaintiff but no larger public benefit;¹¹³ the plaintiffs' ability to pass their litigation costs on to consumers;¹¹⁴ the plaintiff's proceeding in forma pauperis while benefiting from court-appointed counsel;¹¹⁵ the failure of a consent decree to mention fees;¹¹⁶ an award of injunctive relief only;¹¹⁷ a third party's financing the plaintiffs' suit,¹¹⁸ and the routine nature of the case.¹¹⁹

Cases in which claims of special circumstances succeed generally involve highly unusual conditions. For example, the Tenth Circuit upheld a determination of special circumstances in a case in which the plaintiff won an injunction that was eventually mooted before the defendant had an opportunity to appeal, and in a virtually identical companion case, the decision for the plaintiff had been reversed on appeal.¹²⁰ In another example, the Eighth Circuit found that nuisance settlements also constitute "special circumstances" that render an award "unjust."¹²¹

111. See *Farrar v. Hobby*, 506 U.S. 103 (1992), discussed *infra* text accompanying notes 245–56.

112. *Barlow-Gresham Union High Sch. v. Mitchell*, 940 F.2d 1280, 1285–86 (9th Cir. 1991); *Cooper v. Utah*, 894 F.2d 1169, 1172 (10th Cir. 1990).

113. See, e.g., *Wheatley v. Ford*, 679 F.2d 1037, 1040 (2d Cir. 1982). *Accord Lawrence v. Bowsher*, 931 F.2d 1579, 1580 (D.C. Cir. 1991) (trial court found special circumstances where plaintiff's success was actually harmful to large class of prospective plaintiffs; court of appeals reversed, stating that prevailing plaintiff "is entitled to reasonable attorney's fees independent of the district court's view of the greater good for the greater number").

114. *Am. Booksellers Ass'n v. Virginia*, 802 F.2d 691, 697 (4th Cir. 1986).

115. *Starks v. George Court Co.*, 937 F.2d 311, 315–16 (7th Cir. 1991).

116. *El Club del Barrio, Inc. v. United Cmty. Corp.*, 735 F.2d 98, 100–01 (3d Cir. 1984).

117. *Crowder v. Hous. Auth. of Atlanta*, 908 F.2d 843, 848–49 (11th Cir. 1990).

118. *Am. Council of the Blind v. Romer*, 962 F.2d 1501, 1503 (10th Cir. 1992), *vacated and remanded on other grounds*, 113 S. Ct. 1038 (1993).

119. *Staten v. Hous. Auth. of Pittsburgh*, 638 F.2d 599, 605 (3d Cir. 1980).

120. *Dahlem v. Bd. of Educ.*, 901 F.2d 1508, 1512, 1514 (10th Cir. 1990).

121. *Tyler v. Corner Constr. Corp.*, 167 F.3d 1202, 1206 (8th Cir. 1999) (defining "nuisance settlement" as "one that is accepted despite the fact that the case against the

6. Is there a fee waiver?

Prevailing parties may waive their right to a fee award as part of a settlement agreement. Courts of appeals have established rules for determining whether fees are waived. The Third Circuit requires express stipulation of a waiver in the settlement agreement.¹²² The Ninth Circuit permits inferring a waiver from “clear evidence that . . . an ambiguous clause was intended [as a waiver] by *both* parties.”¹²³ The Second Circuit applies a less stringent standard: “a party may express its intent to waive attorneys’ fees by employing broad release language, regardless of whether that release explicitly mentions attorneys’ fees.”¹²⁴ The Third, Ninth, and Tenth Circuits require the party responsible for fees in civil rights cases to show that the settlement agreement included a release of fees.¹²⁵ However, the Eighth and D.C. Circuits place the burden on the prevailing party to show that the release did not waive fees.¹²⁶ There is also a split among circuits on how to interpret silence regarding fees. The Sixth, Ninth, and Tenth Circuits agree that silence does not equal a waiver of attorneys’ fees,¹²⁷ while the Eighth Circuit holds that it may.¹²⁸

In *Evans v. Jeff D.*,¹²⁹ the plaintiff accepted a generous settlement offer conditioned on a waiver of fees but argued on appeal that such offers placed counsel in an ethical dilemma. The Supreme Court rejected this argument, maintaining that counsel faced no ethical dilemma because there is no duty to pursue a fee award. The Court held that a fee award belongs to the party, not to counsel, and may be waived by the party.

defendant is frivolous or groundless, solely in an effort to avoid the expense of litigation”).

122. *Ashley v. Atlantic Richfield Co.*, 794 F.2d 128, 136–39 (3d Cir. 1986); *El Club del Barrio, Inc. v. United Cmty. Corp.*, 735 F.2d 98, 101 (3d Cir. 1984).

123. *Muckleshoot Tribe v. Puget Sound Power & Light Co.*, 875 F.2d 695, 698 (9th Cir. 1989).

124. *Valley Disposal, Inc. v. Cent. Vermont Solid Waste Mgmt. Dist.*, 71 F.3d 1053, 1058 (2d Cir. 1995).

125. *Ellis v. Univ. of Kansas Med. Ctr.*, 163 F.3d 1186, 1201 (10th Cir. 1999); *Muckleshoot*, 875 F.2d at 698; *El Club del Barrio*, 735 F.2d at 100–01.

126. *Wray v. Clarke*, 151 F.3d 807, 809 (8th Cir. 1998); *Elmore v. Shuler*, 787 F.2d 601, 603 (D.C. Cir. 1986).

127. See *Ellis*, 163 F.3d at n.19 and cases cited therein.

128. *Wray*, 151 F.3d at 809.

129. 475 U.S. 717 (1986).

Thus, settlements contingent on a waiver of a fee award are valid and enforceable.

At the other end of the spectrum from fee waivers, courts have expressed concerns about fees that are part of a “sweetheart” settlement, whereby the defendant pays a small amount to the plaintiff and a high amount in attorneys’ fees. A sweetheart settlement might occur in fee-shifting or common fund contexts. In *In re Bluetooth Headset Products Liability Litigation*,¹³⁰ the Ninth Circuit identified at least three “subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations”:

- (1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded;
- (2) when the parties negotiate a “clear sailing” arrangement providing for the payment of attorneys’ fees separate and apart from class funds, which carries “the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class”; and
- (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.¹³¹

The Third Circuit recommended a procedure to safeguard against this problem by insisting on “settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys’ fees. . . . [to] eliminate the situation . . . of having, in practical effect, one fund divided between the attorney and client.”¹³² The Supreme Court, however, said courts may not require this structural approach,¹³³ and courts have looked for other ways to control collusive settlements. All such approaches call for judges to evaluate the benefits of the settlement and

130. 654 F.3d 935 (9th Cir. 2011).

131. *Id.* at 947 (citations omitted). *See also* *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004); *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991).

132. *Prandini v. Nat’l Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1975).

133. *Evans*, 475 U.S. at 738 n.30.

I. Fee-Shifting Statutes

compare the portion received by the prevailing party with the share received by that party's attorney.¹³⁴

B. Calculating the Amount of the Award

Determining that a fee award is in order is only the beginning. The proper amount of the award must be calculated, and this involves several considerations:

- What constitute fees?
- What is the method of calculating the amount of fees?
- What documentation is required?
- Should the lodestar be adjusted?
- Are there special considerations for awards to defendants?
- What are the procedural aspects of fee disputes?

1. What constitute fees?

Two Supreme Court cases addressed the definition and composition of attorneys' fees. In *Missouri v. Jenkins*,¹³⁵ the Court examined compensation for paralegals and law clerks, holding that their work should be compensated at the rates at which it is billed to clients. Although the case turned on the question of what constitutes a "reasonable" fee for such services, not on whether such services are part of attorneys' fees (a point the defendant conceded), the Court made some observations relevant to the definition of fees:

Clearly, a "reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. . . . We thus take as our starting point the self-evident proposi-

134. See, e.g., *Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 925 (9th Cir. 2014); *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003).

135. 491 U.S. 274 (1989).

tion that the “reasonable attorney’s fee” provided for by statute should compensate the work of paralegals, as well as that of attorneys.¹³⁶

The Court, in *Richlin Security Service Co. v. Chertoff*,¹³⁷ extended *Jenkins*’ rationale to attorney fee awards against the federal government under the Equal Access to Justice Act (EAJA). Because section 504(b)(1)(A) of the EAJA provides for awards at “prevailing market rates,” a litigant entitled to fees under the EAJA is entitled to recover fees expended for paralegal services at the market rate for such services. The language of the statute, the Court concluded, “leaves no doubt that Congress intended the ‘reasonable cost’ . . . to be calculated from the perspective of the litigant,” and not from the perspective of the cost to the attorney.¹³⁸

In *West Virginia University Hospitals, Inc. v. Casey*,¹³⁹ the Court held that a fee-shifting statute does not authorize compensation for experts’ fees unless it expressly says that it does.¹⁴⁰ The basis of the holding was a long tradition of statutes that distinguish between experts’ fees and attorneys’ fees. The Court distinguished the case from *Jenkins* on two related grounds. First, no fee-shifting statutes treat fees for law clerks or paralegals separately from attorneys’ fees. Second, the cost of such work has traditionally been included in an attorney’s fee (even though it is now generally billed separately), whereas experts’ fees have always been treated as a separate item. The Court reaffirmed the *Casey* ruling in the context of awarding “costs” under the Individuals with Disabilities Education

136. *Id.* at 285. Rejecting the argument that the work of paralegals and law clerks should be compensated by reference to its cost to the firm, the Court said that the marketplace is the guide, and attorneys generally bill clients separately (at for-profit rates) for paralegals’ and law clerks’ work. *Id.* at 287–88. *See also* *Lipsett v. Blanco*, 975 F.2d 934, 939 n.5 (1st Cir. 1992) (“[w]hether paralegal hours may be billed at a market rate ultimately depends upon whether such a practice is common in the relevant legal market”).

137. 553 U.S. 571 (2008).

138. *Id.* at 579 (citing 5 U.S.C. § 504(b)(1)(A) (2008)).

139. 499 U.S. 83 (1991).

140. The Civil Rights Act of 1991 effectively overrode *Casey*, making fees for expert witnesses available under the civil rights fee-shifting statute. However, the Act in no way undercuts *Casey*’s holding that such fees are unavailable unless expressly authorized by statute. The EAJA is another example of a statute that expressly authorizes awards of expert witness fees. *See* 5 U.S.C. § 504(b)(1)(A) (“fees and other expenses’ includes the reasonable expenses of expert witnesses”).

Act, reasoning that the term “costs” is a “term of art” that does not include expert fees.¹⁴¹

Jenkins and *Casey* focus on determining fee components in relation to traditional billing and fee-shifting practice.¹⁴² Courts of appeals have addressed similar issues in relation to awards of costs for electronic discovery, computer-assisted legal research, and other expenses of modern litigation.¹⁴³ The determination of what constitutes a reasonable fee—in terms of the work performed by attorneys and paralegals, and their billing rates—is a somewhat different matter, treated at length below.

2. What is the method of calculating the amount of fees?

In *Hensley v. Eckerhart*,¹⁴⁴ the Supreme Court established that, in fee-shifting cases, the basis of a fee award is the “lodestar”—the number of hours reasonably expended multiplied by the applicable hourly market

141. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297 (2006).

142. See, e.g., *Davis v. San Francisco*, 976 F.2d 1536, 1557 (9th Cir. 1992) (remanding for consideration whether assorted claimed costs (e.g., filing cabinet) are normally “treated as reimbursable in a private attorney-client relationship”); *Davis v. Mason Cnty.*, 927 F.2d 1473, 1488 (9th Cir.) (affirming compensation for travel costs because “expenses incurred during the course of litigation which are normally billed to fee-paying clients” are compensable under fee-shifting statutes), *cert. denied*, 112 S. Ct. 275 (1991).

143. See, e.g., *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 261 (4th Cir. 2013) (“only the conversion of native files to TIFF and PDF formats, and the transfer of files onto CDs, constituted ‘making copies’ under [28 U.S.C.] § 1920(4)”); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 160 (3d Cir. 2012) (“only scanning and file format conversion can be considered to be ‘making copies,’ an activity that amounts to approximately \$30,000 of the more than \$365,000 in electronic discovery charges taxed in this case”); *United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 172 (2d Cir. 1996) (holding that computer-aided legal research costs are part of attorneys’ fees and may not be separately billed); *Haroco, Inc. v. Am. Nat’l Bank & Trust Co. of Chicago*, 38 F.3d 1429, 1440–41 (7th Cir. 1994) (same); *Standley v. Chilhowee R-IV Sch. Dist.*, 5 F.3d 319, 325 n.7 (8th Cir. 1993) (same).

144. 461 U.S. 424 (1983).

rate for legal services.¹⁴⁵ This is true regardless of whether the plaintiff and the attorney had a private (contingent or hourly) fee contract.¹⁴⁶

Several appellate courts have rejected lower courts' attempts to calculate fees using a method other than the lodestar.¹⁴⁷ These cases involved low damages or limited success.¹⁴⁸ The First Circuit, however, appears to have left the door open to an alternative method.¹⁴⁹

Prior to *Hensley*, many courts calculated fees by analyzing the *Johnson* factors, set out in *Johnson v. Georgia Highway Express*.¹⁵⁰ *Hensley* makes clear that the *Johnson* factors matter only as they bear on the market rate or hours reasonably expended, or, in rare cases, if they are a basis

145. *Id.* at 433. *See also* *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002) (“Thus, the lodestar method today holds sway in federal-court adjudication of disputes over the amount of fees properly shifted to the loser in the litigation.”).

146. *See* *Venegas v. Mitchell*, 495 U.S. 82 (1990) (holding § 1988 didn't prohibit contingent fee agreement in which prevailing civil rights plaintiff paid his attorney more than statutory award against defendant); *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (holding fee award under § 1988 may exceed amount dictated by contingent fee agreement).

147. *See* *Quarantino v. Tiffany & Co.*, 166 F.3d 422, 426 (2d Cir. 1998) (rejecting “billing judgment” approach—where fees are “reasonable” if rationally related to monetary recovery anticipated ex ante—and reaffirming use of lodestar); *Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94, 99–100 (2d Cir. 1997) (remanding because lodestar analysis not made); *Morales v. City of San Rafael*, 96 F.3d 359, 365 (9th Cir. 1996) (rejecting court's “reasoning” of what appropriate fee should be); *Cullens v. Ga. Dep't of Transp.*, 29 F.3d 1489, 1492–94 (11th Cir. 1994) (rejecting fees based on lodestar adjusted downward by multiplier where result appeared to be “multiple-of-damages approach”). *See also* *Konits v. Valley Stream Cent. High Sch. Dist.*, 350 F. App'x 501 (2d Cir. 2009).

148. *See infra* sections I.B.4.a.ii & iii.

149. *Coutin v. Young & Rubicam P.R., Inc.*, 124 F.3d 331, 338, 342 (1st Cir. 1997) (holding “error to forgo the lodestar” and stating “[w]hile such a departure from preferred practice will not necessarily be fatal, spurning all consideration of a lodestar places a substantial burden upon the district court to account for its actions”). *See also* *Cole v. Wodziak*, 169 F.3d 486 (7th Cir. 1999), discussed *infra* text accompanying notes 255 and 274.

150. 488 F.2d 714 (5th Cir. 1974) The *Johnson* factors are (1) time and labor required; (2) novelty and difficulty of issues; (3) skill required; (4) loss of other employment in taking the case; (5) customary fee; (6) whether fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and result obtained; (9) counsel's experience, reputation, and ability; (10) case undesirability; (11) nature and length of relationship with the clients; and (12) awards in similar cases. *Id.* at 717.

I. Fee-Shifting Statutes

for adjusting the lodestar.¹⁵¹ Only the Fifth and Eleventh Circuits clearly require consideration of these factors in each case.¹⁵²

a. Reasonable rate

The reasonable rate is generally determined by reference to the marketplace.¹⁵³ Courts agree that an attorney's customary billing rate is the proper starting point for calculating fees.¹⁵⁴ However, that rate is not always conclusive. In *Blum v. Stenson*,¹⁵⁵ the Supreme Court held that a nonprofit organization is entitled to compensation at the market rate of the legal community at large.¹⁵⁶ The D.C. Circuit extended this holding to for-profit attorneys who charge lower rates for some clients in an effort to promote the public interest.¹⁵⁷ There are other exceptions as well. Most

151. See *infra* section I.B.4 (“Should the lodestar be adjusted?”) for discussion of *Hensley*. See also *Daly v. Hill*, 790 F.2d 1071, 1078 (4th Cir. 1986) (“*Johnson* factors are to be considered . . . in determining the reasonable rate and the reasonable hours”).

152. See, e.g., *Nisby v. Court of Jefferson Cnty.*, 798 F.2d 134, 137 (5th Cir. 1986) (reversing award because court didn’t address “applicability of each of the *Johnson* factors”); *Kraeger v. Solomon & Flanagan, P.A.*, 775 F.2d 1541, 1543–44 (11th Cir. 1985) (same). In the Ninth Circuit, the *Johnson* factors are known as the *Kerr* factors. See *Kerr v. Screen Extras Guild*, 526 F.2d 67, 70 (9th Cir. 1975). The *Kerr* factors that are not subsumed in the lodestar calculation should be considered in determining whether adjustments to the lodestar are warranted. See *Morales*, 96 F.3d at 363–64 nn.8–10.

153. See, e.g., *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) (“we have consistently looked to the marketplace as our guide to what is ‘reasonable’”).

154. See, e.g., *Islamic Ctr. of Miss. v. Starkville, Miss.*, 876 F.2d 465, 469 (5th Cir. 1989); *Kelley v. Metro. Cnty. Bd. of Educ.*, 773 F.2d 677, 683 (6th Cir. 1985) (en banc); *Cunningham v. City of McKeesport*, 753 F.2d 262, 268 (3d Cir. 1985), *vacated on other grounds*, 478 U.S. 1015 (1986).

155. 465 U.S. 886 (1984).

156. The Third, Ninth, Federal, and D.C. Circuits have applied *Blum* and held a market-based award in order when fees are awarded to a salaried union attorney, provided the union deposits the fee into a segregated litigation fund. *Raney v. Fed. Bureau of Prisons*, 222 F.3d 927 (Fed. Cir. 2000) (abrogating *Devine v. Nat’l Treasury Employees Union*, 805 F.2d 384 (Fed. Cir. 1986)); *Kean v. Stone*, 966 F.2d 119, 122–24 (3d Cir. 1992); *Am. Fed’n of Gov’t Employees v. Fed. Labor Relations Auth.*, 944 F.2d 922, 937 (D.C. Cir. 1991); *Curran v. Dep’t of Treasury*, 805 F.2d 1406, 1408 (9th Cir. 1986).

157. *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1524 (D.C. Cir. 1988). In *Barrow v. Falck*, 977 F.2d 1100 (7th Cir. 1992), the Seventh Circuit distinguished *Save Our Cumberland Mountains* and held that when a lawyer charged all his clients a submarket rate, that rate trumps the general market rate. *Barrow*, 977 F.2d at 1105–06.

courts consider the forum community the proper yardstick, so an award for out-of-town counsel will not be based on the rates in their usual place of work.¹⁵⁸ Even for local counsel, if the usual rate is sharply at odds with the prevailing market rate, courts generally have discretion to use the latter.¹⁵⁹ Additionally, some courts base an award on an hourly rate lower than the attorney's usual rate if the litigation is outside the attorney's usual field of practice.¹⁶⁰

In *Blum*, the Supreme Court noted that the market takes into account variation in the skill and experience of attorneys. The reasonable rate for established, experienced practitioners is likely to be greater than the rate for new attorneys in the same market.¹⁶¹ For example, the Fourth Circuit affirmed an award based on a \$150 hourly rate even though the defendants proffered an affidavit showing that the usual rate for civil rights attorneys in South Carolina was \$50 to \$75.¹⁶² It cited counsel's

158. See, e.g., *ACLU of Ga. v. Barnes*, 168 F.3d 423, 437 (11th Cir. 1999); *Davis v. Mason Cnty.*, 927 F.2d 1473, 1488 (9th Cir.); *Ackerly Commc'ns v. Somerville*, 901 F.2d 170, 172 (1st Cir. 1990); *Polk v. N.Y. State Dep't of Corr. Servs.*, 722 F.2d 23, 25 (2d Cir. 1983). Most circuits have carved out exceptions to this rule. See, e.g., *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 179 (4th Cir. 1994) (when local attorneys are unavailable and employing out-of-town counsel is reasonable, out-of-town rates apply); *Gates v. Deukmejian*, 987 F.2d 1392, 1404–05 (9th Cir. 1992) (affirming use of out-of-town counsel's rates when attorneys in forum were unavailable, and citing cases); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 232–33 (2d Cir. 1987) (discussing exceptions). The D.C. Circuit carved out a narrow exception: Local rates do not apply when the bulk of the work is performed in the attorney's home state and that market reflects substantially lower rates. *Davis Cnty. Solid Waste Mgmt. v. EPA*, 169 F.3d 755, 759 (D.C. Cir. 1999).

159. See, e.g., *Davis v. San Francisco*, 976 F.2d 1536, 1548 (9th Cir. 1992); *Maldonado v. Lehman*, 811 F.2d 1341, 1342 (9th Cir. 1987); *Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake, Minn.*, 771 F.2d 1153, 1160–61 (8th Cir. 1985). *But see* *Gusman v. Unisys*, 986 F.2d 1146, 1150–51 (7th Cir. 1993) (lawyer's own rate is presumptive rate, and judge who departs from it "must have some reason other than the ability to identify a different average rate in the community"—e.g., "the lawyers did not display the excellence . . . implied by their higher rates" or the "plaintiff did not need top-flight counsel in a no-brainer case").

160. See, e.g., *Dejesus v. Banco Popular de Puerto Rico*, 951 F.2d 3, 6 (1st Cir. 1991); *Buffington v. Baltimore Cnty.*, 913 F.2d 113, 130 (4th Cir. 1990); *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983); *Moore v. Matthews*, 682 F.2d 830, 840 (9th Cir. 1982).

161. *Blum v. Stenson*, 465 U.S. 886, 895–96 n.11 (1984).

162. *Plyler v. Evatt*, 902 F.2d 273 (4th Cir. 1990).

I. Fee-Shifting Statutes

“vast experience and expertise” and evidence on the record “that the prevailing rate for lawyers of his ‘qualifications and experience in comparable complex litigation range [sic] from \$100 to \$250’ in South Carolina.”¹⁶³

Some courts apply different rates to different tasks, for example, a higher rate for in-court work than for out-of-court work, or different rates for the liability phase of the litigation and the remedy phase.¹⁶⁴ More often, courts apply a flat rate for all work by a particular attorney in the case.¹⁶⁵

The Third Circuit held that once a party meets its prima facie burden of establishing the “community market rate” and the opposing party does not produce contradictory evidence, the trial court does not have discretion to adjust the requested rate downward.¹⁶⁶ The Tenth Circuit held that it is an abuse of discretion to ignore a party’s evidence of a market rate and apply the rate the trial court “consistently grants.”¹⁶⁷

The *Laffey* matrix, established in 1983 by the U.S. District Court for the District of Columbia, is a tool for assessing presumptively reasonable local market rates for attorneys based on years of legal experience.¹⁶⁸ The Civil Division of the U.S. Attorney’s Office for the District of Columbia updates the rates annually to reflect changes in the Consumer Price Index (CPI) for Washington, D.C.¹⁶⁹

163. *Id.* at 278.

164. *See, e.g.,* *Leroy v. City of Houston*, 906 F.2d 1068 (5th Cir. 1990).

165. *See, e.g.,* *New Jersey v. EPA*, 703 F.3d 110 (D.C. Cir. 2012); *Davis v. San Francisco*, 976 F.2d 1536 (9th Cir. 1992); *In re Meese*, 907 F.2d 1192 (D.C. Cir. 1990); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987); *Daggett v. Kimmelman*, 811 F.2d 793 (3d Cir. 1987); *Wildman v. Lerner Stores*, 771 F.2d 605 (1st Cir. 1985); *Craik v. Minn. State Univ. Bd.*, 738 F.2d 348 (8th Cir. 1984).

166. *Washington v. Philadelphia Cnty. Ct. of Common Pleas*, 89 F.3d 1031, 1036 (3d Cir. 1996).

167. *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1256 (10th Cir. 1998).

168. *Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.D.C. 1983), *aff’d in part and rev’d in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984). The D.C. Circuit squarely approved use of the *Laffey* matrix in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1524 (D.C. Cir. 1988) (en banc), and in *Covington v. District of Columbia*, 57 F.3d 1101, 1111 (D.C. Cir. 1995). For discussion of the use of the matrix to assist in managing fee litigation, see *infra* text accompanying notes 654–58.

169. *Act Now to Stop War and End Racism Coal. v. District of Columbia*, 286 F.R.D. 145, 149 (D.D.C. 2012). For rates, see <http://www.justice.gov/usao/dc/divisions/>

The *Laffey* matrix has been applied outside of the District of Columbia, but generally in limited circumstances. For example, the Third Circuit affirmed a district court's application of a variation of the matrix in reviewing a fee award to District of Columbia attorneys.¹⁷⁰ The Seventh Circuit suggested, in dicta, that a trial court might take judicial notice of the *Laffey* matrix,¹⁷¹ and indicated that “[d]istrict courts in this Circuit have occasionally considered the Laffey Matrix when considering the reasonableness of hourly rates for fee awards.”¹⁷² The court acknowledged, however, its and other courts’ “concerns about the Matrix’s utility outside its circuit of origin.”¹⁷³ Although the Fourth and Ninth Circuits accept the *Laffey* matrix as a useful starting point—and as some evidence of hourly market rates¹⁷⁴—they expressed skepticism that it has much usefulness outside of the District of Columbia.¹⁷⁵

Laffey_matrix_2003-2013.pdf. An alternative, the *Salazar* matrix, is enhanced by the legal services component of the CPI. *Act Now to Stop War*, 286 F.R.D. at 149 (citing *Salazar v. D.C.*, 123 F. Supp. 8, 15 (D.D.C. 2000)).

170. *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 426 F.3d 694, 708–10 (3d Cir. 2005). The district court found the attorneys were entitled to be compensated at market rates exceeding those of the forum under an exception to the forum rate rule. *Id.* at 706–07.

171. *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 648 (7th Cir. 2011).

172. *Id.* at 650.

173. *Id.* at 649–50.

174. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 229 (4th Cir. 2009) (“*Laffey* matrix is a useful starting point to determine fees, not a required referent”); *Mancini v. Dan P. Plute, Inc.*, 358 F. App’x 886, 889–90 (9th Cir. 2009) (attorney “introduced sufficient evidence, by reference to the *Laffey* matrix, to demonstrate that the requested hourly rate of \$435 was reasonable in Washington, D.C. for attorneys at the highest experience level”).

175. See, e.g., *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454 (9th Cir. 2010):

[J]ust because the *Laffey* matrix has been accepted in the District of Columbia does not mean that it is a sound basis for determining rates elsewhere, let alone in a legal market 3,000 miles away. It is questionable whether the matrix is a reliable measure of rates even in Alexandria, Virginia, just across the river from the nation’s capital.

Robinson v. Equifax Info. Servs., LLC, 560 F.3d 235, 245 (4th Cir. 2009); see also *Grissom v. Mills Corp.*, 549 F.3d 313, 323 (4th Cir. 2008) (noting that the plaintiff provided “no evidence” that the *Laffey* matrix was “a reliable indicator of the hourly rates of litigation attorneys in Reston, Virginia, a suburb of Washington, D.C”).

b. *Hours reasonably expended*

The Supreme Court has said that a counsel is expected to exercise “billing judgment,”¹⁷⁶ and that district courts “should exclude from this initial fee calculation hours that were not ‘reasonably expended,’” including “excessive, redundant, or otherwise unnecessary” work.¹⁷⁷ The Court has also said, “the defendant cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.”¹⁷⁸ Two experienced judges have recommended making it a practice to compare plaintiff billing records with defendant billing records as one measure of the reasonableness of a fee request.¹⁷⁹

Lower courts have reduced fee awards when there has been duplication of services;¹⁸⁰ failure to pursue settlement prior to filing a straightforward suit;¹⁸¹ excessive total time billed considering the lack of difficulty of the case;¹⁸² excessive time billed for particular tasks;¹⁸³ use of too many

176. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc)).

177. *Id.*

178. *City of Riverside v. Rivera*, 477 U.S. 561, 580 n.11 (1986) (plurality opinion).

179. See *infra* section III.A.8. See also Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 35 (Federal Judicial Center, 3d ed. 2010) (“Another type of cross-check involves examining the defendants’ attorney fee records as a measure of what might be a reasonable number of hours or a total payment.”).

180. See, e.g., *Ackerly Commc’ns v. Somerville*, 901 F.2d 170, 171–72 (1st Cir. 1990).

181. See, e.g., *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 552 (7th Cir. 1999) (fee-paying client would have expected counsel to assess feasibility of quick settlement prior to filing suit).

182. See, e.g., *Clarke v. Frank*, 960 F.2d 1146, 1153 (2d Cir. 1992). The Second Circuit held it was not abuse of discretion to deduct hours because

[t]his was not a complex case. Clarke’s attorney took no depositions, and performed little discovery. The sole issue at trial was the amount of back pay. The trial lasted slightly more than one day. Clarke did not call any witnesses, and did not even testify. The case did not involve any novel areas of law. Clarke’s post-trial motions were neither complicated nor abstruse.

183. See, e.g., *Broyles v. Director*, 974 F.2d 508, 510–11 (4th Cir. 1992) (finding several items excessive—e.g., an hour to read brief opinion and fifteen-minute calls to clerk of court’s office, which handles most inquiries in far less time); *Smith v. Freeman*, 921 F.2d 1120, 1124 (10th Cir. 1990) (upholding reduction of compensable hours for

attorneys¹⁸⁴ or too much conferencing;¹⁸⁵ unnecessary work by a trial consultant deemed a “non-lawyer[] . . . doing lawyers [sic] work”;¹⁸⁶ publicity work;¹⁸⁷ reading or reviewing books not closely related to the case;¹⁸⁸ performance of secretarial or clerical tasks by lawyers;¹⁸⁹ and other assorted work deemed unnecessary.¹⁹⁰ The Tenth Circuit held it is not a per se abuse of discretion to award fewer hours than the defendant agrees are reasonable.¹⁹¹

The Seventh Circuit held that it was appropriate to deny fees completely when the petition for fees was “intolerably inflated” and “outrageously excessive.”¹⁹² The First Circuit reversed an award of fees because

work on fee motion: “neither the factual nor legal issues were especially complex and . . . [counsel] was thoroughly familiar with the issues”); *Ackerly*, 901 F.2d at 173 (disallowing claims for excessive photocopying and computer research); *Ustrak v. Fairman*, 851 F.2d 983, 987 (7th Cir. 1988) (38 hours preparing for oral argument “is far too much” in a short and simple case; likewise, 108.5 hours preparing fee petitions is “the tail wagging the dog, with a vengeance”); *Louisville Black Police Officers Org. v. City of Louisville*, 700 F.2d 268, 279 (6th Cir. 1983) (holding district court’s reduction of hours documented for preparation of plaintiffs’ post-trial and reply briefs was not abuse of discretion).

184. See, e.g., *Goodwin v. Metts*, 973 F.2d 378, 383–84 (4th Cir. 1992) (fees cut in half because firm used several attorneys when one or two would have sufficed); *Grendel’s Den v. Larkin*, 749 F.2d 945, 953 (1st Cir. 1984) (“we see no justification for the presence of two top echelon attorneys at each proceeding.”).

185. *In re Olson*, 884 F.2d 1415, 1429 (D.C. Cir. 1989).

186. *Davis v. Southeastern Pa. Transp. Auth.*, 924 F.2d 51, 56 (3d Cir. 1991).

187. *Halderman by Halderman v. Pennhurst State Sch. & Hosp.*, 49 F.3d 939 (3d Cir. 1995) (public relations); *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 176 (4th Cir. 1994) (same); *Greater L.A. Council on Deafness v. Cmty. Television of S. Cal.*, 813 F.2d 217, 221 (9th Cir. 1987) (publicity and lobbying); *Hart v. Bourque*, 798 F.2d 519, 523 (1st Cir. 1986) (arranging lectures and publications about case).

188. *Alberti v. Klevenhagen*, 896 F.2d 927, 932–34 (5th Cir.), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990).

189. *Lipsett v. Blanco*, 975 F.2d 934, 940 (1st Cir. 1992) (trial court improperly permitted billing of clerical work, e.g., court filings, at lawyers’ rates).

190. See, e.g., *Olson*, 884 F.2d at 1429 (disallowing hours spent on secretarial overtime, overtime dinner expense, press release, and futile lobbying to defeat bill that was sure to be enacted).

191. *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1250–51 (10th Cir. 1998).

192. *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980) (attorney requested fees for 800 hours of billable time, even though his work consisted of filing a six-page complaint and awaiting the outcome of pending Supreme Court litigation). See also *Scham v.*

I. Fee-Shifting Statutes

the requesting party's failure to cull unnecessary hours was "inexcusable."¹⁹³ The Fourth Circuit reversed an award of fees where counsel failed to separate hours spent on a complex but unsuccessful claim from hours spent on a simple, successful breach of contract claim. It found the amount requested "so outrageously excessive it shocked the conscience of the court."¹⁹⁴ In contrast, the Ninth Circuit held that, in the absence of evidence of bad faith or failure to cull hours spent on unsuccessful claims, a trial judge had no basis for denial of an entire fee petition because the amount requested shocked his conscience.¹⁹⁵

Tasks such as travel,¹⁹⁶ lobbying,¹⁹⁷ and public relations work¹⁹⁸ are compensable if they are necessary or useful in litigating the case. Moreover, reasonable work at all stages of the litigation is compensable, including prefiling work;¹⁹⁹ work on an appeal and defending against a petition for certiorari;²⁰⁰ work on a fee petition and litigating a fee dispute;²⁰¹

Dist. Courts Trying Criminal Cases, 148 F.3d 554, 558 (5th Cir. 1998) (claim for 936 hours in a case resolved on summary judgment and involving limited discovery, no court appearances, no settlement discussions, and no meetings).

193. *Lewis v. Kendrick*, 944 F.2d 949, 956 (1st Cir. 1991).

194. *Fair Hous. Council of Greater Wash. v. Landow*, 999 F.2d 92, 97, 98 (4th Cir. 1993).

195. *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1127–28 (9th Cir. 2008).

196. *See, e.g., Perotti v. Seiter*, 935 F.2d 761, 764 (6th Cir. 1991); *Dowdell v. Apopka, Fla.*, 698 F.2d 1181, 1192 (11th Cir. 1983). *But see Smith v. Freeman*, 921 F.2d 1120, 1122 (10th Cir. 1990) (affirming compensation at only 25% of standard hourly rate for travel time).

197. *See, e.g., Glover v. Johnson*, 934 F.2d 703, 717 (6th Cir. 1991); *Demier v. Gondles*, 676 F.2d 92, 93–94 (4th Cir. 1982).

198. *See, e.g., Davis v. San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992).

199. *See, e.g., Dowdell*, 698 F.2d at 1192.

200. *Cabrales v. Cnty. of Los Angeles*, 935 F.2d 1050, 1051 (9th Cir. 1991).

201. The courts are unanimous on this point but split on whether a fee request for appellate work may be brought in the court of appeals in the first instance. *Compare Yaron v. Northampton*, 963 F.2d 33, 36 (3d Cir. 1992) (may be brought before court of appeals), *and Ustrak v. Fairman*, 851 F.2d 983, 990 (7th Cir. 1988) (same), *with Crane v. Texas*, 766 F.2d 193, 195 (5th Cir. 1985) (per curiam) (may not be brought in court of appeals), *and Reel v. Ark. Dep't of Corr.*, 672 F.2d 693, 699 (8th Cir. 1982) (same), *and Souza v. Southworth*, 564 F.2d 609, 613–14 (1st Cir. 1977) (same). Some courts hold that the petition may be brought in the court of appeals, but if the court decides that a fee award is in order, it must remand the case to the trial court to calculate the amount. *See Iqbal v. Golf Course Superintendents*, 900 F.2d 227, 229–30 (10th Cir. 1990); *Finch v.*

and work in connection with post-judgment or post-decree administration, monitoring, or fee collection.²⁰²

The Third Circuit, in *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp.*,²⁰³ affirmed an attorney fee award for work performed in a separate, yet related, case even though the party assessed fees was not a party in the litigation in which the work was performed. The court stated:

[I]f the plaintiff can prove that the fees and expenses incurred in the other litigation resulted in work product that was actually utilized in the instant litigation, that the time spent on other litigation was “inextricably linked” to the issues raised in the present litigation, and that plaintiff has not previously been compensated for those fees and expenses, then the district court may include those fees and expenses in its fee award.²⁰⁴

The Eighth Circuit followed the Third Circuit’s analysis in *Gulfstream* and held that the plaintiffs in two cases that were consolidated were properly awarded attorneys’ fees equal to 90% of attorneys’ billed time.²⁰⁵

In assessing the reasonableness of fee requests, the Tenth Circuit has said that, while a district court is not bound by the billing activity of the parties, “we think it a rare case in which the district court should award significantly fewer hours than those proposed as reasonable or billed by the losing party in a civil rights suit.”²⁰⁶

City of Vernon, 877 F.2d 1497, 1508 (11th Cir. 1989); *McManama v. Lukhard*, 616 F.2d 727, 730 (4th Cir. 1980) (per curiam). The Second Circuit holds that the application should be filed in the court of appeals, which, except in simple cases, will remand it to the district court for decision. *Dague v. City of Burlington*, 976 F.2d 801, 804 (2d Cir.), *rev’d on other grounds*, 112 S. Ct. 2638 (1992).

202. See, e.g., *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1305 (11th Cir. 1988); *Spain v. Mountanos*, 690 F.2d 742, 747 (9th Cir. 1982).

203. 995 F.2d 414 (3d Cir. 1993).

204. *Id.* at 420 (and pointing out that although the defendant lacked opportunity to ensure the plaintiff’s litigation costs were “not unnecessarily escalated” in litigation to which it wasn’t party, the district court had responsibility “to award fees only for work ‘reasonably expended.’”).

205. *Pinkham v. Camex, Inc.*, 84 F.3d 292 (8th Cir. 1996). See also *infra* note 227.

206. *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1251 (10th Cir. 1998). *Cf. Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983) (“The court can look to how many lawyers the other side utilized in similar situations as an indication of the effort required.”). The court should also consider whether particular “responses [were] necessitated by the maneuvering of the other side.” *Id.*

I. Fee-Shifting Statutes

Finally, courts have held that it is improper “to engage in an *ex post facto* determination of whether attorney hours were necessary to the relief obtained.”²⁰⁷ The issue “is not whether hindsight vindicates an attorney’s time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures.”²⁰⁸

3. What documentation is required?

The burden of establishing the lodestar rests on the fee applicant, who must provide appropriate documentation of the hours spent and the market rate. If the documentation is inadequate, the district court may reduce the award accordingly.²⁰⁹

The circuits’ precise requirements or preferences for documentation differ. For example, the Eleventh Circuit has said that

the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity. A well-prepared fee petition also would include a summary, grouping the time entries by the nature of the activity or stage of the case.²¹⁰

Although the Third Circuit has agreed “that a fee petition should include ‘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,’”²¹¹ it has explicitly rejected the requirement of time summaries, stating that a chronological listing of

207. *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992).

208. *Id. Accord In re Synthroid Mktg. Litig. (Synthroid I)*, 264 F.3d 712, 718–19 (7th Cir. 2001); *Woolridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990); *Indep. Sch. Dist. v. Digre*, 893 F.2d 987, 992 (8th Cir. 1990); *Dennis v. Chang*, 611 F.2d 1302, 1308 (9th Cir. 1980).

209. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

210. *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988) (citations omitted).

211. *Rode v. Dellarciprete*, 892 F.2d 1177, 1190 (3d Cir. 1990) (quoting *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973)).

time spent per task is sufficient.²¹² A number of courts have required that such a listing not be overly general.²¹³

The D.C., First, Second, Seventh, and Tenth Circuits require contemporaneous fee records, and may substantially reduce or even deny a fee award in their absence.²¹⁴ The Fifth Circuit has said that contemporaneous fee records are the “preferred practice” but are not required.²¹⁵ The Ninth and Eleventh Circuits have held that reconstructed time records suffice if “supported by other evidence such as testimony or secondary documentation.”²¹⁶ The Eighth Circuit has said that “whether reconstructed records accurately document the time attorneys have spent is best left to the discretion of the [trial] court.”²¹⁷

To establish the market rate, the prevailing party must offer more than an affidavit showing the attorney’s usual rate; it should offer evidence that this rate is in line with the market rate in the community.²¹⁸

212. *Rode*, 892 F.2d at 1190.

213. See, e.g., *Lipsett v. Blanco*, 975 F.2d 934, 938 (1st Cir. 1992) (affirming reduction of hours where “several entries contain[ed] only gauzy generalities” too nebulous to allow opposing party to dispute their accuracy); *In re Donovan*, 877 F.2d 982, 995 (D.C. Cir. 1989) (district court properly excluded hours with “vague description[s],” such as “legal issues,” “conference re all aspects” and “call re status”); *Tomazzoli v. Sheedy*, 804 F.2d 93, 98 (7th Cir. 1986) (affirming reduction in hours where plaintiff listed hours spent on “research” without saying what was researched). See also *Domegan v. Ponte*, 972 F.2d 401, 425 (1st Cir. 1992) (criticizing “mixed entries”—the lumping together of different activities), *vacated and remanded on other grounds*, 113 S. Ct. 1378 (1993).

214. See *In re Olson*, 884 F.2d 1415, 1428 (D.C. Cir. 1989); *Lightfoot v. Walker*, 826 F.2d 516, 523 n.7 (7th Cir. 1987); *Grendel’s Den v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984); *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983); *McCann v. Coughlin*, 698 F.2d 112, 131 (2d Cir. 1983).

215. *Alberti v. Klevenhagen*, 896 F.2d 927, 931 (5th Cir.), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990). However, the court suggested that, in certain cases, the absence of such records would be grounds for reducing the requested fee. In *Walker v. HUD*, 99 F.3d 761, 773 (5th Cir. 1996), the court held that the district court’s failure to reject billing records was “clearly erroneous” where the terse listings of lumped-together activities were “inadequately documented” and “non-contemporaneous.”

216. *Frank Music Corp. v. MGM, Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989). *Accord Jean v. Nelson*, 863 F.2d 759, 772 (11th Cir. 1988), *aff’d*, 496 U.S. 154 (1990).

217. *Macdissi v. Valmont Indus.*, 856 F.2d 1054, 1061 (8th Cir. 1988).

218. See *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984) (fee applicant has burden “to produce satisfactory evidence—in addition to the attorney’s own affidavits—that the requested rates are in line with those prevailing in the community for similar services by

I. Fee-Shifting Statutes

This evidence generally takes the form of affidavits from other counsel attesting to their rates or the prevailing market rate.²¹⁹ Several courts have stated that, especially in the absence of sufficient documentation, a trial court may rely on its own knowledge of the market.²²⁰ A trial court may not, however, substitute its notions of fairness for the market rate.²²¹

4. Should the lodestar be adjusted?

In certain cases, the court may adjust the lodestar upward or downward to arrive at the appropriate fee award.²²²

lawyers of reasonably comparable skill, experience, and reputation”); *Lucero v. Trinidad*, 815 F.2d 1384, 1385 (10th Cir. 1987) (affirming reduced rate because plaintiff’s documentation “showed only the prevailing market rates at [plaintiff’s] firm. [Plaintiff] did not submit any evidence that would show that its rates are representative of the prevailing market rates in Denver or in Colorado.”).

219. See, e.g., *Glover v. Johnson*, 934 F.2d 703, 718 (6th Cir. 1991) (affirming award where “third-party affidavits submitted by plaintiffs established the prevailing market rate”); *Columbus Mills v. Freeland*, 918 F.2d 1575, 1580 (11th Cir. 1990) (affirming award where plaintiff “produced more than an affidavit of the attorney who performed the work. [Plaintiff] produced another affidavit which established that the rates were reasonable.”); *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1304 (11th Cir. 1988).

220. See, e.g., *Norman*, 836 F.2d at 1303; *Miele v. N.Y. State Teamsters Conference Pension & Ret. Fund*, 831 F.2d 407, 409 (2d Cir. 1987); *Lucero*, 815 F.2d at 1385. Cf. *Begley v. Secretary of HHS*, 966 F.2d 196, 198–99 (6th Cir. 1992) (explanation can’t be merely court’s personal belief concerning market, “ignor[ing] the only evidence” on record); *NAACP v. City of Evergreen*, 812 F.2d 1332, 1336 (11th Cir. 1987) (“A trial judge cannot substitute its own judgment for uncontradicted evidence without record support.”); *Black Grievance Comm. v. Philadelphia Elec. Co.*, 802 F.2d 648, 657 (3d Cir. 1986) (district court erred in using hourly rates other than those set out in uncontested affidavits), *vacated on other grounds*, 483 U.S. 1015 (1987).

221. See, e.g., *Pressley v. Haeger*, 977 F.2d 295, 299 (7th Cir. 1992) (vacating award where trial court used lower-than-market rate for work of second and third chairs at trial, presumably because it felt their rate should be less than that of lead attorney: “Prevailing plaintiffs are entitled not to a ‘just’ or ‘fair’ price for legal services, but to the market price for legal services.”).

222. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

a. Downward adjustments

i. Incomplete success

Incomplete success is the most common basis for a downward adjustment in attorney fee awards. In *Hensley v. Eckerhart*,²²³ the Supreme Court said that when the plaintiff advances discrete, essentially unrelated claims²²⁴ and prevails on some but not others, it should not be compensated for work on the unsuccessful claims.²²⁵ (In documenting their work, plaintiffs' attorneys are expected, where possible, to segregate work performed by claim.²²⁶) However, in the majority of cases, courts have rejected the contention that the lodestar should be adjusted downward for unsuccessful claims, usually finding that the successful and unsuccessful claims were legally or factually intertwined or that counsel devoted most of its time to the litigation as a whole.²²⁷ The following exceptions may be instructive.

223. 461 U.S. 424 (1983).

224. That is, claims not involving "a common core of facts or . . . based on related legal theories." *Id.* at 435.

225. *Id.*

226. *Id.* at 437. *See also* Von Clark v. Butler, 916 F.2d 255, 259 (5th Cir. 1990) (award reduced where plaintiffs submitted summaries of time sheets and claimed they pertained only to work on their successful claim); Norman v. Hous. Auth. of Montgomery, 836 F.2d 1292, 1303 (11th Cir. 1988) (counsel applying for fees "should have maintained records to show the time spent on the different claims"). *Cf.* Lipsett v. Blanco, 975 F.2d 934, 941 (1st Cir. 1992) ("If the fee-seeker properly documents her claim and plausibly asserts that the time cannot be allocated between successful and unsuccessful claims, it becomes the fee-target's burden to show a basis for segregability.").

227. *See, e.g.,* Robinson v. City of Edmond, 160 F.3d 1275, 1283–84 (10th Cir. 1998) (plaintiffs won claim for removal of religious symbol from official seal but lost "intertwined" claims); Pinkham v. Camex, Inc., 84 F.3d 292, 294 (8th Cir. 1996) (finding 90% of attorney hours compensable because they were necessary for two intertwined cases, only one of which was subject to fee-shifting statute); Williams v. Roberts, 904 F.2d 634, 640 (11th Cir. 1990) (plaintiff lost transfer and demotion claims but won discharge claim); Northeast Women's Ctr. v. McMonagle, 889 F.2d 466, 475 (3d Cir. 1989) (successful RICO claim and unsuccessful trespass claim based on same evidence); Abshire v. Walls, 830 F.2d 1277, 1282–83 (4th Cir. 1987) (plaintiff won strip search claim but lost false arrest, false imprisonment, and several other related claims); Dominic v. Consol. Edison Co. of N.Y., 822 F.2d 1249, 1259–60 (2d Cir. 1987) (plaintiff won retaliation claim but lost discrimination claim).

I. Fee-Shifting Statutes

- Even though all claims stemmed from a common incident, the claims alleging supervisory liability could have been severed from the claims alleging direct participation in an excessive force lawsuit. It was thus an abuse of discretion to award fees for the severable, unsuccessful claims.²²⁸
- The plaintiff lost his claim that discharge from public employment was in retaliation for exercising his First Amendment rights, but prevailed on his claim that the lack of a pretermination hearing violated due process. The two claims were so distinct that the district court did not err in discounting hours spent on the unsuccessful claim.²²⁹
- The plaintiff prevailed against several state officials, but lost against the governor and the attorney general. The court held that the attorney hours spent unsuccessfully defending against the motions to dismiss “were sufficiently separable from the rest of the litigation to warrant deduction.”²³⁰
- Because the plaintiffs’ claims for partial and total disability under workers’ compensation were based on “different factual theories” and “different legal theories,” a deduction for incomplete success was in order.²³¹
- The plaintiffs had prevailed on one of six unrelated claims. The Seventh Circuit cautioned that, on remand, it would be error to compensate counsel for only one-sixth of the total hours expended, because some time was spent on the litigation as a whole (e.g., jury selection). The proper method is to estimate how much time would have been required if the plaintiffs had pursued only the successful claim.²³²

ii. Limited success

In *Hensley*, the Supreme Court did not limit downward adjustments in attorneys’ fees for incomplete success to situations involving unrelated

228. *Figueroa-Torres v. Todelo-Davilla*, 232 F.3d 270, 278–79 (1st Cir. 2000).

229. *Winter v. Cerro Gordo Cnty. Conservation Bd.*, 925 F.2d 1069 (8th Cir. 1991).

230. *Rode v. Dellarciprete*, 892 F.2d 1177, 1185 (3d Cir. 1990).

231. *Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992).

232. *Ustrak v. Fairman*, 851 F.2d 983, 989 (7th Cir. 1988). *Accord Schultz v. Hembree*, 975 F.2d 572, 577 (9th Cir. 1992).

claims; rather, the Court instructed that even if claims are closely related, or there is just one claim, a downward adjustment to the lodestar may be appropriate if the plaintiff achieved only limited success.²³³ The gauge of success is the result of the lawsuit in terms of relief; there should not be a downward adjustment simply because not every argument or theory prevailed.²³⁴ Many defendants have asked courts to reduce awards because of the plaintiff's unimpressive results, even when the plaintiff prevailed on all claims or when the unsuccessful claims were closely related to the successful claims. Courts have usually rejected these requests,²³⁵ but there have been exceptions.²³⁶

233. *Hensley v. Eckerhart*, 461 U.S. 424, 435–36 (1983). The Court noted that “[t]here is no precise rule or formula” for determining the extent of the reduction; a court “may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.” *Id.* at 436.

For discussions about how success is measured in civil rights cases, see *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1307–08 (11th Cir. 2001), and *Coutin v. Young & Rubicam P.R., Inc.*, 124 F.3d 331, 338 (1st Cir. 1997).

234. *Hensley*, 461 U.S. at 435–37. See *Pressley v. Haeger*, 977 F.2d 295, 298 (7th Cir. 1992) (“*Hensley* permits the court to award fees for losing arguments in support of prevailing claims”). For example, the Seventh Circuit directs a court to look at the “overall results obtained” in determining if a downward adjustment is appropriate when claims are factually or legally related. *Spellan v. Bd. of Educ.*, 59 F.3d 642, 646 (7th Cir. 1995).

235. See, e.g., *Joyce v. Town of Dennis*, 720 F.3d 12, 31 (1st Cir. 2013) (finding “an error of law for the district court to link the amount of recoverable attorney’s fees solely to the amount of her damages”); *Jaffee v. Redmond*, 142 F.3d 409, 414 (7th Cir. 1998) (holding trial court erred in denying fees, as a matter of law, incurred by unsuccessful argument in support of ultimately successful claim). See also *Goos v. Nat’l Ass’n of Realtors*, 68 F.3d 1380, 1384–88 (D.C. Cir. 1995); *Jane L. v. Bangerter*, 61 F.3d 1505, 1512 (10th Cir. 1995); *Grant v. Martinez*, 973 F.2d 96, 101 (2d Cir. 1992); *Herrington v. Cnty. of Sonoma*, 883 F.2d 739, 745 (9th Cir. 1989); *Jackson v. Crews*, 873 F.2d 1105, 1109–10 (8th Cir. 1989).

236. See, e.g., *Andrews v. United States*, 122 F.3d 1367, 1375 (11th Cir. 1997) (abuse of discretion to not give greater weight to plaintiff’s limited success in Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) case); *Fleming v. Ayers & Assocs.*, 948 F.2d 993, 999 (6th Cir. 1991) (no abuse of discretion to reduce award where plaintiff lost at trial and prevailed only on claim suggested to her by court post-trial, and even on that claim she received only portion of back pay, although she requested reinstatement and full back pay); *Gilbert v. Little Rock, Ark.*, 867 F.2d 1063, 1066–67 (8th Cir.) (upholding downward adjustment of fee award where plaintiffs lost on

I. Fee-Shifting Statutes

Courts have wrestled with the “limited success” inquiry in various other situations:

- In a Ninth Circuit case in which the plaintiff’s judgment was vacated by the Supreme Court but reinstated on remand, the plaintiff was entitled to compensation for unsuccessfully opposing the defendant’s petition for certiorari:

If a plaintiff ultimately wins on a particular claim, she is entitled to all attorney’s fees reasonably expended in pursuing that claim—even though she may have suffered some adverse rulings. Here, although the Supreme Court vacated our judgment, the Court’s order was simply a temporary setback on the way to a complete victory for plaintiff. . . . [A] plaintiff who is unsuccessful at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney’s fees even for the unsuccessful stage.²³⁷
- However, where the Ninth Circuit vacated a judgment for the plaintiffs and remanded for retrial, and the plaintiffs then dropped the suit because they had already achieved much of the desired relief, the court upheld the denial of compensation for work on the unsuccessful appeal. It may be proper to award fees for an unsuccessful appeal if the plaintiff prevails on retrial, the court said, “[b]ut in this case, the litigants decided to abandon their claim after losing on appeal. . . . Although they were prevailing parties in the case overall, it is clear that nothing associated with the appeal contributed to any favorable result achieved by the litigation.”²³⁸
- Although the plaintiffs received fees for obtaining a favorable consent decree, they were also awarded fees for unsuccessfully defending against the defendant’s motion to modify the consent decree.

most claims and most individual plaintiffs received no relief); *Spanish Action Comm. of Chicago v. City of Chicago*, 811 F.2d 1129, 1133–36 (7th Cir. 1987) (80% reduction in fee award where plaintiff sought primarily punitive damages and won only compensatory damages, and against only one of many defendants).

237. *Cabrales v. Cnty. of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991).

238. *Clark v. City of Los Angeles*, 803 F.2d 987, 993 (9th Cir. 1986).

[T]he plaintiffs' work . . . was directed toward the protection of rights originally and unambiguously vindicated in the consent decree [I]n holding that the modification should be allowed, we found it necessary to review and evaluate the full range of related reforms that were . . . implemented by the terms of the consent decree. . . . [T]he district court did not abuse its discretion or err as a matter of law in concluding that the matters at issue . . . were so intertwined with the original claims that attorneys' fees for work on those proceedings should be awarded as to a still "prevailing party."²³⁹

- District judges are not required to cull each time entry to determine the fee applicant's degree of success regarding that activity. The Second Circuit endorsed using "a percentage deduction 'as a practical means of trimming fat from a fee application.'"²⁴⁰
- The Seventh Circuit observed that confusion can arise if a district court makes deductions from the plaintiff's proposed award for both partial success and excessive hours. To avoid this problem, the court urged close adherence to the procedures set out in *Hensley*: "First the district court should eliminate all hours claimed that are either not 'reasonably expended' or inadequately explained. Only then should it adjust the total number of 'reasonably expended' hours so that the final award is reasonable in relation to the overall results obtained by the plaintiff."²⁴¹
- The Fifth Circuit, in *Migis v. Pearle Vision, Inc.*,²⁴² held that the trial court did not give adequate consideration to the eighth

239. *Plyler v. Evatt*, 902 F.2d 273, 280–81 (4th Cir. 1990) (citations omitted). The court added that its holding

should not be construed as guaranteeing attorneys' fees after resolution of every dispute involving the consent decree. The initial status of "prevailing party" does not entitle appellees to compensation when resistance to modification is unsuccessful and the position taken was not essential to the preservation of the integrity of the consent decree as a whole.

Id.

240. *McDonald v. Pension Plan of NYSA-ILA Pension Trust Fund*, 450 F.3d 91, 96 (2d Cir. 2006) (citation omitted). See also *infra* section III.A.3, which discusses sampling fee records.

241. *Spanish Action Comm.*, 811 F.2d at 1138.

242. 135 F.3d 1041 (5th Cir. 1998).

I. Fee-Shifting Statutes

Johnson factor, “the amount involved and the result obtained,” when it lowered attorneys’ fees by only 10% for limited success.²⁴³ In *Migis*, the plaintiff sought twenty-six times the damages she was awarded in her private civil rights case, and the fee award was six and one-half times the amount of awarded damages. The Fifth Circuit found that the lower court abused its discretion by “failing to give adequate consideration to the result obtained relative to the fee award, and the result obtained relative to the result sought.”²⁴⁴

iii. Low or nominal damages

An obvious case of limited success is an award of only nominal damages. In *Farrar v. Hobby*,²⁴⁵ the Supreme Court held that the plaintiff receiving such a judgment may be awarded “low fees or no fees.”²⁴⁶ In *Farrar*, the Fifth Circuit had reversed the trial court’s award of fees on the ground that a plaintiff who wins only nominal damages is not a prevailing party. The Supreme Court rejected that view,²⁴⁷ but held that such a plaintiff, albeit a prevailing party, may be denied an award based on lack of success.

But the Court did not say that all awards of nominal damages must result in a denial of fees or a significant downward adjustment—the “extent of success” inquiry still applies. The Court provided little guidance as to how to gauge the success of a party receiving nominal damages,²⁴⁸ but Justice O’Connor’s concurrence cited several relevant factors: “[A] substantial difference between the judgment recovered and the recovery sought suggests that the victory is in fact purely technical”²⁴⁹ and less deserving of fees. Thus, the relief sought by the plaintiff is a consideration. However, this factor is not necessarily decisive, because “an award of

243. *Id.* at 1047–48. See *supra* note 150 for all factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974).

244. *Migis*, 135 F.3d at 1048.

245. 506 U.S. 103 (1992).

246. *Id.* at 115.

247. See *supra* text accompanying notes 30–31.

248. Although the Court found fees inappropriate in the case *sub judice*, it gave little explanation apart from observing that the plaintiff, who sought \$17 million in damages, had “accomplished little.” *Farrar*, 506 U.S. at 114.

249. *Id.* at 121 (O’Connor, J., concurring).

nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved.”²⁵⁰ The court should look at the importance of the issue on which the plaintiff prevails, for example, whether the plaintiff’s success serves “some public goal,” such as deterring misconduct.²⁵¹

The Seventh Circuit adopted Justice O’Connor’s test for determining “whether a prevailing party has achieved a mere technical victory in appropriate for fees.”²⁵² It directed district courts to “look at the difference between the judgment recovered and the recovery sought, the significance of the legal issue on which the plaintiff prevailed and, finally, the public purpose of the litigation.”²⁵³ The Ninth Circuit has cautioned that “[t]he *Farrar* exception, which would allow the court to dispense with the calculation of a lodestar and simply establish a low fee or no fee at all, is limited to cases in which the civil rights plaintiff ‘prevailed’ but received only nominal damages and achieved only ‘technical’ success.”²⁵⁴

Two cases shed further light on when district courts may jettison the lodestar to award low fees or no fees. The Seventh Circuit held that when damages are low, but not nominal, and fees incurred are unreasonable, both *ex post* and *ex ante*, *Farrar* allows a judge to use a method other than the lodestar to devise an award.²⁵⁵ The Eighth Circuit upheld a no-fee award when the plaintiff’s victory in a civil rights case amounted to \$1 in compensatory damages, and the message of “great public importance” sent to the defendant had been heard before.²⁵⁶

250. *Id.*

251. *Id.* at 121, 122.

252. *Johnson v. Lafayette Fire Fighters Ass’n Local 472*, 51 F.3d 726, 731 (7th Cir. 1995).

253. *Id.* (quoting *Cartwright v. Stamper*, 7 F.3d 106, 109 (7th Cir. 1993)).

254. *Morales v. City of San Rafael*, 96 F.3d 359, 362–63 (9th Cir. 1996) (compensatory damages of \$17,500, while substantially less than sought, were not nominal), *amended by, reh’g en banc denied*, 108 F.3d 981 (1997).

255. *Cole v. Wodziak*, 169 F.3d 486, 488 (7th Cir. 1999).

256. *Milton v. Des Moines, Iowa*, 47 F.3d 944, 946 (8th Cir. 1995) (police brutality). The court noted, “Were we the district court, we might have reached a different result; nevertheless, we cannot say that the district court abused its discretion.” *Id.* at 947.

iv. Disproportionately low damages award

At least in cases that serve the public interest, the fact that the lodestar far exceeds the damages award is not itself grounds for a downward adjustment in attorneys' fees. In *City of Riverside v. Rivera*,²⁵⁷ the plaintiffs, who were victimized by police misconduct, were awarded more than \$200,000 in fees (based on the lodestar), even though the verdict was for just \$33,000. The Supreme Court upheld the award, noting that the civil rights fee-shifting statute was adopted precisely because damages awards in civil rights cases were often small, which made it difficult for the plaintiffs to secure legal representation. However, only four justices joined the plurality opinion. Justice Powell cast the deciding vote in a concurrence that noted that the case involved the vindication of constitutional rights and a substantial gain to the public interest. He stated that "[w]here recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought," and he noted that it is a "rare case in which an award of private damages can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case."²⁵⁸ The plurality did not say whether it agreed.

Relying on Justice Powell's concurrence, a district court interpreted *Rivera* as limiting disproportionate fees to cases that involve the public interest while requiring proportionality in cases involving only private damages; however, the Second Circuit reversed the district court's decision, and acknowledged that "*Rivera* provides no guidance. It does not speak to a situation . . . where the monetary damage recovery benefits a single individual."²⁵⁹ The Second Circuit laid down its own rule: The lodestar "should not be reduced simply because a plaintiff recovered a low damage award."²⁶⁰ The Third Circuit has adopted the identical rule.²⁶¹ Likewise, the First Circuit has said that "disproportion alone does

257. 477 U.S. 561 (1986).

258. *Id.* at 585, 586 n.3 (Powell, J., concurring).

259. *Cowan v. Prudential Ins.*, 935 F.2d 522, 526 (2d Cir. 1991).

260. *Id.*

261. *Davis v. Southeastern Pa. Transp. Auth.*, 924 F.2d 51, 55 (3d Cir. 1991); *Northeast Women's Ctr. v. McMonagle*, 889 F.2d 466, 476-77 (3d Cir. 1989) (rejecting contention that disproportionality holding in *Rivera* applies only in civil rights cases);

not render an award unreasonable.”²⁶² The Seventh Circuit elaborated on the rationale for rejecting disproportionality as a rule of thumb:

[I]n many cases the amount in controversy and the complexity of the case will track with one another. But small claims can be complex and large claims can be very straightforward. So while a fee request that dwarfs the damages award might raise a red flag, measuring fees against damages will not explain whether the fees are reasonable in any particular case.²⁶³

The Eleventh Circuit has said that “[u]se of a the multiplier as a sole or dominant criterion” is improper.²⁶⁴ Such an approach “tends to diminish the public benefit, to make the fee depend upon substantiality of monetary relief, and to reduce the inquiry to the arithmetical exercise rejected by the Supreme Court in *Evans v. Jeff D.*, 475 U.S. at 736.”²⁶⁵ The Fifth Circuit agrees: “the district court should avoid placing undue emphasis on the amount recovered.”²⁶⁶

Citing *Rivera*, the First Circuit noted that “[t]he amount of the monetary recovery is ‘certainly [a] relevant’ factor to be considered in setting the size of an attorney fee.”²⁶⁷ Disproportionality could come into play

Cunningham v. City of McKeesport, 807 F.2d 49, 53–54 (3d Cir. 1986) (rejecting suggestion that disproportionate fee award is permissible only if suit serves substantial public interest). See also *Washington v. Philadelphia Cnty. Ct. of Common Pleas*, 89 F.3d 1031, 1041 (3d Cir. 1996) (“a court may not diminish counsel fees in a section 1983 action to maintain some ratio between the fees and the damages awarded”).

262. *Domegan v. Ponte*, 972 F.2d 401, 421 (1st Cir. 1992), *vacated and remanded in light of* *Farrar v. Hobby*, 506 U.S. 103 (1993); *Cange v. Stotler & Co.*, 913 F.2d 1204, 1211 (7th Cir. 1990). See also *Thomas v. NFL Players Ass’n*, 273 F.3d 1124 (D.C. Cir. 2001) (fact that fees are nearly five times recovery doesn’t make them excessive).

263. *Anderson v. AB Painting & Sandblasting, Inc.*, 578 F.3d 542, 546 (7th Cir. 2009).

264. *Cullens v. Ga. Dep’t of Transp.*, 29 F.3d 1489, 1494 (11th Cir. 1994). In a later case, the court hinted that *Rivera*’s rejection of proportionality is limited to civil rights actions. *Andrews v. United States*, 122 F.3d 1367, 1376 (11th Cir. 1997).

265. *Cullens*, 29 F.3d at 1494.

266. *Von Clark v. Butler*, 916 F.2d 255, 260 (5th Cir. 1990). Cf. *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041 (5th Cir. 1998), discussed *supra* text accompanying notes 242–44.

267. *Domegan*, 972 F.2d at 421.

I. Fee-Shifting Statutes

when determining if counsel spent an unreasonable number of hours on the case in light of the probable outcome.²⁶⁸

Of course, extreme disproportionality may result when the plaintiff receives nominal damages only. The Supreme Court held that, in such cases, it may be appropriate to award the plaintiff no fees or only low fees.²⁶⁹

v. Rejecting a Rule 68 settlement offer

In *Marek v. Chesny*,²⁷⁰ the Supreme Court held that under the civil rights fee-shifting statute, if the plaintiff rejects a settlement offer made pursuant to Federal Rule of Civil Procedure 68 (Offer of Judgment), and the offer proves more favorable to the plaintiff than the eventual judgment, attorneys' fees incurred after the offer are noncompensable. The Court so held because the statute provides for fees "as part of the costs,"²⁷¹ bringing the fee award within the ambit of Rule 68's settlement rejection provision for statutes that refer to attorneys' fees as "costs."²⁷² If, under a different fee-shifting statute, fees are not considered costs, a different result

268. See *City of Riverside v. Rivera*, 477 U.S. 561, 590 (1986) (Rehnquist, C.J., dissenting) ("I find it hard to understand how any attorney can be said to have exercised 'billing judgment' in spending such huge amounts of time on a case ultimately worth only \$33,350."). Although Chief Justice Rehnquist's argument was rejected, the Court did not repudiate the notion that, in some cases, a small award would be relevant to a determination that counsel spent excessive time on the case. See also *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 296 (1st Cir. 2001) (proportionality not an issue where prevailing party limited fee request to prevailing claim).

269. *Farrar v. Hobby*, 506 U.S. 103 (1992), discussed *supra* text accompanying notes 30–31, 245–56.

270. 473 U.S. 1 (1985).

271. 42 U.S.C. § 1988.

272. Rule 68(d) provides that if a party makes a timely offer of judgment and "the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made."

obtains.²⁷³ Of course, rejection of an informal settlement agreement not made pursuant to Rule 68 does not affect an award of fees.²⁷⁴

vi. Factors reflected in the lodestar

District courts have been reversed for making downward adjustments in attorney fee awards based on factors that are subsumed in the lodestar analysis. In one case, the district court had based a downward adjustment, in part, on insufficient documentation and mediocre performance; the Ninth Circuit said that these factors should be reflected in the lodestar and are not a basis for adjusting the lodestar.²⁷⁵ Similarly, the Tenth Circuit held that a district court abused its discretion in making a downward adjustment based on simplicity of issues because that factor should be reflected in the lodestar.²⁷⁶ Furthermore, it held that to make a reduction based on simplicity “could lead to the incongruous result of attorneys being less likely to take cases where a person’s civil rights have been obviously and clearly violated.”²⁷⁷

vii. Other downward adjustments

The Seventh Circuit held that a downward adjustment in a fee award for the plaintiff’s refusal to meet with a law clerk to discuss mediation was an abuse of discretion.²⁷⁸

273. See, e.g., *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1337 (4th Cir. 1996) (Rule 68 can’t preclude fees payment pursuant to 42 U.S.C. § 2000e-5(g)(2)(B)(i), but rejection of settlement offer can be considered in determining if or how much fees should be awarded); *Int’l Nickel Co. v. Trammel Crow Distrib. Corp.*, 803 F.2d 150, 157 n.2 (5th Cir. 1986) (rejection of Rule 68 offer didn’t preclude fee award where state fee-shifting statute authorized fees “in addition” to costs rather than “as part of costs”).

274. See *Cole v. Wodziak*, 169 F.3d 486, 487 (7th Cir. 1999) (clear error to reduce lodestar because of oral settlement offer).

275. *Cunningham v. Los Angeles*, 859 F.2d 705, 710–13 (9th Cir. 1988) (acknowledging that in rare cases, quality of representation may be a basis for adjustment to lodestar, but in this case, there was no showing that mediocre performance wasn’t subsumed in lodestar).

276. *Cooper v. Utah*, 894 F.2d 1169, 1172 (10th Cir. 1990).

277. *Id.*

278. *Connolly v. Nat’l Sch. Bus Serv., Inc.*, 177 F.3d 593, 598 (7th Cir. 1999).

I. Fee-Shifting Statutes

b. Upward adjustments

A primary motive for enhancing the lodestar fee calculation is to provide an incentive for lawyers to represent parties in meritorious cases that might not otherwise be litigated. The Supreme Court's starting point for reviewing proposed upward adjustments of lodestar calculations is that "a 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case."²⁷⁹ The second principle, however, is that "the lodestar method yields a fee that is presumptively sufficient to achieve this objective."²⁸⁰

i. Novelty or complexity of issues

The Supreme Court has stated on several occasions that the novelty and complexity of the litigation are reflected in the lodestar and should not be the basis of an upward adjustment in attorneys' fees.²⁸¹ Therefore, the Eighth Circuit overturned a fee enhancement for "complexity of the case and the absence of court precedent," stating "counsel expended greater time and effort [on account of these factors]. Consequently, counsel's lodestar figure directly reflects [these factors], and an enhancement . . . would constitute double counting."²⁸² Likewise, the Fifth Circuit rejected an enhancement based on novelty and difficulty because

[a]ll counsel competent to handle a case such as this one are expected to be able to deal with complex and technical matters; this expertise is reflected in their regular hourly rate. . . . Still further, the difficulty in the handling of the case is adequately reflected in the number of hours billed.²⁸³

279. *Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010). See also Martin A. Schwartz, Section 1983 Litigation (Federal Judicial Center, 3d ed. 2014).

280. *Perdue*, 559 U.S. at 552.

281. See, e.g., *id.* at 553 (circumstances in which superior attorney performance isn't adequately factored into lodestar calculation for award of reasonable attorneys' fees in civil rights case are rare and exceptional, and require specific evidence that lodestar fee wouldn't have been adequate to attract competent counsel). See also *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (*Delaware Valley I*); *Blum v. Stenson*, 465 U.S. 886, 898–900 (1984).

282. *Hendrickson v. Branstad*, 934 F.2d 158, 163 (8th Cir. 1991).

283. *Shipes v. Trinity Indus.*, 987 F.2d 311, 321 (5th Cir. 1993).

ii. Exceptional results or quality of representation

The Supreme Court has stated that the exceptional results or quality of representation of a case are reflected in the lodestar, and thus are not generally a basis for a fee enhancement.²⁸⁴ In a rare case, in which the success or quality of representation transcends what can be expected given the hourly rates and number of hours expended, the lodestar may be enhanced.²⁸⁵ The burden of documenting the appropriateness of such an upward enhancement rests on the applicant.²⁸⁶ If an enhancement is granted (which was not the case in *Delaware Valley I*), a district court or court of appeals must make “detailed findings as to why the lodestar amount was unreasonable, and in particular, as to why the quality of representation was not reflected in the [lodestar].”²⁸⁷ The Court in *Perdue* identified several objective factors that might support an enhancement, such as “where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney’s true market value,” perhaps because it focuses on a single factor such as years of law practice and ignores qualitative factors.²⁸⁸

Lower courts have heeded the admonition that an upward adjustment for outstanding representation should be rare. One exceptional case elucidates the rule: Counsel was appointed for a jury trial beginning three days later, took the case blind, and offered “superb representation under

284. *Perdue*, 559 U.S. at 552–53; *Blum*, 465 U.S. at 899.

285. *Perdue*, 559 U.S. at 553–58; *Blum*, 465 U.S. at 898–900. That such enhancements should be rare was emphasized in *Delaware Valley I*, 478 U.S. at 567–68 (reversing upward adjustment because plaintiff “presented no specific evidence as to what made the results it obtained during this phase so ‘outstanding,’ nor did it provide any indication that the lodestar figure . . . was far below awards made in similar cases where the court found equally superior quality of performance.”).

286. *Perdue*, 559 U.S. at 553; *Delaware Valley I*, 478 U.S. at 567–68; *Blum*, 465 U.S. at 898.

287. *Delaware Valley I*, 478 U.S. at 567–68. See also *Shipes*, 987 F.2d at 322 (holding enhancement for exceptional results “may have been warranted”; remanding for determination “whether it is customary in the area for attorneys to charge an additional fee above their hourly rates for an exceptional result after lengthy and protracted litigation.”).

288. *Perdue*, 559 U.S. at 554–55. Other factors supporting a lodestar enhancement might include the presence of extraordinary expenses and delays in payment due to protracted litigation, “particularly where the delay is unjustifiably caused by the defense.” *Id.* at 556.

I. Fee-Shifting Statutes

the most adverse circumstances.”²⁸⁹ More typical was a Fifth Circuit opinion reversing an enhancement for exceptional results where the “district court asserted that the prevailing rates for attorneys of similar skill, experience, and reputation were not sufficient to compensate [counsel at bar], but it articulated no basis for this finding.”²⁹⁰ Similarly, a First Circuit panel acknowledged the “strength of the attorneys’ performance [and] the magnitude of their triumph,” but nevertheless reversed an upward adjustment: “[W]e see nothing in the record that indicates that the services and results overshadowed, or somehow dwarfed, the lodestar.”²⁹¹

iii. Other upward adjustments

Three circuits have held that an upward adjustment in the fee award is appropriate to compensate for “undesirability” of the case.²⁹² The Ninth Circuit affirmed an upward adjustment in a case in which counsel’s obligation to the class would continue for another ten years.²⁹³

iv. Delay in payment

The Supreme Court has stated that a trial court has discretion to compensate the award recipient for delay in payment.²⁹⁴ This can be achieved

289. *Hollowell v. Gravett*, 723 F. Supp. 107, 110 (E.D. Ark. 1989).

290. *Alberti v. Klevenhagen*, 896 F.2d 927, 936 (5th Cir.), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990).

291. *Lipsett v. Blanco*, 975 F.2d 934, 942–43 (1st Cir. 1992).

292. *See Barnes v. City of Cincinnati*, 401 F.3d 729, 746 (6th Cir. 2005) (affirming fee multiplier of 1.75 for representing transgendered police officer in Title VII case where “the result achieved was extraordinary and the case was highly controversial, based on the [attorneys’] affidavits . . . that few lawyers locally or nationally would take such a case”); *Guam Soc’y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 697–99 (9th Cir. 1996) (holding fee multiplier appropriate in civil rights action that successfully challenged constitutionality of Guam’s anti-abortion statute); *Alberti v. Klevenhagen*, 903 F.2d 352 (5th Cir. 1990) (holding enhancement proper because it was required to attract competent counsel for prison conditions litigation and was supported by testimony from expert economist on how local market treats such cases).

293. *Wing v. Asarco Inc.*, 114 F.3d 986, 989 (9th Cir. 1997).

294. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989). *See also Gates v. Deukmejian*, 987 F.2d 1392, 1407 (9th Cir. 1992); *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992).

In *Library of Congress v. Shaw*, 478 U.S. 310 (1985), the Court held that the “no-interest” rule, which prevents recovery of interest from the United States absent a waiver of sovereign immunity, applies to fee awards. Therefore, an award against the United States

by calculating the lodestar in current dollars²⁹⁵ or by factoring in interest, usually at the prime rate,²⁹⁶ after the lodestar has been computed using historic rates.²⁹⁷ Courts should be careful, however, not to mix methods.²⁹⁸ When a delay is de minimis, a delay enhancement may not be necessary.²⁹⁹

The circuits are split on whether interest should be calculated from the date the trial court rules the party is entitled to fees or from the date the trial court quantifies the fee. Most circuits require interest calculation from the date of fee entitlement.³⁰⁰ The Third, Seventh, and Tenth Circuits calculate interest from the date the fee award is quantified.³⁰¹

should generally not be enhanced for delayed payment. The no-interest rule also does not apply to suits against states. *Jenkins*, 491 U.S. at 280–82 & n.3.

295. *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988) (expressing preference for current rates).

296. *See, e.g., Alberti v. Klevenhagen*, 896 F.2d 927, 938 (5th Cir.) (holding court erred in using municipal bond interest rates instead of prime rate), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990); *Lattimore v. Oman Constr.*, 868 F.2d 437, 438 n.2 (11th Cir. 1989) (approving use of IRS adjusted prime rate); *Skelton v. GM Corp.*, 860 F.2d 250, 255 (7th Cir. 1988) (courts should use prime rate).

297. *See Walker v. HUD*, 99 F.3d 761, 773 (5th Cir. 1996) (6% enhancement for delay approximating 2.96% interest compounded annually not abuse of discretion).

298. *See, e.g., Gray ex rel. Alexander v. Bostic*, 613 F.3d 1035 (11th Cir. 2010) (finding abuse of discretion when district court used current hourly rates to calculate lodestar amount, and also added to resulting amount another 15% to account for delay between time services were rendered and payment for services); *Walker*, 99 F.3d at 773) (noting court may use either unenhanced lodestar based on current rates or lodestar using historical rates plus delay enhancement, but not both); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994) (stating two ways to compensate for delay: (1) current rates or (2) historic rates plus prime rate enhancement; and holding it an abuse of discretion to use hybrid of current rate and last billed rate).

299. *Smith v. Freeman*, 921 F.2d 1120, 1123 (10th Cir. 1990) (enhancement inappropriate where delay is de minimis and there is no showing that counsel's hourly rate increased from the time action commenced).

300. *See, e.g., Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 250 F.3d 482 (6th Cir. 2001); *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 332 & n.24 (5th Cir. 1995); *Friend v. Kolodziejczak*, 72 F.3d 1386, 1391–92 (9th Cir. 1995); *BankAtlantic Inc. v. Blythe Eastman Paine Webber*, 12 F.3d 1045, 1052–53 (11th Cir. 1994); *Jenkins v. Missouri*, 931 F.2d 1273, 1276 (8th Cir. 1991); *Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988).

301. *See, e.g., Eaves v. Cnty. of Cape May*, 239 F.3d 527 (3d Cir. 2001) (discussing circuit split); *MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/American Express, Inc.*,

I. Fee-Shifting Statutes

The Ninth Circuit held that a delay in payment caused by appeal is solely redressed by an award of interest pursuant to 28 U.S.C. § 1961.³⁰²

Courts also have discretion to award interim fees in order to compensate for a delay in payment.³⁰³

v. Risk

In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*,³⁰⁴ the Supreme Court faced the question whether to grant a “contingency enhancement” to compensate the prevailing attorney for the risk of loss. In a plurality decision, the Court reversed the risk enhancement; but only four justices maintained that such enhancements are always inappropriate.³⁰⁵ Justice O'Connor, concurring in part and in the judgment, voted to reverse the enhancement, but maintained that enhancement for risk is sometimes appropriate.³⁰⁶ Justice Blackmun, dissenting, agreed that risk enhancements should be awarded in some cases, but differed on the circumstances that warrant them.³⁰⁷

In *City of Burlington v. Dague*,³⁰⁸ the Supreme Court held that the risk of losing a case—or contingency of nonrecovery—is not a basis for an

962 F.2d 1470, 1475 (10th Cir. 1992) (fees awarded as discovery sanction); *Fleming v. Cnty. of Kane*, 898 F.2d 553, 565 (7th Cir. 1990) (selecting date of quantification, without explanation). In *Travelers Casualty & Surety Co. v. Insurance Co. of North America*, 609 F.3d 143 (3d Cir. 2010), a Third Circuit panel questioned the *Eaves* holding, saying “it makes sense that post-judgment interest on prejudgment interest would begin to run as soon as an order establishing the right to prejudgment interest is entered.” *Id.* at 174. Nonetheless, the court held that “our decision in *Eaves* . . . precludes us from following that logic here.” *Id.*

302. *Corder v. Brown*, 25 F.3d 833, 838 (9th Cir. 1994) (abuse of discretion to recalculate lodestar using current hourly rate; distinguishing *Jenkins* on grounds that seven-year delay was much more extensive than two-year delay in that case).

303. See *supra* text accompanying notes 53–57.

304. 483 U.S. 711 (1987).

305. *Id.* (opinion of White, J., joined by Rehnquist, C.J., Powell and Scalia, JJ.).

306. *Id.* at 731–34 (O'Connor, J., concurring).

307. *Id.* at 735–55 (Blackmun, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.).

308. 505 U.S. 557 (1992). *Dague* construed the Solid Waste Disposal Act, 42 U.S.C. § 6972(e), and the Clean Water Act, 33 U.S.C. § 1365(d), but the rationale applies to similar statutes as well. See, e.g., *Murphy v. Reliance Standard Life Ins. Co.*, 247 F.3d 1313, 1314–15 (11th Cir. 2001) (ERISA); *Cann v. Carpenters' Pension Trust Fund for N. Cal.*, 989 F.2d 313, 318 (9th Cir. 1993) (ERISA).

upward enhancement of attorney fee awards, thereby ostensibly resolving any uncertainty created by *Delaware Valley II*.

The end result is that the Court has moved firmly in the direction of creating and enforcing a presumption that the lodestar calculation generally produces a fee award sufficient to induce attorneys to represent clients in meritorious cases.³⁰⁹ In the decades since *Delaware Valley II* and *Dague*, the Court has not approved an award of fees that includes an enhancement for risk.

vi. Nonmarket factors

Some upward adjustments have been reversed because they were based on factors that did not pertain to the market rate for fees. For example, the Fifth Circuit reversed an enhancement that was based on potential conflicts of interest and the fact that the time expended on the case prevented counsel from obtaining other clients; the court noted that these factors are not bases for increasing fee rates in the private sector.³¹⁰

5. Are there special considerations for awards to defendants?

When defendants request fee awards, the calculation is largely the same as that in plaintiff fee awards, but additional factors come into play. Denying or reducing fees is appropriate if the plaintiff is impecunious.³¹¹ The Seventh Circuit finds a reduction in order if the defendant fails to miti-

309. See *Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010); *supra* text accompanying notes 279–80.

310. *Alberti v. Klevenhagen*, 896 F.2d 927, 934 (5th Cir.), *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990).

311. See, e.g., *Roth v. Green*, 466 F.3d 1179, 1194 (10th Cir. 2006) (ruling “the plaintiffs’ ability to pay was not a relevant factor in determining whether to award fees against them, but was a relevant factor for the district court to consider in determining the amount of the fee award”); *Wolfe v. Perry*, 412 F.3d 707, 724 (6th Cir. 2005) (same); *Toliver v. Cnty. of Sullivan*, 957 F.2d 47, 49–50 (2d Cir. 1992); *Alizadeh v. Safeway*, 910 F.2d 234, 238 (5th Cir. 1990) (award may be reduced but not eliminated); *Miller v. Los Angeles*, 827 F.2d 617, 621 n.5 (9th Cir. 1987); *Kraeger v. Solomon & Flanagan, P.A.*, 775 F.2d 1541, 1544 (11th Cir. 1985) (where defendant seeks award, plaintiff’s financial resources are a “thirteenth factor” to add to the twelve *Johnson* factors); *Munson v. Friske*, 754 F.2d 683, 697–98 (7th Cir. 1985); *Charves v. W. Union*, 711 F.2d 462, 465 (1st Cir. 1983); *Durrett v. Jenkins Brickyard*, 678 F.2d 911, 917 (11th Cir. 1982) (award may be reduced but not eliminated).

gate (for example, by moving for dismissal or summary judgment).³¹² A reduction for failure to mitigate could apply to prevailing plaintiffs as well—since they are entitled to compensation only for “reasonable” hours—but will more likely apply to defendants, since defending against frivolous suits often does not require substantial time.³¹³

6. What are the procedural aspects of fee disputes?

a. Case law

The Supreme Court has said little about the procedural aspects of fee disputes, apart from its admonition that such disputes should not spawn “a second major litigation.”³¹⁴ The courts of appeals, however, have established certain norms, and trial courts have innovated in a quest to establish fair and efficient procedures. Some of those innovations are discussed *infra* Part III and cross-referenced in this section.

Most courts that have addressed the issue agree “that there is no need for an evidentiary hearing in a[n] attorney’s fees case when a record has been fully developed through briefs, affidavits, and depositions.”³¹⁵ Several courts have suggested that an evidentiary hearing is necessary to resolve material factual disputes in certain circumstances.³¹⁶ The Eighth Circuit requires a hearing “[w]hen serious factual disputes surround an application for attorney’s fees.”³¹⁷ Likewise, the D.C. Circuit requires a

312. *Leffler v. Meer*, 936 F.2d 981, 987 (7th Cir. 1991).

313. *See Hamilton v. Daley*, 777 F.2d 1207, 1215–16 (7th Cir. 1985).

314. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

315. *Robinson v. City of Edmond*, 160 F.3d 1275, 1286 (10th Cir. 1998). For cases rejecting the contention that a hearing must be or should have been held, see *Dejesus v. Banco Popular de Puerto Rico*, 951 F.2d 3, 7 (1st Cir. 1991); *Carey v. Crescenzi*, 923 F.2d 18, 22 (2d Cir. 1991); *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988); *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 377–78 (3d Cir. 1987); *Bailey v. Heckler*, 777 F.2d 1167, 1171 (6th Cir. 1985); *Thomason v. Schweiker*, 692 F.2d 333, 336 (4th Cir. 1982); *Nat’l Ass’n of Concerned Veterans v. Sec’y of Def.*, 675 F.2d 1319, 1330 (D.C. Cir. 1982). *See also Guadamuz v. Bowen*, 859 F.2d 762 (9th Cir. 1988) (no right to hearing before Secretary of HHS concerning attorney fee awards in Social Security disability cases).

316. *See Fed. R. Civ. P. 54(d)(2)(D)*, reproduced *infra* text accompanying note 343, which provides that district courts may adopt rules establishing special procedures for resolving fee-related disputes without resorting to an extensive evidentiary hearing.

317. *Herrera v. Valentine*, 653 F.2d 1220, 1233 (8th Cir. 1981).

hearing when “material issues of fact that may substantially affect the size of the award remain in well-founded dispute.”³¹⁸ The Ninth Circuit has stated that “[w]hen a factual dispute exists as to whether a party . . . prevailed, it is wise for the district court to conduct a hearing to resolve the conflict”³¹⁹ and has suggested that a hearing is required when there are vigorous disputes over the elements constituting the fee award.³²⁰ The Fifth Circuit requires a hearing where there are “apparent factual disputes,”³²¹ especially if such a hearing is requested.³²² According to the Eleventh Circuit, a hearing is not necessary if disputes concern

matters as to which the courts possess expertise. Such matters might include the reasonableness of the fee, the reasonableness of the hours and the significance of [the] outcome, But a hearing is necessary where there is a dispute of material historical fact such as whether or not a case could have been settled without litigation or whether attorneys were duplicating each other’s work³²³

Several courts have held that if the district court orders an award lower than that proposed and documented by the plaintiff, it must provide an explanation.³²⁴ Numerous reversals have resulted because the district court failed to explain how it arrived at a fee award.³²⁵ The Eleventh Circuit has said that the court “must articulate the decisions it made, give principled reasons for those decisions, and show its calculation. . . . If the court disallows hours, it must explain which hours are disallowed and show why an award of these hours would be improper.”³²⁶ The Sixth Cir-

318. *Concerned Veterans*, 675 F.2d at 1330.

319. *Church of Scientology v. U.S. Postal Serv.*, 700 F.2d 486, 494 (9th Cir. 1983).

320. *Id.*

321. *Henson v. Columbus Bank & Trust Co.*, 651 F.2d 320, 330 (5th Cir. 1981).

322. *King v. McCord*, 621 F.2d 205, 206 (5th Cir. 1980).

323. *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1304 (11th Cir. 1988).

324. See *United Steelworkers v. Phelps Dodge*, 896 F.2d 403, 406 (9th Cir. 1990); *Cunningham v. City of McKeesport*, 807 F.2d 49, 52–53 (3d Cir. 1986); *Gekas v. Attorney Registration & Disciplinary Comm’n*, 793 F.2d 846, 851 (7th Cir. 1986).

325. See, e.g., *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1255 (10th Cir. 1998); *Fleming v. Ayers & Assocs.*, 948 F.2d 993, 1000 (6th Cir. 1991); *Frank Music Corp. v. MGM, Inc.*, 886 F.2d 1545, 1556–57 (9th Cir. 1989); *Student Pub. Interest Research Group of N.J., Inc. v. AT&T Bell Labs.*, 842 F.2d 1436, 1456 (3d Cir. 1988); *Norman*, 836 F.2d at 1304; *Johnson v. New York City Transit Auth.*, 823 F.2d 31, 33 (2d Cir. 1987).

326. *Norman*, 836 F.2d at 1304 (citations omitted).

I. Fee-Shifting Statutes

cuit has stated that “the district court must not only articulate findings of fact and conclusions of law regarding the inclusion of hours amounting to the fee awarded, but those regarding the exclusion of hours as well.”³²⁷ The First Circuit has said that the court is “expected to explicate the basis for its fee awards Although findings are necessary, however, they need not be ‘infinitely precise,’ . . . ‘deluged with details,’ or even ‘full[y] articul[at]ed.’”³²⁸

The courts of appeals have allowed considerable leeway in applying the need for an explanation. A general explanation for reducing fees by a percentage across the board appears to be sufficient, at least when the reductions are a small percentage of the lodestar request. In certain circumstances, most circuits permit a trial court to make deductions without identifying exactly what hours it disallows. The Tenth Circuit endorses a “general reduction of hours claimed in order to achieve what the court determines to be a reasonable number.”³²⁹ The Seventh Circuit held that a district court acted within its discretion when it cut a lump sum rather than evaluate every entry: This was “a practical means of trimming fat” from an inadequately documented petition.³³⁰ The D.C. Circuit has endorsed this method,³³¹ as have the Second and Ninth Circuits, in cases in which the fee petition was voluminous.³³² The Third Circuit, which once stated that the district court must identify all disallowed hours,³³³ permitted a 10% pro rata reduction in compensable hours in light of “this complex and lengthy case”³³⁴ The Ninth Circuit emphasized that when a court makes a percentage reduction, it still must review the record, and it should explain concisely and clearly why it chose the par-

327. *Glass v. Secretary of HHS*, 822 F.2d 19, 22 (6th Cir. 1987).

328. *Foley v. City of Lowell*, 948 F.2d 10, 20 (1st Cir. 1991) (citations omitted).

329. *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1203 (10th Cir. 1986).

330. *Tomazzoli v. Sheedy*, 804 F.2d 93, 98 (7th Cir. 1986). See also *In re Ohio-Sealy Mattress*, 776 F.2d 646, 657–58 (7th Cir. 1985) (expressing reservations about percentage reduction where great deal of money was at stake); *In re Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992) (common fund case).

331. *Copeland v. Marshall*, 641 F.2d 880, 903 (D.C. Cir. 1980) (en banc).

332. *Gates v. Deukmejian*, 987 F.2d 1392, 1399 (9th Cir. 1992); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 237–38 (2d Cir. 1987).

333. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562 (3d Cir. 1984).

334. *Daggett v. Kimmelman*, 811 F.2d 793, 797–98 (3d Cir. 1987) (suggesting, however, that different result would have obtained if reduction had been significantly higher).

ticular percentage, even though the court is not required to set forth an hour-by-hour analysis of a voluminous fee application.³³⁵

The Seventh Circuit also approved a reduction arrived at by sampling billable time sheets. The district court had closely examined three or four particular tasks described in the fee application and applied its findings to the remaining hours claimed. The court informed counsel it would do this and gave opposing counsel the opportunity to suggest the specific work to be scrutinized. Although it affirmed the lower court's decision, the Seventh Circuit noted that "it might be a better practice to allow both the party opposing the fee award and the party seeking fees to suggest the individual tasks to be sampled."³³⁶

The Third Circuit has held that the district court may not decrease a fee award based on factors not raised by the adverse party.³³⁷ A Fourth Circuit case appears to hold differently.³³⁸ The Seventh Circuit has stated that the plaintiff is entitled to be heard before the court makes a significant reduction in requested hours.³³⁹

The Ninth and Tenth Circuits have rejected the contention that the award of attorneys' fees may be submitted to a jury.³⁴⁰ In a dispute relating to the reasonableness of a fee award, the Fifth Circuit held that there is no Seventh Amendment right to a jury trial on the reasonableness of fees, but it is permissible for a jury to determine fees.³⁴¹ The Second Circuit ruled that the Seventh Amendment guarantees a right to a jury trial

335. *Gates*, 987 F.2d at 1399–1402.

336. *Evans v. City of Evanston*, 941 F.2d 473, 477 (7th Cir. 1991) (reiterating approval of sampling method in *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572–73 (7th Cir. 1992)). Sampling is discussed *infra* section III.A.3.

337. *Bell v. United Princeton Props.*, 884 F.2d 713, 719 (3d Cir. 1989); *Cunningham v. City of McKeesport*, 753 F.2d 262, 267 (3d Cir. 1985), *vacated on other grounds*, 478 U.S. 1015 (1986).

338. *Broyles v. Dir.*, 974 F.2d 508, 510 (4th Cir. 1992) ("Although the [defendant] has not challenged the number of hours claimed, we have the responsibility of determining whether the fees sought are *reasonable*.").

339. *Smith v. Great Am. Rests.*, 969 F.2d 430, 440 (7th Cir. 1992).

340. *MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/American Express, Inc.*, 962 F.2d 1470, 1475 (10th Cir. 1992); *Hatrock v. Jones & Co.*, 750 F.2d 767, 776 (9th Cir. 1984).

341. *Resolution Trust v. Marshall*, 939 F.2d 274, 279 (5th Cir. 1991). The court did not say whether it is wholly within the court's discretion to have a jury determine fees, or whether consent of the parties is required.

I. Fee-Shifting Statutes

to determine whether a contract provides that a party has a legal right to recover attorneys' fees. However, once the jury decides that a party may recover attorneys' fees under the contract, "the better practice is for the judge to determine the amount."³⁴²

b. Rule 54 and local rules

The procedural requirements and options available to judges faced with fee disputes are set forth in Federal Rule of Civil Procedure 54(d)(2)(C) and (D):

(C) *Proceedings*. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge*. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.³⁴³

Using the authority granted in Rule 54(d)(2)(D), a number of federal district courts have adopted local rules to facilitate the management of attorney fee petitions. The District of Maryland has adopted detailed guidelines to facilitate judicial action on matters that generally arise in fee-shifting cases, including the establishment of hourly rates related to attorney experience.³⁴⁴ These guidelines specify how time should be recorded and reported; require attorneys who intend to seek fees to provide quarterly statements of total hours to opposing counsel; require designation of a "lead attorney for each task"; limit compensation for more than

342. *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1315 n.2 (2d Cir. 1993).

343. Fed. R. Civ. P. 54(d)(2)(C) and (D). Rule 54(d)(2)(E) exempts from the amended rule a request for attorneys' fees as a sanction.

344. See D. Md. Loc. R. 109.2 and Appendix B, Rules and Guidelines for Determining Attorneys' Fees in Certain Cases (Feb. 2015 Supp.), <http://www.mdd.uscourts.gov/localrules/LocalRules.pdf>, at 119–22.

one attorney per party for depositions, hearings, and conferences; limit reimbursement for travel; and specify guidelines for hourly rates, based on levels of experience.³⁴⁵

Some district courts require the parties to meet and confer for the purpose of attempting to resolve any disputes about fees.³⁴⁶ The Northern District of Florida has an intricate set of provisions to encourage resolution of fee issues. First, court rules create a bifurcated procedure for determining eligibility for fees before requiring affidavits of fees and expenses.³⁴⁷ Then, if the parties do not settle, and the court rules that the moving party is entitled to fees, that party must file a detailed affidavit. Within fourteen days, the opposing party must file an acceptance or rejection of the amount claimed; if it files an objection, it must specify the objectionable hours with reasons, and must propose an amount it would be willing to pay.³⁴⁸ If a fee matter is not resolved by the prefiling procedures, the court rules authorize the district judge to appoint a special master to hear the dispute, with authority to prorate the special master's fees, "taking into account the reasonableness of the parties' respective positions concerning the amount of the attorneys' fees."³⁴⁹

Some district courts have created rules setting the time for filing fee petitions and outlining the content and format for such petitions. For example, the District of Maryland calls for a party to file a motion for fees within fourteen days of the entry of judgment; a supporting memorandum, however, is not due until thirty-five days after the motion or, in the event of an appeal from the judgment, within fourteen days of the issuance of the mandate.³⁵⁰ The Northern District of Florida calls for a motion to be filed "within the time specified in the scheduling order."³⁵¹

345. D. Md. Loc. Adm. R. 109.3. For example, the hourly rate guideline in the 2014 amended rule for attorneys admitted to the bar for less than five years is \$150–\$225; for five to eight years, it is \$165–\$300; for nine to fourteen years, it is \$225–\$350; for fifteen to nineteen years, it is \$275–\$425; and for twenty years or more, it is \$300–\$475. The hourly rate guideline for paralegals and law clerks is \$95–\$150. *Id.*

346. See, e.g., N.D. Cal. Civ. R. 54-5(a). See also N.D. Ill. R. 54.3(d).

347. N.D. Fla. R. 54.1(d).

348. N.D. Fla. R. 54.1(E)(4).

349. N.D. Fla. R. 54.1(F).

350. D. Md. Loc. Adm. R. 109.2.

351. N.D. Fla. R. 54.1(A). The parties are required to pursue settlement before any motion is considered. N.D. Fla. R. 54.1(C).

C. Issues on Appeal

The legal issues discussed above apply to the courts of appeals as well as to the district courts. The following issues apply only to the courts of appeals:

- the timing of the appeal;
- the scope of review; and
- whether the court of appeals may calculate the award.

1. Timing of the appeal

In *White v. New Hampshire Department of Employment Security*,³⁵² the Supreme Court held that a request for attorneys' fees is collateral to and separate from a decision on the merits.³⁵³ In *Budinich v. Becton Dickinson & Co.*,³⁵⁴ the Court held that a request for attorneys' fees does not prevent an otherwise final decision on the merits from becoming final for purposes of appeal.³⁵⁵ Thus, the thirty-day period for filing an appeal begins once the judgment is entered, even if an order on the fee request has not been entered.

In *Ray Haluch Gravel Co. v. Central Pension Fund*,³⁵⁶ a unanimous Supreme Court ratified the *Budinich* rule, and extended it to cases in which the fee request arises out of a contractual action as well as to cases in which fees were incurred prior to the commencement of the litigation. The Court underscored the importance of "the operational consistency and predictability stressed in *Budinich*."³⁵⁷ In dicta, the Court explained how the Federal Rules of Civil Procedure provide the means to avoid piecemeal litigation: When the merits and fees might beneficially be appealed together, a party can move for attorneys' fees under Rules 54(d)(2) and 58(e); the court might order that the motion has the effect of a Rule 59(e) motion—that is, delaying the running of the time to file an appeal. Nevertheless, the default rule is that a judgment on the merits is final and appealable even when fee issues remain.

352. 455 U.S. 445 (1982).

353. *Id.* at 451–52.

354. 486 U.S. 196 (1988).

355. *Id.* at 202–03.

356. 134 S. Ct. 773 (2014).

357. *Id.* at 780.

*Ramsey v. Colonial Life Insurance Co. of America*³⁵⁸ illustrates the Court's suggestion for avoiding piecemeal litigation. In *Ramsey*, the Fifth Circuit distinguished the earlier Supreme Court cases, which concerned original requests for attorneys' fees, from the case before it, which involved a motion to reconsider attorneys' fees. It held that a request to reconsider a denial of attorneys' fees was a Rule 59(e) motion that tolled the thirty-day period for taking an appeal on the merits of the case. In *Ramsey*, the district court had entered a judgment that included both a disposition on the merits and a denial of attorneys' fees. The Fifth Circuit stated, "a motion to reconsider a judgment will be considered a Rule 59(e) motion even where the request for reconsideration encompasses only that part of the judgment regarding attorney's fees."³⁵⁹

In contrast, the Tenth Circuit, in *Utah Women's Clinic, Inc. v. Leavitt*,³⁶⁰ held that a Rule 59(e) motion to rescind an award of attorneys' fees did not toll the time for appeal on the merits. It distinguished the case from *Ramsey*, which concerned a final disposition of the question of attorneys' fees, that is, they were denied. *Leavitt* did not involve a final disposition of attorneys' fees; the amount of fees was not set. Relying on *Budinich*, the Tenth Circuit noted that the fee issue remained "collateral to the merits judgment, particularly when the judgment contemplates significant further proceedings concerning costs and attorney's fees."³⁶¹

The Third, Sixth, and Ninth Circuits have rejected the contention that Federal Rule of Appellate Procedure 39(d) requires an appeal from a fee order to be filed within fourteen days.³⁶² They held that Rule 39(d) applies only to certain costs specified in the text of the rule—briefs, appendices, and copies of records allowed under Rule 39(c)—and not to attorneys' fees. The D.C. Circuit has held to the contrary.³⁶³ The First,

358. 12 F.3d 472 (5th Cir. 1994).

359. *Id.* at 478.

360. 75 F.3d 564 (10th Cir. 1995).

361. *Id.* at 567.

362. *McDonald v. McCarthy*, 966 F.2d 112, 114 (3d Cir. 1992); *Kelley v. Metro. Cnty. Bd. of Educ.*, 773 F.2d 677, 682 n.5 (6th Cir. 1985) (en banc); *N. Plains Res. Council v. EPA*, 670 F.2d 847, 848 n.1 (9th Cir. 1982), *vacated on other grounds*, 464 U.S. 806 (1983).

363. *Montgomery & Assocs., Inc. v. Commodity Futures Trading Comm'n*, 816 F.2d 783, 785 (D.C. Cir. 1987) (motion for fees untimely because not filed within Rule 39(d) time period).

I. Fee-Shifting Statutes

Third, Fifth, Sixth, and Eleventh Circuits have held that an appellate court's order that each party bear its own costs does not preclude an award of attorneys' fees.³⁶⁴ The Second Circuit has held to the contrary.³⁶⁵

As a result of *Budinich*, district courts generally view proceedings on the merits as procedurally distinct from post-judgment fee proceedings. For example, they often enter separate orders on the merits and on the fee request.³⁶⁶ When this occurs, a separate notice of appeal from the fee decision must be filed.³⁶⁷

The D.C., Federal, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that an order determining liability for fees but not establishing the amount is not a final, appealable order.³⁶⁸

364. *McDonald v. McCarthy*, 966 F.2d 112, 115–18 (3d Cir. 1992); *Chems. Mfrs. Ass'n v. EPA*, 885 F.2d 1276, 1278 (5th Cir. 1989); *Lattimore v. Oman Constr.*, 868 F.2d 437, 440 n.6 (11th Cir. 1989); *Kelley*, 773 F.2d at 681; *Robinson v. Kimbrough*, 652 F.2d 458, 463 (5th Cir. 1981); *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 91 (1st Cir. 1969). These courts found that attorneys' fees are distinct from the costs referred to in Rule 39. *See also* *Terket v. Lund*, 623 F.2d 29, 33 (7th Cir. 1980) (because fees and costs are distinct, appeal from order taxing costs didn't give court of appeals jurisdiction over fee award). Some of these cases were decided before the Supreme Court's ruling in *Marek v. Chesny*, 473 U.S. 1 (1985), which held that fees are part of costs under Rule 68. However, the Third and Sixth Circuits distinguished them from *Marek* (*see McDonald*, 966 F.2d at 116; *Kelley*, 773 F.2d at 681–82 n.5), noting that Federal Rule of Civil Procedure 68 is silent about costs, whereas Federal Rule of Appellate Procedure 39(d) specifically enumerates costs but makes no mention of attorneys' fees.

365. *Toliver v. Cnty. of Sullivan*, 957 F.2d 47 (2d Cir. 1992).

366. The Eighth Circuit, after reviewing a number of cases in which district courts entered separate orders on the merits and on attorneys' fees, stated a preference for reviewing judgments that include a decision both on the merits and on attorney fee awards “[w]henever possible and practical.” *Maristuen v. Nat'l States Ins. Co.*, 57 F.3d 673, 678 (8th Cir. 1995).

367. *McDonald*, 966 F.2d at 118; *Quave v. Progress Marine*, 918 F.2d 33, 34 (5th Cir. 1990); *Art Janpol Volkswagen v. Fiat Motors of N. Am.*, 767 F.2d 690, 697 (10th Cir. 1985); *Exch. Nat'l Bank of Chicago v. Daniels*, 763 F.2d 286, 291–92 (7th Cir. 1985).

368. *Orenshteyn v. Citrix Sys., Inc.*, 691 F.3d 1356 (Fed. Cir. 2012); *McCarter v. Ret. Plan for Dist. Managers of Am. Family Ins. Group*, 540 F.3d 649 (7th Cir. 2008); *Pridgen v. Andresen*, 113 F.3d 391 (2d Cir. 1997); *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675 (D.C. Cir. 1996); *Pennsylvania v. Flaherty*, 983 F.2d 1267 (3d Cir. 1993); *Echols v. Parker*, 909 F.2d 795 (5th Cir. 1990); *Phelps v. Washburn Univ. of Topeka*, 807 F.2d 153 (10th Cir. 1986); *Gates v. Cent. Teamsters Pension Fund*, 788 F.2d 1341 (8th Cir. 1986); *Morgan v. Union Metal*, 757 F.2d 792 (6th Cir. 1985); *Fort v. Roadway Express*, 746 F.2d 744 (11th Cir. 1984). *See also* *Andrews v. Emps.' Ret. Plan*, 938 F.2d 1245, 1248

Interim fee awards—which are based on partial success of the litigation while other issues are pending resolution—generally are not appealable.³⁶⁹ However, the Fifth, Sixth, Seventh, and Ninth Circuits have held that interim fee awards are appealable under the collateral order doctrine if the defendant would otherwise have trouble recovering its money after the litigation.³⁷⁰ The D.C. Circuit declined to follow that approach, and held that interim fee awards in pending class action litigation are not reviewable under the collateral order doctrine.³⁷¹

2. Scope of review

The Supreme Court has held that when a statute grants discretion to award fees to the prevailing party in “exceptional cases,” district judges’ decisions to grant or deny fees are reviewable under a deferential “abuse of discretion” standard.³⁷² In addition, the Court has stated that district courts’ factual determinations with respect to a fee award should also be reviewed under an “abuse of discretion” standard.³⁷³

Most cases do not involve a statutory specification granting discretion to award fees, and other considerations may apply in defining the scope of review. The Supreme Court has not established a definitive scope of review. Courts of appeals have used a variety of approaches. The First Circuit reviews a fee award only for a mistake of law or an abuse of discretion.³⁷⁴ The Third Circuit has held that the legal standards used by

(11th Cir. 1991) (reaffirming position but nevertheless entertaining appeal because, on facts of case, it saw “no practical purpose in delaying resolution of the attorney’s fee issue”).

369. *In re Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143 (3d Cir. 2005); *Shipes v. Trinity Indus.*, 883 F.2d 339 (5th Cir. 1989).

370. *People Who Care v. Rockford Bd. of Educ.*, 921 F.2d 132, 134 (7th Cir. 1991); *Shipes v. Trinity Indus.*, 883 F.2d 339, 344–45 (5th Cir. 1989); *Rosenfeld v. United States*, 859 F.2d 717, 721–22 (9th Cir. 1988); *Webster v. Sowders*, 846 F.2d 1032, 1035 (6th Cir. 1988).

371. *Petties v. District of Columbia*, 227 F.3d 469 (D.C. Cir. 2000).

372. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1747–49 (2014) (interpreting § 285 of the Patent Act, 35 U.S.C. § 285).

373. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). However, such review requires a district court to “provide a concise but clear explanation of its reasons for the fee award.” *Id.*

374. *Coutin v. Young & Rubicam P.R., Inc.*, 124 F.3d 331, 336 (1st Cir. 1997).

I. Fee-Shifting Statutes

the district court are given plenary review.³⁷⁵ Similarly, the Seventh, Ninth, and Tenth Circuits have held that, although the amount of a fee award is generally reviewed for abuse of discretion, whether the plaintiff is entitled to any award is usually a question of statutory interpretation, reviewed de novo.³⁷⁶

3. May the court of appeals calculate the award?

As a general rule, when a court of appeals finds a fee calculation to be erroneous, it remands the case for recalculation. However, on occasion the courts of appeals have decided the matter themselves to further the administration of justice. The Seventh Circuit has suggested that when a case has been in litigation for years, this shortcut is justifiable.³⁷⁷ The First Circuit has found a remand unnecessary if “the record is sufficiently developed that we can apply the law to the facts before us” to recalculate the award in an essentially “mechanical” manner.³⁷⁸ The Fifth Circuit has agreed.³⁷⁹ The Eleventh Circuit has held that it has authority to calculate a fee without a remand unless an evidentiary hearing is required to clarify disputed facts.³⁸⁰

375. *Bell v. United Princeton Props.*, 884 F.2d 713, 718 (3d Cir. 1989). *See also* *Domegan v. Ponte*, 972 F.2d 401, 406 (1st Cir. 1992), *vacated and remanded on other grounds*, 113 S. Ct. 1378 (1993).

376. *See, e.g.*, *Jaffee v. Redmond*, 142 F.3d 409, 413 (7th Cir. 1998); *Schultz v. Hembree*, 975 F.2d 572, 574 n.2 (9th Cir. 1992); *Homeward Bound, Inc. v. Hissom Mem'l Hosp.*, 963 F.2d 1352 (10th Cir. 1992). The Ninth Circuit has also said that “any elements of legal analysis and statutory interpretation which figure in the district court’s [attorneys’ fees] decision are reviewable de novo.” *Coalition for Clean Air v. S. Cal. Edison*, 971 F.2d 219, 229 (9th Cir. 1992).

377. *See Ustrak v. Fairman*, 851 F.2d 983, 989 (7th Cir. 1988).

378. *Lipsett v. Blanco*, 975 F.2d 934, 943 (1st Cir. 1992).

379. *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 326 (5th Cir. 1995) (modifying fee award without remand).

380. *ACLU of Ga. v. Barnes*, 168 F.3d 423, 431–32 (11th Cir. 1999). *See also* *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 181 (4th Cir. 1994) (finding authority to calculate fee award without remand, but not enough information on record to do so).

II. Common Fund and Substantial Benefit

A. Common Fund

Four Supreme Court cases establish the perimeters of the common fund doctrine, which is rooted in the principle of preventing unjust enrichment. Unlike statutory fee shifting, the common fund doctrine is based on common-law judicial holdings that allowing direct beneficiaries of attorney services to not pay for those services would amount to unjust enrichment. In the 1881 case of *Trustees v. Greenough*,³⁸¹ a bondholder's suit resulted in recovery of trust assets and realization of dividend payments to himself and other bondholders. The Court held that the bondholder should be reimbursed from the trust fund for his attorneys' fees lest the other bondholders be unjustly enriched at his expense.³⁸²

A few years later, in *Central Railroad & Banking Co. v. Pettus*,³⁸³ the Court expanded the common fund doctrine, holding that the plaintiff's counsel in a class action not only had standing to seek reimbursement of fees for his client, but also was eligible for an award of his own (not limited to what the client owed him). The Court reasoned that otherwise, the class members would be unjustly enriched at the counsel's expense.

Greenough and *Pettus* involved a kind of recovery that differs fundamentally from statutory fee shifting in that fees are shared by the beneficiaries of the lawsuit rather than shifted to the losing party. These cases established that the common fund doctrine gives rise to two kinds of claims: claims by plaintiffs to have their legal costs shared and claims by attorneys for an award other than that paid or owed by the client.³⁸⁴ (As in statutory fee-shifting cases, intervenors and their attorneys are also

381. 105 U.S. 527 (1881).

382. The Court suggested that fees might also be recovered directly from the other beneficiaries. *Id.* at 532. However, there are no reported cases in which such a recovery has been ordered. *Cf. Vincent v. Hughes Air W. Inc.*, 557 F.2d 759, 770 (9th Cir. 1977).

383. 113 U.S. 116 (1885).

384. *See Skelton v. GM Corp.*, 860 F.2d 250, 253 (7th Cir. 1988) ("Thus, in statutory fee-shifting cases, only parties (usually plaintiffs) may seek reimbursement whereas in common fund cases *attorneys* may seek compensation.").

eligible for an award.³⁸⁵) Each of the two kinds of claims prevents unjust enrichment of the beneficiaries.

Although many common fund cases are class actions, like *Pettus*, the common fund doctrine is not limited to class actions. This point was clarified and the common fund doctrine was further expanded in *Sprague v. Ticonic National Bank*,³⁸⁶ which involved a trust fund that was jeopardized when a bank went into receivership. After the plaintiff successfully sued for a lien establishing her right to recover from the trust, she sought reimbursement of attorneys' fees from the trust. Although the suit had only indirectly established the rights of others, and had not created a fund, the Court held that fees were in order.

Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.³⁸⁷

Sprague notwithstanding, most common fund cases are class actions. In *Boeing Co. v. Van Gemert*,³⁸⁸ the Supreme Court held that the unclaimed portion of a fund established by a class action may be tapped for a fee award. It rejected the contention that the nonclaimants cannot be considered beneficiaries, reasoning that entitlement to the fund makes all

385. See, e.g., *Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1302 (2d Cir. 1990); *Kargman v. Sullivan*, 589 F.2d 63, 68–69 (1st Cir. 1978); *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir. 1976). The court must, of course, assess whether the intervenor made a meaningful contribution. See, e.g., *Bandes v. Harlow & Jones*, 852 F.2d 661, 671 (2d Cir. 1988); *infra* text accompanying note 396; *Lindy Bros.*, 540 F.2d at 112 (intervenors awarded fees because “the financial strength they added to the plaintiff class . . . helped to force the settlement”).

386. 307 U.S. 161 (1939).

387. *Id.* at 167.

388. 444 U.S. 472 (1980).

II. Common Fund and Substantial Benefit

class members beneficiaries for the purposes of the common fund doctrine.³⁸⁹

Despite these cases, application of the common fund doctrine will not invariably be simple. Like fee-shifting cases, common fund cases require a three-step inquiry: (1) whether there is entitlement to a fee award; (2) how the award should initially be calculated; and (3) whether any adjustment to the presumptive award should be made.

B. Class Actions

Federal Rule of Civil Procedure 23(h) governs motions for attorney fee awards in class actions. It does not mandate Rule 54(d)(2)(B)'s fourteen-day filing requirement. Rather, Rule 23(h)(1) allows motions for attorneys' fees "at a time the court sets."

1. Determining whether an award is in order

a. *Is there a fund?*

When a party requests fees from a common fund, the threshold question is whether a common fund exists. On occasion, parties seek awards when there is no common fund.³⁹⁰ The requirement of a common fund is not applied mechanically. For example, the D.C. Circuit rejected a contention that "the [common fund] doctrine is inapplicable because 'there is literally no common fund'; although "retroactive salary payments were paid out of several different appropriations, . . . [t]he entire sum paid to federal employees is the 'common fund'. . . to which the request for contribution is applicable"³⁹¹

In some—perhaps most—class action settlements, there is no monetary fund that is created and that is under the control of the court. In-

389. *Id.* at 479–82. *See also* Williams v. MGM-Pathé Commc'ns Co., 129 F.3d 1026, 1027 (9th Cir. 1997) (per curiam). *Accord* Waters v. Int'l Precious Metals Co., 190 F.3d 1291, 1292–97 (11th Cir. 1999). The latter two cases are discussed *infra* note 487.

390. *See, e.g.*, Christensen v. Kiewit-Murdock Inv. Corp., 815 F.2d 206, 211 (2d Cir. 1987) ("The award appellants seek would not be payable out of any 'fund.'"); Holbrook v. Pitt, 748 F.2d 1168, 1175 (7th Cir. 1984) ("the common fund doctrine cannot be applied because there is no 'common fund'"). The existence of a common fund is not a prerequisite to fee awards under the "substantial benefit" line of cases, discussed *infra* section II.C.

391. Nat'l Treasury Emps. Union v. Nixon, 521 F.2d 317, 320–21 (D.C. Cir. 1975).

stead, the parties agree to create a claims process that will distribute money or other benefits to class members who submit claims.³⁹² While courts generally treat these cases as if there is a common fund, the structure may affect the calculation of a fee award, particularly if some of the common “fund” reverts to the defendant if not claimed by class members.³⁹³

b. *Did the plaintiffs or objecting class members bring about or enhance the fund, or create access to it?*

In common fund cases, the court need not determine whether the plaintiffs or objecting class members achieved success sufficient to warrant a fee award: The fund itself signifies success. However, the plaintiff must establish that its suit was a “but for” cause of the fund (or at least ensured access to the fund). The case of *Bandes v. Harlow & Jones*³⁹⁴ illustrates this requirement. A Nicaraguan company paid an American company for a shipment of goods. The shipment was not made, in part because the Nicaraguan company was taken over by its government. The former owner sought return of the payment, and Alvarez, a representative of the Nicaraguan government, intervened. The American company interpleaded the money, and the two claimants—the former owner and Alvarez—went to trial. The former owner prevailed, but the trial court granted Alvarez attorneys’ fees from the payment, presumably because the fund benefited the unrepresented shareholders, and Alvarez had “demonstrated some solicitude” for them.³⁹⁵ The Second Circuit reversed this decision because Alvarez “did nothing to create the common fund.”³⁹⁶

The Second Circuit could have stressed that Alvarez not only did not “create” the fund but also played no role in benefiting the shareholders (since the fund would have become available even if he had not intervened). This distinction is important because the common fund doctrine does not require that the suit bring about a fund *ab initio*. The leading Supreme Court cases involved funds that predated the suit in *Bandes*.³⁹⁷

392. See *infra* section II.B.2.a.ii.

393. See *infra* text accompanying note 487.

394. 852 F.2d 661 (2d Cir. 1988).

395. *Id.* at 671.

396. *Id.*

397. See *supra* section II.A.

II. Common Fund and Substantial Benefit

The D.C. Circuit has stated that the common fund doctrine applies to actions that “create, enhance, preserve, or protect [a] fund.”³⁹⁸ The Ninth Circuit has said it applies if the plaintiff “created, discovered, increased or preserved” a fund.³⁹⁹ Such formulations are underinclusive. The common fund doctrine has also been applied in cases that resulted in a fund’s reapportionment⁴⁰⁰ or distribution.⁴⁰¹ The doctrine may apply, then, if a lawsuit creates a fund or ensures access to funds.⁴⁰²

An applicant for fees need not be a plaintiff or a named class representative in the litigation. The central question is whether the actions of those seeking fees helped create or enhance the common fund. Objectors may satisfy that test. As the Second Circuit stated decades ago, in *White v. Auerbach*:⁴⁰³

[I]t is well settled that objectors have a valuable and important role to perform in preventing collusive or otherwise unfavorable settlements, and that . . . they are entitled to an allowance as compensation for attorneys’ fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts.⁴⁰⁴

The objectors in *White* “made a prima facie showing that” they were entitled to fees for pointing out to the trial court that a management fee reduction in the original settlement was “illusory” and would provide no benefit to the class unless a “guaranteed minimum” reduction was in-

398. *Abbott, Puller & Myers v. Peyser*, 124 F.2d 524, 525 (D.C. Cir. 1941).

399. *B.P. N. Am. Trading, Inc. v. Vessel Panamax Nova*, 784 F.2d 975, 977 (9th Cir. 1986).

400. *See, e.g., United States v. ASCAP*, 466 F.2d 917 (2d Cir. 1972); *Nolte v. Hudson Navigation Co.*, 47 F.2d 166 (2d Cir. 1931); *Dorfman v. First Boston Corp.*, 70 F.R.D. 366 (E.D. Pa. 1976).

401. *See, e.g., Powell v. Pa. R.R.*, 267 F.2d 241 (3d Cir. 1959); *Lafferty v. Humphrey*, 248 F.2d 82 (D.C. Cir. 1957).

402. *See Sprague v. Ticonic*, 307 U.S. 161, 166–67 (1939) (the fact that the fund wasn’t “formally established by litigation” is not decisive as long as the suit “makes a fund available for others”). The breadth of the doctrine is occasionally overlooked. *See, e.g., Feick v. Fleener*, 653 F.2d 69, 78 (2d Cir. 1981) (rejecting award from estate for attorney whose work during protracted litigation enhanced estate; denying fees because “no fund was created by [their] efforts” and overlooking the fact that common fund doctrine can apply when litigation enhances existing fund).

403. 500 F.2d 822 (2d Cir. 1974).

404. *Id.* at 828.

cluded.⁴⁰⁵ They also made clear that refunds to the class were “to be in addition to and not a credit against the reduction in management fees.”⁴⁰⁶ The Second Circuit found that, “[h]ad it not been for appellants’ objection, [the trial judge] would have had no occasion to consider this issue.”⁴⁰⁷

Often, fees for objectors arise from successful objections to fee requests.⁴⁰⁸ Courts have also awarded fees to objectors for benefits that defy easy conversion into dollars, such as improving “the distributional fairness of the class settlement”⁴⁰⁹ or “contribut[ing] to the adversarial nature of the proceedings.”⁴¹⁰ But always, the court must balance the fee request against the enhanced benefit to the class. The Seventh Circuit articulated the limits of the common fund doctrine as applied to objectors this way: “The principles of restitution that authorize such a result also require, however, that the objectors produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class.”⁴¹¹ And, of course, courts frequently use their discretion to deny objectors’ requests for fees.⁴¹²

The fee applicant’s efforts need not involve an actual adjudication. Recovery can be appropriate when the common fund results from a formal settlement,⁴¹³ or when the defendant takes remedial action that moots the case.⁴¹⁴ In addition, a common fund recovery is arguably available from a fund created by a legislative or administrative action spurred

405. *Id.* at 829.

406. *Id.*

407. *Id.*

408. *See, e.g.,* *Rodriguez v. Disner*, 688 F.3d 645, 660 (9th Cir. 2012); *Useton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 855 (10th Cir. 1993).

409. *Lobur v. Parker*, 378 F. App’x 63, 65 (2d Cir. 2010).

410. *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225, 1227 (8th Cir. 1982).

411. *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 288 (7th Cir. 2002).

412. *See, e.g., McCoy v. UPS*, 222 F. App’x 87 (2d Cir. 2007).

413. *See, e.g., Kopet v. Esquire Realty*, 523 F.2d 1005, 1008 (2d Cir. 1975).

414. *See, e.g., Koppel v. Wien*, 743 F.2d 129, 135 (2d Cir. 1984) (fees appropriate even though “no judgment or consent decree was entered and the complaint was dismissed as moot”); *Reiser v. Del Monte Props.*, 605 F.2d 1135, 1139 (9th Cir. 1979) (fees not precluded when defendant voluntarily takes action favorable to plaintiff that moots suit).

II. Common Fund and Substantial Benefit

by the plaintiff's lawsuit.⁴¹⁵ Finally, in one case, the Supreme Court held that an award was appropriate for defendants whose litigation efforts preserved a fund.⁴¹⁶

c. Are there beneficiaries?

Awards have been denied because there were no bona fide beneficiaries of the fund other than the plaintiff. In one case, a minority shareholder prevailed in a derivative suit against the officers of the corporation, who were also the other shareholders. The officers were ordered to reimburse the corporation for the diminution of stock value caused by their breach of fiduciary duty. The Fifth Circuit found a fee award inappropriate because "the effect of such an award is to shift the liability for those fees to the defendant,"⁴¹⁷ whereas the common fund doctrine aims to spread the fee among beneficiaries. The court elaborated:

The trial court's judgment on the derivative claim in this case creates no common fund benefiting the remaining former . . . shareholders other than [the plaintiff]. Rather, the other shareholders are cast in judgment in the corporation's favor. Therefore, the effect of the award of attorney's fees out of the so-called derivative recovery is to increase the defendants' liability to include the plaintiff's attorney's fees. The award of attorney's fees to the plaintiff who successfully litigates the corporation's claim is not designed "to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them."⁴¹⁸

415. See *Winton v. Amos*, 255 U.S. 373, 393 (1921) (fee recovery appropriate where attorney persuaded legislative and executive branches to restore lands and funds to his clients). *Winton* has rarely been cited, and it was rejected by the D.C. Circuit *sub silentio* in *Whittier v. Emmett*, 281 F.2d 24, 32 (D.C. Cir. 1960) ("claim for compensation for services rendered in sponsoring favorable legislation [does] not deserve prolonged discussion"). See also *Harger v. U.S. Dep't of Labor*, No. CV065071RHW, 2007 WL 4246189, at *2 (E.D. Wash. Nov. 29, 2007) (holding *Boeing* applies only to common benefits created by litigation), *aff'd in part on other grounds*, 569 F.3d 898 (9th Cir. 2009). But see *Paris v. Metro. Life Ins.*, 94 F. Supp. 792 (S.D.N.Y. 1947) (ordering recovery from fund created by action of administrative agency).

416. See *Rude v. Buchhalter*, 286 U.S. 451, 461 (1932).

417. *Junker v. Croy*, 650 F.2d 1349, 1363 (5th Cir. 1981).

418. *Id.* (quoting *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 396–97 (1970)).

In a First Circuit case, the plaintiff, Joseph Catullo, and the defendant, Conservit, Inc., a Maryland corporation, agreed to form a company, Barlof Salvage, to do business in Puerto Rico. When Conservit began to compete with Barlof, Catullo brought a derivative suit on behalf of Barlof. Catullo prevailed and sought fees from the judgment recovered to “avoid burdening the plaintiff and unjustly enriching the only other shareholder—Conservit.”⁴¹⁹ The First Circuit rejected the request because the “[p]laintiff is the sole shareholder to benefit from the derivative action. The only other party in interest, Conservit, must advance the money which plaintiff now proclaims to be a common fund.”⁴²⁰

In *Sprague v. Ticonic National Bank*,⁴²¹ the Supreme Court found the common fund doctrine applicable where the petitioner established the claims of non-plaintiffs through *stare decisis*. Lower courts have applied this doctrine in cases resembling *Sprague*, that is, cases in which the plaintiff and the beneficiary had similar claims on a particular fund.⁴²² However, courts do not apply the common fund doctrine whenever a suit establishes a rule of law that later brings success to others.⁴²³ A Second Circuit case illustrates this limitation. New York farmers who sold milk in Connecticut challenged a government regulation that gave a larger subsidy to Connecticut farmers. When they prevailed by relying on a Supreme Court decision that invalidated a similar regulation (for farmers in other states), the attorney who won in the Supreme Court case intervened in the Second Circuit case to petition for fees. The Second Circuit

419. *Catullo v. Metzner*, 834 F.2d 1075, 1083 (1st Cir. 1987).

420. *Id.* at 1084. *See also In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 840 F.2d 1308, 1318–19 n.9 (7th Cir. 1988) (common fund recovery impermissible where it effectively shifts fees to opposing party); *McQuiston v. Marsh*, 707 F.2d 1082, 1085 (9th Cir. 1983) (same).

421. 307 U.S. 161 (1939), discussed *supra* text accompanying notes 386–87.

422. *See, e.g., City of Klawock v. Gustafson*, 585 F.2d 428, 431 (9th Cir. 1978) (affirming fees based on *Sprague's stare decisis* rule because “[s]pecific property was in the hands of the same defendant who had lost the case and that defendant’s duty under the previous decision was clear”).

423. *See Maier Brewing Co. v. Fleischmann Distilling Corp.*, 359 F.2d 156, 164 n.13 (9th Cir. 1966) (*Sprague* usually applied “in cases having closely analogous facts”), *aff'd*, 386 U.S. 714 (1967). In *Sprague*, the Court cautioned, without elaboration, that fees for a suit benefiting others via *stare decisis* are limited to “exceptional cases” involving “dominating reasons of justice.” *Sprague*, 307 U.S. at 167.

II. Common Fund and Substantial Benefit

rejected the “novel assertion that attorneys who are victorious in one case may . . . claim fees from all subsequent litigants who might rely on or use it in one way or another.”⁴²⁴

The Ninth Circuit expanded the *Sprague* holding in one respect. In *City of Klawock v. Gustafson*,⁴²⁵ the underlying decision that benefited other parties was made by a district court (with no appeal taken), and thus lacked *stare decisis*. The Ninth Circuit held that a fee award was nevertheless in order, and found that it would be unfair to penalize the plaintiff because the case did not go up on appeal.⁴²⁶ However, in a similar case, the Second Circuit reached a different conclusion, denying fees because “it is at least doubtful whether [the plaintiff’s] unreviewed judgment would work as a collateral estoppel in favor of another similarly situated plaintiff.”⁴²⁷

d. Can fees be shifted to the beneficiaries with precision?

A common fund fee award must result in costs being “shifted with some exactitude to those benefiting.”⁴²⁸ Thus, courts deny awards when there are only a few beneficiaries and other parties would be harmed by recovery of fees from the fund. In one case, the plaintiff sued a pension plan, challenging its procedures for awarding disability benefits. The plaintiff prevailed, but the Second Circuit found a fee award inappropriate because “the financial benefit of [the plaintiff’s] success . . . accrue[s] to a relatively few members of the Plan, which provides pension as well as disability benefits.”⁴²⁹ Similarly, the Ninth Circuit denied fees in a suit that stopped the construction of a state highway and thereby preserved the state highway fund. The fund could not be shifted “proportionately and accurately” to the beneficiaries because “it would be impossible to deter-

424. *Cranston v. Hardin*, 504 F.2d 566, 580 (2d Cir. 1974). *Accord* *Schleit v. British Overseas Airways Corp.*, 410 F.2d 261 (D.C. Cir. 1969) (per curiam) (rejecting claim of lawyer who successfully challenged discriminatory user fees and sought attorneys’ fees when another foreign carrier benefited from decision in subsequent suit).

425. 585 F.2d 428 (9th Cir. 1978).

426. *Id.* at 431.

427. *Fase v. Seafarers Welfare & Pension Plan*, 589 F.2d 112, 115 (2d Cir. 1978).

428. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 265 n.39 (1975).

429. *Fase*, 589 F.2d at 115.

mine which beneficiary bears what costs, since residents and taxpayers pay varying amounts into the Fund.”⁴³⁰

As the Ninth Circuit case illustrates, courts generally reject claims for a common fund recovery out of the government treasury because the award would come at the expense of all taxpayers, not solely the beneficiaries of the lawsuit.⁴³¹

In *Boeing Co. v. Van Gemert*,⁴³² the Supreme Court said that the paradigmatic situation in which a fee award would be fairly and precisely spread among beneficiaries is a class action in which “each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf.”⁴³³ The Court noted that

[a]lthough the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery.⁴³⁴

However, not all class actions result in an “entire judgment fund,” as was the case in *Boeing*. A class action may establish liability and leave each class member’s claim to be determined individually without establishing a total judgment amount. In such circumstances, the common fund doctrine presumably does not apply—there is no common fund—and the attorneys who prosecute the individual claims will be compensated by the individual claimants. When gray areas arise (in terms of the relief awarded and the relationship between class members and class counsel), courts may want to consider flexible application of the common fund doctrine to prevent unjust enrichment of some class members or inadequate compensation for class counsel. Of course, plaintiffs in non-class

430. *Southeast Legal Def. Group v. Adams*, 657 F.2d 1118, 1123 (9th Cir. 1981).

431. See, e.g., *Brzonkala v. Morrison*, 272 F.3d 688, 692 (4th Cir. 2001); *Linguist v. Bowen*, 839 F.2d 1321, 1324–25 (8th Cir. 1988); *In re Hill*, 775 F.2d 1037, 1041 (9th Cir. 1985); *Grace v. Burger*, 763 F.2d 457, 459 (D.C. Cir. 1985); *Jordan v. Heckler*, 744 F.2d 1397, 1400 (10th Cir. 1984). Cf. *Puerto Rico v. Heckler*, 745 F.2d 709 (D.C. Cir. 1984).

432. 444 U.S. 472 (1980).

433. *Id.* at 479.

434. *Id.*

II. Common Fund and Substantial Benefit

actions that achieve a similar result are also eligible for common fund awards.

e. Does the court have “control” of the fund?

In *Trustees v. Greenough*,⁴³⁵ the Supreme Court stated that the common fund must be “subjected to the control of the court.”⁴³⁶ In *Boeing Co. v. Van Gemert*,⁴³⁷ the Court explained that this means the court must have “[j]urisdiction over the fund involved in the litigation.”⁴³⁸ This criterion is generally satisfied by jurisdiction over a party that controls the fund,⁴³⁹ usually the defendant. Therefore, absence of control, by itself, is rarely the basis for denial of a fee award.⁴⁴⁰ However, inclusion of a reversion clause in the document creating the fund raises questions about the value of the fund to the beneficiaries and whether the fund is subject to the court’s control.⁴⁴¹

f. Does some other circumstance militate against an award?

Even when the above-mentioned conditions are met, situations in which a statute manifests the congressional intent of not sharing fees or in which beneficiaries of the plaintiff’s suit have adverse interests may render a fee award improper.

i. Congressional intent

In *Bloomer v. Liberty Mutual Insurance*,⁴⁴² the plaintiff, an injured long-shoreman, successfully sued the ship owner. The plaintiff was required by

435. 105 U.S. 527 (1881).

436. *Id.* at 536.

437. 444 U.S. 472 (1980).

438. *Id.* at 478.

439. See Mary Frances Derfner & Arthur D. Wolf, Court Awarded Attorney Fees § 2.03, at 2-27 to 2-34.1 (1992) (discussing ways court may exercise control of fund).

440. The control criterion amounts to whether there are sufficient means “at the disposal of the court to effectuate the end of fairly apportioning the legal fees.” *Id.* at 2–28. Thus, the issue of control is generally subsumed in the matters already discussed in the text—whether there is a fund, and beneficiaries, and whether a fee award would fairly spread the costs among the beneficiaries (and only them). By contrast, the “control” criterion has independent significance in substantial benefit cases. See *infra* section II.C.1.d.

441. See *infra* text accompanying notes 487–89.

442. 445 U.S. 74 (1980).

law to give part of his recovery to the stevedore to offset payments that the stevedore had made to him through workers' compensation. He sought to have the stevedore pay a portion of his attorneys' fees, arguing that his judgment against the ship owner created a common fund from which the stevedore would draw an ascertainable amount. Although the usual conditions of a common fund recovery were met, the Supreme Court denied recovery because the Longshoremen's and Harbor Workers' Compensation Act addressed the longshoreman/stevedore/ship owner triangle, and did not seem to contemplate a distribution of fees.

Similarly, the Seventh Circuit interpreted Supreme Court dictum⁴⁴³ as suggesting that common fund recoveries are inappropriate in Title VII and civil rights cases because such awards could "skew the incentives of plaintiffs' lawyers toward damages rather than equitable remedies."⁴⁴⁴ It did not, however, decide the issue, because the district court had made a statutory award, and was "correct to rule that it was unnecessary to allow both a recovery from the defendants and the common fund in this case."⁴⁴⁵

While acknowledging that a statute governing a particular area can vitiate a common fund award if it manifests congressional intent not to share fees,⁴⁴⁶ the Second, Third, and Seventh Circuits have held that, absent such a showing of legislative intent, the fact that a fee-shifting statute applies to a particular case does not preclude recovery from a common fund.⁴⁴⁷ No courts have held to the contrary.

443. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (under civil rights fee-shifting statute, damages shouldn't be overemphasized and nonmonetary relief shouldn't be shortchanged).

444. *Evans v. City of Evanston*, 941 F.2d 473, 479 (7th Cir. 1991).

445. *Id.*

446. *See, e.g., Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1327 (2d Cir. 1990) ("obviously, if, under a particular combination of facts, the operation of the equitable fund doctrine conflicts with an intended purpose of a relevant fee-shifting statute, the statute must control and the doctrine must be deemed abrogated to the extent necessary to give full effect to the statute").

447. *Id.*; *Skelton v. GM Corp.*, 860 F.2d 250, 255 (7th Cir. 1988); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 (3d Cir. 1984). *See also infra* text accompanying notes 490 and 492–93 (discussing when recovery can be awarded pursuant to either a fee-shifting statute or a common fund doctrine).

II. Common Fund and Substantial Benefit

ii. Adverse interests

In certain circumstances, fee sharing is inappropriate because the other beneficiaries of the plaintiff's suit had interests adverse to those of the plaintiff. In the seminal case, *Hobbs v. McLean*,⁴⁴⁸ the plaintiff obtained a judgment on behalf of a bankrupt. Believing that the recovered sum rightly belonged to them, and fearing that the plaintiff would distribute it to creditors, two other parties brought suit against the plaintiff and won. The plaintiff then moved for attorneys' fees for his efforts in winning the original judgment. The Supreme Court denied the motion, finding the common fund doctrine inapposite:

We see no reason why they should pay [him], who, instead of aiding them in securing their rights, has been an obstacle and obstruction to their enforcement. The services for which [he] seeks pay . . . were not rendered in their behalf, but in hostility to their interest. When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the court of equity . . . will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts. . . . But where one brings adversary proceedings to take the possession of trust property from those entitled to it, . . . and fails in his purpose, it has never been held . . . that such person had any right to demand reimbursement.⁴⁴⁹

The common fund doctrine was applied in *United States v. Tobias*.⁴⁵⁰ The U.S. government condemned territory and named Johnson, an owner of the land, in its complaint. Although the parties negotiated, Tobias, who claimed to own a portion of the land, intervened. A settlement was reached in which the government deposited a sum in court and left Johnson and Tobias to fight over it. Johnson and Tobias went to trial, and a judgment was entered splitting the fund between them. Johnson moved for Tobias to defray his fees, claiming his negotiations with the government increased the value of the fund, which benefited Tobias. The district court granted a fee award, but the Fourth Circuit, citing *Hobbs*, reversed: "A party may not recover and try to monopolize a fund, but

448. 117 U.S. 567 (1886).

449. *Id.* at 581–82.

450. 935 F.2d 666 (4th Cir. 1991).

then, failing in the attempt, declare it a 'common fund' and obtain his expenses from those whose rightful share of the fund he sought to appropriate."⁴⁵¹

In contrast, the Second Circuit held that the plaintiff's opposition to the class settlement that eventually took place was not a ground for denying the plaintiff attorneys' fees from the settlement pot, because the plaintiff had made a substantial contribution to the class.⁴⁵² This case is reconcilable with *Hobbs* and its progeny because, although the plaintiff opposed the particular settlement that was made, its interests and posture in the litigation were not in opposition to those of the class.

iii. Fund claimants that were represented

Several appellate courts have held that when beneficiaries of the common fund are represented by counsel, they are "deemed not to have taken a 'free ride' on the efforts of another's counsel," and their portion of the fund should therefore not be used to defray the plaintiff's legal costs.⁴⁵³ If lead counsel are appointed and do a disproportionate amount of the work, courts may waive this rule.⁴⁵⁴

2. Calculating the amount of an award

a. *What method should be used?*

i. Percentage versus lodestar

Courts have traditionally determined the amount of common fund fee awards by considering several factors, especially the size of the fund, and often what they think is a reasonable percentage of the fund. Courts and commentators call this approach the "percentage of fund method," "percentage-of-fund method," "percentage of recovery method," "percentage of actual recovery method," or, simply, the "percentage method." In the early 1970s, however, courts began moving away from this practice and

451. *Id.* at 668. The court rejected Johnson's contention that he and Tobias were not adverse parties, since both were named defendants in the condemnation action. "We will not adopt such a mechanical test. This case was a pure title dispute between the 'co-defendants.' No equitable doctrine will ignore the reality of the controversy by looking only to which side of the 'v' the disputants are on." *Id.*

452. *Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1327 (2d Cir. 1990).

453. *Tobias*, 935 F.2d at 668 (citing cases).

454. *Id.* at 669.

II. Common Fund and Substantial Benefit

toward the lodestar method.⁴⁵⁵ Then in the 1980s, two developments sparked reconsideration of the lodestar in common fund cases. First, in *Blum v. Stenson*,⁴⁵⁶ the Supreme Court (in a footnote) distinguished the calculation of fees under fee-shifting statutes from the calculation of fees under the “common fund doctrine,” where a reasonable fee is based on a percentage of the fund bestowed on the class.⁴⁵⁷ Second, a Third Circuit task force on attorneys’ fees recommended the percentage method in common fund cases.⁴⁵⁸

In large part as a result of the *Blum* dictum and the task force’s recommendations, the percentage method gained favor in common fund cases.⁴⁵⁹ The D.C. and Eleventh Circuits require the percentage method.⁴⁶⁰ The First, Second, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have stated that the district court may use either the percentage method or the lodestar method.⁴⁶¹ The Seventh Circuit prefers the percentage method.⁴⁶²

455. The seminal case was *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166–69 (3d Cir. 1973). Other courts quickly followed suit.

456. 465 U.S. 886 (1984).

457. *Id.* at 900 n.16.

458. Court Awarded Attorney Fees: Report of the Third Circuit Task Force, *reprinted in* 108 F.R.D. 237, 255–56 (1985). For a summary of Third Circuit jurisprudence governing fee awards in common fund cases, see *Sullivan v. DB Investments*, 667 F.3d 273, 330 (3d Cir. 2011) (percentage-of-recovery “method ‘is generally favored in common fund cases because it allows courts to award fees from the fund “in a manner that rewards counsel for success and penalizes it for failure.”” (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005)); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000) (presenting seven factors for district courts to consider in setting fee award).

459. See Manual for Complex Litigation, Fourth § 14.121, at 187 (2004) (“After a period of experimentation with the lodestar method . . . , the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases.”).

460. See *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *Camden I Condo. Ass’n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).

461. See *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 49–50 (2d Cir. 2000); *Johnston v. Comerica Mortg. Co.*, 83 F.3d 241, 244–46 (8th Cir. 1996); *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994); *Rawlings v. Prudential-Bach Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Harman v.*

The Ninth Circuit has suggested that the percentage method is particularly appropriate when there are multiple claims and it would be difficult to determine what hours were expended on the claims that produced the fund.⁴⁶³ The Ninth Circuit also said that the lodestar is preferable when “special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors.”⁴⁶⁴ The Fifth Circuit has not explicitly adopted the percentage method, but it noted that “district courts in this Circuit regularly use the percentage method blended with a *Johnson* reasonableness check, and for some it is the ‘preferred method.’”⁴⁶⁵ It added, “the Fifth Circuit has never reversed a district court judge’s decision to use the percentage method, and none of our cases preclude its use.”⁴⁶⁶

The percentage method offers several advantages. First, it helps ensure that the fee award will simulate marketplace rates, since most common fund cases are handled on a contingency basis.⁴⁶⁷ Second, compared with the lodestar method, the percentage method requires less detailed

Lyphomed, 945 F.2d 969, 975 (7th Cir. 1991); *Brown v. Phillips Petroleum*, 838 F.2d 451 (10th Cir. 1988).

462. *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572–73 (7th Cir. 1992).

463. Thus, in *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268, 272 (9th Cir. 1989), the court approved use of the percentage method, finding that it would be “impractical if not impossible” to determine precisely the hours spent creating the fund. But in *Florida v. Dunne*, 915 F.2d 542, 546 (9th Cir. 1990), the court upheld use of the lodestar because “we have no such division of claims.”

464. *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). See *Wash. Pub. Power Supply*, 19 F.3d at 1296 (“As always, when determining attorneys’ fees, the district court should be guided by the fundamental principle that fee awards out of common funds be ‘reasonable under the circumstances.’”) (quoting *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990)).

465. *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 643 (5th Cir. 2012) (footnote omitted) (citing *Johnson v. Ga. Highway Express*, 488 F.2d 714 (5th Cir. 1974), discussed *supra* note 150).

466. *Id.* at 644 (footnotes omitted). See also *Strong v. BellSouth Telecomms. Inc.*, 137 F.3d 844, 852–53 (5th Cir. 1998) (approving application of lodestar and stating that application of percentage approach could be restricted to percentage of claims actually made by class members and not total amount that might be claimed).

467. See *Cont'l Ill.*, 962 F.2d at 572–73. See also *Court Awarded Attorney Fees*, *supra* note 458, at 247.

II. Common Fund and Substantial Benefit

record-keeping by plaintiffs and consumes fewer court resources.⁴⁶⁸ Finally, unlike the lodestar method, the percentage method provides incentive to plaintiff's counsel to settle the case early and avoid racking up litigation fees.

To protect against any temptation for counsel to “sell out” the class, judges need to exercise their “fiduciary” responsibility to police class settlements with a “high duty of care.”⁴⁶⁹ Defendants in common fund cases have no incentive to scrutinize fee requests, and individual fund beneficiaries generally lack sufficient incentive to do so.⁴⁷⁰ Thus, the court is saddled with the entire burden of reviewing submissions concerning hours expended and the hourly rate.⁴⁷¹

The court may use a percentage for an initial determination, and adjust it upward or downward depending on various factors, including

468. If using a percentage method, the court may nevertheless ask counsel to maintain time-keeping records in case switching to a lodestar calculation is later deemed desirable, or because these records may affect the percentage chosen or an adjustment to it. *See* Court Awarded Attorney Fees, *supra* note 458, at 271–72. Many courts use an estimate of the lodestar as a check to determine whether the percentage method yields a reasonable fee, as shown by the estimated hourly rate, in a given case. *See infra* text accompanying notes 472–73.

469. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002). *See also* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 12–13 (Federal Judicial Center, 3d ed. 2010). For an example of the application of fiduciary scrutiny to a class settlement, see *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011).

470. *See, e.g., Cont'l Ill.*, 962 F.2d at 568. An exception is when several law firms vie for fees from a limited source, so each has incentive to scrutinize others' applications. *See, e.g., In re Fine Paper Antitrust Litig.*, 751 F.2d 562 (3d Cir. 1984). In statutory fee-shifting cases, by contrast, defense counsel generally relieve the court of much of the burden of reviewing the plaintiff's lodestar figures.

471. The court often offers the only protection for fund beneficiaries. As a result, it is generally agreed that courts have not only authority but also responsibility to review fee requests *sua sponte* in common fund cases. *See, e.g., Cont'l Ill.*, 962 F.2d at 573. Several courts have said that fee requests from common funds are subject to heightened judicial scrutiny. *See, e.g., Skelton v. GM Corp.*, 860 F.2d 250, 253 (7th Cir. 1988); *Fine Paper*, 751 F.2d at 583. *See also* *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518 (1st Cir. 1991) (In the case of a “clear sailing” agreement—i.e., where the party paying fees agrees not to contest the court-awarded amount as long as it does not exceed a negotiated ceiling—“rather than merely rubber-stamping the request, the court should scrutinize it to ensure that the fees awarded are fair and reasonable.”). *Weinberger*, 925 F.2d at 520.

those reflected in the lodestar (for example, hours expended and the market rate).⁴⁷² This is sometimes referred to as a “cross-check” or “hybrid approach.”⁴⁷³ Upward and downward adjustments in common fund cases, whether to the lodestar or to a percentage of the fund, are discussed below.

ii. A reasonable percentage of what?

Authorities are divided on the proper approach to identifying the denominator to be used for calculating the percentage of common funds to be allocated to fees in cases that do not fall under the Private Securities Litigation Reform Act (PSLRA).⁴⁷⁴ Some courts look at the value of the fund through the lens of possible claims based on the size of the class and assume that all class members will submit a claim.⁴⁷⁵ Other courts assess the value of the fund through the lens of claims submitted and paid, typically a much smaller number.⁴⁷⁶

Another court applied an innovative approach to identifying the size of the fund in a multidistrict case. The court used the services of an expert with Ph.D., J.D., and C.P.A. credentials to analyze publicly available data and estimate—to a reasonable degree of scientific certainty—the

472. Alternatively, the court may permit these factors to influence what percentage it chooses. The choice of percentage is discussed *infra* section II.B.2.c.

473. See Manual for Complex Litigation, Fourth § 14.121 n.504 (2004); Vaughn R. Walker & Ben Horwich, The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About “Reasonable Percentage” Fees in Common Fund Cases, 18 Geo. J. Legal Ethics 1453 (2005).

474. See *infra* section II.D.2, discussing PSLRA language restricting payment to a reasonable percentage of funds “actually paid to the class.”

475. See, e.g., *Waters v. Int’l Precious Metals Corp.*, 190 F.3d 1291, 1297 (11th Cir. 1999) (observing total amount of fund is “not illusory or meaningless” because each class member’s award is based on a percentage of that amount). See also *Sylvester v. Cigna Corp.*, 369 F. Supp. 2d 34, 52 (D. Me. 2005) (court reviewed its preliminary approval of a class settlement and concluded it had erroneously premised evaluation on a 100% claims rate from class members; noted that parties hadn’t informed it that “‘claims made’ settlements regularly yield response rates of 10 percent or less”; and then denied motion to approve settlement and denied, as moot, application for attorneys’ fees).

476. See, e.g., *Strong v. Bellsouth Telecomms., Inc.*, 137 F.3d 844, 851–53 (5th Cir. 1998) (upholding denial of request for additional attorneys’ fees based on actual awards to class members—totaling \$1,718,594—rather than potential awards—“\$64 million that plaintiffs’ counsel claimed it had obtained for the class”).

II. Common Fund and Substantial Benefit

collective amount of many thousands of individual settlements that had been or would be reached in the case.⁴⁷⁷

In *Boeing Co. v. Van Gemert*,⁴⁷⁸ the Supreme Court upheld an award of attorneys' fees in a class action in which the award was based on the total fund available to the class rather than the amount actually recovered. In *Boeing*, there was a "judgment that quantified Boeing's liability."⁴⁷⁹ In addition, the district court had "ordered Boeing to deposit the amount of the judgment into escrow at a commercial bank."⁴⁸⁰ In that context, the Court held that "Boeing presently has no interest in any part of the fund," and that calculation of a fee based on the total fund was an appropriate way to satisfy "each class member's equitable obligation to share the expenses of litigation."⁴⁸¹ As Justice O'Connor noted in a later case: "We had no occasion in *Boeing* . . . to address whether there must at least be *some* rational connection between the fee award and the amount of the actual distribution to the class."⁴⁸² That issue remains open, and the circuits continue to be split regarding it.

The Second Circuit requires district courts to calculate the value of the common fund based on the fund in its entirety and not limit it to claims made against the fund.⁴⁸³ In its ruling in *Masters v. Wilhelmina Model Agency, Inc.*,⁴⁸⁴ the court emphasized that "the entire fund created by the efforts of counsel presumably is 'paid to the class,' even if some of the funds are distributed under the Cy Pres Doctrine."⁴⁸⁵ Like the defendant in *Boeing*, the defendant in *Masters* had no right to the unclaimed funds. A district court in the Second Circuit later distinguished *Masters* on the grounds that it involved an "actual fund," whereas the class action

477. *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07-md-01871, 2012 WL 6923367, at *1 (E.D. Pa. Oct. 19, 2012).

478. 444 U.S. 472 (1980).

479. *Id.* at 481.

480. *Id.* at 476.

481. *Id.* at 481, 482.

482. *Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (statement of O'Connor, J., respecting denial of petition for writ of cert.).

483. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (holding "allocation of fees by percentage should . . . be awarded on the basis of the total funds made available, whether claimed or not.").

484. *Id.*

485. *Id.* at 437-38.

settlement agreement “simply provides that Time Warner will satisfy those claims that are made by eligible class members, while retaining any unclaimed benefits.”⁴⁸⁶ Following that analysis to its logical conclusion, the court used the value of actual claims to guide the determination of a reasonable fee award.

The Eleventh and Ninth Circuits allow district courts to calculate the value of the common fund based on the fund in its entirety and not limit it to claims made against the fund even when the unclaimed funds revert to the defendant under the settlement terms.⁴⁸⁷

In contrast, the Fifth Circuit affirmed a district court’s decision to deny a request for additional fees because the fees were not justified by the benefit to the class as shown by the number of actual claims made and paid.⁴⁸⁸ “In contrast to *Boeing*, in this settlement, no money was paid into escrow or any other account—in other words, no fund was established at all in this case.”⁴⁸⁹ Resolution of this central question awaits action by the Supreme Court or evolution of a consensus among the circuits.

iii. Fee-shifting statute litigation establishes a common fund

A case governed by a fee-shifting statute may, through settlement or judgment, create a common fund. A common fund award is not necessarily precluded in such a case. The Second and Seventh Circuits have suggested that the court has discretion to make either a fee-shifting award

486. *Parker v. Time Warner Entm’t Co., L.P.*, 631 F. Supp. 2d 242, 265 (E.D.N.Y. 2009). *See also In re TJX Cos. Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 403 (D. Mass. 2008) (distinguishing *Masters* and finding that class action settlement agreement at hand “creates no fund; it simply provides that TJX will pay claims on an as-made basis, subject to certain caps”).

487. *Waters v. Int’l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (holding district court didn’t abuse discretion by calculating attorneys’ fees as percentage of total settlement amount instead of actual claims where total “fund” not found to be illusory, despite clause providing that unexpended funds would revert to defendant); *Williams v. MGM-Pathé Commc’ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (per curiam) (holding district court didn’t abuse discretion in ruling that parties’ negotiation of settlement amount and attorney fee percentage based on entire settlement fund was reasonable, even though unclaimed portion of “common fund” would revert to defendants).

488. *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 852–53 (5th Cir. 1998).

489. *Id.* at 852 (footnote omitted).

II. Common Fund and Substantial Benefit

against defendants or an award from the common fund, but it should not grant both.⁴⁹⁰

b. Lodestar in common fund cases

If the court uses the lodestar in a common fund case, it should engage in virtually the same analysis as it does in fee-shifting cases. Thus, for example, the Seventh Circuit, using several aspects of the analysis outlined *supra* sections II.B.1.a–f, found a number of errors in the calculation of the lodestar in a common fund case: The trial court erroneously substituted its own notions of a reasonable hourly rate for the market rate, refused to allow compensation of paralegals at market rates, and slashed hours without identifying which hours were excessive and why.⁴⁹¹

The calculation of the lodestar in common fund cases differs from the calculation in statutory fee-shifting cases in one respect. Although fees for time spent preparing the fee application and litigating fee disputes are compensable in statutory fee-shifting cases, they are not compensable in common fund cases.⁴⁹² Such efforts do not serve the beneficiaries—indeed, if fees were compensated, they would deplete the common fund from which the beneficiaries draw.⁴⁹³

c. Choosing a percentage

If a court opts for the percentage method, it is faced with the challenging task of finding an appropriate percentage.⁴⁹⁴ Empirical studies of attorney

490. *Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1327 (2d Cir. 1990) (“Duplicative recovery is to be avoided.”); *Evans v. City of Evanston*, 941 F.2d 473, 479 (7th Cir. 1991) (district court made statutory award and was “correct to rule that it was unnecessary to allow both a recovery from the defendants and the common fund in this case”). The Third Circuit Task Force recommends that “those statutory fee cases that are likely to result in a settlement fund” should be treated like common fund cases from the beginning (i.e., a percentage fee should be established early in the case). Court Awarded Attorney Fees, *supra* note 458, at 255.

491. *In re Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 568–70 (7th Cir. 1992).

492. See, e.g., *Kinney v. Int’l Bhd. of Elec. Workers*, 939 F.2d 690, 694 n.5 (9th Cir. 1991); *Donovan v. CSEA Local Union 1000*, 784 F.2d 98, 106 (2d Cir. 1986); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 595 (3d Cir. 1984).

493. *Kinney*, 939 F.2d at 694 n.5; *Donovan*, 784 F.2d at 106.

494. This determination can be made at any stage of the litigation. See *infra* section III.A.4–5 (discussing implications of timing in connection with case management). For an

fee awards in common fund cases⁴⁹⁵ have motivated a substantial number of district courts to change their approach to finding a percentage that is appropriate.⁴⁹⁶ In the course of ruling on an attorney fee request, Judge Lee Rosenthal⁴⁹⁷ observed, “District courts increasingly consider empirical studies analyzing class-action-settlement fee awards to set the appropriate percentage benchmark or to test the reasonableness of a given benchmark.”⁴⁹⁸ The results of those empirical studies and the techniques courts have developed to apply them are discussed *infra* Part III.

How does the empirical approach interact with appellate standards for awarding fees? Generally, trial judges have discretion to use whatever percentage arrangements may prove just or workable in a particular case.⁴⁹⁹ Courts of appeals use various approaches and typically have required district courts to examine multiple factors in determining fee

extensive discussion of the factors involved in this task, see Manual for Complex Litigation, Fourth § 14.121 (2004).

495. See *e.g.*, Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. Empirical Legal Stud. 248 (2010) [hereinafter Eisenberg & Miller II]; Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27 (2004) [hereinafter Eisenberg & Miller I]. See also Thomas E. Willging & Shannon R. Wheatman, *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation* 52 (Federal Judicial Center 2005); Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Rep. 169 (2003); Denise N. Martin, et al., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions*, 5 Stan. J.L. Bus. & Fin. 121 (1999); Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in the Federal Courts* (Federal Judicial Center 1996).

496. See, *e.g.*, *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1080–82 (S.D. Tex. 2012) (citing three empirical studies and several cases in which judges have used empirical studies).

497. Judge Rosenthal (S.D. Tex.) was Chair of the Judicial Conference's Advisory Committee on Civil Rules during its revision of Federal Rule of Civil Procedure 23(h).

498. *In re Heartland*, 851 F. Supp. 2d at 1080–81 (footnotes omitted). See also *id.* nn.36–37 (citing Eisenberg & Miller I, Eisenberg & Miller II, and Fitzpatrick, *supra* note 495).

499. For example, if a colossal fund is created, fees may be extracted from the interest earned rather than from the corpus of the fund. *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985) (\$180 million fund case earned \$15 million in interest, out of which \$10 million was assigned as fees), *modified*, 818 F.2d 226 (2d Cir. 1987).

II. Common Fund and Substantial Benefit

awards. The Tenth and Fourth Circuits have said that the twelve *Johnson* factors should be applied to determine the proper percentage.⁵⁰⁰ The Eleventh Circuit agreed that the *Johnson* factors should be considered, and it added other relevant factors: “whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action.”⁵⁰¹ The Second, Third, Fifth, and Sixth Circuits also use multifactor tests with variations on the *Johnson* factors.⁵⁰² The Seventh Circuit has developed what has come to be known as the “market mimicking approach”⁵⁰³ set out in *In re Synthroid Marketing Litigation (Synthroid I)*.⁵⁰⁴ That method directs courts to “do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.”⁵⁰⁵

District courts have considered the empirical studies against the backdrop of relevant appellate standards. For example, in *In re Heartland Payment Systems, Inc. Customer Data Security Breach Litigation*,⁵⁰⁶ Judge Rosenthal applied the Fifth Circuit’s *Johnson* factors while noting the relevance of the market-mimicking approach of courts in the Seventh Cir-

500. The *Johnson* factors are enumerated in *supra* note 150. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988). The Tenth Circuit suggested that the essential factor in fee-shifting cases—time and labor required—may be less important in common fund cases than the results obtained and amount involved. *Id.* at 456. *In re MRRM, P.A.*, 404 F.3d 863, 867–68 (4th Cir. 2005). The Fourth Circuit reviewed application of the *Johnson* factors adopted in *Barber v. Kimbrell’s, Inc.*, 577 F.2d 216 (4th Cir. 1978).

501. *Camden I Condo. Ass’n v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991).

502. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (six factors, including “the requested fee in relation to the settlement”); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195–97 (3d Cir. 2000) (seven factors, including size of fund created and awards in similar cases); *In re Cahill*, 428 F.3d 536, 540 (5th Cir. 2005) (combination of factors specified in § 330 of Bankruptcy Code and *Johnson* factors); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974) (six factors, including value of benefit).

503. *Nilsen v. York Cnty.*, 400 F. Supp. 2d 266, 278–79 (D. Me. 2005) (reviewing strengths and weaknesses of possible approaches to determining percentage of fund).

504. 264 F.3d 712 (7th Cir. 2001).

505. *Id.* at 718.

506. 851 F. Supp. 2d 1040 (S.D. Tex. 2012).

cuit.⁵⁰⁷ Some courts have used empirical data to identify a reasonable fee percentage and then applied multifactor tests to modify or confirm that percentage.⁵⁰⁸ Other courts appear to have used the empirical data as a principal mode of analysis, at least for the purpose of setting a benchmark.⁵⁰⁹

The Seventh Circuit has directed district courts to look to “(1) actual fee agreements; (2) data from large common fund cases where the parties negotiated the fees privately; and (3) bids and results from class counsel auction cases for insight into the fee levels attorneys in competition were willing to accept.”⁵¹⁰ Following that directive, district courts in the Sev-

507. *Id.* at 1082 (referencing *Johnson* factors and citing *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1014 (E.D. Wis. 2010)). See also *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 863–64 (E.D. La. 2007) (using empirical data to establish initial benchmark percentage; noting similarity to market-mimicking approach).

508. See, e.g., *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 461–63 (D.P.R. 2011) (using empirical findings to narrow range, then applying other factors, including those from other cases within First Circuit); *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 467 (S.D. W. Va. 2010) (using empirical studies to find requested 25% rate to be similar to rates granted in other cases; awarding 20% of fund based on other factors); *Braud v. Transp. Serv. Co. of Ill.*, No. 05-1898c/w05-1977, 2010 U.S. Dist. LEXIS 93433, at *29, 30–31 (E.D. La. Aug. 17, 2010) (using empirical studies to set “initial benchmark” and then determining if “benchmark should be adjusted based on the particular circumstances of this case [and] . . . the other eleven *Johnson* factors”); *In re ETS Praxis Principles of Learning & Teaching: Grades 7-12 Litig.*, 447 F. Supp. 2d 612, 630–32 (E.D. La. 2006) (using empirical data to determine initial benchmark, then turning to *Johnson* factors); *In re Relafin Antitrust Litig.*, 231 F.R.D. 52, 80–81 (D. Mass. 2005) (“welcom[ing] citation to these thorough and objective studies . . . ; but pursu[ing] this nuanced analysis looking at the complexity, duration, and type of the case, and the skill and efficiency of the attorneys involved”).

509. See, e.g., *Loudermilk Servs., Inc. v. Marathon Petroleum Co.*, 623 F. Supp. 2d 713, 724 (S.D. W. Va. 2009) (reviewing multiple factors and stating, “Because the Eisenberg and Miller study was a far more comprehensive analysis of similar cases than this Court could hope to achieve in a reasonable time, the Court accepts their results as a benchmark on which to judge a reasonable fee in this case.” See Eisenberg & Miller I, *supra* note 495.).

510. *Sutton v. Bernard*, 504 F.3d 688, 692 n.2 (7th Cir. 2007) (citing *In re Synthroid Mktg. Litig. (Synthroid I)*, 264 F.3d 712, 719–21 (7th Cir. 2001)). See also *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744–45 (7th Cir. 2011) (noting special master “relied heavily” on studies of Eisenberg and Miller (see Eisenberg & Miller I, *supra* note 495), and reciting their findings with apparent approval; modifying district court’s order and

II. Common Fund and Substantial Benefit

enth Circuit (and some outside the circuit) have used empirical data to implement the market-mimicking approach established by the court of appeals. In one case, the district court stated, “the best indicator of what the market would pay class counsel for their services is the data contained in a recently updated study.”⁵¹¹ Another district court in the Seventh Circuit used three empirical studies to conclude that the stipulated percentage of the common fund was unreasonable.⁵¹² Yet another district court cited two empirical studies and a contingent fee contract entered into with the named plaintiffs to justify reducing a fee request.⁵¹³ Making explicit what other courts may be saying implicitly, a district court concluded that “[a]lthough the Court finds the empirical studies helpful, they do not replace the analysis required under *Synthroid I*.”⁵¹⁴

Some courts award a lower percentage in what are sometimes referred to as “mega fund” cases, defined as cases with a common fund re-

mandating application of percentage of fund recommended by special master to value of entire settlement).

511. *In re Lawnmower*, 733 F. Supp. at 1013 (citing Eisenberg & Miller II, *supra* note 495). The court went on to say:

The tables included in this study are good indicators of what the market would pay for class counsel’s services because the tables show what attorneys have been paid in similar cases, and thus what class counsel could have expected when they decided to invest their resources in this case.

Id. at 1014.

512. *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033–34 (N.D. Ill. 2011) (citing Eisenberg & Miller I, Eisenberg & Miller II, and Fitzpatrick, *supra* note 495). The court then examined other factors, including the “significant risk of nonpayment,” and concluded that a percentage fee above the mean and median percentages in the empirical studies was warranted. *Id.* at 1035–36.

513. Pavlik v. FDIC, No. 10C816, 2011 WL 5184445, at *1, 4 (N.D. Ill. Nov. 1, 2011) (citing Eisenberg & Miller I and Fitzpatrick, *supra* note 495).

514. Heekin v. Anthem, Inc., No. 1:05-cv-01908, 2012 WL 5878032, at *2 (S.D. Ind. Nov. 20, 2012). For cases outside the Seventh Circuit that use empirical studies in applying the Seventh Circuit’s market-mimicking approach, see *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 862–63 (E.D. La. 2007) (Eisenberg & Miller I, *supra* note 495, “sheds light on at least two of the *Johnson* factors: the customary fee and awards in similar cases.”); *In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 40–45 (D.N.H. 2006) (examining empirical studies and auction cases to approximate market fee arrangement at outset of case).

covery of more than \$100 million.⁵¹⁵ In the multidistrict litigation dealing with product liability for injuries related to diet drugs, the district court referred to the litigation as a “super-mega-fund settlement,” that is, one exceeding \$1 billion.⁵¹⁶ The court examined the percentage of recovery for each of the nine settlements that met that criterion between 1998 and 2007, and found that the range was “from 4.8% to 15%.”⁵¹⁷ The diet drug litigation produced settlements and class benefits valued at \$6.44 billion; the Third Circuit affirmed a fee award of \$479.68 million, representing 7.45% of the common fund and non-monetary benefits, “slightly below the average of 8.26% in the . . . super-mega-fund cases.”⁵¹⁸

Theodore Eisenberg and Geoffrey P. Miller found a clear, but inverse, relationship between the size of the fund and the percentage awarded: the larger the recovery, the smaller the percentage to be allocated to fees.⁵¹⁹

A few courts have used a sliding scale, allowing recovery of a given percentage of a certain amount of the fund and decreasing percentages of subsequent amounts.⁵²⁰ The Third Circuit has held that use of a sliding

515. See, e.g., *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 340 (3d Cir. 1998) (remanding “for a more thorough examination and explication of the proper percentage to be awarded . . . in light of the magnitude of the recovery”; observing that “[t]he basis for this inverse relationship [between recovery and fees] is the belief that ‘[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel.’” *Id.* at 339 (citations omitted). Cf. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 303 (3d Cir. 2005) (“*Prudential* does not mandate application of the declining percentage sliding scale”).

516. *In re Diet Drugs Prods. Liab. Litig.*, 553 F. Supp. 2d 442, 480 (E.D. Pa. 2008), *aff'd*, 582 F.3d 524 (3d Cir. 2009). See also *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07-md-01871, 2012 WL 6923367, at *6, *7, *10 (E.D. Pa. Oct. 19, 2012) (super-mega-fund case reviewing assessments, fee awards, and multipliers in similar cases).

517. *In re Diet Drugs*, 553 F. Supp. 2d at 480. The mean percentage was 8.26% and the median was 6.5%. *Id.*

518. *Id.*

519. See Eisenberg & Miller II, *supra* note 495, at 262–64. See also Manual for Complex Litigation, Fourth § 14.121, at 188 (2004) (“Accordingly, in ‘mega-cases’ in which large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentages of recovery to be appropriate.”).

520. See, e.g., *In re Synthroid Mktg. Litig. (Synthroid II)*, 325 F.3d 974, 980 (3d Cir. 2003) (awarding consumer class counsel 30% of first \$10 million, 25% of next \$10 million, 20% of next \$10 million, and 10% of balance); *In re Fidelity Bancorporation Sec.*

II. Common Fund and Substantial Benefit

scale is not mandatory,⁵²¹ and it even approved an award in which the percentage awarded for fees increased as the size of the common fund increased.⁵²²

d. Should the fee be adjusted?

Regardless of the method used for calculating the initial fee, a court may make an upward or downward adjustment based on the individual circumstances of a case.⁵²³ Some of the factors justifying an adjustment of the lodestar in fee-shifting cases will also apply in a common fund case (regardless of whether the lodestar or percentage method is used). In addition, the Ninth Circuit has stated that courts should consider all pending fee applications to ascertain whether “the combined effect of granting the fee applications in toto would be to reduce substantially the size of the common fund available for distribution to the plaintiff class.”⁵²⁴ The court implied that trial courts may adjust an award if attorneys would otherwise receive an unacceptably high portion of the common fund.⁵²⁵

Before the Supreme Court’s decision in *City of Burlington v. Dague*,⁵²⁶ courts permitted risk enhancements in common fund cases.⁵²⁷ Circuits that have addressed the issue have held that *Dague*’s prohibition against

Litig., 750 F. Supp. 160, 163 (D.N.J. 1990) (awarding 30% of first \$10 million, 20% of next \$10 million, and 10% of any fund beyond \$20 million).

521. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 303 (3d Cir. 2005) (“court did not abuse its discretion in declining to apply a ‘sliding scale’ reduction, nor in viewing the size of the fund to be a factor weighing in favor of approval of the fee request”).

522. *In re AT & T Corp.*, 455 F.3d 160, 174 (3d Cir. 2006) (“sliding scale was fair and reasonable in light of the size of the settlement fund, the difficulty and length of the litigation, and the fact that all benefits accruing to class members are properly credited to the efforts of class counsel”).

523. *See, e.g., Fischel v. Equitable Life Assur. Soc’y of U.S.*, 307 F.3d 997, 1007–08 (9th Cir. 2002). However, if the court selects a percentage for recovery based in part on the kind of factors normally used to make an adjustment, an adjustment would be inappropriate because it would involve a double impact of certain factors. *Id.* at 1008.

524. *Florida v. Dunne*, 915 F.2d 542, 546 (9th Cir. 1990).

525. *Id.* (remanding for further fact-finding, and noting “[t]he fact that seventy-two percent of the common fund could be distributed in attorney’s fees and costs in this case is disturbing”).

526. 505 U.S. 557 (1992).

527. *See, e.g., Skelton v. GM Corp.*, 860 F.2d 250, 256–57 (7th Cir. 1988); *Bebchick v. Wash. Metro. Area Transit Comm’n*, 805 F.2d 396, 406–07 (D.C. Cir. 1986).

risk enhancements does not apply in common fund cases.⁵²⁸ Some circuits that have not addressed the issue directly appear to permit risk enhancements of the lodestar in common fund cases by allowing discretion to apply percentage-of-fund calculations in relation to risks of loss and other factors.⁵²⁹

e. The effect of a private fee agreement

A private agreement between plaintiff and counsel—whether for payment by hourly rate or contingent fee—does not necessarily dictate the amount of fees to be recovered from a fund, because such an agreement could still leave the beneficiaries unjustly enriched by the lawyers' work (or be unfair to the represented plaintiffs).⁵³⁰ Thus, notwithstanding any private agreement, courts must independently determine a reasonable fee under the circumstances of the case.⁵³¹

f. May plaintiffs be compensated for personal expenses?

In 1881, in *Trustees v. Greenough*,⁵³² the Supreme Court held that the plaintiff's compensation from a common fund may not go beyond attorneys' fees to include the private costs incurred in bringing the suit. The

528. *In re* Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 308 (1st Cir. 1995); *In re* Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1299 (9th Cir. 1994); *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 564–65 (7th Cir. 1994). In dictum, the Third Circuit stated that *Dague* precluded a risk multiplier in common fund cases. *In re* GM Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir. 1995). It later said that risk multipliers, if applied, “require particular scrutiny and justification.” *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 341 n.121 (3d Cir. 1998). Several district courts have applied *Dague* to common fund cases. See, e.g., *Nensel v. Peoples Heritage Fin. Group*, 815 F. Supp. 26 (D. Me. 1993); *Bolar Pharm. v. Gackenbach*, 800 F. Supp. 1091 (E.D.N.Y. 1992).

529. See, e.g., *In re* Synthroid Mktg. Litig. (*Synthroid II*), 325 F.3d 974 (3d Cir. 2003) (examining risk undertaken by attorneys as measure of percentage fee court should award).

530. See *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 126–27 (1885).

531. See, e.g., *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 120 (3d Cir. 1976). See also *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 781 (6th Cir. 1996) (discovery of fee-sharing agreements not warranted during post-settlement approval).

532. 105 U.S. 527 (1881).

II. Common Fund and Substantial Benefit

Court considered reimbursement for personal expenses “decidedly objectionable.”⁵³³

However, two appellate courts have limited the reach of this holding. The Sixth Circuit permitted reimbursement for money the plaintiff spent on accountants and investment bankers, maintaining that these expenditures were “related to advancing the litigation” and thus “not ‘private’ in the sense found objectionable in *Greenough*.”⁵³⁴ The Seventh Circuit noted that “[s]ince without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers’ nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable.”⁵³⁵ The court denied compensation for the plaintiff’s personal expenses in the case *sub judice*, maintaining that such compensation is in order only if the record suggests that no named plaintiff could otherwise have been recruited.

The Seventh Circuit did not mention *Greenough*’s seemingly categorical rejection of recovery for the plaintiff’s personal expenses, but its rationale for sometimes permitting recovery of such expenses—that it may be necessary to attract a class representative—seems to borrow from the fee-shifting statute’s rationale. However, whereas the goal of fee-shifting statutes is to encourage certain kinds of actions, the goal of the common fund doctrine is to prevent unjust enrichment.⁵³⁶

g. Procedures

If a class action creates a common fund, a hearing on a motion for attorneys’ fees is optional, but the court “must find the facts and state its legal conclusions.”⁵³⁷ Furthermore, notice of the motion for fees must be “directed to class members in a reasonable manner.”⁵³⁸ In cases of settlement, the parties should submit motions for attorneys’ fees soon after

533. *Id.* at 537.

534. *Granada Invs. Inc. v. DWG Corp.*, 962 F.2d 1203, 1208 (6th Cir. 1992).

535. *In re Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992).

536. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980).

537. Fed. R. Civ. P. 23(h)(3).

538. Fed. R. Civ. P. 23(h)(1).

announcing a settlement so that the Rule 23(h)(1) notice of fees request can be combined with the required Rule 23(e) notice of settlement.⁵³⁹

In non-class actions, because the fee request is often unopposed and yet fund beneficiaries are affected by the award, the rationale for an evidentiary hearing is compelling. As the D.C. Circuit put it:

In “common fund” cases, the losing party no longer continues to have an interest in the fund; the contest becomes one between the successful plaintiffs and their attorneys over division of the bounty.

By contrast, . . . where the prevailing party’s fees are paid by the loser pursuant to statute, the adversary papers . . . may adequately illuminate the factual predicate for a reasonable fee. This is so because the losing party in statutory fee cases retains an interest in contesting the size of the fee. This is not the case in “common fund” fee litigation, so the District Court in those cases has a special obligation to ensure that the fee is fair.⁵⁴⁰

Rule 23(h), adopted in 2003, allows for judicial discretion to hold a hearing in a class action context.⁵⁴¹ The Third Circuit requires a hearing before a common fund award is made,⁵⁴² and the D.C. and Second Circuits strongly encourage one.⁵⁴³ The First Circuit encourages such a hearing where large sums are at stake.⁵⁴⁴

539. See Manual for Complex Litigation, Fourth § 21.721 (2004).

540. *Copeland v. Marshall*, 641 F.2d 880, 905 n.57 (D.C. Cir. 1980) (citation omitted).

541. See *infra* section III.B for techniques judges use to avoid unnecessary hearings.

542. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 584 (3d Cir. 1984) (“hearing on a fee application in an equitable fund case requires compliance with those procedural rules which assure fair notice and an adequate opportunity to be heard. Equally plainly, the requirement of an evidentiary hearing demands the application in that hearing, of the Federal Rules of Evidence.”).

543. *Copeland v. Marshall*, 641 F.2d 880, 905 n.57 (D.C. Cir. 1980) (“hearing may be vital in cases involving attorney’s fees to be paid from a ‘common fund’”); *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470, 473 (2d Cir. 1974) (*Grinnell I*) (noting court should “allow a complete airing of all objection[s] to a petitioner’s fee claim”; when there are overt factual disputes, “an evidentiary hearing, complete with cross-examination, is imperative”; even absent such disputes, “an additional hearing” may be necessary to fill any “factual voids”).

544. *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 614 (1st Cir. 1992) (evidentiary hearing not necessary in all cases, but district court held one here, “wisely . . . considering the stakes”).

II. Common Fund and Substantial Benefit

These holdings are all in cases involving use of the lodestar. If a court uses the percentage method and there are no factual disputes concerning an upward or downward adjustment, a hearing seems less necessary. The court can protect the interests of beneficiaries or potential beneficiaries by choosing a reasonable percentage. The court need not expend time examining submissions by counsel, as it does in cases involving the lodestar.

If a hearing is held, the court should ensure that all attorneys staking a claim to fees are given notice and a reasonable opportunity to be heard.⁵⁴⁵

The Eleventh Circuit has said that the district court “should articulate specific reasons for selecting the percentage upon which the attorneys’ fee award is based. . . . [It] should identify all factors upon which it relied and explain how each factor affected its selection of the percentage”⁵⁴⁶ In common fund cases no less than in fee-shifting cases, effective appellate review requires that the trial court articulate clearly the bases for its decisions and calculations.⁵⁴⁷ Failure to do so may be an abuse of discretion.⁵⁴⁸

Federal Rule of Civil Procedure 54 applies in the common fund context as well.

545. See, e.g., *In re High Sulfur Content Gasoline Prod. Liab. Litig.*, 517 F.3d 220, 231 (5th Cir. 2008) (vacating order allocating fees among attorneys, and finding appointment of fee committee that reported ex parte to court violated Rule 23(h) by failing to give notice and opportunity to be heard to attorneys not on fee committee); *Nineteen Appeals*, 982 F.2d at 614 (reversing fee award in large-scale consolidated case in which lawyers from a steering committee were permitted to testify, examine witnesses, and offer oral argument at evidentiary hearing, but other lawyers representing individual clients were not).

546. *Camden I Condo. Ass’n v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991).

547. *In re Fine Paper*, 751 F.2d at 596.

548. See *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (abuse of discretion not to sufficiently explain award); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195–201 (3d Cir. 2000) (same). See also *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988).

3. Issues on appeal

a. Timing

A decision awarding or denying fees from a common fund, like a decision pursuant to a fee-shifting statute, is severable from the decision on the merits and separately appealable.⁵⁴⁹ The discussion of the timing of appeals of statutory fee determinations⁵⁵⁰ also applies to appeals of common fund decisions.

b. Scope of review

Courts of appeals have said little about the scope of review in common fund cases. A district court's factual determinations clearly must be reviewed deferentially.⁵⁵¹ The Ninth and Tenth Circuits have suggested that a district court's decision of what method to use to calculate the award is also entitled to deference.⁵⁵²

c. May the court of appeals calculate an award itself?

The same considerations that might lead a court of appeals in a rare statutory fee-shifting case to calculate the award itself rather than remand it for calculation⁵⁵³ seem to apply in common fund cases, particularly when there have been multiple fee appeals.⁵⁵⁴

C. Substantial Benefit

The substantial benefit (or the common benefit) doctrine extends the common fund doctrine to lawsuits that produce nonmonetary benefits.

549. *Trustees v. Greenough*, 105 U.S. 527, 531 (1881); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 n.5 (1980); *Nineteen Appeals*, 982 F.2d at 609–10; *Overseas Dev. Disc Corp. v. Sangamo Constr. Co.*, 840 F.2d 1319, 1324 (7th Cir. 1988).

550. See *supra* sections I.A.1 and I.C.1.

551. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 237 (2d Cir. 1987).

552. *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988).

553. See *supra* section I.C.3.

554. See, e.g., *In re Synthroid Mktg. Litig. (Synthroid II)*, 325 F.3d 974, 980 (3d Cir. 2003) (calculating award rather than remanding for second time). See also *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 312 (1st Cir. 1995) (calculating award rather than remanding).

II. Common Fund and Substantial Benefit

Application of the two doctrines is similar, but there are noteworthy differences.⁵⁵⁵

The Supreme Court has applied the substantial benefit doctrine in two seminal cases. *Mills v. Electric Auto-Lite Co.*⁵⁵⁶ involved a derivative suit by minority shareholders to set aside a merger. Finding that the merger violated securities laws, the Court remanded the case for the district court to fashion a remedy, and it specified that the plaintiffs should be awarded attorneys' fees. The Court noted that "this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid" but maintained that,

[a]lthough the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a "common fund" for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses.⁵⁵⁷

Rather, fees may be awarded where litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them."⁵⁵⁸

In *Hall v. Cole*,⁵⁵⁹ the Supreme Court applied the substantial benefit doctrine in a "union democracy" case. In assessing fees against a labor union that expelled the plaintiff for violating a union rule found to be unconstitutional, the Court held that the plaintiff "necessarily rendered a substantial service to his union as an institution and to all of its members. . . . [B]y vindicating his own right [of free speech], the successful litigant dispel[led] the 'chill' cast upon the rights of others."⁵⁶⁰ Extracting fees from "the union treasury simply shifts the costs of litigation to 'the

555. Although courts often used to treat the common fund doctrine and substantial benefit doctrine as one, the current trend is to treat them separately. Of course, if a suit produces both a common fund and a substantial nonmonetary benefit, both doctrines may be applicable.

556. 396 U.S. 375 (1970).

557. *Id.* at 392.

558. *Id.* at 393–94. The beneficiaries were the shareholders, and an award against the corporation spread costs proportionately among them.

559. 412 U.S. 1 (1973).

560. *Id.* at 8.

class that has benefited from them and that would have had to pay them had it brought the suit.”⁵⁶¹

In *Alyeska Pipeline Service Co. v. Wilderness Society*,⁵⁶² the Supreme Court rejected the “private attorney general” doctrine as a basis for attorneys’ fees, but affirmed the vitality of the substantial benefit doctrine developed in *Mills* and *Hall*. The Court noted that when fees are claimed under this doctrine, the primary inquiry is similar to that required in a common fund case: Did the plaintiff’s suit produce a substantial benefit for an identifiable class of beneficiaries, and can the benefits be traced and the costs shifted fairly and with some accuracy?⁵⁶³

As in statutory fee-shifting and common fund cases, intervenors are eligible for awards based on the substantial benefit doctrine.⁵⁶⁴ Indeed, substantial benefit awards in labor cases are often made to intervenors. These cases are brought under the Labor-Management Reporting and Disclosure Act of 1959,⁵⁶⁵ which authorizes suit by the Secretary of Labor only. The court must determine the extent to which the intervenor’s work helped secure the benefit as opposed to merely duplicating the efforts of the Secretary of Labor.⁵⁶⁶ “[T]he intervenor usually confers a sub-

561. *Id.* at 9 (footnote omitted) (quoting *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 397 (1970)).

562. 421 U.S. 240 (1975).

563. *Id.* at 264–65 n.39. The Ninth Circuit held that the “tracing” requirement does not apply in labor cases because *Mills* did not mention it. *Southerland v. Int’l Longshoremen’s Union*, 845 F.2d 796, 798–99 (9th Cir. 1987). No other court has so held, and both the Third and D.C. Circuits have cited the tracing requirement in labor cases. *Brennan v. United Steelworkers of Am.*, 554 F.2d 586, 604–05 (3d Cir. 1977); *Usery v. Local Union No. 639, Int’l Bhd. of Teamsters*, 543 F.2d 369, 382 (D.C. Cir. 1976). In any case, *Mills* requires an “ascertainable class” of beneficiaries; where there is such a class, benefits can generally be traced with accuracy.

564. *Donovan v. CSEA Local Union 1000*, 784 F.2d 98, 103 (2d Cir. 1986); *Brennan*, 554 F.2d at 604; *Usery*, 543 F.2d at 382–89.

565. 29 U.S.C. §§ 401–531.

566. See, e.g., *Marshall v. United Steelworkers*, 666 F.2d 845, 852 (3d Cir. 1981) (reversing denial of fees to intervenors whose efforts “narrowed the issues for Labor and helped to isolate the specific problems with the election” but upholding denial of compensation for work at later stages found by district court to be either duplicative of Secretary of Labor’s work or ineffectual); *Donovan v. Local Union 70*, 661 F.2d 1199, 1203 (9th Cir. 1981) (award proper in light of Secretary of Labor’s counsel attesting to intervenor’s

II. Common Fund and Substantial Benefit

stantial benefit on the union membership by identifying, investigating and presenting for the Secretary's ultimate prosecution, evidence of union violations."⁵⁶⁷

1. Determining whether an award is in order

a. *Did the suit confer a substantial benefit?*

In *Mills*, the Supreme Court agreed with the Minnesota Supreme Court that a "substantial benefit must be something more than technical in its consequence and . . . accomplish[] a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest."⁵⁶⁸ Even apart from the fact that this statement applies only to shareholder suits, it provides limited guidance. Lower courts have not developed a more precise standard,⁵⁶⁹ and determinations of whether suits conferred a substantial benefit have been largely fact-specific. Nevertheless, the case law provides guidance on some important issues.

As should be clear from *Mills*, not every beneficiary must benefit personally for the plaintiff to recover fees. In labor cases involving, for example, an improper election or a violation of free speech, the remedy affects all members only insofar as they are presumed to benefit from a more democratic union; this is sufficient for recovery of fees.⁵⁷⁰ Indeed, the Third Circuit rejected a claim that an award was improper because it secured free elections for only one district.⁵⁷¹ The court held that, "to the extent that prosecution of LMRDA [Labor-Management Reporting and

assistance, but "modest amount awarded strongly suggests it does not exceed the value of the intervenor's contribution").

567. *CSEA Local Union 1000*, 784 F.2d at 103.

568. *Mills*, 396 U.S. at 396 (quoting *Bosch v. Meeker Coop. Light & Power Ass'n*, 101 N.W.2d 423 (Minn. 1960)).

569. *Cf. Southerland v. Int'l Longshoremen's Union*, 845 F.2d 796, 800-01 (9th Cir. 1987) (equating substantial benefit with "valuable service")

570. *See, e.g., Zamora v. Local 11*, 817 F.2d 566, 571 (9th Cir. 1987) (where suit forced union to provide Spanish translation at meetings, defendant argued fee award was improper because most members did not benefit; court disagreed because suit "benefits the entire membership, including English-speaking members, by facilitating discussion and participation at the monthly meetings").

571. *Brennan v. United Steelworkers of Am.*, 554 F.2d 586, 605 (3d Cir. 1977).

Disclosure Act of 1959] violations supports union democracy, such activity confers direct and substantial benefit upon the entire union membership.”⁵⁷²

The Fifth Circuit suggested, in dictum, that the benefit cannot consist solely of the likelihood that the defendant will change its practices to prevent future liability.⁵⁷³ However, no court has so held, and the Eleventh Circuit explicitly disagreed, finding that a labor union’s “incentive to change” constituted a substantial benefit to the members: “[W]e do not find such incentive an insubstantial benefit. Substantiality does not rest on compulsory reform or injunctive relief.”⁵⁷⁴

As a general matter, the substantial benefit need not be achieved by a formal judgment.⁵⁷⁵ For example, a suit may confer a substantial benefit if a settlement is reached⁵⁷⁶ or if the defendant takes action that moots the case.⁵⁷⁷ In the latter situation, the Third and Ninth Circuits required the plaintiff to demonstrate that its complaint was “meritorious.”⁵⁷⁸

The Sixth Circuit held that a suit conferred a substantial benefit where a preliminary injunction forced a union to distribute the plaintiffs’ campaign literature. The “plaintiffs’ attorneys’ fees for work undertaken in obtaining and enforcing the preliminary injunction . . . did create a

572. *Id.* Of course, the benefit must be more than that shared by the entire population. *See, e.g., id.* at 606 (doctrine inapplicable where “every individual might be said to benefit”); *Crane Co. v. Am. Standard*, 603 F.2d 244, 255 (2d Cir. 1979) (denying fees because “[t]he shareholders . . . received no benefit from this litigation, other than the incremental benefit which arguably accrues to all participants in the securities markets whenever violations of the securities laws are uncovered”).

573. *Shimman v. Int’l Union of Operating Eng’rs*, 744 F.2d 1226, 1235 n.13 (5th Cir. 1984) (en banc) (“Since there was no injunction . . . the benefits received by other union members were achieved not by direct operation of the judgment, but rather were the result of a realization that the union would have to reform itself or risk exposure to further liability.”).

574. *Erkins v. Bryan*, 785 F.2d 1538, 1549 (11th Cir. 1986).

575. *See Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974) (“So long as a substantial benefit is conferred upon the corporation, it is not necessary that the litigation be brought to a successful completion.”).

576. *See, e.g., Koppel v. Wien*, 743 F.2d 129, 135 (2d Cir. 1984).

577. *See, e.g., Lewis v. Anderson*, 692 F.2d 1267, 1270 (9th Cir. 1982); *Ramey*, 508 F.2d at 1196.

578. *Lewis*, 692 F.2d at 1270–71; *Kahan v. Rosenstiel*, 424 F.2d 161, 167 (3d Cir. 1970).

II. Common Fund and Substantial Benefit

‘common benefit’ for all of the union members: it ensured free and democratic elections of candidates for union office.”⁵⁷⁹ This holding is consistent with the Eleventh Circuit’s reversal of a fee award where the plaintiff was granted a preliminary injunction preventing the imposition of a trusteeship on the union but then lost its case on the merits.⁵⁸⁰ The Eleventh Circuit found the award inappropriate because the plaintiff’s success procured no meaningful or lasting benefit for the union members.⁵⁸¹

The Ninth Circuit held that fees are inappropriate for a labor union defendant that succeeds in defending a suit.⁵⁸² Such an award would shift costs away from the beneficiaries and onto the opposing party—this is not the rationale in substantial benefit cases. Applying the same reasoning in a non-labor case, the Ninth Circuit held that a victorious defendant could not be awarded fees against the plaintiff because the plaintiff “has not benefited from this action. To saddle him with the attorney’s fee will only increase his losses from this action, not correlate costs with benefits.”⁵⁸³

b. Do the defendant and the beneficiaries share an identity of interests?

In keeping with *Mills* and *Hall*, substantial benefit awards are usually made in suits by a shareholder against a corporation or by a labor union member against a union.⁵⁸⁴ Fees are paid by the defendant, because it is

579. *Bliss v. Holmes*, 867 F.2d 256, 258 (6th Cir. 1988).

580. *Markham v. Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers*, 901 F.2d 1022 (11th Cir. 1990). *See also* *Benda v. Grand Lodge*, 584 F.2d 308 (9th Cir. 1978) (finding award premature where plaintiff was granted preliminary injunction but decision on merits had yet to be reached).

581. *Markham*, 901 F.2d at 1028. The court explicitly held open the possibility of fees where a preliminary injunction “form[ed] a vital function in changing the legal relationship between the parties.” *Id.*

582. *Ackley v. W. Conference of Teamsters*, 958 F.2d 1463 (9th Cir. 1992). The court gave a second rationale for denying fees against the plaintiff: a chilling effect on “union members in the exercise of their statutory right to sue the union.” *Id.* at 1479 (quoting *Pawlak v. Greenawalt*, 713 F.2d 972, 980 (3d Cir. 1983)).

583. *Oldfield v. Athletic Congress*, 779 F.2d 505, 509 (9th Cir. 1985).

584. The shareholder suits are generally class actions or derivative suits. The courts are split on whether the substantial benefit doctrine applies when the plaintiff brings suit as an individual shareholder. *Compare* *Bailey v. Meister Brau, Inc.*, 535 F.2d 982, 995 (7th

the alter ego of the beneficiaries who would otherwise be unjustly enriched by the suit. If the defendant and the beneficiaries have no such identity of interests, an award against the defendant is improper because it would shift the costs unfairly.⁵⁸⁵

A Ninth Circuit case illustrates this point. A suit by residents of an irrigation district forced the Secretary of the Interior to free up land for the residents to buy at a below-market price. The plaintiffs sought fees from the district, since members of the district benefited from the suit. However, the Ninth Circuit found an award inappropriate because

the result achieved is not beneficial to all landowners within the District. Those who own excess lands will be required to sell the excess at below-market prices, or will no longer receive water for irrigating those lands. If appellants' attorneys' fees were drawn from the District's general revenues, there would be no congruence between the funds dis-

Cir. 1976) (doctrine inapplicable because award would shift costs to losing party), *with Reiser v. Del Monte Props.*, 605 F.2d 1135, 1139 (9th Cir. 1979) (to require that suit be brought derivatively or representatively misconstrues purpose of doctrine). The *Reiser* court made a strong case that as long as the suit benefits shareholders, recovery should not depend on the status of the plaintiff. *See also Bailey*, 535 F.2d at 997 (Swygert, J., dissenting) (“The majority employs a formalistic approach . . . which obscures the purpose of the [substantial benefit] rule . . . and thereby achieves an inequitable result. That purpose is to insure that the costs of litigation are not borne solely by one or a few shareholders” where a benefit is conferred on all the shareholders.).

Successful shareholder derivative actions qualify for a substantial benefit award only when they produce nonmonetary relief. When they produce a monetary recovery for the corporation, the common fund doctrine applies.

585. *See, e.g., Johnson v. HUD*, 939 F.2d 586, 590 (8th Cir. 1991) (denying award because “defendants are neither the alter ego nor the representative of the benefited class”); *Oster v. Bowen*, 682 F. Supp. 853, 857 (E.D. Va.) (“Where the common benefit rule is invoked against a stock corporation or a union, the beneficiaries may incur their share of the costs by such means as reduced dividends or higher union dues. MSVRO, however, is a non-stock corporation. Plaintiff has demonstrated no financial relationship whatsoever between MSVRO and the physicians who may benefit from the new procedures.”), *appeal dismissed*, 859 F.2d 150 (4th Cir. 1988). *See also Home Sav. Bank v. Gillam*, 952 F.2d 1152, 1163 (9th Cir. 1991) (where bank sued and recovered severance benefits from its former CEO, award of fees was reversed because defendant was hurt by suit, and where “the party ordered to pay fees is not a beneficiary . . . the common benefit exception does not apply”).

II. Common Fund and Substantial Benefit

bursed as the fee award and the funds taken in from the beneficiary class in whose name that award is made.⁵⁸⁶

Even in shareholder suits or suits by labor union members against a union, an award may be inappropriate because of insufficient congruence between the defendant and the beneficiaries; that is, the suit may not benefit all shareholders or union members, and therefore, a fee award unfairly penalizes the nonbeneficiaries. Thus, the Ninth Circuit found an award inappropriate where a suit established that a union's policy, as it applied to the plaintiff, resulted in the unfair denial of pension benefits: Not all—or even most—union members benefited from the suit.⁵⁸⁷ Moreover, the change in policy resulting from the suit would not make the union more democratic; its only benefit was to the handful of employees whose pensions would be increased.

Similarly, most courts reject the applicability of the substantial benefit doctrine in suits against the government.⁵⁸⁸ If only some members of the population benefit from the suit, an award from the government treasury is inappropriate because it would involve all taxpayers in the fee sharing.⁵⁸⁹ Indeed, because of the required identity of interests shared by

586. *United States v. Imperial Irrigation Dist.*, 595 F.2d 525, 531 (9th Cir. 1979), *rev'd in part, vacated and remanded on other grounds*, 447 U.S. 352 (1980).

587. *Burroughs v. Bd. of Trustees*, 542 F.2d 1128, 1132 (9th Cir. 1976). The court also noted that because “no records . . . reveal[] the identity of persons benefited by [the] action,” the class of beneficiaries is “of indeterminable size and not easily identifiable.” This focus is misleading because even if the beneficiaries were identified, an award would have been improper because many members of the union who were not beneficiaries would have shared in the costs of any fee award. These two concerns—unequal benefits and difficulty identifying beneficiaries—often overlap. *See, e.g., Edwards v. Heckler*, 789 F.2d 659, 660 (9th Cir. 1985) (reversing award where suit resulted in more lenient standard for Social Security benefits); *Cantwell v. San Mateo*, 631 F.2d 631, 639 (9th Cir. 1980) (fees properly denied where suit required county to change policy with respect to retirement benefits).

588. *See, e.g., Linquist v. Bowen*, 839 F.2d 1321, 1326 (8th Cir. 1988); *In re Hill*, 775 F.2d 1037, 1041 (9th Cir. 1985); *Grace v. Burger*, 763 F.2d 457, 459 (D.C. Cir. 1985); *Jordan v. Heckler*, 744 F.2d 1397, 1400 (10th Cir. 1984).

589. *See supra* text accompanying note 431. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975)—discussed *supra* text accompanying notes 7 and 562—the Supreme Court noted that in its substantial benefit and common fund cases, the beneficiaries were “small in number.” *Id.* at 265 n.39. But the number of beneficiaries does not appear to be a ground for denial of fees except in suits against the government.

the defendant and the beneficiaries, claims for fees based on the substantial benefit doctrine rarely succeed outside the corporate and labor union contexts.

c. Has the plaintiff benefited disproportionately?

The Sixth Circuit has held several times that when the plaintiff receives a damages award from a labor union, a fee award would shift the costs unfairly.⁵⁹⁰ As the Fifth Circuit observed, if the plaintiff who received a personal award were also awarded fees, he or she would pay no greater portion of the fees than any other union member who benefited only incidentally. The fee award would not distribute fees in proportion to benefits.

Receiving a personal award is clearly not a case where the plaintiff “benefits a group of others in the same manner as himself.” . . . [Plaintiff] obtained redress for personal injuries not shared by other union members. The purpose of the common benefit exception is to shift the costs of litigation to “the class that benefited from them and that would have had to pay them had it brought the suit.” . . . Other union members could not have brought suit to redress [plaintiff’s] personal injuries.⁵⁹¹

Similarly, the D.C. Circuit said that fees are inappropriate where “a litigant obtain[s] a direct and pecuniary benefit, and the ‘benefit’ to the class . . . is incremental and relatively intangible.”⁵⁹² The Tenth Circuit agreed.⁵⁹³

Courts have awarded fees based on the substantial benefit doctrine even though the plaintiff recovered damages, without discussing the dis-

See, e.g., Brennan v. United Steelworkers of Am., 554 F.2d 586, 606 (3d Cir. 1977), discussed *supra* text accompanying notes 571–72 (rejecting contention that an award was inappropriate because there were too many beneficiaries).

590. Black v. Ryder, 970 F.2d 1461, 1472 (6th Cir. 1992); Guidry v. Int’l Union of Operating Eng’rs, 882 F.2d 929, 944 (6th Cir. 1989), *vacated on other grounds*, 494 U.S. 1022 (1990).

591. Shimman v. Int’l Union of Operating Eng’rs, 744 F.2d 1226, 1235 (5th Cir. 1984) (en banc) (citations omitted).

592. Am. Ass’n of Marriage v. Brown, 593 F.2d 1365, 1369 (D.C. Cir. 1979).

593. Aguinaga v. United Food & Commercial Workers Int’l Union, 993 F.2d 1480, 1484–85 (10th Cir. 1993).

II. Common Fund and Substantial Benefit

proportionality issue.⁵⁹⁴ In any event, the Sixth Circuit's position has limited scope. First, it appears to apply only to cases in which the plaintiff recovers damages personally—not to cases in which damages are ordered paid to the union.⁵⁹⁵ Second, it does not apply if the plaintiff receives damages and an injunction that directly benefits the other union members.⁵⁹⁶ Finally, it cannot be construed to apply to awards beyond money damages. Clearly, a fee award should not be denied simply because the plaintiff benefits more than other beneficiaries, for example, if a suit that overturns a fraudulent election results in the plaintiff's becoming elected.⁵⁹⁷

d. Does the court have jurisdiction to make an award?

The requirement in common fund cases that the court have jurisdiction over the fund is generally met because the court has jurisdiction over the defendant who controls the fund.⁵⁹⁸ In substantial benefit cases, in which there is no fund, the “jurisdiction” or “control” criterion has occasionally proved to be more complex.

In a Sixth Circuit case, the plaintiff sued both his labor union and an automobile company for various offenses. He prevailed against the company for making improper payments to union officers. The Sixth Circuit held that the district court lacked jurisdiction to award fees against the

594. See, e.g., *Bise v. Int'l Bhd. of Elec. Workers*, 618 F.2d 1299 (9th Cir. 1979); *Rosario v. Amalgamated Ladies Garment Cutters Union*, 605 F.2d 1228 (2d Cir. 1979); *Emmanuel v. Omaha Carpenters Dist. Council*, 560 F.2d 382 (8th Cir. 1977); *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir. 1976).

595. See *Erkins v. Bryan*, 785 F.2d 1538, 1549 (11th Cir. 1986) (distinguishing *Shimman* from case in which damages award was ordered paid to union).

596. *Shimman*, 744 F.2d at 1235 nn.13, 14, could arguably be read to suggest that fees may be in order in such cases. A year later, the Sixth Circuit removed any doubt. See *Murphy v. Int'l Union of Operating Eng'rs*, 774 F.2d 114, 127 (6th Cir. 1985).

597. See, e.g., *Marshall v. United Steelworkers*, 666 F.2d 845, 853 (3d Cir. 1981) (error to deny fees to plaintiff whose suit overturning union election led to his own election: “That the individual who brought suit also receives a direct personal benefit from it is of no matter . . .”). In addition, it is irrelevant that the plaintiff's motive in bringing the suit may have been to help himself rather than the union. *Pawlak v. Greenawalt*, 713 F.2d 972, 980 (3d Cir. 1983).

598. See *supra* section II.B.1.e.

union, since the union was not party to the claim for which fees were awarded:

In holding that the court need only “have ‘jurisdiction over an entity through which the contribution can be effected,’” the district judge has confused jurisdiction over the person with jurisdiction over the subject matter Liability for attorneys’ fees cannot rest, without more, on the fortuitous chance that the claim on which a plaintiff seeks recovery of fees may be joined in the same action with a separate claim against the intended source of that recovery. The court making the award must have jurisdiction over the target of that award by virtue of its jurisdiction over the subject matter of the claim on which the award is based.⁵⁹⁹

The Ninth Circuit has held that the substantial benefit doctrine does not create subject matter jurisdiction, and it therefore dismissed a suit for recovery of fees filed after completion of the underlying litigation.⁶⁰⁰ After the plaintiffs settled their inverse condemnation proceeding, they brought action for fees in federal court against property owners who were not parties to the litigation but who had benefited from the settlement. There was no independent basis for federal jurisdiction, and the Ninth Circuit held that the substantial benefit doctrine did not supply a basis for jurisdiction. The court acknowledged that this issue had not been raised in the numerous cases awarding fees based on the substantial benefit doctrine (and common fund doctrine), but it noted that “in each such case the fee request was part of the original proceeding and the district court’s jurisdiction rested on grounds independent of the fee request.”⁶⁰¹

The plaintiffs could not have recovered anything from the property owners as part of the original suit because the property owners were not parties. In general, a court may not order fees paid by beneficiaries personally if they are not party to the litigation.⁶⁰²

599. *Toth v. UAW*, 743 F.2d 398, 406 (6th Cir. 1984) (citations omitted).

600. *Sederquist v. Court*, 861 F.2d 554, 557 (9th Cir. 1988) (substantial benefit doctrine not part of federal common law, but “merely an equitable exception to the traditional ‘American rule’ governing attorneys’ fees” and does not confer jurisdiction under 28 U.S.C. § 331).

601. *Id.*

602. *See, e.g., Cantwell v. San Mateo*, 631 F.2d 631, 639 (9th Cir. 1980) (rejecting creative fee-sharing proposal that required non-parties to contribute to attorneys’ fees).

II. Common Fund and Substantial Benefit

e. Is an award contrary to congressional intent?

As is true in the common fund context, in substantial benefit cases, a remedial scheme or other evidence that Congress did not intend a fee award in a particular class of cases will defeat an award.⁶⁰³

2. Method for determining amount of award

The lodestar is generally used to determine the amount of fees in substantial benefit cases.⁶⁰⁴ The kinds of adjustments to the lodestar permitted in cases under the fee-shifting statutes may be made in substantial benefit cases as well.⁶⁰⁵ In addition, the Sixth Circuit has said that an award may be adjusted upward or downward to reflect the extent of the benefit conferred.⁶⁰⁶

In substantial benefit cases, work preparing a fee request or litigating over fees is compensable; in common fund cases, it is not.⁶⁰⁷ In common fund cases, the work on fees, if compensated, would deplete the very fund that benefits the beneficiaries. This is not so in substantial benefit cases, in which the benefit conferred by the lawsuit is nonpecuniary.⁶⁰⁸

3. Issues on appeal

The discussion on appellate issues in common fund cases⁶⁰⁹—specifically, the timing of appeals, the scope of review, and whether the court of ap-

603. *Usery v. Local Union No. 639, Int'l Bhd. of Teamsters*, 543 F.2d 369, 386–88 (D.C. Cir. 1976).

604. *See, e.g., Southerland v. Int'l Longshoremen's Union*, 845 F.2d 796, 800–01 (9th Cir. 1987). *See also Rosenbaum v. MacAllister*, 64 F.3d 1439, 1447 (10th Cir. 1995) (holding “percentage of the fund” approach not appropriate in substantial benefit cases, and that while *Johnson* factors must be considered, calculation needn't be based on same approach as that used in statutory fee cases).

605. *Kinney v. Int'l Bhd. of Elec. Workers*, 939 F.2d 690, 695–96 (9th Cir. 1991) (rejecting argument that adjustment to lodestar “is inappropriate in any case where the award of fees is based upon” substantial benefit doctrine).

606. *Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983).

607. *Kinney*, 939 F.2d at 693–95; *Donovan v. CSEA Local Union 1000*, 784 F.2d 98, 106 (2d Cir. 1986); *Pawlak v. Greenawalt*, 713 F.2d 972, 983–84 (3d Cir. 1983).

608. *See Kinney*, 939 F.2d at 694 n.5; *Donovan*, 784 F.2d at 106; *Pawlak*, 713 F.2d at 981.

609. *See supra* section II.B.3.

peals can calculate the award itself—applies in toto to substantial benefit cases.

D. Private Securities Litigation Reform Act of 1995

Congress enacted the Private Securities Litigation Reform Act of 1995⁶¹⁰ (PSLRA) to prevent frivolous and unmeritorious securities class actions.⁶¹¹ The PSLRA provides that “[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.”⁶¹² “Total attorneys’ fees and expenses awarded by the court . . . shall not exceed a reasonable percentage of the amount of any damages . . . actually paid to the class.”⁶¹³ The goal of the PSLRA was to replace lawyer-driven litigation with client-driven litigation.⁶¹⁴

1. Selecting class counsel

Debate quickly arose as to whether trial judges had authority under the PSLRA to conduct an auction for selecting class counsel.⁶¹⁵ The Third Circuit addressed the issue at the stage of selection of lead counsel, in *In*

610. 15 U.S.C. § 78u-4.

611. PSLRA, S. Rep. No. 104-98, at 4 (1995). *See also* Manual for Complex Litigation, Fourth § 31.3 (2004).

612. 15 U.S.C. § 78u-4(a)(3)(B)(v).

613. *Id.* § 78u-4(a)(6). Courts still have a duty under Rule 23 to review the reasonableness of fees at the end of litigation. *See, e.g., In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 730–31 (3d Cir. 2001).

614. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 484 (5th Cir. 2001) (under the PSLRA “[c]lass action lawsuits are intended to serve as a vehicle for capable, committed advocates to pursue the goals of the class members through counsel, not for capable, committed counsel to pursue their own goals through those class members”).

615. Selection of class counsel by an auction or bidding process was developed by Judge Vaughn Walker in *In re Oracle Securities Litigation*, 131 F.R.D. 688 (N.D. Cal. 1990), *modified*, 132 F.R.D. 538 (N.D. Cal. 1990), a securities class action that predated the PSLRA. *See infra* section III.A.4. *See also Third Circuit Task Force Report on Selection of Class Counsel*, 74 Temp. L. Rev. 689 (2001), for an in-depth evaluation of and recommendations on auctioning practices under the PSLRA; and Loral Hooper & Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study* (Federal Judicial Center 2001).

II. Common Fund and Substantial Benefit

re Cendant Corp. Litigation;⁶¹⁶ the Ninth Circuit addressed the issue at the stage of selection of lead plaintiff, in *In re Cavanaugh*.⁶¹⁷

In *Cendant Corp.*, the Third Circuit ruled that selecting lead counsel by competitive bidding is generally not permitted under the PSLRA.⁶¹⁸ The district court had declined to accept the lead plaintiffs' choices for lead counsel and concomitant retainer agreements. It conducted an auction to establish reasonable attorneys' fees through market simulation.⁶¹⁹ The Third Circuit vacated the award of attorneys' fees made pursuant to the auction terms.⁶²⁰ Acknowledging that the PSLRA renders plaintiff's counsel selection "subject to the approval of the court,"⁶²¹ the Third Circuit found that appointing counsel through auction was more than "approving" or "disapproving" the lead plaintiff's choice.⁶²²

This language makes two things clear. First, the lead plaintiff's right to select and retain counsel is not absolute—the court retains the power and the duty to supervise counsel selection and counsel retention. But second, and just as importantly, the power to "select and retain" lead counsel belongs, at least in the first instance, to the lead plaintiff, and the court's role is confined to deciding whether to "approve" that choice. Because a court-ordered auction involves the court rather than the lead plaintiff choosing lead counsel and determining the financial terms of its retention, this latter determination strongly implies that an auction is not generally permissible in a Reform Act case, at least as a matter of first resort.⁶²³

616. 264 F.3d 201 (3d Cir. 2001).

617. 306 F.3d 726 (9th Cir. 2002).

618. *Cendant Corp.*, 264 F.3d at 273. *Cendant Corp.* involved two actions: the non-*Prides* claims and the *Prides* claims. The Third Circuit addressed the auctioning issue in the non-*Prides* claims. For a discussion of selecting lead counsel by competitive bidding, see *infra* section III.A.4.

619. *In re Cendant Corp. Litig.*, 182 F.R.D. 144, 150 (D.N.J. 1998). Because the PSLRA affords lead plaintiffs the opportunity to choose counsel, the court allowed plaintiffs' counsel to meet the terms of the lowest bids. *Id.* at 151. Lawyers for the two lead plaintiffs matched the lowest bids, and the court appointed each attorney as lead counsel for the respective plaintiff.

620. *Cendant Corp.*, 264 F.3d at 201.

621. 15 U.S.C. § 78u-4(a)(3)(B)(v).

622. *Cendant Corp.*, 264 F.3d at 274.

623. *Id.* at 273.

Furthermore, the Third Circuit found that the “auction” model runs contrary to the PSLRA’s “lead plaintiff” model and to its legislative history.⁶²⁴ The PSLRA “evidences a strong presumption in favor of approving a properly-selected lead plaintiff’s decisions as to counsel selection and counsel retention.”⁶²⁵ A district court’s “inquiry is appropriately limited to whether the lead plaintiff’s selection and agreement with counsel are reasonable on their own terms.”⁶²⁶ The Third Circuit gave a non-exhaustive list of questions to ask in making this determination,⁶²⁷ but “the ultimate inquiry is always whether the lead plaintiff’s choices were the result of a good faith selection and negotiation process and were arrived at via meaningful arms-length bargaining.”⁶²⁸

In *In re Cavanaugh*,⁶²⁹ the Ninth Circuit also rejected conducting an auction to select class counsel and held that it was error to select the lead plaintiff according to how well an attorney fee arrangement was negotiated.⁶³⁰ The district court judge had refused to appoint as lead plaintiff the party with the largest stake in the controversy because there were “significant differences in potential attorney fees” among parties.⁶³¹ Finding no other plaintiffs to be “adequate,” the district court appointed a nominal plaintiff and conducted an auction to select class counsel.

The Ninth Circuit vacated the order appointing the nominal plaintiff⁶³² and expressed its disfavor with auctions for selecting class coun-

624. *Id.* at 273–74.

625. *Id.* at 276.

626. *Id.*

627. “[C]ourts should consider: (1) the quantum of legal experience and sophistication possessed by the lead plaintiff; (2) the manner in which the lead plaintiff chose what law firms to consider; (3) the process by which the lead plaintiff selected its final choice; (4) the qualifications and experience of counsel selected by the lead plaintiff; and (5) the evidence that the retainer agreement negotiated by the lead plaintiff was (or was not) the product of serious negotiations between the lead plaintiff and the prospective lead counsel.” *Id.*

628. *Id.* See also *In re Lucent Techs., Inc., Sec. Litig.*, 194 F.R.D. 137, 156 (D.N.J. 2000) (predating *Cendant*) (conducting sealed-bid auction to select class counsel, in part, because “[i]t seems unlikely that there has been . . . independent, arms-length negotiating between Lead Plaintiff and the proposed lead counsel.”).

629. 306 F.3d 726 (9th Cir. 2002).

630. *Id.* at 731–36.

631. *In re Quintus Sec. Litig.*, 201 F.R.D. 475, 488 (N.D. Cal. 2001).

632. *Cavanaugh*, 306 F.3d at 739.

II. Common Fund and Substantial Benefit

sel.⁶³³ It explained that under the PSLRA, the plaintiff with the largest financial stake becomes the presumptive lead plaintiff if he or she meets Federal Rule of Civil Procedure 23(a)'s typicality and adequacy requirements.⁶³⁴ The court of appeals rejected the holding that "deficiencies in the group's fee agreement" were evidence that the potential lead plaintiff was inadequate and the holding that the inadequacy allowed the district court to conduct an auction.⁶³⁵

The district court's review of the presumptive lead plaintiff's choice of counsel and fee arrangements may be relevant in ensuring that the plaintiff is not receiving preferential treatment through some back-door financial arrangement with counsel or proposing to employ a lawyer with a conflict of interest. But this is not a beauty contest; the district court has no authority to select for the class what it considers to be the best possible lawyer or the lawyer offering the best possible fee schedule. Indeed, the district court does not select class counsel at all.⁶³⁶

The Third Circuit held the door open to selection of lead counsel through auctions in limited situations. The court noted that if the lead plaintiff's choice of counsel and fee arrangements appeared unreasonable, then the court should give the plaintiff a chance to renegotiate. If the plaintiff chose not to renegotiate a fairer arrangement, the court could designate the plaintiff as "not adequate" and choose an alternative. In the rare situation that no other "adequate" plaintiff existed, the court could appoint lead counsel through an auction.⁶³⁷

633. *Id.* at 734 n.14.

634. *Id.* at 730. The Ninth Circuit held that the PSLRA did not change the standard for adequacy under Federal Rule of Civil Procedure 23(a). *Id.* at 736. The Fifth Circuit came to a different conclusion in *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 483 (5th Cir. 2001), *reh'g denied*, 279 F.3d 313 (5th Cir. 2002).

635. *Cavanaugh*, 306 F.3d at 732.

636. *Id.* (footnote omitted).

637. *In re Cendant Corp. Litig.*, 264 F.3d 201, 277 (3d Cir. 2001). District courts have selected lead counsel through an auction when they doubted the "adequacy" of the lead plaintiff. *See, e.g.*, Order re Lead Plaintiff Selection & Class Counsel Selection 2, *In re Commtouch Software Ltd. Sec. Litig.*, No. 01-C-00719 (N.D. Cal. June 27, 2001) (ordering lead plaintiff to conduct auction under court-established procedures when the only choice for lead plaintiff had limited English skills and was therefore unable to exercise due diligence in selecting counsel).

In *Cendant Corp.*, the Third Circuit set forth guidelines for reviewing the “reasonableness” of an attorney fee award. The court stated, “under the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel.”⁶³⁸ This presumption “may be rebutted by a prima facie showing that the (properly submitted) retaine[r] agreement fee is clearly excessive.”⁶³⁹ If the presumption were rebutted, “the court would need to set a reasonable fee according to the standards our previous cases have set down for class actions not governed by the PSLRA.”⁶⁴⁰

Some district courts have developed approaches for scrutinizing the adequacy of the lead plaintiff proposed by attorneys in PSLRA cases.⁶⁴¹

638. *Cendant Corp.*, 264 F.3d at 282.

639. *Id.* at 283. The Third Circuit said that in determining whether the retainer is excessive, courts should be guided by the factors it set forth in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000):

(1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Cendant Corp., 264 F.3d at 283. Factors 3 and 7 are less likely to be as meaningful and useful in PSLRA cases as they are in other common fund cases. *Id.* at 284. It also stated that a lodestar “cross-check” may be appropriate. *Id.*

640. *Cendant Corp.*, 264 F.3d at 285.

641. See, e.g., *In re Pfizer Inc. Sec. Litig.*, 233 F.R.D. 334, 337 (S.D.N.Y. 2005) (considering “each potential lead plaintiff individually, and not as artificially grouped by its attorneys”); *In re Flight Safety Techs., Inc. Sec. Litig.*, 231 F.R.D. 124, 129–31 (D. Conn. 2005) (rejecting lawyer-driven groups; evaluating unrelated investors on individual basis); *In re Razorfish Inc. Sec. Litig.*, 143 F. Supp. 2d 304, 308 (S.D.N.Y. 2001) (rejecting group “cobbled together by cooperating counsel for the obvious purpose of creating a large enough grouping of investors to qualify as ‘lead plaintiff.’”). See also *In re Gemstar-TV Guide Int'l, Inc. Sec. Litig.*, 209 F.R.D. 447, 451–52 (C.D. Cal. 2002) (listing district court cases in which the court refused to appoint groups of unrelated investors as lead plaintiffs).

2. Determining a reasonable percentage of amounts actually paid to the class

The Fifth Circuit observed that “[p]art of the reason behind the near-universal adoption of the percentage method in securities cases is that the PSLRA contemplates such a calculation.”⁶⁴² The PSLRA provides expressly that “[t]otal attorneys’ fees and expenses . . . shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.”⁶⁴³

However, the PSLRA does not mandate a percentage-of-actual-recovery approach. In reaching this conclusion in *Powers v. Eichen*, the Ninth Circuit reasoned that the PSLRA’s “primary purpose was to prevent fee awards under the lodestar method from taking up too great a percentage of the total recovery” and that the PSLRA “simply requires that the fees and expenses ultimately awarded be reasonable in relation to what the plaintiffs recovered.”⁶⁴⁴ Under that interpretation, a lodestar calculation with a percentage-of-actual-recovery cross-check would satisfy the statutory requirement, as would a percentage-of-actual-recovery calculation with a lodestar cross-check.⁶⁴⁵

The courts of appeals have not been called on to resolve disputes about the PSLRA language “actually paid to the class”⁶⁴⁶ perhaps because the terms are reasonably clear. Outside the PSLRA context, however, the courts are split on whether the percentage-of-recovery calculation should start with the net value of the fund actually paid to class members who

642. *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 643 (5th Cir. 2012) (holding award of 18% of settlement fund not abuse of discretion).

643. 15 U.S.C. § 78(u)-4(a)(6).

644. *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000) (The Ninth Circuit held that the district court has discretion to use either the lodestar or the percentage-of-fund method to calculate fee awards in PSLRA cases). *Id.* at 1256.

645. *See, e.g., Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 796–97 (N.D. Ohio 2010) (calculating fee by lodestar and cross-checking by percentage-of-fund method) (non-PSLRA case).

646. The Advisory Committee on Civil Rules commented that the PSLRA “explicitly makes [the result actually achieved for class members] a cap for a fee award. . . . For a percentage approach to fee measurement, results achieved is the basic starting point.” Fed. R. Civ. P. 23 Committee Notes to 2003 Amendments, subdivision (h) (2013 ed.). *See also* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 33–35 (Federal Judicial Center, 3d ed. 2010).

present claims or the gross value of the fund to the class as a whole without regard to the claims process.⁶⁴⁷ The plain language of the PSLRA suggests the former, but the issue has rarely surfaced even though the two approaches may yield enormous differences in fee awards.⁶⁴⁸ District courts often repeat the language of the PSLRA, including the “actually paid” term, but, like the courts of appeals, rarely seem to be called on to resolve a dispute about whether the percentage should be based on tangible payments to class members.⁶⁴⁹

647. See *supra* section II.B.2.a.ii.

648. See, e.g., *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295–96 (11th Cir. 1999) (estimated actual payment to class members of \$6.48 million out of \$40 million settlement).

649. See, e.g., *Lonardo*, 706 F. Supp. 2d at 798–99 (non-PSLRA case discussing split of authority, noting PSLRA language, and applying compromise position). See also, e.g., *In re United Health Group, Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094, 1104–06 (D. Minn. 2009); *In re Ashanti Goldfields Sec. Litig.*, No. CV-00-717, 2005 WL 3050284, at *1, *5 (E.D.N.Y. Nov. 15, 2005); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 465 (S.D.N.Y. 2004).

III. Techniques for Managing Attorneys' Fees

Part III covers case-management techniques that judges use for directing the attorney fee process. The techniques described herein are not exhaustive. Apart from presenting ideas for judges to consider, this discussion is intended to encourage innovation in the judiciary's efforts to manage the attorney fee process.

Most of the ideas were gleaned from interviews with judges conducted in 1993, 2001, and 2013.⁶⁵⁰ If changes had occurred that might affect their views, interviewees from earlier editions of this monograph were given an opportunity to update their statements for this revision. Lawyers, computer specialists, and U.S. trustees were also interviewed for earlier editions.

Most of the time that judges spend on fees involves reviewing fee applications and conducting hearings. Part III sets out methods for performing each of these tasks; examines techniques for obtaining a pretrial estimate of anticipated fees, including the historic practice of selecting lead counsel through a competitive bidding process; and offers rules of thumb that may apply to either hearings or review of fee applications.

A. Facilitating Review of Fee Applications

According to most of the judges interviewed, reviewing fee applications to ensure their reasonableness is the most burdensome aspect of the attorney fee process. Determining the appropriate hourly rate can be difficult, and assessing the reasonableness of the hours claimed can be even more difficult. In common fund cases, determining the appropriate percentage of the fund to allocate to fees and expenses presents an additional challenge. A number of methods are available to make these determinations more manageable.

650. For further discussion of judges' practices in managing and reviewing attorney fee petitions, see *Manual for Complex Litigation*, Fourth § 14.2 (2004). For guidance in managing fee litigation, see Federal Rule of Civil Procedure 23(h) and accompanying Committee Note.

1. Establishing presumptively reasonable hourly rates and “no-look” fees

The Committee Notes to Federal Rule of Civil Procedure 54(D) suggest that a district court “consider establishing a schedule reflecting customary fees or factors affecting fees within the community.”⁶⁵¹ A few courts have created such schedules. For example, the local rules of the District of Maryland establish and periodically update “Guidelines Regarding Hourly Rates.”⁶⁵² The rates are designed to “make the fee petition less onerous by narrowing the debate over the range of a reasonable hourly rate in many cases.”⁶⁵³

Along the same lines, most judges in the District of Columbia and some judges in other courts follow the *Laffey* matrix, named after a historic D.C. district court opinion.⁶⁵⁴ The United States Attorney’s Office for the District of Columbia annually updates the hourly rates and publishes a table under the name “*Laffey* matrix.”⁶⁵⁵ The *Laffey* guidelines, however, do not appear to have prevented disputes about the details of fee petitions. Because the guidelines are a one-size-fits-all model and are based on market rates for complex federal litigation,⁶⁵⁶ litigants sometimes argue successfully that discounts should be afforded defendants in cases involving routine law practice.⁶⁵⁷ And disputes about alternative

651. Fed. R. Civ. P. 54(D), Committee Note (2013 ed.). The committee cites an implicit suggestion to that effect by Justice O’Connor, in *Pennsylvania v. Delaware Valley Citizens’ Council*, 483 U.S. 711, 733 (1987) (*Delaware Valley II*) (O’Connor, J., concurring) (“district courts and courts of appeals should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market”).

652. D. Md. Loc. R., Appendix B, Rules and Guidelines for Determining Attorneys’ Fees in Certain Cases § 3, at 122 (Feb. 2015 Supp.).

653. *Id.* at n.6.

654. *Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.D.C. 1983), *aff’d in part and rev’d in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984). The *Laffey* matrix is discussed *supra* text accompanying notes 168–75.

655. *Id.* For a ten-year table showing the *Laffey* rates from 2003 to 2012, see http://www.justice.gov/usao/dc/divisions/civil_Laffey_matrix_2003-2012.pdf.

656. *Covington v. District of Columbia*, 57 F.3d 1101, 1108 (D.C. Cir. 1995).

657. See, e.g., *Sykes v. District of Columbia*, 870 F. Supp. 2d 86, 96 (D.D.C. 2012) (awarding fees at hourly rate equal to three-quarters of *Laffey* matrix rate for routine administrative proceedings in Individuals with Disabilities Education Act case); *Roots v. District of Columbia*, 802 F. Supp. 2d 56, 61–63 (D.D.C. 2011) (same).

methods of updating the underlying market information continue to appear in case reports.⁶⁵⁸

Despite such skirmishes at the borderlines, once courts establish clear and specific guidelines that lay out presumptive hourly rates, attorneys and litigants, for the most part, seem to accept the posted hourly rates, and they fashion their fee petitions and opposing papers in accordance with them.⁶⁵⁹ In effect, attorney and litigant acquiescence in the rates eliminates or reduces the likelihood of a dispute about a key element of a fee petition. In turn, acceptance of the presumptive rates renders the outcome significantly more predictable and hence amenable to settlement without judicial intervention. One judge in the District of Maryland reported that under their rules, he was called on to rule on an average of one disputed fee petition per year.⁶⁶⁰

In bankruptcy proceedings, in which judges are often called on to approve fees for relatively standard legal work, such as representation of a debtor in Chapter 7 or 13 cases, some courts have developed a presumptive “no-look” fee, also known as a “benchmark.”⁶⁶¹ The no-look fee “is a flat, preset fee amount payable for basic and usually specified services provided by bankruptcy counsel. . . . [It] is presumed to be reasonable under 11 U.S.C. § 330(a)(3).”⁶⁶² The Judicial Conference Committee on Administration of the Bankruptcy System reports that “[c]ourts have generally approved the no-look or presumptive fee in Chapter 13

658. See, e.g., *Sykes*, 870 F. Supp. 2d at 94–95 (plaintiff argued for enhanced *Laffey* rate based on national legal services index, and defendant proposed its own D.C. Public Schools schedule of rates).

659. Telephone conference interview by Thomas Willging with Judges Catherine Blake, William Connelly, J. Frederick Motz, and Paul Grimm (all of the District of Maryland) (Mar. 19, 2013); telephone conference interview by Thomas Willging with Judges John Facciola and Alan Kay (both of the District of Columbia) (Mar. 18, 2013).

660. Telephone conference interview by Thomas Willging with Judges Catherine Blake, William Connelly, J. Frederick Motz, and Paul Grimm (all of the District of Maryland) (Mar. 19, 2013).

661. See Committee on the Administration of the Bankruptcy System, Judicial Conference of the United States, Case Management Manual for United States Bankruptcy Judges 732 (Federal Judicial Center, 2d ed. 2012) [hereinafter *Bankruptcy Case Management Manual*] (the *Bankruptcy Case Management Manual* is restricted to the federal judiciary).

662. *Id.*

cases.”⁶⁶³ Judges generally permit counsel to opt out of the presumptive fee and file applications for actual services rendered, using a lodestar analysis.⁶⁶⁴

Despite their obvious efficiency, presumptive fees in bankruptcy cases have been criticized as breaching the congressional intent to compensate bankruptcy attorneys at the same level as non-bankruptcy attorneys.⁶⁶⁵ The Sixth Circuit ruled that a “normal and customary” fee could not supply the basis for a fee award: “At a minimum . . . the bankruptcy courts must expressly calculate the lodestar amount when determining reasonable attorney’s fees.”⁶⁶⁶

Other courts do not seem to follow the Sixth Circuit approach. Researchers have observed that the no-look fee is “[o]ften” adopted in “local rules, standing orders, or guidelines; sometimes, it is established in judicial opinions or, less formally, in letters from the court, or simply by local custom.”⁶⁶⁷

2. Determining the appropriate percentage of a fund to award

Many judges have used empirical studies of large databases of fee awards to assist them in determining the percentage of a common fund that might be appropriately awarded to attorneys who worked to create that fund.⁶⁶⁸ Judge Jack Weinstein found those studies useful because the researchers already conducted the survey of similar cases that he would otherwise have to conduct.⁶⁶⁹ Judge Lee Rosenthal, who documented her use of the empirical studies in the *Heartland* case,⁶⁷⁰ articulated a similar

663. *Id.* (citing cases).

664. *See id.* at 733, 736.

665. *See id.* at 734–35.

666. *In re Boddy*, 950 F.3d 334, 338 (6th Cir. 1991).

667. Bankruptcy Case Management Manual, *supra* note 661, at 732.

668. *See supra* section II.B.2.c.

669. Telephone interview by Thomas Willging with Judge Jack B. Weinstein (E.D.N.Y.) (Mar. 13, 2013). For the type of survey a district judge might have to conduct in a super-mega-case, see *In re Avandia Marketing, Sales Practices & Products Liability Litigation*, No. 07-md-01871, 2012 WL 6923367, at *6, *7, *10 (E.D. Pa. Oct. 19, 2012); *supra* text accompanying notes 477 and 516.

670. *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1080–82 (S.D. Tex. 2012), discussed *supra* text accompanying notes 496–98, 506–07.

III. Techniques for Managing Attorneys' Fees

concept: for a judge, using empirical fee information represents a positive exposure to an expanse of data. Examining systematic studies of a large set of cases gives the judge an opportunity to go beyond anecdote as well as greater confidence in assessing the accuracy of the information.⁶⁷¹

The empirical studies referred to by Judges Rosenthal and Weinstein examined multiple factors that might affect a common fund recovery. Researchers created substantial databases of closed cases and used state-of-the-art statistical measures to sort out the factors that exerted the most impact on fee awards. Eisenberg and Miller found in 2004 (and confirmed in 2010): “The dominance of the client’s recovery as a determinant of the fee is nearly complete.”⁶⁷² In other words, the larger the common fund, the larger the fee award. They also found a “scaling effect”—like the effect courts had previously observed in “mega” cases⁶⁷³—“with fees constituting a lower percent of the client’s recovery as the client’s recovery increases.”⁶⁷⁴ Eisenberg and Miller found risk to be a factor that is “usually significant: fees as a percentage of the recovery tend to be higher in high-risk cases . . . and lower in low-risk cases.”⁶⁷⁵

Eisenberg and Miller organized and presented their results in a form that seems particularly useful to district judges: “A Lookup Table to Check on Fee Awards.”⁶⁷⁶ A judge can plug the value of the common fund recovery into the table and find the percentage fee award for similar recoveries. The values of those outcomes, in turn, represent a range of market values that judges found in those cases. Judge Rosenthal’s experience is illustrative: She used averages from Eisenberg and Miller and the

671. Telephone interview by Thomas Willging with Judge Lee H. Rosenthal (S.D. Tex.) (Mar. 1, 2013).

672. Eisenberg & Miller I, *supra* note 495, at 28. In their 2010 update, they concluded: “The relation between fee amount and class recovery has remained consistent over time.” Eisenberg & Miller II, *supra* note 495, at 253.

673. See *supra* text accompanying notes 515–22.

674. Eisenberg & Miller I, *supra* note 495, at 28. See also Eisenberg & Miller II, *supra* note 495, at 262–64 (finding “a substantial scaling effect existed in the 2003–2008 period, as well as in the earlier 1993–2002 period”).

675. Eisenberg & Miller I, *supra* note 495, at 77. In their 2010 study, the researchers confirmed this finding and concluded: “[C]ourts systematically reward risk.” Eisenberg & Miller II, *supra* note 495, at 265. See also Eisenberg & Miller I, *supra* note 495, at 277–78.

676. Eisenberg & Miller I, *supra* note 495, at 72–76.

Fitzpatrick study⁶⁷⁷ to produce a percentage that “approximately reflects the prevailing market rate that both class members and class counsel could have expected when initiating the litigation.”⁶⁷⁸

3. Sampling

The law permits courts to award only “reasonable” fees, but examining every item in a fee petition can be enormously time-consuming. Fortunately, such close scrutiny is neither necessary nor required. Some judges test the reasonableness of the hours claimed without scrutinizing the entire petition: They “sample” parts of the petition and apply the findings to the entire petition.⁶⁷⁹ Sampling can be done randomly—for example, every tenth page or tenth day—or can be done by looking at a purposely selected activity.⁶⁸⁰

In *Evans v. City of Evanston*,⁶⁸¹ the Seventh Circuit approved this approach, starting from this premise: “As the district court correctly observed, a lawyer’s work habits, while not immutable, are likely to be consistent for the duration of a case litigated over the course of a few years.”⁶⁸² Judge James Zagel, the trial judge in that case, explained that he allowed each Evanston defense attorney to select three stages of the case to be scrutinized. Judge Zagel applied the billing determinations he made in these samples to the entire case.⁶⁸³ In the decades since the *Evans* opin-

677. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010).

678. *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1082 (S.D. Tex. 2012).

679. For example, a former U.S. bankruptcy trustee reported that when she sampled hours billed for “internal communications,” she found they accounted for more than 50% of the bill. She concluded that too much time was spent on internal communications, and she made an across-the-board objection to the entire fee petition. Telephone interview by Diane Sheehey with Marcy Tiffany, former U.S. trustee (Bankr. C.D. Cal.) (Apr. 6, 1993).

680. When choosing a discrete activity to sample, Judge Charles E. Matheson (retired) favored an activity that had been litigated in front of him and with which he was familiar. Telephone interview by Diane Sheehey with Judge Charles E. Matheson (Bankr. D. Colo.) (Apr. 22, 1993).

681. 941 F.2d 473 (7th Cir. 1991).

682. *Id.* at 477.

683. Telephone Interview by Diane Sheehey with Judge James B. Zagel (N.D. Ill.) (Apr. 22, 1993). Because he was not satisfied with the three stages chosen by defense

ion, Judge Zagel has continued to use the process, mostly because it saves time. He has refined his approach by focusing on one or more key events that determine the outcome of the litigation, such as a motion for summary judgment, a motion to dismiss, or a *Daubert* hearing.⁶⁸⁴

4. Selecting lead counsel by competitive bidding

In the 1990s, Judge Vaughn Walker developed a method for awarding fees in common fund cases—selecting class counsel through competitive bidding. In a celebrated case,⁶⁸⁵ he had each firm that wanted to represent the class submit an application (under seal) that established the firm's qualifications and specified a schedule of percentages according to which it would request fees.⁶⁸⁶ He reasoned that competitive bidding “most closely approximates the way class members themselves would make these decisions and should result in selection of the most appropriately qualified counsel at the best available price.”⁶⁸⁷ In a subsequent opinion, Judge Walker expressed satisfaction with the result: He described “arrangements fully consistent with the . . . standard of reasonable compensation” and “accomplished without the ‘protracted, complicated, and exhausting’ fee litigation that typically accompanies lodestar determinations.”⁶⁸⁸

Judge Walker used the method in a number of securities cases.⁶⁸⁹ He did not necessarily appoint the lowest bidder as class counsel—quality

counsel, Judge Zagel chose a fourth stage for sampling. The Seventh Circuit approved this technique, but expressed a preference for allowing both parties to suggest which tasks are to be sampled. *Evans*, 941 F.2d at 476.

684. Telephone interview by Thomas Willging with Judge James B. Zagel (N.D. Ill.) (Mar. 13, 2013).

685. *In re Oracle Sec. Litig.*, 131 F.R.D. 688 (N.D. Cal.), *modified*, 132 F.R.D. 538 (N.D. Cal. 1990).

686. The bid of the firm selected called for different percentages for different ranges of recovery: 24% of the first \$1 million recovered, 20% of the next \$4 million, 16% of the next \$10 million, and 12% of any additional recovery. These percentages were to apply if the case was resolved within a year; higher percentages were to apply otherwise.

687. *In re Oracle*, 131 F.R.D. at 690.

688. *In re Oracle*, 132 F.R.D. at 547–48.

689. See, e.g., *In re Quintus Sec. Litig.*, 201 F.R.D. 475 (N.D. Cal. 2001); *Wendehold v. Cylink Corp.*, 189 F.R.D. 570 (N.D. Cal. 1999); *In re Cal. Micro Devices Sec. Litig.*, 168 F.R.D. 257 (N.D. Cal. 1996); *In re Wells Fargo Sec. Litig.*, 156 F.R.D. 223 (N.D. Cal. 1994).

and experience had to be considered.⁶⁹⁰ Other judges have used competitive bidding in antitrust litigation with apparent success, but the most recent published case discussing this technique was in 2000.⁶⁹¹

In 2001, the Third Circuit Task Force on the Selection of Class Counsel issued a report concluding that “[t]he traditional methods of selecting class counsel, with significant reliance on private ordering, are preferable to auctions in most class action cases.”⁶⁹² Combined with court decisions that rejected the use of bidding in almost all securities litigation,⁶⁹³ it is fair to say that the trend has shifted away from competitive bidding.

However, the Third Circuit Task Force identified a limited set of cases for which bidding might be a viable option for managing fees in class action litigation:

The paradigmatic case in which an auction might be considered is one in which the defendants’ liability appears clear (often as the result of a governmental investigation or an admission of the defendants); the damages appear to be both very large and collectible (thus ensuring a significant number of competing bids); and the lead plaintiff is not a sophisticated litigant that has already retained counsel of its choice through a reasonable, arm’s-length process.⁶⁹⁴

Even in that limited context, the Third Circuit Task Force cautions:

It has yet to be established that the auction process will save judicial time and resources, given the dictates of Federal Rule of Civil Procedure 23 and the emerging case law holding that the use of an auction *ex ante* does not relieve the court of its duty *ex post* to review the reasonableness of fees sought by class counsel.⁶⁹⁵

690. Telephone interview by Diane Sheehy with Judge Vaughn Walker (N.D. Cal.) (Apr. 21, 1993).

691. *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2000). *See also In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp. 1190 (N.D. Ill. 1996).

692. Third Circuit Task Force, *Report on Selection of Class Counsel*, 74 Temp. L. Rev. 689, 704 (2001). Judge Walker strongly disagrees with that conclusion. *See Vaughn R. Walker, Response: The Task Force Got It Wrong*, 74 Temp. L. Rev. 783 (2001).

693. *See supra* section II.D.

694. Third Circuit Task Force, *supra* note 692, at 704.

695. *Id.* Shortly before the task force issued its report, the Third Circuit ruled that an auction that no one challenged on appeal nonetheless did not produce a fee percentage that was beyond appellate oversight. *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 734–35 (3d Cir. 2001) (calling for application of seven-factor test in non-PSLRA case in which

A related technique that might amount to an alternative to competitive bidding can be found in an earlier Third Circuit Task Force recommendation, namely to negotiate a fee at the outset of a case that is likely to create a common fund.⁶⁹⁶ This concept, discussed in the next section, appears to be how the competitive bidding process has evolved.⁶⁹⁷

5. Requiring a pretrial estimate of fees

Federal Rule of Civil Procedure 23 explicitly grants judges the power to order attorneys seeking appointment as class counsel “to propose terms for attorney’s fees and nontaxable costs.”⁶⁹⁸ The Advisory Committee on Civil Rules specifically noted that “attention to this subject from the outset may often be a productive technique.”⁶⁹⁹

A pretrial plan or budget helps a court ensure that counsel approached the case reasonably from the beginning so that the court will be less prone to make its assessment of reasonableness of fees according to how the case turned out.⁷⁰⁰ It also facilitates review of the fee application, because hours in excess of the submission can be presumed unreasonable (although the presumption may be rebutted). In addition, attorneys should be familiar with estimating anticipated hours because many clients require attorneys to submit estimates for legal work.

This technique, however, can be difficult to apply because it does not fit neatly into the standard pretrial process. One judge indicated that it is an excellent idea, but most cases do not require it, and a judge often does

court selected counsel by auction). *See also In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 262 (D. Del. 2002) (same).

696. Court Awarded Attorney Fees: Report of the Third Circuit Task Force, *reprinted in* 108 F.R.D. 237, 255 (1985) (recommending establishing a percentage at the “earliest practicable moment”). Even if the percentage is not established early on, the court can tell the parties that the percentage method will be used. This will reduce their incentive to increase hours expended and can induce early settlement. As the case progresses the court may find that the lodestar is more suitable than a percentage, and thus may want to shift from a percentage to the lodestar. *Id.* at 272. Therefore, the court might require plaintiff’s counsel to maintain billing records.

697. E-mail from Judge Vaughn Walker (N.D. Cal.) (retired) to Tom Willging (Mar. 20, 2013, 09:25 a.m. PDT) (on file with author).

698. Fed. R. Civ. P. 23(g)(1)(C).

699. *Id.* Committee Notes on Rules—2003 Amendment, subdiv. (g), para. 1(C).

700. *See supra* text accompanying notes 207–08.

not know at the outset that having an estimate of fees will be useful in the end.⁷⁰¹ Another judge said that this outstanding idea simply does not occur to him or to most judges at the early stages of a case.⁷⁰²

6. Using computerized billing programs

Computerized billing programs enable judges to analyze fee requests rapidly and discern such indicia of reasonableness as the ratio of partner time to associate time as well as the time spent on activities such as discovery, research, intra-office conferences, and travel. A former U.S. bankruptcy trustee used a computerized billing program's "sorting" capabilities to discover oddities, such as one attorney's billing for more than twenty-four hours in a single day, and attorneys' use of "rounding,"⁷⁰³ that is, billing a minimum amount of time for routine activities like phone calls, letters, and even court appearances.⁷⁰⁴

7. Requiring attorneys to categorize records and avoid inappropriate "block billing"

Difficulty in reviewing fee applications can stem from the opacity of the information they contain. For instance, if the hours are listed chronologically by attorney (a common format for client billing), it is hard to ascertain how many hours are spent on a discrete activity. Therefore, some judges require that hours be categorized. Judge Grady, in *In re Continen-*

701. Telephone interview by Thomas Willging with Judge Lee H. Rosenthal (S.D. Tex.) (Mar. 1, 2013).

702. Telephone interview by Thomas Willging with Judge John F. Grady (N.D. Ill.) (Mar. 7, 2013). For an excellent article combining the setting of ex ante rates with the challenges of performance-based review, see Matthew D. Klaiber, *A Uniform Fee-Setting System for Calculating Court-Awarded Attorneys' Fees: Combining Ex Ante Rates with a Multifactor Lodestar Method and a Performance-Based Mathematical Model*, 66 Md. L. Rev. 228 (2007), available at <http://digitalcommons.law.umaryland.edu/mlr/vol66/iss1/7/>.

703. Telephone interview by Diane Sheehy with Marcy Tiffany, former U.S. trustee (Bankr. C.D. Cal.) (Apr. 6, 1993).

704. *Connecting the Dots in Legal Bill Reviews Can Reveal Disturbing Pattern*, Legalbillreviewerblog (Mar. 5, 2013), <http://legalbillreviewerblog.com>.

III. Techniques for Managing Attorneys' Fees

tal Illinois Securities Litigation,⁷⁰⁵ required attorneys to submit time records chronologically by activity rather than by attorney.⁷⁰⁶

Local rules and guidelines may also require categorization. For example, in civil rights and discrimination cases, the U.S. District Court for the District of Maryland requires that time records be organized by litigation phase.⁷⁰⁷ The U.S. Bankruptcy Court for the Northern District of California has guidelines that encourage categorized time records and discourage “clumping,” or “block billing,” that is, grouping several discrete tasks into one time entry.⁷⁰⁸

In reviewing a fee petition in *Duran v. Town of Cicero*,⁷⁰⁹ Judge John Grady differentiated between block billing that is appropriate—such as billing for a reasonably necessary set of fact investigation activities at the early stages of a case⁷¹⁰—and block billing that lumps together broad categories of unspecified actions—such as legal research, telephone calls, and correspondence, without a clue as to why those activities might have been reasonable or necessary.⁷¹¹ Judge Grady asserts that the latter type of block billing is a plague that judges should not tolerate.⁷¹² Faced with “vague entries and block billing [that] make it impossible for us to fulfill our obligation to determine what was done, whether it was reasonably necessary, and whether a reasonable amount of time was spent on it,”⁷¹³ Judge Grady reduced the fees awarded by 30 percent of the time not adequately documented.⁷¹⁴

705. 572 F. Supp. 931 (N.D. Ill. 1983).

706. *Id.* at 934. See also Thomas E. Willging, *Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial 30–32* (Federal Judicial Center 1984).

707. See *infra* notes 735–36 and accompanying text.

708. Guidelines for Compensation and Expense Reimbursement of Professional and Trustees (Bankr. N.D. Cal.), available at www.canb.uscourts.gov/procedure/guidelines-compensation-and-expense-reimbursement-professional-and-trustees, § I.14 (“Clumping”).

709. No. 01-C-6858, 2012 WL 1279903, at *1 (N.D. Ill. Apr. 16, 2012) (opinion by John F. Grady).

710. *Id.* at *4–5.

711. *Id.* at *5–7.

712. Telephone interview by Thomas Willging with Judge John F. Grady (N.D. Ill.) (Mar. 7, 2013).

713. *Duran*, 2012 WL 1279903, at *13.

714. *Id.* at *15. In support, Judge Grady cited *Tomazzoli v. Sheedy*, 804 F.2d 93, 98 (7th Cir. 1986); *Mallinson Montague v. Pocrnick*, 224 F.3d 1224, 1234 (10th Cir. 2000);

8. Requiring defendants to submit records

Many judges agree with the statement of the late Judge Edward Becker of the Third Circuit that “the most difficult aspect of handling fee awards is assessing how much time it should have taken a lawyer to do a given piece of work.”⁷¹⁵ Some judges and courts make this task easier, and reduce disputes, by requiring defense counsel to submit their own billing records. For example, the Northern District of Illinois has adopted a local rule that mandates the filing of the total amount of billing by the respondent as well as its time and work records, hourly rates, and expenses.⁷¹⁶

The District of Maryland has a local rule that expressly recognizes the power of a judge or private mediator to order a party opposing a fee petition to submit billing records.⁷¹⁷ Such records provide a reference point for particular activities: If defendants claim that plaintiffs spent too much time researching an issue, it is instructive to see how much time defendants’ counsel spent.⁷¹⁸ On occasion, this method will uncover blatant contradictions, such as a defense attorney and a plaintiff’s attorney billing different numbers of hours for attending the same conference.

However, there cannot always be an exact correspondence between the defendant’s hours and the plaintiff’s hours. For example, if a plaintiff spends few hours writing a complaint and it contains vague legal theories, the defendant will need to spend more time figuring out the complaint.⁷¹⁹

Judge John Grady finds his district’s local rule to be “absolutely effective” and “very helpful” in reducing claims from respondents that the

and *Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C. Cir. 2004). *Duran*, 2012 WL 1279903, at *13.

715. Telephone interview by Diane Sheehey with Judge Edward Becker (3d Cir.) (May 25, 1993).

716. N.D. Ill. R. 54.3(d).

717. D. Md. Loc. R., Appendix B, Rules and Guidelines for Determining Attorneys’ Fees in Certain Cases § 1.d, at 120 (Feb. 2015 Supp.).

718. For example, Judge William Browning found “a significant amount of discrepancies” when he required defendants to submit their records in one case. Telephone interview by Diane Sheehey with Judge William D. Browning (D. Ariz.) (Apr. 21, 1993).

719. Telephone interview by Diane Sheehey with Judge James B. Zagel (N.D. Ill.) (Apr. 22, 1993).

opposing party's fees were excessive.⁷²⁰ Judges in the District of Maryland indicate that the threat of ordering the opponent to turn over records by itself suffices to eliminate claims that the opponent's hours were unreasonable.⁷²¹

B. Eliminating or Streamlining Fee Hearings

A number of judges have adopted measures that preclude the need for or at least streamline fee hearings. Federal Rule of Civil Procedure 23(h) gives the judge discretion to decide whether to hold a hearing at all.⁷²² Rule 54(d)(2)(C) requires the judge to "give an opportunity for adversary submissions" on a motion for attorneys' fees. Rule 54(d)(2)(D) expressly permits judges by local rule to "establish special procedures to resolve fee-related issues without extensive evidentiary hearings." In the end, though, the court must find the facts and state its legal conclusions.

The Advisory Committee on Civil Rules notes that in attorney fee matters, a court "might provide for issuance of proposed findings by the court, which would be treated as accepted by the parties unless objected to within a specified time."⁷²³ The next section illustrates an example of that approach.

1. Tentative ruling

To avoid unnecessary hearings, Judge Geraldine Mund issues a tentative ruling on fee petitions.⁷²⁴ Judge Mund's administrative law clerk posts the tentative ruling in the tentative ruling field on "Ciao!" the court's calendaring page, along with a standard instruction that the debtor-in-

720. Telephone interview by Thomas Willging with Judge John F. Grady (N.D. Ill.) (Mar. 7, 2013).

721. Telephone conference interview by Thomas Willging with Judges Catherine Blake, William Connelly, J. Frederick Motz, and Paul Grimm (all of the District of Maryland) (Mar. 19, 2013).

722. Federal Rule of Bankruptcy Procedure 7023 applies Federal Rule of Civil Procedure 23 to adversary proceedings in bankruptcy.

723. Fed. R. Civ. P. 54(D), Committee Note (2013 ed.).

724. Telephone interview by Diane Sheehey with Judge Geraldine Mund (C.D. Cal.) (Apr. 2, 1993) (updated by mail Jan. 6, 2004, and by e-mails to Tom Willging, Mar. 11–14, 2013).

possession or trustee pass along the ruling to each legal professional involved in the case. Each tentative ruling also includes the following macro:

If you submit on this tentative ruling, no appearance is necessary. If you choose to appear and the final ruling is in conformance with the tentative ruling, no additional fees will be allowed for this appearance. If the trustee's firm is representing the trustee, no attorney's fees will be allowed for an appearance on this matter, as the trustee would be expected to be present as part of the trustee's duties.

If counsel submits on the ruling, which almost always occurs, he or she contacts the judge's law clerk by telephone and does not appear. On the rare occasion that a party submits a late opposition or shows up at the hearing to object, Judge Mund initially determines whether the objection has any substance, and then may call on the applicant to participate by telephone. She then determines whether a more extensive hearing is required and, if so, she continues the matter.⁷²⁵ If there is no objection, the tentative ruling becomes final, and counsel submits an order on it. Judge Mund sees the benefits of the tentative ruling as reducing the need for people to come to court, managing fees by eliminating charges for unnecessary court appearances, and saving the court time.⁷²⁶

Although Judge Mund sits in bankruptcy court—and many bankruptcy courts now follow this practice—tentative rulings could cut down on the number of hearings in district courts as well. And by alerting counsel to parts of the petition that the judge finds troublesome, tentative rulings help focus hearings that do take place.

2. Written declaration in lieu of testimony

To streamline contested fee hearings, attorneys may present evidence of their hours by way of written declaration in lieu of direct testimony.⁷²⁷ The Advisory Committee on Civil Rules may have had such a practice in mind when it wrote that a court “might call for matters to be presented

725. E-mail from U.S. Bankruptcy Judge Geraldine Mund (C.D. Cal.) to Tom Willging (Mar. 12 & 14, 2013, 9:25 a.m. PDT) (on file with author).

726. *Id.*

727. See Charles Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony To Be Submitted in Written Form Prior to Trial*, 72 *Geo. L.J.* 73 (1983) (advocating this technique for trials).

III. Techniques for Managing Attorneys' Fees

through affidavits.⁷²⁸ Most judges follow that practice and decide fee petitions on a paper record without a hearing, evidentiary or otherwise.

3. Informal conference

An informal conference can either eliminate the need for or focus a fee hearing. Judge William Schwarzer saw great potential in holding an informal conference to narrow and define issues before a hearing.⁷²⁹

An informal conference without the judge might suffice to streamline the fee petition process. Judge John Grady has found that a local rule requiring the parties to meet and confer and produce a joint statement specifying objections “has largely eliminated the drudgery of going through lengthy fee petitions.”⁷³⁰ The Northern District of Illinois’ Local Rule 54.3 calls on the parties to confer prior to filing a fee motion, and to “attempt in good faith to agree on the amount of fees or related nontaxable expenses that should be awarded.”⁷³¹ If no agreement is reached, the parties must exchange information about their billing records; specifically identify any objections to particular items; and file a joint statement summarizing the petitioner’s fee request, the amount the respondent deems to be reasonable, and a brief description of each specific unresolved dispute.⁷³² Thus, the rule shifts the burden to the parties to define and narrow the issues before bringing any remaining disputes to the judge.

C. General Techniques

The preceding techniques for managing attorneys’ fees are specific measures for facilitating review of applications and avoiding or streamlining hearings. Some more general ideas for managing fees also emerged from our interviews.

728. Fed. R. Civ. P. 54(D), Committee Note (2013 ed.).

729. Interview by Diane Sheehey with Judge William W Schwarzer (N.D. Cal.), Washington, D.C. (Mar. 18, 1993).

730. Telephone interview by Thomas Willging with Judge John F. Grady (N.D. Ill.) (Mar. 7, 2013), referencing N.D. Ill. R. 54.3(d) & (e).

731. N.D. Ill. R. 54.3(d).

732. N.D. Ill. R. 54.3(d)(5) & (e).

1. Setting a framework early in the case

Many judges stress that it is important, early in the case, to inform attorneys of what is expected from them regarding their fees. Some judges lay down specific instructions at the outset of the case.⁷³³ Ground rules can cover staffing at depositions, hearings, and trials; rates of compensation for various levels of legal work; communications among attorneys; and expenses.⁷³⁴ Judges should not hesitate to require lawyers to resubmit unclear or incomprehensible fee petitions.

2. Local rules, guidelines, and written opinions

A number of courts have adopted billing guidelines or local rules on attorneys' fees. For example, the U.S. District Court for the District of Maryland adopted rules and guidelines for determining attorneys' fees in civil rights and discrimination cases.⁷³⁵ A "mandatory rules" section directs attorneys to organize the fee application according to litigation phase (e.g., "case development," "pleadings," "depositions," "motions practice," and "attending trial").⁷³⁶ A "Guidelines" section lists compensable and noncompensable time, specifying, for example, that "[o]nly one lawyer for each party shall be compensated for attending hearings."⁷³⁷ Travel guidelines restrict compensation to "[u]p to two (2) hours of travel time . . . to and from a court appearance, deposition, witness interview, or similar proceedings that cannot be devoted to substantive work."⁷³⁸ Most important, the guidelines set presumptively reasonable

733. See, e.g., *In re Cont'l Ill. Sec. Litig.*, 572 F. Supp. 931 (N.D. Ill. 1983). See also Thomas E. Willging, *Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial* (Federal Judicial Center 1984), a study demonstrating the close relationship between lawyers' billing practices and elements of Judge Grady's pretrial order regulating attorneys' fees in that case.

734. *In re Cont'l Ill.*, 572 F. Supp. at 933–35.

735. See D. Md. Loc. R., Appendix B, Rules and Guidelines for Determining Attorneys' Fees in Certain Cases, at 119–22 (Feb. 2015 Supp.), available at <http://www.mdd.uscourts.gov/localrules/LocalRules.pdf>. See also *supra* text accompanying note 707.

736. See *id.* § 1.b, at 119–20.

737. *Id.* § 2.c., at 121 (footnote omitted).

738. *Id.* § 2.e.ii, at 121.

hourly rate ranges for attorneys, reducing or eliminating the need for individual findings on a potentially contentious matter.⁷³⁹

The adoption of local rules that govern fee petitions has a distinct advantage over actions taken by individual judges to manage fee petitions. Local rules speak for the court as an entity, and they are likely to have a broad and persuasive impact on the practice of local attorneys, as well as on the expectations of local attorneys and the judges in the district. In other words, local rules are more likely to change the legal culture than the rulings of any single judge.

Many judges emphasize that, one way or another, it is helpful for a court to establish and publicize a *modus operandi* concerning attorneys' fees. Guidelines should at least direct attorneys to submit fee applications in a readable and comprehensible form, and to provide appropriate, informative summaries in order to save the judge from having to plow through voluminous backup data.

3. Delegation

At every stage of the fee process, the court should consider calling on others for assistance.

a. Law clerks, assistants, and deputies

Law clerks, judicial assistants, and even deputies can help with the sometimes onerous task of cross-checking attorneys' claims for time against court records. For example, an assistant can compare an attorney's claim for appearances with the court reporter's or deputy's time records.⁷⁴⁰ A law clerk can pull a motion out of the court file to check if time billed for it is reasonable.⁷⁴¹ Clerks can also check final petitions against interim submissions,⁷⁴² and can organize and categorize fee petitions according to

739. *Id.* § 3, at 122. See also discussion of *Laffey* matrix, *supra* text accompanying notes 168–75; 654–58.

740. Telephone interview by Diane Sheehey with Judge William D. Browning (D. Ariz.) (Apr. 21, 1993).

741. Interview by Diane Sheehey with Judge William W. Schwarzer (N.D. Cal.), Washington, D.C. (Mar. 18, 1993).

742. Telephone interview by Diane Sheehey with Judge Norma Shapiro (E.D. Pa.) (May 12, 1993).

activities, stages of litigation, level of attorney or paralegal, or any other relevant factor.

b. Magistrate judges

Federal Rule of Civil Procedure 54(D) contemplates referral of an attorney fee petition to a magistrate judge for a report and recommendation “as if it were a dispositive pretrial matter.” Practices vary throughout the courts. Many judges call on magistrate judges to handle fees in complex cases, but some judges prefer to use their own familiarity with the case to advantage and rule on fee petitions themselves. Judge Jack Weinstein says that he tends to decide fees for himself in lengthy multiparty cases in which he has taken charge from the outset.⁷⁴³ But even in those cases, he refers matters with computations that are time-consuming and tedious to magistrate judges. Often he includes guidelines, like a cap on the fee to be allowed or a guideline to share the benefit of an aggregate settlement with the individual clients. Likewise, in shorter cases that settle and in which a magistrate judge may have handled discovery, Judge Weinstein might refer fee matters to a magistrate judge, with guidelines. And always in a fully tried complex case, Judge Weinstein handles the fee issues because he has seen the legal work played out before him.⁷⁴⁴

c. Special masters and alternative dispute resolution

Federal Rule of Civil Procedure 54(D) also contemplates that a court “refer issues concerning the value of services to a special master under Rule 53 without regard” for the general limits of that rule. Some judges appoint special masters to assist with attorneys’ fees, especially in complex cases. Professor Laura Bartell, who has served as a special master, notes that the parties liked having a special master because it meant the fee application would move forward quickly.⁷⁴⁵ The parties were happy to see that somebody had responsibility for the fee application—someone who was not going to be distracted by a docket, the Speedy Trial Act, or

743. Telephone interview by Thomas Willging with Judge Jack B. Weinstein (E.D.N.Y.) (Mar. 13, 2013).

744. *Id.*

745. Telephone interview by Diane Sheehy with Prof. Laura B. Bartell (Wayne State Univ. L. Sch.) (Apr. 9, 1993) (updated by mail Jan. 5, 2004). At the time of the first interview, Bartell was a partner with Shearman & Sterling.

anything else—and was just going to focus on this, decide it, write the opinion, and issue it so that they could get paid.

The Northern District of Florida Local Rules authorize a district judge to appoint a special master to hear any fee dispute.⁷⁴⁶ To illustrate how the use or threat of using a special master might facilitate resolution of a dispute, consider the following case. In ordering the parties to meet and confer before filing a fee petition, a district judge noted that the disputes in an impending fee motion “appear to be largely the result of personal animosity between counsel.”⁷⁴⁷ The judge signaled the court’s intent not to “expend its resources or those of a magistrate judge on resolving such disputes,” but instead to “appoint a special master, whose fees shall be paid by the parties, to resolve all future disputes over attorneys’ fees and costs that counsel cannot resolve independently.”⁷⁴⁸ Such an order provides a clear incentive for both parties to resolve the dispute. Local Rule 54 (N.D. Fla.) adds incentives to avoid being seen as the unreasonable obstructionist.

Depending on the practices in their district, judges might consider alternative dispute resolution for especially complex fee disputes. By local rule, many courts direct the parties to meet and confer to try to agree on the amount of fees before filing a fee motion.⁷⁴⁹

d. Experts

Occasionally, a judge may need expert assistance in reviewing fee applications. For example, a judge who has been away from practice for a significant length of time might be less familiar with billing practices and rates. Judges also use experts and empirical studies to support selection of an appropriate percentage-of-fund to calculate a fee award.⁷⁵⁰ Judges often avail themselves of expert assistance, especially in bankruptcy court.⁷⁵¹

746. N.D. Fla. R. 54.1(F). *See supra* text accompanying note 349.

747. *Freitag v. Cal. Dep’t of Corr.*, No. C00-2275, 2012 WL 5389839, at *3 (N.D. Cal. Nov. 5, 2012).

748. *Id.*

749. *See supra* text accompanying notes 346–49 and 730.

750. *See supra* section II.B.2.c.

751. Chief Judge Sidney Brooks, for example, has used court-appointed experts to examine fees in several cases. Telephone interview by Diane Sheehy with Chief Judge Sidney Brooks (Bankr. D. Colo.) (Apr. 1, 1993) (updated by mail Jan. 2004).

e. Lead counsel and class actions

The management of attorneys' fees in class actions presents unique issues and options. First, the selection of class counsel can be tied to the attorney fee process. Second, Federal Rule of Civil Procedure 23(e) requires court approval of class action settlements, many of which include attorneys' fees, and courts can take measures that make fee settlement fairer and easier for the court to review.

Additionally, in class actions, judges can assign lead counsel tasks that facilitate fee management. For example, lead counsel can supervise fee petitions submitted by all law firms.⁷⁵²

752. Telephone interview by Diane Sheehey with Judge Norma Shapiro (E.D. Pa.) (May 12, 1993) (updated by mail Dec. 29, 2003).

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Table of Cases (Alphabetical)

- Abbott, Puller & Myers v. Peyser, 124 F.2d 524 (D.C. Cir. 1941), n.398
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- Act Now to Stop War and End Racism Coal. v. District of Columbia, 286 F.R.D. 145 (D.D.C. 2012), n.169
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- Aguinaga v. United Food & Commercial Workers International Union, 993 F.2d 1480 (10th Cir. 1993), n.593
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- Alberti v. Klevenhagen, 903 F.2d 352 (5th Cir. 1990), n.292
- Alizadeh v. Safeway, 910 F.2d 234 (5th Cir. 1990), nn.281, 311
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- Associated General Contractors of Ohio, Inc. v. Drabik, 250 F.3d 482 (6th Cir. 2001), n.300
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- AT&T Corp., *In re*, 455 F.3d 160 (3d Cir. 2006), n.522
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- Bailey v. Heckler, 777 F.2d 1167 (6th Cir. 1985), n.315
- Bailey v. Meister Brau, 535 F.2d 982 (7th Cir. 1976), n.584
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- Begley v. Secretary of Health & Human Services, 966 F.2d 196 (6th Cir. 1992), n.220
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Table of Cases (Alphabetical)

Black Grievance Committee v. Philadelphia Electric Co., 802 F.2d 648 (3d Cir. 1986), n.220
Blanchard v. Bergeron, 489 U.S. 87 (1989), nn.108, 146, 443
Blazy v. Tenet, 194 F.3d 90 (D.C. Cir. 1999), n.90
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Bluetooth Headset Products Liability Litigation, *In re*, 654 F.3d 935 (9th Cir. 2011), nn.130–31, 469
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Bolar Pharmaceuticals v. Gackenbach, 800 F. Supp. 1091 (E.D.N.Y. 1992), n.528
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Braud v. Transport Service Co. of Illinois, No. 05-1898c/w05-1977, 2010 U.S. Dist. LEXIS 93433 (E.D. La. Aug. 17, 2010), n.508
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Brown v. General Motors, 722 F.2d 1009 (2d Cir. 1983), n.99
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Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988), nn.354–55
Buffington v. Baltimore County, 913 F.2d 113 (4th Cir. 1990), n.160
Burka v. United States Department of Health & Human Services, 142 F.3d 1286 (D.C. Cir. 1998), nn.87, 91
Burlington, City of, v. Dague, 505 U.S. 557 (1992), nn.308, 526, 528
Burrroughs v. Board of Trustees, 542 F.2d 1128 (9th Cir. 1976), n.587

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- Cahill, *In re*, 428 F.3d 536 (5th Cir. 2005), n.502
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- Cange v. Stotler & Co., 913 F.2d 1204 (7th Cir. 1990), n.262
- Cann v. Carpenters' Pension Trust Fund for Northern California, 989 F.2d 313 (9th Cir. 1993), nn.50, 308
- Cantwell v. San Mateo, 631 F.2d 631 (9th Cir. 1980), nn.587, 602
- Carey v. Crescenzi, 923 F.2d 18 (2d Cir. 1991), n.315
- Case v. Unified School District No. 233, 157 F.3d 1243 (10th Cir. 1998), nn.167, 191, 206, 325
- Catullo v. Metzner, 834 F.2d 1075 (1st Cir. 1987), nn.419–20
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- Cendant Corp. Litigation, *In re*, 264 F.3d 201 (3d Cir. 2001), nn.616, 618, 620, 622–26, 637–40
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- Center for Biological Diversity v. Norton, 262 F.3d 1077 (10th Cir. 2001), n.65
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- Charves v. Western Union, 711 F.2d 462 (1st Cir. 1983), n.311
- Chemicals Manufacturers Association v. EPA, 885 F.2d 1276 (5th Cir. 1989), n.364
- Chicago, Milwaukee, St. Paul & Pacific Railroad, *In re*, 840 F.2d 1308 (7th Cir. 1988), n.420
- Chin, *In re*, 31 B.R. 314 (Bankr. S.D.N.Y. 1984), n.56
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- Clark v. City of Los Angeles, 803 F.2d 987 (9th Cir. 1986), n.238
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- Coalition for Clean Air v. Southern California Edison, 971 F.2d 219 (9th Cir. 1992), n.376
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Table of Cases (Alphabetical)

- Columbus Mills v. Freeland, 918 F.2d 1575 (11th Cir. 1990), n.219
Commtouch Software Ltd. Securities Litigation, *In re*, No. 01-C-00719 (N.D. Cal. June 27, 2001), n.637
Connolly v. National School Bus Service, Inc., 177 F.3d 593 (7th Cir. 1999), n.278
Continental Illinois Securities Litigation, *In re*, 962 F.2d 566 (7th Cir. 1992), nn.330, 336, 462, 467, 470–71, 491, 535
Continental Illinois Securities Litigation, *In re*, 572 F. Supp. 931 (N.D. Ill. 1983), nn.705–06, 733–34
Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972), n.6
Cooper v. Utah, 894 F.2d 1169 (10th Cir. 1990), nn.112, 276–77
Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980), nn.176–77, 331, 540, 543
Corder v. Brown, 25 F.3d 833 (9th Cir. 1994), n.302
Country Vintner of North Carolina, LLC v. E. & J. Gallo Winery, Inc., 718 F.3d 249 (4th Cir. 2013), n.143
Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F.3d 331 (1st Cir. 1997), nn.149, 233, 374
Covington v. District of Columbia, 57 F.3d 1101 (D.C. Cir. 1995), nn.168, 656
Cowan v. Prudential Insurance, 935 F.2d 522 (2d Cir. 1991), nn.259–60
Craik v. Minnesota State University Board, 738 F.2d 348 (8th Cir. 1984), n.165
Crane v. Texas, 766 F.2d 193 (5th Cir. 1985), n.201
Crane Co. v. American Standard, 603 F.2d 244 (2d Cir. 1979), n.572
Cranston v. Hardin, 504 F.2d 566 (2d Cir. 1974), n.424
Crowder v. Housing Authority of Atlanta, 908 F.2d 843 (11th Cir. 1990), n.117
Cullens v. Georgia Department of Transportation, 29 F.3d 1489 (11th Cir. 1994), nn.147, 264–65
Cunningham v. City of McKeesport, 807 F.2d 49 (3d Cir. 1986), nn.261, 324
Cunningham v. City of McKeesport, 753 F.2d 262 (3d Cir. 1985), nn.154, 337
Cunningham v. Los Angeles, 859 F.2d 705 (9th Cir. 1988), n.275
Curran v. Department of Treasury, 805 F.2d 1406 (9th Cir. 1986), n.156

Daggett v. Kimmelman, 811 F.2d 793 (3d Cir. 1987), nn.165, 334
Dague v. City of Burlington, 976 F.2d 801 (2d Cir. 1992), n.201
Dahlem v. Board of Education, 901 F.2d 1508 (10th Cir. 1990), nn.35, 120
Daly v. Hill, 790 F.2d 1071 (4th Cir. 1986), n.151
Davis v. Mason County, 927 F.2d 1473 (9th Cir. 1991), nn.142, 158
Davis v. San Francisco, 976 F.2d 1536 (9th Cir. 1992), nn.142, 159, 165, 198
Davis v. Southeastern Pennsylvania Transportation Authority, 924 F.2d 51 (3d Cir. 1991), nn.186, 261
Davis v. U.S. Department of Justice, 610 F.3d 750 (D.C. Cir. 2010), n.48

- Davis County Solid Waste Management v. EPA, 169 F.3d 755 (D.C. Cir. 1999), n.158
- Dejesus v. Banco Popular de Puerto Rico, 951 F.2d 3 (1st Cir. 1991), nn.160, 315
- Demier v. Gondles, 676 F.2d 92 (4th Cir. 1982), n.197
- Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980), n.208
- Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), n.543
- Devine v. National Treasury Employees Union, 805 F.2d 384 (Fed. Cir. 1986), n.156
- Dexter v. Kirschner, 984 F.2d 979 (9th Cir. 1992), n.33
- Diet Drugs Products Liability Litigation, *In re*, 582 F.3d 524 (3d Cir. 2009), n.516
- Diet Drugs Products Liability Litigation, *In re*, 401 F.3d 143 (3d Cir. 2005), n.369
- Diet Drugs Products Liability Litigation, *In re*, 553 F. Supp. 2d 442 (E.D. Pa. 2008), nn.516–18
- Doe v. Board of Education of Baltimore County, 165 F.3d 260 (4th Cir. 1998), n.87
- Doe v. Busbee, 684 F.2d 1375 (11th Cir. 1982), n.34
- Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980), n.35
- Domegan v. Ponte, 972 F.2d 401 (1st Cir. 1992), nn.213, 262, 267, 375
- Dominic v. Consolidated Edison Co. of New York, 822 F.2d 1249 (2d Cir. 1987), n.227
- Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), n.6
- Donnell v. United States, 682 F.2d 240 (D.C. Cir. 1982), n.82
- Donovan v. CSEA Local Union 1000, 784 F.2d 98 (2d Cir. 1986), nn.492–93, 564, 567, 607–08
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- Donovan, *In re*, 877 F.2d 982 (D.C. Cir. 1989), n.213
- Dorfman v. First Boston Corp., 70 F.R.D. 366 (E.D. Pa. 1976), n.400
- Dowdell v. Apopka, Florida, 698 F.2d 1181 (11th Cir. 1983), nn.196, 199
- Duran v. Town of Cicero, No. 01-C-6858, 2012 WL 1279903 (N.D. Ill. Apr. 16, 2012), nn.709–11, 713–14
- Durrett v. Jenkins Brickyard, 678 F.2d 911 (11th Cir. 1982), n.311
- Eastwood v. National Enquirer, 123 F.3d 1249 (9th Cir. 1997), n.17
- Eaves v. County of Cape May, 239 F.3d 527 (3d Cir. 2001), n.301
- Echols v. Parker, 909 F.2d 795 (5th Cir. 1990), n.368
- Educational Testing Service Praxis Principles of Learning & Teaching: Grades 7–12 Litigation, *In re*, 447 F. Supp. 2d 612 (E.D. La. 2006), n.508
- Edwards v. Heckler, 789 F.2d 659 (9th Cir. 1985), n.587
- El Club del Barrio, Inc. v. United Community Corp., 735 F.2d 98 (3d Cir. 1984), nn.116, 122, 125

Table of Cases (Alphabetical)

- Elliott v. Sperry Rand Corp., 680 F.2d 1225 (8th Cir. 1982), n.410
Ellis v. University of Kansas Medical Center, 163 F.3d 1186 (10th Cir. 1999), nn.125, 127
Elmore v. Shuler, 787 F.2d 601 (D.C. Cir. 1986), n.126
Emmanuel v. Omaha Carpenters District Council, 560 F.2d 382 (8th Cir. 1977), n.594
Erkins v. Bryan, 785 F.2d 1538 (11th Cir. 1986), nn.574, 595
Evans v. City of Evanston, 941 F.2d 473 (7th Cir. 1991), nn.336, 444–45, 490, 681–83
Evans v. Jeff D., 475 U.S. 717 (1986), nn.97, 129, 133, 265
Exchange National Bank of Chicago v. Daniels, 763 F.2d 286 (7th Cir. 1985), n.367
- Fair Housing Council of Greater Washington v. Landow, 999 F.2d 92 (4th Cir. 1993), n.194
Farmington Dowel Products v. Forster Manufacturing Co., 421 F.2d 61 (1st Cir. 1969), n.364
Farrar v. Hobby, 506 U.S. 103 (1992), nn.30–31, 111, 245–46, 248–51, 262, 269
Fase v. Seafarers Welfare & Pension Plan, 589 F.2d 112 (2d Cir. 1978), nn.427, 429
Feher v. Department of Labor & Industrial Relations, 561 F. Supp. 757 (D. Haw. 1983), n.57
Feick v. Fleener, 653 F.2d 69 (2d Cir. 1981), n.402
Fidelity Bancorporation Securities Litigation, *In re*, 750 F. Supp. 160 (D.N.J. 1990), n.520
Figueroa–Torres v. Todelo–Davilla, 232 F.3d 270 (1st Cir. 2000), n.228
Finch v. City of Vernon, 877 F.2d 1497 (11th Cir. 1989), nn.51, 201
Fine Paper Antitrust Litigation, *In re*, 751 F.2d 562 (3d Cir. 1984), nn.333, 447, 470–71, 492, 542, 547
Fischel v. Equitable Life Assurance Society of United States, 307 F.3d 997 (9th Cir. 2002), n.523
Fleming v. Ayers & Associates, 948 F.2d 993 (6th Cir. 1991), nn.236, 325
Fleming v. County of Kane, 898 F.2d 553 (7th Cir. 1990), n.301
Florida v. Dunne, 915 F.2d 542 (9th Cir. 1990), nn.463–64, 524–25
Florin v. Nationsbank of Georgia, N.A., 34 F.3d 560 (7th Cir. 1994), n.528
Fogerty v. Fantasy, 510 U.S. 517 (1994), nn.74, 76–77
Foley v. City of Lowell, 948 F.2d 10 (1st Cir. 1991), n.328
Ford v. Long Beach Unified School District, 461 F.3d 1087 (9th Cir. 2006), n.87
Fort v. Roadway Express, 746 F.2d 744 (11th Cir. 1984), n.368
Fox v. Vice, 131 S. Ct. 2205 (2011), nn.71–73

- Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545 (9th Cir. 1989), nn.216, 325
- Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center, 765 F.2d 1278 (5th Cir. 1985), n.34
- Freitag v. California Department of Corrections, No. C00-2275, 2012 WL 5389839 (N.D. Cal. Nov. 5, 2012), nn.747–48
- Friend v. Kolodziejczak, 72 F.3d 1386 (9th Cir. 1995), n.300
- Gagne v. Town of Enfield, 734 F.2d 902 (2d Cir. 1984), n.51
- Gates v. Central Teamsters Pension Fund, 788 F.2d 1341 (8th Cir. 1986), n.368
- Gates v. Deukmejian, 987 F.2d 1392 (9th Cir. 1992), nn.158, 294, 332, 335
- Gay Officers Action League v. Puerto Rico, 247 F.3d 288 (1st Cir. 2001), n.268
- Gekas v. Attorney Registration & Disciplinary Commission, 793 F.2d 846 (7th Cir. 1986), n.324
- Gemstar-TV Guide International, Inc. Securities Litigation, *In re*, 209 F.R.D. 447 (C.D. Cal. 2002), n.641
- General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, *In re*, 55 F.3d 768 (3d Cir. 1995), n.528
- Gilbert v. Little Rock, Arkansas, 867 F.2d 1063 (8th Cir. 1989), n.236
- Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675 (D.C. Cir. 1996), n.368
- Gisbrecht v. Barnhart, 535 U.S. 789 (2002), n.145
- Glass v. Secretary of Health & Human Services, 822 F.2d 19 (6th Cir. 1987), n.327
- Global Crossing Securities & ERISA Litigation, *In re*, 225 F.R.D. 436 (S.D.N.Y. 2004), n.649
- Glover v. Johnson, 934 F.2d 703 (6th Cir. 1991), nn.197, 219
- Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000), nn.461, 502
- Goodwin v. Metts, 973 F.2d 378 (4th Cir. 1992), n.184
- Goos v. National Association of Realtors, 68 F.3d 1380 (D.C. Cir. 1995), n.235
- Grace v. Burger, 763 F.2d 457 (D.C. Cir. 1985), nn.431, 588
- Granada Investments v. DWG Corp., 962 F.2d 1203 (6th Cir. 1992), n.534
- Grano v. Barry, 783 F.2d 1104 (D.C. Cir. 1986), n.35
- Grant v. Martinez, 973 F.2d 96 (2d Cir. 1992), nn.207, 235, 294
- Gray *ex rel.* Alexander v. Bostic, 613 F.3d 1035 (11th Cir. 2010), n.298
- Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217 (9th Cir. 1987), n.187
- Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir. 1984), nn.184, 214
- Griffin v. Steeltek, Inc., 261 F.3d 1026 (10th Cir. 2001), n.43
- Grissom v. Mills Corp., 549 F.3d 313 (4th Cir. 2008), n.175
- Grove v. Mead School District, 753 F.2d 1528 (9th Cir. 1985), n.80

Table of Cases (Alphabetical)

- Guadamuz v. Bowen, 859 F.2d 762 (9th Cir. 1988), n.315
- Guam Society of Obstetricians & Gynecologists v. Ada, 100 F.3d 691 (9th Cir. 1996), n.292
- Guidry v. International Union of Operating Engineers, 882 F.2d 929 (6th Cir. 1989), n.590
- Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp., 995 F.2d 414 (3d Cir. 1993), nn.203–04
- Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000), nn.458, 502, 548, 639
- Gusman v. Unisys, 986 F.2d 1146 (7th Cir. 1993), n.159
- Hahnemann University Hospital v. All Shore, Inc., 514 F.3d 300 (3d Cir. 2008), n.50
- Halderman by Halderman v. Pennhurst State School & Hospital, 49 F.3d 939 (3d Cir. 1995), n.187
- Hall v. Cole, 412 U.S. 1 (1973), nn.559–61
- Hamilton v. Daley, 777 F.2d 1207 (7th Cir. 1985), n.313
- Hanrahan v. Hampton, 446 U.S. 754 (1980), n.22
- Hardt v. Reliance Standard Life Insurance Co., 560 U.S. 242 (2010), nn.19, 62, 64
- Harman v. Lyphomed, 945 F.2d 969 (7th Cir. 1991), n.461
- Haroco, Inc. v. American National Bank & Trust Co., 38 F.3d 1429 (7th Cir. 1994), n.143
- Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982), n.33
- Hart v. Bourque, 798 F.2d 519 (1st Cir. 1986), n.187
- Hatrock v. Jones & Co., 750 F.2d 767 (9th Cir. 1984), n.340
- Haywood v. Ball, 634 F.2d 740 (4th Cir. 1980), n.51
- Heartland Payment Systems, Inc. Customer Data Security Breach Litigation, *In re*, 851 F. Supp. 2d 1040 (S.D. Tex. 2012), nn.496, 498, 506–07, 670, 678
- Heekin v. Anthem, Inc., No. 1:05-cv-01908, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012), n.514
- Hendrickson v. Branstad, 934 F.2d 158 (8th Cir. 1991), n.282
- Hensley v. Eckerhart, 461 U.S. 424 (1983), nn.10–11, 13, 68, 108, 144–45, 151, 176–77, 209, 222–26, 233–34, 284, 314, 343, 373
- Henson v. Columbus Bank & Trust Co., 651 F.2d 320 (5th Cir. 1981), n.321
- Hepburn, *In re*, 84 B.R. 855 (Bankr. S.D. Fla. 1988), n.56
- Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981), n.317
- Herrington v. County of Sonoma, 883 F.2d 739 (9th Cir. 1989), n.235
- Hewitt v. Helms, 482 U.S. 755 (1987), n.21
- Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1991), n.52

- High Sulfur Content Gasoline Products Liability Litigation, *In re*, 517 F.3d 220 (5th Cir. 2008), n.545
- Highmark Inc. v. Allcare Health Management System, Inc., 134 S. Ct. 1744 (2014), n.372
- Hill, *In re*, 775 F.2d 1037 (9th Cir. 1985), nn.431, 588
- Hobbs v. McLean, 117 U.S. 567 (1886), nn.448–49
- Holbrook v. Pitt, 748 F.2d 1168 (7th Cir. 1984), n.390
- Hollowell v. Gravett, 723 F. Supp. 107 (E.D. Ark. 1989), n.289
- Home Savings Bank v. Gillam, 952 F.2d 1152 (9th Cir. 1991), n.585
- Homeward Bound, Inc. v. Hissom Memorial Hospital, 963 F.2d 1352 (10th Cir. 1992), n.376
- Howard v. Phelps, 443 F. Supp. 374 (E.D. La. 1978), n.57
- Huey v. Sullivan, 971 F.2d 1362 (8th Cir. 1992), n.23
- Hyman Construction Co. v. Brooks, 963 F.2d 1532 (D.C. Cir. 1992), n.231
- Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989), nn.104–05, 109
- Independent School District v. Digre, 893 F.2d 987 (8th Cir. 1990), n.208
- Interfaith Community Organization v. Honeywell International, Inc., 426 F.3d 694 (3d Cir. 2005), n.170
- International Nickel Co. v. Trammel Crow Distribution Corp., 803 F.2d 150 (5th Cir. 1986), n.273
- International Precious Metals Corp. v. Waters, 530 U.S. 1223 (2000), n.482
- Iqbal v. Golf Course Superintendents, 900 F.2d 227 (10th Cir. 1990), n.201
- Islamic Center of Mississippi v. Starkville, Mississippi, 876 F.2d 465 (5th Cir. 1989), n.154
- Jackson v. Crews, 873 F.2d 1105 (8th Cir. 1989), n.235
- Jaffee v. Redmond, 142 F.3d 409 (7th Cir. 1998), nn.235, 376
- Jane L. v. Bangerter, 61 F.3d 1505 (10th Cir. 1995), n.235
- Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988), n.216
- Jenkins v. Missouri, 967 F.2d 1248 (8th Cir. 1992), nn.106–07
- Jenkins v. Missouri, 931 F.2d 1273 (8th Cir. 1991), n.300
- Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), nn.150–52, 243, 465
- Johnson v. HUD, 939 F.2d 586 (8th Cir. 1991), n.585
- Johnson v. Lafayette Fire Fighters Association Local 472, 51 F.3d 726 (7th Cir. 1995), nn.17, 252–53
- Johnson v. New York City Transit Authority, 823 F.2d 33 (2d Cir. 1987), n.325
- Johnson v. Rodriguez, 260 F.3d 493 (5th Cir. 2001), n.43

Table of Cases (Alphabetical)

- Johnston v. Comerica Mortgage Co., 83 F.3d 241 (8th Cir. 1996), n.461
Jones v. Central Bank, 161 F.3d 311 (5th Cir. 1998), n.17
Jordan v. Heckler, 744 F.2d 1397 (10th Cir. 1984), nn.431, 588
Joyce v. Town of Dennis, 720 F.3d 12 (1st Cir. 2013), n.235
Junker v. Cory, 650 F.2d 1349 (5th Cir. 1981), nn.417–18
- Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir. 1970), n.578
Kahane v. UNUM Life Insurance Co. of America, 563 F.3d 1210 (11th Cir. 2009), n.50
Kargman v. Sullivan, 589 F.2d 63 (1st Cir. 1978), n.385
Kay v. Ehrler, 499 U.S. 432 (1991), nn.85–86
Kay Co. v. Equitable Production Co., 749 F. Supp. 2d 455 (S.D. W. Va. 2010), n.508
Kean v. Stone, 966 F.2d 119 (3d Cir. 1992), n.156
Keely v. City of Leesville, 897 F.2d 172 (5th Cir. 1990), n.51
Kelley v. Metropolitan County Board of Education, 773 F.2d 677 (6th Cir. 1985), nn.154, 362, 364
Kentucky v. Graham, 473 U.S. 159 (1985), n.103
Kerr v. Screen Extras Guild, 526 F.2d 67 (9th Cir. 1975), n.152
King v. McCord, 621 F.2d 205 (5th Cir. 1980), n.322
Kinney v. International Brotherhood of Electrical Workers, 939 F.2d 690 (9th Cir. 1991), nn.492–93, 605, 607–08
Klawock, *City of*, v. Gustafson, 585 F.2d 428 (9th Cir. 1978), nn.422, 425–26
Konits v. Valley Stream Central High School District, 350 F. App'x 501 (2d Cir. 2009), n.147
Kooritzky v. Herman, 178 F.3d 1315 (D.C. Cir. 1999), n.90
Kopet v. Esquire Realty, 523 F.2d 1005 (2d Cir. 1975), n.413
Koppel v. Wien, 743 F.2d 129 (2d Cir. 1984), nn.414, 576
Kraeger v. Solomon & Flanagan, P.A., 775 F.2d 1541 (11th Cir. 1985), nn.152, 311
- Ladnier v. Murray, 769 F.2d 195 (4th Cir. 1985), n.33
Lafferty v. Humphrey, 248 F.2d 82 (D.C. Cir. 1957), n.401
Laffey v. Northwest Airlines, 572 F. Supp. 354 (D.D.C. 1983), nn.168, 174–75, 654–55, 657–58, 739
Laguna v. Coverall North America, Inc., 753 F.3d 918 (9th Cir. 2014), n.134
Lattimore v. Oman Construction, 868 F.2d 437 (11th Cir. 1989), nn.296, 364
Lawnmower Engine Horsepower Marketing & Sales Practices Litigation, *In re*, 733 F. Supp. 2d 997 (E.D. Wis. 2010), nn.507, 511
Lawrence v. Bowsher, 931 F.2d 1579 (D.C. Cir. 1991), n.113

- Lefemine v. Wideman, 133 S. Ct. 9 (2012), nn.24, 32
Leffler v. Meer, 936 F.2d 981 (7th Cir. 1991), n.312
Leroy v. City of Houston, 906 F.2d 1068 (5th Cir. 1990), n.164
Lewis v. Anderson, 692 F.2d 1267 (9th Cir. 1982), nn.577–78
Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991), n.193
Libby v. Illinois High School Association, 921 F.2d 96 (7th Cir. 1990), n.36
Library of Congress v. Shaw, 478 U.S. 310 (1985), n.294
Lightfoot v. Walker, 826 F.2d 516 (7th Cir. 1987), n.214
Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.,
540 F.2d 102 (3d Cir. 1976), nn.211, 385, 455, 531
Liquist v. Bowen, 839 F.2d 1321 (8th Cir. 1988), nn.431, 588
Lipsett v. Blanco, 975 F.2d 934 (1st Cir. 1992), nn.136, 189, 213, 226, 291, 378
Lobur v. Parker, 378 F. App'x 63 (2d Cir. 2010), n.409
Loggerhead Turtle v. County Council, 307 F.3d 1318 (11th Cir. 2002), n.65
Lonardo v. Travelers Indemnity Co., 706 F. Supp. 2d 766 (N.D. Ohio 2010),
nn.645, 649
Loudermilk Services, Inc. v. Marathon Petroleum Co., 623 F. Supp. 2d 713 (S.D.
W. Va. 2009), n.509
Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319 (5th Cir. 1995), nn.300,
379
Louisville Black Police Officers Organization v. City of Louisville, 700 F.2d 268
(6th Cir. 1983), n.183
Lowrance v. Hacker, 966 F.2d 1153 (7th Cir. 1992), nn.98, 101
Lucent Technologies, Inc., Securities Litigation, *In re*, 194 F.R.D. 137 (D.N.J.
2000), n.628
Lucero v. Trinidad, 815 F.2d 1384 (10th Cir. 1987), nn.218, 220

Macdissi v. Valmont Industries, 856 F.2d 1054 (8th Cir. 1988), n.217
Maher v. Gagne, 448 U.S. 122 (1980), n.38
Maier Brewing Co. v. Fleischmann Distilling Corp., 359 F.2d 156 (9th Cir. 1966),
n.423
Maine v. Thiboutot, 448 U.S. 1 (1980), n.29
Maldonado v. Lehman, 811 F.2d 1341 (9th Cir. 1987), n.159
Mallinson Montague v. Pocrnick, 224 F.3d 1224 (10th Cir. 2000), n.714
Mancini v. Dan P. Plute, Inc., 358 F. App'x 886 (9th Cir. 2009), n.174
Marek v. Chesny, 473 U.S. 1 (1985), nn.270, 364
Mares v. Credit Bureau of Raton, 801 F.2d 1197 (10th Cir. 1986), n.329
Maristuen v. National States Insurance Co., 57 F.3d 673 (8th Cir. 1995), n.366
Markham v. International Association of Bridge, Structural & Ornamental Iron
Workers, 901 F.2d 1022 (11th Cir. 1990), nn.580–81

Table of Cases (Alphabetical)

Marshall v. United Steelworkers, 666 F.2d 845 (3d Cir. 1981), nn.566, 597
Martin v. Franklin Capital Corp., 546 U.S. 132 (2005), n.109
Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007), nn.483–86
Mateyko v. Felix, 924 F.2d 824 (9th Cir. 1990), n.51
Mathis v. Spears, 857 F.2d 749 (Fed. Cir. 1988), n.300
McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983), n.214
McCarter v. Retirement Plan for District Managers of American Family Insurance Group, 540 F.3d 649 (7th Cir. 2008), n.368
McCoy v. United Parcel Service, 222 F. App'x 87 (2d Cir. 2007), n.412
McDonald v. Doe, 748 F.2d 1055 (5th Cir. 1984), n.51
McDonald v. McCarthy, 966 F.2d 112 (3d Cir. 1992), nn.362, 364, 367
McDonald v. Oliver, 525 F.2d 1217 (5th Cir. 1976), n.594
McDonald v. Pension Plan of NYSA–ILA Pension Trust Fund, 450 F.3d 91 (2d Cir. 2006), n.240
McGuire v. Russell Miller, Inc., 1 F.3d 1306 (2d Cir. 1993), n.342
McKenzie v. Kennickell, 669 F. Supp. 529 (D.D.C. 1987), n.55
McManama v. Lukhard, 616 F.2d 727 (4th Cir. 1980), n.201
McQuiston v. Marsh, 707 F.2d 1082 (9th Cir. 1983), n.420
Meese, *In re*, 907 F.2d 1192 (D.C. Cir. 1990), n.165
Mendez v. County of San Bernardino, 540 F.3d 1109 (9th Cir. 2008), n.195
MidAmerica Federal Savings & Loan v. Shearson/American, 962 F.2d 1470 (10th Cir. 1992), nn.301, 340
Miele v. New York State Teamsters Conference Pension & Retirement Fund, 831 F.2d 407 (2d Cir. 1987), n.220
Migis v. Pearle Vision, Inc., 135 F.3d 1041 (5th Cir. 1998), nn.242–44, 266
Miller v. Los Angeles, 827 F.2d 617 (9th Cir. 1987), n.311
Miller v. Staats, 706 F.2d 336 (D.C. Cir. 1983), n.80
Miller-Wohl Co. v. Commissioner of Labor & Industry, State of Montana, 694 F.2d 203 (9th Cir. 1982), n.94
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), nn.418, 556–58, 563, 568
Milton v. Des Moines, Iowa, 47 F.3d 944 (8th Cir. 1995), n.256
Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981), n.52
Mirfasihi v. Fleet Mortgage Corp., 356 F.3d 781 (7th Cir. 2004), n.131
Missouri v. Jenkins, 491 U.S. 274 (1989), nn.135–36, 153, 294
Mokhiber *ex rel.* Ford Motor Co. v. Cohn, 783 F.2d 26 (2d Cir. 1986), n.56
Montgomery & Associates, Inc. v. Commodity Futures Trading Commission, 816 F.2d 783 (D.C. Cir. 1987), n.363
Moore v. Matthews, 682 F.2d 830 (9th Cir. 1982), n.160
Morales v. City of San Rafael, 96 F.3d 359 (9th Cir. 1996), nn.147, 152, 254

- Morales v. Turman, 820 F.2d 728 (5th Cir. 1987), n.93
Morgan v. Union Metal, 757 F.2d 792 (6th Cir. 1985), n.368
MRRM, P.A., *In re*, 404 F.3d 863 (4th Cir. 2005), n.500
Muckleshoot Tribe v. Puget Sound Power & Light Co., 875 F.2d 695 (9th Cir. 1989), nn.123, 125
Munson v. Friske, 754 F.2d 683 (7th Cir. 1985), n.311
Murphy v. International Union of Operating Engineers, 774 F.2d 114 (6th Cir. 1985), n.596
Murphy v. Reliance Standard Life Insurance Co., 247 F.3d 1313 (11th Cir. 2001), n.308
Murray v. GMAC Mortgage Corp., 434 F.3d 948 (7th Cir. 2006), n.131
- NAACP v. City of Evergreen, 812 F.2d 1332 (11th Cir. 1987), n.220
National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982), nn.315, 318
National Treasury Employees Union v. Nixon, 521 F.2d 317 (D.C. Cir. 1975), n.391
Natural Resources Defense Council v. EPA, 484 F.2d 1331 (1st Cir. 1973), n.6
Nensel v. Peoples Heritage Financial Group, Inc., 815 F. Supp. 26 (D. Me. 1993), n.528
New Jersey v. EPA, 703 F.3d 110 (D.C. Cir. 2012), n.165
New York Gaslight Club v. Carey, 447 U.S. 54 (1980), nn.49, 110
Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), nn.108, 110
Newport News Shipbuilding & Dry Dock Co. v. Holiday, 591 F.3d 219 (4th Cir. 2009), n.174
Nicodemus v. Chrysler Corp., 445 F. Supp. 559 (N.D. Ohio 1977), n.57
Nilsen v. York County, 400 F. Supp. 266 (D. Me. 2005), n.503
Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litigation, *In re*, 982 F.2d 603 (1st Cir. 1992), nn.544–45, 549
Nisby v. Court of Jefferson County, 798 F.2d 134 (5th Cir. 1986), n.152
Nolte v. Hudson Navigation Co., 47 F.2d 166 (2d Cir. 1931), n.400
Norman v. Housing Authority of Montgomery, 836 F.2d 1292 (11th Cir. 1988), nn.202, 210, 219–20, 226, 295, 315, 323, 325–26
North Carolina Department of Transportation v. Crest Street Community Council, Inc., 479 U.S. 6 (1986), n.49
Northeast Women's Center v. McMonagle, 889 F.2d 466 (3d Cir. 1989), nn.51, 227, 261
Northern Plains Resource Council v. EPA, 670 F.2d 847 (9th Cir. 1982), n.362

Table of Cases (Alphabetical)

- Octane Fitness, LLC v. Icon Health & Fitness, Inc., 134 S. Ct. 1749 (2014), nn.59–61
- Ohio-Sealy Mattress, *In re*, 776 F.2d 646 (7th Cir. 1985), n.330
- Oldfield v. Athletic Congress, 779 F.2d 505 (9th Cir. 1985), n.583
- Olson, *In re*, 884 F.2d 1415 (D.C. Cir. 1989), nn.185, 190, 214
- Oracle Securities Litigation, *In re*, 131 F.R.D. 688 (N.D. Cal. 1990), nn.615, 685, 687
- Oracle Securities Litigation, *In re*, 132 F.R.D. 538 (N.D. Cal. 1990), nn.615, 685, 688
- Orchano v. Advanced Recovery, Inc., 107 F.3d 94 (2d Cir. 1997), n.147
- Orenshteyn v. Citrix Systems, Inc., 691 F.3d 1356 (Fed. Cir. 2012), n.368
- Oster v. Bowen, 682 F. Supp. 853 (E.D. Va. 1988), n.585
- Overseas Development Disc Corp. v. Sangamo Construction Co., 840 F.2d 1319 (7th Cir. 1988), n.549
- Palmer v. Chicago, 806 F.2d 1316 (7th Cir. 1986), n.34
- Paris v. Metropolitan Life Insurance, 94 F. Supp. 792 (S.D.N.Y. 1947), n.415
- Parke v. First Reliance Standard Life Insurance Co., 368 F.3d 999 (8th Cir. 2004), n.50
- Parker v. Time Warner Entertainment Co., L.P., 631 F. Supp. 2d 242 (E.D.N.Y. 2009), n.486
- Paul, Johnson, Alston & Hunt v. Gaulty, 886 F.2d 268 (9th Cir. 1989), n.463
- Pavlik v. FDIC, No. 10C816, 2011 WL 5184445 (N.D. Ill. Nov. 1, 2011), n.513
- Pawlak v. Greenawalt, 713 F.2d 972 (3d Cir. 1983), nn.583, 597, 607–08
- Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986) (*Delaware Valley I*), nn.38, 44–46, 281, 285–87
- Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987) (*Delaware Valley II*), nn.304–07, 651
- Pennsylvania v. Flaherty, 983 F.2d 1267 (3d Cir. 1993), n.368
- People Who Care v. Rockford Board of Education, 921 F.2d 132 (7th Cir. 1991), nn.56, 370
- Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542 (2010), nn.279–81, 284–86, 288, 309
- Perotti v. Seiter, 935 F.2d 761 (6th Cir. 1991), n.196
- Peterson v. Continental Casualty Co., 282 F.3d 112 (2d Cir. 2002), n.50
- Petties v. District of Columbia, 227 F.3d 469 (D.C. Cir. 2000), n.371
- Pfizer Inc. Securities Litigation, *In re*, 233 F.R.D. 334 (S.D.N.Y. 2005), n.641
- Phelps v. Washburn University of Topeka, 807 F.2d 153 (10th Cir. 1986), n.368
- Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985), n.56
- Pickett v. Sheridan Health Care Center, 664 F.3d 632 (7th Cir. 2011), nn.171–73

- Pinkham v. Camex, Inc., 84 F.3d 292 (8th Cir. 1996), nn.205, 227
- Planned Parenthood of Central New Jersey v. Attorney General of State of New Jersey, 297 F.3d 253 (3d Cir. 2002), n.17
- Plott v. Griffiths, 938 F.2d 164 (10th Cir. 1991), n.52
- Plyler v. Evatt, 902 F.2d 273 (4th Cir. 1990), nn.162–63, 239
- Polk v. New York State Department of Correctional Services, 722 F.2d 23 (2d Cir. 1983), n.158
- Powell v. Pennsylvania Railroad, 267 F.2d 241 (3d Cir. 1959), n.401
- Powers v. Eichen, 229 F.3d 1249 (9th Cir. 2000), nn.548, 644
- Prandini v. National Tea, 557 F.2d 1015 (3d Cir. 1975), n.132
- Pressley v. Haeger, 977 F.2d 295 (7th Cir. 1992), nn.221, 234
- Pridgen v. Andresen, 113 F.3d 391 (2d Cir. 1997), n.368
- Prison Legal News v. Schwarzenegger, 608 F.3d 446 (9th Cir. 2010), n.175
- Prudential Insurance Co. of America Sales Practices Litigation, *In re*, 148 F.3d 283 (3d Cir. 1998), nn.515, 528
- Puerto Rican Cabotage Antitrust Litigation, *In re*, 815 F. Supp. 2d 448 (D.P.R. 2011), n.508
- Puerto Rico v. Heckler, 745 F.2d 709 (D.C. Cir. 1984), n.431
- Pulliam v. Allen, 466 U.S. 522 (1984), n.102
-
- Quaratino v. Tiffany & Co., 166 F.3d 422 (2d Cir. 1998), n.147
- Quave v. Progress Marine, 918 F.2d 33 (5th Cir. 1990), n.367
- Quintus Securities Litigation, *In re*, 201 F.R.D. 475 (N.D. Cal. 2001), nn.631, 689
-
- Race Tires America, Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158 (3d Cir. 2012), n.143
- Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188 (6th Cir. 1974), nn.502, 575, 577
- Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983), nn.160, 206, 214
- Ramsey v. Colonial Life Insurance Co. of America, 12 F.3d 472 (5th Cir. 1994), nn.358–59
- Raney v. Federal Bureau of Prisons, 222 F.3d 927 (Fed. Cir. 2000), n.156
- Rawlings v. Prudential-Bach Properties, Inc., 9 F.3d 513 (6th Cir. 1993), n.461
- Ray v. U.S. Department of Justice, 87 F.3d 1250 (11th Cir. 1996), n.87
- Ray Haluch Gravel Co. v. Central Pension Fund, 134 S. Ct. 773 (2014), nn.356–57
- Razorfish Inc. Securities Litigation, *In re*, 143 F. Supp. 2d 304 (S.D.N.Y. 2001), n.641
- Reel v. Arkansas Department of Corrections, 672 F.2d 693 (8th Cir. 1982), nn.51, 201

Table of Cases (Alphabetical)

- Rego v. Westvaco, 319 F.3d 140 (4th Cir. 2003), n.50
Reiser v. Del Monte Properties, 605 F.2d 1135 (9th Cir. 1979), nn.414, 584
Relafin Antitrust Litigation, *In re*, 231 F.R.D. 52 (D. Mass. 2005), n.508
Resolution Trust v. Marshall, 939 F.2d 274 (5th Cir. 1991), n.341
Reynolds v. Beneficial National Bank, 288 F.3d 277 (7th Cir. 2002), nn.411, 469
Rhodes v. Stewart, 488 U.S. 1 (1988), n.21
Richlin Security Service Co. v. Chertoff, 553 U.S. 571 (2008), nn.137–38
Rickley v. County of Los Angeles, 654 F.3d 950 (9th Cir. 2011), n.89
Rite Aid Corp. Securities Litigation, *In re*, 396 F.3d 294 (3d Cir. 2005), nn.458, 515, 521
Riverside, City of, v. Rivera, 477 U.S. 561 (1986), nn.178, 257–58, 268
Robinson v. City of Edmond, 160 F.3d 1275 (10th Cir. 1998), nn.227, 315
Robinson v. Equifax Information Services, LLC, 560 F.3d 235 (4th Cir. 2009), n.175
Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981), n.364
Rode v. Dellarciprete, 892 F.2d 1177 (3d Cir. 1990), nn.211–12, 230
Rodriguez v. Disner, 688 F.3d 645 (9th Cir. 2012), n.408
Role Models AM, Inc. v. Brownlee, 353 F.3d 962 (D.C. Cir. 2004), n.714
Rooths v. District of Columbia, 802 F. Supp. 2d 56 (D.D.C. 2011), n.657
Rosario v. Amalgamated Ladies Garment Cutters Union, 605 F.2d 1228 (2d Cir. 1979), n.594
Rosenbaum v. MacAllister, 64 F.3d 1439 (10th Cir. 1995), n.604
Rosenfeld v. United States, 859 F.2d 717 (9th Cir. 1988), n.370
Roth v. Green, 466 F.3d 1179 (10th Cir. 2006), n.311
Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983), nn.19, 64
Rude v. Buchhalter, 286 U.S. 451 (1932), n.416
Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169 (4th Cir. 1994), nn.105, 158, 187, 380
Russell v. Board of Plumbing Examiners, 74 F. Supp. 2d 349 (S.D.N.Y. 1999), n.96

Salazar v. District of Columbia, 123 F. Supp. 8 (D.D.C. 2000), n.169
Samuels v. American Motor Sales Corp., 969 F.2d 573 (7th Cir. 1992), n.101
Save Our Cumberland Mountains v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988), nn.157, 168
Scham v. District Courts Trying Criminal Cases, 148 F.3d 554 (5th Cir. 1998), n.192
Schleit v. British Overseas Airways Corp., 410 F.2d 261 (D.C. Cir. 1969), n.424
Schneider v. Colegio de Abogados de Puerto Rico, 187 F.3d 30 (1st Cir. 1999), n.88

- Schneider v. Lockheed Aircraft Corp., 658 F.2d 835 (D.C. Cir. 1981), n.92
Schultz v. Hembree, 975 F.2d 572 (9th Cir. 1992), nn.232, 376
SEC v. Price Waterhouse, 41 F.3d 805 (2d Cir. 1994), n.87
Sederquist v. Court, 861 F.2d 554 (9th Cir. 1988), nn.600–01
Shakopee Mdewakanton Sioux Community v. City of Prior Lake, Minnesota, 771 F.2d 1153 (8th Cir. 1985), n.159
Sheppard v. Riverview Nursing Center, Inc., 88 F.3d 1332 (4th Cir. 1996), n.273
Shimman v. International Union of Operating Engineers, 744 F.2d 1226 (5th Cir. 1984), nn.573, 591, 595–96
Shipes v. Trinity Industries, 987 F.2d 311 (5th Cir. 1993), nn.283, 287
Shipes v. Trinity Industries, Inc., 883 F.2d 339 (5th Cir. 1989), nn.369–70
Sierra Club v. EPA, 322 F.3d 718 (D.C. Cir. 2003), n.65
Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990), nn.464, 552
Skelton v. General Motors Corp., 860 F.2d 250 (7th Cir. 1988), nn.296, 384, 447, 471, 527
Skokos v. Rhoades, 440 F.3d 957 (8th Cir. 2006), nn.51–52
Smillie v. Park Chemical Co., 710 F.2d 271 (6th Cir. 1983), n.606
Smith v. Freeman, 921 F.2d 1120 (10th Cir. 1990), nn.183, 196, 299
Smith v. Great American Restaurants, 969 F.2d 430 (7th Cir. 1992), n.339
Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980), n.34
Sole v. Wyner, 551 U.S. 74 (2007), nn.25–27, 37
Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (9th Cir. 1981), n.430
Southerland v. International Longshoremen's Union, 845 F.2d 796 (9th Cir. 1987), nn.563, 569, 604
Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977), n.201
Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982), n.202
Spanish Action Committee of Chicago v. City of Chicago, 811 F.2d 1129 (7th Cir. 1987), nn.236, 241
Spegon v. Catholic Bishop of Chicago, 175 F.3d 544 (7th Cir. 1999), n.181
Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), n.165
Spellan v. Board of Education, 59 F.3d 642 (7th Cir. 1995), n.234
Sprague v. Ticonic, 307 U.S. 161 (1939), nn.386–87, 402, 421–23
Standley v. Chilhowee R-IV School District, 5 F.3d 319 (8th Cir. 1993), n.143
Starks v. George Court Co., 937 F.2d 311 (7th Cir. 1991), n.115
Staten v. Housing Authority of Pittsburgh, 638 F.2d 599 (3d Cir. 1980), n.119
Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003), n.134
Strong v. BellSouth Telecommunications, Inc., 137 F.3d 844 (5th Cir. 1998), nn.466, 476, 488–89

Table of Cases (Alphabetical)

- Student Public Interest Research Group v. AT&T Bell Laboratories, 842 F.2d 1436 (3d Cir. 1988), n.325
- Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990), nn.385, 446, 452, 490
- Sullivan v. DB Investments, 667 F.3d 273 (3d Cir. 2011), n.458
- Sutton v. Bernard, 504 F.3d 688 (7th Cir. 2007), n.510
- Swedish Hospital Corp. v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993), n.460
- Sykes v. District of Columbia, 870 F. Supp. 2d 86 (D.D.C. 2012), nn.657–58
- Sylvester v. Cigna Corp., 369 F. Supp. 2d 34 (D. Me. 2005), n.475
- Synthroid Marketing Litigation, *In re*, 264 F.3d 712 (7th Cir. 2001) (*Synthroid I*), nn.208, 504–05, 510
- Synthroid Marketing Litigation, *In re*, 325 F.3d 974 (3d Cir. 2003) (*Synthroid II*), nn.520, 529, 554
- Taylor v. Fort Lauderdale, 810 F.2d 1551 (11th Cir. 1987), n.35
- Terket v. Lund, 623 F.2d 29 (7th Cir. 1980), n.364
- Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989), nn.20, 54
- Thirteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litigation, *In re*, 56 F.3d 295 (1st Cir. 1995), nn.461, 528, 554
- Thomas v. National Football League Players Association, 273 F.3d 1124 (D.C. Cir. 2001), n.262
- Thomason v. Schweiker, 692 F.2d 333 (4th Cir. 1982), n.315
- Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc., 253 F.3d 1332 (11th Cir. 2001), n.17
- TJX Cos. Retail Security Breach Litigation, *In re*, 584 F. Supp. 2d 395 (D. Mass. 2008), n.486
- Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923), n.5
- Toliver v. County of Sullivan, 957 F.2d 47 (2d Cir. 1992), nn.311, 365
- Tomazzoli v. Sheedy, 804 F.2d 93 (7th Cir. 1986), nn.213, 330, 714
- Toth v. UAW, 743 F.2d 398 (6th Cir. 1984), n.599
- Trans Union Corp. Privacy Litigation, *In re*, 629 F.3d 741 (7th Cir. 2011), n.510
- Travelers Casualty & Surety Co. v. Insurance Co. of North America, 609 F.3d 143 (3d Cir. 2010), n.301
- Trustees v. Greenough, 105 U.S. 527 (1881), nn.3, 381–82, 435–36, 532–33, 549
- Turner v. Murphy Oil USA, Inc., 472 F. Supp. 2d 830 (E.D. La. 2007), nn.507, 514
- Tyler v. Corner Construction Corp., 167 F.3d 1202 (8th Cir. 1999), n.121

- Union Asset Management Holding A.G. v. Dell, Inc., 669 F.3d 632 (5th Cir. 2012), nn.465–66, 642
- United Health Group, Inc. PSLRA Litigation, *In re*, 643 F. Supp. 2d 1094 (D. Minn. 2009), n.649
- United States v. ASCAP, 466 F.2d 917 (2d Cir. 1972), n.400
- United States v. Board of Education of Waterbury, 605 F.2d 573 (2d Cir. 1979), n.81
- United States v. Imperial Irrigation District, 595 F.2d 525 (9th Cir. 1979), n.586
- United States v. Tobias, 935 F.2d 666 (4th Cir. 1991), nn.450–51, 453–54
- United States *ex rel.* Evergreen Pipeline Construction Co. v. Merritt Meridian Construction Corp., 95 F.3d 153 (2d Cir. 1996), n.143
- United States *ex rel.* Virani v. Jerry M. Lewis Truck Parts & Equipment, Inc., 89 F.3d 574 (9th Cir. 1996), n.97
- United Steelworkers v. Phelps Dodge, 896 F.2d 403 (9th Cir. 1990), n.324
- Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849 (10th Cir. 1993), n.408
- Usery v. Local Union No. 639, International Brotherhood of Teamsters, 543 F.2d 369 (D.C. Cir. 1976), nn.563–64, 603
- Ustrak v. Fairman, 851 F.2d 983 (7th Cir. 1988), nn.183, 201, 232, 377
- Utah Women's Clinic v. Leavitt, 75 F.3d 564 (10th Cir. 1995), nn.360–61
- Valley Disposal, Inc. v. Central Vermont Solid Waste Management District, 71 F.3d 1053 (2d Cir. 1995), n.124
- Vaughan v. Atkinson, 369 U.S. 527 (1962), n.5
- Venegas v. Mitchell, 495 U.S. 82 (1990), n.146
- Villano v. City of Boynton Beach, 254 F.3d 1302 (11th Cir. 2001), n.233
- Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977), n.382
- Von Clark v. Butler, 916 F.2d 255 (5th Cir. 1990), nn.226, 266
- Walker v. United States Department of Housing & Urban Development, 99 F.3d 761 (5th Cir. 1996), nn.215, 297–98
- Warfarin Sodium Antitrust Litigation, *In re*, 212 F.R.D. 231 (D. Del. 2002), n.695
- Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031 (3d Cir. 1996), nn.166, 261
- Washington v. Seattle School District, 458 U.S. 457 (1982), n.110
- Washington Public Power Supply System Securities Litigation, *In re*, 19 F.3d 1291 (9th Cir. 1994), nn.298, 461, 464, 528
- Waters v. International Precious Metals Co., 190 F.3d 1291 (11th Cir. 1999), nn.389, 475, 487, 648
- Webb v. Board of Education, 471 U.S. 234 (1985), n.49

Table of Cases (Alphabetical)

- Webster v. Sowders, 846 F.2d 1032 (6th Cir. 1988), nn.35, 370
- Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991), nn.131, 471
- Wells Fargo Securities Litigation, *In re*, 156 F.R.D. 223 (N.D. Cal. 1994), n.689
- Wenderhold v. Cylink Corp., 189 F.R.D. 570 (N.D. Cal. 1999), n.689
- West Side Women's Service v. Cleveland, 594 F. Supp. 299 (N.D. Ohio 1984), n.55
- West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991), n.139
- Weyant v. Okst, 198 F.3d 311 (2d Cir. 1999), n.18
- Wheatley v. Ford, 679 F.2d 1037 (2d Cir. 1982), n.113
- White v. Auerbach, 500 F.2d 822 (2d Cir. 1974), nn.403–07
- White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), nn.14–15, 352–53
- Whittier v. Emmett, 281 F.2d 24 (D.C. Cir. 1960), n.415
- Wilder v. Bernstein, 965 F.2d 1196 (2d Cir. 1992), nn.80, 83–84, 95
- Wildman v. Lerner Stores, 771 F.2d 605 (1st Cir. 1985), n.165
- Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980), n.35
- Williams v. MGM-Pathe Communications Co., 129 F.3d 1026 (9th Cir. 1997), nn.389, 487
- Williams v. Roberts, 904 F.2d 634 (11th Cir. 1990), n.227
- Wing v. Asarco Inc., 114 F.3d 986 (9th Cir. 1997), n.293
- Winter v. Cerro Gordo County Conservation Board, 925 F.2d 1069 (8th Cir. 1991), n.229
- Winton v. Amos, 255 U.S. 373 (1921), n.415
- Wolfe v. Perry, 412 F.3d 707 (6th Cir. 2005), n.311
- Woodside v. School District of Philadelphia Board of Education, 248 F.3d 129 (3d Cir. 2001), n.87
- Woolridge v. Marlene Industries Corp., 898 F.2d 1169 (6th Cir. 1990), n.208
- Wray v. Clarke, 151 F.3d 807 (8th Cir. 1998), nn.126, 128
- Yaron v. Northampton, 963 F.2d 33 (3d Cir. 1992), n.201
- Zamora v. Local 11, 817 F.2d 566 (9th Cir. 1987), n.570

Table of Cases (by Court)

Supreme Court

- Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), nn.2, 7–8, 428, 562–63, 589
- Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006), n.141
- Astrue v. Ratliff, 130 S. Ct. 2521 (2010), n.97
- Blanchard v. Bergeron, 489 U.S. 87 (1989), nn.108, 146, 443
- Bloomer v. Liberty Mutual Insurance, 445 U.S. 74 (1980), n.442
- Blum v. Stenson, 465 U.S. 886 (1984), nn.155–56, 161, 218, 281, 284–86, 456–57
- Boeing Co. v. Van Gemert, 444 U.S. 472 (1980), nn.388–89, 432–34, 437–38, 478–81, 536, 549
- Bradley v. School Board of Richmond, 416 U.S. 696 (1974), nn.53, 55, 110
- Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001), nn.39–42, 44
- Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988), nn.354–55
- Burlington, City of, v. Dague, 505 U.S. 557 (1992), nn.308, 526, 528
- Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1885), nn.3, 383, 530
- Christiansburg Garment v. EEOC, 434 U.S. 412 (1978), nn.66, 68–71
- Evans v. Jeff D., 475 U.S. 717 (1986), nn.97, 129, 133, 265
- Farrar v. Hobby, 506 U.S. 103 (1992), nn.30–31, 111, 245–46, 248–51, 262, 269
- Fogerty v. Fantasy, 510 U.S. 517 (1994), nn.74, 76–77
- Fox v. Vice, 131 S. Ct. 2205 (2011), nn.71–73
- Gisbrecht v. Barnhart, 535 U.S. 789 (2002), n.145
- Hall v. Cole, 412 U.S. 1 (1973), nn.559–61
- Hanrahan v. Hampton, 446 U.S. 754 (1980), n.22
- Hardt v. Reliance Standard Life Insurance Co., 560 U.S. 242 (2010), nn.19, 62, 64
- Hensley v. Eckerhart, 461 U.S. 424 (1983), nn.10–11, 13, 68, 108, 144–45, 151, 176–77, 209, 222–26, 233–34, 284, 314, 343, 373
- Hewitt v. Helms, 482 U.S. 755 (1987), n.21
- Highmark Inc. v. Allcare Health Management System, Inc., 134 S. Ct. 1744 (2014), n.372
- Hobbs v. McLean, 117 U.S. 567 (1886), nn.448–49
- Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989), nn.104–05, 109
- International Precious Metals Corp. v. Waters, 530 U.S. 1223 (2000), n.482
- Kay v. Ehrler, 499 U.S. 432 (1991), nn.85–86

Kentucky v. Graham, 473 U.S. 159 (1985), n.103
Lefemine v. Wideman, 133 S. Ct. 9 (2012), nn.24, 32
Library of Congress v. Shaw, 478 U.S. 310 (1985), n.294
Maher v. Gagne, 448 U.S. 122 (1980), n.38
Maine v. Thiboutot, 448 U.S. 1 (1980), n.29
Marek v. Chesny, 473 U.S. 1 (1985), nn.270, 364
Martin v. Franklin Capital Corp., 546 U.S. 132 (2005), n.109
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), nn.418, 556–58, 563, 568
Missouri v. Jenkins, 491 U.S. 274 (1989), nn.135–36, 153, 294
New York Gaslight Club v. Carey, 447 U.S. 54 (1980), nn.49, 110
Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), nn.108, 110
North Carolina Department of Transportation v. Crest Street Community Council, Inc., 479 U.S. 6 (1986), n.49
Octane Fitness, LLC v. Icon Health & Fitness, Inc., 134 S. Ct. 1749 (2014), nn.59–61
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986) (*Delaware Valley I*), nn.38, 44–46, 281, 285–87
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987) (*Delaware Valley II*), nn.304–07, 651
Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542 (2010), nn.279–81, 284–86, 288, 309
Pulliam v. Allen, 466 U.S. 522 (1984), n.102
Ray Haluch Gravel Co. v. Central Pension Fund, 134 S. Ct. 773 (2014), nn.356–57
Rhodes v. Stewart, 488 U.S. 1 (1988), n.21
Richlin Security Service Co. v. Chertoff, 553 U.S. 571 (2008), nn.137–38
Riverside, City of, v. Rivera, 477 U.S. 561 (1986), nn.178, 257–58, 268
Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983), nn.19, 64
Rude v. Buchhalter, 286 U.S. 451 (1932), n.416
Sole v. Wyner, 551 U.S. 74 (2007), nn.25–27, 37
Sprague v. Ticonic, 307 U.S. 161 (1939), nn.386–87, 402, 421–23
Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989), nn.20, 54
Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923), n.5
Trustees v. Greenough, 105 U.S. 527 (1881), nn.3, 381–82, 435–36, 532–33, 549
Vaughan v. Atkinson, 369 U.S. 527 (1962), n.5
Venegas v. Mitchell, 495 U.S. 82 (1990), n.146
Washington v. Seattle School District, 458 U.S. 457 (1982), n.110
Webb v. Board of Education, 471 U.S. 234 (1985), n.49
West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991), n.139

Table of Cases (by Court)

White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), nn.14–15, 352–53
Winton v. Amos, 255 U.S. 373 (1921), n.415

Appellate Courts

First Circuit

Ackerly Communications v. Somerville, 901 F.2d 170 (1st Cir. 1990), nn.158, 180, 183
Benitez v. Collazo-Collazo, 888 F.2d 930 (1st Cir. 1989), n.100
Catullo v. Metzner, 834 F.2d 1075 (1st Cir. 1987), nn.419–20
Charves v. Western Union, 711 F.2d 462 (1st Cir. 1983), n.311
Coalition for Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982), n.35
Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F.3d 331 (1st Cir. 1997), nn.149, 233, 374
Dejesus v. Banco Popular de Puerto Rico, 951 F.2d 3 (1st Cir. 1991), nn.160, 315
Domegan v. Ponte, 972 F.2d 401 (1st Cir. 1992), nn.213, 262, 267, 375
Farmington Dowel Products v. Forster Manufacturing Co., 421 F.2d 61 (1st Cir. 1969), n.364
Figueroa-Torres v. Todelo-Davilla, 232 F.3d 270 (1st Cir. 2000), n.228
Foley v. City of Lowell, 948 F.2d 10 (1st Cir. 1991), n.328
Gay Officers Action League v. Puerto Rico, 247 F.3d 288 (1st Cir. 2001), n.268
Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir. 1984), nn.184, 214
Hart v. Bourque, 798 F.2d 519 (1st Cir. 1986), n.187
Joyce v. Town of Dennis, 720 F.3d 12 (1st Cir. 2013), n.235
Kargman v. Sullivan, 589 F.2d 63 (1st Cir. 1978), n.385
Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991), n.193
Lipsett v. Blanco, 975 F.2d 934 (1st Cir. 1992), nn.136, 189, 213, 226, 291, 378
Natural Resources Defense Council v. EPA, 484 F.2d 1331 (1st Cir. 1973), n.6
Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litigation, *In re*, 982 F.2d 603 (1st Cir. 1992), nn.544–45, 549
Schneider v. Colegio de Abogados de Puerto Rico, 187 F.3d 30 (1st Cir. 1999), n.88
Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977), n.201
Thirteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litigation, *In re*, 56 F.3d 295 (1st Cir. 1995), nn.461, 528, 554
Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991), nn.131, 471
Wildman v. Lerner Stores, 771 F.2d 605 (1st Cir. 1985), n.165

Second Circuit

- Agent Orange Product Liability Litigation, *In re*, 818 F.2d 226 (2d Cir. 1987), nn.158, 332, 499, 551
- Bandes v. Harlow & Jones, 852 F.2d 661 (2d Cir. 1988), nn.385, 394–96
- Brown v. General Motors, 722 F.2d 1009 (2d Cir. 1983), n.99
- Carey v. Crescenzi, 923 F.2d 18 (2d Cir. 1991), n.315
- Christensen v. Kiewit-Murdock Investment Corp., 815 F.2d 206 (2d Cir. 1987), n.390
- Clarke v. Frank, 960 F.2d 1146 (2d Cir. 1992), n.182
- Cowan v. Prudential Insurance, 935 F.2d 522 (2d Cir. 1991), nn.259–60
- Crane Co. v. American Standard, 603 F.2d 244 (2d Cir. 1979), n.572
- Cranston v. Hardin, 504 F.2d 566 (2d Cir. 1974), n.424
- Dague v. City of Burlington, 976 F.2d 801 (2d Cir. 1992), n.201
- Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), n.543
- Dominic v. Consolidated Edison Co. of New York, 822 F.2d 1249 (2d Cir. 1987), n.227
- Donovan v. CSEA Local Union 1000, 784 F.2d 98 (2d Cir. 1986), nn.492–93, 564, 567, 607–08
- Fase v. Seafarers Welfare & Pension Plan, 589 F.2d 112 (2d Cir. 1978), nn.427, 429
- Feick v. Fleener, 653 F.2d 69 (2d Cir. 1981), n.402
- Gagne v. Town of Enfield, 734 F.2d 902 (2d Cir. 1984), n.51
- Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000), nn.461, 502
- Grant v. Martinez, 973 F.2d 96 (2d Cir. 1992), nn.207, 235, 294
- Johnson v. New York City Transit Authority, 823 F.2d 33 (2d Cir. 1987), n.325
- Konits v. Valley Stream Central High School District, 350 F. App'x 501 (2d Cir. 2009), n.147
- Kopet v. Esquire Realty, 523 F.2d 1005 (2d Cir. 1975), n.413
- Koppel v. Wien, 743 F.2d 129 (2d Cir. 1984), nn.414, 576
- Lobur v. Parker, 378 F. App'x 63 (2d Cir. 2010), n.409
- Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007), nn.483–86
- McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983), n.214
- McCoy v. United Parcel Service, 222 F. App'x 87 (2d Cir. 2007), n.412
- McDonald v. Pension Plan of NYSA-ILA Pension Trust Fund, 450 F.3d 91 (2d Cir. 2006), n.240
- McGuire v. Russell Miller, Inc., 1 F.3d 1306 (2d Cir. 1993), n.342
- Miele v. New York State Teamsters Conference Pension & Retirement Fund, 831 F.2d 407 (2d Cir. 1987), n.220
- Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981), n.52

Table of Cases (by Court)

Mokhiber *ex rel.* Ford Motor Co. v. Cohn, 783 F.2d 26 (2d Cir. 1986), n.56
Nolte v. Hudson Navigation Co., 47 F.2d 166 (2d Cir. 1931), n.400
Orchano v. Advanced Recovery, Inc., 107 F.3d 94 (2d Cir. 1997), n.147
Peterson v. Continental Casualty Co., 282 F.3d 112 (2d Cir. 2002), n.50
Polk v. New York State Department of Correctional Services, 722 F.2d 23 (2d Cir. 1983), n.158
Pridgen v. Andresen, 113 F.3d 391 (2d Cir. 1997), n.368
Quarantino v. Tiffany & Co., 166 F.3d 422 (2d Cir. 1998), n.147
Rosario v. Amalgamated Ladies Garment Cutters Union, 605 F.2d 1228 (2d Cir. 1979), n.594
SEC v. Price Waterhouse, 41 F.3d 805 (2d Cir. 1994), n.87
Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990), nn.385, 446, 452, 490
Toliver v. County of Sullivan, 957 F.2d 47 (2d Cir. 1992), nn.311, 365
United States v. ASCAP, 466 F.2d 917 (2d Cir. 1972), n.400
United States v. Board of Education of Waterbury, 605 F.2d 573 (2d Cir. 1979), n.81
United States *ex rel.* Evergreen Pipeline Construction Co. v. Merritt Meridian Construction Corp., 95 F.3d 153 (2d Cir. 1996), n.143
Valley Disposal, Inc. v. Central Vermont Solid Waste Management District, 71 F.3d 1053 (2d Cir. 1995), n.124
Weyant v. Okst, 198 F.3d 311 (2d Cir. 1999), n.18
Wheatley v. Ford, 679 F.2d 1037 (2d Cir. 1982), n.113
White v. Auerbach, 500 F.2d 822 (2d Cir. 1974), nn.403–07
Wilder v. Bernstein, 965 F.2d 1196 (2d Cir. 1992), nn.80, 83–84, 95

Third Circuit

Ashley v. Atlantic Richfield, 794 F.2d 128 (3d Cir. 1986), n.122
AT&T Corp., *In re*, 455 F.3d 160 (3d Cir. 2006), n.522
Bell v. United Princeton Properties, 884 F.2d 713 (3d Cir. 1989), nn.337, 375
Black Grievance Committee v. Philadelphia Electric Co., 802 F.2d 648 (3d Cir. 1986), n.220
Blum v. Witco Chemical Corp., 829 F.2d 367 (3d Cir. 1987), n.315
Brennan v. United Steelworkers of America, 554 F.2d 586 (3d Cir. 1977), nn.563–64, 571–72, 589
Cendant Corp. Litigation, *In re*, 264 F.3d 201 (3d Cir. 2001), nn.616, 618, 620, 622–26, 637–40
Cendant Corp. Prides Litigation, *In re*, 243 F.3d 722 (3d Cir. 2001), nn.613, 695
Cunningham v. City of McKeesport, 807 F.2d 49 (3d Cir. 1986), nn.261, 324
Cunningham v. City of McKeesport, 753 F.2d 262 (3d Cir. 1985), nn.154, 337

- Daggett v. Kimmelman, 811 F.2d 793 (3d Cir. 1987), nn.165, 334
- Davis v. Southeastern Pennsylvania Transportation Authority, 924 F.2d 51 (3d Cir. 1991), nn.186, 261
- Diet Drugs Products Liability Litigation, *In re*, 582 F.3d 524 (3d Cir. 2009), n.516
- Diet Drugs Products Liability Litigation, *In re*, 401 F.3d 143 (3d Cir. 2005), n.369
- Eaves v. County of Cape May, 239 F.3d 527 (3d Cir. 2001), n.301
- El Club del Barrio, Inc. v. United Community Corp., 735 F.2d 98 (3d Cir. 1984), nn.116, 122, 125
- Fine Paper Antitrust Litigation, *In re*, 751 F.2d 562 (3d Cir. 1984), nn.333, 447, 470–71, 492, 542, 547
- General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, *In re*, 55 F.3d 768 (3d Cir. 1995), n.528
- Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp., 995 F.2d 414 (3d Cir. 1993), nn.203–04
- Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000), nn.458, 502, 548, 639
- Hahnemann University Hospital v. All Shore, Inc., 514 F.3d 300 (3d Cir. 2008), n.50
- Halderman by Halderman v. Pennhurst State School & Hospital, 49 F.3d 939 (3d Cir. 1995), n.187
- Interfaith Community Organization v. Honeywell International, Inc., 426 F.3d 694 (3d Cir. 2005), n.170
- Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir. 1970), n.578
- Kean v. Stone, 966 F.2d 119 (3d Cir. 1992), n.156
- Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976), nn.211, 385, 455, 531
- Marshall v. United Steelworkers, 666 F.2d 845 (3d Cir. 1981), nn.566, 597
- McDonald v. McCarthy, 966 F.2d 112 (3d Cir. 1992), nn.362, 364, 367
- Northeast Women's Center v. McMonagle, 889 F.2d 466 (3d Cir. 1989), nn.51, 227, 261
- Pawlak v. Greenawalt, 713 F.2d 972 (3d Cir. 1983), nn.583, 597, 607–08
- Pennsylvania v. Flaherty, 983 F.2d 1267 (3d Cir. 1993), n.368
- Planned Parenthood of Central New Jersey v. Attorney General of State of New Jersey, 297 F.3d 253 (3d Cir. 2002), n.17
- Powell v. Pennsylvania Railroad, 267 F.2d 241 (3d Cir. 1959), n.401
- Prandini v. National Tea, 557 F.2d 1015 (3d Cir. 1975), n.132
- Prudential Insurance Co. of America Sales Practices Litigation, *In re*, 148 F.3d 283 (3d Cir. 1998), nn.515, 528
- Race Tires America, Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158 (3d Cir. 2012), n.143

Table of Cases (by Court)

Rite Aid Corp. Securities Litigation, *In re*, 396 F.3d 294 (3d Cir. 2005), nn.458, 515, 521
Rode v. Dellarciprete, 892 F.2d 1177 (3d Cir. 1990), nn.211–12, 230
Staten v. Housing Authority of Pittsburgh, 638 F.2d 599 (3d Cir. 1980), n.119
Student Public Interest Research Group v. AT&T Bell Laboratories, 842 F.2d 1436 (3d Cir. 1988), n.325
Sullivan v. DB Investments, 667 F.3d 273 (3d Cir. 2011), n.458
Synthroid Marketing Litigation, *In re*, 325 F.3d 974 (3d Cir. 2003) (*Synthroid II*), nn.520, 529, 554
Travelers Casualty & Surety Co. v. Insurance Co. of North America, 609 F.3d 143 (3d Cir. 2010), n.301
Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031 (3d Cir. 1996), nn.166, 261
Woodside v. School District of Philadelphia Board of Education, 248 F.3d 129 (3d Cir. 2001), n.87
Yaron v. Northampton, 963 F.2d 33 (3d Cir. 1992), n.201

Fourth Circuit

Abshire v. Walls, 830 F.2d 1277 (4th Cir. 1987), n.227
American Booksellers Association v. Virginia, 802 F.2d 691 (4th Cir. 1986), n.114
Broyles v. Director, 974 F.2d 508 (4th Cir. 1992), nn.183, 338
Bryant Woods Inn, Inc. v. Howard County, 124 F.3d 597 (4th Cir. 1997), n.79
Brzonkala v. Morrison, 272 F.3d 688 (4th Cir. 2001), n.431
Buffington v. Baltimore County, 913 F.2d 113 (4th Cir. 1990), n.160
Country Vintner of North Carolina, LLC v. E. & J. Gallo Winery, Inc., 718 F.3d 249 (4th Cir. 2013), n.143
Daly v. Hill, 790 F.2d 1071 (4th Cir. 1986), n.151
Demier v. Gondles, 676 F.2d 92 (4th Cir. 1982), n.197
Doe v. Board of Education of Baltimore County, 165 F.3d 260 (4th Cir. 1998), n.87
Fair Housing Council of Greater Washington v. Landow, 999 F.2d 92 (4th Cir. 1993), n.194
Grissom v. Mills Corp., 549 F.3d 313 (4th Cir. 2008), n.175
Goodwin v. Metts, 973 F.2d 378 (4th Cir. 1992), n.184
Haywood v. Ball, 634 F.2d 740 (4th Cir. 1980), n.51
Ladnier v. Murray, 769 F.2d 195 (4th Cir. 1985), n.33
McManama v. Lukhard, 616 F.2d 727 (4th Cir. 1980), n.201
MRRM, P.A., *In re*, 404 F.3d 863 (4th Cir. 2005), n.500

Newport News Shipbuilding & Dry Dock Co. v. Holiday, 591 F.3d 219 (4th Cir. 2009), n.174
Plyler v. Evatt, 902 F.2d 273 (4th Cir. 1990), nn.162–63, 239
Rego v. Westvaco, 319 F.3d 140 (4th Cir. 2003), n.50
Robinson v. Equifax Information Services, LLC, 560 F.3d 235 (4th Cir. 2009), n.175
Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169 (4th Cir. 1994), nn.105, 158, 187, 380
Sheppard v. Riverview Nursing Center, Inc., 88 F.3d 1332 (4th Cir. 1996), n.273
Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980), n.34
Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), n.165
Thomason v. Schweiker, 692 F.2d 333 (4th Cir. 1982), n.315
United States v. Tobias, 935 F.2d 666 (4th Cir. 1991), nn.450–51, 453–54

Fifth Circuit

Alberti v. Klevenhagen, 896 F.2d 927, *vacated on other grounds*, 903 F.2d 352 (5th Cir. 1990), nn.188, 215, 290, 296, 310
Alberti v. Klevenhagen, 903 F.2d 352 (5th Cir. 1990), n.292
Alizadeh v. Safeway, 910 F.2d 234 (5th Cir. 1990), nn.281, 311
Berger v. Compaq Computer Corp., 257 F.3d 475 (5th Cir. 2001), nn.614, 634
Cahill, *In re*, 428 F.3d 536 (5th Cir. 2005), n.502
Chemicals Manufacturers Association v. EPA, 885 F.2d 1276 (5th Cir. 1989), n.364
Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972), n.6
Crane v. Texas, 766 F.2d 193 (5th Cir. 1985), n.201
Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980), n.35
Echols v. Parker, 909 F.2d 795 (5th Cir. 1990), n.368
Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center, 765 F.2d 1278 (5th Cir. 1985), n.34
Henson v. Columbus Bank & Trust Co., 651 F.2d 320 (5th Cir. 1981), n.321
High Sulfur Content Gasoline Products Liability Litigation, *In re*, 517 F.3d 220 (5th Cir. 2008), n.545
International Nickel Co. v. Trammel Crow Distribution Corp., 803 F.2d 150 (5th Cir. 1986), n.273
Islamic Center of Mississippi v. Starkville, Mississippi, 876 F.2d 465 (5th Cir. 1989), n.154
Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), nn.150–52, 243, 465
Johnson v. Rodriguez, 260 F.3d 493 (5th Cir. 2001), n.43
Jones v. Central Bank, 161 F.3d 311 (5th Cir. 1998), n.17

Table of Cases (by Court)

Junker v. Cory, 650 F.2d 1349 (5th Cir. 1981), nn.417–18
Keely v. City of Leesville, 897 F.2d 172 (5th Cir. 1990), n.51
King v. McCord, 621 F.2d 205 (5th Cir. 1980), n.322
Leroy v. City of Houston, 906 F.2d 1068 (5th Cir. 1990), n.164
Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319 (5th Cir. 1995), nn.300,
379
McDonald v. Doe, 748 F.2d 1055 (5th Cir. 1984), n.51
McDonald v. Oliver, 525 F.2d 1217 (5th Cir. 1976), n.594
Migis v. Pearle Vision, Inc., 135 F.3d 1041 (5th Cir. 1998), nn.242–44, 266
Morales v. Turman, 820 F.2d 728 (5th Cir. 1987), n.93
Nisby v. Court of Jefferson County, 798 F.2d 134 (5th Cir. 1986), n.152
Quave v. Progress Marine, 918 F.2d 33 (5th Cir. 1990), n.367
Ramsey v. Colonial Life Insurance Co. of America, 12 F.3d 472 (5th Cir. 1994),
nn.358–59
Resolution Trust v. Marshall, 939 F.2d 274 (5th Cir. 1991), n.341
Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981), n.364
Scham v. District Courts Trying Criminal Cases, 148 F.3d 554 (5th Cir. 1998),
n.192
Shimman v. International Union of Operating Engineers, 744 F.2d 1226 (5th
Cir. 1984), nn.573, 591, 595–96
Shipes v. Trinity Industries, 987 F.2d 311 (5th Cir. 1993), nn.283, 287
Shipes v. Trinity Industries, Inc., 883 F.2d 339 (5th Cir. 1989), nn.369–70
Strong v. BellSouth Telecommunications, Inc., 137 F.3d 844 (5th Cir. 1998),
nn.466, 476, 488–89
Union Asset Management Holding A.G. v. Dell, Inc., 669 F.3d 632 (5th Cir.
2012), nn.465–66, 642
Von Clark v. Butler, 916 F.2d 255 (5th Cir. 1990), nn.226, 266
Walker v. United States Department of Housing & Urban Development, 99 F.3d
761 (5th Cir. 1996), nn.215, 297–98

Sixth Circuit

Anderson v. Procter & Gamble, 220 F.3d 449 (6th Cir. 2000), n.50
Associated General Contractors of Ohio, Inc. v. Drabik, 250 F.3d 482 (6th Cir.
2001), n.300
Bailey v. Heckler, 777 F.2d 1167 (6th Cir. 1985), n.315
Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005), n.292
Begley v. Secretary of Health & Human Services, 966 F.2d 196 (6th Cir. 1992),
n.220
Black v. Ryder, 970 F.2d 1461 (6th Cir. 1992), n.590
Bliss v. Holmes, 867 F.2d 256 (6th Cir. 1988), n.579

Boddy, *In re*, 950 F.3d 334 (6th Cir. 1991), n.666
Bowling v. Pfizer, Inc., 102 F.3d 777 (6th Cir. 1996), n.531
Fleming v. Ayers & Associates, 948 F.2d 993 (6th Cir. 1991), nn.236, 325
Glass v. Secretary of Health & Human Services, 822 F.2d 19 (6th Cir. 1987),
n.327
Glover v. Johnson, 934 F.2d 703 (6th Cir. 1991), nn.197, 219
Granada Investments v. DWG Corp., 962 F.2d 1203 (6th Cir. 1992), n.534
Guidry v. International Union of Operating Engineers, 882 F.2d 929 (6th Cir.
1989), n.590
Kelley v. Metropolitan County Board of Education, 773 F.2d 677 (6th Cir. 1985),
nn.154, 362, 364
Louisville Black Police Officers Organization v. City of Louisville, 700 F.2d 268
(6th Cir. 1983), n.183
Morgan v. Union Metal, 757 F.2d 792 (6th Cir. 1985), n.368
Murphy v. International Union of Operating Engineers, 774 F.2d 114 (6th Cir.
1985), n.596
Perotti v. Seiter, 935 F.2d 761 (6th Cir. 1991), n.196
Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188 (6th Cir. 1974), nn.502, 575,
577
Rawlings v. Prudential-Bach Properties, Inc., 9 F.3d 513 (6th Cir. 1993), n.461
Smillie v. Park Chemical Co., 710 F.2d 271 (6th Cir. 1983), n.606
Toth v. UAW, 743 F.2d 398 (6th Cir. 1984), n.599
Webster v. Sowders, 846 F.2d 1032 (6th Cir. 1988), nn.35, 370
Wolfe v. Perry, 412 F.3d 707 (6th Cir. 2005), n.311
Woolridge v. Marlene Industries Corp., 898 F.2d 1169 (6th Cir. 1990), n.208

Seventh Circuit

Anderson v. AB Painting & Sandblasting, Inc., 578 F.3d 542 (7th Cir. 2009),
n.263
Bailey v. Meister Brau, 535 F.2d 982 (7th Cir. 1976), n.584
Barrow v. Falck, 977 F.2d 1100 (7th Cir. 1992), n.157
Bigby v. Chicago, 927 F.2d 1426 (7th Cir. 1991), n.105
Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980), n.192
Cange v. Stotler & Co., 913 F.2d 1204 (7th Cir. 1990), n.262
Chicago, Milwaukee, St. Paul & Pacific Railroad, *In re*, 840 F.2d 1308 (7th Cir.
1988), n.420
Cole v. Wodziak, 169 F.3d 486 (7th Cir. 1999), nn.149, 255, 274
Connolly v. National School Bus Service, Inc., 177 F.3d 593 (7th Cir. 1999),
n.278

Table of Cases (by Court)

Continental Illinois Securities Litigation, *In re*, 962 F.2d 566 (7th Cir. 1992), nn.330, 336, 462, 467, 470–71, 491, 535
Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), n.6
Evans v. City of Evanston, 941 F.2d 473 (7th Cir. 1991), nn.336, 444–45, 490, 681–83
Exchange National Bank of Chicago v. Daniels, 763 F.2d 286 (7th Cir. 1985), n.367
Fleming v. County of Kane, 898 F.2d 553 (7th Cir. 1990), n.301
Florin v. Nationsbank of Georgia, N.A., 34 F.3d 560 (7th Cir. 1994), n.528
Gekas v. Attorney Registration & Disciplinary Commission, 793 F.2d 846 (7th Cir. 1986), n.324
Gusman v. Unisys, 986 F.2d 1146 (7th Cir. 1993), n.159
Hamilton v. Daley, 777 F.2d 1207 (7th Cir. 1985), n.313
Harman v. Lyphomed, 945 F.2d 969 (7th Cir. 1991), n.461
Haroco, Inc. v. American National Bank & Trust Co., 38 F.3d 1429 (7th Cir. 1994), n.143
Holbrook v. Pitt, 748 F.2d 1168 (7th Cir. 1984), n.390
Jaffee v. Redmond, 142 F.3d 409 (7th Cir. 1998), nn.235, 376
Johnson v. Lafayette Fire Fighters Association Local 472, 51 F.3d 726 (7th Cir. 1995), nn.17, 252–53
Leffler v. Meer, 936 F.2d 981 (7th Cir. 1991), n.312
Libby v. Illinois High School Association, 921 F.2d 96 (7th Cir. 1990), n.36
Lightfoot v. Walker, 826 F.2d 516 (7th Cir. 1987), n.214
Lowrance v. Hacker, 966 F.2d 1153 (7th Cir. 1992), nn.98, 101
McCarter v. Retirement Plan for District Managers of American Family Insurance Group, 540 F.3d 649 (7th Cir. 2008), n.368
Mirfasihi v. Fleet Mortgage Corp., 356 F.3d 781 (7th Cir. 2004), n.131
Munson v. Friske, 754 F.2d 683 (7th Cir. 1985), n.311
Murray v. GMAC Mortgage Corp., 434 F.3d 948 (7th Cir. 2006), n.131
Ohio-Sealy Mattress, *In re*, 776 F.2d 646 (7th Cir. 1985), n.330
Overseas Development Disc Corp. v. Sangamo Construction Co., 840 F.2d 1319 (7th Cir. 1988), n.549
Palmer v. Chicago, 806 F.2d 1316 (7th Cir. 1986), n.34
People Who Care v. Rockford Board of Education, 921 F.2d 132 (7th Cir. 1991), nn.56, 370
Pickett v. Sheridan Health Care Center, 664 F.3d 632 (7th Cir. 2011), nn.171–73
Pressley v. Haeger, 977 F.2d 295 (7th Cir. 1992), nn.221, 234
Reynolds v. Beneficial National Bank, 288 F.3d 277 (7th Cir. 2002), nn.411, 469
Samuels v. American Motor Sales Corp., 969 F.2d 573 (7th Cir. 1992), n.101

Skelton v. General Motors Corp., 860 F.2d 250 (7th Cir. 1988), nn.296, 384, 447, 471, 527
Smith v. Great American Restaurants, 969 F.2d 430 (7th Cir. 1992), n.339
Spanish Action Committee of Chicago v. City of Chicago, 811 F.2d 1129 (7th Cir. 1987), nn.236, 241
Spegon v. Catholic Bishop of Chicago, 175 F.3d 544 (7th Cir. 1999), n.181
Spellan v. Board of Education, 59 F.3d 642 (7th Cir. 1995), n.234
Starks v. George Court Co., 937 F.2d 311 (7th Cir. 1991), n.115
Sutton v. Bernard, 504 F.3d 688 (7th Cir. 2007), n.510
Synthroid Marketing Litigation, *In re*, 264 F.3d 712 (7th Cir. 2001) (*Synthroid I*), nn.208, 504–05, 510
Terket v. Lund, 623 F.2d 29 (7th Cir. 1980), n.364
Tomazzoli v. Sheedy, 804 F.2d 93 (7th Cir. 1986), nn.213, 330, 714
Trans Union Corp. Privacy Litigation, *In re*, 629 F.3d 741 (7th Cir. 2011), n.510
Ustrak v. Fairman, 851 F.2d 983 (7th Cir. 1988), nn.183, 201, 232, 377

Eighth Circuit

Bishop v. Committee on Professional Ethics, 686 F.2d 1278 (8th Cir. 1982), n.35
Craik v. Minnesota State University Board, 738 F.2d 348 (8th Cir. 1984), n.165
Elliott v. Sperry Rand Corp., 680 F.2d 1225 (8th Cir. 1982), n.410
Emmanuel v. Omaha Carpenters District Council, 560 F.2d 382 (8th Cir. 1977), n.594
Gates v. Central Teamsters Pension Fund, 788 F.2d 1341 (8th Cir. 1986), n.368
Gilbert v. Little Rock, Arkansas, 867 F.2d 1063 (8th Cir. 1989), n.236
Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982), n.33
Hendrickson v. Branstad, 934 F.2d 158 (8th Cir. 1991), n.282
Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981), n.317
Huey v. Sullivan, 971 F.2d 1362 (8th Cir. 1992), n.23
Independent School District v. Digre, 893 F.2d 987 (8th Cir. 1990), n.208
Jackson v. Crews, 873 F.2d 1105 (8th Cir. 1989), n.235
Jenkins v. Missouri, 967 F.2d 1248 (8th Cir. 1992), nn.106–07
Jenkins v. Missouri, 931 F.2d 1273 (8th Cir. 1991), n.300
Johnson v. HUD, 939 F.2d 586 (8th Cir. 1991), n.585
Johnston v. Comerica Mortgage Co., 83 F.3d 241 (8th Cir. 1996), n.461
Linquist v. Bowen, 839 F.2d 1321 (8th Cir. 1988), nn.431, 588
Macdissi v. Valmont Industries, 856 F.2d 1054 (8th Cir. 1988), n.217
Maristuen v. National States Insurance Co., 57 F.3d 673 (8th Cir. 1995), n.366
Milton v. Des Moines, Iowa, 47 F.3d 944 (8th Cir. 1995), n.256
Parke v. First Reliance Standard Life Insurance Co., 368 F.3d 999 (8th Cir. 2004), n.50

Table of Cases (by Court)

Pinkham v. Camex, Inc., 84 F.3d 292 (8th Cir. 1996), nn.205, 227
Reel v. Arkansas Department of Corrections, 672 F.2d 693 (8th Cir. 1982),
nn.51, 201
Shakopee Mdewakanton Sioux Community v. City of Prior Lake, Minnesota,
771 F.2d 1153 (8th Cir. 1985), n.159
Skokos v. Rhoades, 440 F.3d 957 (8th Cir. 2006), nn.51–52
Standley v. Chilhowee R-IV School District, 5 F.3d 319 (8th Cir. 1993), n.143
Tyler v. Corner Construction Corp., 167 F.3d 1202 (8th Cir. 1999), n.121
Winter v. Cerro Gordo County Conservation Board, 925 F.2d 1069 (8th Cir.
1991), n.229
Wray v. Clarke, 151 F.3d 807 (8th Cir. 1998), nn.126, 128

Ninth Circuit

Ackley v. Western Conference of Teamsters, 958 F.2d 1463 (9th Cir. 1992), n.582
Balla v. Idaho, 677 F.3d 910 (9th Cir. 2012), n.47
Barlow-Gresham Union High School v. Mitchell, 940 F.2d 1280 (9th Cir. 1991),
n.112
Benda v. Grand Lodge, 584 F.2d 308 (9th Cir. 1978), n.580
Bennett v. Yoshina, 259 F.3d 1097 (9th Cir. 2001), n.43
Bise v. International Brotherhood of Electrical Workers, 618 F.2d 1299 (9th Cir.
1979), n.594
Bluetooth Headset Products Liability Litigation, *In re*, 654 F.3d 935 (9th Cir.
2011), nn.130–31, 469
B.P. North American Trading, Inc. v. Vessel Panamax Nova, 784 F.2d 975 (9th
Cir. 1986), n.399
Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974), n.6
Burroughs v. Board of Trustees, 542 F.2d 1128 (9th Cir. 1976), n.587
Cabrales v. County of Los Angeles, 935 F.2d 1050 (9th Cir. 1991), nn.200, 237
Cann v. Carpenters' Pension Trust Fund for Northern California, 989 F.2d 313
(9th Cir. 1993), nn.50, 308
Cantwell v. San Mateo, 631 F.2d 631 (9th Cir. 1980), nn.587, 602
Cavanaugh, *In re*, 306 F.3d 726 (9th Cir. 2002), nn.617, 629–30, 632–36
Church of Scientology v. United States Postal Service, 700 F.2d 486 (9th Cir.
1983), nn.319–20
Clark v. City of Los Angeles, 803 F.2d 987 (9th Cir. 1986), n.238
Coalition for Clean Air v. Southern California Edison, 971 F.2d 219 (9th Cir.
1992), n.376
Corder v. Brown, 25 F.3d 833 (9th Cir. 1994), n.302
Cunningham v. Los Angeles, 859 F.2d 705 (9th Cir. 1988), n.275
Curran v. Department of Treasury, 805 F.2d 1406 (9th Cir. 1986), n.156

Davis v. Mason County, 927 F.2d 1473 (9th Cir. 1991), nn.142, 158
Davis v. San Francisco, 976 F.2d 1536 (9th Cir. 1992), nn.142, 159, 165, 198
Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980), n.208
Dexter v. Kirschner, 984 F.2d 979 (9th Cir. 1992), n.33
Donovan v. Local Union 70, 661 F.2d 1199 (9th Cir. 1981), n.566
Eastwood v. National Enquirer, 123 F.3d 1249 (9th Cir. 1997), n.17
Edwards v. Heckler, 789 F.2d 659 (9th Cir. 1985), n.587
Fischel v. Equitable Life Assurance Society of United States, 307 F.3d 997 (9th Cir. 2002), n.523
Florida v. Dunne, 915 F.2d 542 (9th Cir. 1990), nn.463–64, 524–25
Ford v. Long Beach Unified School District, 461 F.3d 1087 (9th Cir. 2006), n.87
Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545 (9th Cir. 1989), nn.216, 325
Friend v. Kolodziejczak, 72 F.3d 1386 (9th Cir. 1995), n.300
Gates v. Deukmejian, 987 F.2d 1392 (9th Cir. 1992), nn.158, 294, 332, 335
Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217 (9th Cir. 1987), n.187
Grove v. Mead School District, 753 F.2d 1528 (9th Cir. 1985), n.80
Guadamuz v. Bowen, 859 F.2d 762 (9th Cir. 1988), n.315
Guam Society of Obstetricians & Gynecologists v. Ada, 100 F.3d 691 (9th Cir. 1996), n.292
Hatrock v. Jones & Co., 750 F.2d 767 (9th Cir. 1984), n.340
Herrington v. County of Sonoma, 883 F.2d 739 (9th Cir. 1989), n.235
Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1991), n.52
Hill, *In re*, 775 F.2d 1037 (9th Cir. 1985), nn.431, 588
Home Savings Bank v. Gillam, 952 F.2d 1152 (9th Cir. 1991), n.585
Kerr v. Screen Extras Guild, 526 F.2d 67 (9th Cir. 1975), n.152
Kinney v. International Brotherhood of Electrical Workers, 939 F.2d 690 (9th Cir. 1991), nn.492–93, 605, 607–08
Klawock, *City of*, v. Gustafson, 585 F.2d 428 (9th Cir. 1978), nn.422, 425–26
Laguna v. Coverall North America, Inc., 753 F.3d 918 (9th Cir. 2014), n.134
Lewis v. Anderson, 692 F.2d 1267 (9th Cir. 1982), nn.577–78
Maier Brewing Co. v. Fleischmann Distilling Corp., 359 F.2d 156 (9th Cir. 1966), n.423
Maldonado v. Lehman, 811 F.2d 1341 (9th Cir. 1987), n.159
Mancini v. Dan P. Plute, Inc., 358 F. App'x 886 (9th Cir. 2009), n.174
Mateyko v. Felix, 924 F.2d 824 (9th Cir. 1990), n.51
McQuiston v. Marsh, 707 F.2d 1082 (9th Cir. 1983), n.420
Mendez v. County of San Bernardino, 540 F.3d 1109 (9th Cir. 2008), n.195
Miller v. Los Angeles, 827 F.2d 617 (9th Cir. 1987), n.311

Table of Cases (by Court)

Miller-Wohl Co. v. Commissioner of Labor & Industry, State of Montana, 694 F.2d 203 (9th Cir. 1982), n.94
Moore v. Matthews, 682 F.2d 830 (9th Cir. 1982), n.160
Morales v. City of San Rafael, 96 F.3d 359 (9th Cir. 1996), nn.147, 152, 254
Muckleshoot Tribe v. Puget Sound Power & Light Co., 875 F.2d 695 (9th Cir. 1989), nn.123, 125
Northern Plains Resource Council v. EPA, 670 F.2d 847 (9th Cir. 1982), n.362
Oldfield v. Athletic Congress, 779 F.2d 505 (9th Cir. 1985), n.583
Paul, Johnson, Alston & Hunt v. Gaulty, 886 F.2d 268 (9th Cir. 1989), n.463
Powers v. Eichen, 229 F.3d 1249 (9th Cir. 2000), nn.548, 644
Prison Legal News v. Schwarzenegger, 608 F.3d 446 (9th Cir. 2010), n.175
Reiser v. Del Monte Properties, 605 F.2d 1135 (9th Cir. 1979), nn.414, 584
Rickley v. County of Los Angeles, 654 F.3d 950 (9th Cir. 2011), n.89
Rodriguez v. Disner, 688 F.3d 645 (9th Cir. 2012), n.408
Rosenfeld v. United States, 859 F.2d 717 (9th Cir. 1988), n.370
Schultz v. Hembree, 975 F.2d 572 (9th Cir. 1992), nn.232, 376
Sederquist v. Court, 861 F.2d 554 (9th Cir. 1988), nn.600–01
Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990), nn.464, 552
Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (9th Cir. 1981), n.430
Southerland v. International Longshoremen’s Union, 845 F.2d 796 (9th Cir. 1987), nn.563, 569, 604
Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982), n.202
Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003), n.134
United States v. Imperial Irrigation District, 595 F.2d 525 (9th Cir. 1979), n.586
United States *ex rel.* Virani v. Jerry M. Lewis Truck Parts & Equipment, Inc., 89 F.3d 574 (9th Cir. 1996), n.97
United Steelworkers v. Phelps Dodge, 896 F.2d 403 (9th Cir. 1990), n.324
Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977), n.382
Washington Public Power Supply System Securities Litigation, *In re*, 19 F.3d 1291 (9th Cir. 1994), nn.298, 461, 464, 528
Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980), n.35
Williams v. MGM-Pathé Communications Co., 129 F.3d 1026 (9th Cir. 1997), nn.389, 487
Wing v. Asarco Inc., 114 F.3d 986 (9th Cir. 1997), n.293
Zamora v. Local 11, 817 F.2d 566 (9th Cir. 1987), n.570

Tenth Circuit

- Aguinaga v. United Food & Commercial Workers International Union, 993 F.2d 1480 (10th Cir. 1993), n.593
- American Council of the Blind v. Romer, 962 F.2d 1501 (10th Cir. 1992), n.118
- Art Janpol Volkswagen v. Fiat Motors of North America, 767 F.2d 690 (10th Cir. 1985), n.367
- Brown v. Phillips Petroleum, 838 F.2d 451 (10th Cir. 1988), nn.461, 500, 548, 552
- Case v. Unified School District No. 233, 157 F.3d 1243 (10th Cir. 1998), nn.167, 191, 206, 325
- Center for Biological Diversity v. Norton, 262 F.3d 1077 (10th Cir. 2001), n.65
- Cooper v. Utah, 894 F.2d 1169 (10th Cir. 1990), nn.112, 276–77
- Dahlem v. Board of Education, 901 F.2d 1508 (10th Cir. 1990), nn.35, 120
- Ellis v. University of Kansas Medical Center, 163 F.3d 1186 (10th Cir. 1999), nn.125, 127
- Griffin v. Steeltek, Inc., 261 F.3d 1026 (10th Cir. 2001), n.43
- Homeward Bound, Inc. v. Hissom Memorial Hospital, 963 F.2d 1352 (10th Cir. 1992), n.376
- Iqbal v. Golf Course Superintendents, 900 F.2d 227 (10th Cir. 1990), n.201
- Jane L. v. Bangerter, 61 F.3d 1505 (10th Cir. 1995), n.235
- Jordan v. Heckler, 744 F.2d 1397 (10th Cir. 1984), nn.431, 588
- Lucero v. Trinidad, 815 F.2d 1384 (10th Cir. 1987), nn.218, 220
- Mallinson Montague v. Pocrnick, 224 F.3d 1224 (10th Cir. 2000), n.714
- Mares v. Credit Bureau of Raton, 801 F.2d 1197 (10th Cir. 1986), n.329
- MidAmerica Federal Savings & Loan v. Shearson/American, 962 F.2d 1470 (10th Cir. 1992), nn.301, 340
- Phelps v. Washburn University of Topeka, 807 F.2d 153 (10th Cir. 1986), n.368
- Plott v. Griffiths, 938 F.2d 164 (10th Cir. 1991), n.52
- Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983), nn.160, 206, 214
- Robinson v. City of Edmond, 160 F.3d 1275 (10th Cir. 1998), nn.227, 315
- Rosenbaum v. MacAllister, 64 F.3d 1439 (10th Cir. 1995), n.604
- Roth v. Green, 466 F.3d 1179 (10th Cir. 2006), n.311
- Smith v. Freeman, 921 F.2d 1120 (10th Cir. 1990), nn.183, 196, 299
- Useton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849 (10th Cir. 1993), n.408
- Utah Women's Clinic v. Leavitt, 75 F.3d 564 (10th Cir. 1995), nn.360–61

Table of Cases (by Court)

Eleventh Circuit

ACLU of Georgia v. Barnes, 168 F.3d 423 (11th Cir. 1999), nn.158, 380
Andrews v. Employees' Retirement Plan, 938 F.2d 1245 (11th Cir. 1991), n.368
Andrews v. United States, 122 F.3d 1367 (11th Cir. 1997), nn.236, 264
BankAtlantic Inc. v. Blythe Eastman Paine Webber, 12 F.3d 1045 (11th Cir. 1994), n.300
Camden I Condominium Association v. Dunkle, 946 F.2d 768 (11th Cir. 1991), nn.460, 501, 546
Columbus Mills v. Freeland, 918 F.2d 1575 (11th Cir. 1990), n.219
Crowder v. Housing Authority of Atlanta, 908 F.2d 843 (11th Cir. 1990), n.117
Cullens v. Georgia Department of Transportation, 29 F.3d 1489 (11th Cir. 1994), nn.147, 264–65
Doe v. Busbee, 684 F.2d 1375 (11th Cir. 1982), n.34
Dowdell v. Apopka, Florida, 698 F.2d 1181 (11th Cir. 1983), nn.196, 199
Durrett v. Jenkins Brickyard, 678 F.2d 911 (11th Cir. 1982), n.311
Erkins v. Bryan, 785 F.2d 1538 (11th Cir. 1986), nn.574, 595
Finch v. City of Vernon, 877 F.2d 1497 (11th Cir. 1989), nn.51, 201
Fort v. Roadway Express, 746 F.2d 744 (11th Cir. 1984), n.368
Gray *ex rel.* Alexander v. Bostic, 613 F.3d 1035 (11th Cir. 2010), n.298
Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988), n.216
Kahane v. UNUM Life Insurance Co. of America, 563 F.3d 1210 (11th Cir. 2009), n.50
Kraeger v. Solomon & Flanagan, P.A., 775 F.2d 1541 (11th Cir. 1985), nn.152, 311
Lattimore v. Oman Construction, 868 F.2d 437 (11th Cir. 1989), nn.296, 364
Loggerhead Turtle v. County Council, 307 F.3d 1318 (11th Cir. 2002), n.65
Markham v. International Association of Bridge, Structural & Ornamental Iron Workers, 901 F.2d 1022 (11th Cir. 1990), nn.580–81
Murphy v. Reliance Standard Life Insurance Co., 247 F.3d 1313 (11th Cir. 2001), n.308
NAACP v. City of Evergreen, 812 F.2d 1332 (11th Cir. 1987), n.220
Norman v. Housing Authority of Montgomery, 836 F.2d 1292 (11th Cir. 1988), nn.202, 210, 219–20, 226, 295, 315, 323, 325–26
Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985), n.56
Ray v. U.S. Department of Justice, 87 F.3d 1250 (11th Cir. 1996), n.87
Taylor v. Fort Lauderdale, 810 F.2d 1551 (11th Cir. 1987), n.35
Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc., 253 F.3d 1332 (11th Cir. 2001), n.17
Villano v. City of Boynton Beach, 254 F.3d 1302 (11th Cir. 2001), n.233

Waters v. International Precious Metals Co., 190 F.3d 1291 (11th Cir. 1999), nn.389, 475, 487, 648
Williams v. Roberts, 904 F.2d 634 (11th Cir. 1990), n.227

District of Columbia Circuit

Abbott, Puller & Myers v. Peyser, 124 F.2d 524 (D.C. Cir. 1941), n.398
American Association of Marriage v. Brown, 593 F.2d 1365 (D.C. Cir. 1979), n.592
American Federation of Government Employees v. FLRA, 944 F.2d 922 (D.C. Cir. 1991), n.156
Bebchick v. Washington Metropolitan Area Transit Commission, 805 F.2d 396 (D.C. Cir. 1986), n.527
Blazy v. Tenet, 194 F.3d 90 (D.C. Cir. 1999), n.90
Burka v. United States Department of Health & Human Services, 142 F.3d 1286 (D.C. Cir. 1998), nn.87, 91
Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980), nn.176–77, 331, 540, 543
Covington v. District of Columbia, 57 F.3d 1101 (D.C. Cir. 1995), nn.168, 656
Davis v. U.S. Department of Justice, 610 F.3d 750 (D.C. Cir. 2010), n.48
Davis County Solid Waste Management v. EPA, 169 F.3d 755 (D.C. Cir. 1999), n.158
Donnell v. United States, 682 F.2d 240 (D.C. Cir. 1982), n.82
Donovan, *In re*, 877 F.2d 982 (D.C. Cir. 1989), n.213
Elmore v. Shuler, 787 F.2d 601 (D.C. Cir. 1986), n.126
Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675 (D.C. Cir. 1996), n.368
Goos v. National Association of Realtors, 68 F.3d 1380 (D.C. Cir. 1995), n.235
Grace v. Burger, 763 F.2d 457 (D.C. Cir. 1985), nn.431, 588
Grano v. Barry, 783 F.2d 1104 (D.C. Cir. 1986), n.35
Hyman Construction Co. v. Brooks, 963 F.2d 1532 (D.C. Cir. 1992), n.231
Kooritzky v. Herman, 178 F.3d 1315 (D.C. Cir. 1999), n.90
Lafferty v. Humphrey, 248 F.2d 82 (D.C. Cir. 1957), n.401
Lawrence v. Bowsher, 931 F.2d 1579 (D.C. Cir. 1991), n.113
Meese, *In re*, 907 F.2d 1192 (D.C. Cir. 1990), n.165
Miller v. Staats, 706 F.2d 336 (D.C. Cir. 1983), n.80
Montgomery & Associates, Inc. v. Commodity Futures Trading Commission, 816 F.2d 783 (D.C. Cir. 1987), n.363
National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982), nn.315, 318
National Treasury Employees Union v. Nixon, 521 F.2d 317 (D.C. Cir. 1975), n.391
New Jersey v. EPA, 703 F.3d 110 (D.C. Cir. 2012), n.165

Table of Cases (by Court)

Olson, *In re*, 884 F.2d 1415 (D.C. Cir. 1989), nn.185, 190, 214
Petties v. District of Columbia, 227 F.3d 469 (D.C. Cir. 2000), n.371
Puerto Rico v. Heckler, 745 F.2d 709 (D.C. Cir. 1984), n.431
Role Models AM, Inc. v. Brownlee, 353 F.3d 962 (D.C. Cir. 2004), n.714
Save Our Cumberland Mountains v. Hodel, 857 F.2d 1516 (D.C. Cir. 1988),
nn.157, 168
Schleit v. British Overseas Airways Corp., 410 F.2d 261 (D.C. Cir. 1969), n.424
Schneider v. Lockheed Aircraft Corp., 658 F.2d 835 (D.C. Cir. 1981), n.92
Sierra Club v. EPA, 322 F.3d 718 (D.C. Cir. 2003), n.65
Swedish Hospital Corp. v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993), n.460
Thomas v. National Football League Players Association, 273 F.3d 1124 (D.C.
Cir. 2001), n.262
Usery v. Local Union No. 639, International Brotherhood of Teamsters, 543 F.2d
369 (D.C. Cir. 1976), nn.563–64, 603
Whittier v. Emmett, 281 F.2d 24 (D.C. Cir. 1960), n.415

Federal Circuit

Mathis v. Spears, 857 F.2d 749 (Fed. Cir. 1988), n.300
Orenshteyn v. Citrix Systems, Inc., 691 F.3d 1356 (Fed. Cir. 2012), n.368
Raney v. Federal Bureau of Prisons, 222 F.3d 927 (Fed. Cir. 2000), n.156

Bankruptcy Courts

Chin, *In re*, 31 B.R. 314 (Bankr. S.D.N.Y. 1984), n.56
Hepburn, *In re*, 84 B.R. 855 (Bankr. S.D. Fla. 1988), n.56

District Courts

Arkansas

Hollowell v. Gravett, 723 F. Supp. 107 (E.D. Ark. 1989), n.289

California

California Micro Devices Securities Litigation, *In re*, 168 F.R.D. 257 (N.D. Cal.
1996), n.689
Commtouch Software Ltd. Securities Litigation, *In re*, No. 01-C-00719 (N.D.
Cal. June 27, 2001), n.637
Freitag v. California Department of Corrections, No. C00-2275, 2012 WL
5389839 (N.D. Cal. Nov. 5, 2012), nn.747–48
Gemstar-TV Guide International, Inc. Securities Litigation, *In re*, 209 F.R.D. 447
(C.D. Cal. 2002), n.641

Oracle Securities Litigation, *In re*, 131 F.R.D. 688 (N.D. Cal. 1990), nn.615, 685, 687
Oracle Securities Litigation, *In re*, 132 F.R.D. 538 (N.D. Cal. 1990), nn.615, 685, 688
Quintus Securities Litigation, *In re*, 201 F.R.D. 475 (N.D. Cal. 2001), nn.631, 689
Wells Fargo Securities Litigation, *In re*, 156 F.R.D. 223 (N.D. Cal. 1994), n.689
Wenderhold v. Cylink Corp., 189 F.R.D. 570 (N.D. Cal. 1999), n.689

Delaware

Warfarin Sodium Antitrust Litigation, *In re*, 212 F.R.D. 231 (D. Del. 2002), n.695

District of Columbia

Act Now to Stop War and End Racism Coal. v. District of Columbia, 286 F.R.D. 145 (D.D.C. 2012), n.169
Laffey v. Northwest Airlines, 572 F. Supp. 354 (D.D.C. 1983), nn.168, 174–75, 654–55, 657–58, 739
McKenzie v. Kennickell, 669 F. Supp. 529 (D.D.C. 1987), n.55
Roots v. District of Columbia, 802 F. Supp. 2d 56 (D.D.C. 2011), n.657
Salazar v. District of Columbia, 123 F. Supp. 8 (D.D.C. 2000), n.169
Sykes v. District of Columbia, 870 F. Supp. 2d 86 (D.D.C. 2012), nn.657–58

Hawaii

Feher v. Department of Labor & Industrial Relations, 561 F. Supp. 757 (D. Haw. 1983), n.57

Illinois

Amino Acid Lysine Antitrust Litigation, *In re*, 918 F. Supp. 1190 (N.D. Ill. 1996), n.691
AT&T Mobility Wireless Data Services Sales Tax Litigation, *In re*, 792 F. Supp. 2d 1028 (N.D. Ill. 2011), n.512
Continental Illinois Securities Litigation, *In re*, 572 F. Supp. 931 (N.D. Ill. 1983), nn.705–06, 733–34
Duran v. Town of Cicero, No. 01-C-6858, 2012 WL 1279903 (N.D. Ill. Apr. 16, 2012), nn.709–11, 713–14
Pavlik v. FDIC, No. 10C816, 2011 WL 5184445 (N.D. Ill. Nov. 1, 2011), n.513

Table of Cases (by Court)

Indiana

Heekin v. Anthem, Inc., No. 1:05-cv-01908, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012), n.514

Louisiana

Braud v. Transport Service Co. of Illinois, No. 05-1898c/w05-1977, 2010 U.S. Dist. LEXIS 93433 (E.D. La. Aug. 17, 2010), n.508
Educational Testing Service Praxis Principles of Learning & Teaching: Grades 7–12 Litigation, *In re*, 447 F. Supp. 2d 612 (E.D. La. 2006), n.508
Howard v. Phelps, 443 F. Supp. 374 (E.D. La. 1978), n.57
Turner v. Murphy Oil USA, Inc., 472 F. Supp. 2d 830 (E.D. La. 2007), nn.507, 514

Maine

Nensel v. Peoples Heritage Financial Group, Inc., 815 F. Supp. 26 (D. Me. 1993), n.528
Nilsen v. York County, 400 F. Supp. 266 (D. Me. 2005), n.503
Sylvester v. Cigna Corp., 369 F. Supp. 2d 34 (D. Me. 2005), n.475

Massachusetts

Relafin Antitrust Litigation, *In re*, 231 F.R.D. 52 (D. Mass. 2005), n.508
TJX Cos. Retail Security Breach Litigation, *In re*, 584 F. Supp. 2d 395 (D. Mass. 2008), n.486

Minnesota

United Health Group, Inc. PSLRA Litigation, *In re*, 643 F. Supp. 2d 1094 (D. Minn. 2009), n.649

New Hampshire

Cabletron Systems, Inc. Securities Litigation, *In re*, 239 F.R.D. 30 (D.N.H. 2006), n.514

New Jersey

Cendant Corp. Litigation, *In re*, 182 F.R.D. 144 (D.N.J. 1998), n.619
Fidelity Bancorporation Securities Litigation, *In re*, 750 F. Supp. 160 (D.N.J. 1990), n.520
Lucent Technologies, Inc., Securities Litigation, *In re*, 194 F.R.D. 137 (D.N.J. 2000), n.628

New York

- Agent Orange Product Liability Litigation, *In re*, 611 F. Supp. 1296 (E.D.N.Y. 1985), n.499
- Ashanti Goldfields Securities Litigation, *In re*, No. CV-00-717, 2005 WL 3050284 (E.D.N.Y. Nov. 15, 2005), n.649
- Auction Houses Antitrust Litigation, *In re*, 197 F.R.D. 71 (S.D.N.Y. 2000), n.691
- Bolar Pharmaceuticals v. Gackenbach, 800 F. Supp. 1091 (E.D.N.Y. 1992), n.528
- Global Crossing Securities & ERISA Litigation, *In re*, 225 F.R.D. 436 (S.D.N.Y. 2004), n.649
- Paris v. Metropolitan Life Insurance, 94 F. Supp. 792 (S.D.N.Y. 1947), n.415
- Parker v. Time Warner Entertainment Co., L.P., 631 F. Supp. 2d 242 (E.D.N.Y. 2009), n.486
- Pfizer Inc. Securities Litigation, *In re*, 233 F.R.D. 334 (S.D.N.Y. 2005), n.641
- Razorfish Inc. Securities Litigation, *In re*, 143 F. Supp. 2d 304 (S.D.N.Y. 2001), n.641
- Russell v. Board of Plumbing Examiners, 74 F. Supp. 2d 349 (S.D.N.Y. 1999), n.96

Ohio

- Lonardo v. Travelers Indemnity Co., 706 F. Supp. 2d 766 (N.D. Ohio 2010), nn.645, 649
- Nicodemus v. Chrysler Corp., 445 F. Supp. 559 (N.D. Ohio 1977), n.57
- West Side Women's Service v. Cleveland, 594 F. Supp. 299 (N.D. Ohio 1984), n.55

Pennsylvania

- Avandia Marketing, Sales Practices & Products Liability Litigation, *In re*, No. 07-md-01871, 2012 WL 6923367 (E.D. Pa. Oct. 19, 2012), nn.477, 516, 669
- Diet Drugs Products Liability Litigation, *In re*, 553 F. Supp. 2d 442 (E.D. Pa. 2008), nn.516–18
- Dorfman v. First Boston Corp., 70 F.R.D. 366 (E.D. Pa. 1976), n.400

Puerto Rico

- Puerto Rican Cabotage Antitrust Litigation, *In re*, 815 F. Supp. 2d 448 (D.P.R. 2011), n.508

Table of Cases (by Court)

Texas

Heartland Payment Systems, Inc. Customer Data Security Breach Litigation, *In re*, 851 F. Supp. 2d 1040 (S.D. Tex. 2012), nn.496, 498, 506–07, 670, 678

Virginia

Oster v. Bowen, 682 F. Supp. 853 (E.D. Va. 1988), n.585

West Virginia

Kay Co. v. Equitable Production Co., 749 F. Supp. 2d 455 (S.D. W. Va. 2010), n.508

Loudermilk Services, Inc. v. Marathon Petroleum Co., 623 F. Supp. 2d 713 (S.D. W. Va. 2009), n.509

Wisconsin

Lawnmower Engine Horsepower Marketing & Sales Practices Litigation, *In re*, 733 F. Supp. 2d 997 (E.D. Wis. 2010), nn.507, 511

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