

Shining a Brighter Light On the “Lodestar”

BY LAZAR EMANUEL

Courts are often confronted with the challenge of determining a reasonable fee for lawyers involved in litigation. In interpreting what has become known as the “Lodestar” method, which would appear on its face to be a simple two-step process, they have applied several different theories and measurements.

In an effort to inject some order into these calculations, the U.S. Court of appeals for the Second Circuit recently decided the appeal in *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*. (Docket no. 06-0086 (April 14, 2007), amended July 12, 2007). The Court included Supreme Court Justice Sandra Day O’Connor (retired), sitting by designation. The Court’s opinion was written by Chief Justice John M. Walker, Jr.

The case involved a complaint against Albany County and the County’s Board of Elections alleging a violation of the Voting rights act of 1965. The district court found for the County on the merits, but the Court of appeals reversed and ordered the County to comply with the act by scheduling a special election (*Arbor Hill I*).

The Voting rights act enables a successful plaintiff to recover its counsel fees from the defendant (42 USC § 1973). Plaintiff moved for counsel fees and the Court of appeals remanded the matter to the district court for determination of the appropriate fee (*Arbor Hill II*).

Complicating the district court’s determination was the fact that plaintiffs had retained as one of its counsel the NYC firm of Gibson, Dunn and Crutcher, which asserted the right to recover a fee based on its own hourly rates and not the rates prevailing in the Albany market. The district court nevertheless applied the “local forum” rate, leading Gibson to argue that the firm had been required by the court “to show extraordinary circumstances” before it would agree to apply an hourly rate greater than the rate of the local forum.

During the course of the *Arbor Hill* matter, three separate firms had supplied legal services to the plaintiff: a local Albany law firm, the lawyers for a non-profit Lawyer’s Committee for Civil rights in Washington, and Gibson Dunn. As the Court stated, Gibson Dunn was chosen “because of the firm’s practice before the Second Circuit and the firm’s ‘muscle,’ specifically, its ability to prepare quickly the appeal on an abbreviated briefing schedule.”

Defining “Lodestar”

Ostensibly, “Lodestar” is a simple formula for computing a reasonable legal fee, i.e., hours of service multiplied by the lawyer’s hourly rate. Occasionally, there is a contest about the hours-worked element, but disputes generally revolve more around the applicable hourly rate. In *Arbor Hill*, Gibson argued that the district court had been “unnecessarily strict” when it applied the “forum rule.” The Court of appeals agreed that the district court had been too strict:

We agree that the district court may have applied the forum rule in too unyielding a fashion. We therefore clarify its proper application in this circuit: While the district court should generally use the prevailing hourly rate in the district where it sits to calculate what has been called the “Lodestar” – what we think is more aptly termed the “presumptively reasonable fee” – the district court may adjust this base hourly rate to account for a plaintiff’s reasonable decision to retain out-of-district counsel, just as it may adjust the base hourly rate to account for other case-specific variables.

Nevertheless, the Court found no error in the fee awarded to Gibson. It pointed out that other interests than money can be used by a client to influence a law firm to accept a case.

We are confident that a reasonable, paying client would have known that law firms undertaking representation such as that of plaintiff often obtain considerable non-monetary returns — in experience, reputation, or achievement of the attorneys’ own interests and agendas — and would have insisted on paying his attorneys at a rate no higher than that charged by Albany attorneys.

Moreover, the Court said, it was inclined to extend “considerable deference” to the district court’s assessment. “The district court is in closer proximity to and has greater experience with the relevant community whose prevailing market rate is determinative.”

Standards for District Courts

In his opinion, Chief Judge Walker reviewed the various standards which have been used by the federal courts to determine a lawyer’s fee. Calling the many variations “but a symptom of a more serious illness,” and asserting, “our fee-setting jurisprudence has become needlessly confused,” and “...untethered from the free market it is meant to approximate,” he urged the district courts to consider what a reasonable client would be willing to pay, ... not arbitrarily to apply the out-of-district hourly rate. In cases under the Voting act, for example, the client, knowing that its fees may be paid by the other side, has little incentive to negotiate a rate structure before the litigation. The district court must therefore bear the burden of “stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary...”

Bearing these factors in mind, the district court should consider:

- The complexity and difficulty of the case;
- The expertise and capacity of client’s other counsel, if any;
- The resources required to prosecute the case effectively;
- The resources available to the other side (without acknowledging scorched-earth tactics);
- The case’s time demands;
- Whether the lawyer has an interest in the case separate from the client’s;
- Whether the lawyer initially acted pro bono;
- Whether the lawyer expects other “returns” or benefits (e.g., enhanced reputation) from the matter.

A Brief History

In adopting the Voting rights act, Congress (see, Senate report), "implicitly endorsed two existing methods of calculating the 'reasonable fee' that were developed in the 1970s by the circuit courts." In 1973, the Third Circuit announced its support of the Lodestar method. *See, Lindy Bros. Builder, Inc. v. Am. Radiator & Standard Sanitary 2 Corp.*, 487 F.2d 161 (3d Cir. 1973).

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate... (*Hensley v. Eckerhart*, 461 U.S. 424, 429-30 & n.3 (1983)).

As utilized by a succession of decisions, the Lodestar method involved two steps: (1) the Lodestar calculation; and (2) adjustment of the Lodestar based on case-specific considerations.

In the meantime. The Fifth Circuit was adopting another standard, which involved a single-step test with many ingredients. *See, Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), abrogated on other grounds by *Blanchard v. Bergeron*, 489 U.S. 87 (1989). This standard, referred to by Judge Walker as "the Johnson method," required the district courts to consider 12 different factors:

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

Under *Johnson*, the lawyer's customary hourly rate is only one of twelve relevant factors and would seem to have only proportionate value relative to the other factors.

The tension between Lodestar and the Johnson method was never resolved. "In theory... a district court that adopted the Lodestar method was expected to consider fewer variables than a district court utilizing the Johnson method. In practice, however, both considered substantially the same set of variables [,] just at a different point in the fee-calculation process."

The confusion was compounded by a series of decisions by the Supreme Court. Although the Court adopted Lodestar in principle, (*Hensley, supra; Blum v. Stenson*, 465 U.S.886 (1984)); it also encouraged use of the Johnson factors:

[Instead of] using the attorney's own billing rate to calculate the lodestar and then examining the lodestar in light of case specific variables to ensure that it was in fact a reasonable fee, as the Third Circuit had suggested, the Supreme Court instructed district courts to use a reasonable hourly rate – which it directed that district courts set in light of the Johnson factors - in calculating what it continued to refer to as the lodestar.

In effect, Judge Walker concluded, the Court had “shifted district courts’ focus from the reasonableness of the lodestar to the reasonableness of the hourly rate used in calculating the lodestar, which in turn became the de facto reasonable fee.”

The result of the Supreme Court’s intervention was that the Circuit Courts “struggled with the nettlesome interplay between the lodestar method and the Johnson method.” Judge Walker compared several cases to show how the two methods had become interlocked and interdependent. [See, *Rutherford v. Harris County, Tex.*, 197 F.3d 173, 192 (5th Cir. 1999); *Murray v. Weinberger*, 741 F.2d 1423, 1430 (D.C. Cir. 1984); *Bebchick v. Wash. Area Metro. Transit Comm’n*, 805 F.2d 396, 404 (D.C. Cir. 1986) and the Supreme Court has not yet fully resolved the relationship between the two methods. In cases decided after Hensley and Blum, it has both (1) suggested that district courts should use the Johnson factors to adjust the lodestar, and (2) reiterated its holding in Hensley and Blum that “many of the Johnson factors ‘are subsumed within the initial calculation.’”

Judge Walker acknowledged that his own Court had contributed to the confusion.

The net result of the fee-setting jurisprudence here and in the Supreme Court is that the district courts must engage in an equitable inquiry of varying methodology while making a pretense of mathematical precision. The “lodestar” is no longer a lodestar in the true sense of the word — “a star that leads,” Webster’s Third International Dictionary 1329 (1981). nor do courts use it in the way the term was first used by the Third Circuit — as a base amount that is susceptible of ready adjustment; rather, circuit court deference to the district court’s estimate of a “reasonable” hourly rate is a “lodestar” only in the sense that it is a guiding jurisprudential principle...What the district courts in this circuit produce is in effect not a lodestar as originally conceived, but rather a “presumptively reasonable fee.”...The focus of the district courts is no longer on calculating a reasonable fee, but rather on setting a reasonable hourly rate, taking account of all case-specific variables.

The Court’s Decision

At the end of its long journey into the history and vagaries of fee determination in the district courts, the Court announced its decision:

The meaning of the term “lodestar” has shifted over time, and its value as a metaphor has deteriorated to the point of unhelpfulness. **This opinion abandons its use.** [Emphasis added] [In a footnote, the Court said, “While we do not purport to require future panels of this court to abandon the term – it is too well entrenched – this panel believes that it is a term whose time has come.]

We think the better course -- and the one most consistent with attorney’s fees jurisprudence - is for the district court, in exercising its considerable discretion, to bear in mind all of the case - specific variables that we and other courts have identified as relevant to the reasonableness of attorney’s fees in setting a reasonable hourly rate. The reasonable hourly rate is the rate a paying client would be willing to pay. In determining what rate a paying client would be willing to pay, the district court should consider, among others, the Johnson factors; it should also bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case

effectively. The district court should also consider that such an individual might be able to negotiate with his or her attorneys, using their desire to obtain the reputational benefits that might accrue from being associated with the case. The district court should then use that reasonable hourly rate to calculate what can properly be termed the “presumptively reasonable fee.”

The Forum Rule

Having announced its new approach to fee determination, the Court proceeded to consider how the “forum rule”, *supra*, fits into the formula. Strictly applied, the rule would require a district court to fix a fee within the range of prevailing hourly rates in the “community” where the court sits. *Polk v. N.Y. State Dep’t of Corr. Servs.*, 722 F.2d 23, 25 (2d Cir. 1983).

[But] district courts — and indeed our court — quickly succumbed to the general confusion surrounding the difference between a “lodestar” and a reasonable hourly rate. Sometimes, they considered the variation between in-district and out-of-district rates in setting the hourly rate (which they then used to calculate the presumptively reasonable fee); but sometimes, they considered that variation only in deciding whether to adjust the presumptively reasonable fee after they had arrived at it (on the basis of in-district rates).

Once again, Judge Walker announced the Court’s decision to impose a new standard for the district courts:

We now clarify that a district court may use an out-of-district hourly rate – or some rate in between the out-of district rate sought and the rates charged by local attorneys – in calculating the presumptively reasonable fee if it is clear that a reasonable, paying client would have paid those higher rates. We presume, however, that a reasonable, paying client would in most cases hire counsel from within his district, or at least counsel whose rates are consistent with those charged locally. This presumption may be rebutted – albeit only in the unusual case – if the party wishing the district court to use a higher rate demonstrates that his or her retention of an out-of-district attorney was reasonable under the circumstances as they would be reckoned by a client paying the attorney’s bill.

In two previous cases, the Court had declared “the touchstone of its analysis” – the belief that courts should award fees “just high enough to attract competent counsel.”

We adhere to this touchstone, but we would not be true to it by insisting on an overly strict application of the forum rule. Rather, to reiterate, a district court should consider the rate a reasonable, paying client would pay, and use that rate to calculate the presumptively reasonable fee.

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