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THE CONTINGENCY FACTOR AND THE ATTORNEY'S FEES AWARDS ACT OF 1976: LEGISLATIVE HISTORY REQUIRES CONTINUED APPLICATION

I. INTRODUCTION

Recognizing the prohibitive cost of civil rights actions, Congress passed the Civil Rights Attorney's Fees Award Act in 1976. The Fees Act provides that a prevailing party litigating an action under the Civil Rights Act of 1872 is entitled to collect reasonable attorney's fees from his adversary as part of the costs. The practice of requiring an adversarial party to pay costs and expenses of litigation, including attorney fees, is called fee shifting. This practice has long been accepted in civil rights litigation, and has been provided for by statute in all major civil rights legislation since 1964.

The Fees Act extended fee shifting to cover all civil rights legis-
lation which did not already contain such statutory provisions. Congress expressed the policies which support this broad expansion of fee shifting in an extensive legislative history and in a Senate Report. Foremost among these policies was the desire to allow the private sector to assume an even greater role in the vindication of national civil rights. With the resources of the public sector becoming increasingly limited in the civil rights arena, the Fees Act is assuming new and greater importance.

In recent years, however, commentators and legislators have closely scrutinized the Fees Act, and fee awards have become the subject of extensive litigation. Opponents of the Fees Act contend that fee awards have become windfalls for public interest attorneys, while proponents suggest that courts regularly devalue the amount of fees awarded due to the nonpecuniary interests involved. Both sides agree that the Fees Act lacks reasoned guidelines to enable the courts to determine the amount of fees to be awarded.

Several alternatives to the current method of awarding attorney's fees have been proposed and are currently under consideration. These proposals include placing a "cap" of seventy-five dollars on the hourly rate a plaintiff's counsel can charge, and prohibiting any increase in awards beyond a base fee of hours spent on the litigation.

6. Id. at 8.
7. This importance does not stem solely from the use of the Fees Act as a means of providing public interest legal services. Because the legislative history of the Fees Act is so comprehensive, the Supreme Court applies the Fees Act fee shifting standard to all similar statutory provisions which award fees to "prevailing parties." See Hensley v. Eckerhart, 103 S. Ct. 1933, 1939 n.7 (1983). Therefore, any interpretation of the Fees Act has broad implications.
9. See generally E. Larson, Federal Court Awards of Attorney's Fees (1981) (author provides comprehensive guide of factors considered by courts in fee awards litigation; however, the book lacks a supplement, therefore, much of the information is not current).
multiplied by an attorney's hourly rate. These proposals suffer from a failure to consider adequately the relationship between a "reasonable" fee and the congressional objectives of the Fees Act as expressed in its legislative history. Like recent United States Supreme Court decisions, advocates of these proposals incorrectly view the Fees Act as an end to deriving reasonable fees, rather than as a means to vindicate civil rights.

This comment addresses the recent United States Supreme Court decisions concerning the definition of a reasonable fee under the Fees Act. Discussion focuses on the use of multipliers to provide an upward adjustment to the base fee award. Specifically, this comment considers the use of the "contingency factor," an upward adjustment to the base fee which rewards a plaintiff's counsel for bearing the risk of not prevailing and, therefore, not qualifying for fees under the Fees Act. Most recently, in \textit{Blum v. Stenson}, the Supreme Court rejected the practice of using several different factors to consider an upward adjustment to the base fee. However, the Court declined to consider whether the contingency factor, the rewarding of counsel for prevailing in complex and novel litigation, was an appropriate multiplier under the Fees Act.

Section II of this comment discusses the background and development of the Fees Act and the case law cited by Congress to guide courts in awarding fees. Section III focuses on the Supreme Court's most recent application of the use of the contingency factor under the Fees Act. Next, section IV evaluates the policies supporting the use of the contingency factor. Finally, this comment concludes that all courts must consider the contingency factor in all petitions for fees under the Attorney's Fees Award Act. The contingency factor takes into consideration the complexity and novelty of the case in order to determine the risk of undertaking the litigation. This determination

14. \textit{See infra} note 91 and accompanying text for a definition of multiplier.
17. \textit{See infra} section II.
18. \textit{See infra} note 58 & section IV(B)(1) for discussion of applicable cases cited by Congress in the Fees Act.
19. \textit{See infra} section IV.
20. \textit{See infra} section V.
allows judges to adjust the base fee accordingly. An upward adjustment would only be granted if a plaintiff's counsel undertakes litigation in which the risk of not prevailing outweighs the chance of success.

Mandatory consideration of the contingency factor achieves the following goals: it respects judicial precedent by allowing an upward adjustment only for exceptional cases; it reflects congressional intent by awarding attorneys reasonable fees without producing windfalls; and it is well suited for practical application in future fee award litigation, to insure continuity and stability in fee awards to private attorneys. An analysis of the background and legislative history demonstrates that these are some of the precise goals Congress sought to achieve through passage of the Fees Act.

II. BACKGROUND: THE "PRIVATE ATTORNEY GENERAL THEORY"

A. Common Law Development

Attorney's fee awards ordinarily are governed by "The American Rule" in the United States. Under this rule, an attorney collects fees from his client rather than from his opponent. However, exceptions to this rule can be created either through statute, or through the equity powers of the courts. Some major equitable exceptions to the "American Rule" now exist. The "bad faith" exception allows a prevailing party to collect attorney's fees if the court determines that his opponent litigated the case "vexatiously, wantonly, or for oppressive reasons." A similar exception allows courts to award fees to the plaintiff when the defendant willfully disobeys a

21. However, the contingency factor may only be added to increase the amount of a fee award. See Hughes v. Repko, 578 F.2d 483, 487-88 (3d Cir. 1978).
22. See infra section IV(A); by definition, a contingency factor only awards exceptional success.
23. See infra section IV(A); consideration of the contingency factor does not constitute double-counting.
24. See infra section V.
26. Fioretti & Convery, supra note 8, at 263. For a comprehensive list of Federal statutory fee-shifting provisions, see 7 ATTY'S FEE AWARDS Rptr. 2 (1984).
27. Alyeska, 421 U.S. at 247.
court order. Under each of these exceptions, the fee award to the opposing party is considered a penalty which is levied upon the vexatious litigant. The final exceptions are the “common fund” and related “common benefit” exceptions. These exceptions allow for awards in any case in which, as a result of the litigation, a common fund or common benefit is created for an identifiable class. Under each of these exceptions, attorneys are rewarded for the beneficial nature of the litigation. Their fees are derived from the proceeds of the litigation rather than the pockets of the litigants.

The Fees Act itself is based upon what was a separate equitable exception to the American Rule, the “private attorney general theory.” This theory is a hybrid of the equitable exceptions and an offspring of the statutory exceptions, which was developed by lower courts following the Supreme Court’s decision in *Newman v. Piggie Park Enterprises*. *Newman* involved a statutory exception to the American Rule, Title II of the Civil Rights Act of 1964, in which Congress specifically granted attorney’s fees to prevailing plaintiffs. Rejecting a challenge to an award of fees under the statute, the Supreme Court noted that:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a “private attorney general,” vindicating a policy that Congress considered of the highest priority.

The *Newman* language was adopted by courts throughout the nation, and was applied even in cases in which statutory authority to

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30. The Supreme Court created the common fund exception in *Trustees v. Greenough*, 105 U.S. 527 (1882), and expanded upon the theory in *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161 (1939), to allow a fee award to a plaintiff who sued on his own behalf, rather than as a representative of a class. The common benefit theory is derived from *Mills v. Electric Autolite Co.*, 396 U.S. 375 (1970), in which a stockholder’s derivative suit was found to warrant a fee award from the defendant corporation because the suit had benefited all stockholders. For a comprehensive discussion of this area, see Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 Harv. L. Rev. 1597 (1974).
31. These statutory exceptions include Title II and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)-(g), from which the private attorney general theory was derived, and upon which the Fees Act is based.
32. 390 U.S. 400 (1968).
33. *Id.* at 401-02.
shift fees did not exist. Courts viewed such fee shifting as a means of rewarding plaintiffs who acted as so-called "private attorney generals" in pursuing litigation deemed to be in the best interests of the public at large.

A majority of the private attorney general cases were based upon the Civil Rights Act of 1872, which had never included a fee shifting provision. Courts reasoned that such provisions were unnecessary. Fee shifting in these cases appeared entirely consistent with other equitable exceptions by rewarding attorneys for benefiting the public interest, and by punishing defendants for violating it. Further, congressional intent could be inferred from the statutory exceptions which provided fees in numerous other civil rights actions. In this manner, the private attorney general theory was quickly adopted by lower courts as a separate equitable exception to the American Rule.

1. Abandonment of Private Attorney General Theory in Alyeska

In 1975, the Supreme Court directly addressed the issue of attorney fee awards under the private attorney general theory in *Alyeska Pipeline Service Co. v. Wilderness Society.* While upholding the other accepted equitable exceptions to the American Rule, the Supreme Court rejected the use of the private attorney general theory as a means of shifting fees in civil rights or other such public interest litigation. The Court's reasoning was two-fold. First, the Court specifically stated that Congress alone has the power to make such public interest exceptions to the American Rule, and those exceptions were only created to aid in the enforcement of congressional goals of the highest priority. Second, the Court reasoned that it is an abuse of judicial discretion for lower courts to pick and choose which cases are sufficiently within the public interest to warrant an award of fees from the opposing party. Thus, the Court concluded that without an express statutory provision created by Congress, fee shifting under the private attorney general theory constituted an

34. Fioretti & Convery, supra note 8, at 265.
35. See, e.g., Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Donahue v. Stanton, 471 F.2d 475 (7th Cir. 1972).
36. See supra note 2 and accompanying text.
37. Fioretti & Convery, supra note 8, at 265.
39. Id. at 263.
40. Id. at 247.
abuse of judicial discretion.\textsuperscript{41}

As a result of the \textit{Alyeska} decision, an "anomalous gap"\textsuperscript{42} existed in the awarding of attorney's fees with respect to civil rights litigation. While most civil rights legislation included fee shifting provisions,\textsuperscript{43} several other statutes did not. Among those that did not were some of the most vital legislative enactments for the protection and enforcement of national civil rights.\textsuperscript{44}

2. Attorney's Fees Awards Act of 1976

Congress reacted quickly to mend this gap in the civil rights enforcement mechanism by passing the Civil Rights Attorney's Fees Awards Act of 1976.\textsuperscript{45} The provision for attorney's fees in civil rights cases was not unique.\textsuperscript{46} However, this marked the first time that Congress had considered the awarding of attorney's fees as a wholly separate legislative enactment, apart from a mere provision within a comprehensive statutory scheme.\textsuperscript{47} Many reasons were given to support such unprecedented legislation, but the most important consideration stems from the very nature of civil rights actions.

In passing the Fees Act, Congress recognized that civil rights violations most often affect those who can least afford an attorney.\textsuperscript{48} Without fee shifting provisions, such persons would be unable to attract competent counsel and therefore would be denied meaningful access to the courts.\textsuperscript{49} This problem is further complicated by the fact that civil rights cases are often nonpecuniary in nature. Even if monetary damages are available, such damages may be limited by various governmental immunities.\textsuperscript{50}

Another aspect of civil rights litigation directly addressed by the Fees Act is the complexity and novelty of such actions. Several components of the Fees Act show that Congress encouraged the pursuit of civil rights litigation despite such complexities. The threshold re-

\textsuperscript{41} \textit{Id.} at 269.

\textsuperscript{42} \textit{SOURCE BOOK, supra} note 5, at 7.

\textsuperscript{43} \textit{Id.} at 9.

\textsuperscript{44} These included all of the provisions of the Civil Rights Act. \textit{See supra} note 2.

\textsuperscript{45} The Fees Act was passed within six months of the Supreme Court's \textit{Alyeska} decision.

\textsuperscript{46} \textit{See supra} note 4.

\textsuperscript{47} Berger, \textit{supra} note 11, at 306.

\textsuperscript{48} \textit{SOURCE BOOK, supra} note 5, at 8.

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} However, the immunities which serve to protect government employees from damage awards, do not apply to fee awards under the Fees Act. \textit{See} Hutto v. Finney, 437 U.S. 678 (1978).
quirement that a plaintiff prevail in the litigation in order to qualify for a fee award allowed compensation for "all time reasonably expended upon a matter."\textsuperscript{51} In addition, Congress provided for the awarding of fees \textit{pendente lite},\textsuperscript{52} as well as at the conclusion of the litigation. This practice ensured that litigants could afford to stay in court despite lengthy proceedings and mounting costs.

Even beyond these specific components, the legislative history demands a broad and liberal interpretation of the Fees Act, requiring courts to place emphasis on the vindication of civil rights. "In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws."\textsuperscript{53} Before \textit{Alyeska}, fee shifting was such a remedy and the Fees Act was passed to ensure that it would remain so.

Congress cited policies which strongly support the use of fee shifting in civil rights litigation. In addition to its role as a theoretical tool to afford the underprivileged greater access to the courts, the statute may be viewed as a practical tool to insure the continued enforcement of civil rights legislation while avoiding complete reliance upon governmental agencies. By devising a plan which allowed for attorney's fee awards in civil rights actions, Congress effectively shifted some of the burden of enforcement to the private sector. The legislative history of the statute speaks to this point. In reviewing the reasoning behind similar statutes, such as Title II and Title VII of the Civil Rights Act of 1964, the Senate Report noted that "These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy."\textsuperscript{54}

In view of current governmental policies,\textsuperscript{55} decreased reliance on government agencies is perhaps one of the most important attributes of the Fees Act. The Act seeks to control the growth of government bureaucracy by encouraging the private sector to vindicate civil rights.

Although the Act does not create a "startling new remedy,"\textsuperscript{56} to civil rights violations, it clearly pronounces the importance Congress placed on the effective enforcement of civil rights legislation and the

\begin{itemize}
\item \textsuperscript{51} \textit{Source Book}, \textit{supra} note 5, at 12.
\item \textsuperscript{52} \textit{Id.} at 11.
\item \textsuperscript{53} \textit{Id.} at 9.
\item \textsuperscript{54} \textit{Id.} at 10.
\item \textsuperscript{55} \textit{See Katz}, \textit{supra} note 13 (discussion of the current administration's proposals concerning the Fees Act).
\item \textsuperscript{56} \textit{Source Book} \textit{supra} note 5, at 12.
\end{itemize}
continued involvement of the private bar as the best means of effecting that goal.

B. Awarding of Fees Under the Statute

The Act provides little guidance as to the method of awarding fees. While it does state that qualification for awards generally will be based upon the old Newman-Northcross "prevailing party" standards, the Act gives great discretion to district courts in deciding the proper amount of such fee awards. Congressional guidance as to the manner in which an award should be created is contained in a single paragraph of the legislative history:

It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases, and not be reduced because the rights involved may be non-pecuniary in nature. The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. 944 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." David, supra; Stanford Daily, supra, at 684.88

Thus, any question as to the proper method for devising fee awards must be resolved through consideration of the policies behind the statute and the scant congressional guidance provided in the paragraph above. A review of some of the basic criteria for fee awards under the Act provides greater insight into the congressional intent underlying the legislation.

1. The Prevailing Party

In order to qualify for fees under the Act, first a party must be

57. Id. at 3. Newman, 390 U.S. 400, was reaffirmed by the Court in Northcross v. Board of Educ., 412 U.S. 427 (1973) (per curiam). Hence, the "special circumstance" standards became commonly known as the Newman-Northcross standards. See, e.g., Fioretti & Convery, supra note 8, at 269.
58. Source Book, supra note 5, at 11.
deemed the prevailing party. The earliest judicial interpretations of this requirement were broad and liberal and allowed prevailing plaintiffs reasonable attorney's fees in a variety of contexts. From the outset, courts also refused to search for "special circumstances" which might render an award to prevailing plaintiffs unjust.

Similarly, in *Christianberg Garment Co. v. EEOC*, a Title VII discrimination case, the Supreme Court held that prevailing defendants must meet a stricter standard in order to be awarded fees. The Court found that such fees could only be awarded when a trial court found that a plaintiff's lawsuit was "frivolous, unreasonable or groundless or that the plaintiff continued to litigate after it clearly became so." This decision, with its overwhelmingly pro-plaintiff dictum, gave civil rights proponents reason to believe that the Act, with its highly-favorable legislative history, would continue to provide meaningful access to the federal courts for civil rights litigants.

An aspect of the prevailing party standard which was left unsettled, however, was the relationship between the extent to which a party prevails in a suit and how that correlates with the ultimate fee received. At issue was what constitutes a reasonable fee when a

61. See generally Larson, supra note 11, at 314.
63. Id. at 422. See also Larson, supra note 11, at 312 (arguing that because of the broad legislative history, the standards for prevailing defendant under the Fees Act should be higher).
64. In noting the stringent standard that should be applied when considering whether to grant fees to a prevailing defendant, the Court wrote: In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.
65. See, e.g., Larson, supra note 11. (Throughout his article, Larson makes the point that the Fees Act has a broad legislative history, and should be liberally construed in the future).
plaintiff prevails in some, but not all the major aspects of his suit. The legislative history of the Fees Act provides that counsel be reimbursed "as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter'." Further, Davis v. County of Los Angeles, a case cited by Congress in the legislative history, directly addressed this issue. The Davis court held that counsel would be awarded fees for a "certain limited amount of time [spent] pursuing certain issues of fact and law that ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not prevail."

Despite the favorable language in Davis, several circuits had adopted significantly more restrictive methods for calculating fees for plaintiffs who did not prevail on all of the underlying substantive issues in a suit. Among the most restrictive of such methods was the mathematical "proportionality test" adopted by several circuits. Under this formulation, the court first analyzed each claim as defined in rule 10(b) of the Federal Rules of Civil Procedure. Then, the court considered whether the plaintiff had essentially succeeded as to that claim. If so, fees were awarded for that claim only. If not, plaintiff did not prevail as to that claim and fees were denied for the

66. By citing Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974) in the legislative history, Congress made it clear that a partially prevailing plaintiff could collect fees. Courts interpreted this citation to allow fees when plaintiffs "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978). The current issue, however, is the definition of a reasonable fee in light of only partial success.

67. See supra note 58 and accompanying text.

68. 8 E.P.D. ¶ 9444 (C.D. Cal. 1974).

69. Id.

70. See, e.g., Bartholomew v. Watson, 665 F.2d 910, 914 (9th Cir. 1982) (plaintiffs should not receive fees for any work on unsuccessful claims); contra Brown v. Bathke, 588 F.2d 634, 636-37 (8th Cir. 1978) (prevailing plaintiffs should receive fees based on hours spent on all non-frivolous claims); contra Copeland v. Marshall, 641 F.2d 880, 891-92 (D.C. Cir. 1980) (plaintiff's fee depends on the relationship between hours spent and success achieved).


72. Rule 10(b) provides that:

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

FED. R. CIV. P. 10(b).
time spent in its litigation.  

The Supreme Court addressed the propriety of the proportionality formula in *Hensley v. Eckerhart*.  

Although *Hensley* ultimately rejected the proportionality test, the Court did not reaffirm the liberal interpretation of the Fees Act, because it reached its conclusion in a glaringly negative manner. Rather than merely relying on the trial court’s discretion to exclude hours that were not “reasonably expended” from the initial fee calculation, the Court instead remanded the case and ordered the trial court to specifically consider the relationship between the degree of success and the amount of the fees awarded.

By focusing on the extent of success or “results obtained” in civil rights litigation, the Supreme Court misrepresents the congressional intent of the Fees Act. While it is apparent that Congress passed the Fees Act to encourage attorneys to litigate even the most novel civil rights actions, the Supreme Court found otherwise, declaring:

> Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

This quote states the precise reason why Congress passed the Fees Act. The Act was meant to insure that plaintiffs never would be barred from filing a civil rights action because of costs. Furthermore, the Act was meant to encourage conscientious counsel to litigate such actions with special skill and devotion by guaranteeing adequate compensation for time reasonably expended.

As a result of *Hensley*, instead of being guaranteed payment for “all time reasonably expended on a matter,” counsel may not expect reimbursement for time reasonably expended on any risky claim which is not accepted by the trial court, despite the ultimate achievement of prevailing party status. The Supreme Court apparently has mandated consideration of the extent of a plaintiff’s success as a new factor for consideration in fee awards litigation. Although the Fees

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73. See Stein & Fisher, supra note 71, at 21.
74. 103 S. Ct. 1933 (1983).
75. Id. at 1940, n.11.
76. Source Book, supra note 5, at 12.
77. Hensley, 103 S. Ct. at 1943.
78. Id. at 1940.
79. Id. at 1941.
80. See supra note 58 and accompanying text.
Act was passed to encourage civil rights litigation *per se*, the Court appears to have interpreted the Act as only encouraging completely successful litigation. Such an interpretation may lead to a diminishing of fee awards as courts unduly focus on the *results* of the litigation, rather than considering the litigation as a result in itself.81 *Hensley* makes awards under the Fees Act even more contingent in nature by raising the threshold of the prevailing party requirement. Plaintiffs now must not only prevail in the litigation, but must achieve "excellent results" as well in order to qualify for fees.82

Thus, the emphasis of the *Hensley* decision is at odds with the legislative history and its judicial progeny. For the first time, the Court failed to interpret the statute broadly on behalf of the prevailing plaintiff, as is clearly mandated by the legislative history. Further, *Hensley* acts as a direct disincentive to pursuing novel claims in civil rights litigation. If the claim fails, the attorney now risks the chance of being denied reimbursement for time expended on its presentation.

In the conclusion to his separate opinion, Justice Brennan expressed concern over the Majority's "nuance and tone,"83 but found few differences in the basic framework of analysis for fee awards that the Court developed. It was precisely the nuance and tone of the decision that should have disturbed Justice Brennan, because *Hensley* marks a turning point in the Court's analysis of fee awards. The Court has shifted emphasis from upholding the purpose and intent of the Fees Act, to concentrating on the term "reasonable fee" and to limiting the amount of awards which can be given.84

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81. This result clearly conflicts with the legislative history of the Fees Act, because no "traditional method" of billing allows such a discount. As declared in *Northcross*:

We know of no 'traditional' method of billing whereby an attorney offers a discount based upon his or her failure to prevail on 'issues or parts of issues.' Furthermore, it would hardly further our mandate to use the 'broadest and most flexible remedies available' to us to enforce the civil rights laws if we were so directly to discourage innovative and vigorous lawyering in a changing area of the law. That mandate is best served by encouraging attorneys to take the most advantageous position on their client's behalf that is possible in good faith. 611 F.2d at 636. See also Berger, supra note 11, at 316-30.

82. *Hensley*, 103 S. Ct. at 1941.

83. Id. at 1951.

84. This shift in focus by the Court is becoming even more apparent. Most recently, in *City of Riverside v. Rivera*, 679 F.2d 795 (9th Cir.), cert. granted, 106 S. Ct. 244 (1985), Justice Rhenquist stayed the circuit court's award of attorney's fees to plaintiff pending the disposition of the petition for certiorari. See 54 U.S.L.W. 3143 (1985).

In *Rivera*, plaintiff received a jury verdict of $35,350 against the defendants for false arrest and imprisonment and 11 other § 1983 violations. Plaintiff's counsel was then granted $245,456 in attorney's fees. Certiorari has been granted to consider whether a disproportionate
2. Developing a "Reasonable" Attorney Fee

The methodology to be used to devise a reasonable fee award under the statute is set out in a single paragraph of the legislative history. Congress refers to appropriate standards and cites *Johnson v. Georgia Highway Express.* The case did not, however, explain the means by which a court should consider these factors, or the relative importance to be placed on each. Courts attempting solely to use the *Johnson* factors have had little success in devising fee awards with clearly articulated standards, due to the overlapping nature of the several considerations.

Congress included several cases in the legislative history which had, in its view, successfully applied the *Johnson* standards to create a reasonable fee. Two of these cases, *Stanford Daily v. Zurcher* and *Davis v. County of Los Angeles,* used a rough approximation relationship between the jury verdict and the subsequent fee award may constitute grounds for a downward adjustment of the base fee. Given that the legislative history of the Fees Act specifically declares that fees may be awarded even in actions where the rights violated were "non-pecuniary in nature," how the Court could now somehow require judges to consider the proportionality of jury verdicts, if any, to fee awards is truly mystifying. Unfortunately, some of our most precious civil rights provide meager civil remedies.

85. 488 F.2d 714 (5th Cir. 1974); see supra note 58 and accompanying text.

86. The *Johnson* factors are:
   1) The time and labor required;
   2) The novelty and difficulty of the questions presented;
   3) The skill required to perform the legal services;
   4) The preclusion of other employment by the attorney due to acceptance of the case;
   5) The customary fee in the community;
   6) Whether the fee is fixed or contingent;
   7) Time limitations imposed by the client or circumstances;
   8) The amount involved and the results obtained;
   9) The experience, reputation and ability of the attorney;
   10) The undesirability of the case;
   11) The nature and length of the professional relationship with the client;
   12) Awards in similar cases.

Id. at 717-19.

87. Berger, supra note 11, at 286-87, nn.26 & 27. But see Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976*, 13 J. MAR. 331 (1980) (author attempts to sort *Johnson* factors and to place them in a manageable form so as to minimize consideration of overlapping factors. With the Supreme Court's apparent adoption of the lodestar method in *Hensley*, this comment is now outdated).

88. 64 F.R.D. 680 (N.D. Cal. 1974).

89. 8 E.P.D. ¶ 9444 (C.D. Cal. 1974).
of the "lodestar"\textsuperscript{90} method of developing a fee award. This method multiplies a reasonable number of hours spent on the case by a reasonable prevailing market rate per hour, in order to develop a base fee. Such a fee could then be adjusted upward or downward according to various factors not accounted for in the base fee award. Such factors were termed "multipliers" and included consideration of intangibles such as desirability of the case, the delay in payment, or the quality of representation, which may not have been reflected in either the hourly rate or the number of hours spent on the litigation.\textsuperscript{91} The lodestar method is, essentially, only a means of quantifying the Johnson factors. Rather than just listing standards for consideration and then weighing and balancing them to decide upon a reasonable fee, the lodestar method provides a framework for consideration of the factors. Following the passage of the Fees Act, the lower courts failed to reach a clear consensus as to whether the Johnson factors test or the lodestar method was preferable in developing fee awards.\textsuperscript{92} The Supreme Court appears to have settled this issue \textit{sub silientio} in Hensley, however, by acknowledging that developing a lodestar amount for the base fee award was the "most useful starting point" to determine the amount of a reasonable fee.\textsuperscript{93} Further, the Court points out that district courts may then consider the Johnson factors a means by which to adjust the base fee figure either upward or downward.\textsuperscript{94} While Hensley reaffirms the lodestar method of developing fee awards and the use of the Johnson factors as multipliers, it did not state how such multipliers are to be considered. The court addressed this issue in Blum v. Stenson,\textsuperscript{95} its next attempt to define a reasonable fee.

\textsuperscript{90} See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (first case to adopt lodestar method of hours multiplied by the rate, and to adopt lodestar title); Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) (early antitrust case which follows Lindy in adopting lodestar method for computing fee awards).

\textsuperscript{91} See generally E. Larson, \textit{Federal Court Awards of Attorneys' Fees} (1981) In Hensley, 103 S. Ct. at 1940, n.9, the Court apparently limited the factors which may be used as multipliers solely to consideration of the 12 factors enumerated in Johnson, see supra note 86. Many of these factors, however, were later rejected by the Court in Blum, see infra notes 109-111 and accompanying text.

\textsuperscript{92} E. Larson, \textit{supra} note 91.

\textsuperscript{93} \textit{Hensley}, 103 S. Ct. at 1939.

\textsuperscript{94} \textit{Id.} at 1940.

\textsuperscript{95} 104 S. Ct. 1541 (1984).
III. PROBLEM: SUPREME COURT RESTRICTIONS ON THE USE OF MULTIPLIERS UNDER THE FEES ACT

A. Blum v. Stenson

*Blum* involved the awarding of attorney's fees under the Fees Act. Attorneys from the Legal Aid Society of New York successfully challenged the procedures used to terminate benefits of some Medicaid recipients. The fees awarded included a lodestar figure of $79,312 plus an upward adjustment of fifty percent based on a variety of factors designated by the district court.

In *Blum*, the Supreme Court addressed two separate questions related to the judicial definition of a reasonable fee. The question the Court first considered was what constituted a reasonable hourly rate for calculating the lodestar figure. The petitioners in *Blum* contended that such a rate should be calculated only according to the cost of legal services in contrast to the traditional method of using prevailing market rates. The Solicitor General, as *amicus curiae*, urged the adoption of a cost based standard for nonprofit legal service corporations. He argued that calculation of the fee at prevailing market rates resulted in an "unjustified windfall" to nonprofit organizations, because prevailing market rates naturally included a profit margin. The Court rejected each of these arguments with a cursory consideration of the legislative history, noting that in each of the four cases cited by the Senate Report, fee awards were calculated according to prevailing market rates, and none made any mention of a cost-based standard. The Court further noted that both the *Stanford Daily* and *Davis* cases specifically rejected any notion of a different standard for fee awards for nonprofit organizations. In considering these issues, the Court gave great deference to the legislative history of the Fees Act. Such deference was abandoned, however, as the Court focused on the next question presented on appeal, the use of multipliers.

1. The Use of Multipliers

The Court next considered whether the district court had abused its discretion by allowing the fifty percent upward adjustment
to the lodestar figure. The petitioner contended first that such an adjustment was not permitted under the statute, as calculation of the lodestar itself produces a reasonable fee. Alternatively, the petitioner focused on her particular case and submitted that such an upward adjustment was not called for by the facts, as her case was neither complicated nor novel.

The Court rejected petitioner's first contention, relying principally on its holding in Hensley, which allowed for upward adjustments to the lodestar in cases of exceptional success. However, the Court accepted petitioner's second argument, that the facts of her case did not justify any upward adjustment through the use of multipliers, because the lodestar itself provided reasonable compensation. In its holding, the Court specifically rejected the lower court's use of a number of different factors as direct multipliers. These factors included: "the complexity of the litigation and the novelty of the issues, the high quality of representation, [and] the results obtained . . ."

Taking each of the factors set forth by the district court separately, and without further consideration of the legislative history of the Fees Act, the Court concluded the following: first, the novelty and complexity of the issues were accurately reflected in the number of billable hours recorded by counsel and thus did not warrant an upward adjustment; second, "the quality of representation is generally reflected in the reasonable hourly rate"; and third, "because acknowledgment of the 'results obtained' generally will be subsumed
within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award. In rejecting each of these factors, the Court clearly set aside a strong precedent at the lower court level which had traditionally considered such factors. Just as clearly, the Court ignored the legislative intent, if not the decree, of the Fees Act.

2. Footnote 17 and the Contingency Factor

The only multiplier spared the judicial scythe in Blum was the contingency factor. This factor allows an upward adjustment to the lodestar figure for the risk of not prevailing, and thus rewards counsel for bearing the risk of nonremuneration. Although the district court had adjusted the lodestar, in part, for the risk of not prevailing, the Supreme Court refused to grant an adjustment, as the record did not support an increase. In footnote seventeen, the majority opinion declared:

We have no occasion in this case to consider whether the risk of not being the prevailing party in a § 1983 case, and therefore not being entitled to an award of attorneys' fees from one's adversary, may ever justify an upward fee adjustment.

In his concurring opinion, Justice Brennan, joined by Justice Marshall, wrote that although the issue was unresolved, in their view the contingency factor could justify a fee adjustment. Justice Brennan cited the legislative history of the Fees Act and the cases cited in the Senate Report to support his arguments. The resolution of the issue left open in footnote seventeen thus depends upon the interpretation of the legislative history cited by Justice Brennan,


114. Blum, 104 S. Ct. at 1550.
115. Id. at 1594, n.17.
116. Id. at 1550. (While Justice Brennan concurred in the result of Blum, he wrote a separate opinion to specifically address the Court’s treatment of the contingency factor).
viewed in light of the Supreme Court’s narrow definition of a reasonable fee under the Civil Rights Attorney’s Fees Awards Act of 1976.

IV. Analysis: The Use of the Contingency Factor as a Multiplier Under the Fees Act

A. Legislative History: Supreme Court Interpretation

In Hensley, the Supreme Court interpreted the legislative history of the Fees Act to provide for the development of a lodestar amount, which may then be adjusted according to factors outlined in Johnson.117 Factor six in Johnson is whether “the fee is fixed or contingent.”118 Due to the “prevailing party” threshold requirement and its subsequent interpretation by the Supreme Court in Hensley, fees under section 1988 are now completely contingent in nature. Thus, fee awards must somehow account for the particular disincentive Hensley provides toward the litigation of novel claims.

In both Blum and Hensley, the Supreme Court added other qualifications to the use of multipliers. In Hensley, the Court declared that when a plaintiff had obtained excellent results, his attorney should be awarded a fully compensatory fee.119 “Normally this will encompass all hours reasonably expended on the litigation, and, indeed, in some cases of exceptional success an enhanced award may be justified.”120 In Blum, the Court reaffirmed the holding of Hensley and noted that only the “rare case” calls for upward adjustments.121

The Supreme Court’s adoption of the “exceptional success” standard cannot preclude consideration of the contingency factor as a multiplier. By definition, the contingency factor only rewards “exceptional success.” While any award under the Fees Act is contingent upon success, the contingency factor itself allows for an upward adjustment of the lodestar only when the risk of not prevailing is greater than the chance of succeeding. When the plaintiff bears little or no risk of losing his litigation, the court should not allow for an upward adjustment of his fee. On the other hand, in the rare case in which the plaintiff prevails despite the complexity, novelty or other tangible factors of the litigation which weigh against him, courts

117. Johnson factors, supra note 86.
118. Johnson, 488 F.2d 714, 718 (5th Cir. 1974).
119. Hensley, 103 S. Ct. at 1940.
120. Id. (emphasis added).
121. Blum, 104 S. Ct. at 1549, n.18.
must view this as "exceptional success." In such cases, an upward adjustment to the lodestar through the use of the contingency factor is the only means of providing a fully compensatory fee as defined by the Supreme Court in *Hensley*.

The Supreme Court's interpretation of a reasonable fee under the Act, even after the decision in *Blum*, does not preclude consideration of the contingency factor as a multiplier. Following *Blum*, complexity and novelty of the issues may not be used as *direct multipliers* because the Court found that these factors were already accounted for in the lodestar. Such a practice would constitute "double counting."\textsuperscript{122} However, the legislative history of the Fees Act strongly supports including the novelty and complexity issues within a general factor. In *Stanford Daily*, a bonus fee was allowed due to the novelty of the issues. The court reasoned that "[t]he novelty of the issues in a case does not automatically increase the number of hours of work which attorneys must expend."\textsuperscript{133} Thus, because the novelty of issues may not be reflected in the lodestar, consideration of this factor does not constitute the "double counting" disallowed in *Blum*.\textsuperscript{124}

In contrast, the level of complexity in litigation may lead to an increase in expended time. But, the consideration of complexity as a component of the contingency factor, rather than as a direct multiplier, focuses on a different issue. It rewards attorneys for prevailing in civil rights litigation despite the complexities involved.\textsuperscript{125} This consideration has long been held reasonable in antitrust fee awards, which are cited for comparison by Congress in the legislative history of the Fees Act.\textsuperscript{126}

Although the Court's interpretation of the Fees Act in both *Hensley* and *Blum* allows for consideration of the contingency factor

\textsuperscript{122} Id. at 1547-48.

\textsuperscript{123} Stanford Daily, 64 F.R.D. at 686-87.

\textsuperscript{124} 104 S. Ct. at 1547. Since the Supreme Court's decision in *Blum*, at least one circuit court has decided that the contingency factor may still be considered by courts in determining fee awards. See Hall v. Burrough of Roselle, 747 F.2d 838, 842-43 (3d Cir. 1984) (legislative history of Fees Act supports use of contingency factor). But see McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984) (while not rejecting the use of a contingency multiplier following *Blum*, the court notes that risk of losing alone does not justify its use in the Seventh Circuit).

\textsuperscript{125} See Comment, Adjusting Attorney Fee Awards Through Multipliers in Antitrust Class Actions, 21 Hous. L. Rev. 801 (1984) (Author provides an excellent breakdown of factors to be considered in contingency or risk multiplier. Because of congressional reliance on antitrust cases as a model for use in developing awards under the Act, this comment has direct application to § 1988 fee awards.).

\textsuperscript{126} See supra note 58 and accompanying text.
as a multiplier, such a reading understates the importance of its use. As will be shown, the contingency multiplier must be seen as an integral and inseparable component of the Fees Act.

B. Legislative History and the Contingency Factor

Congress set out guidelines to develop awards under the Fees Act in a single paragraph.\textsuperscript{127} The factors contained in that paragraph included cites to previous precedent and analogies to other complex federal litigation which granted fee awards. Thus, these two factors must be considered in resolving the question of the continued use of the contingency factor in section 1988 fee awards.


Several cases are cited by Congress in the Fees Act legislative history. However, only \textit{The Stanford Daily v. Zurcher} specifically focused on the use of the contingency factor in fee awards. \textit{The Stanford Daily} involved the awarding of attorney’s fees following the attainment of injunctive and declaratory relief to prevent the proposed search of a newspaper office for photographs taken at the scene of a campus uprising.\textsuperscript{128} In \textit{The Stanford Daily}, the contingent nature of success was a major factor the court considered in allowing an upward adjustment of the base fee.\textsuperscript{129} The court cited numerous reasons for this decision. First, the court recognized that such an adjustment merely reflected the American Bar Association’s own determination that attorneys deserve higher compensation for contingency work than for fixed-fee work.\textsuperscript{130} Second, the court considered the use of such a factor from the standpoint of an attorney and recognized that its use allowed counsel to “take the financial gamble of representing pernicious clients since, over the long run, substantial fee awards in successful cases will provide full and fair compensation for all legal services rendered to all clients.”\textsuperscript{131} Third, the court ap-

\begin{itemize}
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{See} \textit{The Stanford Daily v. Zurcher}, 64 F.R.D. 680 (N.D. Cal. 1974), aff’d, 550 F.2d 464 (9th Cir. 1972).
\item \textsuperscript{129} \textit{The Stanford Daily} court considered “the amount of time devoted by the attorneys to the litigation; the value of the time in light of billing rates and of the attorney’s experience, reputation, and ability; and the attorney’s performance given the novelty and complexity of the legal issues in the litigation.” 64 F.R.D. at 682. The emphasis on novelty and complexity shows that Congress tacitly approved the use of these factors as multipliers; the question is how best to consider them. \textit{See infra} notes 132-35 and accompanying text.
\item \textsuperscript{130} \textit{The Stanford Daily}, 64 F.R.D. at 685.
\item \textsuperscript{131} \textit{Id.}
\end{itemize}
proached the use of such a factor from the public’s standpoint and recognized that contingent fees help equalize access to the courts by making an attorney’s decision concerning representation dependent upon the merit of an action rather than a client’s income. Finally, the court recognized its own role in granting a contingency multiplier which “helps attract attorneys to the enforcement of important constitutional principles and significant congressional policies which might otherwise go unrepresented.”

In granting the use of a contingency factor as a multiplier in The Stanford Daily, the district court, two years before the passage of the Fees Act, expressed precisely the same concerns as were eventually addressed by Congress. The Stanford Daily, however, demonstrates that the policies of the Fees Act are directly affected through the use of the contingency factor as a multiplier. Used as a multiplier, the contingency factor provides more than a mere increase in the amount of the fee award; rather, it assures that reasonable fees are defined in light of the congressional policies they were created to support.

2. Analogy: Equally Complex Federal Litigation — Antitrust Fee Awards

In the legislative history to the Fees Act, Congress also cited “equally complex Federal litigation, such as antitrust cases as a standard by which the amount of awards under the Fees Act should be governed.” This citation has two important meanings. First, it offers antitrust cases as a model to develop a reasonable fee award. The use of the contingency factor as a multiplier plays a major role in antitrust fees litigation. In antitrust cases, courts regularly allow increases in fee awards because of the risk of not prevailing due to the complexity or novelty of the litigation. In antitrust cases, the contingency factor is accepted as a means of encouraging litigation

132. Id.
133. Id. (citing Comment, Court Awarded Attorney’s Fees and Equal Access to the Courts, 122 U. Pa. L. Rev. 636, 650-52, 708-11 (1974)).
134. See supra notes 45-55 and accompanying text.
135. See supra note 58 and accompanying text.
above and beyond the treble damages provision.\textsuperscript{137} This policy of encouraging litigation also occurs through the use of the contingency factor as a multiplier in civil rights litigation. To deny the use of the contingency factor as a multiplier in civil rights actions while allowing its use in antitrust actions, would directly contravene the express congressional declaration that fee awards in these two fields be "governed by the same standards."\textsuperscript{138}

A second important implication derived from the antitrust comparison is the congressional recognition that civil rights cases are complex federal litigation.\textsuperscript{139} In developing the Fees Act, Congress sought to encourage the undertaking of complex and novel civil rights litigation. The very nature of the cases cited in the legislative history supports this assertion. \textit{Swann, The Stanford Daily} and \textit{Davis} each involve complex and novel legal issues.\textsuperscript{140} Civil rights litigation not only parallels antitrust litigation in terms of its complexity, but may surpass it in terms of novelty. It is precisely this type of litigation that is addressed by use of the contingency factor. Few attorneys would be willing to risk much time and effort on complex and protracted litigation without some hope of adequate compensation for bearing the risk of not qualifying for fee awards. Further, due to the Supreme Court's narrow interpretation of the prevailing party requirement in \textit{Hensley},\textsuperscript{141} few attorneys would be willing to bear the risk of nonremuneration now inherent in the advancement of novel claims. By rewarding attorneys for taking these risks, the contingency factor offers such remuneration. Use of the contingency factor as a multiplier thereby facilitates the undertaking of complex and novel litigation by private attorneys to fulfill the purposes of the Fees Act.

\textsuperscript{137} Springer, \textit{supra} note 136, at 103.

\textsuperscript{138} See \textit{supra} note 58 and accompanying text. It also must be noted that the lodestar method itself was developed through antitrust award actions, see \textit{supra} note 90. Thus, until the contingency factor is abolished in those actions, both case law development and the legislative history require its consideration under the Fees Act.

\textsuperscript{139} Such a conclusion by Congress was well-founded. Civil rights cases rank among the most complex and protracted civil litigation presently occupying federal courts. See G. Bermaint, \textit{Protracted Civil Trials: Views from the Bench and the Bar} (Federal Judicial Center 1981) (a quantitative analysis of protracted litigation, including complexity of issues and difficulty of factual application).

\textsuperscript{140} Swann, 66 F.R.D. 483 (protracted litigation over school desegregation); \textit{The Stanford Daily}, 64 F.R.D. 680 (application of warrantless search and seizure precedent to innocent third parties); and Davis, 8 E.P.D. at 5047 (seminal issues in the field of affirmative action).

\textsuperscript{141} See \textit{supra} notes 74-83.
V. Resolution: Courts Must Consider the Contingent Nature of Success for All Awards Under the Fees Act

The legislative history supporting the Fees Act demonstrates the importance Congress places on awarding reasonable fees to civil rights advocates. The use of the contingency factor as a multiplier plays an essential role in developing such an award. To give full force and effect to the Fees Act, the risk of not prevailing must be used by the courts as a multiplier to the lodestar. Mandatory consideration of the contingency factor serves several purposes. Most important, the use of the contingency factor ensures strict adherence to the policies and goals of the Fees Act as expressed by Congress. The contingency factor awards counsel only for undertaking complex and novel litigation. The goal of encouraging such litigation was specifically addressed by Congress through its comparison of civil rights litigation to other types of complex litigation and through its citation of cases using the novelty and complexity factors as precedents. This goal is further addressed through awards pendente lite which give plaintiffs involved in complex and protracted litigation the opportunity to continue litigation despite mounting costs.

Mandatory use of the contingency factor is also supported by the Court’s interpretation of the method of deriving a reasonable fee. The contingency factor focuses on the results obtained in civil rights litigation and it rewards only those who achieve “exceptional success” within the meaning of Blum and Hensley. Unlike the other multipliers addressed in Blum, the contingency factor is a direct means of implementing the congressional intent for the Fees Act. Use of the contingency factor allows for a fully compensatory fee in light of the circumstances of each case.

Further, as stated in Hensley, “[a] request for attorneys’ fees

142. See supra notes 135-41.
143. See supra note 140.
144. Source Book, supra note 5, at 11.
145. See supra notes 119-21 and accompanying text.
146. For an excellent discussion of contingency bonuses as a whole, see Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 YALE L.J. 473 (1981). The author argues that the contingency factor awards counsel for bringing cases that may have little or no merit and that it should not be applied on a case-by-case basis, but across the board to all successful litigation of a designated type. However, this approach would cut against the case-by-case basis for awards designated by Congress in the Fees Act.

Despite his criticisms, the author concludes that some form of the contingency factor is the best method of rewarding counsel for undertaking risky litigation, which is a major conclusion of the Fees Act.
should not result in a second major litigation." Yet, one of the major causes of such litigation is the lack of standardized methods of awarding fees. The courts have arbitrarily exercised the purposefully broad judicial discretion granted by Congress. Use of the contingency factor would focus, not lessen judicial discretion. Rather than ruling first on whether to consider the factor as a multiplier, a court would automatically consider it and then clearly explain the reasons for granting or denying an upward adjustment. Such a standardization would expedite the fee awards process by focusing attention on a more narrow range of issues, and would thereby diminish the grounds for continued litigation.

Finally, consideration of this factor by all courts may, in the long run, actually decrease the amount of awards ultimately received. Because counsel is awarded fees for time spent in preparing awards petitions, and in some cases fees are increased to account for the present value of money, fee awards may ultimately be decreased as the efficiency of receiving awards is increased. Greater efficiency through mandatory consideration would also decrease the amount of time spent by defense counsel in litigation. The greatest goal achieved in a standard method of fee awards without diminishing the amount received, however, is that competent civil rights attorneys will spend more time vindicating civil rights and less time justifying their fees. As Justice Brennan declared in *Hensley*, "[i]n systemic terms, attorneys' fee appeals take up lawyers' and judges' time that could more profitably be devoted to other cases, including the substantive civil rights claims that Section 1988 was meant to facilitate."

VI. CONCLUSION

In the Civil Rights Attorney's Fees Awards Act of 1976, Congress enlisted the assistance of the private bar to assure vigorous enforcement of our national civil rights laws. By guaranteeing a reasonable fee to the prevailing plaintiff, Congress took steps to assure

147. 103 S. Ct. at 1941.
148. See generally, E. Larson, Federal Court Awards of Attorney Fees (1981) (an attempt to compile all of the different methods used in awarding attorney's fees under the Fees Act).
150. 103 S. Ct. at 1951 (Brennan, J., dissenting).
that people would not be denied access to the courts in an effort to vindicate their civil rights. Conflict exists between the legislative intent of the Fees Act and its subsequent judicial interpretation. As more attempts are made to define a "reasonable fee," less attention is paid to the reasoning of the Fees Act.

The use of the contingency factor as a multiplier under the Fees Act is an issue not yet addressed by the Supreme Court. This comment calls for the mandatory consideration of the contingency factor by every court when developing an award. This mandatory consideration is strongly supported by the legislative history of the Fees Act. The contingency factor is regularly utilized in antitrust fee awards, which were cited by Congress as a model for the Act. The contingency multiplier also encourages litigation of complex and novel cases, which is an express goal of the Act. Finally, even the Supreme Court's narrow definition of a reasonable fee does not preclude consideration of the contingency factor. The use of the lodestar method for developing the base fee and mandatory consideration of the contingency factor will mark a positive step toward clarifying a perpetually unsettled area of the law.

Andrew W. Stroud