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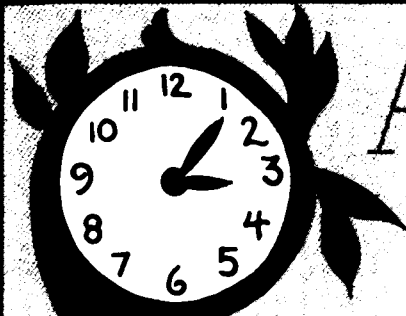
Attorney's Fee Statutes in Civil Litigation: The State of the Art

Susan Bennett

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Attorney's Fees Statute

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by Susan Bennett*

For decades Congress has been cutting into the old common law "American Rule" that says parties to litigation must pay their own way through the legal system whether they win or lose. From the Civil Rights Act of 1964 to the Equal Access to Justice Act of 1980, Congress has passed some forty statutes under which prevailing plaintiffs in a variety of civil actions can

petition the court to require their unsuccessful opponents to pay their fees and court costs. Losing parties who can now be forced to shoulder their opponents' litigation costs range from private landlords under the Fair Housing Act, to the federal government itself.

The Civil Rights Attorney's Fees Act of 1976, at 42 U.S.C. §1988, gave courts discretion, "... (to) allow a prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The legislative history of this law shows that the goal of civil attorney's fees

legislation is to encourage litigants who might not otherwise be able to afford counsel to assert certain meritorious claims in court, and in so doing to function as private attorneys general for the enforcement of these laws. Put another way, the message projected by these fee-shifting statutes is simple: it is possible to litigate "poor people's issues"—consumer protection, welfare rights—without being a "poor people's lawyer".

Practitioners should note that these opportunities for litigation and compensation are not limited to the federal court

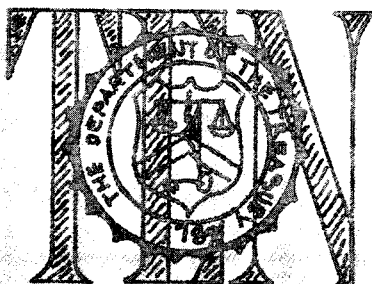
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Attorneys' Fees in Civil Litigation

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system. Since state courts can adjudicate federal causes of action, they can also award federal statutory attorney's fees. *County Executive of Prince George's County v. Doe*, 300 Md. 445, 452, 479 A.2d 352, 356 (Md. 1984).

Common to all litigation, whether in state or federal court, concerning civil attorneys' fees statutes are two recurring issues: first, how much success, and on what issues, must a "prevailing party" win in order to earn an award of fees, and second, what must a court consider in its calculation of the "reasonable fee"? The

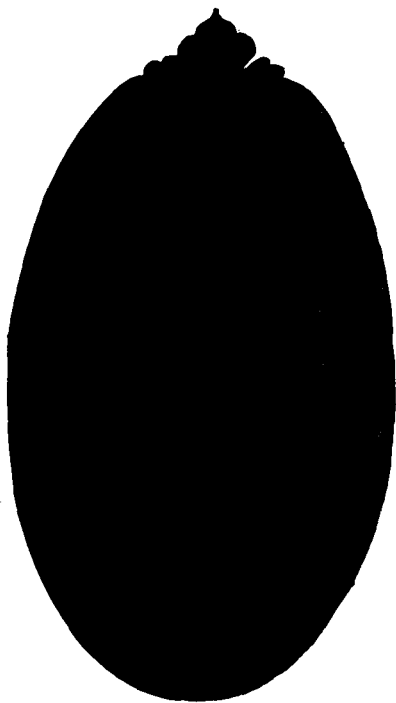
goal of this article is to provide encouragement, and some caveats, to attorneys in search of a practice that will both reward the conscience and pay the bills.

How does one "prevail"?

In *Hensley v. Eckerhart*, the Supreme Court's first attempt to set standard criteria for calculation of statutory attorney's fees, the Court advanced a basic formula for compensation: "the number of hours reasonably expended on the litigation multiplied by a reasonable

hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Court said it wanted to make this formula and all other standards enunciated in the opinion to be applicable to all cases invoking federal statutes that allow fee awards to "prevailing parties." The threshold issue, one with a history which long precedes *Hensley*, is how a court should decide whether a plaintiff has sufficiently "prevailed" to be entitled to attorney's fees. The question has evolved: for which specific hours may a prevailing plaintiff claim compensation?

Some consensus has emerged concerning some aspects of the definition of "prevailing party." It is clear that a party can receive a fee award for having won a preliminary injunction, or for a successful settlement. The Fourth Circuit has approved fees awarded pursuant to 29 U.S.C. §794(b), the Rehabilitation Act, on a "catalyst" theory: that plaintiff's filing of the civil action prompted defendants to act to plaintiff's significant benefit. *Disabled in Action v. Mayor and City Council of Baltimore*, 685 F.2d 881, 885 (4th Cir. 1982). This Circuit and the District Court of Maryland have also consistently awarded fees regardless of the amount of money damages, particularly when the plaintiff has succeeded in securing rights of intangible monetary worth. *Burt v. Abel*, 585 F.2d 613, 617 (4th Cir. 1978); *Coles v. Levin*, 561 F. Supp. 146 (D. Md. 1983).



Generally, the Fourth Circuit has defined "prevailing" as the achievement of some vindication through litigation, an "establishment of a right or proscription of a wrong," *Smith v. University of North Carolina*, 632 F.2d 316, (4th Cir. 1980), and has allowed full compensation even in the absence of success on every issue, *Disabled in Action v. Mayor and City of Baltimore*, 685 F.2d 881, 886 (4th Cir. 1982). *But see Coles v. Levine*, 561 F. Supp. 146, 156 (D. Md. 1983); *Storch v. Payne*, 579 F. Supp. 1074, 1080 (D. Md. 1983), (fees reduced or denied because of lack of success, or because favorable settlement established no significant rights).

In *Hensley* the Supreme Court sought to clarify how a court should determine fees when a plaintiff had achieved only partial success. The Court stressed the importance of avoiding a mechanical award of fees apportioned according to success or failure. However, it also emphasized that courts should require plaintiff to keep records in sufficient detail to enable the judge to distinguish between hours spent on successful issues, and hours spent on failing issues, so that the judge could award compensation for the former. Thus, the message is mixed. A district court now has, in general, the discretion to recognize the significance of a plaintiff's achievement and to award fees without quibbling over whether every hour billed contributed to an identifiable successful result. Yet it also has the obligation to deny compensation for hours spent on matters unrelated to the winning issues. In its desire to give substance to the nebulous concept of the "prevailing party," the Court has in fact produced a new unit of measure: the prevailing hour.

The most exhaustive application of the "prevailing hours" doctrine to date in this jurisdiction has been presented in *Vaughns, et al. v. Board of Education of Prince George's County, et al.*, 598 F. Supp. 1262 (D. Md. 1984). A decision arising from the re-opening in 1981 of a school desegregation case filed in 1972, *Vaughns* was devoted wholly to consideration of how to calculate plaintiffs' request for attorneys' fees. Involved were some two years of discovery and motions practice, plus twenty-five days of trial, out of which plaintiffs ultimately prevailed on one out of seven factual issues. Despite the disparity between the number of issues won and lost, the court never disputed plaintiffs' claim to being the prevailing party. Instead, in the spirit of *Hensley*, the court concentrated on eliminating from its calculations those hours spent on unsuccessful claims.

After perusing the record and the fee petitions, the court excised more than a third of the 6055 hours for which plaintiffs' attorneys had sought compensation. The reduction took account of imprecise time records, and hours spent at trial in support of unsuccessful claims.

Vaughns suggests at least three concerns for the Maryland attorney seeking to compensate his or her time via a "prevailing party" fee-shifting statute. First, in deciding the number of hours for which an attorney may request compensation, the court will refuse to consider hours spent ultimately in futility. Second, the court will, in the process, scrutinize

closely the record and the affidavits submitted in support of the attorney's fee petition. Third, the court will not hesitate either to make reductions beyond those that the attorney may already have conceded, or to penalize attorneys who keep ambiguous records.

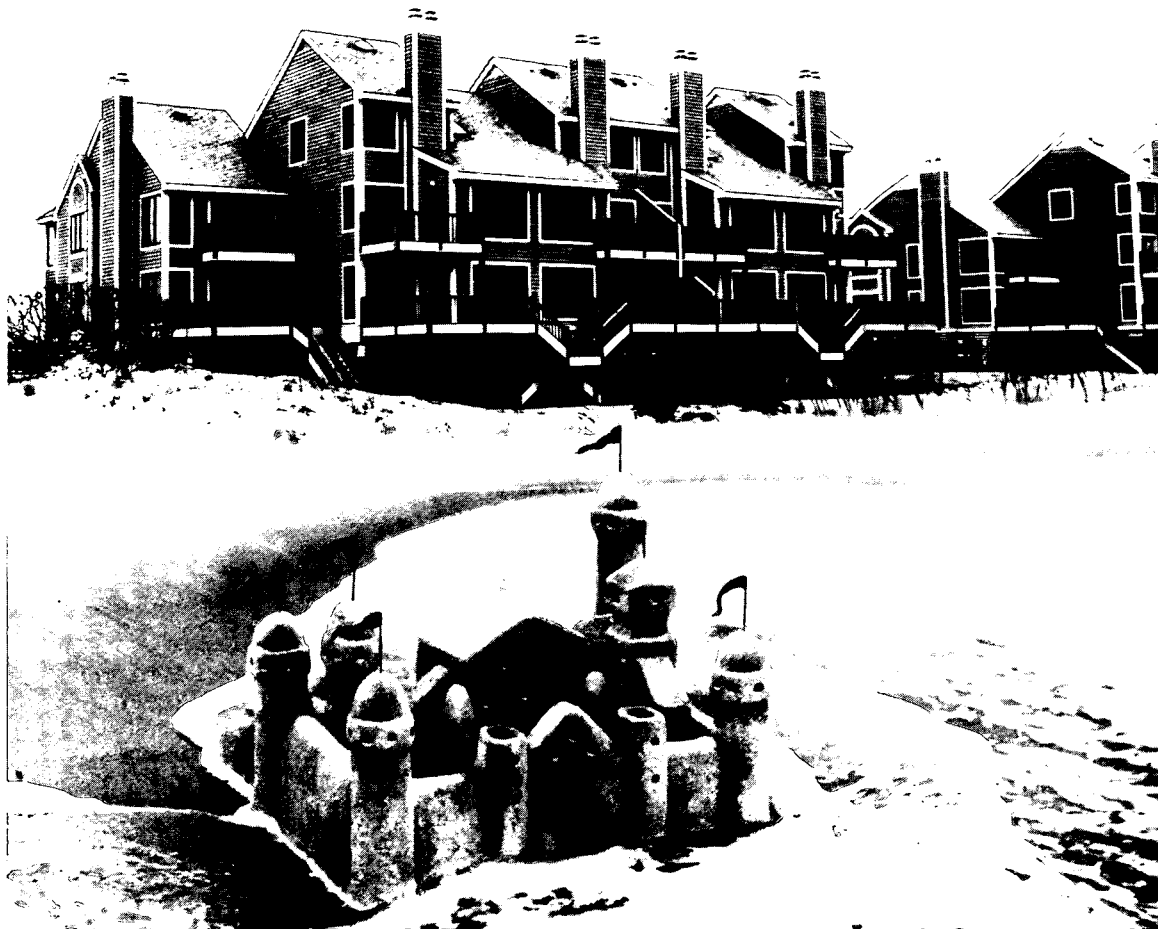
Hensley's major point—that courts should categorize issues as successful or related to successful, or as unsuccessful—is closely associated with a problem which often arises in litigation over fees in civil rights cases: should a plaintiff who has gained substantial relief collect fees, even if the court grants relief under a statute that does not authorize a fee award? The major problem occurs usually when a plaintiff alleges both a major deprivation of a constitutional right and thus a cause of action under 42 U.S.C. §1983, for which 42 U.S.C. §1988 allows fees, and a related statutory claim for which no comparable attorney's fee statute exists. In *Smith v. Robinson*, 468 U.S. 104, S Ct. 3457 (1984), the plaintiff pleaded both the Education of the Handicapped Act ("EHA"), which contains no fee provision, and a Fourteenth Amendment equal protection claim pursuant to 42 U.S.C. §1983. After prevailing on the EHA claim, the plaintiff received fees under §1983, even though the Court did not rule on the equal protection claim. The trial court's rationale was that, under *Maher v. Gagne*, 448 U.S. 122 (1980), prevailing plaintiffs should not be prejudiced in their fee requests by the traditional avoidance of constitutional claims, and should receive fees under §1988, if the unaddressed constitutional claim was substantial, and related to the winning statutory claim. Relying on *Hensley*, the Court reversed the award.

Key to the reversal was this issue of "relatedness." Since the Court interpreted the EHA as completely controlling the remedies available to the plaintiff, and precluding any resort to any constitutional claim, it found the equal protection claim to be unrelated to the winning EHA issue, and thus uncompensatable. By implication, if the district court had actually reviewed the plaintiff's equal protection claim, the court would have rejected it as preempted by the EHA, and thus the claim could not be classified as "substantial."

The Supreme Court's ruling in *Smith v. Robinson* does not overrule the holding in *Maher v. Gagne*, and should not deter the practitioner who wishes simultaneously to allege constitutional and statutory claims for relief. But caution is advisable, both in the state and in



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the federal arenas. Even before *Hensley* and *Smith*, the Court of Special Appeals denied a \$1988 claim because plaintiffs had pleaded a constitutional, not a \$1983 claim, and the court did not find these to be synonymous, *Brown v. Hornbeck*, 54 Md. App. 404, 458 A.2d 900 (1983), and because plaintiffs had prevailed solely on the state law ground, with the unaddressed equal protection claim evaluated as totally unsubstantial. In *County Executive of Prince George's County v. Doe*, 300 Md. 445, 479 A.2d 352 (1984), the Court of Appeals, also confronting a prevailing statutory claim, an unaddressed \$1983 claim, and a \$1988 request for fees, found the \$1983 claim to lack substance and denied the fees. *Doe* at 465, 363. What seems clear is that attorneys who attempt to collect fees for prevailing issues on the basis of unaddressed \$1983 claims can expect to endure a second review on the merits, both in state and federal court.

Practitioners should also take note of the Supreme Court's recent decision in *Marek v. Chesny*, 53 U.S.L.W. 4903 (6/25/85), in which the court ruled that plaintiffs who win less in damages at trial than they were offered in pre-trial settlement may not receive attorney's fees for any of their post-settlement efforts. The court held that Fed. R. Cir. P. 68, which bars recovery of "costs" incurred in such a situation, extends to attorney's fees sought, in this case, under \$1988.

What is the "reasonable fee"?

The metaphysical struggles of the courts in selecting countable hours serves only as a prelude to the more technical, but conceptually less exhausting inquiry of how to determine the reasonable fee. The factors to be considered, first enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (1974), a Title VII case, were adopted by the Fourth Circuit in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226

(1978), a Truth in Lending case. As further refined by *Anderson v. Morris*, 658 F. 2d 246 (4th Cir. 1981) these factors are still considered basic to calculations of attorney's fees in this circuit, and are in similar forms acknowledged in all circuits and by the Supreme Court to this day. See *Blum v. Stenson*, 465 U.S. 104 S.Ct. 154 (1984); *Burnley v. Short*, 730 F.2d 136, 141 (4th Cir. 1984) (*Barber/Johnson* standard applied in a Fair Labor Standards Act mandatory fees award).



The twelve *Barber/Johnson* factors include the customary fee for the type of work, the experience of the attorney and the skill required by the task, the novelty of the issues, and the attorney's "opportunity costs." Using the formula eventually adopted in *Hensley*, the Fourth Circuit in *Anderson v. Morris* proposed a method of applying the twelve factors: number of hours "reasonably expended" multiplied by the customary rate (factors one and five), with a subsequent adjustment of the result in light of the remaining factors. *Vaughns, et al. v. Board of Education of Prince George's County, supra*, illustrates in detail how a court may go about determining market rate, reaching a base fee, and then evaluating it for upward or downward adjustment in light of the *Barber/Johnson* factors.

State Attorney's Fees Statutes

As is true in the federal system under the American Rule, Maryland state courts can only require an opposing party to pay fees pursuant to specific statutory

authorization. Some Maryland statutes do provide for awards to prevailing parties under limited circumstances. However, the conduct of the losing party rather than the success of the winner seems to be the triggering factor. Recent litigation under Maryland Rule 1-341, which allows a court to compel payment by one party-or his culpable attorney-of the opposing party's fees, if the party is responsible for maintaining his position in bad faith, or without substantial justification, has raised the issue of how to evaluate either standard. In *Blanton v. Equitable Bank, N.A.*, 61 Md. App. 158, 485 A.2d 694 (1985), the Court of Special Appeals found that defendant's attempt to appeal an unappealable collateral order lacked substantial justification, thereby allowing the court to award fees under Maryland Rule 1-341. It is instructive to contrast the Court of Special Appeals' calculation of fees with the process labored over by the federal courts. The Court found the plaintiff's fee request to contain no specific documentation of what personnel worked on the claim. The Court also considered the nature of the work to be fairly routine. Combining these factors, the Court reduced the request for \$902.80 to \$500, the primary rationale for the reduction being that it was "reasonable."

Conclusion

The practice of public interest law, and putting bread on the table, may well be compatible; the message to be carried away from the growing library of court opinions is that, in filing a petition for attorneys' fees, one may labor as mightily for the bread as for the public interest. While emphasizing the value of compensating civil rights attorneys, the Supreme Court has in some ways made it more onerous for the trial court to do so. The trial court must act more as an auditor than an arbitrator; in some instances, the court must conduct virtually anew a review of issues which it may previously have avoided on the merits. The higher expectations for documentation of course impose greater burdens on the attorney. It is to be hoped that the prospective public interest attorney will regard these observations as warnings, rather than as efforts to discourage. Despite the possible difficulties, the inducements for this type of representation still exist-the rewards inherent in the preservation of important rights and, yes, the likelihood of compensation—and the work remains to be done.

**September
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