



Providing Keys to the Courthouse Without Giving Up Full Recovery

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The contingency fee agreement, the proverbial key to the courthouse,¹ and, by its terms, is a limit to the amount a lawyer can recover from the client. Such an agreement, however, should not necessarily limit the attorney fees that prevailing counsel can recover from the unsuccessful opposing litigant. In construction law, practitioners sometimes prosecute claims on behalf of clients that seek, as part of the claim for relief, reasonable attorney fees. In certain situations, particularly when those fees are sought pursuant to a statute, like an unfair or deceptive trade practices act, worker's compensation act, or a mechanic's lien law, and where the successful client sought vindication of both private and public wrongs,² those reasonable attorney fees might be recovered without regard to the limitations on the total recovery otherwise imposed by a contingency fee agreement.

In a recent ruling the U.S. District Court for the District of Connecticut, Judge Christopher F. Droney decided, over objection, that a plaintiff was "entitled to an attorney's fee award that is greater than the one provided for by the contingency fee agreement."³ In that case, *Charts v. Nationwide Mutual Insurance Co.*, the plaintiff and his lawyer entered into a contingency fee agreement that provided that the attorney fee "will be one quarter (25%) of any recovery obtained in the case, after deduction of expenses, either by way of settlement, trial or appeal." At the conclusion of a week-long trial, the jury awarded Charts \$2,300,000 in compensatory damages. As to the fee agreement, "At a minimum," the court wrote, "this provision requires an award of \$575,000 (\$2,300,000 x .25)." The court awarded Charts \$750,000 in

attorney fees and \$17,745.75 in costs.

In *Charts*, the jury found that Nationwide violated two statutes: the Connecticut Franchise Act and the Connecticut Unfair Trade Practices Act. Both statutes have provisions for the award of attorney fees. Specifically, the Connecticut Franchise Act states that a franchisee, "if successful, shall be entitled to costs, including, but not limited to, reasonable attorneys' fees." The Connecticut Unfair Trade Practices Act states, "In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery." Nationwide argued that "an award of attorney's fees to Charts under the Franchise Act is capped by the amount established in the contingency fee agreement," and cited Connecticut Supreme Court decisions for the notion that "a trial court should not depart from a reasonable fee agreement in the absence of a persuasive demonstration that enforcing the agreement would result in substantial unfairness to the defendant." The defendants also argued that the court should exercise its discretion under the Unfair Trade Practices Act and deny Charts's request for attorney fees pursuant to the Connecticut Unfair Trade Practices Act and, thus, award pursuant to the Franchise Act only what would be provided by the contingency agreement.

The court held that "\$750,000 accurately reflects the reasonable hours worked by Charts' attorney, and is based on a reasonable billing rate that is adjusted for present value, as well as affected by other factors." In coming to that determination, the court looked to the 12 factors relevant to an award of reasonable attorney fees first set forth

in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).⁴

The 12 Factors since *Johnson*

The 12 *Johnson* factors are as follows:

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

State courts might also look to their local rules of professional conduct and/or canons of ethics or other locally adopted combinations of factors similar to *Johnson's* 12 in determining the reasonableness of attorney fees.⁶

Since the Fifth Circuit decided *Johnson* and set forth its 12 factors, every circuit has addressed the use of those factors in determining the reasonableness of attorney fee awards, as has the U.S. Supreme Court. The Court of Appeals for the First Circuit "has embraced the *Johnson* factors for use in sculpting fee awards."⁷ In the Second Circuit the *Johnson* factors may be used in adjusting the lodestar rate, the rate achieved by multiplying a reasonable hourly rate by the number of hours reasonably spent working on the case, which is discussed in more detail later in this article.⁸ The Court of Appeals for the Third Circuit has

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*Litigation*⁵⁰ bears heavily on this word of caution. In that highly fact-specific and complex case, the court reversed an attorney fee award of \$2,064,000, calling the award a windfall and finding that the award did not bear a reasonable relationship with the amount of recovery generated. As the court said, the facts of the case “illustrate the importance of maintaining a billing system capable of generating an accurate record of time expended when attorney fees are recoverable either by statute or by contract.”⁵¹

Counsel should consider a possible attorney fee claim from the beginning of their representation in a matter. Lawyers must be prepared to defend any request for fees with concurrent records of time spent, their own affidavits, and affidavits of other lawyers in their geographic region testifying to reasonable rates and quality of representation, as well as with other credible evidence that speaks to the factors a court in the jurisdiction will consider, regardless of the type of agreement they have with their clients. The keys to the courthouse should not be a lawyer’s bar to the recovery of reasonable fees.

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Endnotes

1. See, e.g., Philip H. Corboy, *Contingency Fees: The Individual’s Key to the Courthouse Door*, LITIG., Summer 1976; Federico v. Sullivan, 1990 WL 166653, at *1 (D. Ariz. 1990) (“The Court notes that counsel for petitioner took the case on a contingency basis and that the contingent-fee agreement is often the only effective key to the courthouse for a Social Security petitioner in combating the almost unlimited resources of the United States Government and the Department of

Health and Human Services.”); Harris v. Union Elec. Co., 1985 WL 29961, at *1, Fed. Sec. L. Rep. 92,352 (E.D. Mo. 1985) (“Mr. John Shepherd, Esquire, immediate past president of the American Bar Association, and experienced trial attorney, opined that the amount requested, representing a thirty percent contingent fee, is reasonable. As characterized by Mr. Shepherd, the contingent fee arrangement is the ‘poor man’s key to the courthouse.’ ”).

2. See *D&A Excavating Serv., Inc. v. J.I. Case Co.*, 555 So. 2d 1256 (Fla. App. 1990) (in action under misleading advertising statute court held that when counsel represents a client who seeks vindication for a private as well as a public wrong attorney’s fees are not limited by the terms of the contingent fee agreement).

3. *Charts v. Nationwide Mut. Ins. Co.*, 2005 WL 2789319, at *17, 3:97 CV 01621 (CFD) (D. Conn. Oct. 25, 2005).

4. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974)."

5. *Johnson*, 488 F.2d at 717–19.

6. See, e.g., *Finnell v. Seismic*, 67 P.3d 339 (Okla. 2003); *Flagala Corp. v. H.E. Hamm*, 302 So. 2d 195 (Fla. App. 1974).

7. *Coutin v. Young Rubicam P.R., Inc.*, 124 F.3d 331, 337 n.3 (1st Cir. 1997) (internal citations omitted).

8. “In adjusting a lodestar figure, the Fifth Circuit developed a set of factors that may be taken into consideration...As the Supreme Court noted in *Hensley*, in adjusting a fee upward or downward, a ‘district court...may consider...factors identified in *Johnson*...though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate.’” *United States Football League v. National Football League*, 887 F.2d 408, 415 (2d Cir. 1989) (internal citations omitted).

9. *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978). “The courts have enumerated a number of factors in determining the reasonableness of awards under . . . attorney’s fee provisions.” *Hughes*, 578 F.2d at 488 n.7. “The twelve factors enumerated in *Johnson*, of course, are not exclusive.” *Hughes*, 578 F.2d 496 n.6 (concurring opinion).

10. “Furthermore, although the district court did not consider all twelve *Johnson* factors, we do not believe that the twelve factors must all be considered in each and every case.” *Martin v. Mecklenberg County*, Slip Op., 2005 WL 2764755, at *7 (4th Cir. Oct. 26, 2005) (internal citations omitted).

11. *Barnes v. City of Cincinnati*, 401 F.3d 729, 745 (6th Cir. 2005) quoting *Blanchard v. Bergeron*, 489 U.S. 87, 93,

109 S. Ct. 939, 103 L. Ed. 2d 67 (1989).

12. “The lodestar may then be adjusted by reference to the twelve factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974), which have been approved and adopted by the Supreme Court.” *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 63 Fair Empl. Prac. Cas. (BNA) 1064 (7th Cir. 1993) (internal citations omitted).

13. *In re Kula*, 213 B.R. 729 (8th Cir. 1997) (holding that *Johnson* factors may be considered by bankruptcy court in making adjustments to lodestar amount and remanding for performance of lodestar calculation).

14. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975) cert. denied, 425 U.S. 951, 96 S. Ct. 1762, 48 L. Ed. 2d 195 (1976).

15. “To determine reasonableness, federal courts have relied heavily on the factors articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), in calculating and reviewing attorneys’ fee awards.” *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 455 (10th Cir. 1988) (stating that because the *Johnson* factors measure an attorney’s contribution, they are appropriate in setting and reviewing percentage fee awards in common fund cases), cert. denied, 488 U.S. 822, 109 S. Ct. 66, 102 L. Ed. 2d 43 (1988).

16. *Schafler v. Fairway Park Condo. Ass’n*, 147 Fed. Appx. 113 (11th Cir. 2005) (holding that district court is not required to consider insurance coverage or other indemnification agreements in determining amount of reasonable fee under lodestar formula) (internal citations omitted).

17. See Application under the Equal Access to Justice Act Consolidated Technologies, Inc., 1989 WL 22694, 90-1 BCA P 22603 (A.S.B.C.A. 1989); Application for Attorney Fees Middlesex Contractors & Riggers, Inc., 1989 WL 103630, 89-3 BCA P 22186 (I.B.C.A. 1989).

18. *Hensley*, 461 U.S. at 435.

19. *Blanchard*, 489 U.S. at 94.

20. See *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1343 (2d Cir. 1994) (upholding district court’s refusal to reduce lodestar, where the facts and legal theories were “thoroughly intermingled” and constituted a common core of facts).

21. *Phelps v. Hamilton*, 120 F.3d 1126, 1131 (10th Cir. 1997).

22. *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565, 106 S. Ct. 3088, 3098 (1986).

23. *Lindy Bros. Builders, Inc. of*

Phila. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976).

24. Spodnick v. Chater, 1997 WL 104940, at *11 (N.D. Okla. 1997) (internal citations omitted).

25. Missouri v. Jenkins, 491 U.S. 274, 282, 109 S. Ct. 2463 (1989).

26. *Id.* quoting Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987).

27. Chambless v. Masters, Mates & Pilots Pension Plan, 885 F.2d 1053, 1060 (2d Cir. 1989) (emphasis added).

28. Grant v. Martinez, 973 F.2d 96, 100 (2d Cir. 1992).

29. LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 763-64 (2d Cir. 1998).

30. James v. City of Dallas, 2005 WL 954999, at *3 (N.D. Tex. 2005).

31. Walker v. United States Dep't of Hous. & Urban Dev., 99 F.3d 761, 773 (5th Cir. 1996) (internal citations omitted).

32. See Tsombanidis v. City of West Haven, 208 F. Supp. 2d 263 (D. Conn. 2002) (an appropriate adjustment for delay in payment, whether by the application of current rates, or otherwise, is within the contemplation of the civil rights fee award statutes, but noting that particular case did not involve delay in payment); P.L. v. Norwalk Bd. of Ed., 64 F. Supp. 2d 61 (D. Conn. 1999) ("Inasmuch as this case is only two years old, and due to the paucity of special education attorneys in this state, the

Court orders that the attorneys be compensated at the current, not historical, rate."); *In re Master Key Antitrust Litig.*, 1977 WL 1545, at *6 (D. Conn. 1977) (without benefit of *Missouri v. Jenkins*, awarding nearly \$4.1 million in attorney fees and stating, "Normally the lodestar determination should be based on the attorney's current rates at the time of the filing of the fee petitions," but noting that rates were changed at the "very tail end of litigation" and that a class should not be "forced to compensate an attorney for services rendered some years ago at a rate which presupposes knowledge and experience gained since that time").

33. Heder v. City of Two Rivers, 255 F. Supp. 2d 947, 957 (E.D. Wis. 2003).

34. Bolden v. Se. Pa. Transp. Authority, 897 F. Supp. 188, 192-93 (E.D. Pa. 1995) (civil rights action).

35. Anderson v. Director, Office of Workers' Comp. Programs, 91 F.3d 1322 (9th Cir. 1996).

36. Fischel v. Equitable Life Ass. Soc. of the U.S., 307 F.3d 997 (9th Cir. 2002).

37. *Id.* at 1010 quoting *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994).

38. Alaska v. Cowgill, 115 P.3d 522 (Alaska 2005).

39. Finnell v. Seismic, 67 P.3d 339 (Okla. 2003).

40. Taylor v. Medenica, 331 S.C. 575, 503 S.E.2d 458 (S.C. 1998).

41. Morgan v. Ebby Halliday Real Estate, Inc., 873 S.W.2d 385 (Tex. App. 1994).

42. Bloomington Elec. Co. v. Freeman's, Inc., 394 N.W.2d 605 (Minn. App. 1986).

43. Bloomington Elec., 394 N.W.2d at 608 citing *Asp v. O'Brien*, 277 N.W.2d 382, 385 (Minn. 1979).

44. Frank L. Pirtz Constr., Inc. v. Hardin Town Pump, Inc., 214 Mont. 131, 692 P.2d 1160 (Mont. 1984).

45. Wallace v. Fox, 7 F. Supp. 2d 132, 141 (D. Conn. 1998) citing *Roberts v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997).

46. *Rose v. Heintz*, 671 F. Supp. 901, 907 (D. Conn. 1987) citing *Lewis v. Coughlin*, 801 F.2d 570 (2d Cir. 1986) (In *Rose v. Heintz* the district court found that attorneys were entitled to an enhanced award because of exceptional success. *Id.*).

47. *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986).

48. *Wallace*, 7 F. Supp. 2d at 141 (internal citations omitted).

49. *Charts*, 2005 WL 2789319, at *20.

50. *In re S.D. Microsoft Antitrust Litig.*, 2005 WL 3073673, 2005 SD 113 (S.D. Nov. 16, 2005).

51. *In re S.D. Microsoft Antitrust Litig.*, 2005 WL 3073673.