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Calculating Attorney's Fees to Prevailing Parties

In this month's column, we report on *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*,[1] in which the U.S. Court of Appeals for the Second Circuit last month clarified how district courts should calculate attorney's fees that are awarded to prevailing parties pursuant to certain federal statutes.[2] Judge John M. Walker Jr. authored the decision, in which retired U.S. Supreme Court Justice Sandra Day O'Connor, sitting by designation, and Chief Judge Dennis G. Jacobs joined.

The court's analysis was divided into three sections. First, the court untangled and clarified seemingly conflicting precedent. It suggested that the term "lodestar" be abandoned in favor of the term "presumptively reasonable fee," which should be calculated at the hourly rate that "a reasonable, paying client would be willing to pay." Second, the court addressed the "forum rule," which requires a district court to use the prevailing hourly rates in the district in which it sits when calculating attorney's fees. The court held that a district court is permitted to use an out-of-district hourly rate if market considerations justify such a rate. Finally, the Second Circuit concluded that the district court in this case had applied the forum rule too strictly, but nevertheless affirmed the judgment, primarily because application of the principles set forth in its opinion would not have led to a different outcome.

Background and Procedural History

On April 22, 2003, plaintiffs, the Arbor Hill Concerned Citizens Neighborhood Association, the Albany County Branch of the NAACP and three individuals, brought suit under the Voting Rights Act of 1965 against Albany County and its Board of Elections in the Northern District of New York. Plaintiffs alleged that Albany County's 2002 legislative redistricting plan violated §2 of the Voting Rights Act. On Aug. 22, 2003, Judge

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Norman Mordue enjoined Albany County from holding a scheduled election in November 2003 pending adoption by the Albany County Legislature of a revised redistricting plan, but declined to order Albany County to hold a special election in place of the November 2003 election. Plaintiffs appealed that decision and on Jan. 28, 2004, the Second Circuit vacated the district court's decision and ordered Albany County to hold the special election on March 2, 2004. In August 2004, the parties resolved the remaining issues in the case by consent decree.

Plaintiffs then moved in the Second Circuit for an award of attorney's fees under the Voting Rights Act. Throughout the case, plaintiffs had received legal services from three entities: (1) the Albany law firm of DerOhannesian & DerOhannesian; (2) the Washington, D.C. non-profit organization Lawyers' Committee for Civil Rights Under Law; and (3) the Manhattan office of Gibson, Dunn & Crutcher (Gibson Dunn). The Second Circuit issued an opinion granting plaintiffs' motion "in principle," but remanded to the district court to determine the appropriate fee.

The district court adopted a Report-Recommendation prepared by Magistrate Judge David R. Homer, which rejected Gibson Dunn's request for reimbursement of attorney's fees based on the prevailing hourly rate charged in the Southern District of New York,[3] and held that the Northern District of New York was the relevant district for purposes of establishing the applicable hourly rate.

The district court ruled that plaintiffs had not met their burden of showing "special circumstances" that justified their decision to retain counsel outside of the Northern District of New York. Judge Mordue determined that:

> baseless assumptions on the part of plaintiffs regarding the unavailability of qualified legal counsel in this District outside of Albany County defy all reason and logic and preclude plaintiffs from meeting their burden on this issue. Importantly, it is undisputed that plaintiffs did not even attempt to contact attorneys or law firms in the Northern District of New York outside of Albany County insofar as obtaining representation in this matter.

Plaintiffs appealed the district court's decision to award Gibson Dunn a fee based on the hourly rate prevailing in the Northern District of New York.

Second Circuit Decision

The Second Circuit observed at the outset that "this dispute concerning the 'forum rule' is but a symptom of a more serious illness: Our fee-setting jurisprudence has become needlessly confused—it has come untethered from the free market it is meant to approximate."[4] The court then recounted the history of jurisprudence pertaining to the determination of attorney's fees that can be awarded to prevailing parties in civil rights cases as well as in certain other contexts.

In the 1970s, two fee calculation methods were developed in the circuit courts. The first, the "lodestar" method, was developed by the U.S. Court of Appeals for the Third Circuit in *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp.*[5] It involved a two-step inquiry: (1) calculation of the lodestar (a product of the attorney's usual hourly rate and the number of hours worked on the matter), and (2) adjustment of the lodestar based on case-specific considerations. The second method was developed by the U.S. Court of Appeals for the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*[6] The *Johnson* method required the district court to arrive at a reasonable fee by considering 12 specified factors, which included the attorney's customary rate, the time and labor required, the difficulty of the questions, the level of skill required, the experience of the attorney, and awards in other cases, among other factors.

In theory, the lodestar method involved consideration of fewer factors than the *Johnson* method. In practice, however, district courts tended

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to consider the same set of factors. The difference between the two methods did not turn on the number of factors reviewed, but when they were considered. The lodestar method required a district court to consider case-specific factors after it had already determined the lodestar. In contrast, under the *Johnson* method, a district court would consider the "time and labor required" and "the attorney's customary hourly rate" at the same time that it evaluated the other *Johnson* factors.

In the 1980s, the Supreme Court weighed in on the appropriate fee calculation method.[7] According to the Second Circuit, the Supreme Court "adopted the lodestar method in principle," but did not "fully abandon[] the *Johnson* method." Instead of requiring the lodestar to be calculated using the attorney's own billing rate and then adjusted for reasonableness in light of case-specific variables, "the Supreme Court instructed district courts to use a reasonable hourly rate—which it directed that district courts set in light of the *Johnson* factors—in calculating what it continued to refer to as the lodestar." The Supreme Court thus "collapsed what had once been a two-step inquiry into a single-step inquiry; it shifted district courts' focus from the reasonableness of the lodestar to the reasonableness of the hourly rate used in calculating the lodestar, which in turn became the de facto reasonable fee."[8]

But the Supreme Court's decisions led to confusion, due to the "nettlesome interplay between the lodestar method and the *Johnson* method." The circuit courts, including the Second Circuit, struggled to decide whether the *Johnson* factors should be applied before the lodestar was calculated, after the lodestar was determined, or at both stages. Indeed, even the Supreme Court "has not fully resolved the relationship between the two methods."[9]

The Second Circuit in *Arbor Hill* noted that the district court's opinion reflects the general uncertainty in this area of the law. The district court appeared to use both a one-step and a two-step lodestar calculation, and at times appeared unsure of its role "in approximating the workings of the market."[10]

The Second Circuit sought to clarify this confused precedent. To begin with, the court found that a semantic change was in order: "The meaning of the term 'lodestar' has shifted over time, and its value as a metaphor has deteriorated to the point of unhelpfulness." The court abandoned the use of the term "lodestar" for purposes of this opinion, and urged (but did not require) future Second Circuit panels to do the same. Explaining that a better term was "presumptively reasonable fee," the Second Circuit instructed district courts to focus on determining a "reasonable hourly rate," which is "the rate a paying client would be willing to pay." In calculating that rate, district courts should consider all of the case-specific variables identified in *Johnson* and other decisions, and "should also bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively." Essentially, the court appears to have adopted the view that the *Johnson* factors and other equitable variables should be considered only once, at the beginning of a district court's calculations, when the district court determines the appropriate hourly rate.

The court then turned to the particular principle at issue—the forum rule. Under that rule, the district court is to determine the lodestar using the prevailing hourly rate in the community, and the Second Circuit has interpreted community to mean the district where the district court sits. Again, there has been confusion in district court and Second Circuit precedent on this issue. Some courts have "considered the variation between in-district and out-of-district rates in setting the hourly rate" (in other words, before they calculated the lodestar); others have considered that variation only after they had already arrived at the lodestar amount. The *Arbor Hill* court held that a rebuttable presumption existed in favor of the in-district rate, but that a higher rate could be used if a party could "demonstrate that his or her retention of an out-of-district attorney was reasonable under the circumstances as they would be reckoned by a client paying the attorney's bill."[11]

The 'Arbor Hill' decision should be understood less as a departure from prior precedent than as an effort to harmonize prior cases and streamline the analysis a district court is required to conduct in determining an appropriate attorney's fee award.

The Second Circuit grounded its holding on the market considerations that determine a client's retention of an attorney. The court noted that in light of the increasing interconnection among legal communities, it may be appropriate to define markets by practice area rather than geography in some circumstances. Other relevant market factors included:

> the complexity and difficulty of the case, the available expertise and capacity of the client's other counsel (if any), the resources required to prosecute the case effectively (taking account of the resources being marshaled on the other side but not endorsing scorched earth tactics), the timing demands of the case, whether the attorney had an interest (independent of that of his client) in achieving the ends of the litigation or initiated the representation himself, whether the attorney was initially acting pro bono (such that a client might be aware that the attorney expected low or non-existent remuneration), and other returns (such as reputation, etc.) the attorney expected from the representation.[12]

The court concluded that by focusing on how a client would weigh these factors when deciding how much to spend per hour for legal representation, "the district court can enforce market discipline, approximating the negotiation that might ensue were the client actually required to pay the attorney's fees."[13]

Finally, the court briefly discussed the particular facts of the case. Although the district court's application of the forum rule had been too strict, the Second Circuit found no error in the fee award. According to the court's newly articulated analysis, "a reasonable, paying resident of Albany would have made a greater effort to retain an attorney practicing in the Northern District of New York….The rates charged by attorneys practicing in the Southern District of New York would simply have been too high for a thrifty, hypothetical client…."[14] The court also noted that it would accord considerable deference to the district court's evaluation of the *Johnson* factors and other variables. The court thus affirmed the district court's decision to reject Gibson Dunn's request for payment at an out-of-district rate.

Conclusion

As the *Arbor Hill* court itself indicated, this decision should be understood less as a departure from prior precedent than as an effort to harmonize prior cases and streamline the analysis a district court is required to conduct in determining an appropriate attorney's fee award. The Second Circuit appears to have been motivated by two overarching goals: (1) clarifying what had become a "muddled legal landscape"[15]; and (2) emphasizing the importance of free-market principles in fee-setting jurisprudence.

It is difficult to predict what impact, if any, the *Arbor Hill* decision will have on the choices that clients and attorneys make in cases where fee awards are available, such as civil rights cases. At first blush, the court's holding that a "thrifty, hypothetical" client would have retained lower-priced, in-district counsel instead of higher-priced, out-of-district counsel might seem to affect the chances that the latter types of retentions would occur. But, as the court suggested, lawyers are likely to continue to work for clients even in situations where it is reasonably certain that their full rates will not be recovered as long as they are rewarded in other, intangible ways—such as by gaining experience, boosting their reputations or achieving their political and social agendas.

1. No. 06-0086-CV, 2007 WL 1189487 (2d Cir. April 24, 2007).
2. See Voting Rights Act of 1965, 42 U.S.C. §1973; Civil Right's Attorney's Fees Awards Act, 42 U.S.C. §1988(b).
3. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 419 F.Supp.2d 206 (N.D.N.Y. 2005).
4. *Arbor Hill*, 2007 WL 1189487 at *1.
5. 487 F.2d 161 (3d Cir. 1973).
6. 488 F.2d 714 (5th Cir. 1974).
7. See *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Blum v. Stenson*, 465 U.S. 886 (1984).
8. *Arbor Hill*, 2007 WL 1189487 at *5.
9. Id. at *6.
10. Id. at *7.
11. Id. at *8.
12. Id. at *1.
13. Id. at *8.
14. Id. at *2.
15. Id. at *7.