Notes

ATTORNEYS' FEES IN CLASS ACTION SHAREHOLDER
DERIVATIVE SUITS

I. INTRODUCTION

Recently, there has been much discussion concerning the award of attorneys' fees in class action and shareholder derivative suits. Case law during the past decade has delineated and clarified both the circumstances in which attorneys' fees should be awarded, and the factors to be considered in determining the amount of the award. Modern courts view fee petitions with an increasingly critical eye, founding their disapproval on both public policy and legal rationales. In many cases, courts have found that the fees requested by petitioning attorneys are excessive and must be reduced to more accurately reflect the extent of the attorneys' labor as well as the quality of their efforts. Implicit in these reductions of attorneys' fee petitions is the judicial perception that lawyers are misusing the legally sanctioned system of granting fee awards in class suits to gain unmerited fees at the expense of the members of the class.

A discussion of the historical foundation of the judicial award of attorneys' fees in representative suits may serve to illustrate the public policy considerations in the courts' review of present day fee petitions. Also, an analysis of the variables used in determining the amount of the fees awarded may afford guidelines to attorneys seeking awards in shareholder derivative actions, as well as reflect the basis for judicial concern about the so-called "excessive" fee petitions being submitted.

1. The scope of this article is restricted to judicial analyses of attorneys' fees petitions in the absence of authorizing statutes, although the discussion of factors to be considered in determining the amount of the fee to be awarded may be applicable in circumstances where there is statutory authorization for the award.
3. See, e.g., Altman v. Central of Ga. Ry., 580 F.2d 659, 660 (D.C. Cir. 1978) (attorneys' fees awarded, but court stated that it would be "inappropriate to award fees for efforts which were not productive of any benefit").
II. Historical Foundations—The "Common Fund" Doctrine

A. Development of Doctrine

It has generally been held that attorneys' fees may not be awarded to the prevailing parties in a suit. However, in the case of representative suits, this doctrine may produce unfair results; i.e., in a class action, where the class representative must pay costs that resulted in the creation of a fund which benefits persons who did not take an active part in the litigation. The response to this dilemma has been "to award fees only in certain kinds of cases or to certain kinds of winners or against particular kinds of losers." In the case of class action or shareholder derivative suits, the "common fund" doctrine has developed to ensure that the named plaintiffs will not be forced to bear the entire expense of litigation while the unnamed members of the class reap the benefits. The "common fund" doctrine originated in the seminal case of Trustees v. Greenough. There, as security for a bond issue, the state of Florida conveyed millions of acres of state land to certain trustees. The trustees then proceeded to sell the land at nominal prices without maintaining adequate reserves for payments on the bonds. The plaintiff, a bondholder, successfully sued to rescind the fraudulent land transfers, and financed the action personally. The plaintiff then attempted to secure reimbursement of his attorneys' fees from the residue of the fund that his successful suit created. The Supreme Court held for the plaintiff, stating that to deny contribution "would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage."

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4. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). The Supreme Court discussed the so-called "American Rule," which denies the awarding of attorneys' fees to prevailing litigants, and then rejected respondents' request for an exception to this rule based on the "private attorney general" approach approved by the Court of Appeals for the District of Columbia. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 495 F.2d 1026 (D.C. Cir. 1974). The Court stated that it was "convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in this manner." Alyeska Pipeline Serv. Co., 421 U.S. at 247.

5. See Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). The Mills Court held that "[i]f to allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." Id. at 392.

6. Dawson, supra note 2, at 1599.

7. 105 U.S. 527 (1881).

8. Id. at 532. The Supreme Court went on to say that the unnamed bondholders "ought to contribute their due proportion of the expenses which [plaintiff]
The next such case to receive the Supreme Court's attention was *Central Railroad & Banking Co. v. Pettus*, in which the attorneys asserted their claim on the fund directly. The defense was raised that the attorneys had already collected their fee for services from their clients and should not be permitted to recover again. This has come to be known as the "contract defense." The *Pettus* Court determined that the attorneys had intended, throughout the litigation, to collect from the class as a whole, and that had they foreseen that this would not be the case, they would have charged the named plaintiffs a higher fee. The Court held that the passive members of the class were aware that their interests were being protected, and, consequently, it would be unjust to permit them to benefit at the expense of the named plaintiffs. The *Pettus* ruling allowed, for the first time, a cause of action by the lawyer against the fund in his own right, based on the theory that he, himself, had produced it for the benefit of the class as a whole. However, it is generally agreed that this ruling does not bar the client from asserting a right of contribution against the fund.

The next step in the development of the common fund doctrine was the determination of the basis of the fee award. In the case of *In re Osofsky*, the court enunciated six variables to be considered in making this determination, one of which was the amount of the fund the lawyers' efforts created. However, these factors soon proved

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9. 113 U.S. 116 (1885).
10. Id. at 125.
11. Id. at 127.
13. 50 F.2d 925 (S.D.N.Y. 1931).
14. The factors the Southern District Court of New York considered were the following:
   1) The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary;
   2) The quality and skill which the situation facing the attorney demanded;
   3) The skill employed in meeting that situation;
   4) The amount involved; because that determines the risk of the client and the commensurate responsibility of the lawyer;
   5) The result of the case; because that determines the real benefit to the client; and
   6) The eminence of the lawyer at the bar, or in the specialty in which he may be practicing.

*Id.* at 927.
unsatisfactory, as they were a "result obtained" measure of benefit to the lawyer.15 By using the amount of the fund as an element, a lesser recovery would result in a lesser fee. In addition, the use of these factors was unreliable and had the effect of turning fee award petitions into "profit-sharing schemes with the judge determining the shares under variable and uncertain standards."16

A significant departure from the original Greenough theory of the common fund doctrine occurred in Sprague v. Ticonic National Bank.17 In this case, plaintiff sued to obtain her share of a clearly identifiable fund which was already in existence. However, although plaintiff's suit was successful, thirteen other beneficiaries did not receive any share of the fund. Justice Frankfurter determined that, although the thirteen beneficiaries did not have rights established by a decree in plaintiff's favor, the stare decisis of the decision provided the "connecting link of benefit to the class of beneficiaries, even though no fund was created."18 As a result of this decision, it generally has been held that attorneys need only commence the litigation in order to recover.19

This extension of the traditional common fund doctrine has been particularly significant in awarding attorneys' fees in shareholder derivative actions.20 "Recent decisions have relaxed the requirement

15. Dawson, supra note 2, at 1609.
16. Id.
18. Id. at 164-67.
19. Dawson, supra note 2, at 1611.
This development has been most pronounced in shareholders' derivative actions, where the courts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all the shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor.

Id. at 394. See also Blau v. Rayette-Faberge, Inc., 389 F.2d 469 (2d Cir. 1968); Gilson v. Chock-Full-O-Nuts Corp., 331 F.2d 107 (2d Cir. 1964) (fund consisted of "shortswing profits" recovered for the corporation against officer and directors who had engaged in insider trading in violation of § 16 of the Securities Exchange Act of 1934); Globus v. Jaroff, 279 F. Supp. 807 (S.D.N.Y. 1968) (although no actual fund was created, the court assessed attorneys' fees against the corporation due to the avoidance of monetary loss by its being relieved of its obligation to issue stock at 60% of its market value); Mencher v. Sachs, 39 Del. Ch. 366, 164 A.2d 320 (1960) (although no fund existed, the benefit conferred upon the corporation was the cancellation of illegally issued stock). Cf. Schectman v. Wolfson, 244 F.2d 537 (2d Cir. 1957) (where the plaintiff could not identify any concrete benefit conferred on the corporation, the court rejected the claim as being too speculative; Miles v. Bank of Hefflin, 349 So. 2d 1072 (Ala. 1977) (although, in principle, the plaintiff shareholders could confer a benefit upon the corporation through the inspection of records, awarding of attorneys' fees was premature where stockholders had not yet completed their inquiries).
of a specific connection between the 'fund' and the beneficiaries such as a trust or a lien.21 Illustrative of this development is Bosch v. Meeker Cooperative Light & Power Association,22 where the court held that a finding of "substantial benefit" to the corporation would justify the award of attorneys' fees, even if the benefit was not monetary.23 The court went on to note that "substantial benefit must be something more than technical in its consequence" and it must be one that "corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the shareholder's interest."24

The Supreme Court expressed its approval of the "substantial benefit" rule in the landmark case of Mills v. Electric Auto-Lite Co.25 This decision reflected both the doctrine of substantial benefit and the concept of encouraging litigation by "private attorneys-general."26 Both of these concepts serve to support the award of attorneys' fees in shareholder derivative suits, in that "private stockholder actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders."27 The Mills Court also emphasized that the absence of a monetary recovery does not preclude an award of attorneys' fees. "The absence of an avowed class suit or the creation of a fund, . . . through stare decisis . . . hardly touches the power of equity in doing justice as between a party and the beneficiaries of his litigation."28

The Mills Court found the shareholder derivative action particularly suited to the practice of awarding attorneys' fees from a fund created, or of allocating the costs of litigation to the corporation.29 The share-

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21. See Note, Reimbursement for Attorneys' Fees From the Beneficiaries of Representative Litigation, 58 Minn. L. Rev. 933, 939 (1974) [hereinafter cited as Note, Attorneys' Fees] (referring to decisions in shareholder derivative suits rendered by the Second Circuit).
22. 257 Minn. 362, 101 N.W.2d 423 (1960). Derivative action against directors and counsel of defendant corporation resulting in a determination that a purported election of directors and a proposed amendment of corporate bylaws were illegal. The stockholder was entitled to reimbursement of attorneys' fees if the corporation had received a substantial benefit as a result of the stockholder's action.
23. Id. at 367, 101 N.W.2d at 426-27.
24. Id. at 366-67, 101 N.W. at 427.
26. See Note, Attorneys' Fees, supra note 21, at 941.
27. Mills, 396 U.S. at 396.
28. Id. at 393 (citing Sprague, 307 U.S. at 167).
29. The Mills Court noted that "the courts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor." Id. at 394.
holder derivative action is unique in that the defendant corporation is actually the beneficiary of the shareholders' successful claim. The practice of assessing attorneys' fees against the corporation recognizes this fact. It is presumed that the corporation will pass the costs of the assessment on to its shareholders who are the real beneficiaries of the action. The shareholders will be responsible for their pro rata share of the costs of the legal services. 30

B. Problems With Doctrine

The application of the common fund doctrine in the award of attorneys' fees has raised several problems for the courts. In a simple case, an attorney represents a class and initiates litigation which he pursues to a successful conclusion. In this traditional "common fund" scenario, the attorney could recover his fees from the common fund or from the representative defendant corporation. 31 More typically, however, it is not so obvious that the attorney has caused the class to gain its benefit, or, if multiple attorneys have been engaged, which attorneys afforded the benefit. In response to this uncertainty, the Second Circuit developed the "but for" test. 32 Under this analysis, reimbursement may be denied if the petitioning attorneys cannot show that the benefit would have been lost but for their services. 33

For example, the defendant may undermine the determination that plaintiffs' counsel created a benefit by agreeing to take the action

30. It should be noted that the "contract defense" raised in Pettus is still viable. For example, in Mills, Justice Black dissented from the majority opinion on the ground that attorneys should not be awarded fees in the absence of a valid contractual agreement or a statute creating such a right to recovery. Id. at 397.

31. In Zilker v. Klein, 540 F. Supp. 1196 (N.D. Ill. 1982), the court stated that in the consideration of the award of attorneys' fees, there is little distinction between the class action and the derivative suit. "All the needs for the protection of the unrepresented . . . have equal force in the two situations. All that distinguishes them is the presence of a board of directors to represent stockholder rights in the derivative action." Id. at 1198.

32. Grace v. Ludwin, 484 F.2d 1262, 1268 (2d Cir. 1973) (in denying the attorneys' fee petition the court stated, "[i]t is by no means clear to the Commission that but for plaintiffs' intervention in the administrative proceeding the Commission and its then Division of Corporate Regulation would have sanctioned a violation of the Investment Company Act.").

33. In the situation where the benefit is the result of the services of many attorneys, courts have generally apportioned the fee award among all of them. See Perkins v. Standard Oil Co., 474 F.2d 549 (9th Cir. 1973), cert. denied, 412 U.S. 940 (1973). The trial court set the overall fee of $85/hour for the services of all the attorneys who participated, including partners, associates, and lead counsel. The Ninth Circuit, however, reduced it to $40/hour to reflect the relative contributions of the three groups of attorneys. Id. at 553-54.
that the class is demanding or by agreeing to settlement before trial. Using the "but for" test, the award of attorneys' fees may be based on a finding that defendants' "salutary action" would not have occurred but for the efforts and pressure applied by the plaintiffs' attorneys. In the case of a derivative action, it may be possible for the attorneys of would-be plaintiffs to prepare the action, only to have it taken over by the corporation. While attorneys ordinarily are not entitled to fees where the benefits are a result of the corporation's own counsel, an exception may be made where the corporate action is a result of the threat of litigation. Plaintiff attorneys' fees are generally awarded in settlements despite defendant counsels' participation in the agreement. As one court noted, "[c]ausation is the crucial link upon which any equitable award of attorneys' fees must be based, because if plaintiffs' suit did not in some respect cause the abandonment [of defendant's improper conduct] equitable principles could not justify an award." The defendant has the burden of proof to show that there was no causal connection.

It has been held that attorneys should be entitled to recover for only those services related to claims on which they were successful. However, a determination as to which party actually prevailed is sometimes difficult, particularly in the case where the parties have settled. In response to this dilemma, the doctrine of the "prevailing party" has emerged. Under this doctrine, the court is required to scrutinize the fee award to ensure that they are limited to only those claims for

34. Note, Attorneys' Fees, supra note 21, at 950 (citing Globus, 279 F. Supp. at 810. "Defendant's cancellation of the action when the plaintiff was on the brink of success provides a sufficient basis for an inference that the cancellation was in fact due to plaintiff's efforts." Id.).


36. See Gilson v. Check Full O'Nuts Corp., 331 F.2d 107 (2d Cir. 1964): [T]he record shows that the services appropriately rendered by Gilson's attorney were considerably more than simple preparation of the statutory request for the corporation to sue. [The amount, however,] should not be as much as if the attorney had himself instituted and prosecuted the actions; the corporation ought not to have to pay both him and its own counsel for the same legal services. . .

Id. at 109.

37. Barton v. Drummond, 636 F.2d 978, 983 (5th Cir. 1981). See also Lindy Brothers Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 165 (3d Cir. 1973) (Lindy I) ("The equitable powers of the court may be used to compensate individuals whose actions in commencing, pursuing or settling litigation. . . .")

38. See Barton v. Drummond, 636 F.2d 978, 983 (5th Cir. 1981).

39. Id. at 983-85.
which plaintiff’s counsel can specifically demonstrate that it had prevailed. The rationale is that it is inequitable to require a party "to pay twice, once to its own successful counsel and once to the other side’s unsuccessful counsel."\(^{41}\)

In complex litigation, however, it may be difficult to determine on which issues a party has prevailed. To that end, "plaintiffs may be considered ‘prevailing parties’ for attorneys’ fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."\(^{42}\) The court must make this determination on a case-by-case basis.\(^{43}\) There is some indication that, in proper circumstances, courts may view the "prevailing party" issue broadly.\(^{44}\) Moreover, the Second Circuit has indicated that the prosecution of some unsuccessful claims should be compensated if those same legal services also supported the prosecution of successful claims.\(^{45}\)

III. Modern Application of The "Common Fund" Doctrine

The common fund doctrine has evolved to reflect the changes in current legal and social conditions. However, the basic rationale of the rule remains intact. Courts still find "authority for the award of attorneys’ fees under the general equitable powers of the court."\(^{46}\)

In the landmark case of *Lindy Brothers Builders v. American Radiator & Standard Sanitary Corp. (Lindy I)*,\(^{47}\) the Third Circuit recognized that this practice, known as the "equitable fund doctrine," may be used "to compensate individuals whose action in commencing, pursuing, or settling litigation, even if taken solely in their own name and for

40. See, e.g., Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978). See also Busche v. Burkes, 649 F.2d 483, 521 (7th Cir. 1981) ("[A] prevailing party [may] recover fees only to the extent he is found to have prevailed."); Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978) (fees should be awarded on work that is successful).

41. Zilker, 540 F. Supp. at 1198. Since plaintiff was no more than marginally successful in litigation resulting in a settlement in that all but one of the wide-ranging claims of the complaint were rejected, plaintiff’s counsel was awarded $48,333 instead of his requested $200,000.

42. Nadeau, 581 F.2d at 278-79, also quoted with approval in Busche, 649 F.2d at 521.

43. Id.

44. See Busche, 649 F.2d at 521.


46. See Greenough, 105 U.S. at 536-37. See also Grace, 484 F.2d at 1267 (court, relying on *Sprague*, 307 U.S. at 166, stated that "a court of equity [has] the inherent power to reimburse a successful suitor for the costs of litigation, including his attorney's fees").

47. 487 F.2d 161 (3d Cir. 1973).
their own interest, benefit a class of persons not participating in the litigation.” The court also found that the award of attorneys’ fees was “analogous to an action in quantum meruit: the individual seeking compensation has, by his actions, benefited another and seeks payment for the value of the services performed.” The court justified the award of attorneys’ fees on the basis of unjust enrichment.

With the recent increase in the size of representative classes, courts have found the assessment of fees to each member unwieldy, if not impossible. Therefore, the Supreme Court has found it necessary to re-establish the rule that the winning party may not shift the costs of the suit to the losing party without statutory authorization for doing so. However, there are several exceptions to the Court’s ruling. One exception arises where there has been “willful disobedience of a court order . . . or when the losing party has acted in bad faith.” Another exception arises out of the courts’ “historic power of equity to permit . . . a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys’ fees, from the fund or property itself or directly from the other parties enjoying the benefit.” In order for this second exception to be operative, there must be a fund from which the fees can be paid and a readily identifiable class to which it is to be distributed. Nevertheless, the court need not create or preserve a fund, but simply must be able to identify a beneficiary of the litigation upon which it may impose a charge. In general, in order to avail themselves of the common fund rule, attorneys need only ensure that the classes are small and easily identifiable, the benefits can be traced with some precision, and the costs can be reliably shifted to those benefiting.

48. Id. at 165.
49. Id.
50. See Lindy I, 487 F.2d at 165. See also Lindy Brothers Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (Lindy II) (“We take as a starting point the settled principle that passive members of a class who ‘accepted the fruits’ of the labors of others are obligated to contribute to the attorney for the active members who created the fund.” Id. at 119.).
51. Alyeska, 421 U.S. at 247. The Court asserted the American Rule that attorneys’ fees must be borne by each party. 28 U.S.C. §§ 1920, 1923 were cited as referring to docket fees. Alyeska, 421 U.S. at 255-56.
52. Alyeska, 421 U.S. at 258.
53. Id. at 257.
54. See id. at 257-58.
55. Altman, 580 F.2d at 661-63.
IV. Factors to be Considered in Setting the Amount of the Award

There appears to be no serious dispute that the award of attorneys' fees is entrenched as a viable solution to the problem of sharing the costs of litigation in class action and shareholder derivative suits. There is little dispute as well about the factors to be used in determining the amount of the award that should be allowed. However, Rule 23.1 of the Federal Rules of Civil Procedure offers no guidelines on the awarding of attorneys' fees. Precedent alone permits the court to make the determination as to whether and to what extent a fee should be awarded. In response to the uncertainty inherent in the above approach, the Third Circuit in Lindy first announced what has since been termed the "lodestar" approach to determining reasonable attorneys' fees in a class action. The Lindy I court reasoned that any fair determination must start with the ascertainment of the purpose of the award, which is to compensate the attorney for "the reasonable value of the services benefiting [the unrepresented claimant]." This analysis starts with an appraisal of the number of hours the attorney has spent in litigation. The next element established by the court is the determination of the value of the attorney's services. The court believed that the value of these services is usually determined by the attorney's normal billing rate, "taking account of the attorney's legal reputation and status (partner, associate)." Thus, a court's

57. See Note, Attorneys' Fees, supra note 21, at 936-38. The current controversy over attorneys' fee awards stems from the interpretation of the factors and the perception that the attorneys are requesting excessive fees.
60. 487 F.2d 161 (3d Cir. 1973).
61. Id. at 165.
62. The Lindy I court explained that:

[b]efore the value of the attorney's services can be determined, the district court must ascertain just what were those services. To this end the first inquiry of the court should be into the hours spent by the attorneys—how many hours were spent in what manner by which attorneys. It is not necessary to know the exact number of minutes spent or the precise activity to which each hour was devoted nor the specific attainments of each attorney. But without some fairly definite information as to the hours devoted to various general activities, e.g. pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e.g. senior partners, junior partners, associates, the court cannot know the nature of the services for which compensation is sought.

Id. at 167.
63. Id.
analysis should begin with the number of hours multiplied by a "reasonable hourly rate to which attorneys of like skill in the area would typically be entitled for a comparable type of work." 64

The *Lindy I* court recognized that, although this calculation establishes a base figure, it may not accurately reflect the merit of the attorneys' services in relation to the benefit they obtained for the class. The court explained that "[w]hile the amount thus found to constitute reasonable compensation should be the lodestar of the court's fee determination, there are at least two other factors that must be taken into account in computing the value of the attorneys' services." 65 These two factors, the contingent nature of success and the quality of the attorneys' work, may be used to augment the lodestar. Although these two variables give the court necessary discretion in setting the attorney's fee, they have also caused the greatest dissonance in fee petition hearings and in the matter of fee awards in general.

The *Lindy I* court attempted to clarify the subfactors that should be taken into consideration when augmenting the lodestar, and the discussion was continued on appeal in *Lindy II*. 66 In both suits, the court agreed that in determining the quality of the attorneys' work, consideration should be given to the "complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained." 67 While most courts have rejected the "result obtained" measure established by *In re Ososky*, 68 the *Lindy* court recognized that this factor may be the only way to measure quality when the action terminated in settlement before trial. 69 Also, the *Ososky* approach "permits the court to recognize and reward achievements of a particularly resourceful attorney who secures a substantial benefit for his clients with a minimum of time invested, or to reduce the objectively determined fee where the benefit produced

64. Levenson v. Overseas Shipholding Group, Inc., 84 F.R.D. 354, 360 (S.D.N.Y. 1979) (quoting Burger v. C.P.C. Int'l, Inc., 76 F.R.D. 183, 188 (S.D.N.Y. 1977)). This calculation establishes a "lodestar" or base figure from which adjustment may be made. See also City of Detroit v. Grinnell Corp., 495 F.2d 448, 468-69 (2d Cir. 1974).
66. 540 F.2d 102 (3d Cir. 1976).
67. *Lindy I*, 487 F.2d at 168; *Lindy II*, 540 F.2d at 116. "Preliminarily, we reaffirm the standards enunciated in *Lindy I*. . . . Nothing in the augmentation hereinafter set forth should be considered as a dilution or diminution of that basic formula." *Id.*
68. 50 F.2d 925 (S.D.N.Y. 1931). The court used this measure in a bankruptcy proceeding.
69. *Lindy I*, 487 F.2d at 168.
does not warrant awarding the full value of the time expended."

In addition, the Lindy court admonished the argument that the quality of the attorney's work will usually be reflected in the hourly rate.

The Lindy II court attempted to support and further clarify the formula outlined in Lindy I. In its evaluation of the contingent nature of success variable, the Lindy II court suggests that courts should consider the "probability or likelihood of success, viewed at the time of filing suit." The court divided its analysis of this variable into three categories: the plaintiff's burden, the risks assumed in developing the case, and the delay in receipt of payment for services rendered. The court in Lindy II emphasized that any increase in the lodestar based on consideration of these factors should be applied "apart from the evaluation of the quality of services rendered in the particular proceedings."

Some courts have attempted to mitigate the potentially harsh result that may occur by increasing the lodestar based on the complexity of the issues in the case. While recognizing that it is reasonable to increase the base computation depending on the complexity of the case, the Third Circuit found no precedent for reducing the award based on the simplicity of the case. Instead, the court determined that "the

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71. Lindy I, 487 F.2d at 168 ("Any increase or decrease in fees to adjust for the quality of work is designed to take account of an unusual degree or skill, be it unusually poor or unusually good.") (emphasis added).
72. Lindy II, 540 F.2d at 117.
73. Under the category, "the plaintiff's burden," the court lists:
(a) the complexity of the case—legally and factually:
(b) the probability of defendant's liability—whether it is clear or dubious;
whether it has been previously suggested by other civil or criminal proceedings; whether it is asserted under existing case law or statutory interpretation, or is advanced as a novel theory;
(c) an evaluation of damages—whether the claims would be difficult or easy to prove.

Under the second category, "risks assumed in developing the case," the court's examination includes,
(a) the number of hours of labor risked without guarantee of renumeration;
(b) the amount of out-of-pocket expenses advanced for processing motions, taking depositions, etc.;
(c) the development of prior expertise in the particular type of litigation;
recognizing that counsel sometimes develop, without compensation, special legal skills which may assist the court in efficient conduct of the litigation, or which may aid the court in articulating legal precepts and implementing sound public policy.

Id.

74. Id.
75. See, e.g., Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978).
76. Id. at 487.
simplicity of the issues involved should be reflected in the court's determination of the hours reasonably devoted to the successful claims, a determination that must be made in arriving at the lodestar itself.'

In clarifying the rationale underlying the "quality of the attorney's work" multiplier, the *Lindy II* court explained that generally, quality is included in the basic computation of the lodestar. The court determined that "counsel who possess or who are reputed to possess more experience, knowledge and legal talent generally command hourly rates superior to those who are less endowed." For this reason, the typical value of an attorney's work is already included in the basic computation, and should not be used to increase or decrease the basic award. Therefore, the judge must look for "a degree of skill above or below that expected for lawyers of the caliber reflected in the hourly rates." The *Lindy I* court also set out the procedural requirements for the award of attorneys' fees. The primary procedural requirement is that any petition for an award of fees must be accomplished by a hearing, since the evidence on which the petition is based may be subject to dispute. The court noted that in every such hearing there are two opposing interests since a denial of fees would "harm the petitioning attorney," while an award of fees would "harm the unrepresented claimant by reducing his net recovery." The court also dismissed expert testimony as unnecessary. "A judge is presumed knowledgeable as to the fees charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys; these presumptions obviate the need for expert testimony such as might establish the value of services rendered by doctors or engineers."

77. *Id.*
78. *Lindy II*, 540 F.2d at 117. *Lindy II* suggests two categories of variables for consideration of the quality of the attorneys' services:
1. The result obtained by verdict or settlement, evaluated in terms of:
   (a) the potential money damages available to the class member, *i.e.*, a comparison of the extent of possible recovery with the amount of actual verdict or settlement;
   (b) the benefit—monetary or non-monetary—conferred on the class, . . . [and]
2. An evaluation of the professional methods utilized in processing the case—rewarding the use of efficient methods to expedite the case and penalizing the use of methods the predominant purpose of which was to delay or obstruct the proceedings.

*Id.* at 118.
79. *Id.* at 117.
80. *Id.*
81. *Id.*
82. *Lindy I*, 487 F.2d at 169.
83. *Id.*
84. *Id.*
Lindy II reaffirmed the proposition that the award of fees is within the court’s discretion. After a careful analysis of the meaning of ‘discretion,’ the court stated that it may be abused only when it is ‘irrational.’ Unreasonableness, the court stated, is found only when the trial court ‘utilizes improper standards or procedures in determining fees’ or makes ‘a clearly erroneous finding of fact.’ Thus, the only means of finding abuse of discretion in fee award proceedings is if the ‘trial court has not properly identified and applied the criteria.’ This conclusion demonstrates that it is imperative that the trial judge explain both the facts and reasoning buttressing his award of fees.

V. APPLICATION OF THE LODESTAR

As mentioned above, within the past decade, courts have developed a more critical attitude toward petitions for fee awards. There are various reasons for this trend. The following discussion of selected fee petition hearings will reflect the legal and public policy reasons underlying the recent reductions in court-awarded fees in class actions and derivative suits.

In Openlander v. Standard Oil Co. (Indiana), which was decided prior to Lindy I, the court used variables similar to those enumerated in Lindy I in order to determine the amount of the fee award. In awarding the full amount of the attorneys’ fee petition, the court held that the significant amount of recovery, $35 million, was of primary importance in its decision. Other factors noted by the court included

85. Lindy II, 540 F.2d at 115 (citing Merola v. Atlantic Richfield Co., 493 F.2d 292, 295 (3d Cir. 1974)).
86. Id.
87. Id. at 116.
88. Id.
89. 64 F.R.D. 597 (D. Colo. 1974).
90. The variables used by the Openlander court included the following:
1. The benefits conferred [sic] upon the members of the class, the results achieved;
2. The magnitude, complexity, and uniqueness of the litigation;
3. The court’s knowledge of the nature, extent, and quality of services rendered by counsel;
4. The time and effort expended by counsel in the litigation;
5. Any advance fee arrangements between counsel and members of the class;
6. Any public policy considerations; and
7. The extent and basis of objections to the allowance of the attorneys’ fees.
91. Id. at 605.
the high degree of professionalism displayed by the attorneys,\textsuperscript{92} the novelty of the legal issues presented in the case, and that the discovery and preparation of the case had been monumental.\textsuperscript{93}

The \textit{Openlander} court, unlike the court in \textit{Lindy I}, heard outside “expert” testimony in support of the petitioners’ fee requests. Attorneys unconnected with the litigation testified as to the importance of affording minority stockholders the opportunity to “secure the services of highly competent attorneys of ability and integrity, such as plaintiff’s counsel in this case.”\textsuperscript{94} One such expert witness also testified as to the risk involved in this litigation, and that he had decided not to take the case on a contingent basis.\textsuperscript{95}

The fees requested in \textit{Openlander} represented approximately $190 per hour.\textsuperscript{96} The court held that this request was reasonable in light of the amount of time spent by the attorneys, the reputation and legal status of the counsel, the novelty of the issues, the quality of the work as observed by the trial judge, the risks involved, the time constraints, and the public policy rationale of encouraging competent counsel to take these high-risk cases.\textsuperscript{97} Throughout the opinion, the court evidenced approval of the attorneys’ reasonableness and spirit of service to the “public.” The attorneys’ request amounted to approximately twenty percent of the total recovery. The generous fee award apparently reflected the court’s attempt to reward counsel for their “social consciousness.”

The \textit{Lindy} cases also are typical of those in which a generous award is made to reward attorneys for their hyperbolic efforts and sense of social duty. While the \textit{Lindy} court determined that there were no novel issues in the suit,\textsuperscript{98} it did find it to be a “massive multi-district litiga-

\textsuperscript{92} The court noted, with particularity, the high degree of professionalism rendered by the attorneys:

The institution of the suit, highly professional case preparation by the plaintiffs’ and intervenors’ counsel, counsel’s experience in complex litigation and posture in settlement conferences were of crucial importance in bringing this litigation to successful financial recovery. The recovery can be attributed to efforts of counsel to effectuate a satisfactory recovery. \textit{Id.} at 606.

\textsuperscript{93} \textit{Id.} at 607.

\textsuperscript{94} \textit{Id.} at 610.

\textsuperscript{95} \textit{Id.}

\textsuperscript{96} \textit{Id.} at 613.

\textsuperscript{97} \textit{Id.} at 615-16.

tion... with myriad attendant subsidiary issues."99 The trial court was clearly impressed with the industry of the attorneys. This finding of quality may not, however, have been shared by the panel on appeal. "We do not consider this finding of complexity clearly erroneous, but, as hereinafter set forth, we question whether this factor should be considered under the rubric of quality of professional performance."100

In noting the attorneys' high quality of work, the district court in the *Lindy* cases stated:

Petitioners have exhibited an unusual degree of skill in conducting these proceedings. They were aggressive and imaginative throughout. Because the work has been efficient and of an atypical quality, the aggregate hourly compensation should be increased. Indeed, the total amount of time spent by petitioners in this case is relatively low when one considers what was accomplished and the number of years that have elapsed since the litigation was commenced. Certainly, economy of effort should not be penalized. Less experienced and less skillful attorneys would undoubtedly have expended much more time in achieving the same result than did petitioners.101

It is not difficult to infer the district court's direct appreciation of counsels' time-saving efforts in cases of this magnitude, as well as their temperance in the number of hours submitted for compensation. As further evidence of the attorneys' unusual quality, the court took note of the amount of the recovery.102

As to the contingent nature of success variable in the *Lindy* cases, the district court noted that plaintiffs carried "substantial problems of proof... as to both liability and damages."103 This alone, according to the district court, justified "a substantial [sic] increased allowance."104 The appellate court refused to find an abuse of discretion on this issue.105 For these reasons, a doubling of the lodestar was affirmed.106 It

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99. *Id.* The *Lindy* litigation represented the largest number of cases of any matter that has ever come before the Judicial Panel on Multidistrict Litigation. There were 374 cases and over 10,000 claims filed in the builder-owner settlement alone.

100. *Id.*

101. *Id.* (quoting from *Lindy*, 382 F. Supp. at 1021-22).

102. *Id.* at 115. In a $29 million recovery, the per unit settlement figure was "two to three times the actual price increase resulting from the conspiracy. The original settlement was a most favorable one." *Id.*


104. *Id.* at 116 (quoting from *Lindy*, 382 F. Supp. at 1017).

105. *Id.*

106. *Id.* at 116.
should be noted, however, that the court disallowed an award for services performed in connection with the fee application, since those services did not benefit the fund.\textsuperscript{107}

In Trist \textit{v. First Federal Savings \\& Loan Association of Chester},\textsuperscript{103} the court was faced with a situation in which the fee petition was presented \textit{ex parte}, with no adversarial arguments.\textsuperscript{109} The court lamented the fact that it had only a "cold record of hours and tasks performed, albeit in this case a detailed and thoroughly documented one. . . ."\textsuperscript{110} In this situation, the court was forced to rely on the good faith of counsel. However, the court considered itself fortunate in that

\begin{quote}
[c]ounsel [had] demonstrated . . . an uncommon dedication to the interests of the clients. . . . As only one example, in several instances counsel [had] not asked compensation for hours invested early on in the litigation because of their attenuated relation to the ultimate recovery. Similar restraint [was] apparent in the hours claimed for services rendered throughout the litigation.\textsuperscript{111}
\end{quote}

The court allowed one attorney very generous fees in light of his expertise in the area of class actions.\textsuperscript{112} The court approved the total lodestar and increased it by thirty percent on the ground that the petition was detailed, accurate, and comprehensive, reflecting an understanding of the applicable law.\textsuperscript{113}

In addition to the above factors, the court stated, "[a]pparently finding quantitative self-aggrandizement unseemly, petitioners do not request a specific increase in the lodestar amount, but ask that I set a figure based on my familiarity with the case and with counsel."\textsuperscript{114} The court noted the uniqueness and complexity of the case, the contingent fee basis, and the great risk involved.\textsuperscript{115} Once again, the court

\textsuperscript{107} \textit{Id.} at 111.
\textsuperscript{108} 89 F.R.D. 8 (E.D. Pa. 1980).
\textsuperscript{109} \textit{Id.} at 10.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.} 365 hours were foregone because of attenuated relationship to the settlement . . . the hours claimed were mostly for pretrial, justified by the enormous effort of counsel to amass evidence for the trial. Counsel took over 44 depositions and defended 34 more by defendant's counsel. Plaintiff proposed to call over 150 witnesses, defendants over 250.
\textsuperscript{112} Herbert Newberg, author of the multi-volume \textit{Class Actions}. \textit{Id.} at 12-13.
\textsuperscript{113} \textit{Trist,} 89 F.R.D. at 13.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}

Petitioners were assured that the defense would be skilled and financially
seemed to require Herculean efforts to justify augmentation of the ‘lodestar.’

The cases which reduce fee petitions, however, are far more numerous than those increasing the amount requested. In Ellis v. Flying Tiger Corp., the appellate court refused to adhere to the district court’s findings concerning the fee award, since the record was insufficient to establish the factors used in the lower court’s award decision. The appellate court found that a large percentage award was inappropriate, since the benefits conferred upon the class were not attributable to the ‘direct effort and skill of the attorneys involved.’ The court stated that the plaintiffs had a strong motive for settling before trial, since prolonging the litigation would have had a ‘disastrous economic effect on all the shareholders, including the plaintiff class.’

The Ellis court also found the attorneys lacking in the area of time expended in preparation of the case. ‘It does not appear that there was any discovery in this case, or preparation for trial on the merits of the case. New developments in the law have not resulted from this litigation.’ Apparently, the Ellis court would require a showing of ‘extensive discovery, successive appeals and development of new legal theories or implementation of older theories to apply to a new set of facts’ in order to approve the fee requested.

An examination of the fee request reveals the probable explanation for the court’s hostility toward the petition in this case. The attorneys requested $600,000 for a total of 797 hours worked, including 227 hours in preparation and litigation of the issue of attorneys’ fees. The court agreed to assume that the number of hours requested was reasonable, although not reflected by a factual finding in the record. The court noted, however, that if the request were to be honored, the attorneys would be recompensed at approximately $1,000 per hour. The court held:

well-supported. They were faced with the possibility of being financially overwhelmed by outlay in expenses and unpaid attorney time before a favorable result could be achieved. Thus petitioners put at risk not only their time and money but the viability of their practice.

116. 504 F.2d 1004 (7th Cir. 1972).
117. Id. at 1006.
118. Id. at 1008.
119. Id.
120. Id.
121. Id.
122. Id. at 1008 & n.7.
123. Id. at 1008. If the 227 hours requested for litigating the fee petition were disallowed, the fee request would have yielded an hourly fee of $1,052.63. If permitted, the hourly fee would have been $752.82.
Although the amount of time expended in preparation of a case is ordinarily only one factor to be considered by a district court, we think that the circumstances presented here necessitate a decision based somewhat more closely on the number of hours actually spent in preparation than would be the case where substantial benefits had been achieved following protracted or particularly innovative litigation.\textsuperscript{124}

The attorneys were allowed $75,000.\textsuperscript{125} There was no statement as to whether any portion of the award was allocated to the hours spent in litigating the issue of attorneys' fees. However, with inclusion of the hours for the fee petition, the court made its award based on approximately $95 per hour. It may be reasonable to assume that the hours spent in preparation for the attorneys' fees issue were recompensed. Any reasonable interpretation of the Ellis case would lead to the conclusion that unreasonable requests for extraordinary amounts will be viewed with disapproval.

In Altman v. Central of Georgia Ry.,\textsuperscript{126} the Court of Appeals for the District of Columbia Circuit affirmed the district court's allowance of a fee award below that which was requested by petitioning attorneys. The trial court awarded the attorneys $40,000.\textsuperscript{127} The appellate court refused to augment this award, based upon a finding that “most of the litigation effort was unproductive;” moreover, “[t]he legal work necessary to cause the payment of the dividend was relatively minimal.”\textsuperscript{128} The Altman case, decided after the Lindy rulings, stands for the principle that attorneys may expect to recover only for hours spent in successful litigation. This tenet is based on the original concept of the “common fund” doctrine, in which counsel may make a claim against a fund that is created for the benefit of the class. If the attorneys' efforts did not produce that fund, then there is no reasonable claim to receive a portion of it.

One year later, the Southern District Court of New York, in Levenson v. Overseas Shipbuilding Group, Inc.,\textsuperscript{129} heard a petition for $400,000 and allowed an award of $272,609. The court relied on an earlier appellate decision, in which it was held that “the courts should avoid awarding 'windfall fees' and . . . they should likewise avoid every

\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} 580 F.2d 659 (D.C. Cir. 1978).
\textsuperscript{127} Id. at 660.
\textsuperscript{128} Id. at 662.
\textsuperscript{129} 84 F.R.D. 354 (S.D.N.Y. 1979).
appearance of having done so.'" Relying on another earlier case, the court stated that "'[t]he application for fees . . . should be viewed with an eye toward moderation.'" After making a determination of the lodestar, the *Levenson* court disallowed payment for those hours which were valued at "'excessive hourly rates.'" However, after determining the basic calculation, the court permitted a multiplier of ten percent, as well as expenses for paralegals and accountants, photocopying, and similar expenses. After recalling that the attorneys' skill, reputation, and legal status are generally reflected in his normal billing rate, and that any increase in the lodestar is to be applied only when the attorney displays unusual quality in his performance, the ten percent increase appears to be a reflection of the court's recognition of the attorneys' superior achievement. It is equally obvious that the court considered the attorneys' original request as excessive. The *Levenson* court clearly stated that its reduction was a result of the public policy that the appearance of excessive awards is to be avoided. Thus, by 1979, courts were no longer attempting to justify their decisions based on an interpretation of the common fund doctrine, e.g., that the size of the benefit (the fund) conferred on the class did not permit an increase in the proportion the attorneys had sought. Instead, the courts were reasoning that the public could no longer support the generous fee awards that had been approved in representative suits.

In *Wright v. Hetzer Corp.*, the District Court for the Northern District of Illinois recently applied the *Lindy* factors to disallow an increase in the lodestar on the basis of quality, but to allow the use of a multiplier on the ground of the contingent nature of success. The *Wright* court found that "'[t]he quality of the attorneys' services . . . is measured by the benefit conferred upon the corporation, the magnitude of the case, the skill and experience necessary to succeed in the litigation, and the efficiency of the attorney's efforts.'" In this case, no fund was created, but a "'substantial benefit'" was conferred upon the corporation. The court found, however, that the nature of the benefit was "'speculative.'" While admitting that this did not

130. City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974).
133. *Id.*
134. *Id.*
135. *Id.*
137. *Id.* at 824 (citing *Lindy II*, 540 F.2d at 117-18).
138. *Id.* at 825.
require a denial of fees, the court held that the degree of the multiplier should "reflect the speculative nature of the benefit," and so awarded no multiplier based on the benefit to the corporation.\textsuperscript{139} The court further refused to apply a multiplier to the time spent on unsuccessful claims.\textsuperscript{140} Since the court was unable to identify the actual hours spent on the unsuccessful claims, it decided to reduce the multiplier on all the hours.\textsuperscript{141} In addition, the court found that the primary suit was not one in which "petitioners recovered a huge fund for the benefit of a large class of injured parties."\textsuperscript{142} The \textit{Wright} court noted that the attorneys' skill and experience were reflected in their normal hourly rates, and that they demonstrated no unusually high degree of quality, and so refused the award of a multiplier on that basis.\textsuperscript{143} While admitting that the "decision revealed a novel theory of liability," the court also felt uncertain that petitioners could "take credit for that theory."\textsuperscript{144}

The \textit{Wright} court also determined that petitioners had used their time somewhat inefficiently, in that they performed tasks which could have been performed as well by attorneys with less skill and status.\textsuperscript{145}

Considering the contingent nature of success, however, the \textit{Wright} court found that augmentation of the lodestar was justified. The court generously held that "[b]ecause attorneys are never guaranteed success in a particular case, despite vigorous and competent efforts, the normal hourly rate may not be adequate compensation."\textsuperscript{146} Here, the court relied on policy considerations. "To a certain extent, the contingency factor reflects the fact that counsel must receive a premium to allow them to continue to undertake representation in contingency cases, in some of which they will be successful and receive no fees."\textsuperscript{147} The court permitted a 1.75 multiplier for pre-appeal hours, reduced to 1.5 due to the lack of success on three transactions. For the post-appeal hours, the court permitted a 1.33 multiplier.\textsuperscript{148} The court denied a multiplier for time spent by the attorneys in pursuing the fee issue,\textsuperscript{149} but permitted a straight fee award based on defendant's bad faith con-

\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id. (citing \textit{In re Equity Funding Corp. of Am., Sec. Litig.}, 438 F. Supp. 1303 (C.D. Cal. 1977)).
\textsuperscript{143} \textit{Wright}, 503 F. Supp. at 825.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 826.
\textsuperscript{149} Id.
duct "in a method calculate to frustrate the entire litigation."

The Wright case indicates a trend away from encouraging fee awards in cases based on the "private attorney general theory," where plaintiffs’ purpose is to reinforce a statutory policy. Instead, the Wright court focused on the pecuniary benefits produced by the litigation.

In 1975, the Supreme Court ruled that no fee awards would be permitted absent statutory authority. The common fund doctrine is an exception to that ruling. The "substantial benefit" cases, as an extension of the common fund rule, are included in the exception to the 1975 ruling forbidding the award of fees. The "substantial benefit" cases, however, are similar, in terms of the eventual outcome, to the "private attorney general" cases, in which fee awards are disallowed absent statutory authority. In a "substantial benefit" case, the plaintiff class brings the action to force the corporation to conduct itself in the manner sought. In the "private attorney general" cases, the class brings the action to vindicate a statutory policy. In both cases, the recovery or preservation of a fund is secondary. In both types of cases, the quality of the attorneys' efforts would serve to ensure the successful outcome of the litigation, in which no reference to a fund need be made.

Indeed, in the "substantial benefit" cases, the defendant corporation is assessed the fees, as the recipient of the benefit of the litigation. Since the "substantial benefit" cases are analogous to the "private attorney general" cases in which fee awards are disallowed, a court may seek to clearly predicate its fee award on a fund created by the litigation, rather than on the benefit to the class, so as to avoid criticism or reversal on appeal. The Wright court announced its decision to focus on the pecuniary benefit immediately after discussing the Supreme Court's disallowance of attorneys' fees in cases brought solely to vindicate "a statutory policy." Perhaps this is an indication that modern courts will continue to feel more comfortable allocating awards based on the size of the recovery, rather than the quality of the attorneys' efforts.

150. Id. at 824.
151. Id. at 816. Private attorney general theory is discussed in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (no attorneys' fee awards without statutory authority, except for "common fund" cases or cases in which defendant shows "bad faith").
154. Wright, 503 F. Supp. at 816.
In *In re Capital Underwriters, Inc. Securities Litigation*, plaintiffs' counsel had agreed to a ceiling on its fees with the plaintiff class, and then submitted a petition for more than twice the agreed amount, forcing the court to reduce the fees by more than half. The court stated that it was “troubled by this discrepancy between the estimated amount of fees and the amount actually requested, and [could] only conclude that some plaintiffs’ counsel have once again validated the truth of the Italian proverb, that ‘a lawsuit is a fruit tree planted in a lawyer’s garden.’” The court saw its role in this case as protecting not only “the interests of absent class members, but also the interests of those counsel whose efforts clearly benefitted the class members’ interests.”

The court decided that its focus must be on “dividing the limited quantity of fees available in this action,” and placing “priority . . . on efforts that played a substantial role in producing the final recovery.”

After considering an increase in the lodestar based on the quality of the attorneys’ services, the court concluded that “in no case does counsel’s effort rise to the unusual degree of skill that a quality multiplier is designed to reward. . . . The level of performance necessary to qualify for a quality multiplier must be particularly outstanding where, as here, a limited fund is available.” The court also refused to increase the fees based on the contingent nature of the case. While recognizing that the case was complex, and that counsel were dealing with classes with distinct interests and were forced to conduct settlement negotiations on a nationwide basis, the court felt that counsel was already compensated for such efforts in its lodestar calculation.

Indeed, the *Capital Securities* court felt it necessary to decrease the lodestar, applying an “inverse multiplier,” due to the “low level benefit

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155. 519 F. Supp. 92 (N.D. Cal. 1981), aff’d in part, remanded in part, 705 F.2d 466 (9th Cir. 1983).
156. Id. at 101.
157. Id. (citing *City of Detroit*, 495 F.2d at 469).
158. Id.
159. Id. In explaining its reduction of the fee petition, the court stated: Thus, in calculating the initial factor of time and labor expended, the Court has considered not only such factors as duplicative effort, and vagueness or inaccuracy in recordkeeping, but has also deducted time expended on behalf of the claims of individual clients rather than the class as a whole, and time expended on issues or motions that failed to produce a benefit to the class.

*Id.* (citations omitted).
160. *Id.* at 102 (citing Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (3d Cir. 1973)).
161. *Id.*
to the class secured by the services of counsel.’”162 This court also raised the principle that the burden of proof in these cases rests on the petitioning attorneys. “Any uncertainties arising from inaccuracies or incompleteness have been resolved against the petitioner seeking to share the fund.”163

It is obvious that the Capital Securities court felt the need to chastise the petitioning attorneys for the excessive nature of their request. In relying on the traditional inquiries into quality and contingency, the court restated the belief that both factors were already present in the hourly fee computed in the lodestar. The court repeated, and thus strengthened, the argument that fees should be based on the amount of benefit secured to the class. In addition, the court increased its ability to reduce fee awards by holding that uncertainties may be resolved against the petitioning attorneys.

In Zilkir v. Klein,164 plaintiff’s counsel requested $200,000 in fees. The court found, however, that they were successful on only one of the many claims they presented165 and therefore granted fees of only $48,333. The court applied the “prevailing party” test and found this case dissimilar to those in which plaintiff’s counsel has “prevailed substantially and it would be inappropriate to carve out the time spent on unsuccessful theories.166 Here, the only successful claim was entirely discrete and a relatively minor part of the litigation.”167

The Zilkir court followed the rationale that it would be unjust to require the defendants to pay twice, once to their own successful counsel and once to plaintiff’s unsuccessful attorneys. The court held that defendants were the substantial victors168 and refused to credit petitioners’ assertion that the one successful claim took 75-80% of the total number of hours charged. The court stated that even if that estimate were accurate, it would be a “totally uneconomic decision—one that would never have been made by counsel and a client were they exercising a free market judgment.”169 Thus, this case presents a situa-

162. Id. (relying on Merola v. Atlantic Richfield Co., 515 F.2d 165, 168-69 (3d Cir. 1975)).
165. Id. at 1197.
166. Id. at 1198 (citing Syvock v. Milwaukee Boiler Manufacturing Co., 665 F.2d 149, 162-65 (7th Cir. 1981); and Seigel v. Merrick, 619 F.2d 160, 164-65 (2d Cir. 1980)).
168. Id. at 1199.
169. Id.
tion in which courts may use the traditional "prevailing party" doctrine to temper an excessive request for fees. In addition, it represents another in a trend of cases in which courts are using more obvious and forceful language to voice their disapproval of excessive fee petitions.

In In re Fine Paper Antitrust Litigation, the court reduced the lodestar to reflect the "duplication, waste and inefficiency, which resulted from the participation of forty-one sets of attorneys and the committee structure established by counsel." The court criticized the use of senior partners in performing routine and clerical services and stated that they would not be compensated at partner level rates for those tasks. Further, since the risk of an unsuccessful result was spread among so many firms, the court allowed a multiplier of only 1.5 for the contingency factor. Also, since there were so many attorneys involved, the court found that the risk was not very high, since there were "a large number of attorneys who were willing to prosecute this case purely on a contingent basis." On policy grounds, the court found that it was not necessary to increase the multiplier to encourage attorneys to take high-risk cases, who might otherwise decline to do so for fear of going unpaid. The court disallowed any positive quality multiplier. Indeed, the court found one petitioning counsel primarily responsible for the waste, duplication, and inefficiency, and stated that it was tempted to deny its petition altogether. Accordingly, the court applied a negative multiplier of .5 as a penalty to the lead firm.

The strongest language found by this writer appears in Zeffiro v.

171. Id. at 83. The court went on to say:
The abundance of attorneys representing the class substantially diluted each attorney's role and, therefore, the rates should be reduced accordingly to reflect their diminished contribution. In many instances, adequate representation for the class may result in some degree of duplication, but the proliferation of lawyers here cannot be justified on any rational basis.

Id.

172. Id.
173. Id. at 84 (quoting In re Penn Cent. Secs. Litig., 416 F. Supp. at 919 n.30).
174. Id.
175. Id. (citing Lindy II, 540 F.2d at 118).
This reflects my considered judgment that effective management could have produced the same results in less than half the time expended. The application of a negative multiplier in a case of this nature is necessary to remind counsel, particularly those in a leadership role, that a class action is something more than a fee-generating device. It is a cause of action belonging to the members of the class to whom counsel owe a duty of fidelity. Their primary job is to create a fund for the class, not the lawyers.

Id. at 84-85.
First Pennsylvania Bank,176 in which counsel produced a settlement fund of $1.5 million. Counsel requested $420,000 in addition to a forty percent share of the interest earned by the settlement fund for 3,358.55 hours of work by ten attorneys, two legal assistants, and three paralegals. This figure included an adjustment to the lodestar of $109,967.97.177 The lower court awarded the attorneys $310,132.97, which reflected the requested lodestar without adjustment.178 The attorneys appealed on the ground that the lodestar without augmentation did not make them financially whole due to the delay in payment.179

The reviewing court found this appeal provided further evidence of the "burgeoning criticism that challenges 'the altruism of some class action lawyers and charg[es] that the paramount motivation for such litigation [is] counsel's desire to generate substantial fees.'"180 The court recognized that since the primary litigation was initiated five years previously, inflation and resultant erosion of the dollar had taken place.

[T]he court perceived that delay in major class action suits such as this one should be of relatively minor importance. The attorneys must recognize that undertakings of this sort involve protracted litigation. Consequently, they must anticipate a long wait for receipt of ultimate compensation, just as in other contingency representations.181

The court proceeded to discuss the social aspects of the protracted litigation.

More importantly, the court would remind counsel that as they alleged throughout the litigation, the class had suffered since 1976, two "'inflationary years'" longer than counsel. Ultimately, the members of the class will receive only 53% of that to which they are entitled. There is no reason why the inflationary burden should be borne by the class alone for the exclusive benefit of counsel.182

177. Id. at 812.
178. Id.
179. Id.
182. Id.
Petitioners further aroused the court by comparing the instant fee award with that of a previous award allowed by the same court. The petitioners maintained that by the standards of the previous case, the class was “receiving a windfall at the expense of Petitioners who by their increased time, expenditures and success in overcoming the risks inherent in the litigation, succeeded in obtaining a larger class recovery.” The court found, however, that in the previous case, counsels’ fees amounted to 16.5% of the settlement, while in the present case, the attorneys were allotted 26% of the settlement. Ultimately, the court ruled that “[u]nder the circumstances, counsel’s complaints do not muster sympathy.” It is interesting to note that in its hostility toward this fee petition, the court completely ignored the original Greenough rationale for awarding fees from the common fund benefit secured by class counsel. The doctrine was founded on the concept of unjust enrichment, which requires a finding that it is the client who is not entitled to a portion of the fund because it was secured through the efforts of counsel.

The court concluded by recognizing that there is a trend away from class litigation, “which many lawyers attribute to the poor economics of class action suits, including the uncertainty of success,

183. Id. The petitioners compared their award with that of Moore v. Industrial Valley Bank & Trust Co., No. 80-4909 (E.D. Pa. Oct. 25, 1982).

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185. First, the client does not understand the concept that a client, who gets less than that to which is is truly entitled under the law, is somehow receiving a windfall because the attorneys’ fees are not higher. Second, counsel imply that they have a right to be awarded no less than what Judge Ditter awarded in Moore. Such a misapprehension should be hastily put aside... “[[I]t is... the nature of... discretionary judgment that the same set of facts may evoke contrary responses—but responses which are nonetheless equally warranted in law—from different judges.”

Id. at 814 (quoting Golden Quality Ice Cream Co. v. Deerfield Specialty, 87 F.R.D. 53, 55-56 (E.D. Pa. 1980)).
the substantial litigation costs, and the delay in payment."\textsuperscript{186} This court did not believe that the fault was in the judicial refusal to award fair and just fees.\textsuperscript{187} The court admonished the bar to engage in restraint, lest "'[t]he legislative bodies that authorize fees may undertake to limit them as well.'"\textsuperscript{188} The court rationalized its caution to achieve moderation on public policy grounds; it wished to reassure the public that excesses would not be tolerated, thereby making further legislation unnecessary. Finally, the \textit{Zeffiro} court did not wish the attorneys to view the denial of an increase in the lodestar as a "punishment," but simply as an "informed discretionary decision that under the circumstances an adjustment was not necessary."\textsuperscript{189}

\textbf{VI. Social Policy Considerations}

Various commentators have identified several social policy considerations inherent in the award of fees to class suit attorneys. It has been seen that "the approach the court uses will have great impact on the number of cases brought and the way they are handled."\textsuperscript{190} One writer urges that the lodestar technique encourages lawyers to increase and even falsify their hours.\textsuperscript{191} Determining the award as a percentage of the recovery obtained forces lawyers to reach for higher settlements, but penalizes them for excess hours spent.\textsuperscript{192} An award based on the quality of the attorneys' efforts introduced an undesirable bias toward risk-taking.\textsuperscript{193} The practice of reducing awards for duplication of effort or time spent in pursuing unsuccessful legal or factual theories is also unfair.\textsuperscript{194}

The real issues, however, do not relate to the approach used to determine the amount of the attorneys' fees. Rather, the problem concerns a balancing of the interests of the class against the interests of

\textsuperscript{186} Id.
\textsuperscript{187} The \textit{Zeffiro} court stated, "'[a]ttorneys who may be disappointed in their fees or whose expectations may not be met because of the misuse of the class action device, certainly form no part of that trend that is of any concern to this court.'" \textit{Id.}
\textsuperscript{188} \textit{Id.} (quoting Ursic v. Bethlehem Mines, 719 F.2d 670, 678 (3d Cir. 1983)).
\textsuperscript{189} \textit{Id.}
\textsuperscript{191} \textit{Id.}
\textsuperscript{192} \textit{Id.} at 27.
\textsuperscript{193} \textit{Id.} at 26 (citing J. Watson, \textit{The Double Helix} (1968)).
\textsuperscript{194} Openlander v. Standard Oil Co. (Indiana), 64 F.R.D. 597 (D. Colo. 1974). "Some people make few mistakes, but accomplish little of importance; other make many mistakes but achieve outstanding results."
the petitioning attorneys. The award must be sufficient to continue to encourage attorneys "to remain in the field of public interest litigation." However, in its position of determining the amount of the fees, the court "acts as the guardian of the rights of absent class members."

Since the portion of the fund allocated to attorneys' fees will obviously not be available to remedy the substantive wrongs for which the fund was created, excessive fees have a broader detrimental effect as well on the continued usefulness of the class action mechanism since such awards provoke criticism of the legal professions and class representation in particular.

While the Court should exercise moderation in awarding attorneys' fees, it must also bear in mind the need to adequately compensate attorneys for the value of their services to the class in the light of the policy of the law in class action * * to provide a motive to private counsel to represent consumers and enforce the laws.

As one final consideration, attorneys should bear in mind the difference in their role as class representatives as opposed to private litigators. In a private action, the attorney is employed through a simple application of the private enterprise system. However, "both the class determination and designation of counsel as class representative come through judicial determinations, and the attorney so benefitted serves in something of a position of public trust. Consequently, the attorney shares with the court the burden of protecting the class action device against public apprehensions that it encourages strike suits and excessive attorneys' fees." It appears that counsel owes a "duty

195. "In awarding attorney fees in a class action, the Court is charged with the duty of being fair to class members, who are viable litigants, non-appearing class members and the attorneys whose efforts and professional abilities have produced the recovery." Id. at 613.

196. Id.


of fidelity' to the class, and their duty is to "create a fund for the class, not the lawyer." A lawyer must place his loyalty to the client above his personal interests.

VII. Conclusion

The preceding discussion reflects the view that attorneys representing class actions or shareholder derivative suits may be faced with a careful and sometimes hostile scrutiny of their fee requests. Before submitting the fee petition, the attorney would be advised to consider the extent to which either party has prevailed in the litigation, as well as to present a reasonable, accurate, and detailed summary of the hours and efforts expended in obtaining a successful result. The courts appear to recognize that an attorney's involvement in a class or shareholder derivative suit may entail a greater expenditure of time and require specialized skill and greater risk, thereby Meriting an increase in the award normally obtained by attorneys engaged in less complex proceedings. However, the courts no longer appear to be willing to summarily approve any fee requests that are presented, without detailed justification for the award.

Many courts are becoming increasingly antipathetic to attorneys who approach them with less than a superior record. The question has now become: have counsel, through the medium of excessive fee petitions, subverted the intent of the common fund doctrine, which was to benefit counsel for their efforts on behalf of passive class members? Or, is the more accurate query: have courts, operating under the weight of public pressure, succumbed to an unrealistic expectation of the altruism of modern attorneys? These questions can be answered only by a careful and honest evaluation of the role of the attorney in a class action and the role of the class action, or shareholder derivative suit, in modern society.

Barbara Warnick Thompson

200. Id. (citing In re Fine Paper, 98 F.R.D. at 84-85).