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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Some Nuts and Bolts Of Attorney's Fees Applications

More than the East River separates the Southern and Eastern Districts of New York. Despite the proximity of the two districts, and the belief by many local lawyers that their practices extend seamlessly between Manhattan and Brooklyn federal court, the difference in prevailing rates charged by lawyers in those two districts has resulted in a divide that the Brooklyn Bridge cannot effectively span.

The significance of customary local rates in judicially determined attorney's fees has grown in importance as the U.S. Court of Appeals for the Second Circuit has sought to impose market discipline on attorney's fees applications, resulting in greater scrutiny of fee applications and more modest awards. As a pair of recent decisions from the U.S. District Court for the Southern District of New York shows, this shift in emphasis in fee-setting jurisprudence is having an impact on the earliest stages in litigation, and throughout the conduct of a case.

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The Forum Rule

Last month in *Legrand v. City of New York*,[1] Southern District Judge Denise L. Cote issued a decision transferring that false arrest and malicious prosecution case from the Southern District to the Eastern District of New York, finding that the plaintiff had selected venue in the Southern District solely "because he expect[ed] to achieve a larger award of attorney's fees" than he would be eligible for had he filed in the Eastern District.[2]

Despite the fact that the defendant police officers were assigned to a precinct in the Eastern District, the plaintiff's residence was in the Eastern District, and the events giving rise to the claim occurred in the Eastern District, the plaintiff filed his case in the Southern District seeking the advantages of the so-called "forum rule" applicable to attorney's fees applications. That rule directs courts to "generally use the hourly rates employed in the district in which the reviewing court sits" in calculating attorney's fees.[3]

In a decision issued last year in *Simmons v. New York City Transit Authority*,[4] the Second Circuit reinforced the centrality of the forum district's prevailing rate, concluding that "in order to receive an attorney's fee award based on higher out-of-district rates, a litigant must overcome a presumption in favor of the forum rule, by persuasively establishing that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result."[5]

At issue in *Simmons* was whether the successful plaintiff in a discrimination case brought in the Eastern District could obtain a fee award based on the billable rates of her Southern District attorneys. The district court had found that the plaintiff was justified and reasonable in retaining out-of-district counsel because of their "experience and 'success rate' in litigating disability discrimination cases, and the fact that the 'travel time' between the Southern and Eastern districts is 'minimal.'"[6]

> Courts continue to place substantial weight on the empirical factors of time and rate.

The Second Circuit, in an opinion by Judge John M. Walker, Jr., held that although counsel's special expertise in litigating a particular type of case is relevant to determining whether the litigant has overcome the forum rule presumption, "[a] litigant cannot overcome the presumption through mere proximity of the districts, nor…by relying on the prestige or 'brand name' of her selected counsel." Rather, the court held, the litigant must show that the use of in-district counsel would produce a substantially inferior result, and that in that case, the plaintiff had failed to make the requisite showing.[7]

In *Legrand*, Judge Cote observed that *Simmons* had "created an incentive to file all civil rights litigation" in the Southern District in order to facilitate high attorney's fees awards. She concluded that where the plaintiff has chosen a particular forum "not because of convenience, but because of the interplay of the forum rule and this district's higher prevailing rates for attorney's fees, his choice of forum is entitled to little deference."[8] Because none of the other factors relevant to consideration on a motion to transfer weighed in favor of keeping the litigation in the Southern District, Judge Cote took the unusual step of transferring the case to the Eastern District.

The 'Arbor Hill' Factors

The forum rule is just one of many factors courts are to consider in arriving at what the Second Circuit now refers to as a "presumptively reasonable fee." In an effort to cure what it described as the "serious illness" afflicting fee-setting jurisprudence, the court issued a decision in 2007 in *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*,[9] setting out the multiple factors district courts should weigh in setting a fee. Lamenting that the law surrounding fee awards had become "confused" and "untethered from the free market it is meant to approximate," *Arbor Hill* reviewed the history of two different schools of thought for calculating attorney's fees—the lodestar method and the approach set out in 1974 by the U.S. Court of Appeals for the Fifth Circuit in *Johnson v. Georgia Highway Express Inc.*[10]

The lodestar method started with the product of the attorney's usual hourly rate and the number of hours worked, and permitted adjustment either upward or downward, based on case-specific considerations, to arrive at a "reasonable" fee. Under the *Johnson* method, the number of hours worked and the attorney's usual rate were only two of 12 factors considered in establishing a "reasonable" fee.

Other *Johnson* factors included the novelty and difficulty of the questions; the level of skill required; the preclusion of employment by the attorney because of the case; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved in the case and the results obtained; the experience, reputation, and ability of the attorneys; the "undesirability" of the case; the nature and length of the professional relationship with the client; and awards in similar cases.[11]

Arbor Hill observed that the lodestar method was more market-based, allowing courts to adjust fee amounts that did not accurately reflect the market to ensure that the ultimate fee award was reasonable, whereas the *Johnson* method "relied on the district court's experience and judgment," rather than market forces, to arrive at a reasonable fee.[12] Ultimately, the Second Circuit settled on an amalgam of the two approaches, instructing district courts to consider not just the *Johnson* factors, but all other factors

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that a reasonable paying client wishing to spend the minimum necessary to effectively litigate the case might consider. It instructed district courts to use these factors to arrive at a reasonable hourly rate (rather than to calculate a reasonable overall fee), and then use that rate to calculate what the court referred to as a "presumptively reasonable fee."[13]

Although *Arbor Hill* dictates that a host of market considerations should bear on the reasonable fee determination, as *Legrand*, and a recent decision filed in *In re AOL Time Warner Shareholder Derivative Litigation*[14] make clear, courts continue to place substantial weight on the empirical factors of time and rate. In *AOL*, Southern District Judge Colleen McMahon adopted a lengthy and detailed Report and Recommendation by Special Master David H. Pikus determining the fees to be awarded 10 plaintiffs' law firms following settlement of a number of derivative actions arising out of the merger between AOL and Time Warner.

The settlement consisted of changes in the company's governance and compliance functions, as well as an acknowledgement that the derivative actions were a "'substantial factor' in the [c]ompany's ability to obtain an approximately $200 million recovery from its director and officer liability insurance carriers." Because there was no monetary aspect to the settlement generating a common fund, some percentage of which could be used for attorney's fees, the AOL fee was based on the "presumptively reasonable fee" method articulated in *Arbor Hill*.[15]

The Special Master's report took into account a number of competing and overlapping factors in determining the weight to be accorded the hourly rates charged by the various plaintiffs' firms, located in Pennsylvania, Delaware and Arkansas.[16] Noting that application of the forum rule, as articulated in *Simmons*, could create an unintended windfall for out-of-district lawyers whose regular rates were lower than the prevailing rates in the Southern District of New York, the report concluded that the preference for host district rates should give way to the policy underlying *Arbor Hill* in favor of moderating fees.

The report concluded that the rates for all firms were "on the 'higher end of the prevailing range'" for their localities, and "press[ed] the envelope of the presumptively reasonable fee envisioned in *Arbor Hill*." It found, however, that the higher rates were balanced, or at least mitigated, by other factors, including the complexity of the case and its demands for "exceptionally able counsel," and that counsel had forgone any increase in rates to reflect the lengthy delay between the period during which the fees were incurred and consideration of the fee application.[17]

Hours Worked

In calculating the presumptively reasonable fee, *AOL* focused heavily on the second empirical factor—the number of hours worked—painstakingly examining the amount of time devoted by counsel to various tasks. Its scrutiny, and criticism, of common timekeeping practices is highly instructive, not just for attorneys seeking court-awarded fees, but for those who have actual "reasonable paying clients" as well.

The report engaged in a line-by-line review of the attorneys' daily time records, disallowing approximately $330,000 of additional charges for conferences between or among lawyers where only one participant's time was recorded, certain travel time, and inadequately described services. With respect to attorney conferences, the report noted that the failure of one attorney to record the time may indicate that he or she did not consider it sufficiently meaningful or lengthy to bill, but that even if the failure of one participant to record a conference was simple oversight, the law required disallowance of recorded time for other attorneys in the absence of all corresponding time entries.[18]

Applying the "reasonableness" standard to billing for travel time, the report distinguished between long distance and local travel, stating that "[a] long distance trip…affords opportunities to perform work for the present or other clients, especially with advances in technology such as laptop computers and cellular phones." Accordingly, the report reduced by 50 percent time billed for long distance travel that did not include evidence of other work performed en route.[19]

Although the Second Circuit has expressed displeasure with the routine use of multipliers to adjust 'presumptively reasonable fees' (formerly known as 'lodestars'), use of multipliers has continued to 'flourish,' and 'AOL' granted counsels' request for use of a multiplier of 1.6.

The report also rejected billings which insufficiently identified the participants or the subject, because such entries could not be reviewed for necessity or appropriateness, and it reduced by 10 percent those time entries bearing "telltale signs of rounding and estimation, rather than precise recording." Stressing that these disallowances did not reflect deliberate padding and "should not detract from counsel's fidelity to their cause, the laudable service they rendered or the efficiency with which much of the case was handled," the report concluded that "excesses" resulted from time pressures, the sheer size of the litigation, and interaction between a large number of lawyers.[20]

Use of Multipliers

Although the Second Circuit has expressed displeasure with the routine use of multipliers to adjust "presumptively reasonable fees" (formerly known as "lodestars"), use of multipliers has continued to "flourish,"[21] and *AOL* granted counsels' request for use of a multiplier of 1.6. The report noted that whether and by how much a fee should be multiplied is generally driven by an assessment of quality and risk. (Of note, neither this nor any other post-*Arbor Hill* decision applying a multiplier to a fee award has noted that both quality and risk are also to be considered in setting the reasonable hourly rate—a phenomena that would appear to permit "double counting" of those factors if they were faithfully folded into the base hourly rate from which the presumptively reasonable fee is determined.)

In agreeing to the multiplier, *AOL* observed that the requested multiplier of 1.6 was relatively low (citing a range of 1.5 to 4.0); that plaintiffs' counsel had yielded money damages in settlement, which would have generated a common fund from which their fees could have been paid; and that in addition, counsel "ha[d] taken the unusual step of absorbing their out-of-pocket expenses within their fee request."[22]

Conclusion

In instructing the lower courts to consider hypothetical, yet realistic market factors in determining what a reasonable, paying client would be willing to pay for the particular services rendered in a given case, *Arbor Hill* presaged an era of lower, more moderate fee awards.[23] Attorneys engaged in litigation where the court will play a fee-setting role should be prepared to have their billing methods and practices closely scrutinized. Out-of-district litigators should also anticipate that courts will apply the methodology leading to the lowest possible rate when determining the "reasonable" rate that a savvy, cost-conscious client would be willing to pay.

1. 2010 WL 742584 (SDNY, March 3, 2010).
2. Id. at *3.
3. *Arbor Hill Concerned Citizens Neighborhood Assoc. v. County of Albany*, 493 F.3d 110, 119 (2d Cir. 2007) (internal citations omitted), amended and superseded on other grounds by 522 F.3d 182 (2d Cir. 2008).
4. 575 F.3d 170 (2d Cir. 2009).
5. Id. at 172.
6. Id at 173.
7. Id. at 177.
8. 2010 WL 742584, at *1, 3.
9. 493 F.3d 110-112.
10. 488 F.2d 714 (5th Cir. 1974).
11. Id. at 717-19.
12. 493 F.3d at 115.
13. Id. at 117-118. See also *McDaniel v. County of Schenectady*, __F.3d__, 2010 WL 520899 (2d Cir. Feb. 16, 2010) (discussing *Arbor Hill* methodology). The *Arbor Hill* court also observed that the meaning of the term "lodestar" had shifted, and in fact "deteriorated to the point of unhelpfulness" as a metaphor. The court eschewed further use of that term in favor of the expression "reasonable hourly rate"—a lexicographical instruction that has not yet taken hold, inasmuch as the "lodestar" remains the central focus of many fee awards from courts in the Second Circuit.
14. 2010 WL 363113 (SDNY, Feb. 1, 2010).
15. The report observed that *Arbor Hill* arose in the context of a fee-shifting statute rather than a derivative settlement resulting in non-monetary relief, but concluded that *Arbor Hill's* admonition that a court should "replicate as much as possible 'market' compensation that would be paid by a sophisticated but 'thrifty' client bargaining for such services" applied with equal force in the present context. Id. at *7.
16. The Special Master also gave no separate weight to the *Johnson* factors calling for an assessment of the quality and skill of the legal work, because, although the case required and received high-quality legal work, the work was of the caliber expected from the prominent firms involved and the assumption of such high-quality representation was built into the firms' hourly rates. Id. at *12.
17. Id. at *19-20.
18. Id. at *9 (citing *Carrero v. New York City Housing Authority*, 750 F.Supp. 660 (SDNY 1990)).
19. Id. at *10.
20. Id. at *10-11.
21. Id. at *22 (citing *Goldberger v. Integrated Resources Inc.*, 209 F.3d 43, 57 (2d Cir. 2000)).
22. Id. at *23-24. Finally, the report noted that the requested fee, including the multiplier, was the result of mediation conducted by the same special master who settled the underlying case and its two companion cases, and that "[w]hile this factor is by no means decisive, it provides an additional measure of support for the request." Id. at *24.
23. *Hall v. Children's Place Retail Stores*, 669 F.Supp.2d 399, 403 (SDNY 2009).