

ATTORNEYS' FEES IN INDIVIDUAL AND CLASS ACTION ANTITRUST LITIGATION

Section 4 of the Clayton Act provides that the victim of a violation of the antitrust laws may recover from the violator "a reasonable attorney's fee" in addition to treble damages.¹ This provision, which finds its roots in a similar section of the Sherman Act,² exists to encourage private enforcement of the antitrust laws. Congress, when enacting the Sherman Act, was greatly concerned that the antitrust laws would provide remedies only for "[r]ich corporations and rich men," leaving "the great mass of the people [who] are not able to employ counsel" unable to vindicate their rights.³ Feeling that the primary beneficiaries of a civil remedy for antitrust violations should be "the great mass of the people,"⁴ Congress in enacting this section strove to make access to the courts as feasible and rewarding as possible.⁵ The section also serves to implement the "private attorney general" notion by avoiding the necessity of government prosecutions of all violations of the antitrust laws.⁶

Although the "reasonable attorney's fee" provision plays a key role in this scheme, Congress has not established criteria for determining a reasonable fee. Trial courts, left to their own discretion,⁷ have applied many different theories of "reasonableness" when making fee determinations. Indeed, it seems there are almost as many notions of what is reasonable as there are judges.⁸

The sheer size of attorney fee awards alone—the most notable being 7.5 million dollars in *Trans World Airlines, Inc. v. Hughes*⁹—

1. 15 U.S.C. § 15 (1970), formerly ch. 323, § 4, 38 Stat. 730 (1914).

2. Sherman Antitrust Act § 7, 26 Stat. 210 (1890), as amended 15 U.S.C. § 15 (1970). Section 4 of the Clayton Act only changed the remedy provided by the Sherman Act by extending it to persons injured as a result of violations of *any* of the antitrust laws. Formerly the remedy was restricted in operation to the particular act cited. S. REP. NO. 698, 63d Cong., 2d Sess. 9 (1914).

3. 21 CONG. REC. 2564 (1890).

4. *Id.*

5. *Id.* at 2612.

6. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968); *Byram Concretanks, Inc. v. Warren Concrete Prod. Co.*, 374 F.2d 649, 651 (3d Cir. 1967), *cert. denied*, 377 U.S. 916 (1964).

7. *W.W. Montague & Co. v. Lowry*, 193 U.S. 38 (1904); *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952).

8. "The attorney's fees recoverable under the statute, it is well settled, must be reasonable. Judging from the reported cases, there are nearly as many notions of what is reasonable as there are judges." Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363, 412 (1954).

9. 312 F. Supp. 478 (S.D.N.Y. 1970), *modified and aff'd*, 449 F.2d 51 (2d Cir. 1971), *cert. granted*, 405 U.S. 915 (1972).

suggests the necessity for close analysis of the rationales employed for determining these awards. Additionally, there is no overall consistency in the methods used by courts for calculating fees, and the resulting lack of predictability in the determination of attorneys' fees only decreases the incentive for private enforcement of the antitrust laws.¹⁰ For instance, when an attorney contemplates taking a case with a relatively small potential recovery, a private contingent fee arrangement between the client and his attorney, whereby the attorney is to receive 25 percent or 30 percent of the recovery, might be an inadequate incentive to take the case. In this situation, the court's determination of fees that the defendant must pay in addition to treble damages could, as Congress intended, provide the added financial incentive necessary to bring the case. But if the attorney thinks the court will calculate the fee primarily as a percentage of the small recovery, as is frequently done,¹¹ this added incentive may be inadequate. On the other hand, if the attorney thinks the fee will be based primarily on the amount of time expended by the attorney in the litigation, as is also done,¹² he may be more likely to take the case. Inconsistency in judicial fee determinations hinders an attorney's ability to make such a judgment, and consequently the purpose for the attorney's fee provision may not be realized to the extent possible.

Part I of this Comment analyzes various factors that courts have considered when making fee determinations in antitrust cases brought by individuals. It then suggests an approach aimed at consistency in the application and emphasis of these factors. Part II considers attorneys' fees in antitrust class actions and settlements. While the considerations that are discussed here are related only tangentially to section 4 determinations, they are nevertheless of great importance in a discussion of attorneys' fees in antitrust litigation because of the important role that attorneys' fees play in antitrust class actions in general, and settlements of such actions in particular.

I

ATTORNEYS' FEES IN ANTITRUST CASES BROUGHT BY INDIVIDUALS

A. *Factors Involved in Determining Reasonable Attorneys' Fees*

1. *Effect of the Agreement Between the Individual and His Attorney*

The great majority of plaintiffs' attorneys in antitrust suits have

10. The charts in the appendix to this Comment evidence the lack of consistency in judicial fee determinations.

11. See text accompanying notes 37-56 *infra*.

12. See text accompanying notes 57-65 *infra*.

private fee arrangements with their clients.¹³ Normally a court's award of a reasonable attorney's fee, which is paid to plaintiff rather than directly to plaintiff's attorney, is merely a factor in these arrangements.¹⁴ With one apparent exception, courts have consistently found such private arrangements to be wholly immaterial to the judicial determination of attorneys' fees.¹⁵ The one case casting doubt on this principle was the district court's decision in *Farmington Dowel Products Co., v. Forster Manufacturing Co.*¹⁶

In *Farmington*, plaintiff agreed to pay his attorney one-third of any recovery, plus any amount awarded by the court as a reasonable attorney's fee. Following a treble damage award of \$327,300, the court determined that \$85,000 would be a reasonable attorney's fee. It concluded, however, that the private fee arrangement was "so antipathetic to the objective and spirit of Section 4" that *no* statutory fee award should be made.¹⁷ The court reasoned that section 4 provides an award of attorney's fees in order to reimburse plaintiff for his costs of suit; consequently, the purpose of section 4 is thwarted if an attorney receives the entire court award of attorney's fees as well as one-third of the total recovery.¹⁸ The court stated further that diverting part of the recovery from the claimant to his attorney would frustrate the purpose of the statutory fee awards, that purpose being to encourage private treble damage actions by enabling a claimant to keep his recovery intact.¹⁹ The court also found it could not "in good conscience" give effect to an agreement under which counsel would receive over \$190,000—more than twice what the court had found to be reasonable.²⁰

13. Alioto, *The Economics of a Treble Damage Case*, 32 A.B.A. ANTITRUST L.J. 87, 93 (1966):

The usual [financial arrangement between lawyer and client] involves a retainer within a range of \$5,000 to \$25,000, a percentage arrangement on damage recovery, and some understanding on the attorney's fee which is ordered by the Court to be paid by the defendant.

14. *Id.*

15. See, e.g., *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561, 570 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 169 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961).

16. 297 F. Supp. 924 (D. Me. 1969), *modified*, 421 F.2d 61 (1st Cir. 1969). Subsequently an order was entered by the district court establishing the maximum ethically permissible fee that could properly be accepted by plaintiff's counsel as 50% of the treble damages. The circuit court [436 F.2d 699 (1st Cir. 1970)] reversed this order, seeking more deliberate articulation of its rationale.

17. 297 F. Supp. 924, 929.

18. *Id.*

19. "By the present fee arrangements counsel are, in effect, seeking to reap the benefit of a provision whose advantage was clearly meant to accrue to their client." *Id.* The court did not consider, however, the possibility that if the client had not agreed to this fee arrangement, the attorney might not have agreed to take the case.

20. *Id.*

The First Circuit, finding the district court's opinion misleading and overbroad, modified the decision on appeal.²¹ It found that the district court's opinion, in effect, erroneously prevented any court award of attorney's fees where, by arrangement, the award goes directly to plaintiff's counsel. According to the circuit court, the lower court decision implied that no section 4 award (neither treble damages nor attorney's fees) could be made when a contingent fee arrangement existed between plaintiff and his attorney. Such a conclusion, the First Circuit reasoned, would truly frustrate the purpose of section 4, for it would leave private antitrust enforcement to the independently wealthy.²²

The court of appeals stated that although it was proper to inquire into the ethical nature of the fee arrangement between plaintiff and his counsel, the district court confused the ethical question with the completely separate issue involved in a section 4 inquiry.²³ A court's power to prevent a client from paying excessive amounts to an attorney should not be confused with a court's role in determining a section 4 fee that is reasonable for defendant to pay the plaintiff.

The *Code of Professional Responsibility* provides ethical standards that govern the reasonable amount of compensation an attorney should receive for his services.²⁴ These standards are similar to those that are relevant to section 4, but there are significant differences between a determination of reasonableness under section 4 and a similar determination under the *Code*.²⁵ For purposes of the *Code*, the reasonableness of a fee arrangement should generally be viewed prospectively, according to the circumstances in which it was made. Section 4, however, contemplates a retrospective estimate of reasonableness.²⁶ A fee arrangement that is contingent upon success is relevant to a determination under the *Code*, but it is not under section 4.²⁷ Furthermore, a court's role in making section 4 awards is quite different from its role

21. 421 F.2d 61 (1st Cir. 1970).

22. [The district court] would say that treble damages could not be properly awarded if counsel has a contingent fee arrangement—say, one third—because one third of such damages 'would not reimburse plaintiff in any sense, since it would accrue entirely to counsel.' Carried one step further, it would say that any part of the award under section 4 will not be awarded if the plaintiff is bound to pay his attorney out of it. We cannot accept that conclusion, which would leave private antitrust enforcement to the independent wealthy. . . . [W]e do not understand the language of section 4 to preclude a 'fees awarded' arrangement. *Id.* at 88.

23. *Id.* at 89.

24. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-17, 2-18 (formerly the ABA CANONS OF PROFESSIONAL ETHICS).

25. *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 89 (1st Cir. 1970).

26. *Id.*

27. *Id.* at 90.

in exercising supervisory power over the bar. A section 4 award is very common and has only economic impact, while a court's supervisory decision involves an ethical judgment and is reserved for exceptional circumstances.²⁸ A court making a section 4 award should determine whether plaintiff is paying his attorney more than is ethically acceptable. However, this should in no way affect the court's assessment against defendant, for this is part of a defendant's penalty for violating the antitrust laws. The defendant should not escape this penalty because, quite fortuitously, an objectionable fee arrangement exists between plaintiff and his attorney.²⁹

2. *Nature of the Case*

The size and difficulty of the litigation has been considered by many courts to be an important factor in making section 4 determinations of attorneys' fees. Factors related to this subject, such as whether plaintiff's counsel had the benefit of a prior judgment or decree in a preceding case, the magnitude and complexity of the litigation, and the responsibility undertaken by plaintiff's counsel, are frequently considered separately,³⁰ but similar considerations apply to each. When the difficulty of an attorney's task is decreased by the availability of a favorable prior judgment, or when the scope of a case is limited in terms of magnitude or complexity, a commensurate reduction in compensation is justified.³¹ Courts have not, however, developed a method for effectively measuring the impact of these factors for purposes of compensating attorneys. It is difficult, perhaps impossible, to quantify these factors in terms of dollars and cents. While the nature of the case is relevant to an award of attorneys' fees, as an isolated variable this factor is too intangible to serve as a basis for computing such fees. Whether an attorney's task is considered very difficult or quite simple, his fee must be computed after considering other factors. The true importance

28. *Id.*

29. "We cannot believe that the imposition of this penalty was meant to turn in any way on the nature or amount of the plaintiff's fee arrangement, a fortuity wholly unrelated to defendant's illegal conduct." *Id.* But see *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561, 570 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952): "Certainly Congress did not intend to impose a further penalty upon the defendants under the guise of 'a reasonable attorney's fee'. . . ."

30. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F. Supp. 258, 302 (M.D. Pa. 1965), *vacated on other grounds*, 377 F.2d 776 (3d Cir. 1967), *aff'd in part on other grounds, rev'd in part on other grounds*, 392 U.S. 481 (1968); see also *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 168, 169 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961).

31. See *Twentieth Century-Fox Film Corp. v. Brookside Theatre*, 194 F.2d 846, 859 (8th Cir. 1952), *cert. denied*, 343 U.S. 942 (1952); *Bordonaro Bros. Theatres v. Paramount Pictures*, 113 F. Supp. 196 (W.D.N.Y. 1953), *aff'd*, 203 F.2d 676 (2d Cir. 1953).

of the nature of the case as a criterion for determining attorneys' fees would seem realistically to be only as a means for retrospective justification of the figure that is finally chosen.

3. *Standing of Counsel at the Bar*

Another factor often given great importance in the fixing of attorneys' fees in antitrust cases is the standing of counsel at the bar: the attorney's reputation for general professional skill and his reputation as a litigator.³² But although it is a simple matter to state that plaintiff's counsel is a highly respected antitrust attorney,³³ or that counsel displayed unusual skill and competence,³⁴ it is quite difficult to translate this into a formula for computing attorneys' fees.

The importance of adequately compensating excellence seems clear.³⁵ As an independent variable in computing compensation, though, a judicial evaluation of the reputation and professional skill of the litigator, like the "nature of the case" criterion, is too intangible to be of any real value. This factor likewise seems more useful as a basis for justifying a generous fee than as a basis for determining such a fee.³⁶

4. *Percentage of Recovery*

Over a period of time, courts faced with the task of determining reasonable attorneys' fees have developed a percentage theory of compensation based upon the award of single damages.³⁷ Most courts at least refer to this theory when making attorneys' fee awards, on the premise that an attorney's compensation should bear some relation to the fruits of his labor. Examination of the charts in the appendix

32. *E.g.*, *Bordonaro Bros. Theatres v. Paramount Pictures*, 113 F. Supp. 196, 197 (W.D.N.Y. 1953), *aff'd*, 203 F.2d 676 (2d Cir. 1953); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 169 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961).

33. *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708, 718 (N.D. Cal. 1962).

34. *Id.* at 717.

35. "Unless excellence in the trial lawyer is properly recompensed, the best men will not spend their time in court, and thus there will dry up the most essential sources of an independent bar." *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 242, 244 (D. Mass. 1954).

36. One court, while maintaining that such factors as the nature of the case and the standing of counsel are very important for purposes of attorney fee determination, admitted that they are "imponderable and intangible." *Webster Motor Car Co. v. Packard Motor Car Co.*, 166 F. Supp. 865, 866 (D.D.C. 1955), *rev'd and cross appeal concerning attorney's fees dismissed as moot*, 243 F.2d 418 (1957), *cert. denied*, 355 U.S. 822 (1957).

37. *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 170 (E.D. Pa. 1958), *aff'd* 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961).

reveals, however, that the courts have applied this theory with little consistency. Furthermore, analysis reveals that the percentage theory's value as a determining factor in computing fees is limited at best.

Some courts have used a "fixed" percentage theory as the ultimate solution to the problem of awarding attorney's fees. For example, in *Webster Motor Car Co. v. Packard Motor Car Co.*,³⁸ the award of attorney's fees was based solely on such a theory.³⁹ The court relied on four cases in which the percentage of single damages awarded to the attorneys ranged from 20 to 26.6⁴⁰ and concluded that an award of approximately 23 or 24 percent would be appropriate.⁴¹ In similar fashion, the Tenth Circuit adopted a fixed percentage approach in holding, without explanation, that 15 percent of the amount recovered in a particular case would constitute a reasonable attorney's fee.⁴² Such hard and fast applications of the percentage theory are, however, the exception rather than the norm, and for good reason.

The rigid requirements of the "fixed" percentage theory, with its insensitivity to individual differences in antitrust suits, make it inappropriate in the great majority of cases. This was recognized in the

38. 166 F. Supp. 865 (D.D.C. 1955), *rev'd and cross appeal concerning attorneys' fee dismissed as moot*, 243 F.2d 418 (1957), *cert. denied*, 355 U.S. 822 (1957).

39. *Id.* at 865-66. The court, feeling it to be unfair to compensate on an hourly or daily basis, contended that the matters for consideration are the magnitude and the complexity of the issues involved, the standing of counsel at the bar, the skill exercised, and the result achieved. All but the last of these factors seem to have been ignored, however, when the attorney fee award was made.

40. *Paramount Film Distrib. Corp. v. Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955); *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir. 1952), *cert. denied*, 343 U.S. 942 (1952); *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 242 (D. Mass. 1954).

41. 166 F. Supp. 865, 866 (D.D.C. 1955), *rev'd and cross appeal concerning attorneys' fee dismissed as moot*, 243 F.2d 418 (1957), *cert. denied*, 355 U.S. 822 (1957). The four cases referred to were decided within the five year period prior to *Webster*. It is interesting to note that three other antitrust cases decided within that same period resulted in attorney fee awards representing percentages of single damages substantially different from the implied norm of 20 to 26 percent that forms the foundation for the decision in *Webster*. See *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919, 920 (5th Cir. 1951), *modified on rehearing*, 190 F.2d 73, 74 (5th Cir. 1951) (approximately 58% of single damages); *Kiefer Stewart Co. v. Joseph Seagram & Son, Inc.*, 340 U.S. 211 (1951), *rev'g on other grounds* 182 F.2d 228 (2d Cir. 1950), *and reinstating the order of the district court*, (approximately 15% of single damages); *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), *modified on other grounds*, 340 U.S. 558 (1951) (61% of single damages).² The *Webster* court gave no indication as to why 20 to 26% was considered reasonable, and why 61% or 15% would not have been considered reasonable had these latter cases been analyzed.

42. *Union Carbide and Carbon Corp. v. Nisley*, 300 F.2d 561, 587 (10th Cir. 1962).

famous case of *Trans World Airlines, Inc. v. Hughes*,⁴³ where the court totally ignored the percentage theory. The court reasoned that the theory gives undue emphasis to the size of the recovery. Where there are small recoveries, the percentage theory "completely ignores professional skill and the complexity of the work involved."⁴⁴ Conversely, where the recovery is very high, the theory can result in an excessive award.⁴⁵ The weakness of the percentage theory can be illustrated in other situations: where plaintiffs, in order to expedite the trial, stipulate that they will not claim certain damages to which they might otherwise be entitled,⁴⁶ or where the court acknowledges that actual damages suffered as a direct result of the antitrust violation would have been found to be far greater except for the difficulty of proof,⁴⁷ the fixed percentage approach would be clearly unfair.

A more widely used approach rejects the set percentage formula and compares a suggested fee award with the damages recovered, to determine if such an award would "shock the conscience." The court of appeals in *Milwaukee Towne Corp v. Loew's, Inc.*⁴⁸ found the trial court's fee award, amounting to more than 50 percent of the single damages, to be "shocking to our sense of reason and justice."⁴⁹ As will be noted from the charts in the appendix, the court, relying principally on the number of hours expended by plaintiff's counsel, reduced the fees to the equivalent of 24 percent of the single damages. Similarly, the Eighth Circuit held that an attorney's fee amounting to 40 percent of the single damages "shock[ed] the conscience,"⁵⁰ but ap-

43. 312 F. Supp. 478 (S.D.N.Y. 1970), *modified and aff'd*, 449 F.2d 51 (2d Cir. 1971), *cert. granted*, 405 U.S. 915 (1972). The single damage recovery was \$45,870,478, and plaintiff's counsel was awarded \$7,500,000 as a reasonable attorney's fee.

44. *Id.* at 484.

45. A point is reached where the amount of plaintiff's recovery is unrelated to services of counsel. The large amounts involved do not add to the complexity of the problems, increase the responsibilities of counsel or require greater capabilities of counsel. *Id.*

46. *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 170 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961).

47. *Clapper v. Original Tractor Cab. Co.*, 270 F.2d 616, 626 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960); *see also* *Finley v. Music Corp. of America*, 66 F. Supp. 569 (S.D. Cal. 1946).

48. 190 F.2d 561, 571 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952).

49. [T]he fabulous amount allowed is shocking to our sense of reason and justice. . . . And we are disturbed because in our sober judgment this exorbitant allowance, if it should become a precedent, is calculated to bring both the bar and the bench into public disrepute. . . . [T]he possibility that the anti-trust laws might develop into a racketeering practice should not be enhanced by the allowance of exorbitant and unreasonable attorney fees.

Id. at 569-70.

50. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 859 (8th Cir. 1952), *cert. denied*, 343 U.S. 942 (1952).

parently concluded that an award of 26.6 percent was not unreasonable. Another court, applying the same logic but utilizing a different "conscience," awarded a fee that equaled 78 percent of the single damages, thinking it to be both reasonable and consistent with other anti-trust cases.⁵¹

A close examination of cases reveals that the percentage theory appears to function properly only when the amount of single damages is in a particular range, such that what seems to be a reasonable attorney's fee also happens to represent a reasonable percentage of the damages. When the amount of damages falls within this range, courts frequently use the percentage theory to compute or justify the amount of attorney fees. The range appears to be approximately \$150,000 to \$500,000.⁵² When the damages are not within this range, the percentage theory does not "work" and is rarely relied upon. A "reasonable" percentage is considered, for purposes of demonstration, to fall somewhere between 15 percent and 35 percent.⁵³ In 34 of the cases surveyed in the appendix, single damages were outside the \$150,000 to \$500,000 range. Of the 34 cases, only four awarded attorneys' fees that fall *within* the "reasonable" percentage boundaries of 15 percent and 35 percent.⁵⁴ Of the 13 cases with single damages ranging from \$150,000 to \$500,000,⁵⁵ however, eight involved attorneys' fees that

51. *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 297 F. Supp. 924, 928 (D. Me. 1969), *modified*, 421 F.2d 61 (1st Cir. 1969).

Another approach that courts have used in considering the result of the action is to incorporate this factor into a "formula" with other factors and thereby determine the fee award. Courts that have taken this approach have usually done so because they feel the percentage test is noteworthy, but not as important as the professional skill required and the amount of work necessary. *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 297 F. Supp. 924, 928 (D. Me. 1969), *modified on appeal*, 421 F.2d 61 (1st Cir. 1969); *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490, 493 (D. Mass. 1963). This approach appears similar to the "shock the conscience" approach, with the only difference being that the percentage of damages is kept in mind *while* computing attorneys' fees, rather than considered after the fees have been computed.

52. This figure is a rough estimation reached after analysis of the cases on the charts in the appendix. The average single damage award (excluding the highest award (\$45,870,478) and the two lowest awards (\$325 and \$500)) is approximately \$250,000.

53. This determination was made by extending *Webster's* "reasonable" 20% to 26% norms. 166 F. Supp. 865-66. See notes 39 and 40 and accompanying text.

54. *Bausch Mach. Tool Co. v. Aluminum Co. of America*, 79 F.2d 217 (2d Cir. 1935), *rev'g lower court decision on other grounds and remanding for new trial* (31.4%); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966) (33%); *Bigelow v. FKD Radio Pictures, Inc.*, 150 F.2d 877 (7th Cir. 1945) (24%); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478 (S.D.N.Y. 1970), *modified and aff'd*, 449 F.2d 51 (2d Cir. 1971), *cert. granted*, 405 U.S. 915 (1972) (16.4%).

55. *Armco Steel Corp. v. North Dakota*, 376 F.2d 206 (8th Cir. 1967); *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708 (N.D. Cal. 1962) (\$146,300); *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 242

fall within these "reasonable" percentage boundaries, and two more are right on the borderline.⁵⁶ It therefore appears that while the validity of the percentage theory depends on the amount of the damages involved, the validity of the fee does not depend on the percentage. Thus, despite the substantial amount of court time that is spent discussing, analyzing, and applying the percentage theory, its significance as a positive tool for actually computing attorneys' fees is limited at best.

This is not to imply that the percentage test serves no purpose. Its proper function is found in retroactively justifying the affirmation or rejection of a fee award by applying the "shock the conscience" approach. When the attorney fee *seems* unjust on its face, the situation should be examined closely. Even from this perspective, however, the value of the percentage theory is limited, for courts' "consciences" vary significantly.

5. *Time Expended by the Attorneys*

The number of hours expended by plaintiff's counsel in the successful litigation is an easily quantifiable standard for determining attorney's fees. Once again, however, courts have attributed various degrees of significance to this standard. They have also encountered some difficulty in calculating the exact number of hours for which plaintiff's attorney should be compensated. One court deemed the fixing of fees on an hourly or daily basis to be clearly unfair, ". . . just as a surgeon who performs a delicate and dangerous operation does not fix his fee on the number of minutes that the operation took, but rather

(D. Mass. 1954); *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), *modified on other grounds*, 340 U.S. 558 (1951); *Kiefer-Stewart Co. v. Joseph Seagram & Son, Inc.*, 340 U.S. 211 (1951), *rev'd on other grounds* 182 F.2d 228 (7th Cir. 1950), *and reinstating the order of the trial court*; *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 n.6 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *Milwaukee Towne Corp. v. Loews, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961); *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189, 193 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966); *Paramount Film Distrib. Corp. v. Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955); *Sunkist Growers, Inc. v. Winekler & Smith Citrus Prods. Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962); *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir. 1952), *cert. denied*, 343 U.S. 942 (1952); *Webster Motor Car Co. v. Packard Motor Car Co.*, 166 F. Supp. 865 (D.D.C. 1955), *rev'd and cross appeal concerning attorney's fee dismissed as moot*, 243 F.2d 418 (1957), *cert. denied*, 355 U.S. 822 (1957).

56. The eight cases with attorneys' fees equalling 15% to 35% of single damages are: *Armco Steel*, *Cape Cod Food*, *Kiefer-Stewart*, *Locklin*, *Milwaukee Towne*, *Paramount Film*, *Twentieth Century-Fox Film Corp. v. Brookside*, and *Webster Motor Car*. The borderline cases are *Bal Theatre* (38%) and *Sunkist Growers* (39%). See note 55 *supra*.

on the whole situation."⁵⁷ The great majority of courts, though, give at least some consideration, but in different degrees, to the number of hours spent on the litigation. Some courts have simply multiplied the number of hours times a reasonable fee per hour and have used this product as the basis for their fee determination.⁵⁸ Most courts, however, have merely treated the number of hours as one of several factors for consideration.⁵⁹ In only 17 of the cases surveyed is the actual number of hours expended by the attorneys even stated by the courts, and the attorney fee awards made in these cases, when divided by the number of hours, range from \$4.37⁶⁰ to \$128.00⁶¹ per hour. This tremendous variance results not from vast differences of opinion concerning how much attorneys should be paid per hour, but rather from great inconsistency in the importance attributed to the time factor.

An additional problem encountered by the courts in considering the time factor is the difficulty of calculating the actual compensable attorney time. First, it is established that time spent by attorneys in seeking to obtain equitable relief such as an injunction cannot be considered in determining the attorneys' fees to be awarded.⁶² Courts have

57. *Webster Motor Car Co. v. Packard Motor Car Co.*, 166 F. Supp. 865, 865-66 (D.D.C. 1955), *rev'd and cross appeal concerning attorney's fee dismissed as moot*, 243 F.2d 418 (1957), *cert. denied*, 355 U.S. 822 (1957).

58. *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 297 F. Supp. 924, 928 (D. Me. 1969), *modified*, 421 F.2d 61 (1st Cir. 1969); *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561, 571 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *see Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 245 F. Supp. 258, 303 (M.D. Pa. 1965), *vacated on other grounds*, 377 F.2d 776 (3d Cir. 1967), *aff'd in part on other grounds, rev'd in part on other grounds*, 392 U.S. 481 (1968). In *Hanover*, the court purported to consider eight factors in making its fee determination, but the final award appears to be the product of the number of hours expended multiplied by a reasonable fee per hour.

59. *E.g.*, *Darden v. Besser*, 257 F.2d 285, 286 (6th Cir. 1958). *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708, 717 (N.D. Cal. 1962); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 169 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961). The basic argument against attributing substantial weight to an hourly rate is that to do so is unfair where success and complexity of issues are such significant factors. *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478, 484 (S.D. N.Y. 1970), *modified and aff'd*, 449 F.2d 51 (2d Cir. 1971), *cert. granted*, 405 U.S. 915 (1972). In approximately two-thirds of the cases listed on the charts in the appendix, the courts did not even state the number of hours expended by the attorneys. Instead, some general comment concerning the length of the litigation was frequently made.

60. *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' and Exhibitors' Ass'n of America*, 393 F.2d 75 (9th Cir. 1968), *cert. denied*, 393 U.S. 938 (1968).

61. *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478, 482 (S.D.N.Y. 1970), *modified and aff'd*, 449 F.2d 51 (2d Cir. 1971), *cert. granted*, 405 U.S. 915 (1972).

62. *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478, 482 (S.D.N.Y. 1970), and cases cited therein.

reached this conclusion because the section 4 allowance of attorneys' fees is incidental to the statutory right to damages. The courts must therefore carefully exclude from consideration all attorney hours spent in seeking such relief. Those courts that did not attribute major importance to the time factor may not have bothered to subtract such hours from the number presented to them by the attorneys; therefore the low fee per hour figures that appear on the charts are not necessarily accurate.

Courts have also held that time spent in presenting damage claims that are not proved must be entirely disregarded.⁶³ In applying this limitation, however, courts have been concerned with situations where the recovery is small in relation to an alleged large sum. In one instance, where the recovery was quite substantial, the court reasoned that the limitation did not apply because plaintiff did not fail to *prove* damages; the court merely rejected its particular theory of *measuring* damages.⁶⁴

A final problem with calculating compensable attorney time concerns "overpreparation" by the attorney. In lengthy, complex anti-trust suits there will at times be excessive preparation and duplication of effort. While it may be difficult to measure this "wasted" time, courts are reluctant to compensate for such inefficiency.⁶⁵ Courts must, however, carefully avoid chilling attempts to develop novel theories of law by labeling them wasted effort solely because the theories are not accepted by the courts.

B. Evaluation and Suggestions for Change

While the majority of courts have given consideration to most of the aforementioned factors when computing attorneys' fees, the sig-

63. *Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080, 1099-1100 (D. Md. 1969); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 489 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966); *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490, 491-92 (D. Mass. 1963), *vacated on other grounds*, 333 F.2d 798 (1st Cir. 1964), *cert. denied*, 379 U.S. 931 (1964).

64. *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478, 483 (S.D.N.Y. 1970), *modified and aff'd*, 449 F.2d 51 (2d Cir. 1971), *cert. granted*, 405 U.S. 915 (1972).

65. *Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080, 1099 (D. Md. 1969). In another case, after the defendants raised the issue of overpreparation, the court responded: "[T]his is almost like saying plaintiff could have won more easily—a not very telling argument when made by those who contend that plaintiff should not have won at all." *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 222 (9th Cir. 1964), *cert. denied*, 379 U.S. 880 (1964). It is interesting to note, however, that although this court purported to consider the total number of hours expended by plaintiffs' attorneys, the attorney fee determination that was finally made amounted to only \$7.70 per hour; thus the court seemed to adjust its award downward to reflect the overpreparation.

nificance attributed to those factors that are truly useful in determining fees has varied greatly. Several courts have pointed out that these factors are not intended to serve as precise yardsticks, but rather as guides.⁶⁶ But in using these guides, courts have traveled many confusing and conflicting paths.

Although the legislative mandate to award "a reasonable attorney's fee" offers courts little tangible guidance, an examination of the underlying legislative purpose may be of more assistance. The fee requirement operates to a certain extent as a penalty, but this is only incidental to its primary purpose of encouraging private antitrust suits. The treble damage provision of the Clayton Act provides the economic bite.⁶⁷ If the fee awards are too small, the incentive for attorneys to undertake similar cases in the future will be reduced. Conversely, if a fee award is too large, the award exceeds its purpose of encouraging prosecution and improperly enlarges the punitive component of the amount the unsuccessful defendant must pay.

This Comment does not propose that reasonable attorneys' fees should be computed according to an inflexible formula. Instead, it proposes that all courts should subscribe to the same basic approach or method in making their fee assessments, thereby achieving some consistency in judicial determinations. Mere reference to similar factors by most courts has not solved the problem, for consistency cannot be achieved without some common framework to direct and confine the use of these factors. The problem, therefore, is to articulate a method of computing fees that gives the courts a reasonably certain yardstick against which they can measure the relevant factors, thus providing a common basis for fulfilling, but not exceeding, the legislative purpose for which the fees are awarded.

The approach suggested in this Comment is, briefly, that courts should determine reasonable attorneys' fees by methods similar to those normally used to compensate defense attorneys in antitrust cases.⁶⁸

66. *E.g.*, *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 221 (9th Cir. 1964), *cert. denied*, 379 U.S. 880 (1964); *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 479, 480 (S.D.N.Y. 1970), *modified and aff'd*, 449 F.2d 51 (2d Cir. 1971), *cert. granted*, 405 U.S. 915 (1972).

67. Clayton Act § 4, 15 U.S.C. § 15 (1970), *formerly* ch. 323, § 4, 38 Stat. 730 (1914); *see* 21 CONG. REC. 3147 (1890), concerning a similar section in the Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 210 (1890).

68. This suggestion is similar in many respects to the "ultimate test" that two judges have said should be applied: that is, a fee that in the judgment of the trial court "would be reasonable for counsel to charge a victorious plaintiff. The rate is the free market price, the figure which a willing, successful client would pay a willing, successful lawyer." *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 242, 244 (D. Mass. 1954) (Wyzanski, J.); *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 297 F. Supp. 924, 926 (D. Me. 1969), *modified*, 421 F.2d 61 (1st Cir. 1969).

The most significant factor in making an assessment of fees for defense counsel is the number of hours expended by the attorney in the litigation and the amount that the attorney charges per hour. An attorney's hourly fee usually reflects many factors—such as the attorney's skill, reputation, and experience—that courts tend to consider as discrete elements when making section 4 fee determinations. A lawyer with a reputation for considerable ability and experience commands a higher fee for his time than a lawyer without such a reputation. Figuring fees according to time spent on the case also accounts for the complexity of the litigation; generally, a complex case demands more of a lawyer's time than a simple one.

Of course, the amount the defense attorney in an antitrust case charges for his services is usually not determined solely by a mathematical formula. There must be flexibility to allow consideration of certain intangible factors such as the difficulty and the importance of the case. Certainly the nature of the case and the amount involved are relevant, but only as bases for a retrospective evaluation of a particular fee determination. The testimony of expert witnesses should be encouraged for purposes of aiding the courts in making their assessments, and care should be taken to avoid compensating inefficiency.⁶⁹

One strong objection to the "defense attorney" approach to determining fees is that if plaintiff wins a large recovery, the attorney will want the court awarded fee to be expressed as a percentage of the recovery. Unless this is done, it may be argued, attorneys will not be sufficiently compensated in their moments of victory to offset the defeats that yielded no compensation because the cases were taken on a contingent fee basis.

While this argument has some merit, two responses may be made. First, forcing the defendant to pay this premium is unfair to defendants. When an attorney takes a case on a contingent basis, he bears the risk of going with no compensation if he should lose. To compensate for taking this risk, attorneys usually charge more than they would for cases that are not taken on a contingent basis. The greater the risk of loss, the more an attorney will want to receive if he should win. Because the unsuccessful defendant in an antitrust case must

(Gignoux, J.). The principal similarity between the two tests is that in neither the case of the defense attorney nor of the successful lawyer is compensation contingent on recovering damages. The risk of recovering no damages is never an issue with the defense attorney, and is no longer an issue from the perspective of the "successful lawyer." Fees should therefore compensate generously for a job well done, but should not compensate the attorney for having taken the case on a contingent basis. The "successful lawyer" test does not appear to have been applied except in the above two cases.

69. See text accompanying note 65 *supra*.

pay, at a minimum, treble damages plus some amount of attorney's fees, to require the defendant also to compensate plaintiff's attorney for taking the risk that plaintiff might lose seems particularly harsh. Essentially, the more innocent the defendant appears to be, the greater is the perceived risk that the plaintiff will lose. The defendant should not have to bear a heavier burden for *not* being in flagrant violation of the law. Although a plaintiff's attorney should be compensated for having assumed the risk of going without any payment, the source of this compensation should be a portion of plaintiff's treble damage recovery rather than the statutory award of a reasonable attorney's fee.

A second reason for not calculating attorneys' fees as a percentage of the recovery is that to do so would run counter to the legislative purpose underlying this provision. Congress, after much debate, decided that there should be no jurisdictional minimum amount before an antitrust suit could be brought in a federal district court.⁷⁰ If the amount of recovery plays a significant role in the determination of attorneys' fees, however, there will be, in effect, a quasi-judicial obstacle to the initiation of antitrust suits with low potential recoveries. While this reasoning offers little consolation to attorneys in cases with large recoveries, the attorney's fee provision was not written specifically with them in mind. Congress realized that it is the smaller plaintiffs, damaged to a lesser degree, who need incentive to sue.⁷¹ Where there are large recoveries, a private fee arrangement with the client, added to court-awarded attorney's fees, assures adequate compensation for the attorney.

A perplexing situation exists when a low treble damage recovery has been produced by attorney time worth several times that amount. In such a case, courts must balance the policies in favor of generous attorneys' fees—providing “the great mass of the people” with judicial remedies and encouraging prosecution by “private attorneys general”—against the need to discourage unwarranted lawsuits. If the case, while involving relatively low damages, nevertheless represents a significant legal or social step forward, the argument in favor of generous attorneys' fees is strong. On the other hand, it may be argued that Congress did not intend such an onerous burden to be borne by the defendant under the guise of “a reasonable attorney's fee.”

The “defense attorney” approach does not provide the courts with a precise tool for assessing attorneys' fees. Indeed, it is not meant to do so. Rather, consistent use of this approach by the courts should sharpen their inquiry and provide a greatly needed yardstick against

70. 21 CONG. REC. 2612 (1890).

71. See text accompanying notes 2-5 *supra*.

which the factors relevant to determining attorneys' fees can be measured—thereby injecting a common rationale into the congressionally required determination of what is "reasonable."

II

ATTORNEYS' FEES IN ANTITRUST CLASS ACTIONS

Class actions, relative newcomers to antitrust litigation,⁷² have become an important enforcement device because they allow the aggregation of claims that, taken individually, are too small to prompt litigation.⁷³ While hailed by some as one of history's most socially useful remedies,⁷⁴ serious problems—principally the potential burden on judicial resources—attend the use of the mass class action.⁷⁵ Significant steps have been taken to promote the efficient and effective use of this device.⁷⁶ Nevertheless, there is concern that the true beneficiaries in antitrust class actions are the attorneys, not the plaintiff class members, since enormous attorneys' fees may swallow much of the class recovery.⁷⁷ This section explores the possibility of protecting against such an occurrence. It also seeks to resolve potential tension between the normal method of compensating attorneys in class actions—from the plaintiff's recovery⁷⁸—and the section 4 provision that losing de-

72. The 1966 amendment of the class action provisions of rule 23 of the Federal Rules of Civil Procedure has resulted in the greatly increased use of class actions in antitrust suits. Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 5-6 (1971) [hereinafter cited as Handler].

73. The class action facilitates the vindication of claims that are too small on an individual basis to justify legal action, but when combined with others, grow to litigable size. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968).

74. See, e.g., Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259 (1970). "A wave of emotionalism has been generated, with the result that anyone who does not enthusiastically endorse consumer class suits becomes an enemy of progress and a disciple of the devil." Handler, *supra* note 72, at 6.

75. Handler *supra* note 72, at 7-8.

76. There has been a definite trend to greater emphasis on the manageability requirement of rule 23. See Handler, *supra* note 72, at 11.

77. Handler, *supra* note 72, at 10. Professor Handler maintains that a class action should be disallowed where the costs of administration, including attorney's fees, are disproportionate to the probable benefits inuring to the individual class members and where the class action creates unmanageable burdens on the federal courts. *Id.* at 12. However, while unmanageability should never be encouraged, the relationship between attorney's fees and benefits to the individual class members should be virtually irrelevant in deciding whether to allow class actions. The potential recovery by the class rather than by the individual plaintiffs provides the motivating force behind prosecution. This fact seems implicit in the nature of a mass class action, and it has been recognized and approved by the courts. *E.g.*, *Dolgow v. Anderson*, 43 F.R.D. 472, 485 (E.D.N.Y. 1968).

78. See text accompanying notes 79-81 *infra*.

endants in antitrust cases pay attorneys' fees in addition to plaintiff's damages.

A. Attorneys' Fees in Class Actions

The method of compensating successful attorneys in class actions is called the "salvage fund" theory.⁷⁹ This theory derives from analogy to maritime salvage cases where courts, seeking to encourage future salvage operations, have compensated successful salvors generously by awarding them a share of the total salvage value.⁸⁰ Similarly, the attorneys in class actions salvage a fund shared by the entire class and from which the litigation expenses, including legal fees, are paid. Courts have complete discretion to determine what is fair and reasonable compensation, notwithstanding a prior arrangement between the named plaintiffs and their attorneys.⁸¹

Two basic reasons have been proffered in support of this method of compensation. The first treats the named parties as agents or representatives of the class, authorizing them to retain an attorney on behalf of, and to be compensated by, the class.⁸² The second and more compelling rationale is the quasi-contractual theory. According to this theory, each member of the benefited class contributes a pro rata share of the expenses; otherwise, unnamed and unknown class members would be unjustly enriched.⁸³

Unlike most antitrust cases brought by individuals, where counsel receive compensation from a combination of the recovered damages and the court determined reasonable attorneys' fees,⁸⁴ attorneys in class suits generally accept compensation only from the fund recovered.⁸⁵ Therefore courts, when awarding attorneys' fees in these two situations, must apply two different standards of "reasonableness." A reasonable fee in a class action is determined from the viewpoint of the case when it is first initiated, with the contingency upon success warranting higher compensation than where such contingency is irrelevant.⁸⁶ This compensation is normally expressed in terms of a percentage of the recovered fund. In an antitrust case, however, where the losing defendant must pay "reasonable attorney's fees," it seems unfair to assess him a greater amount solely because, when the case was first initiated, there

79. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658, 663-65 (1956) [hereinafter cited as Hornstein].

80. *Id.* at 664.

81. *Id.* at 681.

82. *Id.* at 658.

83. *Id.*

84. See note 13 *supra*.

85. *Id.* at 659.

86. *Id.* at 661; *Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221, 224 (N.D. Ill. 1972).

was the risk that he might not be found guilty. For this reason, it is suggested that the definition of reasonableness in section 4 determinations should be based on what a client would pay a defense attorney in an antitrust case, thus reducing the significance of the actual amount involved.⁸⁷

As a result of the paramount importance attributed to success and the amount of the fund recovered in compensating attorneys in class actions,⁸⁸ attorneys will be discouraged from initiating these suits unless they are adequately compensated in their moments of victory for assuming the risk of loss. The courts have determined that class actions serve an important role in our judicial system, and they have therefore been generous in rewarding attorneys.⁸⁹

B. *Antitrust Class Actions*

1. *Attorneys' Fees in Antitrust Class Actions That Proceed to Judgment*

From the time rule 23 of the Federal Rules of Civil Procedure was amended in 1966 until the date of this publication, no antitrust class action has proceeded through trial to an actual judicial determination of damages. While to a slight degree this may be attributed to the longevity of many antitrust cases, it is primarily because most class actions are settled out of court.⁹⁰

If such a case were to proceed to judgment for the plaintiff class, the court would be obligated to devise a new formula for compensating attorneys. Section 4 of the Clayton Act specifies that the defendant shall pay a "reasonable attorney's fee."⁹¹ Moreover, the salvage fund theory, peculiar to class actions, would also appear to provide an appropriate means for compensating the attorneys in antitrust class actions. In a great many antitrust suits brought by individual plaintiffs, attorneys work on a contingency basis—agreeing to charge nothing if they lose, but requesting more than the court-determined attorney's fee if the suit is successful. The amount in excess of the court-determined fee is usually agreed upon prior to the litigation and is expressed as a percentage of the verdict.⁹²

Similar compensation is both reasonable and necessary in an antitrust class action, but it should not come from either the defendant or

87. See text accompanying and following note 68 *supra*.

88. Hornstein, *supra* note 79, at 659.

89. *Id.* at 682; see also *Berland v. Mack*, 48 F.R.D. 121, 125 (S.D.N.Y. 1969), and cases cited therein.

90. See text accompanying note 99 *infra*.

91. 15 U.S.C. § 15 (1970).

92. See note 13 *supra*.

the plaintiff class alone. The defendant's burden should first be calculated as in any antitrust case, with the court evaluating several factors, but placing emphasis upon the amount of time expended on the litigation by plaintiff's attorney.⁹³ However, the problem of compensating plaintiff's attorney for taking the case on a contingency basis would still remain. The nature of a large class action precludes the attorneys from making a fee arrangement with every member of the class prior to the litigation. Furthermore, it is unfair to allow a few members of the class, who may have a vested interest in a high attorney's fee,⁹⁴ to establish a fee arrangement with the attorneys binding the rest of the class.⁹⁵

In order to provide the attorneys with additional compensation, the court should make a second calculation, determining the attorney's fee according to the salvage fund theory as it is applied in ordinary class actions.⁹⁶ The attorney's total compensation for litigating the case should equal this latter amount, but the class recovery should only be reduced by the difference between this amount and the amount that has already been assessed against the defendant under a section 4 analysis. This approach would encourage attorneys to participate in similar actions in the future;⁹⁷ in addition, the mandate of section 4 would be satisfied by assessing the defendant a reasonable attorney's fee, thereby protecting the individual class members from an unnecessary and unjustifiable decrease in their share of the recovery. To relieve the defendant of his statutory burden solely because the suit was brought as a class action would in effect give him a windfall for injuring a large group of persons to a minor degree rather than one person to a large degree.

A determination of the defendant's share of the fees may be more difficult in a class action than in a suit by an individual, since the cumbersome size of the action could lead to inefficient use of counsel time which should not, of course, be rewarded. Alternative tactics in a lawsuit, however, must never be confused with inefficiency. It is some consolation that the potential amount of attorneys' fees will normally be so great that both the plaintiffs and the defendant will have a strong interest in its determination. Facts, figures, and arguments presented by both sides should greatly assist the judge in determining the amount.

93. See text accompanying notes 66-68 *supra*.

94. Such a vested interest clearly exists where one of the named plaintiffs is also one of the plaintiff class attorneys. See *Norman v. McKee*, 290 F. Supp. 29, 36 (N.D. Cal. 1968), *aff'd*, 431 F.2d 769 (1970).

95. *Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221, 223 (N.D. Ill. 1972).

96. See text accompanying notes 79-89 *supra*.

97. See text accompanying note 80 *supra*.

2. Attorneys' Fees in Antitrust Class Action Settlements

All antitrust class actions since 1966 yielding damages to the plaintiffs have ended in settlements,⁹⁸ and consequently settlements are a major focus of concern.⁹⁹ The determination of attorneys' fees in such cases is extremely important because the unstructured nature of a class action settlement lends itself to the possible abuse of the class's interest through excessive attorney compensation. This situation is worsened by the fact that class action settlements need not be subjected to judicial scrutiny until a tentative settlement is reached.¹⁰⁰ Therefore, the underlying concern in examining attorneys' compensation in these settlements must be to ensure that the interests of the class predominate over the personal interests of the attorneys representing the class.¹⁰¹

The calculation and distribution of damages in a large class action is complicated,¹⁰² but there are, essentially, three methods for distributing damages to a class. Under the first method the defendant pays the class a certain amount of damages from which all costs of administration, including attorneys' fees, are paid. This practice virtually assures that the attorneys will be well compensated for their efforts even though the class may recover a minimal amount.

A method more favorable to the class provides for the payment of a similar amount of damages plus compensation for the attorneys. Damages that are not claimed within a certain period revert to the defendant, however. Frequently, most of the class members in a large class action do not claim this compensation.¹⁰³ The deterrent effect of the suit is thus diminished because the defendant is allowed to retain some of the fruits of his illegal practices.

A third method of distributing damages entails distributing all unclaimed damages to the class as a whole, rather than returning them

98. See Handler, *supra* note 72, at 8.

99. Professor Handler contends that even innocent defendants in a mass class action have no practical alternative to settlement. "Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail." Handler, *supra* note 72, at 9. It is questionable, however, whether defendants, normally represented by law firms of the highest caliber, would propose settlements for millions of dollars if they were truly convinced of their innocence.

100. Fed. R. Civ. P. 23(e): "A class action shall not be dismissed or compromised without the approval of the court"

101. Bearing in mind the desirability of providing small claimants with a forum in which to seek redress for alleged large scale anti-trust violations, we are still reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968).

102. See generally Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338, 360-73 (1971).

103. *Id.* at 361.

to the defendant. The payment of attorneys' fees is either deducted from the recovery or paid separately by the defendant. This method is known as a fluid class recovery or floating fund recovery.¹⁰⁴ In *Daar v. Yellow Cab Co.*,¹⁰⁵ for example, the recovered fund was dispersed by lowering all cab fares in the City of Los Angeles for a specified period of time.

Any one of these procedures can yield generous compensation for the attorneys, but not all adequately protect the class itself. If the attorneys are offered a settlement following the first approach, their compensation will be guaranteed (it will come from the class's recovery); their incentive to reject such a settlement in hopes of obtaining a fluid class recovery, with costs and attorneys' fees paid separately, will consequently be reduced. This potential interference of personal interest with the just resolution of a class action makes it necessary for the courts to closely scrutinize the role of attorneys' fees in proposed settlements.

The framework for such judicial scrutiny is found in rule 23(e) of the Federal Rules of Civil Procedure, which provides that "[a] class action shall not be dismissed or compromised without the approval of the court"¹⁰⁶ This requirement exists to prevent the representative of a class from neglecting the interests of the members of the class.¹⁰⁷ In approving the settlement of a class action, the judge must ascertain that the settlement as proposed does not promote the interests of the attorneys at the expense of the class. The judge abuses his discretion if he relies too heavily upon the recommendations of the attorneys.¹⁰⁸

This is not meant to imply that proposed settlements necessarily ignore the interests of the class. Examples of class-oriented settlements are not difficult to find. The settlement with Hilton Hotels in *In re Hotel Telephone Charges*,¹⁰⁹ for example, provided for payment of 3.8 million dollars—the total amount of single damages—into a fluid fund;

104. Comment, 70 MICH. L. REV. 338, *supra* note 97, at 363-64.

105. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). This class action did not involve an antitrust violation.

106. FED. R. CIV. P. 23(e).

107. *Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970):

The reason for the requirement [of 23(e)] is obvious. Because the rights of many persons are at stake who are parties to the action only through their representative, a settlement negotiated between the named parties may not give due regard to the interests of those unnamed. The question for the district judge is whether the proposed settlement is fair and adequate to all concerned.

108. *Norman v. McKee*, 290 F. Supp. 29, 36 (N.D. Cal. 1968), *aff'd*, 431 F.2d 769 (9th Cir. 1970); see *Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221, 223 (N.D. Ill. 1972).

109. Multi-District Litigation No. 89 (Submitted for approval, Sept. 15, 1972).

class members were given 90 days to claim their share of this fund, and the remainder was distributed indirectly to the class in the form of credits on the room bill of each guest at a Hilton Hotel until the fund was exhausted. The settlement also provided for payment by defendant of the attorneys' fee, over and above the full damages, in a sum not to exceed 30 percent of the 3.8 million dollars, with the amount to be determined by a district judge. It further provided that the defendant pay the full cost of administration of the settlement, over and above the damages to the class. Such a settlement clearly separates the interests of the attorneys from those of the class, and both interests appear to have been fairly treated.

Nevertheless, the great potential for overlooking class interests in the settlement procedure warrants continuing concern. The proposed settlement of a class action involving Master Charge card holders exemplifies the type of settlement that should receive particularly close analysis by a judge prior to approval.¹¹⁰ This case involved alleged violations of the federal truth-in-lending regulations, and it was alleged that the total damages to the class were as much as 10 million dollars. Under the terms of the settlement, however, no monetary damages were to be paid. The case was settled with an agreement that defendants pay only court costs and attorneys' fees, in addition to the cost of mailing out explanatory material to Master Charge card holders.¹¹¹ Not all litigation need result in an actual award (or a large award) of monetary damages to the injured parties. Where substantial amounts of damages are alleged, though, an agreement to forego any recovery of these damages should be scrutinized closely. The lack of an effective deterrent to similar future conduct should be considered, as well as the possibility that the attorney for the class may simply ignore the interests of the class when it becomes evident he will be generously compensated.

One district court judge suggested an appealing approach to this problem after he disapproved a proposed settlement that had lumped together the class recovery with the amount to be paid to the attorneys. The judge suggested that any proposed settlements should be presented in terms of the gross consideration to the class, with the separate question of attorneys' fees left for judicial determination and award.¹¹² The failure to do this, the judge stated, could lead to a "premature or inadequate settlement of a derivative or class action."¹¹³

110. Wall Street Journal, Dec. 8, 1971, at 15, col. 1.

111. *Id.*

112. Norman v. McKee, 290 F. Supp. 29, 36 (N.D. Cal. 1968), *aff'd*, 431 F.2d 769 (9th Cir. 1970). Although this particular case involved a shareholder's derivative suit, the suggestion expressly applies to all types of class actions.

113. *Id.*

Requiring attorneys' fees to be determined by the court in every settlement of a class action would be a significant step toward ensuring the just disposition of class actions. The nature of a settlement, of course, precludes using any rigid formula in determining attorneys' fees; also, more court time would be consumed in determining attorneys' fees than is required to merely approve a private proposal for fees.¹¹⁴ Nevertheless, the benefits that can result from increased court intervention in every class action settlement are well worth the price.

CONCLUSION

The relationship between attorneys' fees and the initiation of anti-trust suits by individuals and by classes is substantial. For this reason, Congress has provided that the violator of antitrust laws must pay "a reasonable attorney's fee" to the injured party. Courts, recognizing the importance of class actions, have generously compensated attorneys bringing such suits. This Comment has analyzed past approaches to compensating attorneys in both types of cases. In addition, suggestions are proposed that, if implemented, should promote the purposes underlying awards of attorneys' fees in antitrust litigation. Specifically, it is suggested that statutory fee determinations should place little significance on the amount of damages recovered and should look instead to the amount of work performed by the attorney. In the class action field, it is suggested that the attorneys' fees should always be clearly separated from the recovery to the class, in settlements as well as in judgments.

Kevin F. Kelly

114. *Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221, 223 (N.D. Ill. 1972).

APPENDIX

ATTORNEYS' FEES IN RELATION TO THE AMOUNT OF SINGLE DAMAGES
AND TO THE TIME SPENT ON THE CASE

Case	Amount of Single Damages	Attorney's Fee	Percentage of Single Damages	Number of Hours Claimed	Fee on an Hourly Rate
A.C. Becken Co. v. Gemex Corp., 314 F.2d 839 (7th Cir. 1963), <i>cert. denied</i> , 375 U.S. 816 (1963)	\$24,765	\$17,500	71%		
Advance Business Systems & Supply Co. v. SCM Corp., 287 F. Supp. 143 (D. Md. 1968)	16,714	35,875	214%	2614	\$ 13.72
American Can Co. v. Bruce's Juices, 187 F.2d 919, 920 (5th Cir. 1951), <i>modified on rehearing</i> , 190 F.2d 73, 74 (5th Cir. 1951)	60,000	35,000	58%		
American Can Co. v. Ladoga Canning Co., 44 F.2d 763 (7th Cir. 1930), <i>cert. denied</i> , 282 U.S. 899 (1931)	30,000	15,000	50%		
Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967)	258,355	72,500	28%		
Bal Theatre Corp. v. Paramount Film Distrib. Corp., 206 F. Supp. 708, 718 (N.D. Cal. 1962)	146,300	55,000	38%	2300	23.91
Bausch Mach. Tool Co. v. Aluminum Co. of America, 79 F.2d 217 (2d Cir. 1935), <i>rev'g lower court decision on other grounds and remanding for new trial</i>	956,300	300,000	31.4%		
Bergians Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476 (E.D. Mo. 1965), <i>aff'd</i> , 368 F.2d 679 (8th Cir. 1966)	38,500	12,850	33%	2216	5.80
Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 254 (1946), <i>rev'g</i> 150 F.2d 877 (7th Cir. 1945), <i>and aff'g the judgment of the district court</i>	120,000	30,000	25%	1300	23.08
Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc., 176 F.2d 594, 596 (2d Cir. 1949)	28,500	18,000	63%		
Bowl America Inc. v. Fair Lanes Inc., 299 F. Supp. 1080, 1099 (D. Md. 1969)	61,147	70,000	114%	4041	17.32
Cape Cod Food Prods., Inc. v. National Cranberry Ass'n, 119 F. Supp. 242, 244 (D. Mass. 1954)	175,000	35,000	20%	597	58.60

Case	Amount of Single Damages	Attorney's Fee	Percentage of Single Damages	Number of Hours Claimed	Fee on an Hourly Rate
Charles A. Ramsay Co. v. Associated Bill Posters of United States and Canada, 42 F.2d 152, 156 (2d Cir. 1930), <i>cert. denied</i> , 282 U.S. 864, 865 (1930)	8,546	7,500	88%		
Chatanooga Foundry and Pipe Works v. Atlanta, 203 U.S. 390 (1906)	1,500	2,500	167%		
Clapper v. Original Tractor Cab Co., 165 F. Supp. 565, 587-89 (S.D. Ind. 1958), <i>aff'd</i> , 270 F.2d 616, 626 (7th Cir. 1959), <i>cert. denied</i> , 361 U.S. 967 (1960)	27,611	25,000	91%	3700	6.76
Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' and Exhibitors' Ass'n. of America, 393 F.2d 75 (9th Cir. 1968), <i>cert. denied</i> , 393 U.S. 938 (1968)	3,400	10,000	294%	2289	4.37
Darden v. Besser, 257 F.2d 285 (6th Cir. 1958)	15,000	30,000	200%	2126	14.92
Diamond Block & Gravel Co. v. Atlas Building Prods. Co., No. 3057 (D.N.M., May 12, 1958), <i>aff'd</i> , 269 F.2d 950 (10th Cir. 1959), <i>cert. denied</i> , 363 U.S. 843 (1960)	10,000	8,000	80%		
Emich Motors Corp. v. General Motors Corp., 181 F.2d 70, 72 (7th Cir. 1950), <i>modified on other grounds</i> , 340 U.S. 558 (1951)	412,000	250,000	61%		
Farmington Dowel Prods. Co. v. Forster Mfg. Co., 297 F. Supp. 924 (D. Me. 1969), <i>modified</i> , 421 F.2d 61 (1st Cir. 1969)	109,100	85,000	78%	2540	34.00
Flintkote Co. v. Lysford, 246 F.2d 368, 373 (9th Cir. 1957), <i>cert. denied</i> , 355 U.S. 835 (1957)	50,000	25,000	50%		
Fowler Mfg. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), <i>cert. denied</i> , 396 U.S. 1012 (1970)	8,541	9,000	105%		
Fox West Coast Theatres Corp. v. Paradise Theatre Bldg. Corp., 264 F.2d 602 (9th Cir. 1958)	20,000	10,000	50%		
Gossner v. Cache Valley Dairy Ass'n, 307 F. Supp. 1090 (D. Utah 1970)	30,000	42,500	142%		
Hanover Shoes, Inc. v. United Shoe Mach. Corp., 245 F. Supp. 258, 303 (M.D. Pa. 1965), <i>vacated on other grounds</i> , 377 F.2d 776 (3d Cir. 1967), <i>aff'd in part on other grounds, rev'd in part on other grounds</i> , 392 U.S. 481 (1968)	1,413,203	600,000 (Chief Counsel) 50,000 (Local Counsel)	42%	Chief Counsel: 4849 (Partners) 6574 (Associates) Local Counsel: 950	74.00 37.00 52.60

Kiefer-Stewart Co. v. Joseph Seagram & Son, Inc., 340 U.S. 211 (1951), <i>rev'd on other grounds</i> 182 F.2d 228 (7th Cir. 1950), <i>and reinstating the order of the trial court</i>	325,000	50,000	15%		
Locklin v. Day-Glo Color Corp., 429 F.2d 873, 876 n.6 (7th Cir. 1970), <i>cert. denied</i> , 400 U.S. 1020 (1971)	356,793	75,000	21%		
Milwaukee Towne Corp. v. Loews, Inc., 190 F.2d 561, 571 (7th Cir. 1951), <i>cert. denied</i> , 342 U.S. 909 (1952)	313,858	75,000	24%	2389	31.40
Montague & Co. v. Lowry, 193 U.S. 38, 48 (1904)	500	750	150%		
Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 166 F. Supp. 163, 170 (E.D. Pa. 1958), <i>aff'd</i> , 273 F.2d 218 (3d Cir. 1959), <i>rev'd on other grounds</i> , 365 U.S. 127 (1961)	217,358	200,000	92%	4600	43.48
North Texas Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d 189, 193 (5th Cir. 1965), <i>cert. denied</i> , 382 U.S. 977 (1966)	365,000	25,000	68.5%		
Osborn v. Sinclair Refining Co., 171 F. Supp. 37 (D. Md. 1959), <i>rev'd and remanded</i> , 286 F.2d 832 (4th Cir. 1960); on second appeal, \$12,000 trebled was awarded, and the case was remanded for additional attorney's fees, 324 F.2d 566, 575 (4th Cir. 1963)	325	14,000	4,308%	859	16.28
Paramount Film Distrib. Corp. v. Applebaum, 217 F.2d 101 (5th Cir. 1954), <i>cert. denied</i> , 349 U.S. 961 (1955)	150,000	40,000	26.7%		
Perryton Wholesale, Inc. v. Pioneer Distrib. Co., Inc., 353 F.2d 618 (10th Cir. 1965), <i>cert. denied</i> , 383 U.S. 945 (1966)	28,442	12,500	44%		
Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959), <i>cert. denied</i> , 361 U.S. 961 (1960)	7,900	7,500	95%		
South-East Coal Co. v. Consolidated Coal Co., 434 F.2d 767 (6th Cir. 1970), <i>cert. denied</i> , 402 U.S. 983 (1971)	2,410,452	335,000	13.6%		
Straus v. Victor Talking Mach. Co., 297 F. 791, 796 (2d Cir. 1924)	33,894	30,000	89%		
Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 284 F.2d 1, 4 (9th Cir. 1960), <i>rev'd on other grounds</i> , 370 U.S. 19 (1962)	500,000	195,000	39%		
Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 482 (S.D.N.Y. 1970), <i>modified and aff'd</i> , 449 F.2d 51 (2d Cir. 1971), <i>cert. granted</i> , 405 U.S. 915 (1972)	45,870,478	7,500,000	16.4%	58,600	128.00

Case	Amount of Single Damages	Attorney's Fee	Percentage of Single Damages	Number of Hours Claimed	Fee on an Hourly Rate
Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 859 (8th Cir. 1952), <i>cert. denied</i> , 343 U.S. 942 (1952)	375,000	100,000	26.6%		
Twentieth Century-Fox Film Corp. v. Goldwyn, 328 F.2d 190, 221 (9th Cir. 1964), <i>cert. denied</i> , 379 U.S. 880 (1964)	100,000	100,000	100%	12,912	7.70
Union Leader Corp. v. Newspapers of New England, Inc., 218 F. Supp. 493 (D. Mass. 1963), <i>vacated on other grounds</i> , 333 F.2d 798 (1st Cir. 1964), <i>cert. denied</i> , 379 U.S. 931 (1964)	29,442	68,000	231%		
Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 387 (6th Cir. 1962), <i>cert. denied</i> , 372 U.S. 907 (1963)	100,000	60,000	60%		
Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 346 F.2d 661, 667 (6th Cir. 1965), <i>cert. denied</i> , 382 U.S. 904 (1965)	25,000	50,000	200%	3400	14.70
Washington State Bowling Proprietors Ass'n, Inc. v. Pacific Lanes, Inc., 356 F.2d 371, 373 (9th Cir. 1966), <i>cert. denied</i> , 384 U.S. 963 (1966)	35,000	22,500	64%		
Webster Motor Car Co. v. Packard Motor Car Co., 166 F. Supp. 865 (D.D.C. 1955), <i>rev'd and cross appeal concerning attorneys' fee dismissed as moot</i> , 243 F.2d 418 (D.C. Cir. 1957), <i>cert. denied</i> , 355 U.S. 822 (1957)	approx. 190,000	45,000	23%- 24%		
William H. Rankin Co. v. Associated Bill Posters of United States U. & L.C., 42 F.2d 152, 156 (2d Cir. 1930), <i>cert. denied</i> , 282 U.S. 864-65 (1930)	101,000	50,000	50%		