

October 2011

Attorney's Fees in Civil Rights Cases - October 2009 Term

Martin A. Schwartz

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Schwartz, Martin A. (2011) "Attorney's Fees in Civil Rights Cases - October 2009 Term," *Touro Law Review*. Vol. 27: No. 1, Article 5.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol27/iss1/5>

This Annual Supreme Court Review is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

ATTORNEY'S FEES IN CIVIL RIGHTS CASES— OCTOBER 2009 TERM

*Martin A. Schwartz**

I. INTRODUCTION

In the October 2009 Term, the Supreme Court decided an important case concerning statutory attorney's fees in civil rights cases.¹ This decision will directly impact the determination of fee applications in federal civil rights cases.

About thirty-five years ago, Congress determined that the effective enforcement of federal civil rights statutes is largely dependent upon private parties bringing lawsuits to enforce their rights under civil rights provisions.² At the same time, Congress understood that private parties frequently do not have the funds to hire private attorneys to bring civil rights actions.³ As a result, Congress over the years enacted various fee-shifting statutes, which authorize a court to

* Professor of Law, Touro Law Center. B.B.A., *cum laude*, 1966, City College of New York; J.D., *magna cum laude*, 1968, Brooklyn Law School; L.L.M., 1973, New York University School of Law. Professor Schwartz has authored leading treatises including *Section 1983 Litigation: Claims and Defenses* (4th ed. 2004-2006), *Section 1983 Litigation: Federal Evidence* (4th ed. 2007) and *Section 1983 Litigation: Jury Instructions* (2007). He is co-author of *Section 1983 Litigation: Statutory Attorney's Fees* (3d ed. 1991 & Supp. 2011). Professor Schwartz is also the author of a bi-monthly column for the *New York Law Journal* entitled "Public Interest Law." He is lead author of *Section 1983 Litigation, Second Edition* (Federal Judicial Center 2008). He chairs the Practising Law Institute's annual program on Section 1983 litigation and Trial Evidence and co-chairs its annual Supreme Court Review program. This Article is based on a presentation given at the Twenty-Second Annual Leon D. Lazer Supreme Court Review held in Central Islip, New York on November 5, 2010. The author expresses appreciation for the valuable assistance of the editors of the *Touro Law Review* in the preparation of this Article.

¹ *See* *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010).

² S. REP. NO. 94-1011, at 2 (1976) ("All of these civil rights laws [referred to in 42 U.S.C.A. § 1988] depend heavily upon *private* enforcement" (emphasis added)).

³ *Id.* (stating that "[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer").

award attorney's fees to a "prevailing party."⁴ Thus, a court may allow a prevailing plaintiff to recover attorney's fees from the defendant.⁵ This is where the phrase "fee-shifting" comes from; meaning that if the plaintiff prevails, liability for the attorney's fees will shift from the plaintiff to the defendant.⁶

Overall, there are about 150 federal fee-shifting statutes.⁷ These statutes include civil rights fee-shifting statutes,⁸ environmental statutes,⁹ fair housing statutes,¹⁰ consumer legislation,¹¹ consumer lending,¹² and ERISA.¹³ This Article will discuss the Civil Rights

⁴ See, e.g., 42 U.S.C.A. § 1988 (West 2011) (stating that "[i]n any action or proceeding . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs"). See the appendix to Justice Brennan's opinion in *Marek v. Chesny*, 473 U.S. 1, 44-51 (1985) (Brennan, J., dissenting), for a list of 119 fee-shifting statutes.

⁵ A prevailing defendant may recover fees, but only when plaintiff's suit was frivolous, unreasonable, or groundless. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

⁶ See 42 U.S.C.A. § 1988.

⁷ See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983) (stating that approximately 150 federal fee-shifting statutes exist).

⁸ See, e.g., 42 U.S.C.A. § 1988; Civil Rights of Institutionalized Persons Act, 42 U.S.C.A. § 1997a(b) (West 2011); Title II of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000a-3(b) (West 2011).

⁹ See, e.g., Federal Water Pollution Control Act, 33 U.S.C.A. § 1365(d) (West 2011); Clean Air Act Amendments of 1977, 42 U.S.C.A. § 7622(e)(2) (West 2011).

¹⁰ See, e.g., Fair Housing Act, 42 U.S.C.A. § 3612(p) (West 2011).

¹¹ See, e.g., 15 U.S.C.A. § 1691e(d) (West 2011) ("In the case of any successful action under [15 U.S.C.A. § 1691e(a)-(c)], the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection."); 15 U.S.C.A. § 2310(d)(1)(B)(2) (West 2011) ("If a consumer finally prevails in any action brought under [15 U.S.C.A. § 2310(d)(1)], he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorney's fees would be inappropriate.").

¹² See, e.g., 15 U.S.C.A. § 1640(a)(3) (West 2011).

¹³ See, e.g., 29 U.S.C.A. § 1132(g)(1) (West 2011) ("In any action under [29 U.S.C.A. § 1132] (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."). In determining when attorney's fees should be granted under ERISA, courts have looked to five factors:

- (1) the degree of the opposing party's culpability or bad faith;
- (2) the opposing party's ability to satisfy an award of attorney's fees;
- (3) the deterrent effect of an award on other persons under similar circumstances;
- (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve signifi-

Attorney's Fee Award Act of 1976,¹⁴ which is the most significant federal fee-shifting statute.

II. ISSUES REGARDING FEE-SHIFTING STATUTES

The Civil Rights Attorney's Fee Award Act of 1976 provides that a court, in its discretion, may award a reasonable attorney's fee to the prevailing party in the civil rights cases that are specified in 42 U.S.C. § 1988.¹⁵ The phrase "in its discretion" contained in § 1988(b), makes clear that an award of attorney's fees is within the court's discretion and is not mandated.¹⁶ The key statute specified in § 1988 is 42 U.S.C. § 1983, which is the federal statute that authorizes individuals to bring suits to vindicate their federal constitutional rights against state officials, local officials, and municipalities.¹⁷ Of the more than 150 federal fee-shifting statutes, many are worded in a way that is similar to § 1988(b), and, therefore, are interpreted the same way.¹⁸ However, some fee-shifting statutes are worded differently, and are subject to their own individualized interpretation.¹⁹

In general, there are two reasons that federal fee-shifting sta-

cant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

Sec'y of Dep't of Labor v. King, 775 F.2d 666, 669 (6th Cir. 1985).

¹⁴ 42 U.S.C.A. § 1988.

¹⁵ *Id.* ("[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .").

¹⁶ In fact, the wording of the statute has been classified as "provid[ing] the courts with almost unbridled discretion." *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1303 (6th Cir. 1991).

¹⁷ See 42 U.S.C.A. § 1988 (enumerating 42 U.S.C.A. § 1983 as one of the statutes in which a prevailing party may recover a reasonable attorney's fee under the section). Title 42, Section 1983 of the United States Code states, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C.A. § 1983 (West 2011).

¹⁸ See *Perdue*, 130 S. Ct. at 1671 n.3 ("Virtually identical language appears in many of the federal fee-shifting statutes.").

¹⁹ See, e.g., *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149 (2010) (interpreting ERISA fee-shifting statute).

tutes have generated a tremendous amount of litigation. The first reason is that the stakes are often very high.²⁰ In some cases, the defendant's fee liability may be substantially greater than his or her liability on the merits.²¹ For example, in 1986, the United States Supreme Court, in a police misconduct case in which the plaintiffs recovered about \$33,050 in money damages,²² upheld an attorney's fee award of more than \$245,000, which was about seven times greater than the damages award.²³ In the Supreme Court case decided last Term, the federal district court's fee award was \$10.5 million, which certainly illustrates the potentially high stakes in statutory fee-shifting litigation.²⁴

The second reason there is a large volume of contentious litigation under the fee-shifting statutes is that many of the terms in the

²⁰ See Gregory Scott Heier, *City of Riverside v. Rivera, A Windfall for Civil Rights Attorneys*, 66 NEB. L. REV. 808, 823-24 (1987) (underscoring the need for legislation requiring a clearer standard of the meaning of "reasonable" with respect to fee-shifting statutes to prevent "overzealous attorneys" from "enrich[ing] themselves at the expense of the public").

²¹ See, e.g., *Perdue*, 130 S. Ct. at 1669-70 (noting that the district court awarded a \$10.5 million dollar award of attorney's fees following a consent decree resolving all disputes); see also *City of Riverside v. Rivera*, 477 U.S. 561, 564-65 (1986) (noting that a jury awarded a plaintiff attorney's fees that were seven times greater than the compensatory and punitive damages combined); *Cowan v. Prudential Ins. Co. of Am.*, 935 F.2d 522, 523 (2d Cir. 1991) (noting that attorney's fees of \$20,000 was challenged as being out of proportion to an emotional distress award of \$15,000); *Adorno v. Port Auth. of N.Y. & N.J.*, 685 F. Supp. 2d 507, 510 (S.D.N.Y. 2010) (noting that over \$765,000 in attorney's fees was requested after the plaintiffs were awarded a total of slightly more than \$101,000); *Arnone v. CA, Inc.*, No. 08-Civ.4458(SAS), 2009 WL 585841, at *1 (S.D.N.Y. Mar. 6, 2009) (recognizing that there was an award of \$71,520.50 in attorney's fees and \$56,628.25 in damages).

²² See *Rivera*, 477 U.S. at 564-65.

²³ *Id.* at 565. Pursuant to 42 U.S.C. § 1988, the district court in *Rivera* awarded the plaintiffs "reasonable" attorney's fees in the amount of \$245,465.25, but the defendants complained that the fee award was not proportionate to the amount of damages. *Id.* at 567. Ultimately, the Supreme Court upheld the fee award, despite the fact that it was seven times greater than the sum of compensatory and punitive damages. *Id.* at 581. The Court stated:

A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988. Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process.

Id. at 576.

²⁴ See *Perdue*, 130 S. Ct. at 1669-70. In *Perdue*, a class action suit was filed against the Governor of Georgia and several officials on behalf of some three thousand foster care children who claimed deficiencies in the system. *Id.* After the district court approved a consent decree arrived at through mediation, the court awarded attorney's fees of \$10.5 million. *Id.*

fee statutes give rise to difficult questions of interpretation.²⁵ For example, how should the Court exercise its discretionary authority? Who is a “prevailing party”? What is a “reasonable” attorney’s fee?

The prevailing party issue has given rise to some difficult issues. Two hypothetical examples illustrate this point. In the first, a plaintiff brings a § 1983 constitutional claim against a city and a police officer and the jury renders a verdict finding a violation of the plaintiff’s constitutional rights, but awards only one dollar in damages. The plaintiff then seeks \$400,000 in attorney’s fees for litigating the case. The Supreme Court has held that a civil rights plaintiff who recovers only nominal damages is a prevailing party, but normally a reasonable attorney’s fee under these circumstances is no fee or a very low fee.²⁶

Now let’s say the plaintiff and defendant settle a § 1983 case by settlement. If the settlement culminates in a consent decree, that clearly qualifies the plaintiff as a prevailing party. But, if instead the parties reach a purely private settlement, the plaintiff is not a prevailing party and therefore not eligible for attorney’s fees, because the Supreme Court holds that judicial relief is required to qualify as a prevailing party.²⁷

There are two fairly recent Second Circuit Court of Appeals

²⁵ See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 600 (2001) (determining that the term “prevailing party” included a party that neither won on the merits nor secured a court-ordered consent decree, but in effect achieved the desired result by changing the defendant’s conduct; the Court held it did not); see also *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 784, 793 (1989) (noting a circuit split and holding that a party that prevails on significant issues in civil rights cases is a “prevailing party”); *Perez v. Westchester Cnty. Dep’t of Corr.*, 587 F.3d 143, 149 (2d Cir. 2009) (“[I]n order to be considered a ‘prevailing party’ . . . , a plaintiff must not only achieve some material alteration of the legal relationship of the parties, but that change must also be judicially sanctioned.” (alteration in original) (quoting *Roberson v. Giuliani*, 346 F.3d 75, 79 (2d Cir. 2003)) (internal quotation marks omitted)); *A.R. ex rel. R.V. v. Bd. of Educ. of N.Y.C.*, 407 F.3d 65, 78 (2d Cir. 2005) (holding that the settlement of an administrative proceeding qualifies the prevailing plaintiffs as “prevailing parties” under the terms of the fee shifting statute).

²⁶ See *Farrar v. Hobby*, 506 U.S. 103 (1992).

²⁷ See *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 604 n.7 (“We have subsequently characterized the *Maher* opinion as also allowing for an award of attorney’s fees for private settlements. But this dictum ignores that *Maher* only ‘held that fees may be assessed . . . after a case has been settled by the entry of a consent decree.’ Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal.” (quoting *Evans v. Jeff D.*, 475 U.S. 717, 720 (1986))).

decisions where the plaintiffs' relief under a settlement agreement satisfied the prevailing party requirement because the settlement culminated in a judicial order.²⁸ In one case, the settlement was incorporated into an "Order of Settlement, Release and Stipulation of Discontinuance," and qualified the plaintiff as a prevailing party.²⁹ In the second case, the settlement agreement was not incorporated into the dismissal order, but the district court retained jurisdiction for the purpose of enforcing the settlement agreement, and again the plaintiff qualified as a prevailing party.³⁰ From these two examples, it is easy to see why important litigation may well take place over the prevailing party issue. These decisions illustrate that the manner in which a case is settled could well determine whether a plaintiff will receive attorney's fees.

III. *PERDUE V. KENNY A. EX REL. WINN*

Another major issue is how a court determines "a reasonable attorney's fee." This question was addressed by the United States Supreme Court last Term in *Perdue v. Kenny A. ex rel. Winn*.³¹ In *Perdue*, the plaintiffs brought a class action that alleged serious deficiencies in Georgia's foster care system.³² The case was litigated for eight years and the record was voluminous, with twenty boxes of legal papers filed.³³ The litigation eventually culminated in a consent decree which qualified the plaintiff as a prevailing party.³⁴ The consent decree was forty-seven pages, and it outlined thirty-one different

²⁸ See *Perez*, 587 F.3d 143; *Roberson*, 346 F.3d 75.

²⁹ See *Perez*, 587 F.3d at 144. In *Perez*, a group of Muslim prisoners settled a lawsuit after the defendants agreed to its demands for Halal or Kosher meat. *Id.* The district court, in memorializing the settlement, awarded the plaintiffs attorney's fees. *Id.*

³⁰ See *Roberson*, 346 F.3d at 78. In *Roberson*, a dismissal order that acknowledged the parties' settlement, but stated only that the district court "shall retain jurisdiction over the settlement agreement for enforcement purposes," was challenged when the plaintiffs sought attorney's fees. *Id.* The defendants claimed that the order of dismissal failed to state that the plaintiffs were the "prevailing parties," and therefore, were not entitled to attorney's fees. *Id.*

³¹ 130 S. Ct. 1662.

³² *Id.* at 1669 (recognizing that 3000 children in foster care in two counties near Atlanta sued state government officials for injunctive and declaratory relief, and attorney fees and expenses).

³³ *Id.* at 1679 (Breyer, J., concurring in part and dissenting in part).

³⁴ *Id.* at 1669-70 (majority opinion) (noting that the parties entered into a consent decree which settled all issues in the case, except for attorney's fees).

requirements the State had to comply with in order to rectify the deficiencies in its state foster care system.³⁵

Plaintiffs moved for statutory attorney's fees under § 1988 in the federal district court, requiring the court to determine a reasonable fee award.³⁶ The district court judge used the "lodestar" method of multiplying the reasonable hours expended by plaintiffs' attorneys on the case by the reasonable hourly rates.³⁷ Of course, the parties might well disagree about what constitutes reasonable hours or rates.³⁸

The district judge in *Perdue* said that "based on its personal observation of plaintiffs' counsel's performance throughout this litigation, the [c]ourt finds that the superb quality of their representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar."³⁹ The district judge continued:

[P]laintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the [c]ourt has seen displayed by the attorneys in any other case during its [twenty-seven] years on the bench. The foster children of Fulton and DeKalb Counties were indeed fortunate to have such unparalleled legal representation⁴⁰

Because the judge was so impressed with the legal services rendered by plaintiffs' attorneys, he enhanced the lodestar amount by seventy-five percent, making the total fee award \$10.5 million.⁴¹ The

³⁵ *Id.* at 1681 (Breyer, J., concurring in part and dissenting in part).

³⁶ *Perdue*, 130 S. Ct. at 1670 (majority opinion). *See also* *Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260, 1266 (N.D. Ga. 2006) (stating that "one difficult issue remains: what is a reasonable amount of attorneys' fees and expenses to be awarded to plaintiffs' counsel?").

³⁷ *See Kenny A.*, 454 F. Supp. 2d at 1272-73.

³⁸ *See id.* (explaining that there are factors that first must be determined by the court to reach the lodestar amount).

³⁹ *Id.* at 1288-89.

⁴⁰ *Id.* at 1289 (concluding that "the [c]ourt would be remiss if it failed to compensate counsel for this extraordinary level of service to their clients").

⁴¹ *See Perdue*, 130 S. Ct. at 1670 (noting that the additional 75% added \$4.5 million to the award); *see also Kenny A.*, 454 F. Supp. 2d at 1290 ("[T]he [c]ourt conclude[d] that the lodestar should be adjusted upward by a multiplier of 1.75, resulting in a total fee award of \$10,522,405.08.").

Eleventh Circuit affirmed the award.⁴²

On appeal, the Supreme Court reversed the district court's fee award.⁴³ The Supreme Court agreed that a reasonable fee should start with the lodestar amount, but also stated that determining a reasonable fee should normally end with the lodestar.⁴⁴ The Court recognized that district court judges have discretionary authority to enhance the lodestar amount for exceptional representation producing exceptional results, but only in rare and extraordinary cases.⁴⁵ At the same time, the Supreme Court has never upheld such an enhancement.⁴⁶

The justices were split five-to-four, with the conservative justices in the majority voting to overturn the seventy-five percent lodestar enhancement.⁴⁷ The majority found that the district judge's enhancement of the lodestar, based upon the quality of representation producing exceptional results, failed to point to specific evidence that justified the enhancement.⁴⁸ The district court must provide an explanation and justification for an enhancement that is sufficiently specific to allow for meaningful appellate review.⁴⁹ According to the majority, the district court failed to do so.⁵⁰ By contrast, the dissent stressed the extraordinary results achieved by plaintiffs' attorneys, and that appellate courts should defer to district court fee determinations.⁵¹

⁴² Kenny A. *ex rel.* Winn v. Perdue, 532 F.3d 1209 (11th Cir. 2008), *reh'g denied*, 547 F.3d 1319 (11th Cir. 2008).

⁴³ *Perdue*, 130 S. Ct. at 1677.

⁴⁴ *Id.* at 1675.

⁴⁵ *See id.* at 1676. The Court further explained that even though the district courts do possess this discretionary authority, it is not without limitation. *Id.* If this discretionary authority was without limitation, it is highly likely that the value of settlements awarded would be based on the judge's subjective opinion of what the legal representation in question was worth. *Id.* As a result, prospective defendants seeking out enhancement fees would be devoid of a standard by which they could measure their prospective earnings, as awarded by the courts. *Perdue*, 130 S. Ct. at 1676. Moreover, as much of the attorney's fees are in fact paid by the state and, essentially, the tax payers from which the matter arose, fees that should be allocated towards vital state programs would instead be allocated to subsidizing enhancement fees potentially awarded by the courts. *Id.* at 1676-77.

⁴⁶ *See id.* at 1673.

⁴⁷ *See id.* at 1669, 1676.

⁴⁸ *Id.* at 1676.

⁴⁹ *See Perdue*, 130 S. Ct. at 1676.

⁵⁰ *See id.*

⁵¹ *See id.* at 1679 (Breyer, J., dissenting) ("This case well illustrates why our tiered and functionally specialized judicial system places the task of determining an attorney's fee

The Supreme Court in *Perdue* strongly endorsed the lodestar approach.⁵² This is important because in 2007, the Second Circuit rejected the lodestar approach and attempted to institute an alternative “presumptively reasonable fee” approach that many found difficult to comprehend.⁵³ *Perdue* now makes clear that the fee determination should start with the lodestar approach and, therefore, implicitly rejected the Second Circuit’s alternative approach.⁵⁴

According to the majority in *Perdue*, the critical problem was

award primarily in the district court's hands. The plaintiffs' lawyers spent eight years investigating the underlying facts, developing the initial complaint, conducting court proceedings, and working out final relief. The District Court's docket, with over 600 entries, consists of more than 18,000 pages. Transcripts of hearings and depositions, along with other documents, have produced a record that fills 20 large boxes. Neither we, nor an appellate panel, can easily read that entire record. Nor should we attempt to second-guess a district judge who is aware of the many intangible matters that the written page cannot reflect.”)

⁵² See *id.* at 1669 (majority opinion).

⁵³ See *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany*, 493 F.3d 110 (2d Cir. 2007). The court in *Arbor Hill* stated:

[T]he better course—and the one most consistent with attorney’s fees jurisprudence—is for the district court, in exercising its considerable discretion, to bear in mind *all* of the case-specific variables that we and other courts have identified as relevant to the reasonableness of attorney’s fees in setting a reasonable hourly rate. The reasonable hourly rate is the rate a paying client would be willing to pay. In determining what rate a paying client would be willing to pay, the district court should consider, among others, the *Johnson* factors; it should also bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively. The district court should also consider that such an individual might be able to negotiate with his or her attorneys, using their desire to obtain the reputational benefits that might accrue from being associated with the case. The district court should then use that reasonable hourly rate to calculate what can properly be termed the “presumptively reasonable fee.”

Id. at 117-18. The twelve factors are:

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

Id. at 114 n.3 (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)). See *McDow v. Rosado*, 657 F. Supp. 2d 463, 467 (S.D.N.Y. 2009) (stating that it is not obvious how *Arbor Hill*’s approach differs from the lodestar approach).

⁵⁴ See *Perdue*, 130 S. Ct. at 1672-73, 1675-76.

the district court judge's failure to explain why seventy-five percent was selected as the enhancement. In other words, the Supreme Court questioned why it was not fifty percent, twenty-five percent, or ten percent.⁵⁵ As a result, the enhancement was reversed and the matter was remanded to the district court.⁵⁶

IV. *SIMMONS V. NEW YORK CITY TRANSIT AUTHORITY*

There is another fee issue that directly affects attorneys who litigate fee issues governed by the precedent of the Second Circuit Court of Appeals. The issue concerns the determination of the reasonable hourly rate when attorneys with offices in the Southern District of New York, where the hourly rates are relatively high, litigate a case in the Eastern District of New York, where the hourly rates are generally lower. The Second Circuit Court of Appeals, in *Simmons v. New York City Transit Authority*,⁵⁷ ruled that when the attorneys for the prevailing party have an office that is located in a different district from where the case is litigated, there is a strong presumption that the market rates of the forum govern.⁵⁸ However, an exception exists if the plaintiff can show "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."⁵⁹

This decision has caused some Eastern District judges to be resentful, arguing that the Eastern and Southern Districts should be viewed as one economic market because, after all, it is only one subway stop away from lower Manhattan over the Brooklyn Bridge to get from the Southern District to the Eastern District.⁶⁰ The Second

⁵⁵ *Id.* at 1675. The Court explained that when a "judge awards an enhancement on an impressionistic basis, a major purpose of the lodestar method—providing an objective and reviewable basis for fees—is undermined." *Id.* at 1676 (citing *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992)).

⁵⁶ *Id.* at 1677.

⁵⁷ 575 F.3d 170 (2d Cir. 2009).

⁵⁸ *Id.* at 172.

⁵⁹ *Id.* " 'We . . . have strayed from [the forum] rule *only in the rare case* where the special expertise of non-local counsel was essential to the case, it was clearly shown that local counsel was unwilling to take the case, or other special circumstances existed.' " *Id.* at 175 (alteration in original) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 232 (2d Cir. 1987)).

⁶⁰ See *Luca v. Cnty. of Nassau*, 698 F. Supp. 2d 296 (E.D.N.Y. 2010); *Gutman v. Klein*, No. 03 Civ. 1570(BMC), 2009 WL 3296072 (E.D.N.Y. Oct. 13, 2009) ("[T]he border between the Eastern and Southern Districts of New York is uniquely permeable. . . . Imposing

Circuit said: “The [defendant] should not be required to pay for a limousine when a sedan could have done the job.”⁶¹ This statement caused resentment in some Eastern District judges because they viewed the statement as condescending.⁶² In response, Judge Frederick Block in the Eastern District said “the [c]ourt has throughout the years presided over trials with Eastern District lawyers . . . who deserved to drive in limousines, and has had trials with some Southern District lawyers who should have been driving clunkers.”⁶³

V. CONCLUSION

Because the stakes are frequently high and the issues difficult, fee-shifting statutes have and will continue to generate a tremendous amount of litigation. *Perdue* and *Simmons* serve as examples of important fee shifting litigations. The fiscal incentive provided by federal fee-shifting statutes gives attorneys a personal stake in the outcome of their cases and, in so doing, serves to promote rigorous enforcement of federal civil rights laws.

the *Simmons* burden on litigants ignores the ‘geographic reality and its economic consequences in New York City.’ ” (citations omitted)).

⁶¹ *Simmons*, 575 F.3d at 177.

⁶² See Mark Fass, *Eastern District Judge Criticized as ‘Condescending’ Circuit’s Approach to Calculation of Attorney’s Fees*, 243 N.Y. L.J. 1 (2010) (“ ‘In conjuring this metaphor, the circuit court presumably did not intend to suggest that there was a qualitative difference in the competency of counsel between the two districts, yet it regrettably may be perceived by lawyers whose offices are in the Eastern District as having a condescending tone,’ Judge Block wrote.”).

⁶³ *Luca*, 698 F. Supp. 2d at 300.

