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I. INTRODUCTION

Litigating the reasonableness of attorney's fees in a Federal Rule 23 class action is no picnic. Usually, payment of legal fees is set from a contractual arrangement between attorney and client. That is often quick and easy. Conversely, payment of class action legal fees is set by a district court. That process can be drawn out and labor intensive. In this latter situation, a district court must be persuaded, ultimately, that the amount of the award is reasonable.[1] But what does "reasonable" mean? It is a tricky question—class action math always is—and litigating it can become contact sport.

The parties must be ready for potential opposition, objectors, and a skeptical court as attorney's fees are a part of the entire settlement package. And then there is the perception problem: in an age when a melting pot of television talking heads, newspapers, and social media cast more and more influence on the national dialogue—in this case, this influence is anything anti-lawyer—will a court shut out such platitudes and greenlight paying lawyers gazillions of dollars? Even the late-night comedians have joined the fray, often ridiculing lawyers in their monologues. But such a mentality is not anything new. In *David*

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1. FED. R. CIV. P. 23(h) authorizes such an award: "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." *See also* Boeing v. Van Gemert, 444 U.S. 472, 478 (1980) (establishing reasonableness standard). In addition to seeking an award for fees, class counsel often seeks an award for nontaxable costs as provided by the rule. A discussion seeking such costs is beyond the scope of this Article.

Copperfield,[2] Dickens described a lawyer named Uriah Heep as one whose "lank forefinger followed up every line as he read and made clammy tracks along the page . . . like a snail."[3] All of this negativism, even entrenched historical negativism, is a lot to overcome.

Significant time and money are usually spent by the lawyers to land ongoing class action case. But it is often a bumpy landing. Preparing a fee application, on top of all of the other filings that accompany it—settlement papers that include motions, briefs, declarations or affidavits, evidentiary documents, studies, notices, and the like—must be carefully choreographed. And nevermind the fact that "professional" objector attorneys can be awaiting offshore, often perceived by the litigation counsel as circling sharks hunting for their next meal. These waters can be difficult to navigate.[4]

Mindful of this, the Supreme Court has cautioned that a fee fight should not turn into a "second major litigation."[5] That caution, however, is more aspirational than it is reality. In the bob and weave of a big money brawl, the amount of attorney's fees sought can often be much larger than the amount of relief collectively obtained by individual class members.[6] Attorneys, like everyone else, can and will fight hard when the fight comes down to their fees. It has always been this way, and a fight over attorney's fees can last for years.[7] But all of this is not

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2. Charles Dickens, *David Copperfield*, PROJECT GUTENBERG EBOOK https://www.gutenberg.org/files/766/766-h/766-h.htm (last updated Sept. 25, 2016). Uriah Heep is not to be confused with the rock band of the 1970s.

3. Dickens, *supra* note 2, at 136.

4. A 2015 report by the Federal Judicial Center, for example, indicated that "the burden or complexity of fee awards" in fee-shifting cases had not been significantly reduced despite warnings over at least the past three previous decades that fee disputes were consuming "substantial judicial resources." *See* ALAN HIRSCH ET AL., AWARDING ATTORNEYS FEES AND MANAGING FEE LITIGATION 2 (Kris Markarian, 3rd ed. 2015).

5. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

6. For example, a national study conducted of 432 "no-injury" class action settlements and trial awards from the years 2005–2015 found that class counsel received 37.9% of available funds while class members received less than 9% of the total. That averaged over four times the amount distributed to the class. Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions*, Emory Univ. School of Law Rsch. Paper No. 16-402 (Feb. 4, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905.

7. The speediest turnarounds—from filing a motion that seeks approval of fees to actual payment—are roughly five to six months. This is with the court acting expeditiously and absent any opposition, objections, or appeals. But with opposition, objections, or appeals, a fee dispute can often last two years or more, and in the case of the Home Depot customer data security breach case, over five years. *In re* Home Depot, Inc., Customer Data Sec. Breach Litig., No. 1:14-MD-02583-TWT, 2017 U.S. LEXIS 221736 at *1 (N.D. Ga. Oct. 11, 2017), *aff'd in part, vacated in part, remanded sub nom.*,

difficult to imagine. The on-the-hook defendant is primarily concerned with its entire monetary burden, mindful of not just the settlement amount, but the enormous outlays of fees and expenses it also must pay its own attorneys and experts. [8] Class counsel, too, is naturally motivated to maximize their award as a piece of the settlement pie.[9] There is a lot at stake.

Enter the district court. Once a settlement is achieved or a judgment is taken, the district court has a "significant supervisory role" in the settlement process.[10] This was recently expanded and clarified by the United States Court of Appeals for the Eleventh Circuit to mean "a type of a fiduciary role for the class" to ensure that the entire settlement is "fair, adequate, and reasonable."[11] As part of the settlement, the district

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In re Home Depot Inc., 931 F.3d 1065 (11th Cir. 2019), *on remand*, *In re* Home Depot, Inc., Customer Data Sec. Breach Litig., No. 1:14-MD-02583-TWT, 2020 U.S. LEXIS 13978 (N.D. Ga. Jan. 23, 2020), *appeal pending sub. nom*.

8. *In re Home Depot Inc.*, 931 F.3d at 1080 (noting that "defendant is concerned, first and foremost, with its total liability").

9. These concerns have been noticed not just by district courts within the Eleventh Circuit, but also nationwide.

> In the class context, courts often comment that there is an 'incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers.'

See Keim v. ADF MidAtlantic, LLC, 328 F.R.D. 668, 689 (S.D. Fla. 2018) (quoting Creative Montessori Learning Centers v. Ashford Gear LLC, 662 F.3d 913, 917 (7th Cir. 2011)). *See also In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 446 (3d Cir. 2016) ("[W]e are sympathetic to [these] concerns . . ."); *In re* Samsung Top-Load Washing Mach. Mktg., Sales Pracs. & Prod Liab. Litig., 997 F.3d 1077, 1090 (10th Cir. 2021) ("[W]e have expressed wariness about the potential for class counsel and defendants to reach an agreement that prioritizes the award of attorneys' fees and costs at the expense of class compensation and the interests of class members . . . .").

10. Waters v. Int'l Precious Metals Corp., 190 F.3d 1291, 1293 n. 4 (11th Cir. 1999) (noting that the district court satisfied its supervisory function under Fed. R. Civ. P. 23(e) to ensure no collusion occurred among the parties' settlement).

11. Shiyang Huang v. Equifax Inc. (*In re* Equifax Customer Data Sec. Breach Litig.), 999 F.3d 1247, 1265 (11th Cir. 2021). Although the Supreme Court has not specifically acknowledged such a fiduciary status, it has come close to doing so. *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 629 (1997) (finding that Rule 23 must be applied with the interests of absent class members "in close view."). Other Circuits have previously subscribed to this notion of the district court assuming a fiduciary rule for Rule 23(e) purposes. *See* Grant v. Bethlehem Steel Corp., 823 F.2d 20, 22 (2d Cir. 1987) (noting that the district court has a fiduciary responsibility to ensure the class members' interests were adequately represented); *In re* Cendant Corp. Litig., 264 F.3d 201, 231 (3d Cir. 2001) ("[D]istrict court acts as a fiduciary guarding the rights of absent class members . . ."); Culver v. City of Milwaukee, 277 F.3d 908, 915 (7th Cir. 2002) (holding that the district court is a fiduciary of the class for Rule 23(e) purposes).

court must be satisfied that the amount of attorney's fees to be awarded is reasonable.[12]

So, is it legally proper for attorneys to make millions while an individual class member may only receive a few dollars? And, do the rules create a "divided loyalty" ethical problem when class counsel, presumably self-interested, becomes a claimant to the common-fund that necessarily reduces class members' compensation? [13] These are difficult ethical issues often considered in the approval of a settlement, and more specifically, in an application for attorney's fees.

All of this has not escaped the watchful eye of the United States Court of Appeals for the Seventh Circuit, Judge Richard Posner, who, in a trio of widely cited opinions issued in 2014, lambasted the fee harvesting process as "outlandish," "questionable," and "scandalous."[14] Such language seemingly gilds the popular perception that it is the lawyers, not the victims, who make the lion-share of the money. But on the other hand, fundamental fairness dictates that skilled legal counsel should be incentivized to earn a reasonable fee, even a big fee, for successfully representing a group of similarly-situated individuals who suffer a harm, even a small harm.[15] And there is the rub.

No matter whether the award being sought is from a common-fund or from a statutory entitlement, all courts within the Eleventh Circuit must determine that the amount of the fee is reasonable and likewise be assured that it is not a product of unfair collusion between the

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12. *See Boeing Co.*, 444 U.S. at 478 ("[A] litigant or a lawyer who recovers a common-fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."). *See also* Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) ("[A]ttorneys' fees awarded from a common-fund shall be based on a reasonable percentage of the fund established for the benefit of the class.").

13. The Committee note for FED. R. CIV. P. 23(e)(2)(C) provides this cautionary statement:

> Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

14. Pearson v. NBTY, Inc., 772 F.3d 778, 781 (7th Cir. 2014) ("outlandish"); Redman v. RadioShack Corp., 768 F.3d 622, 637 (7th Cir. 2014) (settlement was "wrong"); Eubank v. Pella Corp., 753 F.3d 718, 721 (7th Cir. 2014) (entire settlement found "scandalous").

15. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L.REV. 2043, 2047 (2010) (concluding that attorneys should be fully incentivized through fee awards "to bring as many cost-justified actions as possible"); *Amchem Prods., Inc.*, 521 U.S. at 617 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

parties.[16] This Article will drill down what constitutes a "reasonable" attorney fee. The discussion here will get into the practical elements of making fee applications. Likewise, there is discussion about some of the problems that may drag down a settlement, such as, "clear sailing provisions" and "kicker clauses." These dark holes are often the product of varying negotiation strengths or weaknesses that can sometimes jeopardize the timely final approval of a settlement package, especially in large class action cases that can attract lots of objectors.

For context, this article begins with some history of how attorneys charged fees in early America. Readers may be surprised to find that the challenges regarding fees that faced lawyers 200 years ago are not unlike the challenges that lawyers face today. Such a lookback is helpful as it demonstrates exactly how attorneys charged their clients from long ago, and thereafter traces the evolution of attorney's fees and how such fees were charged through the modern standards of contingent fees and hourly rates used today. In a sense, it demonstrates the evolving nature of what the word "reasonable" means as it modifies the phrase "attorney's fees."

To keep things practical, the scope is limited to controlling authority for federal cases situated in Georgia, Florida, and Alabama. The discussion here emphasizes fee applications that seek a percentage from a pool of money, often called a common-fund fee award, that is created out of a settlement. This is the type of fee award that is sought in most class action cases.[17] This contrasts with fee applications that seek a statutory-fee award in which a defendant pays attorney's fees, known as a "lodestar,"[18] directly to class counsel. The lodestar—a word that does not naturally roll off the tongue in normal conversation—has been

16. FED. R. CIV. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." *See In re Equifax Customer Data Sec. Breach Litig.*, 999 F.3d at 1265 (observing that the district court must guard against collusive practices that favor class representatives or their attorneys over absent class members).

17. For example, for all reported class action cases involving fees during the years 2009–2013, a national study carried out by Professors Theodore Eisenberg, Geoffrey Miller, and Roy Germano determined that 53.61% were awarded fees on a percentage basis as opposed to 6.29% were awarded based on a lodestar. A hybrid of cases mixing a percentage amount cross-checked with a lodestar amount comprised 38.23% of the cases, while 1.86% of the cases left it up to the district court's discretion. T. Eisenberg et al., *Attorneys' Fees in Class Actions*: *2009-2013*, 92 N.Y.U. L. REV. 937, 942–47 (2017).

18. "Lodestar" has been defined by Merriam-Webster's Dictionary as "something that serves as a guiding star." *Lodestar*, MERRIAM-WEBSTER'S UNABRIDGED DICTIONARY https://www.unabridged.merriam-webster.com/unabridged/lodestar (last visited Sept. 21, 2021); City of Burlington v. Dague, 505 U.S. 557, 562 (1992) ("The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence.").

defined as "the number of hours worked multiplied by the prevailing hourly rates" under a federal fee-shifting statute.[19] The basic difference between these two payment schemes is that the common-fund method comes from a pot of money created for absent class members, while the fee-shifting method comes from the opposing party.

The analysis here starts with two rules, the "English Rule" and the "American Rule," that are the center of the universe of this discussion. Understanding these rules, and where they come from, underpins any rationale that either justifies or criticizes an attorney fee award.

II. THE ENGLISH AND THE AMERICANS: TWO PEOPLES DIVIDED BY A SIMPLE RULE OVER ATTORNEY'S FEES

A. Historical Development

Under the "English Rule," as explained by the Supreme Court in *Hensley v. Eckerhart*,[20] "the losing party, whether plaintiff or defendant, pays the winner's fees."[21] In England, the Rule had its origins from early statutes created by Parliament.[22] The rule is simply triggered by demonstrating the objective fact of a party's complete defeat.[23] It was part of a larger and more elaborate payment costs system in which the loser would have to pay the winner all legal costs, not just attorney's fees, but other expenses too.[24] This would provide the winner full and fair compensation.[25] The sentiment during these early times was that a victory was not totally complete without the inclusion of all out-of-pocket monies spent in prosecuting the prevailing party's cause.[26] This

19. Perdue v. Kenny A., 559 U.S. 542, 546 (2010).

20. *Hensley*, 461 U.S. at 424.

21. *Id.* at 443 n. 2.

22. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1571 (1993).

23. Vargo, *supra* note 22.

24. W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZ. J. INT'L & COMP. 361, 404–06 n. 338 (1999). Such an award is therefore not dependent on bad faith, fault, or frivolity. But there may be mitigating factors that could reduce the amount of the award in "partial" victories. And, like anything in the law, there are "state of mind" and other exceptions that may exempt a universal application of this Rule. Davis, *supra* at note 24, at 405–06.

25. David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L. & COMP. L. REV. 583, 604 (2005).

26. Root, *supra* note 25, at 589 ("This is in line with the old Roman law that an unjustified party should make whole his adversary. [Cit. omitted.] It also is in line with

same sentiment today, popularly known as "loser-pays," provides fuel to tort reform agendas promoted by various conservative groups.[27]

Initially, the English Rule flourished in pre-Revolutionary War America. At that time, and much like it is now, anti-lawyer sentiment was intense and universal. Occasionally, there were calls to ban lawyers entirely—that was always unsuccessful—but what often followed was restrictive attorney fee regulations imposed by colonial legislatures.[28] Essentially, lawyers had to stick to a fee schedule based on various tasks performed, such as "perusing" pleadings, making court appearances, and arguing causes.[29] This meant that lawyers could only charge their clients what the legislatures said they could charge.[30]

Such fee restrictions were highly unpopular with lawyers and were considered draconian. John Adams' recorded diary entry for July 28, 1766, tells of a meeting of his local bar at a coffee house where one of the speakers "rail'd about the lowness of the fees," this being a "common [p]lace Topick."[31] This situation incentivized grumbling lawyers to take on higher volumes of work and to also search for creative ways around these legislative curbs.[32]

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the premise that a victory is not complete when the costs of obtaining the victory are not covered.") *Id*. at n. 243.

27. Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L. J. 597, 628–29 (2010) (discussing tort reform loser-pays proposal from Quayle Council on Competitiveness from the early 1990s).

28. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery,* 47 L. & CONTEMP. PROBS. 9, 10–11 n. 8 (1984).

29. *See* Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 878 n. 101 (1929), which reprinted N.Y. STAT. c. 10, § 4 (1829):

> Retaining fee, three dollars and seventy-five cents, to one counsel only; Perusing, amending, and signing every petition of appeal, and every answer to a petition of appeal, two dollars and fifty cents; Perusing and amending every other petition to the court, in a case where an appeal is pending, or in which a writ of error shall have been brought, one dollar and twenty-five cents; Perusing, amending and settling every special pleading, entry or order, one dollar and fifty cents; Attending the court to make or oppose a motion, or to present or oppose a petition, one dollar and twenty-five cents; Arguing every special motion or petition, two dollars and fifty cents; Arguing every cause, or attending for such argument pursuant to notice, three dollars and seventy-five cents; But the foregoing fees shall be allowed only to one counsel on each side, who shall have been actually employed and rendered the service charged.

30. Vargo, *supra* note 22, at 1572.

31. John Adams, *Diary Entry of Monday, July 28, 1766,* pp. 19–20, ADAMS FAMILY PAPERS AN ELECTRONIC ARCHIVE, https://www.masshist.org/digitaladams/archive/doc?id=D13&hi=1&query=fees&tag=text&archive=all&rec=20&start=10&numRecs=24 (last visited Oct. 7, 2021).

32. Patrick Henry's account book shows that, aside from his receiving his usual fifteen shillings per case (which was the standard fee for unspecified "other actions"), he also received in-kind remuneration to get around the per-case fee limitations such as "a

Concomitant with this, legislation was also enacted to include loser-pays rules.[33] This continued through the American Revolution, when many of the colonies adopted "reception statutes" to receive at least some English common law and acts of Parliament (legislatures commonly choosing start dates such as 1607, 1620, or 1776) as a legacy to construct a beginning foundation in their newly created State authorities.[34]

Not surprisingly, during the early days of the Republic, lawyers either challenged, evaded, ignored, or successfully lobbied against the low fee scale. A widening gap developed between the fees lawyers were charging their clients, which was steadily climbing, and the amount of fees that could be taxed as costs, which was stagnant. This was partly due to inflation and a failure of the State legislatures to update their fee schedules.[35] But, the higher amounts being charged were also becoming legitimized through case law, notably by breach of contract or *quantum meruit* actions.[36] By the mid-1800s, many state legislatures, state courts, or both began to formally unshackle lawyers from the dreaded fee scales, acknowledging reality and giving way to entrepreneurial attorneys to charge even higher amounts.[37] Eventually, the attorney fee

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silver watch," or "1 Barren Cow," or "10 Gallons peach brandy." Clement Eaton, *A Mirror of the Southern Colonial Lawyer: The Fee Books of Patrick Henry, Thomas Jefferson, and Waightstill Avery*, 8 WM. & MARY Q. 520, 530–32 (1951). Likewise, Professor Leubsdorf noted that John Adams "managed to do pretty well, collecting substantial sums by way of 'gifts' and charges for legal services not mentioned in the statutory scale." Leubsdorf, *supra* note 28, at 11–12.

33. Professor Leubsdorf notes that the laws in effect at the time "served less as a way to shift or not shift fees from one party to another than as a way to limit the amount of those fees." Leubsdorf, *supra* note 28, at 11.

34. Georgia's reception statute gives "full force and effect" to the common laws of England "as they existed on May 14, 1776." O.C.G.A. § 1-1-10(c)(1) (1982). But, such reception statutes were not universal. As discussed in a dissent by Justice Souter, not all States imported English common law "wholesale" due to general hostility towards the English government in post-colonial America. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 132 (1996) (Souter, J., dissenting).

35. Leubsdorf, *supra* note 28, at 13–14. Professor Leubsdorf noted that lawyers such as Alexander Hamilton, Andrew Jackson, and Daniel Webster each routinely collected from their clients much more money than the allowable statutory maximums. Interestingly, John Marshall, while he was a practicing lawyer in Virginia, *did* adhere to his State's fee scale. *Id.* at n. 24. *See* Vargo, *supra* note 22, at 1573.

36. Leubsdorf, *supra* note 28, at 16. *Quantum meruit* is defined as the "reasonable value of services." *Quantum Meruit,* BLACK'S LAW DICTIONARY (11th ed. 2019).

37. The Field Code of New York, established in 1848, paved the way to repeal New York's regulatory scheme of attorney fee regulation. *See* The Field Code, 1848 N.Y. Laws ch. 379. It struck down all provisions "establishing or regulating the costs or fees of attorneys" and expressly stated "hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties." 1848 N.Y. Laws at 258. Other states

component of loser-pay rules in many States was decoupled or dramatically reduced from the costs system.[38] At the federal level, in *Arcambel v. Wiseman*,[39] the United States Supreme Court disallowed fee-shifting altogether, curtly ruling in a one-page opinion that a damage award, which had annexed to it a charge of $1,600 for counsel's fees, should not be allowed.[40] Eventually, this gap, along with a legislative willingness of most legislatures to let go of the English Rule,[41] led to the creation of the American Rule.[42]

B. The Rise of the Contingent Fee and the American Rule

More freedom to set fees based on prevailing market conditions gave rise to another inventive approach, and not inconsistent with the emergence of the American Rule—the contingent fee. This was a significant pecuniary enhancement beyond a fixed-fee approach or an hourly amount.[43] The contingent fee allowed a person of any means to have access to the courts without having to pay fees upfront, this in exchange for the lawyer acquiring a contingent percentage of the claim.[44] And, although there were complaints and statutory impediments placed on this kind of fee, it became legitimized, accepted, and now a standard charge.[45] The importance of this cannot be understated, at least as it concerns class action lawsuits. The Eleventh Circuit prefers the contingent fee approach, as opposed to a lodestar approach, in common-fund cases. Noting that this approach was in operation for over 80 years (from 1885 until 1973) in similar situations,

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followed. For a discussion of this, *see* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 37 n. 27 (1989). Regarding early court decisions, s*ee* Newnan v. Washington, 8 Tenn. 79, 82 (1827) ("[I]t cannot be seriously thought that the General Assembly intended the tax fee, which is directed to be included in the bill of costs in each suit, as the sole reward of professional exertion."); Adams v. Stevens & Cagger, 26 Wend. 451 (N.Y. 1841) (attorney may collect fees through *quantum meruit*, notwithstanding limits established by the legislature).

38. Professor Leubsdorf indicates that the Field Code in New York allowed for nominal attorney's fees to be recovered, but also indicates that the reason or reasons supplied for fixing a nominal amount has been lost to history. Following implementation of the Code, nine other states allowed no recovery, while most of the rest of the states only allowed "minuscule amounts." Leubsdorf, *supra* note 28, at 18, 20, 22.

39. 3 U.S. 306 (1796).

40. *Id.* at 306.

41. *See* The Field Code of New York, *supra* note 37, at 497.

42. Leubsdorf, *supra* note 28, at 16–17.

43. *Id.* at 16.

44. *Id.*

45. Taylor v. Bemiss, 110 U.S. 42, 46 (1884) (allowing a contingent fee contract of 50%).

the Eleventh Circuit held this approach to be "better reasoned" for awards derived from a common-fund.[46] It therefore comes as no surprise that the contingent fee has thrived during America's conversion from the English Rule to the American Rule. Under the American Rule, "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."[47] Later, this language was slightly modified to "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise."[48] Save for the state of Alaska, which employs a modified English Rule,[49] the rule against fee-shifting is enforced in every state.[50] The American Rule is universal throughout all the federal circuits, its basic principle being characterized as "bedrock."[51]

Even though the American Rule is universally accepted in the federal courts, class counsel almost always asks the district court to depart from this rule in a fee application. To do otherwise would mean that class counsel would have to look to their client, the named class representative, for payment of their fees. But, that is a rare to nonexistent situation. Likewise, contingency fee agreements are not used because there is no nexus between the contract and the attorney's fees to be recovered from absent class members. Arguably, even though there is privity of contract between attorney and client, such privity does not extend to class members.[52] In other words, the fee agreement does not bind class members.[53]

It is therefore one of the exceptions to the American Rule, and not the Rule itself, that is the driving force to a class counsel's fee recovery. At the federal level, these exceptions are:

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46. *Camden I Condo. Ass'n*, 946 F.2d at 774.

47. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

48. Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 253 (2010).

49. ALASKA R. CIV. P. 82.

50. Davis, *supra* note 24, at 402.

51. *Hardt*, 560 U.S. at 253.

52. Typically a canon of state law, privity of contract "requires that only parties to a contract may bring suit to enforce it." Scott v. Cushman & Wakefield of Georgia, Inc., 249 Ga. App. 264, 265, 537 S.E.2d 794, 796 (2001). Arguably, since an individual class member is not a party to the original representation agreement, an attorney cannot enforce provisions of the attorney fee agreement against an absent individual.

53. *See* Steigerwald v. Saul, No. 1:17-CV-01516, 2020 U.S. LEXIS 905971, at *3 (N.D. Ohio Nov. 4, 2020) (holding that a contingent fee agreement between the class representative and class counsel did not bind class members). The district court concluded that "Class Counsel does not have a valid contingent fee agreement with the class members." *See also* Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 540 F.2d 102, 120 (3d Cir. 1976) ("Private arrangements individual members of the class may have with counsel are simply irrelevant.").

(1) A fee award created through plaintiff's efforts that establishes a pool of money or a "common fund" from which class counsel takes a percentage.[54]

(2) A fee award expressly authorized by statute.[55]

(3) A fee award based on contract.[56]

(4) A fee award based on a nonmonetary benefit, often called a "substantial benefit," in which a class of persons are benefitted through a plaintiff's efforts.[57]

(5) A fee award due to a party's bad faith.[58]

(6) A fee award based on enforcement of a contempt order.[59]

Less seen are substantial benefit and contract cases. But, of all the exceptions, it is the pool of money from the common-fund exception that is most used by class counsel to obtain attorney's fees. That is why fees can result in the millions of dollars in common-fund scenarios. Comparatively, the fee-shifting exception—which is the English Rule by another name—often pays less money than the common-fund exception, unless the hours charged exceed a percentage of the common-fund. Such a payment scheme has difficulty competing with the common-fund method.

III. TYPES OF FEE CALCULATIONS: WHICH ONE TO USE?

There are three ways to calculate fees: (1) the percentage-of-the-fund or common-fund method (terms that will be used interchangeably throughout this Article),[60] (2) the lodestar method,[61] and (3) a hybrid

54. Trustees v. Greenough, 105 U.S. 527, 529 (1882).

55. *Alyeska*, 421 U.S. at 257 ("[A]bsent statute or enforceable contract, litigants pay their own attorney's fees.").

56. *Id.*

57. F. D. Rich Co., Inc. v. U.S. for Use of Indus. Lumber Co., Inc., 417 U.S. 116, 129–30 (1974) (holding that an exception exists "where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class.").

58. Hall v. Cole, 412 U.S. 1, 5 (1973) (observing that the underlying rationale is a punitive action taken by the court).

59. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 427–28 (1923) (allowing fees that were incurred by enforcing a contempt order).

60. The Eleventh Circuit and the D.C. Circuit endorse the percentage-of-the-fund approach and require district courts to follow this method. *Camden I Condo. Ass'n*, 946 F.2d at 774 ("Henceforth in this circuit, attorneys' fees awarded from a common fund shall

using either the percentage-of-the-fund method or the lodestar method as a primary determinant, accompanied with a cross-check of the secondary determinant, to assure reasonableness.[62] Examined below in some detail are the first two methods, as these are those most used in the Eleventh Circuit. A brief discussion of the hybrid method, only as it pertains to crosschecking the first two methods, also follows.

A. Percentage-of-the-Fund Method: The Preferred Approach

The leading case in the Eleventh Circuit is *Camden I Condo. Ass'n. v. Dunkle*, which requires district courts to use the percentage-of-the-fund method.[63] As an equitable remedy, this method of calculation "rests on

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be based upon a reasonable percentage of the fund established for the benefit of the class"); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1272 (D.C. Cir. 1993) ("[W]e conclude that percentage-of-the-fund is the proper method for calculating fees in a common fund case.").

61. In 1985, the Third Circuit Task Force on Court Awarded Attorney Fees, which consisted of a number of distinguished judges and scholars, was formed to study and make recommendations regarding the various methods to determine attorney's fee awards. Widely cited, the Task Force's Report discussed what a lodestar is and how it is calculated:

> First, the court must determine the hours reasonably expended by counsel that created, protected, or preserved the fund. Second, the number of compensable hours is multiplied by a reasonable hourly rate for the attorney's services. Hourly rates may vary according to the status of the attorney who performed the work (that is, the attorney's experience, reputation, practice, qualifications, and similar factors) or the nature of the services provided. This multiplication of the number of compensable hours by the reasonable hourly rate was said to constitute the "lodestar" of the court's fee determination.

Court Awarded Attorney Fees, 108 F.R.D. 237, 243 (3d Cir. 1985).

62. The United States Courts of Appeal for the First, Third, Sixth, Seventh, Eighth, and Ninth Circuits defer to their respective district courts' informed discretion to use either for the percentage-of-the-fund or lodestar method or a crosscheck. *See In re* Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 308 (1st Cir. 1995) (district court has discretion to use either method or some combination); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 821–22 (3d Cir. 1995) (district court has discretion to use either method or as a crosscheck for the other); Linneman v. Vita-Mix Corp., 970 F.3d 621, 624 (6th Cir. 2020) (district court has discretion to select the most appropriate method); Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc., 743 F.3d 243, 247 (7th Cir. 2014) (district court may choose either method); Johnston v. Comerica Mort. Corp., 83 F.3d 241, 246 (8th Cir. 1996) (district court has discretion to determine which of the two methods to apply); *In re* Online DVD-Rental Antitrust Litig., 779 F.3d 934, 949 (9th Cir. 2015) (district court has discretion to use either lodestar or the percentage-of-the-fund method, but is encouraged to employ a crosscheck); Gottlieb v. Barry, 43 F.3d 474, 482–83 (10th Cir. 1994) ("Our approach has been called a 'hybrid' approach, combining the percentage fee method with the specific factors traditionally used to calculate the lodestar.").

63. *Camden I Condo. Ass'n.*, 946 F.2d at 768.

the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense."[64] Stated another way, equity will not allow class members to gain a "free ride" on the laboring oars of the attorneys.[65] The district court then exercises jurisdiction over this fund and assesses a percentage of the attorney's fees over the entire fund by spreading the fees proportionately among the class members.[66]

Importantly, at least as it concerns class counsel, *Camden I Condo. Ass'n* establishes a "median range" of fees—20% to 30%—with 25% as a benchmark.[67] For the Eleventh Circuit, a 2017 survey reported that a mean percentage average was 30% while the median average was 33%.[68] These percentages can go higher,[69] or lower depending on the individual case.[70]

B. The Johnson Factors

If class counsel requests fees beyond 25%,[71] the Eleventh Circuit instructs that a laundry list of factors be used for percentage adjustments called the *Johnson* factors.[72] Such factors were put in place to establish a record for the appellate court to have a "meaningful

64. *Boeing Co.*, 444 U.S. at 478.

65. *See* Wal-Mart Stores Health & Welfare Plan v. Wells, 213 F.3d 398, 402 (7th Cir. 2000) (noting that free riding on attorneys' efforts would be "contrary to the equitable concept of 'common fund.'").

66. *Boeing Co.*, 444 U.S. at 478.

67. *Camden I Condo. Ass'n*, 946 F.2d at 775.

68. Eisenberg, *supra* note 17 at 951.

69. *See* Cabot E. Broward 2 LLC v. Cabot, No. 16-61218-CIV, 2018 U.S. LEXIS 192706 at *8 (S.D. Fla. Nov. 9, 2018) (33.333%); Fernandez v. Merrill Lynch, Pierce, Fenner & Smith Inc., No. 15-22782-CIV, 2017 U.S. LEXIS 219031, at *4 (S.D. Fla. Dec. 18, 2017) (35%); Waters v. Cook's Pest Control, Inc., No. 2:07-CV-00394-LSC, 2012 U.S. LEXIS 99129, at *16 (N.D. Ala. Jul. 17, 2012) (35%).

70. *See* Kuhr v. Mayo Clinic Jacksonville, No. 3:19-CV-453-MMH-MCR, 2021 U.S. LEXIS 184994, at *12 (M.D. Fla. Mar. 30, 2021) (20%); Roth v. GEICO Gen. Ins. Co., No. 16-62942-CIV, 2020 U.S. LEXIS 188204, at *1 (S.D. Fla. Oct. 8, 2020) (21.56%); Halpern v. You Fit Health Clubs, LLC, No. 18-61722-CIV, 2019 U.S. LEXIS 143753, at *2 (S.D. Fla. Aug. 22, 2019)(17.62%).

71. Faught v. Am. Home Shield Corp., 668 F.3d 1233, 1242 (11th Cir. 2011).

72. Johnson v. Georgia Highway Exp., Inc., 488 F.2d 714, 717–19 (5th Cir. 1974). Johnson is controlling law in the Eleventh Circuit by virtue of Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (holding that decisions from the former Fifth Circuit handed down prior to the close of business on September 30, 1981, are binding in the Eleventh Circuit).

review" of how the district court made its percentage adjustments.[73] Three additional factors were added years later,[74] and various district courts have included other factors that may be unique to that particular case.[75]

Johnson listed the following factors be discussed in fee applications for percentage adjustment purposes: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the client; and (12) awards in similar cases.[76] And, thanks to *Camden I Condo. Ass'n*, there are three more: "[(13)] whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel [; (14)] any non-monetary benefits conferred upon the class by the settlement[;] and [(15)] the economics involved in prosecuting a class action."[77] In lodestar calculations or crosschecks to a contingent fee amount, the Supreme Court has relegated the second, third, eighth, and ninth factors to secondary importance, these being subsumed within the lodestar amount or basic fee.[78]

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73. *Johnson*, 488 F.2d at 720; *see Perdue*, 559 U.S. at 558 (reversing district court's enhancement of lodestar fee awarded on "impressionistic basis" undermined "objective and reviewable basis" that did not permit "meaningful appellate review.").

74. *Camden I Condo. Ass'n*, 946 F.2d at 775.

75. *Id.* (district courts are also to consider "additional factors unique to the particular case . . ."); *see* Ferron v. Kraft Heinz Foods Co., No. 20-CV-62136-RAR, 2021 U.S. LEXIS 81589, at *19 (S.D. Fla. Jul. 13, 2021) ("As applied, the *Camden I* [*Condo. Ass'n*] factors and the facts unique to this case support the reasonableness of the requested attorneys' fees and costs award."). For the sake of clarity and brevity, all of the factors mentioned will be referred to as the *Johnson* factors.

76. *Johnson*, 488 F.2d at 717–19.

77. *Camden I Condo. Ass'n*, 946 F.2d at 775.

78. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986), *modified*, 483 U.S. 711 (1987) (citing Blum v. Stenson, 465 U.S. 886, 898–900 (1984)).

> Expanding on our earlier finding in *Hensley* that many of the *Johnson* factors 'are subsumed within the initial calculation' of the lodestar, we specifically held in *Blum* that the 'novelty [and] complexity of the issues,' 'the special skill and experience of counsel,' the 'quality of representation,' and the 'results obtained' from the litigation are presumably fully reflected in the lodestar

Practical experience dictates that fee applicants should always go through the *Johnson* factors and any other factors, notwithstanding whether the percentage amount sought is lower than 25%, since the district court has such wide discretion to fix fees. That advice can be more like a cautious warning, as Professors Macey and Miller have put it, "the court should award fees and expenses only up to the level justified by the information presented."[79] Interestingly, there is no parallel requirement for district courts to explicitly analyze the *Johnson* factors in its order awarding attorney's fees, and the Eleventh Circuit has declined to make such a rule.[80]

Care should be taken to prepare and assemble declarations or affidavits, evidentiary exhibits, and contemporaneous time records (should they be necessary) to make a complete record. Demonstrating the amount of time expended, often when analyzed through a lodestar cross-check,[81] is often considered a useful metric to enable the court to value the services offered in a given case. The Supreme Court has also weighed-in, indicating that while it is not necessary to record in "great detail how each minute . . . was expended,"[82] evidence should indicate the "hours worked and rates claimed."[83] But, post-*Hensley*, other courts from around the country have put forth several degrees of exactitude regarding billing records, and no uniform standard is in play.[84]

Submission of complete time records as part of the fee application can be thorny. Attorneys often hate recording their time. And, district courts often loath having to review time records, one describing it as

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amount, and thus cannot serve as independent bases for increasing the basic fee award.

79. Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 198 (2009).

80. *In re Home Depot, Inc.*, 931 F.3d at 1090.

81. *Waters*, 190 F.3d at 1298 ("[W]hile we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison.").

82. *Hensley*, 461 U.S. at 437 n.12.

83. *Id*. at 433.

84. *See* Feuer v. Cornerstone Hotels Corp., No. 14-CV-5388, 2021 U.S. LEXIS 202316, at *4 (E.D.N.Y. Oct. 20, 2021) (quoting Kirsch v. Fleet St., Ltd., 148 F.3d 149, 173 (2d Cir. 1998)) ("Applications for fee awards should generally be documented by contemporaneously created time records that specify, for each attorney, the date, the hours expended, and the nature of the work done"); *Cf.* Moore v. D.C., 674 F. Supp. 901, 905 (D.D.C. 1987) ("Adequate documentation is required—not bills"); *Cf.* Ramsey v. State of Alabama Pub. Serv. Comm'n, No. CIV.A. 96-T-275-N, 2000 WL 426187, at *5 (M.D. Ala. Apr. 13, 2000) (15-minute intervals on billing records held insufficient); *Cf.* San Filippo v. U.S. Tr. Co. of New York, Inc., No. 81 CIV. 19 (JFK), 1986 WL 3512, at *4 (S.D.N.Y. Mar. 19, 1986) (five-minute increments on billing records held sufficient).

"mind numbing."[85] It can be a time-consuming process,[86] having been described as "complex."[87] Hardly anyone likes it.

But, in common-fund cases, the Eleventh Circuit has not indicated an absolute requirement that raw time records be submitted. This is because the rationale behind awarding a reasonable percentage in common-fund cases differs from the rationale of awarding a lodestar in fee-shifting cases. The Third Circuit Task Force, which studied issues such as these, concluded that each issue should be handled differently.[88] Awarding fees in common-fund cases serves the twin goals of avoiding unjust enrichment of class members,[89] and staying compliant with the American Rule.[90] Hence, Courts are more interested with the quality of time[91] spent by an attorney on a common fund case rather than, say, the total amount of time spent by an attorney demonstrating his or her lodestar.[92] Submitting time records, therefore, does little to show the effect class counsel has had on enlarging the recovery for absent class members in common fund cases.

In contrast, in awarding fees in statutory fee-shifting lodestar cases, the goal is to provide an incentive for persons, including those with limited means, to privately enforce certain statutes, even when a monetary recovery is small.[93] Such statutes are purposefully designed—but woefully inadequate—to attract competent counsel by including fee-shifting provisions. Requiring a defendant to pay class counsel his or her hours at market rate is still, nonetheless, consistent with this legislative purpose. Submitting time records in a fee-shifting case is therefore necessary and required.[94]

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85. Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1214 (S.D. Fla. 2006).

86. *See* Stanley v. U.S. Steel Co., No. 04-74654, 2009 U.S. LEXIS 114065, at *1 (E.D. Mich. Dec. 8, 2009).

87. Hirsch et al., *supra* note 4, at 2.

88. *Court Awarded Attorney Fees,* 108 F.R.D. at 255.

89. *Trustees*, 105 U.S. at 528. *See Court Awarded Attorney Fees,* 108 F.R.D. at 250.

90. *Boeing Co.*, 444 U.S. at 481 ("The common-fund doctrine, as applied in this case, is entirely consistent with the American rule against taxing the losing party with the victor's attorney's fees.").

91. *Camden I Condo. Ass'n*, 946 F.2d at 773.

92. *Blum*, 465 U.S. at 900 n.16.

93. *City of Burlington*, 505 U.S. at 568 (Blackmun, J. dissenting).

94. Norman v. Hous. Auth. of City of Montgomery, 836 F.2d 1292, 1303 (11th Cir. 1988) ("Further, fee counsel should have maintained records to show the time spent on the different claims, and the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity.").

This begs the question: for common-fund cases, are maintaining contemporaneous time records even necessary? The short answer is, yes. And it is a very wise practice, too. The raw records may be required by the district court to show enhancements beyond a 25% contingency fee.[95] That reason may be reason enough. Additionally, to enhance the persuasion factor, a declaration of one or more class counsel typically accompanies a fee application and usually provides a summary of the time spent by counsel. At the least, the raw fee records can serve as a backup because it is not unusual for district court judges to ask counsel for additional support.[96] Finally, and not unimportantly, should fees be awarded to multiple attorneys who are grouped as "class counsel," the raw records may be helpful to allocate the division of fees.[97] These are all good reasons.

The alternative—if accurate records are not kept—can be perilous: the court can strike or reduce excessive or redundant records and accordingly reduce the amount of the fee award sought.[98] Even worse, the district court can call into question the attorney's credibility and truthfulness.[99] If an attorney did not maintain contemporary time records, many district courts will accept recreated time records as evidence of time expended.[100] Such a reconstruction, even when faced with objections of unreliability, has been deemed acceptable.[101]

Many district court judges have indicated that an estimate or a sampling of time is acceptable.[102] The typical practice is for class counsel is to submit summaries of time, often categorized, through declarations or affidavits.[103] This is done to show enhancement of the

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95. *Camden I Condo. Ass'n*, 946 F.2d at 775. Adjustments of the percentage amount rely on the *Johnson* factors which include the "time and labor required" which must be shown. *Id.* at 772.

96. Hirsch et. al., *supra* note 4, at 103–05.

97. In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 357 (N.D. Ga. 1993) ("Ideally, allocation is a private matter to be handled among class counsel.").

98. *Norman*, 836 F.2d at 1301.

99. For example, in *Ramsey*, after a review of time records, the district court sided against plaintiffs' counsel believing that some rounding off to the nearest quarter hour did occur despite contradictory testimony of one of plaintiff's counsel, that is, "neither his firm nor he individually has a policy of rounding off time entries to the nearest quarter hour and that, 'typically, . . . I don't do any rounding at all.'" *Ramsey*, 2000 WL 426187, at *4–5.

100. Alba Conte, *1 Attorney Fee Awards* § 4:26 (3rd ed. 2021).

101. Jean v. Nelson, 863 F.2d 759, 772 (11th Cir. 1988), *aff'd sub nom*. Comm'r, I.N.S. v. Jean, 496 U.S. 154, 166 (1990).

102. Hirsch et. al., *supra* note 4, at 103–05.

103. *See* Williams v. Mohawk Indus., Inc., No. 4:04-CV-0003-HLM, 2010 U.S. Dist. LEXIS 152308, at *10 (N.D. Ga. July 22, 2010) (declarations used describing attorneys' activities).

percentage or to provide the court a useful cross-check. If there is a call to provide more detail, then class counsel can file the submissions to satisfy an objection or a court inquiry. Knowing the district court's preferences is helpful.

C. Fee-Shifting Cases: A Good Idea that Needs Improvement

Fee-shifting cases start with the lodestar, which the Supreme Court has said must be used.[104] Lodestar cases typically involve hourly fees that are awarded through statutes or agreements in which the opposing party—and not the class members—pay "prevailing market rates in the relevant community."[105] It is the classic English Rule in motion. It is incumbent on a fee applicant, therefore, to demonstrate the number of hours worked and multiply this by the applicable prevailing hourly rates.[106]

1. Prevailing Party

To be eligible for a fee award, the plaintiff must be a prevailing party on "any significant claim affording some of the relief sought."[107] The Supreme Court initially allowed a highly flexible definition for "prevailing party," not limiting it just to judgments against a defendant, but expanding it to monetary settlements,[108] or even a "change in conduct that redresses the plaintiff's grievances."[109] This became known as the "catalyst theory."[110]

But years later, the breadth of the catalyst theory became procedurally hampered by virtue of *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*.[111] *Buckhannon* initially caused an uproar in the legal community because it excluded attorney's fees to any party who did not receive a judgment on the merits or obtain a court-ordered consent decree.[112] This, explained the Court, would cause a "material alteration of the legal relationship of the parties" that was necessary to permit such an

104. *City of Burlington*, 505 U.S. at 562.

105. *Blum*, 465 U.S. at 895.

106. *Hensley*, 461 U.S. at 424.

107. Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791 (1989).

108. Maher v. Gagne, 448 U.S. 122, 129 (1980) ("The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees.").

109. Hewitt v. Helms, 482 U.S. 755, 760–61 (1987).

110. *Id.* at 763.

111. 532 U.S. 598 (2001).

112. *Id.* at 601.

award.[113] But, while the importance of *Buckhannon* may apply in many different situations, it is virtually obsolete as it concerns class action cases. This is because Federal Rule of Civil Procedure (FRCP) 23(e) requires court approval for settlements, dismissals, or compromises, effectively thwarting any *Buckhannon*-style objections.[114]

2. Time Records and Billing Judgment

For time records, the hours recorded must be "reasonably expended" and an attorney must exercise "billing judgment," removing excessive or redundant hours.[115] It can be recorded on a per task basis or even in "block billing."[116] It can also include reasonable time expended for those who contributed to the work product, such as paralegals and law clerks at marketplace rates.[117]

As for billing judgment, knowing whether or not the task performed may be tallied as compensable is important. For example, prosecuting one lawsuit containing unrelated claims with mixed results for success can be problematic; only the successful claims can be deemed prevailing. The time put into the unsuccessful claims is not compensable.[118] However, the Supreme Court has acknowledged that time expended towards multiple claims with mixed results that "involve a common core of facts" or are "based on related legal theories" can be difficult to divide from the litigation as a whole.[119] Taking this cue, the Eleventh Circuit has affirmed district courts' refusals to reduce a lodestar among successful and non-successful claims when the case facts were "inextricably intertwined" in a race discrimination suit,[120] and "overlapping and intertwined," in a First Amendment wrongful discharge case.[121] But, this should not be taken as a panacea on lawsuits containing multiple claims with mixed success: the Eleventh

113. *Id.* at 604.

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

115. *Hensley*, 461 U.S. at 434.

116. "Block billing" details tasks into one time entry without a time breakdown for each task. This has been approved as "reasonable and efficient" and not to be "discouraged." Spurlock v. Complete Cash Holdings, LLC, No. 4:19-CV-219-AT, 2021 U.S. Dist. LEXIS 94598, at *6 (N.D. Ga. May 14, 2021).

117. Missouri v. Jenkins, 491 U.S. 274, 285 (1989). *See Jean*, 863 F.2d at 778 (holding law clerk and paralegal time is recoverable but "only to the extent that the paralegal performs work traditionally done by an attorney.").

118. *Hensley*, 461 U.S. at 434–35.

119. *Id.* at 435.

120. Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1292 (11th Cir. 2008).

121. Williams v. Roberts, 904 F.2d 634, 640 (11th Cir. 1990).

Circuit has taken a case-by-case approach and has also excluded hours on the non-successful claims.[122]

Categories of expended time deemed compensable in fee-shifting cases include time invested in a matter prior to the lawyer-client relationship,[123] time spent on soliciting and vetting potential class representatives,[124] travel time,[125] and time spent on preparing the fee application.[126] Class counsel should therefore exercise billing judgment here and not go overboard loading up questionable hours. The often-repeated proverb "pigs get fed, hogs get slaughtered" can—and does—happen as similar types of motions get decided.[127] An outrageous request for fees can result in an applicant receiving no fee at all.[128]

3. Prevailing Market Rates

The other half of the lodestar multiplication is determining what constitutes a reasonable hourly rate. In the Eleventh Circuit, "[a] reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation."[129] The relevant market is "the place where the case is filed."[130] A fee applicant carries the burden to demonstrate such market rates and must provide evidence of

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122. Avila v. Coca-Cola Co., 849 F.2d 511, 514 (11th Cir. 1988) (holding that a lodestar be reexamined because claims were of a "different nature."). *See* Shannon v. Bellsouth Telecomm., Inc., 292 F.3d 712, 718 (11th Cir. 2002) (same result in mixed results concerning discrimination and retaliation claims).

123. Dowdell v. City of Apopka, Florida, 698 F.2d 1181, 1188 (11th Cir. 1983) (civil rights class action).

124. *In re Home Depot Inc.*, 931 F.3d at 1088 (contractual fee-shifting case).

125. Johnson v. Univ. Coll. of Univ. of Alabama, 706 F.2d 1205, 1208 (11th Cir. 1983); holding modified by Gaines v. Dougherty Cnty. Bd. of Educ., 775 F.2d 1565, 1568 (11th Cir. 1985) (reasonable travel time allowed, but rate may be reduced if no legal work was performed during travel).

126. Jonas v. Stack, 758 F.2d 567, 568 (11th Cir. 1985). But, for lodestar cross-check purposes, time spent preparing a fee application in a common-fund case is not allowed since that time does not benefit the absent class members. *See* William B. Rubenstein, *4 Newberg on Class Actions* § 14:7 (4th ed. 2021).

127. Park Cityz Realty, LLC v. Archos Capital, LLC, No. 2:20-CV-00522-JCB, 2021 U.S. Dist. LEXIS 175974, at *2 (D. Utah Sept. 15, 2021) (court applied this adage to plaintiffs seeking excessive fees and costs in motion for sanctions).

128. Fair Hous. Council of Greater Washington v. Landow, 999 F.2d 92, 98 (4th Cir. 1993) (fee request so outrageously excessive it shocked the conscience of the court, resulting in no fee recovery).

129. *Norman*, 836 F.2d at 1299; *see Blum*, 465 U.S. at 895.

130. Am. Civil Liberties Union of Georgia v. Barnes, 168 F.3d 423, 437 (11th Cir. 1999) (citing Cullens v. Georgia Dep't. of Transp., 29 F.3d 1489, 1494 (11th Cir. 1994)).

rates "actually billed and paid in similar lawsuits."[131] Proof is often shown through declarations or affidavits, fee award studies, expert testimony, and even discovery from the opposing party demonstrating the opposition's hourly rate.[132] In addition, some or all of the relevant *Johnson* factors may be used.[133] The district court itself also may use its own experience and expertise to determine what is reasonable.[134]

4. Multipliers: "A Little Help?"

In *Muehler v. Land O' Lakes, Inc.*,[135] Judge Miles W. Lord passionately wrote about attorney's fees in class actions, stating in part:

> The contingent fee and the class action are "the poor man's keys to the courthouse." Both vehicles allow the average citizen and taxpayer to have their injuries redressed and their rights protected. Both permit persons of limited resources to obtain competent legal counsel, an essential ingredient in our adversary system of justice. And both are under constant attack.[136]

In fee-shifting cases, a policy to encourage attorneys to prosecute a bad actor's violation of a statute is likewise no less compelling to ensure competent representation. But, the gap between what a common-fund case pays and what a lodestar pays is widening. Lodestar cases are simply less desirable to take on and prosecute. And like the pre-contingent fee era of America's colonial days, straight lodestar cases almost always pay less than a comparable common-fund fee case. Monetary enhancements to compensate lawyers for the risk of nonrecovery seems almost nonexistent.

The Supreme Court has helped a little bit, but not much. It has said that reasonable hours times a reasonable rate "does not end the inquiry" and that "other considerations" may allow for an upward (or downward) adjustment of fees.[137] But, this was later narrowed to mean that the lodestar figure was still considered to be a "strong presumption" for reasonableness, and that only a rare circumstance will trigger an adjustment where the lodestar itself is not reasonable and

131. *Norman*, 836 F.2d at 1299.

132. *See generally* Conte, *supra* note 100, at 45–49.

133. Maner v. Linkan LLC, 602 F. App'x 489, 493 (11th Cir. 2015).

134. Loranger v. Stierheim, 10 F.3d 776, 781 (11th Cir. 1994) (acknowledging that district court is itself an expert who may draw upon its own knowledge and experience to determine prevailing market rates).

135. 617 F. Supp. 1370, 1370 (D. Minn. 1985).

136. *Id.* at 1375.

137. *Hensley*, 461 U.S. at 434.

otherwise inadequate.[138] Arguably, the Court is still encouraging attorneys to take on lodestar cases since it did not wipe out enhancements altogether. [139]

In *Perdue v. Kenny A.*, the Court indicated at least three situations in which an upward or downward adjustment of fees using the lodestar method is possible: (1) the method for determining the hourly rate during the lodestar calculation is an inadequate measure of the attorney's true market value; (2) there is an extraordinary outlay of expenses borne by the attorney and litigation is exceptionally protracted; and (3) extraordinary circumstances result in an exceptional delay to the payment of fees to the attorney.[140] By its near rebuke of the *Johnson* factors, as well as other previous decisions, *Perdue's* realignment of how adjustments may be justified seemingly consolidates or rebrands some of the non-subsumed *Johnson* factors into a new package.

The Eleventh Circuit; however, has strayed slightly from these guidelines, at least to the extent of analyzing lodestar enhancements through the lens of the *Johnson* factors. Whether or not this constitutes a departure from the rare circumstance to move a proposed lodestar upward or downward remains to be seen. But, in *In re Home Depot, Inc.*, the Eleventh Circuit clarified its standards for lodestar adjustments by employing use of the *Johnson* factors to "determine if the proposed [hourly] rate accurately reflects the true worth of counsel."[141] This was done despite *Perdue*'s realignment of the *Johnson* factors. Does this mean that for lodestar adjustments, the Eleventh Circuit still endorses the *Johnson* factors? Although the *Johnson* factors did face intense criticism throughout *In re Home Depot*, *Inc.*, the discussion regarding enhancements is not over. But, where the discussion may lead is anyone's guess.

In a bit of irony, enhancements to a lodestar are most often discussed when attorneys attempt to justify the reasonableness of their percentage-take in common fund, not lodestar, fee applications.

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138. *Perdue*, 559 U.S. at 554.

139. For a discussion of the rationale behind enhancement, *see* 7B Wright, Miller, & Kane, *Federal Practice and Procedure Civil 3rd* § 1803.1 (West 2005) ("[S]ince the objective of the award is to create a financial incentive to initiate socially desirable litigation and thereby enhance access to the adjudicative process, taking into account the amount of the benefit actually produced and allowing fees to be enhanced accordingly seems particularly appropriate.").

140. *Perdue*, 559 U.S. at 554–56.

141. *In re Home Depot, Inc.*, 931 F.2d at 1091. Ultimately, it was decided that the district court had abused its discretion to use a multiplier to account for risk. This was not an appropriate basis for enhancement. *Id.* at 1084.

Enhancement of lodestar amounts are usually expressed as "multipliers." Typically, class counsel will quantify the amount requested for the fee—often expressed as a dollar amount of the monetary fund, the common benefit, or some combination of the two—and divide it by lodestar amount, which equates to a "multiplier."[142] Percentage-of-the-fund fee applications with lodestar multipliers averaging three, have been approved as reasonable within the Eleventh Circuit.[143] This is called or known as the "lodestar cross-check" and it is used as a "check" or a "cross-check" to demonstrate reasonableness in common fund applications. It is a useful tool in a class action lawyer's toolbox, but such a tool is no fix-it in encouraging competent counsel to prosecute violations of socially desirable statutes.

The bottom line is this: lawyers need to be paid well. Lodestar fee applications should be enhanced to make them comparable to common fund cases. This would give a huge boost to statutory fee-shifting cases and fulfill the legislative imperative to enforce compliance of socially desirable statutes. Such a reform lies with Congress and not the courts.

5. A Hybrid of Sorts: the Lodestar Cross-Check

The lodestar cross-check, discussed in the previous section, can effectively demonstrate the reasonableness of a fee award in common-fund cases.[144] This tool should be used in all percentage-of-the-fund fee applications. Establishing a lodestar, therefore, is an important starting point to demonstrate that the percentage of the common-fund applied for is reasonable. The end goal for class counsel is to show that the fee derived from the common-fund calculation is not out of whack when compared to or "cross-checked" with a lodestar computation.[145] Multipliers are then used, also as described in the previous section, to demonstrate that a common-fund award and a lodestar award (with a "reasonable" multiplier) are roughly equivalent. The cross-check will often satisfy district courts that the approved percentage-of-the-common-fund is reasonable. Such cross-checks are not required in the

142. *See In re* Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 271 n. 16 (D.N.H. 2007).

143. Behrens v. Wometco Enter., Inc., 118 F.R.D. 534, 549 (S.D. Fla. 1988), *aff'd sub nom*. Behrens v. Wometco Enter., 899 F.2d 21 (11th Cir. 1990).

144. *In re Home Depot Inc.*, 931 F.2d at 1091 ("Courts often use a cross-check to ensure that the fee produced by the chosen method is in the ballpark of an appropriate fee.").

145. *Id.*

Eleventh Circuit,[146] but the device it is widely used here and elsewhere.[147]

IV. PROBLEMS WITH COMMON-FUND APPLICATIONS

A. Choice of Law Considerations

If the parties can agree on the source of law that governs the settlement agreement, it should be inserted as one of the settlement provisions. But, if no agreement can be reached, the parties risk forcing the case into ponderous choice of law issues—causing the case to travel into an ionizing nebula sputtering gases of uncertainty and delay. No party's attorney or judge wants to go there. The prudent move is to agree on a choice of law provision.

If there is no agreement for which jurisdiction controls, courts sitting in diversity usually evaluate choice of law rules under the principles established by the Erie Doctrine.[148] Where a federal question is at stake, federal law rules. This becomes more problematic in multi-district litigation (MDL) situations.

Although it may be counterintuitive to some, the power of a federal court to award attorney's fees in a class action case is not derived from Federal Rule of Civil Procedure (FRCP) 23(h) itself.[149] Nor is it derived from a district court's inherent federal equitable powers of awarding fees due to the unjust enrichment of class members.[150] Instead, State law, rather than federal common law, normally applies because contract interpretation of a settlement agreement is a matter of state contract law.[151] But as a practical matter, the parties often agree to adopt the federal law of the jurisdiction where the case sits as the controlling jurisdiction.

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146. *In re Equifax Customer Data Sec. Breach Litig.*, 999 F.3d at 1280 n. 26.

147. For example, an examination of 431 PSLRA class action settlements from 2007 through 2012 indicated that 92.16% of all fee applications employed a cross-check analysis. *See* Lynn A. Baker, et al., *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1387 n. 73 (2015).

148. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 64 (1938).

149. Wright, et al.*, supra* note 139. *See In re* Volkswagen & Audi Warranty Extension Litig., 692 F.3d 4, 15 (1st Cir. 2012) ("We reject the argument that Rule 23(h) provides a basis for applying federal-law principles to the award of attorneys' fees here.").

150. *In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d at 16.

151. *In re* Chira, 567 F.3d 1307, 1311 (11th Cir. 2009).

B. Clear-Sailing Provisions

A clear-sailing provision is a stipulation that the amount of the negotiated attorney's fees will not be contested by the defense side, so long as it falls at or beneath a negotiated cap.[152] It is a provision that is only occasionally inserted into agreements. Including such a provision into a settlement agreement gives something to both parties.[153] Plaintiffs get some assurances that their payday will not be delayed or bogged down in a protracted district court fight or otherwise held hostage to a prolonged appeal. And defendants get the certainty of knowing the amount of their total payout.[154]

Although the parties may like such agreements, these provisions are often perceived as red flags to objectors, district courts, and even some commentators.[155] The criticisms leveled are largely twofold, that (1) class counsel conducted simultaneous negotiations of settlement relief and attorney's fees—said to trigger concerns of ethical violations—to the detriment of the absent class members;[156] and (2) that class counsel may be more accepting of a smaller class award in exchange for preferred treatment of their attorney's fees.[157] These criticisms have raised concerns that the adversarial approach for fees is taken out of play, excepting objections by a class member or that the district court *sua sponte* has its own concerns. Additionally, doubts or suspicions are raised that class counsel secured its own path to fee procurement by bargaining away something of value that otherwise would have gone to the absent class members. These criticisms taken separately or together can be devastating.

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152. *In re Home Depot, Inc.*, 931 F.3d at 1081.

153. *Id.* at 1081 n. 14.

154. *Id.* at 1081.

155. Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 901 (2016).

156. Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1986) (holding that to avoid potential conflicts of interest and ethical improprieties, conducting a negotiation of fees must begin after a settlement on the merits was concluded). This became known as the *Prandini* Rule, and it has been widely followed on a broad scale by various federal courts. The Supreme Court soon after limited the *Prandini* Rule, finding that such a rule hampered settlements in civil rights fee-shifting cases and reversed *Prandini*. Evans v. Jeff D., 475 U.S. 717, 737–38 (1986) (holding "it is not necessary to construe the Fees Act [42 U.S.C. § 1988] as embodying a general rule prohibiting settlements conditioned on the waiver of fees in order to be faithful to the purposes of that Act."). Nevertheless, the shadow of the Prandini Rule lives on for common-fund cases.

157. *See* Malchman v. Davis, 761 F.2d 893, 907 (2d Cir. 1985) (Newman, J., concurring). Judge Newman's concurrence discussing these criticisms has been widely cited.

The FRCP enable district courts to carefully scrutinize settlements.[158] A district court can spoil an approval of a fee application or the class settlement, or both, by using a heightened scrutiny to analyze the reasonableness of the fees.[159] Ironically, the very act of a district court using a heightened scrutiny analysis could defeat the original purpose of inserting the clear-sailing provision into the settlement agreement in the first place, that is, by prolonging the approval process or jeopardizing the agreed upon amounts in the settlement.

There are only a few cases in the Eleventh Circuit that discuss clear-sailing agreements. That could be due to the nature of the agreements themselves limiting appellate action. But of the objections lodged that actually reached the appellate level, the judicial panels routinely rejected such complaints, often finding that the record supported no such allegations of collusion.[160] But, despite this lack of any reportable judicial temper tantrums towards clear-sailing arrangements, the risks of a clear-sailing agreement spoiling a settlement remain the same. The bottom line is that in all common-fund settlements, where the defense's only real interest is in a total settlement payout, defendants ought to stay in their own lane for matters regarding fee issues. Those are issues between the class counsel and the district court—not the defendants.[161]

C. "Kicker" Clauses

A kicker clause is an agreement "that provides that if the judge reduces the amount of fees that the proposed settlement awards to class counsel, the savings shall inure not to the class but to the defendant."[162] Judge Posner has called this clause a "gimmick for defeating objectors," as it deprives an objector proper standing to object.[163] This, he explained, is because the class receives no benefit from the reduction,

158. FED. R. CIV. P. 23(e)(2)(C)(iii) (authorizing district court's consideration regarding the terms for any proposed award of attorney's fees, including the time of payment).

159. *Redman*, 768 F.3d at 637 (reversing district court's approval of settlement agreement, noting that clear-sailing clause should have been subjected to "intense critical scrutiny," which it was not at the district court level).

160. *See* Carter v. Forjas Taurus, S.A., 701 F. App'x 759, 766 (11th Cir. 2017) (finding no collusion); *Waters*, 190 F.3d at 1293 n.4 (adopting district court finding of no collusion amid complaints surrounding clear-sailing agreement).

161. *In re Chira*, 567 F.3d at 1311.

162. *Pearson*, 772 F.3d at 786. *See* Poertner v. Gillette Co., 618 F. App'x. 624, 630 n. 6 (11th Cir. 2015) (quoting *In re* Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 949 (9th Cir. 2011) ("A 'kicker' clause provides that 'all fees not awarded would revert to defendants rather than be added to the *cy pres* fund or otherwise benefit the class.'")).

163. *Pearson*, 772 F.3d at 786.

and likewise, the objecting class member has no stake in the outcome of the dispute—depriving standing.[164]

Unsurprisingly, it is not unusual to see in a settlement agreement a clear-sailing provision accompanied with a kicker clause,[165] which is a strategic one-two punch. Depending on how the settlement agreement is structured, it could theoretically freeze or confine an objector's complaint about attorney's fees, which on its face, is a red flag showing collusion in some quarters. That said, appellate courts are beginning to take action to insure against such collusion between class counsel and the defense regarding these clauses.[166] Although this issue has not yet come to light in the Eleventh Circuit, counsel should be aware of the issues regarding a kicker clause and the implications of using it with a clear-sailing arrangement. If such clauses are used in tandem, as seems to be the trend, three words come to mind: proceed with caution.

V. MISCELLANEOUS MATTERS

A. Standards of Review

Once a fee application is submitted, the ultimate decision in awarding fees rests within the sound discretion of the district court.[167] This has been characterized as "wide,"[168] since the district court is in the "best position to calculate such an award."[169] But, that discretion is not unlimited,[170] and the district court must articulate a "concise but clear explanation of its reasons for the fee award."[171]

That decision may be appealed by any party or an objector after a final disposition of the merits as a final appealable decision.[172] An appellate court would thereafter determine whether the district court abused its discretion in its Order on Attorney's Fees. In other words, as

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164. *Id*.

165. *See In re Samsung Top-Load Washing Mach. Mktg., Sales Pracs. & Prod. Liab*. Litig., 997 F.3d at 1088.

166. *Id*. at 1091 (employing a "heightened scrutiny approach" where the two clauses are included in a settlement agreement); Cf. *In re* Southwest Airlines Voucher Litig., 799 F.3d 701, 712 (7th Cir. 2015) (calling for "intense critical scrutiny" for such a combination of clauses).

167. Yellow Pages Photos, Inc. v. Ziplocal, LP, 846 F.3d 1159, 1163 (11th Cir. 2017).

168. *Id.* at 1163.

169. *Id*.

170. *Id*. ("Unquestionably, the district court possesses wide discretion in calculating the amount and reasonableness of such an award"); *See Perdue*, 559 U.S. at 558 (district court's discretion not unlimited).

171. *Hensley*, 461 U.S. at 437.

172. 28 U.S.C. § 1291 (1982). *See* Conte, *supra* note 100, at § 2:29.

it was opined in *Gray v. Bostic*[173] in an *en banc* concurring opinion, "if a district court has abused its discretion, the court of appeals should not decide how to exercise the district court's discretion . . . ."[174] The abuse of discretion standard in the Eleventh Circuit is met if the district court failed to apply the proper legal standard, if proper procedures were not followed in making the fee determination, or if the fee determination is based on findings of fact that are clearly erroneous.[175]

B. Procedures

The procedures are referenced in FRCP 23(h).[176] A claim for an award must be made pursuant to FRCP 54(d)(2).[177] The timing to file the application should be made before the expiration of allowable objections so that objectors have notice and a sufficient opportunity to be heard.[178] Since proof is required to demonstrate reasonableness, affidavits, declarations, time records (or a synopsis), and evidence must be submitted. Typically, the application accompanies the motion to approve the settlement. Although not required, the district often hears each matter together in the same proceeding and usually decides both in one written ruling.[179] Thereafter, the district court must find facts and state its conclusions of law as provided in FRCP 52(a).[180] Only then can an appellate court give this ruling a meaningful review.

VI. CONCLUSION

A central theme of this article is to provide an honest assessment of the law profession with respect to the pursuit of attorney's fees, and in particular, class action fees. Notwithstanding the risks involved in prosecuting a big class action case (and the risk of not winning is substantial), the attraction of getting huge fees can be powerful and

173. 625 F.3d 692 (11th Cir. 2010).

174. *Id.* at 693 (Carnes, J., concurring) (concurring in the denial of rehearing *en banc*).

175. *In re Home Depot, Inc.*, 931 F.3d at 1078.

176. FED. R. CIV. P. 23(h).

177. FED. R. CIV. P. 54(d)(2).

178. Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1253 (11th Cir. 2020) (holding that district court abused its discretion under FRCP 23(h) by requiring class members to object to fee petition prior to the time fee petition was filed).

179. Although the district court is required to hold a hearing to determine whether a settlement is fair, reasonable, and adequate pursuant to FRCP 23(e)(2), often called a "fairness hearing," it is not required to hold a hearing on fees. *See* FED. R. CIV. P. 23(h)(3) (The court may hold a hearing [on attorney's fees and nontaxable costs]). As a matter of convenience, courts often rule on the fee application at the time it rules on the settlement or shortly thereafter. Conte, *supra* note 100, at § 2:21, at 200–01.

180. FED. R. CIV. P. 23(h)(3).

compelling. The hopes of winning "the big case" can be overwhelming and a day or two may not go by when the potential for that big fee is detached from the sub-conscience. But that is only human. Like anyone, lawyers seek a happy life and being financially secure is but one major component.

Financial security is not the only component to a happy life. The primary components are simple: work hard, maintain hope, be fair, show kindness, and strive for high morals. This goes for everyone, attorneys too, and almost all the ones that I know adhere to these principles.

But, we attorneys are often labeled as greedy, dishonest, and unethical. Dickens' vivid description of lawyer Uriah Heep again comes to mind, with his "lank forefinger" leaving "clammy tracks" on the page "like a snail."[181] And separately, the class action device is often branded as a disreputable way for that greedy lawyer to take millions off the backs of hardworking, decent-minded, and similarly situated individuals who are the victims of a bad actor's enterprise. But this is unfair branding. I wholeheartedly agree with Judge Lord, cited previously in this Article, who said:

> We as members of the judiciary must be ever watchful to avoid being isolated from the experience of those who are actively engaged in the practice of law. It is difficult to evaluate the effort it takes to successfully and ethically prosecute a large plaintiffs' class action suit. It is an experience in which few of us have participated. The dimensions of the undertaking are awesome. The time and effort expended test the ability of many lawyers to survive during the lifetime of the action. Some plaintiffs' lawyers have worked on cases before me for as long as ten years and spent a substantial portion of their billable time each year on the effort. At the end they may have received a fee in the millions of dollars. However, averaged out over the years and subtracting taxes and the expenses of a law office, it averages out to a very moderate payment. It certainly does not equate with any bonanza or pot of gold.[182]

Judge Lord concluded about his personal experience: "My personal experience is that the plaintiffs' class action bar is responsible, ethical, and a credit to the legal profession."[183] This is true.

I have practiced with brilliant Ivy League lawyers who receive a fraction of their true value simply because they are working on salary

181. Dickens, *supra* note 2.

182. *Muehler*, 617 F. Supp. at 1376.

183. *Id*. at 1378.

for nonprofit organizations. They chose to do this. I have practiced with large-firm attorneys who are smart, kind, and more concerned about doing the right thing rather than earning a buck. And, I have practiced with a variety of individual attorneys, who are wise and wonderful, all of whom carry deep convictions of a just case result. These are good people and their motivations are marked by strong moral rectitude.

Attorneys today are as inventive in finding ways to garner fees as they were over 200 years ago. But, that is no reason to tar and feather the profession. For the few bad apples out there, and there are some, there are many checkpoints and safety valves to ensure that the fee application process is a fair process. The process of determining whether or not a fee is reasonable is far from perfect. But it does work.