DEFENDING AND RESOLVING FEE SHIFTING CASES, ESPECIALLY WHEN COMPENSATORY DAMAGES ARE NIL, AND THE ATTORNEY'S FEES DRIVE THE CASE

Remzy D. Bitar  
Crivello Carlson, S.C.  
rbitar@crivellocarlson.com  
Wisconsin Defense Counsel  
Spring Conference  
Thursday, April 25, 2013

I. INTRODUCTION

A. Recent Examples of Fee Shifting in the News

1. “After years of litigation, Baker Botts was awarded another $5.2 million in legal fees on Tuesday for defending its earlier $142 million fee award for representing a copper mining operation in a bankruptcy case. Asarco objected to the $142 million, particularly a $4 million enhancement. In his Tuesday ruling awarding Baker Botts another $5.2 million, U.S. District Judge Andrew Hanen praised the law firm for what he called ‘extraordinary’ work in the Brownsville, Texas, case.” See “Baker Botts gets another $5.2M in litigation over $142M fee award in $6B bankruptcy case,” www.abajournal.com (3/28/2013).

2. In a settlement related to Bernard Madoff’s Ponzi scheme, a recent New York Law Journal story, “A.G. Blasts Fee Request From Counsel Madoff Investors,” reports that New York’s Attorney General criticized as unreasonable and “wildly excessive” a $42 million fee request from plaintiffs lawyers representing investors.

3. The Eastern District of Pennsylvania, presiding over the multidistrict litigation involving the diabetes drug Avandia, approved over $140 million in attorney fees. See “Judge Approves Nearly $144 Mil. In Avandia MDL Attorney Fees,” The Legal Intelligencer (11/12/12).
4. “[A] Boston federal judge erred when he awarded $30 million in fees in a class action against Volkswagen and Audi over engine defects. The appeals court ordered the trial judge to try again, starting from the lawyers’ hourly rate total of $7.7 million.” See Alison Frankel, “1st Circuit slashes $30 million fee award in Audi class action,” Thomson Reuters News and Insights (7/30/12).

5. “[T]he Delaware Supreme Court upheld a record $300 million attorney fee award in a shareholder derivative suit. [The appellant] argued that [the trial court] abused his discretion by awarding an amount that pays the plaintiff's lawyers over $35,000 per hour, recounts the Wall Street Journal Law Blog....” See “Top Del. Court OKs Record $300M Attorney Fee Award,” ABA Journal (8/28/12).

6. In a contract dispute, “a federal judge has rejected a ‘breathtaking’ $3.1 million fee request submitted by [a firm], awarding the firm only a fraction of the money sought for winning a fight over a down payment on a luxury apartment co-operative. Southern District Judge William Pauley said he conducted a ‘mind-numbing review’ of [the firm’s] billing records ... ‘Astonishingly, [the firm’s] attorneys, paralegals, and staff amassed 5,536.4 billable hours on this matter, employing four partners, three special counsel, ten associates, eight paralegals and a summer associate,’ ...with partners billing range of $680 per hour to $1025 per hour, associates from $440 per hour to $745 per hour, paralegals from $250 per hour to $295 per hour, and ... a summer associate for $335 per hour. [Judge] Pauley allowed only a total award of $475,000 in legal fees and expenses.” See “Federal Judge Reduces Prevailing Defendant’s Fee Request,” the National Association of Legal Fee Analysis (NALFA) blog (9/18/2012).

B. American Rule vs. English Rule

1. The “American Rule”: each party bears its own attorney fees.

   a. Rationale: Considerations for the American Rule “include the possible deterrent effect that fee shifting
would have on poor litigants with meritorious claims, the
time, expense, and difficulty of litigating the fee question,
and the possibility that the principle of independent
advocacy might be threatened by having ‘the earnings of
the attorney flow from the pen of the judge before whom
he argues.” Summit Valley Industries, Inc. v.

2. The “English Rule”: fees awarded to the prevailing party.

   a. Rationale: Seeks to decrease frivolous or unreasonable
      litigation. A party is entitled to legal representation to
      prosecute his or her claim and should not have to incur
      the cost of this representation if the claim is meritorious.
      Because the rule encourages meritorious claims and
      discourages frivolous ones, it reduces litigation.

C. Purposes of Fee Shifting Statutes:

   1. “One purpose of allowing an award of attorney’s fees to a
      prevailing plaintiff is to disable defendants from inflicting with
      impunity small losses on the people whom they wrong.” Orth v.
      Wisconsin State Employees Union Counsel 24, 546 F.3d
      868, 875 (7th Cir. 2008); see also Fletcher v. City of Fort
      Wayne, 162 F.3d 975, 976 (7th Cir. 1998) (citation omitted) (“a
      plaintiff with a small claim who achieves a complete recovery is
      entitled to fees, because civil rights laws entitle victims of petty
      violations to relief. The cumulative effect of minor
      transgressions is considerable, yet they would not be deterred if
      fees were unavailable”).

   2. Private Attorney Generals: Some fee shifting statutes – such
      as the Civil Rights Attorney’s Fees Awards Act of 1976, 42
      U.S.C. § 1988 – are private attorney general measures intended
      to encourage litigation enforcing important rights.

   3. Market Theory: Under ordinary market conditions, few
      attorneys have an incentive to offer representation to claimants,
      who may be seeking little to non-monetary relief. Statutes that
      authorize an award of attorney’s fees in such cases can shift
      market forces, creating incentives for attorneys to take clients
and pursue meritorious claims that do not normally make sense from a business perspective.

4. **Double Standard:** For many fee shifting statutes a prevailing plaintiff “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” *Hensley v. Eckerhart*, 461 U.S. 424, 428 (1983). By contrast, a “prevailing defendant may recover an attorney’s fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant.” *Id.* at 428 n.2. The Supreme Court recently reviewed this asymmetry in *Fox v. Vice*, 131 S.Ct. ___ (2011) (when a civil rights lawsuit under Section 1983 includes both frivolous and non-frivolous claims, a court may award reasonable attorney’s fees to a defendant for costs that it would not have incurred “but for” the frivolous claims. That is, “if the defendant would have incurred [attorney’s fees] anyway, to defend against non-frivolous claims,” such as a deposition addressing both frivolous and non-frivolous claims, “then a court has no basis for transferring the expense to the plaintiff.”).

**D. Federal Research and Statistics**

1. It is difficult to comprehensively determine the total number of claims filed for attorney fees, who receive payments, in what amounts, and under what statutes.

2. The table below reflects the federal Government Accountability Office’s recent efforts to analyze Treasury data based upon a request of several federal agencies and Congressional members to reform certain fee shifting laws.

<table>
<thead>
<tr>
<th>Statute under which case was brought</th>
<th>Attorney fees and costs</th>
<th># of payments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Endangered Species Act, 16 U.S.C. § 1540</td>
<td>$21,298,971b</td>
<td>238</td>
</tr>
<tr>
<td>Civil Rights Act Title VII, 42 U.S.C. § 2000e-16</td>
<td>1,243,194</td>
<td>38</td>
</tr>
<tr>
<td>Tucker Act (inverse condemnation&amp; other claims), 28 U.S.C. § 1491</td>
<td>1,086,185</td>
<td>2</td>
</tr>
<tr>
<td>Privacy Act, 5 U.S.C. § 552a</td>
<td>953,180</td>
<td>1</td>
</tr>
</tbody>
</table>
Table from U.S. Government Accountability Office, Letter to Congressional Requesters (April 12, 2012)

Scope of GAO's report: “To conduct our work, we contacted 33 USDA and 42 Interior agencies; Treasury; and DOJ’s Civil Division, Environment and Natural Resources Division, and the Executive Office of United States Attorneys. We asked each agency if it maintained information on cases where attorney fees were sought, and for those that maintained this information, we asked them to provide the case name, party name, claim amount, date of the award or payment, payment amount, and statutes under which the cases were brought for fiscal years 2000 through 2010. Our scope included attorney fees involving USDA and Interior, namely those associated with administrative adjudications of claims as well as cases filed with the courts. Our scope included attorney fee payments regardless of the source of law authorizing the payment—independently applicable statutory fee-shifting provisions, EAJA subsection (b) or (d), or EAJA’s adversarial adjudication provisions—and regardless of whether the fees were paid from Treasury’s Judgment Fund or from an agency’s appropriations.” Id. at 3.

E. Some Suggested Reforms:

1. Proposed reforms include some of the following:

   a. Setting a lower, fixed, inflation adjusted hourly rate paid
for all cases subject to fee shifting.

b. Eliminating fee “enhancements” for expertise.

c. Restricting the criteria for various types of organizations to even be eligible for seeking fees.

d. Capping the total amount that can be collected by a litigant, both on an annual and on a longer-term basis.

e. For fee shifting against government units, allowing the government to argue that a decision was “substantially justified” as a basis for denying fees.

II. SOURCES OF FEE SHIFTING

A. Statutes

1. Legislative enactments act as the primary source for the award of attorney fees in particular circumstances.

B. Contracts

1. Many contracts also provide for fee shifting. This is one of the first things you should explore when handling a case involving a written contract. The terms of the fee-shifting provision generally control its meaning and scope. Court’s will not construe the contractual fee provision to permit recovery unless it is clear and unambiguous. See Woodhaven Homes and Realty Inc. v. Hotz, 396 F.3d 822, 825 (7th Cir. 2005) (applying Wisconsin law).

2. Some fee shifting contractual provisions may be void: there are some instances where contractual attorney fee provisions are considered to be void and unenforceable or against public policy. See e.g., Baierl v. McTaggart, 2001 WI 107, 245 Wis.2d 632, 629 N.W.2d 277 (fee-shifting provision in a residential lease found to be an unfair trade practice).
C. Equitable Doctrines

1. The American Rule is also subject to several judicially created exceptions, including:

   a. Wisconsin Courts have allowed attorney fees under certain circumstances even when there is no contractual or statutory right of recovery. See Silverton Enterprises v. General Casualty Co., 143 Wis.2d 661, 675, 422 N.W.2d 154 (Ct. App. 1998) (stating that it is “more a rule of damages than an exception to the American Rule” when attorney fees incurred as a result of another’s tortious conduct or breach of contract are recoverable). See also DeChant v. Monach Life Ins. Co., 200 Wis.2d 559, 572-573 547 N.W.2d 592 (1996) (court held that if an insurer denies coverage in bad faith, the insured may recover damages based on the attorney fees incurred in bringing a legal action against the insurer to enforce the policy); Majorowicz v. Allied Mutual Ins. Co., 212 Wis.2d 513, 536-537, 569 N.W.2d 472 (Ct. App. 1997) (attorney fees incurred in obtaining a punitive damages award in a bad faith action were not recoverable).

   b. Duty to Defend and Insurance Coverage Disputes: The liability insurer that breaches a duty to defend its policyholder must compensate the policyholder for the attorney fees incurred in successfully establishing coverage. See Lievovich v. Minnesota Ins. Co., 2007 WI App. 28, ¶ 17, 299 Wis.2d 331, 728 N.W.2d 357; Elliott v. Donahue, 169 Wis.2d 310, 314, 485 N.W.2d 403, 404 (1992) (“When the insurer declines to provide insurance coverage thereby forcing the insured to litigate the issue of coverage for a claim that is alleged to fall under the insurance policy, the insured is deprived of the benefit that was bargained for and paid for with the periodic premium payments. We hold that sec. 806.04(8), Stats. [The Uniform Declaratory Judgments Act], which recognizes the principles of equity, permits the recovery of reasonable attorney fees incurred by the insured in successfully establishing coverage.”). However, “Elliott
did not . . . fashion a rule that the duty to indemnify requires the insurer to pay the insured's attorney fees, when it loses a contest over coverage.” *See Reid v. Benz*, 2001 WI 106, ¶ 32, 245 Wis.2d 658, 629 N.W.2d 262 (the insurer properly sought a declaration of coverage while staying liability and, as such, did not breach its duty to defend. Even though the insured ultimately established that the insurer owed it indemnity coverage under the policy and had to expend money to establish coverage that fell within the ambit of the insurance policy, the basis for the attorney fees award in *Elliott* was absent, and the circuit court’s order awarding fees to the insured was reversed.).

c. **Subrogation:** Fees have been awarded in certain circumstances in subrogation actions. *See Oakley v. Wis. Fireman's Fund*, 162 Wis.2d 821, 827, 470 N.W.2d 882 (1991) (Wis. Stat. § 803.03(2)(b) provides that a party which has a claim based on subrogation (the subrogee) has three options. Under the “second option,” the subrogee may agree to have his interest represented by the party who caused the joinder by signing a written waiver of the right to participate in the action which expresses consent to be bound by the judgment in the action. “If the second option is chosen, the party that represents the interests of the subrogee and obtains a judgment favorable to the subrogee may be awarded reasonable attorney’s fees by the court.”).

d. **Restitution:** Attorney fees are recoverable as special damages pursuant to Wis. Stat. § 973.20(5)(a) because they can be recovered in a civil action against a defendant for his or her conduct in the commission of a crime. *See State v. Anderson*, 215 Wis.2d 673, 682-83, 573 N.W.2d 872 (Ct.App. 1997).

e. **Equity:** When a trial court is sitting in equity, it may in the exercise of its discretion fashion a remedy which includes an award of attorney fees. *Gunlach v. Estate of Pirsch*, 148 Wis.2d 425, 433, 435 N.W.2d 317, 321 (Ct. App. 1988). To do so, the party’s conduct must be “fraudulent, shocking or in bad faith.” *Id.*
f. **Common Fund Doctrine:** The common fund doctrine recognizes that 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.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Wisconsin Retired Teachers Ass’n v. Employe Trust Funds Bd.*, 207 Wis.2d 1, 36, 558 N.W.2d 83 (1997). This rule is based on the “free rider” problem, to wit: “persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant’s expense.” *Wisconsin Retired Teachers Ass’n*, 207 Wis. 2d at 36. Elements of the appropriate application of the common fund doctrine include the following three factors: (1) whether the classes of beneficiaries are small in number and easily identifiable, (2) whether the benefits can be accurately traced, and (3) whether the costs can be shifted with some exactitude to those benefiting. *Id. at 37.*

III. FEDERAL FEE SHIFTING STATUTES

A. Federal Fee Shifting Statutes

Listing every federal fee shifting statute is beyond the scope of this outline; there are well over 200. Generally, when a citizen prevails in litigation against the federal government, the Equal Access to Justice Act (EAJA - 28 U.S.C. § 2412) is the applicable fee-shifting statute. Two prominent examples of cases where EAJA applies are (1) suits against federal agencies for failing to obey statutory and regulatory mandates and to challenge arbitrary and capricious agency actions under the Administrative Procedure Act; and (2) cases involving disability claims by social security claimants and veterans.

Other, more specific fee-shifting statutes may apply depending on the nature of the suit, such as those under the Freedom of Information Act (5 U.S.C. § 552(a)(4)(E)), the Civil Rights Act’s (42 U.S.C. § 2000e-5(k)) provisions barring employment discrimination and the Civil Rights
Attorney’s Fees Awards Act of 1976 (42 U.S.C. § 1988(b)). Most Supreme Court decisions involving attorney’s fees have interpreted civil rights statutes.

B. Other Relevant Federal Statutes

1. Rule 23(h): Class Actions
   a. Court may award “reasonable attorney’s fees” that are “authorized by law or the parties agreement.” Rule 23(h).
   b. Procedures, including provisions for notice, hearing, assignment of a special master and the right of a class member to object to the fee petition, are set forth in Rule 23(h).

2. Rule 54: Costs
   a. Rule 54(d) and 28 U.S.C. § 1920 define the power of the federal courts to award costs and the types of costs.
   b. Rule 54(d)(2)(B) requires fee motions to be filed no later than 14 days after entry of judgment “[u]nless otherwise provided by statute or order of the court . . . .”
   c. Other procedural requirements regarding fee disputes are set forth in Rule 54(d)(2).

IV. FEE SHIFTING STATUTES IN WISCONSIN

A. Wisconsin Fee Shifting Statutes

As in the federal system, there are numerous fee shifting statutes. These statutes are designed to provide incentives to persons to prosecute important state policies, like the State’s public records laws (Wis. Stat. § 19.37(2)) and the open meetings laws (Wis. Stat. § 19.97(4)). Some statutes look to provide compensation, such in inverse condemnation actions (Wis. Stat. § 32.28(3)). Other statutes that allow attorneys fees include trademark violations (Wis. Stat. §
B. Other Relevant Wisconsin Authorities

1. **Wis. Stat. § 814.04(1)(a):** "When the amount recovered or the value of the property involved is greater than the maximum amount specified in s. 799.01 (1) (d), attorney fees shall be $500; when it is equal to or less than the maximum amount specified in s. 799.01 (1) (d), but is $1,000 or more, attorney fees shall be $300; when it is less than $1,000, attorney fees shall be $100. In all other cases in which there is no amount recovered or that do not involve property, attorney fees shall be $300."

2. **Wis. Stat. § 814.04(1)(c):** No attorney fees for unrepresented party.

3. **Wis. Stat. § 802.05(3) – Sanctions for Frivolous Lawsuits:** Formerly Wis. Stat. § 814.025 (costs upon frivolous claims and counterclaims) and Wis. Stat. § 802.05 (signing of pleadings, motions and other papers; sanctions), the consolidated rule still allows for a discretionary award of attorneys fees where appropriate under the circumstances. “Factors that the court may consider in imposing sanctions include the following: (1) whether the alleged frivolous conduct was part of a pattern of activity or an isolated event; (2) whether the conduct infected the entire pleading or was an isolated claim or defense; and (3) whether the attorney or party has engaged in similar conduct in other litigation. Sanctions …may include an award of actual fees and costs to the party victimized by the frivolous conduct.”

**Comments to Wis. Stat. § 802.05(3).**

4. **Wis. Stat. § 809.25(3) – Frivolous Appeals:** If court of appeals finds an appeal or cross-appeal to be frivolous, it may
award reasonable attorneys fees. See *Tennyson v. School Dist. of the Menomonie Area*, 2000 WI App 21, ¶¶ 33-35, 232 Wis.2d 267, 606 N.W.2d 594. In order to impose sanctions, one or more of the following must exist: (1) the appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another; or (2) the party or the party’s attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. *Id.*

5. **Wis. Stat. § 814.045:** Creates a presumptive cap on attorney fee awards for all cases in which actual attorney fees can be awarded. Courts are required to presume that reasonable attorney fees do not exceed 3 times the amount of any compensatory damage award. Factors to be considered include:

a) The time and labor required by the attorney.

b) The novelty and difficulty of the questions involved in the action.

c) The skill requisite to perform the legal service properly.

d) The likelihood that the acceptance of the particular case precluded other employment by the attorney.

e) The fee customarily charged in the locality for similar legal services.

f) The amount of damages involved in the action.

h) The results obtained in the action.

i) The time limitations imposed by the client or by the circumstances of the action.

j) The experience, reputation, and ability of the attorney.
k) Whether the fee is fixed or contingent.

l) The complexity of the case.

m) Awards of costs and fees in similar cases.

n) The legitimacy or strength of any defenses or affirmative defenses asserted in the action.

o) Other factors the court deems important or necessary to consider under the circumstances of the case.

6. **Supreme Court Rule 20:1.5:** In determining the reasonableness of attorney fees, courts may consider:

a) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

b) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

c) the fee customarily charged in the locality for similar legal services;

d) the amount involved and the results obtained;

e) the time limitations imposed by the client or by the circumstances;

f) the nature and length of the professional relationship with the client;

g) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

h) whether the fee is fixed or contingent.
V. ABA MODEL RULE ON ATTORNEYS FEES

Rule 1.5: Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

VI. KEY ATTRIBUTES OF FEE SHIFTING STATUTES

A. “Prevailing Party”

1. Threshold Issue: Most fee shifting statutes require a “prevailing party” plaintiff. But see Hardt v. Reliance Standard Life Ins. Co., 130 S.Ct. 2149, 176 L. Ed. 2d 998 (2010) (since the term “prevailing” does not appear in the applicable section of the ERISA fee-shifting statute, the Supreme Court concluded that the prevailing party requirement does not apply. Instead, fees may be awarded if the party achieves “some success on the merits.”).

2. How much do you have to win?

a. In determining attorney’s fees, one of the more important factors is the “results obtained.” Hensley v. Eckerhart, 461 U.S. 424, 433-434 (1983).

b. A plaintiff is a “prevailing party” when he receives at least some relief on the merits of his claim, even nominal damages. Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep’t of Health and Human Res., 532 U.S. 598 (2001). See also Texas Teachers Ass’n. v.
Garland Sch. Dist., 489 U.S. 782, 791 (1989) (a prevailing party is “one who has succeeded on any significant claim affording it some of the relief sought ...”).

c. Losing on some issues may or may not result in a reduced fee-award amount. It does not affect “the availability of a fee award vel non.” Texas Teachers, 489 U.S. at 793.

3. What form the victory must take?

a. Catalyst Theory Rejected: For a party to be “prevailing” there must also be a “judicially sanctioned change in the legal relationship of the parties.” Buckhannon, 532 U.S. at 605. In Buckhannon, the Supreme Court rejected the “catalyst theory” for awarding attorney’s fees. A defendant’s decision to provide the plaintiff all of the relief requested in the complaint is insufficient for an award of attorney’s fees because there has been no “judicially sanctioned change in the legal relationship of the parties.” Id. at 605.

i. In response to Buckhannon, Congress restored the ability to recover fees as a catalyst in some statutes, like Freedom of Information Act (FOIA) cases. An FOIA complainant has “substantially prevailed” and is eligible for fees if the complainant has obtained relief through “a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.” 5 U.S.C. § 552(a)(4)(E)(ii).

b. Simply filing a lawsuit that prompts defendants to change illegal behavior voluntarily (i.e., acting as a “catalyst”) does not qualify the plaintiffs as prevailing parties. See Zessar v. Keith, 536 F.3d 788 (7th Cir. 2008) (Challenge to election laws which allowed rejection of voter’s absentee ballot without notice and hearing was moot since election laws were amended with no indication that prior law would be reenacted, and voter was not prevailing party for purposes of attorney fee award since
relationship of voter and election officials was not judicially altered).

c. Winning a judgment obviously qualifies a plaintiff as a prevailing party in most cases. But, the judgment must require “some action (or cessation of action) by the defendant.” *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). A judicial declaration alone does not suffice. *Id.* (concluding on successive appeal that the plaintiff was not a prevailing party despite a court of appeals holding that his due process rights were violated because the appellate court left it to the district court to fashion relief and the district court determined that the defendants were entitled to qualified immunity). The judgment may be for nominal relief, although in such cases a court may deny fees altogether to the prevailing plaintiff. See *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (“When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief the only reasonable fee is usually no fee at all.”).

d. Plaintiffs who obtain preliminary injunctions but ultimately lose on the merits are not entitled to fees. See *Sole v. Wyner*, 551 U.S. 74 (2007) (declining to bestow prevailing party status on a plaintiff whose motion for preliminary injunction was granted but who failed to prevail on the merits).

e. Key issue is how much “judicial imprimatur” for the change of the legal relationship between the parties is needed for a settlement agreement to qualify a plaintiff as a prevailing party. *Buckhannon*, 532 U.S. at 605. *Buckhannon* states that a plaintiff who secures a court-ordered consent decree is a prevailing party. *Id.* at 604. However, a litigant who achieves success through a “private settlement” is not. *Id.* Private settlements lack the “judicial approval and oversight involved in consent decrees.”
B. “Reasonable”

1. Even where an attorney fee award is justified, a prevailing plaintiff is only entitled to “reasonable” attorney’s fees. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

C. Burden of Proof

1. The plaintiff carries the burden of proving that the fees requested were both reasonable and necessary. *Id.*


D. The “Lodestar” Methodology

1. Under the lodestar method, the court multiplies the number of hours reasonably expended in the litigation by a reasonable hourly rate. The lodestar approach forms the “centerpiece” of attorney’s fee determinations. It applies even in cases where the attorney represents the prevailing party pursuant to a contingent fee agreement. *See Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989). *See also Stuart v. Weisflog’s Showroom*, 2008 WI 22, ¶¶ 45-47, 308 Wis.2d 103, 746 N.W.2d 762 (remanding where trial court used another approach rather than utilizing the “lodestar” methodology); *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶ 30, 275 Wis.2d 1, 683 N.W.2d 58 (following *Hensley*).

2. In *Hensley*, the Supreme Court set forth the legal principles governing the determination of attorney’s fee awards in civil rights cases under 42 U.S.C. § 1988. Initially, the court must determine a “lodestar” amount. The court may then reduce the lodestar amount by considering twelve other factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) 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 length of the professional relationship with the client; and (12) awards in similar cases. *Id. at 430 n.3.*

3. **Hourly Rate:** Plaintiffs’ attorneys are required to establish the reasonableness of their claimed hourly rate. “[T]he market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question.” *Bankston v. State of Ill., 60 F.3d 1249, 1256 (7th Cir. 1995).* The “attorney’s actual billing rate for comparable work is ‘presumptively appropriate’ to use as the market rate.” *Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 555 (7th Cir. 1999); Central States Pension Fund v. Central Cartage Co., 76 F.3d 114, 116-17 (7th Cir.1996)* (“[T]he union’s lawyer had a low rate for everything; that normal rate, we held, is the market rate.”). The court may also consider the prevailing market rate for attorneys who provide similar legal services in the community where the case is pending.

**E. Fee Enhancements**

1. Trial courts may award fee enhancements above the “lodestar” amount to lawyers for superior performance, but only in *rare* and *well-documented circumstances*.


   a. Plaintiffs, on behalf of a class of 3,000 foster children, brought a civil rights lawsuit against the State of Georgia alleging systematic deficiencies against Georgia’s foster care system. Plaintiff’s trial counsel included lawyers from a non-profit children’s rights advocacy group and private attorneys who took the case as a *pro bono* matter. The State opposed the children’s efforts to obtain expedited discovery and to enjoin the operation of two emergency shelters in the Atlanta area, but subsequently agreed to close the shelters after a hearing on the matter. The two sides then engaged in extensive discovery, during which the State rejected a request to conduct joint record review. The State also filed a motion for summary
judgment and moved to exclude expert witnesses that the children planned to call. The district court eventually denied those motions. After a series of mediation sessions aimed at resolving the litigation without trial, the parties agreed to a proposed consent decree that was intended to eliminate the greatest problems in the foster care system through what the district court described as “sweeping” reforms.

b. In addition to the reforms implemented by the consent decree, the parties also agreed that the children’s lawyers should recover a reasonable amount of attorney’s fees, in accordance with 42 U.S.C. § 1988.

c. The trial judge awarded a lodestar amount of approximately $6 million, then added on a performance enhancement of another $4.5 million, amounting to a 75% increase. The court explained that the attorneys had incurred expenses and costs during the duration of the case, took the case on a contingency basis, and achieved comprehensive relief for the class. The district court ruled the attorneys demonstrated “a higher degree of skill, commitment, dedication, and professionalism . . . than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench.” Id. at 1670.

d. The Supreme Court’s 5-4 majority rejected the fee enhancement request of $6 million.

e. The Court held that “superior attorney performance” can justify enhancement, but only in “rare” and “exceptional” circumstances that are not already “adequately taken into account in the lodestar calculation.” Id. at 1673, 1674.

f. The Court described such exceptional circumstances as when the hourly rate in the lodestar calculation does not adequately measure the attorney’s true market value, when the attorney’s performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted, or when there is exceptional delay in payment of fees “unjustifiably caused” by the opposing party. Id. at 1674-1675.
g. These circumstances require “specific evidence” that a lodestar fee would not have been adequate to attract competent counsel. *Id.* at 1674.

h. Notably, the Court concluded that the district court improperly ruled on an “impressionistic basis” and that the 75 percent increase was “essentially arbitrary.” *Id.* at 1675-1676.

i. By comparing the performance of counsel in the case to the performance of counsel in “unnamed prior cases,” the district court simply did not use a methodology that “permitted meaningful appellate review.” This “undermined” the major purpose of the lodestar method—“providing an objective and reviewable basis for fees.” *Id.* at 1676.

VII. FACTORS DRIVING FEE REDUCTIONS

A. Limited success in the litigation

1. The level of success achieved by the prevailing plaintiffs in an action is a critical factor in the court’s determination of the amount of attorney’s fees to award.

2. A court may exercise discretion to disallow fees for unsuccessful discrete claims. “Unrelated claims [must] be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.” See *Hensley*, 461 U.S. at 434-434-435 (where a plaintiff prevails on only part of his or her interrelated claims, the “district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.”); see also *Jaffee v. Redmond*, 142 F.3d 409, 413 (7th Cir.1998) (where a party presents multiple claims for relief based on a common core of facts or related legal theories, no legal bar exists against awarding attorney’s fees for time spent on rejected claims.).

3. The court will not reduce attorney’s fees solely because plaintiffs obtain a small damages award.
If the ultimate recovery is small relative to the original amount sought by the plaintiffs in a particular case, the court may account for this disparity by reducing attorney’s fees to reflect the plaintiffs’ limited success. Indeed, plaintiffs who overreach with an excessive damages demand and later end up with a small fraction of their initial demand may run the risk of causing the court to summarily reject their attorney’s fees application in its entirety. See Moriarty v. Svec, 233 F.3d 955, 967-968 (7th Cir. 2001) (“We have not formulated any mechanical rules requiring that a reasonable attorney’s fee be no greater than some multiple of the damages claimed or recovered….. However, proportionality concerns are a factor in determining what a reasonable attorney’s fee is.”).

B. Unnecessary multiplication of proceedings

1. Conduct by plaintiffs’ counsel that improperly prolongs the litigation and wastes the court’s time may result in reduced fee awards.

2. Look for strategic miscalculations such as inclusion of meritless claims, pursuit of claims which are not fundamental to the alleged injury, damages assessments that are unrealistic and the pursuit of damages theories and calculations that lack evidentiary and legal support.

3. Courts also frown upon abusive motion practice, including the filing of unnecessary and frivolous motions on issues that could have been addressed without the expenditure of substantial judicial resources.

C. Clerical and administrative work

1. Courts may discount attorney’s fees for time spent on work that appears to be of a clerical or administrative nature. See, e.g., Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 553 (7th Cir. 1999) (affirming decision to disallow time spent by an attorney and paralegal on essentially clerical or secretarial tasks). Hours may be disallowed for work that was performed by attorneys, but that should have been performed by paralegals
at lower hourly rates. Attorney’s fees have also been reduced due to excessive time spent by attorneys on the drafting of boilerplate documents that require little or no legal analysis.

D. Deficient time records

1. The daily log or timesheet should identify the attorney involved in rendering the services and record time devoted to the matter along with a brief description of the services. The time entries should demonstrate substantive legal work devoted to the matter so as to avoid an argument that counsel was merely acting as a passive observer. Where part of a claim may be subject to fee shifting, but not another part, time entries should clearly segregate between the matters.

2. Courts often criticize time records that contain vague time entries. If descriptions of the work performed are not sufficiently specific, the court will not be able to determine if hours are properly compensable.

3. Courts will also criticize time records that contain instances of “block billing,” which is the inclusion of multiple tasks under a single time entry. Block billing obscures the amount of time dedicated to each task and hampers the court’s ability to determine if the number of hours expended by counsel on certain activities were reasonable.

E. Excessive, redundant or otherwise unnecessary work including duplication

1. There is no requirement to pay for hours that are “excessive, redundant, or otherwise unnecessary.” *Hensley, 461 U.S. at 434.*

2. Courts may be willing to reduce a fee award when it is convinced that the legal services are duplicative. *Schlacher v. Law Offices, 574 F.3d 852 (7th Cir. 2009)* (district court properly reduced consumers’ requested fees because, in part, the collaboration among four attorneys led to duplicative work and excessive billing);
VIII. DEFENSE STRATEGIES

A. Start of the Case

1. Review claims to determine if there is any possible ground to recover attorneys’ fees.

2. Thinking about how to reduce fees at the outset of a case is a direct way to control exposure.

3. If potential liability is clear, it may be prudent to negotiate a settlement early in the litigation and before counsel for the plaintiffs have expended significant time and resources on the case.

4. If the parties wish to avoid motion practice over the attorney’s fees issue, it may be worthwhile to request documentation of fees from plaintiffs’ counsel, such as actual time records, and then arrive at a reasonable fee in the course of settlement.

5. If a settlement is being negotiated, also consider settling the substantive claims and allowing plaintiffs’ counsel to petition the court for an award of reasonable attorney’s fees and costs. By structuring the settlement in this manner, you have preserved the opportunity to challenge the application for attorney’s fees.

B. Dispositive Motions

1. Consider filing early dispositive motions challenging those claims that allow for recovery of attorneys fees.

2. The claimed fee shifting statute may be subject to dismissal due to standing, mootness, or it may not allow the plaintiff a private right of action. However, “a defendant cannot defeat a valid claim of attorney’s fees by making an offer of judgment that covers merely the plaintiff’s damages and arguing that therefore the case is moot. In order to moot the case, the offer must include a reasonable attorney’s fee, if as in this case the entitlement to such a fee is a part of the plaintiff’s claim.”
Thorogood v. Sears, Roebuck and Co., 595 F.3d 750 (7th Cir. 2010) (“the district judge was within his discretion in deciding that no fee should be awarded. The plaintiff’s individual claim, as we indicated in our previous opinion, was notably weak, his understanding of Sears’s “stainless steel” representation being almost certainly unreasonable. The defendant’s offer of $20,000 was intended to get rid of a nuisance claim. The making of the offer was not a vindication of the plaintiff’s theory of liability, an acknowledgment that it had some potential merit. Furthermore, the $246,000 in fees that the plaintiff seeks to be reimbursed for were incurred in attempting to maintain the suit as a class action; no sane person incurs fees in that amount to prosecute a claim worth at most $3,000. The plaintiff’s effort to exalt his meager claim into a sprawling nationwide class action was a flop. Sears should not have to bear the entire cost of the flop.”).

3. Be forewarned that dispositive motions may increase time and expense of litigating for both sides. Consider whether there is a strong basis for the motion and a high probability of success.

C. Discovery

1. Consider discovery focused on the elements of claims allowing attorney’s fees.

2. Avoid needless interrogatories, requests for documents or depositions.

3. Alternatively, consider whether information can be gathered from some other source or in some other manner without the involvement of plaintiffs’ counsel.

D. Rule 68 of the Federal Rules of Civil Procedure

1. This can be an effective device to limit a plaintiff’s ability to recover attorney’s fees and costs in litigation. Rule 68 is a mechanism used for promoting settlement prior to trial, where a
defendant offers to have a judgment entered against it, in the plaintiff's favor, and for a certain fixed amount.

2. Rule 68 applies to attorney’s fees when a statute that makes them recoverable includes them as part of “costs.” See Marek v. Chesny, 473 U.S. 1, 9 (1985) (“absent congressional expressions to the contrary, where the underlying statute defines ‘costs’ to include attorney’s fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.”).

3. If the plaintiff refuses a Rule 68 offer and ultimately wins at trial, but the judgment at trial does not exceed the defendant’s offer of judgment, then instead of receiving costs as the prevailing party, the plaintiff does not receive its “post-offer of judgment costs.” Alternatively, the court may reduce attorney’s fees to account for the limited results obtained by the plaintiff. See Payne v. Milwaukee County, 288 F.3d 1021 (7th Cir. 2002) (district court correctly found that plaintiff’s attorney was not entitled to his fees, all of which were incurred after the date of the Rule 68 offer, where the jury’s verdict in his client’s favor was for a lower amount than Milwaukee County’s Rule 68 offer); Harbor Motor Co, Inc. v. Arnell Chevrolet-Geo, Inc., 265 F.3d 638, 645 (7th Cir. 2001) (a rejected offer of judgment that is more favorable than a final judgment a plaintiff obtains at trial will preclude recovery of attorney’s fees by the plaintiff.).

4. Some courts have held that if a plaintiff is unable to obtain a more favorable judgment at trial, the plaintiff must pay the defendant costs and attorney’s fees incurred after the offer was made. See Jordan v. Time, Inc., 111 F.3d 102, 105 (11th Cir. 1997) (defendant made a Rule 68 offer of judgment which exceeded the amount ultimately awarded to plaintiff on a copyright infringement claim. In a per curiam opinion, the court agreed and awarded defendant all attorney’s fees incurred after the making of the Rule 68 offer.); but see Champion Produce, Inc. v. Ruby Robinson Co., Inc., 342 F.3d 1016, 1032 (9th Cir. 2003) (stating with respect to a shifting of defense attorney fees that “[w]hile Rule 68 is designed to ‘require plaintiffs to think very hard about whether continued litigation is worthwhile,’ it is not a gun to the head.”); Harbor Motor Co., Inc., 265 F.3d at 647 (analogized cases arising under the
Copyright Act to those arising in the context of Section 1988. Because both statutes include an award of attorney’s fees as part of the costs, but only to a prevailing party, the court held that a non-prevailing defendant cannot recover attorney’s fees as part of a Rule 68 award.  

5. Even where Rule 68 does not apply, settlement offers may be considered by the court as a factor in determining an award of reasonable attorney’s fees. See Moriarty v. Svec, 233 F.3d 955, 968 (7th Cir. 2001). An offer of judgment can provide advantages even in cases where costs are not expressly defined to include attorney’s fees. While the rejection of a more favorable offer of judgment does not automatically bar a plaintiff’s recovery of attorney’s fees in these cases, many courts have considered the refusal of a more favorable offer of judgment to reduce an attorney’s fee award and to even deny the award of attorney’s fees outright. See Id. (“Attorney’s fees accumulated after a party rejects a substantial offer provide minimal benefit to the prevailing party, and thus a reasonable attorney’s fee may be less than the lodestar calculation. ... Determining whether an offer is substantial is left in the first instance to the discretion of the district court. Nevertheless, an offer is substantial if, as in this case, the offered amount appears to be roughly equal to or more than the total damages recovered by the prevailing party. In such circumstances, a district court should reflect on whether to award only a percentage (including zero percent) of the attorney’s fees that were incurred after the date of the settlement offer.”).  

6. There is no limit to the number of Rule 68 offers that a defendant can send the plaintiff. Each one of them will stand separately on its own, rather than being combined together with previous offers of judgment. As such, the defendant does not have a disincentive to make further offers of judgment. Rather, this gives the defendant added reason, as the litigation progresses, to attempt to settle the dispute prior to trial, thereby fulfilling the purpose of Rule 68.  

7. Wis. Stat. § 807.01: It is generally advisable to include the statutory phrase “with costs.” Pursuant to Wis. Stat. § 807.01(1), “[a]fter issue is joined but at least 20 days before the trial, the
defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with costs.” The costs referenced relate to those set forth in Wis. Stat. § 814.04, including “[a]ll the necessary disbursements and fees allowed by law.” See also Alberte v. Anew Health Care Servs., Inc., 2004 WI App 146, ¶ 8, 275 Wis.2d 571, 685 N.W.2d 614 (reading these statutory sections to conclude that attorneys fees are “necessary fees allowed by law.”). Whether attorneys fees are subsumed in the offer of judgment depends on the nature of the action, whether a fee shifting provision is at issue and the wording of the offer. See Stewart v. Farmers Ins. Group, 2009 WI App 130, 321 Wis.2d 391, 773 N.W.2d 513 (in a case involving the tort of bad faith, attorney fees become recoverable as damages such that a litigant cannot accept an offer of judgment as a complete settlement and then seek a further award of attorney fees as damages).

E. Fee Petition

1. The fee petition is typically set up via a written motion. The motion should set forth the legal and factual basis for the award, including affidavits establishing the foundational facts supporting the claim and the reasonableness of the rates, hours, and aspects of the litigation warranting the award.

2. When a fee application includes entries that are inadequately documented or employs block billing, a court may either strike the problematic entries or (in recognition of the impracticality of performing an item-by-item accounting) reduce the proposed fee by a reasonable percentage. Harper v. City of Chicago Heights, 223 F.3d 593, 602 (7th Cir. 2000). It is here where block billing becomes disfavored by the courts because the court is unable to evaluate the reasonableness of the expenditure of hours. See Role Models A.M. Inc. v. Brownlee, 353 F.3d 962, 971 (D.C.Cir. 2004). Courts may decline to award fees for such hours. Tomazzoli v. Sheedy, 804 F.2d 93, 98 (7th Cir. 1986) (affirming district court’s reduction of fees, in part, because “the total number of hours attributable to research alone is uncertain; in some instances [the attorney] lists ‘research’ along
with other tasks performed and gives but a single total for the combined work”).

3. Carefully review all billing records. All billing attorneys and paralegals on a plaintiff’s case must keep accurate and contemporaneous time records of the fees incurred. These records should show that time was recorded in specific and sufficient detail, describing the work performed and tasks accomplished by each of the attorneys and paralegals involved in the case. If the defendant can successfully object to the submitted billing entries as being inaccurate or not properly maintained, then a court could substantially reduce, or even completely disallow, a plaintiff’s fee petition. See Bishop v. Gainer, 272 F.3d 1009, 1020 (7th Cir. 2001) (denying a request for hundreds of hours of telephone calls because the substance of the calls was not disclosed in general terms); Dutchak v. Central States, Southeast & Southwest Areas Pension Fund, 932 F.2d 591, 596 (7th Cir. 1991) (“Where documentation of hours is inadequate, the district court may reduce the award accordingly.”).

4. “Billing Judgment Required”: Attorneys are expected to make “a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his submission.” Hensley, 461 U.S. at 434. The Supreme Court has noted that “billing judgment” by attorneys is just as important in fee-shifting cases just as it is in the private sector. Id. Hours that would not normally be billed to a private client should not be billed to an adversary. Id. “Cases may be overstaffed, and the skill and experience of lawyers vary widely.” Id. “Where the documentation of hours is inadequate, the district court may reduce the award accordingly.” Id.

5. Particular attention should also be paid to the rates sought and whether they are in compliance for the type of case in the relevant community.

F. Expert
1. In some cases it may be prudent to retain an expert to provide testimony via affidavit opposing the fee application. Where the fees are substantial an expert may be helpful to challenge the award, particularly if the underlying record is not well developed.

G. Other Considerations

1. The parties may disagree on which city’s prevailing rates apply when plaintiff’s counsel practices outside the forum jurisdiction. Generally, the forum community’s rates are applicable unless the plaintiff can show that “local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case.” Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997).

2. In suits lasting many years, the defendants may argue that compensation must be limited to “historical rates”: the market rates prevailing for each of the years the suit was litigated. The Supreme Court has held, however, that “an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of [Section 1988].” Missouri v. Jenkins, 491 U.S. 274, 284 (1989).

3. Remind the court and your opponent of the limits on fees. The purpose of fee enhancements was not to enrich the lawyers. Federal fee-shifting law “... serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights. But unjustified enhancements that serve only to enrich attorneys are not consistent with the statute’s aim.” Perdue, 130 S.Ct. at 1676. Fees awards “were never intended to ‘produce windfalls to attorneys.” Farrar v. Hobby, 506 U.S. 103, 115 (1992). See also Kolupar v. Wilde Pontiac Cadillac Inc., 2004 WI 112, ¶ 17, 275 Wis.2d 1, 683 N.W.2d 58 (trial court properly observed that fee request was not a “blank check”).
4. Fee petition work can also be scrutinized. See, e.g., *Ustrak v. Fairman*, 851 F.2d 983, 978-988 (7th Cir. 1988) (stating that plaintiff’s excessive hours in preparing fee request “is the tag wagging the dog, with a vengeance” and therefore reducing that time by 67%); *Torres-Rivera v. O’Neill-Cancel*, 524 F.3d 331, 340-341 (1st Cir. 2008) (in § 1983 case, court observed that “in awarding such fees, the reasonableness requirement applies without diminution” and that “[b]ecause litigating a fee petition is typically an uncomplicated exercise, fees for such work are often calculated at lower rates than those deemed reasonable for the main litigation.”).