

THE NATURE OF "A REASONABLE ATTORNEY'S FEE" IN PRIVATE ANTITRUST LITIGATION

On numerous occasions, Congress has sought to encourage the public to aid in the fulfillment of its legislative purposes by providing for the award of attorney's fees to successful private litigants. In some situations, a mathematical basis has been prescribed to determine the amount of the award.¹ In others, the power to set such a fee has been delegated either to administrative agencies² or to the courts.³ In antitrust litigation, Congress has provided for the award of "a reasonable attorney's fee" and placed the authority for determining the amount of the award in the courts. In view of the magnitude and complexity of antitrust litigation, this is perhaps the best method available. Not only is the setting of fees a not uncommon duty of a judge, but also he is in the best position to know the particular facts and circumstances of a case and to reach a conclusion based upon those factors which merit consideration. This note will discuss the statute which instructs the courts to award "a reasonable attorney's fee" in private antitrust cases, the policies behind it, and its application.⁴

I. THE STATUTE AND ITS POLICY

Section 4 of the Clayton Act provides that:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant

1. *E.g.*, 60 Stat. 1053 (1946), 25 U.S.C. § 70n (1964). In this section, which allows the Indian Claims Commission to award a reasonable attorney's fee in cases involving claims of Indians against the United States, the maximum amount which may be awarded is ten percent of the amount recovered.

2. *E.g.*, 54 Stat. 913 (1940), 49 U.S.C. § 17(12) (1964).

For a table of statutory and administrative limitations in these areas, see *Attorney's Fees Before Government Bureaus*, 25 ALA. LAW. 78 (1964).

3. The provision that the courts shall award a "reasonable attorney's fee" is neither unique nor novel in federal regulatory legislation. Similar provisions are included in other important regulatory statutes. Packers and Stockyards Act, 42 Stat. 165 (1921), 7 U.S.C. § 210(f) (1964); 17 U.S.C. § 116 (1964) (copyright laws); Fair Labor Standards Act, 52 Stat. 1069 (1938), 29 U.S.C. § 216(b) (1964); 35 U.S.C. § 285 (1964) (patent laws) (in exceptional cases); Communications Act of 1934, 48 Stat. 1072, 47 U.S.C. § 206 (1964); Interstate Commerce Act, 24 Stat. 382 (1887), 49 U.S.C. § 8 (1964).

4. The scope of this note does not include the determination of a reasonable attorney's fee in any situations other than in antitrust cases; all antitrust cases which discuss the issue of attorney's fees are considered. For an informative discussion of the fee problem generally, see Annot., 56 A.L.R.2d 13 (1957).

resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, *including a reasonable attorney's fee*.⁵

The antitrust decisions have generally recognized that this section was adopted to accomplish dual purposes: to protect the public interest in competitive markets and to provide a remedy for private parties who are injured by violations of the antitrust laws. These goals, however, do not carry the same weight—the primary purpose is protection of the public interest.⁶ Although the interest of the private litigant is considered secondary, he performs a vital function in the overall scheme of enforcement set up by the antitrust laws.⁷ The courts have indicated three methods by which this function is fulfilled: (1) adding private self-interest to the efforts of the

5. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964). (Emphasis added.)

6. *D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co.*, 236 U.S. 165 (1915); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955); *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 214 F.2d 891 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955); *Maltz v. Sax*, 134 F.2d 2 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943); *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F.2d 885 (4th Cir. 1934); *Nelligan v. Ford Motor Co.*, 161 F. Supp. 738 (W.D.S.C. 1958); *Sandidge v. Rogers*, 156 F. Supp. 286 (S.D. Ind. 1957), *rev'd on other grounds*, 256 F.2d 269 (7th Cir. 1958); *Brenner v. Texas Co.*, 140 F. Supp. 240 (N.D. Cal. 1956); *Fanchon & Marco v. Paramount Pictures, Inc.*, 100 F. Supp. 84 (S.D. Cal. 1951), *cert. denied*, 345 U.S. 964 (1953), *aff'd*, 215 F.2d 167 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955); ATT'Y GEN. NAT'L COMM. ANTI-TRUST REP. 378 (1957).

In its claim for treble damages . . . the plaintiff seeks a windfall on account of an alleged violation of the antitrust laws. The main purpose of those laws was to protect the public from monopolies and restraint of trade, and the private right of action for treble damages was incidental and subordinate to that main purpose. *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, *supra* at 893.

7. Speaking in a case where a similar provision in the Fair Labor Standards Act, 52 Stat. 1069 (1938), 29 U.S.C. § 216(b) (1964), was under consideration, District Judge Wyzanski, in *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943), has well stated the argument advanced in favor of taxing plaintiff's attorney's fee against an unsuccessful defendant in furtherance of Congress' policy to secure compliance with this type of legislation:

The rationale in all the federal statutes is the same. The argument runs as follows. The government has set up a regulatory system for the benefit of persons in the plaintiff's class. To make the regulation effective private suits as well as public prosecutions are permitted. Suits by plaintiffs, if well founded, are in the public interest. Therefore, the cost of prosecuting successful suits should be borne not by those who were victims but by those who have violated the regulations and caused the damage. The fear of this liability for double damages and attorney's fees not only aids compliance, but promotes the settlement of controversies at the conference table or in the administrative office rather than the courts.

The necessity of keeping this section of the antitrust laws free of emasculating restrictions so that the private litigant might perform his function in the best manner possible was indicated by the Ninth Circuit in *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). "[A] niggardly construction of the treble damage provisions would do violence to the clear intent of Congress. The private antitrust action is an important and effective method of combatting unlawful and destructive business practices. . . . Its efficacy should not be weakened by judicial construction."

Department of Justice;⁸ (2) maintaining a free and competitive society

8. *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751 (1947); *Osborn v. Sinclair Ref. Co.*, 324 F.2d 556, 572 (4th Cir. 1963); *Flintkote Co. v. Lysfjord*, *supra* note 7, at 398; *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 214 F.2d 891, 893 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955); *Maltz v. Sax*, 134 F.2d 2, 4 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943); *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521, 525 (S.D.N.Y. 1965); *Cinnamon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833, 834 (E.D. Mich. 1963); *Bateman v. Ford Motor Co.*, 202 F. Supp. 595, 597 (E.D. Pa.), *rev'd on other grounds*, 302 F.2d 63 (3d Cir. 1962); *P.W. Husserl, Inc. v. Simplicity Pattern Co.*, 191 F. Supp. 55, 60 (S.D.N.Y. 1961), *rev'd on other grounds sub nom. House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962); *Englander Motors, Inc. v. Ford Motor Co.*, 186 F. Supp. 82, 85 (N.D. Ohio 1960), *aff'd in part, rev'd in part*, 293 F.2d 802 (6th Cir. 1961); *United States v. Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 171 (S.D.N.Y. 1955); *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796, 798 (S.D. Cal. 1950); *Quemos Theatre Co. v. Warner Bros. Pictures, Inc.*, 35 F. Supp. 949, 950 (D.N.J. 1940).

This is perhaps the most important function of the section. In fact, when Congress initially enacted the Sherman Act, no additional appropriation was made to the Justice Department to enable it to enforce the act's provisions, and no special policing agency was established. It was felt that the section, with its treble damage provision, would be sufficient to induce private parties to keep a sharp eye on the activities of others, bring antitrust violators into court, and make the act almost self-enforcing, thus rendering the provisions for government suits unnecessary. THORELLI, *THE FEDERAL ANTITRUST POLICY* 588 (1954). It should be noted, however, that while the section does set up one group of private citizens to combat the transgressions of another, this did not (and can not) make the antitrust laws "self-enforcing." Situations may arise in which private parties would refrain from acting, or would settle with the violator and, for a price, allow the violation to continue. The provisions which authorize government suits are neither meaningless nor unnecessary. The two sets of actions are said to complement each other; they are cumulative, not mutually exclusive. *United States v. Borden Co.*, *supra* at 518.

That the Justice Department depends upon private suits was pointed out by the Assistant to the Solicitor General in oral argument in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). He suggested that this case represented a "petty squabble" of the type against which the Justice Department, on its limited budget, cannot act. This is the situation in which § 4 of the Clayton Act is most effective; it allows the small businessman to bring his own action to put an end to an antitrust violation which is damaging him but which is too small to justify action by the Justice Department. 27 U.S.L. WEEK 3239, 3240 (1959). It has been estimated that absent such action by private parties, the budget of the Department would have to be at least quadrupled in order to achieve the same standard of antitrust enforcement. Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 168 (1958).

The main value of the government suit is that under § 5 of the Clayton Act, a prior decision in a government suit may be introduced as prima facie evidence that the defendant has violated the antitrust laws; all that the plaintiff need do, then, is prove that he has suffered injury because of this violation. *United States v. Standard Ultramarine & Color Co.*, *supra* at 170-72; Loevinger, *supra* at 169. For a full discussion of § 5 of the Clayton Act, see Timberlake, *The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 36 N.Y.U.L. Rev. 991 (1961); notes 62-65 *infra* and accompanying text.

through private enforcement of the law;⁹ and (3) discouraging repetition of offenses and deterring potential violators.¹⁰

The successful defendant is never awarded his counsel's fee.¹¹ Although

9. *D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co.*, 236 U.S. 165, 174 (1915); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9th Cir. 1955); *Maltz v. Sax*, *supra* note 8, at 4; *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 100 F. Supp. 84, 103 (S.D. Cal. 1951), *cert. denied*, 345 U.S. 964 (1953), *aff'd*, 215 F.2d 167 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955).

10. *Commissioner v. Obear-Nester Glass Co.*, 217 F.2d 56, 61 (7th Cir. 1954), *cert. denied*, 348 U.S. 982 (1955); *P. W. Husserl, Inc. v. Simplicity Pattern Co.*, 191 F. Supp. 55, 60 (S.D.N.Y. 1961), *rev'd on other grounds sub nom.* *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962); *Englander Motors, Inc. v. Ford Motor Co.*, 186 F. Supp. 82, 85 (N.D. Ohio 1960), *aff'd in part, rev'd in part*, 293 F.2d 802 (6th Cir. 1961); *United States v. Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 171 (S.D.N.Y. 1955).

As a deterrent, a private suit for treble damages will probably be more effective than either a government criminal action or a government suit for damages. In the criminal action, there has been a relatively minor increase in the maximum fine from \$5,000 to \$50,000 with a discretionary maximum prison term of one year. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964). Further, in the government civil action (in the event that the government has suffered any recompensable harm) the treble damage feature does not apply. While a large business might be willing to absorb a fine, the size of some recent treble damage recoveries indicates that an antitrust violation followed by a successful private suit might take the profit out of antitrust violations. *E.g.*, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258 (M.D. Pa. 1965) (\$4,239,609 treble damages, \$650,000 attorney's fee).

11. *E.g.*, *Gillam v. Shyman, Inc.*, 205 F. Supp. 534, 535 (D. Alaska 1962).

Since 1607, the English courts, on the other hand, have accorded defendants equal treatment with plaintiffs in the award of what they term "costs." 4 *HOLDSWORTH, A HISTORY OF ENGLISH LAW* 538 (1924); Goodhart, *Costs*, 38 *YALE L.J.* 849, 853 (1929). Counsel fees are included in such a "costs" award. Goodhart, *supra* at 856-58. See generally *id.* at 856-72. The costs awarded may greatly exceed the damages, *id.* at 850, thus, in effect, acting as a deterrent to frivolous suits. *Id.* at 872; Note, 49 *YALE L.J.* 699, 702 (1940).

However, since a lawsuit is in large part a gamble, this practice also deters some parties who might feel that they have a just claim but do not wish to take the risk of losing the suit and then paying the costs of both parties. The general American feeling is that everybody has a right to a day in court, and access to the courts ought not to be impeded in this manner; no one should be "taxed out of court." *Cf.* *Fleischer v. Paramount Pictures Corp.*, 329 F.2d 424, 426 (2d Cir. 1964).

The American courts have, however, indicated that they may allow fees to the prevailing defendant under certain limited circumstances. In *Uni-Therm Indus. v. Chloride of Silver Dry Cell Battery Co.*, 1963 Trade Cas. ¶ 70864 (D. Md. 1963), plaintiff moved to dismiss his treble damage action with prejudice; defendant asked for costs under either Rule 41(a)(2) of the Federal Rules of Civil Procedure or the general equity power of the court. The court said that the fees could not be awarded in a dismissal with prejudice, as this is *res judicata*. However, if the action has been dismissed without prejudice, then fees might have been awarded. In such a case, defendant would not have the benefit of *res judicata*. Plaintiff could still re-institute his suit at will, and because of the policy against harassing suits, fees would be awarded to compensate the defendant for his trouble. The court also pointed out that the statute does not provide for an

the defendant serves the interest of society by preventing incorrect decisions from becoming precedent, the public is no more interested in aiding him than any other successful defendant.¹² Furthermore, if a potential plaintiff were placed under the apprehension of paying both his own and his opponent's attorney's fees, many violations of the antitrust laws might go uncontested and, as a result, the policy of encouraging enforcement of the antitrust laws by private litigants would be undermined.¹³

Also, a reasonable attorney's fee is not awarded to every successful antitrust plaintiff. As the courts have interpreted the statute, the attorney's fee is merely incidental to the successful prosecution of a *damage* suit.¹⁴ This would seem to indicate that the plaintiff *must* recover damages to be entitled to the fee award.¹⁵ However, at least one court has allowed a fee to a plaintiff who had proved the defendant's violation of the antitrust laws but had his monetary damages deleted by the court because there was insufficient evidence to support the jury's estimate of actual damages.¹⁶ It is

attorney's fee for the successful *defense* of a private antitrust action, and that while it was within the general equity power of the court to award a fee in exceptional circumstances, this case was not in that category. See also notes 18-25 *infra* and accompanying text.

12. *Cf. Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943).

13. See *ibid.* Of course, it may also be true that the defendant, placed under a similar apprehension, may capitulate prematurely in an effort to keep his losses as low as possible. If this is the case, the major purpose of the antitrust laws—punishing anti-trust *violators*—will be undermined, since it will not be clear whether the defendant gave up because he was a violator or because he felt that his chances of winning the lawsuit were not great enough to warrant the risk involved.

14. *W.W. Montague & Co. v. Lowry*, 193 U.S. 38, 48-50 (1904); *Clabaugh v. Southern Wholesale Grocers' Ass'n*, 181 Fed. 706, 708 (C.C.N.D. Ala. 1910); *Allen Bradley Co. v. Local 3, IBEW*, 51 F. Supp. 36, 40 (S.D.N.Y. 1943), *rev'd on other grounds*, 145 F.2d 215 (2d Cir. 1944), *rev'd*, 325 U.S. 797 (1945).

15. I have concluded that plaintiffs have not shown any injury *from defendants' violations* of the anti-trust laws and that, even if we presume injury, plaintiffs have not proved anything from which the court could approximate the damages. It follows that plaintiffs are not entitled to a money judgment and therefore cannot be awarded "a reasonable attorney's fee" under 15 U.S.C.A. § 15. *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 899 (S.D.N.Y. 1948). (Emphasis added.)

The converse of this position is also true: "Since plaintiff. . . has proved some damages, however modest, he is *entitled* also to receive an award for counsel fees." *Osborn v. Sinclair Ref. Co.*, 207 F. Supp. 856, 864 (D. Md. 1962), *rev'd on other grounds*, 324 F.2d 566 (4th Cir. 1963) (Emphasis added.); *accord*, *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 221 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490, 491 (D. Mass. 1963), *rev'd on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964); *Allen Bradley Co. v. Local 3, IBEW*, *supra* note 14, at 40.

16. *Finley v. Music Corp. of America*, 66 F. Supp. 569, 571 (S.D. Cal. 1946). *But see Ledge Hill Farms, Inc. v. W.R. Grace & Co.*, 1964 Trade Cas. ¶ 71105 (S.D.N.Y. 1964). In this case, while it was determined that the defendant had violated the anti-

submitted that in such a case, the courts should make a distinction between the time spent in proving the defendant's violation of the antitrust laws and the time spent in attempting to prove the plaintiff's injury allegedly caused by the violation. Consistent with the primary purpose of section 4, protection of the public interest, the plaintiff should be compensated for proving the violation. Moreover, the fee for proving the violation should be the same whether or not damages are established.¹⁷

One significant problem in this area is that the courts have consistently

trust laws, no damages were proved by the plaintiff. The court refused to allow nominal damages and indicated that where no damages were proved or allowed the plaintiff was not entitled to attorney's fees. Cf. *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962); *Schutte & Koerting Co. v. Fischer*, 4 F.R.D. 11 (E.D. Pa. 1944). *Ledge Hill Farms* did state, however, that this should not be an absolute rule, and under appropriate circumstances (such as flagrant and willful violation of the laws) fees might be awarded even though no damages were proved. *Ledge Hill Farms, Inc. v. W.R. Grace & Co.*, *supra* at 79369.

17. Closely allied to *Finley v. Music Corp. of America*, *supra* note 16, is one case in which nominal damages were awarded, *Siegfried v. Kansas City Star Co.*, 193 F. Supp. 427 (W. D. Mo. 1961), *aff'd*, 298 F.2d (8th Cir.), *cert. denied*, 369 U.S. 819 (1962), and several others in which it was indicated that such damages might be appropriate. *Elgin Corp. v. Atlas Bldg. Prods. Co.*, 251 F.2d 7, 12 (10th Cir.) (dictum), *cert. denied*, 357 U.S. 926 (1958); *Pennsylvania Sugar Ref. Co. v. American Sugar Ref. Co.*, 166 Fed. 254, 260 (2d Cir. 1908) (dictum); *United Exhibitors, Inc. v. Twentieth Century Fox Film Distrib. Corp.*, 31 F. Supp. 316 (W.D. Pa. 1940) (dictum). But *Siegfried*, like *Finley*, involved a jury finding of injury to the plaintiff. Specific questions were put to the jury for decision, and their answers clearly indicate that (1) the defendants had violated the antitrust laws, (2) this violation was the cause of damage to the plaintiffs, but (3) from the proof offered, the damage was too speculative to determine. Nominal damages of one dollar on each of four counts were awarded, and a hearing was set to determine attorney's fees. *Siegfried v. Kansas City Star Co.*, *supra* at 439-40.

While the statute is broad in its intent and far reaching in its consequences, it is clear that even a liberal interpretation of it requires that the private plaintiff must have been damaged to some extent by defendant's antitrust violation. See Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 *COL. L. REV.* 570, 585, (1964). In both *Finley* and *Siegfried*, while damages recovered were either minimal or nonexistent, there had been a determination that the plaintiffs had been injured by the defendants. Thus, an award of an attorney's fee would seem to be within the scope of the statute. In view of the broad purpose of Congress in enacting this section, the statute should not be read as allowing a fee only if damages are recovered. It should be sufficient that the plaintiff prove that he is within the class of plaintiffs for whose protection this part of the act was passed. However, this is not meant to imply that suits should be allowed by plaintiffs who have not been injured to some extent. If they are, two serious problems could arise. First, the danger of strike suits, instituted purely to coerce a settlement from the defendant, would be increased if the plaintiff no longer had to prove injury. Second, if all that had to be proved was the defendant's violation of the antitrust laws, suits might be filed for the sole purpose of collecting the "reasonable attorney's fee."

refused to award fees for time spent in seeking equitable relief.¹⁸ The justification usually given is that section 16 of the Clayton Act¹⁹ which provides for private injunction actions does not authorize the granting of an attorney's fee.²⁰ But the absence of such a provision may not present a tenable justification for such a refusal. Two reasons are offered why awards should be given in these cases.

First, the major purpose in allowing any kind of private action under the antitrust laws is to aid in protecting the public. As the Supreme Court said in *United States v. Borden Co.*,²¹ "the private-injunction action, like the treble-damage action under §4 of the Act, supplements Government enforcement of the antitrust laws. . . ." ²² The purpose of the antitrust laws is thus fostered by both actions without regard to monetary recovery. The attorney's fee is both an incentive and a reward for aiding in the enforcement of the act and should be allowed in both. Second, the argument that the statute itself appears to distinguish between the two types of suits by specifically providing for the award of fees in a law action for treble damages and remaining silent on the subject in its provision for private injunctive actions is not persuasive. An express statutory provision in the antitrust laws was not necessary to authorize the award of a fee in an equitable action. Subject to Congress' power to modify, the federal courts, exercising their equity jurisdiction, have historically had the power to award fees and expenses to successful plaintiffs in appropriate situations.²³ Congress' only pro-

18. *Milgram v. Loew's, Inc.*, 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952); *Decorative Stone Co. v. Building Trades Council*, 23 F.2d 426 (2d Cir.), *cert. denied*, 277 U.S. 594 (1928); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476 (E.D. Mo. 1965); *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490 (D. Mass. 1963), *rev'd on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964); *Ring v. Spina*, 84 F. Supp. 403 (S.D.N.Y. 1949); *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *Allen Bradley Co. v. Local 3, IBEW*, 51 F. Supp. 36 (S.D.N.Y. 1943), *rev'd on other grounds*, 145 F.2d 215 (2d Cir. 1944), *rev'd*, 325 U.S. 797 (1945); see *Mid-west Theatres Co. v. Co-operative Theatres*, 43 F. Supp. 216 (E.D. Mich. 1941).

19. 38 Stat. 737 (1914), 15 U.S.C. § 26 (1964).

20. Plaintiff's appeal from the district court's refusal to allow it an attorney's fee we deem without merit. Plaintiff seeks equitable relief only; hence the scope of its remedy is defined and necessarily limited by Section 16 of the Clayton Act. . . . Section 16, unlike Section 4, . . . makes no provision for the allowance of an attorney's fee to the successful plaintiff. *Milgram v. Loew's, Inc.*, 192 F.2d 579, 586-87 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

21. 347 U.S. 514 (1954).

22. *Id.* at 518.

23. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939); *Angoff v. Goldfine*, 270 F.2d 185, 186 (1st Cir. 1959); *Cutler v. American Fed'n of Musicians*, 231 F. Supp. 845, 848 (S.D.N.Y. 1964); see *Guardian Trust Co. v. Kansas City So. Ry.*, 28 F.2d 233, 240 (8th Cir. 1928).

nouncement in this area is Rule 54(d) of the Federal Rules of Civil Procedure which has been interpreted as allowing the courts, in their discretion, to award attorney's fees in equity cases where an award is essential to do justice between the parties.²⁴ Since historically the courts did not have the power to award fees in actions at law, an explicit statutory provision was required if they were to be so empowered; courts of equity, which inherently possessed such power, needed no such statutory authorization. Since the expressed policy of Congress is to encourage private enforcement of its anti-trust legislation, the courts should effectuate this policy through the use of all the powers at their command.²⁵

II. FACTORS WHICH COURTS CONSIDER IN DETERMINING WHAT IS "REASONABLE"

By use of the word "reasonable" in the statute, Congress has indicated that there is no set formula by which the fee may be determined, but that each case must be decided on its own facts.²⁶

However, the courts have not agreed upon whether the statute requires an award directed to the plaintiff or to his attorney.²⁷ Most courts assume,

24. *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 481 (4th Cir. 1951); *Apple Growers Ass'n v. Pelletti Fruit Co.*, 153 F. Supp. 948, 952 (N.D. Cal. 1957); *Ruck v. Spray Cotton Mills, Inc.*, 120 F. Supp. 944, 947 (M.D.N.C. 1954); see *Sprague v. Ticonic Nat'l Bank*, *supra* note 23, at 167; *In re Swartz*, 130 F.2d 229, 232 (7th Cir. 1942); *cf. Lockridge v. Brockman*, 137 F. Supp. 383, 385 (N.D. Ind. 1956).

25. While, as indicated, the courts presently possess the power to award attorney's fees in equitable actions, no court has so held. In light of this, it is submitted that the bills which have been introduced in Congress to amend both §4 and §16, would if adopted, clear up the problems discussed, for they provide that a suit filed pursuant to either section "shall be deemed to be impressed with a substantial public interest." See 28 A.B.A. ANTITRUST SECTION 195 (1965); 25 A.B.A. ANTITRUST SECTION 244 (1964). In this form, the statutes would clearly indicate what has only been hinted at in a few cases—that both actions perform similar functions in the enforcement provisions of the antitrust laws. Additionally, they would strengthen the argument that the cases in this area are "exceptional" within the meaning of the interpretation of Rule 54(d) and that the attorney's fees ought to be awarded to the successful plaintiff.

26. For example, a percentage of either the actual or treble damages, as awarded by the Indian Claims Commission (see note 1 *supra*), or the imposition of a ceiling on hourly rates, as is the practice of the ICC (see note 2 *supra*), would seem to lack that flexibility which is inherent in the word "reasonable."

27. The English courts, in awarding "costs"—which include attorney's fees—distinguish "costs between party and party" and "costs between solicitor and client."

In dividing "costs" into these two categories, they distinguish between necessity and luxury. If "party and party" costs are given, the plaintiff recovers only those expenses, including attorney's fees, which were necessary in order for him to conduct the litigation. If "solicitor and client" costs are awarded, the plaintiff is allowed a more liberal amount. He recovers "all the expenses a solicitor would 'reasonably' incur in the conduct of the case." Note, 49 YALE L.J. 699, 702 (1940). See generally Goodhart, *supra*

and some courts have explicitly stated, that the wording of the statute indicates that the award is to provide for the plaintiff's reasonable expenses.²⁸ Thus each factor is viewed from the plaintiff's standpoint. Others, however, seem to operate under the assumption that the award is to the attorney, at least indirectly through his client,²⁹ and have praised the attorney

note 11. While "reasonable" is not defined, this procedure at least directs the consideration of the court to a specific party.

28. *E.g.*, *First Iowa Hydro Elec. Co-op. v. Iowa-Illinois Gas & Elec. Co.*, 245 F.2d 630 (8th Cir.), *cert. denied*, 355 U.S. 871 (1957); *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490 (D. Mass. 1963), *rev'd on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert denied*, 379 U.S. 931 (1964); *cf. Keen v. Mid-Continent Petroleum Corp.*, 63 F. Supp. 120, 141 (N.D. Iowa 1945), *aff'd*, 157 F.2d 310 (8th Cir. 1946) (Fair Labor Standards Act); *In re L.E. Elliott Brokerage Co.*, 48 F. Supp. 144 (D. Kan. 1942) (Fair Labor Standards Act).

In *First Iowa*, the trial court dismissed the case and plaintiff's attorneys appealed in their own right. They felt that they had an interest in the litigation because of their prospective fee and thus were entitled to appeal. The court held that the right to an attorney's fee under the antitrust laws accrued to the injured party, not to his attorney. *First Iowa Hydro Elec. Co-op. v. Iowa-Illinois Gas & Elec. Co.*, *supra* at 632.

In *Union Leader*, the court, after deciding what fee should be awarded, concluded: "No part of that sum is a direct award to any attorney . . ." *Union Leader Corp. v. Newspapers of New England, Inc.*, *supra* at 494.

29. See *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965); *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952); *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791 (2d Cir. 1924); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258 (M.D. Pa. 1965); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961); *Darden v. Besser*, 147 F. Supp. 376 (E.D. Mich. 1956), *modified*, 257 F.2d 285 (6th Cir. 1958); *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 242 (D. Mass. 1954); *Bordonaro Bros. Theatres v. Paramount Pictures, Inc.*, 113 F. Supp. 196 (W.D.N.Y.), *aff'd*, 203 F.2d 676 (2d Cir. 1953); *cf. American Fed'n of Tobacco Growers, Inc. v. Allen*, 186 F.2d 590 (4th Cir. 1951).

In the *Tobacco Growers* case, judgment for defendant was reversed and the case remanded by the court of appeals. Before retrial the parties settled out of court for \$57,000, which was to cover attorney's fees as well as damages. No amount of this had been specifically earmarked for fees. The local counsel and the principal counsel from out of town had agreed that \$15,000 was the amount of fees that should be included in the settlement. This amount was paid to the local counsel, but nothing was paid to the other, who had received only \$1,250 as part of his retainer. He was sent another check for \$1,250 as payment of the balance, and he petitioned the court to determine the fees. The court found that he was entitled to half of the \$15,000 and concluded:

The \$57,000 received by plaintiff embraced settlement for attorneys' fees to which plaintiff's attorneys in the case were entitled; and plaintiff may not include such fees in the settlement and then ignore the rights of counsel therein. . . . If the settlement had brought the \$57,000 into the treasury of the court, no one would dispute its power to fix the fees of counsel and direct their payment. *Id.* at 591-92. (Emphasis added.)

The court must have assumed that the right to the "reasonable attorney's fee" under the statute accrued to the attorney.

and indicated that the fee is a reward for his diligence.³⁰ This latter view is so strongly held by some courts that it has been decided that no appeal of the fee would lie because the attorney had indicated to the trial court that he was satisfied,³¹ and that the only true test is: "[W]hat, in the opinion of the Trial Judge, after considering all the factors in the case . . . would be a reasonable charge for the services of plaintiffs' counsel?"³²

An assumption by the court that the fee is viewed as an award to the attorney probably leads to greater consideration of the attorney's actual performance. Those courts which view the award in this manner do not necessarily grant larger fees than the others, but this approach allows a court to do so if it has been impressed by the work of plaintiff's attorney. Of course, if the court is unimpressed with the attorney's work, the fee may be decreased accordingly. Conversely, if the court views the fee as part of the award to the plaintiff, it is likely to allow an amount which is reasonable under all the circumstances in spite of the court's opinion of counsel's work.³³

Under either view, the courts have indicated that several factors, which may be found scattered throughout the various opinions, merit consideration in determining a reasonable fee.³⁴ However, it must be emphasized that the courts have not established a single criterion by which such a determination can be made nor indeed one which should even be controlling. Canon 12 of the Canons of Professional Ethics of the American Bar Association has

30. See *Straus v. Victor Talking Mach. Co.*, *supra* note 29, at 806; *Hanover Shoe, Inc. v. United Shoe Mach. Co.*, *supra* note 29, at 302-05; *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, *supra* note 29, at 242-43.

31. *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189, 196-97 (5th Cir. 1965).

The appellee Metzger complains that the \$25,000 fixed by the district court as plaintiff's attorney's fees is low and unreasonable and that the amount was fixed without opportunity for a hearing. However, Metzger's counsel did not request a hearing. Instead, when the district court stated: "The Court will assess an attorney fee in the amount of \$25,000. The lawyers have handled this case throughout all of its phases, and I will announce a fee of \$25,000." Metzger's counsel replied simply, "Thank you, Your Honor."

32. *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 170 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961) (Emphasis added.); see Neville, *Antitrust Treble Damage Suit . . . The Fees of It!*, Mich. S.B.J., Oct. 1958, p. 20; *cf.* *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952); *Bordonaro Bros. Theatres v. Paramount Pictures, Inc.*, 113 F. Supp. 196 (W.D.N.Y.), *aff'd*, 203 F.2d 676 (2d Cir. 1953).

33. See, *e.g.*, *Osborn v. Sinclair Ref. Co.*, 207 F. Supp. 856 (D. Md. 1962), *rev'd on other grounds*, 324 F.2d 566 (4th Cir. 1963).

34. See, *e.g.*, *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Bal Theatre Corp. v. Paramount Film Distrib. Co.*, 206 F. Supp. 708 (N.D. Cal. 1962).

established guides for setting attorney's fees³⁵ that have been given consideration where applicable³⁶ along with other considerations peculiarly relevant to these cases. The trial courts have merely selected relevant factors appropriate to the case, weighed them one against the other, and awarded a fee which is reasonable in the sense that it is just to all interested parties.³⁷

A. Time Necessarily Spent

The courts have agreed that the time necessarily spent by an attorney in the preparation and trial of a case is an element which must be and is taken into consideration in the setting of a fee.³⁸ However, time and effort spent

35. This Canon states in part:

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in causes likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service. . . .

Canon 12, ABA, CANONS OF PROFESSIONAL ETHICS.

36. *E.g.*, *Osborn v. Sinclair Ref. Co.*, 207 F. Supp. 856, 864 (D. Md. 1962), *rev'd on other grounds*, 324 F.2d 566 (4th Cir. 1963); *cf.* *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943).

37. The court's own knowledge of the conferences, arguments and pre-trial work of plaintiff's attorney as evidenced by the record may also be considered. *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 221 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258, 302 (M.D. Pa. 1965); *Bal Theatre Corp. v. Paramount Film Distrib. Co.*, 206 F. Supp. 708, 716 (N.D. Cal. 1962); *A.C. Becken Co. v. Gemex Corp.*, 204 F. Supp. 28, 29 (N.D. Ill. 1962), *modified*, 314 F.2d 839 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 168 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961); *Clapper v. Original Tractor Cab Co.*, 165 F. Supp. 565, 589 (S.D. Ind. 1958), *modified*, 270 F.2d 616 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960); *Sager Glove Corp. v. Bausch & Lomb Optical Co.*, 1951 Trade Cas. ¶ 62956 (N.D. Ill. 1951). Where, by stipulation, the parties agreed that no evidence of this nature should be presented, the court's own knowledge was the only basis upon which it could award the fee. *Applebaum v. Paramount Pictures, Inc.*, 1951 Trade Cas. ¶ 62944 (S.D. Miss. 1951), *rev'd on other grounds sub nom. Paramount Film Distrib. Corp. v. Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955).

38. *Twentieth Century Fox Film Corp. v. Goldwyn*, *supra* note 37, at 221; *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763, 771 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931); *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791, 806 (2d Cir. 1924); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, *supra* note 37, at 302; *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490, 492 (D. Mass. 1963), *rev'd on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp.*,

in attempting to establish damages which are not proved,³⁹ in preparing anything relating to dismissed defendants, or in defending counterclaims⁴⁰ cannot be taken into consideration. The time spent on these matters must be deducted from the total amount of time spent by plaintiff's attorney on the case in order to obtain the proper time factor.⁴¹ Of course, if this factor

333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964); *A.C. Becken Co. v. Gemex Corp.*, *supra* note 37, at 29; *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, *supra* note 37, at 169; *Darden v. Besser*, 147 F. Supp. 376, 382 (E.D. Mich. 1956), *modified*, 257 F.2d 285 (6th Cir. 1958); *Bordonaro Bros. Theatres v. Paramount Pictures, Inc.*, 113 F. Supp. 196, 197 (W.D.N.Y.), *aff'd*, 203 F.2d 676 (2d Cir. 1953); *Kobe, Inc. v. Dempsey Pump Co.*, 97 F. Supp. 342, 354 (N.D. Okla. 1951), *aff'd*, 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952); *Applebaum v. Paramount Pictures, Inc.*, *supra* note 37.

One court has suggested that the fee is not to be calculated mathematically by multiplying the number of hours spent by the attorney by a reasonable hourly rate because other factors may necessarily be limiting. *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661, 667 (6th Cir. 1965). The trial court found that twenty-five dollars per hour was a reasonable hourly rate for experienced lawyers in the Knoxville, Tennessee, area and that the plaintiff's counsel alleged by affidavit that they spent 3,400 hours on the case. This would seem to indicate that a reasonable attorney's fee would be about \$85,000. In awarding a fee of \$50,000, however, the court seemed to indicate that the recovery of only \$25,000 single damages was a relevant factor limiting the amount of the fee.

39. Where in an antitrust suit a plaintiff claims a vast sum and recovers a small sum, he may owe his own counsel on account of legal services not only for items for which recovery was allowed but also for items for which recovery was denied. Yet such a partially successful antitrust plaintiff can recover from the antitrust defendant only on account of such portion of the attorney's effort as produced a recovery.

Union Leader Corp. v. Newspaper of New England, Inc., 218 F. Supp. 409, 492 (D. Mass. 1963), *rev'd on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964); *cf. Straus v. Victor Talking Mach. Co.*, 279 Fed. 791 (2d Cir. 1924). *But cf. Finley v. Music Corp. of America*, 66 F. Supp. 569, 571 (S.D. Cal. 1946).

40. *E.g., Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 489 (E.D. Mo. 1965). In this case the plaintiffs asked for injunctive relief, and also dismissed four defendants before trial. Furthermore, the defendants had filed a counterclaim in three counts. The court felt that the fee award could not include compensation for any of these matters. Compare notes 18-25 *supra* and accompanying text.

41. *Quaere*, whether time spent in establishing the fee, in keeping time records, in a separate hearing on the fee, or in a district court hearing to determine the fee for the appeal is or should be compensable. *Cf. Hudson & M.R.R.*, 339 F.2d 114, 115 (2d Cir. 1964) (bankruptcy proceeding). There, the court emphasized the importance of keeping detailed and accurate time sheets if the attorneys expected to be compensated correctly:

We wish to emphasize that any attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent. Lawyers are well aware that, especially where services of the nature here involved are spread over a period of time and ultimate payment is virtually assured, they are valued principally on the basis of the time required. There is no excuse for an established law firm to rely on estimates made on the eve of payment and almost entirely unsupported by daily records or for it to expect a court to do so.

is viewed from the plaintiff's standpoint, the court would determine whether the time spent was reasonable under the circumstances.⁴²

B. Skill and Standing

Not only the skill and ability displayed by the attorneys for both parties⁴³ but also their standings within the legal profession itself⁴⁴ are factors which the courts consider. The reputation and ability of the opposing counsel may be especially helpful to reflect credit upon the ability of the plaintiff's attorney.⁴⁵ Even if the court views the award as compensation to the plaintiff for his reasonable expenses, the skill and ability of the opposing counsel may be especially relevant as an indication of the quality of attorney he must employ.

The courts have had difficulty in setting out a precise measure for an attorney's skill. They have considered the responsibility undertaken by him,⁴⁶ his choice of the proper theory upon which to try the case,⁴⁷ his

42. See *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490, 493 (D. Mass. 1963), *rev'd on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964).

43. *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791, 806 (2d Cir. 1924); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258, 303 (M.D. Pa. 1965). The skill of only plaintiff's attorney was considered in the following cases. *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708, 716 (N.D. Cal. 1962); *Darden v. Besser*, 147 F. Supp. 376, 382 (E.D. Mich. 1956), *modified*, 257 F.2d 285 (6th Cir. 1958); *Webster Motor Car Co. v. Packard Motor Car Co.*, 166 F. Supp. 865, 866 (D.D.C. 1955), *rev'd on other grounds*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Bordonaro Bros. Theatres v. Paramount Pictures, Inc.*, 113 F. Supp. 196 (W.D.N.Y.), *aff'd*, 203 F.2d 676 (2d Cir. 1953); *Sager Glove Corp. v. Bausch & Lomb Optical Co.*, 1951 Trade Cas. ¶62956 (N.D. Ill. 1951); *Applebaum v. Paramount Pictures, Inc.*, 1951 Trade Cas. ¶ 62944 (S.D. Miss. 1951), *rev'd on other grounds sub nom. Paramount Film Distrib. Corp. v. Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 931 (1955).

44. *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 221 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Straus v. Victor Talking Mach. Co.*, *supra* note 43, at 806; *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, *supra* note 43, at 302; *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 168 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961); *Webster Motor Car Co. v. Packard Motor Car Co.*, *supra* note 43, at 866; *Bordonaro Bros. Theatres v. Paramount Pictures, Inc.*, *supra* note 43, at 197; *cf. Darden v. Besser*, 257 F.2d 285, 286 (6th Cir. 1958) (per curiam); *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, *supra* note 43, at 716.

45. See, e.g., *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791, 806 (2d Cir. 1924); *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490, 492 (D. Mass. 1963), *rev'd on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964).

46. *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 221 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Straus v. Victor Talking Mach. Co.*, *supra* note 45, at 806; *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258, 302 (M.D.

brevity or simplicity of presentation,⁴⁸ and his treatment and solution of novel⁴⁹ and difficult⁵⁰ legal questions. His skill may also be indicated by his establishing important legal principles of far reaching significance for future antitrust prosecutions.⁵¹

Pa. 1965); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 168 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961); *Darden v. Besser*, 147 F. Supp. 376, 382 (E.D. Mich. 1956), *modified*, 257 F.2d 285 (6th Cir. 1958); *Applebaum v. Paramount Pictures, Inc.*, 1951 Trade Cas. ¶ 62944 (S.D. Miss. 1951), *rev'd on other grounds sub nom. Paramount Film Distrib. Corp. v. Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955).

47. It was not easy in this case to determine the theory on which it should be tried. That determination demanded the courage of selection. If the action had been planned and tried upon a wrong theory, it would have failed, and thus it is that ability should be recognized as an attribute not to be measured by a yardstick. *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791, 806 (2d Cir. 1924).

48. *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 242, 244 (D. Mass. 1954).

49. *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763, 772 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258, 303 (M.D. Pa. 1965); *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708, 716 (N.D. Cal. 1962); *Sager Glove Corp. v. Bausch & Lomb Optical Co.*, 1951 Trade Cas. ¶ 62956 (N.D. Ill. 1951); see *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 168 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961). Correspondingly, a lack of unique or novel issues may warrant the awarding of a smaller fee, *Bordonaro Bros. Theatres v. Paramount Pictures, Inc.*, 113 F. Supp. 196, 197 (W.D.N.Y.), *aff'd*, 203 F.2d 676 (2d Cir. 1953), or the reduction of the fee by the appellate court, *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 858 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952). *Contra*, *Milwaukee Towne Corp. v. Loew's Inc.*, 190 F.2d 561, 570 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952). Here the court held that the uniqueness of the case was irrelevant in the determination of a reasonable attorney's fee.

50. *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 222 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *American Can Co. v. Ladoga Canning Co.*, *supra* note 49; *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, *supra* note 49, at 302; *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, *supra* note 49; *Noerr Motor Freight, Inc. v. Eastern R. R. Presidents Conference*, *supra* note 49; *Webster Motor Car Co. v. Packard Motor Car Co.*, 166 F. Supp. 865, 866 (D.D.C. 1955), *rev'd on other grounds*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Darden v. Besser*, 147 F. Supp. 376, 382 (E.D. Mich. 1956), *modified*, 257 F.2d 285 (6th Cir. 1958); *Kobe, Inc. v. Dempsey Pump Co.*, 97 F. Supp. 342, 354 (N.D. Okla. 1951), *aff'd*, 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952); *Sager Glove Corp. v. Bausch & Lomb Optical Co.*, *supra* note 49; *Applebaum v. Paramount Pictures, Inc.*, 1951 Trade Cas. ¶ 62944 (S.D. Miss. 1951), *rev'd on other grounds sub nom. Paramount Film Distrib. Corp. v. Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955). *Contra*, *Milwaukee Towne Corp. v. Loew's, Inc.*, *supra* note 49; *Clapper v. Original Tractor Cab Co.*, 165 F. Supp. 565, 587 (S.D. Ind. 1958), *aff'd in part, rev'd in part*, 270 F.2d 616 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960).

51. *Osborn v. Sinclair Ref. Co.*, 207 F. Supp. 856, 864 (D. Md. 1962), *rev'd on other grounds*, 324 F.2d 566 (4th Cir. 1963); see *Twentieth Century-Fox Film Corp. v. Brook-*

C. Customary Charges of the Bar

The court may also consider as a factor the customary charges of the bar for similar services rendered in cases of comparable magnitude and complexity, although there is lack of unanimity whether it should be the fee prevailing in the antitrust field in general,⁵² in the judicial district where the case is tried,⁵³ or in the particular locality.⁵⁴ Evidence as to customary charges or the amount of a reasonable fee may or may not be introduced. Where expert testimony of this nature has been admitted the courts have held that it is in no way binding on them, and they have often disregarded it completely.⁵⁵

side Theatre Corp., 194 F.2d 846, 858 (8th Cir.), *cert. denied*, 343 U.S. 942 (1959); *cf.*, Twentieth Century Fox Film Corp. v. Goldwyn, *supra* note 50, at 222.

52. See *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708, 717 (N.D. Cal. 1962).

53. *A.C. Becken Co. v. Gemex Corp.*, 204 F. Supp. 28, 29 (N.D. Ill. 1962), *modified*, 314 F.2d 839 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963); *Bordonaro Bros. Theatres v. Paramount Pictures, Inc.*, 113 F. Supp. 196, 197 (W.D.N.Y.), *aff'd*, 203 F.2d 676 (2d Cir. 1953).

54. *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763, 772 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931); see *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791, 805-06 (2d Cir. 1924). In *Straus* the court noted that local economic factors may play an important part in determining a reasonable attorney's fee. It would seem that the fee prevailing in a particular locality (for this type of case) would be the most equitable basis for comparison because of varying economic factors. The other bases suggested might tend to favor one party over the other, depending upon the fees prevailing in other areas.

55. Seven cases have been found which indicate that rate evidence was taken. Of these, in only one case was the evidence considered to be strong enough for the court to follow. *William H. Rankin Co. v. Associated Bill Posters of United States & Canada*, 42 F.2d 152 (2d Cir. 1930). In two cases, the district courts awarded fees which approached the rate established by the testimony, but the courts of appeals cut the fees drastically. In *Milwaukee Towne Corp. v. Loew's Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert denied*, 342 U.S. 909 (1952), a district court award of attorney's fees of \$225,000 was reduced to \$75,000. Three independent members of the Chicago bar testified that a reasonable fee under the circumstances would be between \$175,000 and \$250,000. The court of appeals countered with the information that a competent lawyer could be hired in Chicago for forty dollars per hour (twenty dollars per hour for an associate) and would not award more than this. In *A.C. Becken Co. v. Gemex Corp.*, 204 F. Supp. 28 (N.D. Ill. 1962), *modified*, 314 F.2d 839 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963), evidence was introduced by a disinterested attorney that a reasonable rate would be fifty dollars per hour. Taking into account the 600 hours of partner time involved, a reasonable fee would have been \$30,000; the trial court awarded \$25,000. The appellate court apparently felt that this was too much in light of the fact that the actual damages found were only \$24,764.68. It concluded: "Defendant asks us not to give to the testimony of attorney Edward R. Johnston, who was called by plaintiff and who is admittedly an expert in the antitrust field, the weight given to it by the district court." *Id.* at 843. The court must have followed defendant's advice, for it then cut the fee to \$17,500.

In *Darden v. Besser*, 147 F. Supp. 376 (E.D. Mich. 1956), *modified*, 257 F.2d 285 (6th Cir. 1958), the appellate court raised the attorney's fee on the basis of expert

D. Amount of Damages

Damages may be used as either a positive or negative factor. As a positive factor, the awards increase as the damages increase. Although the amount in controversy may merit some consideration, the courts have tended to place their reliance on the damage recovery.⁵⁶ Furthermore, the better view is that only the amount of the actual (single) damages should be considered since two-thirds of the total award represents a penalty imposed by Congress.⁵⁷

But the damage award may also be used negatively, in order to limit the fee. The damages actually recovered may be compared to the amount in

testimony, but still did not come close to awarding the recommended fee. The trial court was not persuaded by the testimony of a "highly respected and competent member of the local bar" that a reasonable fee would be \$72,000; the court awarded \$10,000. This amount was increased to \$30,000 on appeal.

In *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661 (6th Cir. 1965), it was noted that the trial court found that twenty-five dollars per hour was a reasonable rate for an experienced attorney in Knoxville. 3,400 hours had been spent by plaintiff's attorneys in preparation, which would indicate a fee of \$85,000. The court held that even though twenty-five dollars per hour was a reasonable rate, it would not award more than \$50,000 for this case.

See *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476 (E.D. Mo. 1965) (evidence indicated between \$80,135 and \$82,970, but court awarded \$12,850); *Osborn v. Sinclair Ref. Co.*, 207 F. Supp. 856 (D. Md. 1962), *rev'd on other grounds*, 324 F.2d 566 (4th Cir. 1963) (evidence indicated between \$21,037.50 and \$35,132.50, but court awarded \$14,000).

56. *E.g.*, *Twentieth Century Fox-Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 859 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952); *Milwaukee Towne Corp. v. Loew's Inc.*, 190 F.2d 561, 571 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791, 806 (2d Cir. 1924); *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708, 716 (N.D. Cal. 1962); *Darden v. Besser*, 147 F. Supp. 376, 382 (E.D. Mich. 1956), *modified per curiam*, 257 F.2d 285 (6th Cir. 1958).

57. *Clapper v. Original Tractor Cab Co.*, 270 F.2d 616, 626 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960); *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, *supra* note 56; *Milwaukee Towne Corp. v. Loew's, Inc.*, *supra* note 56; *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490, 493 (D. Mass. 1963), *rev'd on other grounds sub nom.* *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964); *Applebaum v. Paramount Pictures, Inc.*, 1951 Trade Cas. ¶ 62944 (S.D. Miss. 1951), *rev'd on other grounds sub nom.* *Paramount Film Distrib. Corp. v. Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955); see *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964). *But see* *Straus v. Victor Talking Mach. Co.*, *supra* note 56 (court considered the "result attained"); *Bal Theatre Corp. v. Paramount Film Distrib. Co.*, *supra* note 56 ("amount recovered"); *Darden v. Besser*, 147 F. Supp. 376 (E.D. Mich. 1956) ("amount recovered"), *modified*, 257 F.2d 285 (6th Cir. 1958) ("result achieved"); *Kobe, Inc. v. Dempsey Pump Co.*, 97 F. Supp. 342 (N.D. Okla. 1951), *aff'd*, 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952) ("amount involved").

controversy, and the fact that there is a large disparity between the two may influence a court to award a lower fee.⁵⁸ Also, some courts use the amount of actual damages to limit the fee. These courts reason either that Congress did not intend the attorney's fee to be a further penalty,⁵⁹ or that the policy of the legislation to prevent the necessity of government suits does not justify the allowance of an attorney's fee nearly equal to or in excess of the single damages.⁶⁰ The courts are agreed, however, that any contingent fee arrangement between the plaintiff and his attorney shall be completely irrelevant to a determination of the fee award.⁶¹

E. Benefit from Prior Suit

An important factor utilized by the courts is whether the plaintiff's counsel has benefited from a prior government suit against the same defendant.⁶² Section 5(a) of the Clayton Act allows the plaintiff to use a final civil or criminal judgment or decree in favor of the United States against the same defendant as prima facie evidence for all issues to which the prior judgment

58. See *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490, 492 (D. Mass. 1963), *rev'd on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964). Perhaps consideration of this amount would only lead to a negative inference as to the skill and ability of counsel for the plaintiff as measured by the responsibility undertaken by him where there is wide variance in the amount of damages claimed and that recovered. However, depending upon the circumstances of the case, it might indicate only that the merits of plaintiff's position were weak in some respects. See note 93 *infra*.

59. *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561, 570 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952). In a case in which the recovery is small and no important legal principles are established, there would seem to be no reason to award a large fee. None of the policies underlying the legislation is fulfilled in such a case. *But see Union Leader Corp. v. Newspapers of New England, Inc.*, *supra* note 58, at 492.

60. See *Union Leader Corp. v. Newspapers of New England, Inc.*, *supra* note 58, at 492-93.

61. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 859 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952); *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561, 569 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *Bordonaro Bros. Theatres v. Paramount Pictures, Inc.*, 113 F. Supp. 196, 198 (W.D.N.Y.), *aff'd*, 203 F.2d 676 (2d Cir. 1953); *Applebaum v. Paramount Pictures, Inc.*, 1951 Trade Cas. ¶ 62944 (S.D. Miss. 1951), *rev'd on other grounds sub nom. Paramount Film Distrib. Corp. v. Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955).

The contingent fee type contract probably is considered irrelevant by the courts because the parties to it may intend that some form of "bonus" be given to the attorney if he is successful in the action. Furthermore, a collusive agreement could be made simply for the purpose of extracting a higher fee from the defendant.

62. Although this factor may be considered as a measure of the time and the skill required of the attorney, it is often separately treated by the courts. *E.g.*, *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 168 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961). For convenience the factor will be so treated here.

or decree would be an estoppel.⁶³ The effect of this section is to relieve the plaintiff of the burden of proving the defendant's antitrust violation. He has only to produce evidence that this conduct damaged him and to prove the extent of the damages sustained.⁶⁴ Not only may the prior judgment reduce the time and skill required of the plaintiff's attorney, but may also be the plaintiff's only means of success because he cannot obtain the special investigatory aids available to the government.⁶⁵

F. "Ordinary" and "Extraordinary" Cases

There are two substantially different types of cases which confront the courts. For lack of better terminology, these two types will be characterized

63. 69 Stat. 283 (1955), 15 U.S.C. § 16(a) (1964). This statute provides in part that:

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken

Also, this section does not apply to decrees entered in actions under § 4A of the Clayton Act, which provides for civil damage actions by the United States similar to private damage suits except that recovery is limited to actual damages and cost of suit. The courts have read § 5 of the Clayton Act as not including proceedings before the Federal Trade Commission, as it was felt that such proceedings did not constitute "final judgments." *Proper v. John Bene & Sons, Inc.*, 295 Fed. 729 (E.D.N.Y. 1923). However, in 1959, Congress passed an amendment which provided that FTC orders, unless appealed, would become final sixty days after service of the order. Clayton Act § 11, 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1964). This would seem to remove the obstacle which previously had impeded the courts in this area. For a full discussion of the problems in relation to FTC proceedings and § 5 of the Clayton Act, see Note, 53 *Geo. L.J.* 481 (1965).

The same theory has been applied to exclude pleas of *nolo contendere*. *City of Burbank v. General Elec. Co.*, 329 F.2d 825 (9th Cir. 1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F.2d 412 (7th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964). While the status of judgments entered on a guilty plea is somewhat uncertain, the courts probably will allow their admission in subsequent civil cases for the purposes of this section. *General Elec. Co. v. City of San Antonio*, 334 F.2d 480 (5th Cir. 1964); *City of Burbank v. General Elec. Co.*, *supra*; *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, *supra*. For a full discussion of the problems involved in this phase of antitrust litigation, see Seamans, Winson & McCartney, *Use of Criminal Pleas in Aid of Private Antitrust Actions*, 3 *Duquesne U.L. Rev.* 165 (1965). Civil injunctions issued in favor of the government pursuant to § 15 of the Clayton Act, 38 Stat. 736 (1914), as amended, 15 U.S.C. § 25 (1964), may also be used under this section as prima facie evidence of a defendant's violation. Seamans, Winson & McCartney, *supra* at 167 n.6.

64. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 858-59 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952).

65. See *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 242, 244 (D. Mass. 1954).

as "ordinary" and "extraordinary" cases. In the "ordinary" case, the plaintiff relies upon legal principles that are firmly established.⁶⁶ In such a case, the factors discussed above may be readily applied to the facts presented. In the "extraordinary" case, new and important legal principles, such as new types of antitrust violations, are established which may have far reaching application in future antitrust prosecutions.⁶⁷ In this type of case courts should distinguish between the time and ability involved in proving the defendant's violation of the antitrust laws and in establishing the plaintiff's damages.⁶⁸ The plaintiff should be compensated for carrying out the public policy of developing and enforcing the laws⁶⁹ regardless of the damages actually recovered.⁷⁰

G. Application of the Factors

While the courts all indicate that these are the factors which should be considered in arriving at a reasonable fee, there is no way to determine what weight is given to the individual factors in most of the reported cases. Very little time is spent in discussing these factors or in applying them to the particular case. The typical opinion simply states the factors and gives an award without discussion.⁷¹ Thus, while it may be said that the courts have

66. *E.g.*, *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952); *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476 (E.D. Mo. 1965).

67. If the court views the fee award as accruing to the attorney, a large fee may be awarded *because of* his diligence in establishing new principles. See *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964). On the other hand, if the court views the fee as an award to the plaintiff to cover his reasonable expenses, it may award a large fee *in spite of* the fact that the attorney may have stumbled onto the principles "unwittingly." See *Osborn v. Sinclair Ref. Co.*, 207 F. Supp. 856, 864 (D. Md. 1962), *rev'd on other grounds*, 324 F.2d 566 (4th Cir. 1963).

68. See also notes 18-25 *supra* and accompanying text.

69. *But see Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490, 492-93 (D. Mass. 1963), *rev'd on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964). This court thought it was

doubtful whether the allowance of an attorney's fee in excess of the losses sustained can be justified solely on the basis that "one of the purposes of private treble damage suits is to prevent the necessity of government civil suits or prosecutions, to establish and correct violations of the antitrust laws."

In this case, however, the court allowed a fee which was larger than the damages recovered because of the amount of work which it felt was necessary in order to make such a recovery.

70. *Cf. Finley v. Music Corp. of America*, 66 F. Supp. 569, 571 (S.D. Cal. 1946).

71. Statements such as the following are typical:

It follows that reasonable attorneys' fees must be fixed in accordance with the usual considerations including the difficulty of the litigation, the amount recovered, time and labor spent, the learning, skill and experience required, and the responsi-

indicated the correct factors to be considered, it is by no means clear how they have applied them.

III. JUDICIAL APPROACHES TO ANTITRUST LITIGATION WHICH MAY DISTORT THE APPLICATION OF THE FACTORS

The obvious approach for a court, having discussed the various factors involved, is to relate these factors to the specific case and thus determine the fee. Many courts have apparently done this. But some courts, because of the views they take of antitrust litigation in general, have developed different approaches when awarding the fee. Depending upon their approach, these courts will weight certain factors more heavily than others or throw out some of them entirely.

A. *The Percentage of Damages Approach*

Some courts have recognized that fee awards have been determined on a percentage basis but have refused to follow such an approach.⁷² Other courts, which have actually applied this approach, have not indicated that this was done.⁷³ No court has expressly recognized the approach and then gone on to apply it.

Even if such an approach is employed, it is difficult to determine just what percentage should be used. An examination of all fee awards compared to the damages recovered is unsatisfactory. The percentages thus obtained are scattered widely, and no compact range of percentage represents even a

bility undertaken. A reasonable allowance to Darden Industries for attorneys' fees is determined to be ten thousand dollars (\$10,000).

Darden v. Besser, 147 F. Supp. 376, 382 (E.D. Mich. 1956), *modified*, 327 F.2d 285 (6th Cir. 1958).

72. See *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490 (D. Mass. 1963), *rev'd on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961). In both of these cases, while the courts acknowledged the existence of such a test, they declined to apply it due to the facts of the specific cases. *Cf. Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 587 (10th Cir. 1961), *appeal dismissed*, 371 U.S. 801 (1962) (15% held reasonable).

73. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258, 303-04 (M.D. Pa. 1965); *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708, 717 (N.D. Cal. 1962); *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 242, 243 (D. Mass. 1954).

It is equally clear, however, that this test is not applied in all the opinions. When the awards are compared to the amount of actual (single) damages recovered, they range from 7% in *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), to 4,308% in *Osborn v. Sinclair Ref. Co.*, 207 F. Supp. 856 (D. Md. 1962), *rev'd on other grounds*, 324 F.2d 566 (4th Cir. 1963).

moderate plurality of the fee awards.⁷⁴ Likewise, if the awards are viewed in chronological order there is no indication that a rational development toward an acceptable percentage has occurred, or that the later awards bear any relation to their predecessors.⁷⁵ Arranging the cases according to the judicial circuit in which they were decided provides little assistance,⁷⁶ for even in those circuits in which the courts appear by their opinions to be operating on a percentage basis there is little indication that the percentages are similar.⁷⁷

However, in some opinions, courts have attempted to apply a percentage, although no two courts have agreed on exactly the same figure. In these decisions each court chose a moderate percentage—somewhat between 12.50

74. As indicated in note 73 *supra*, the spread between the lowest percentage and the highest is quite large. If the percentages are broken down into groups, this disparity can be better illustrated. The percentages used in notes 73-91 and accompanying text are percentages of the single damages unless otherwise indicated. This and other charts include all cases found which discussed a fee award.

Less than 10%: 1 case	41%-50%: 4 cases	81%-90%: 2 cases
11%-20%: 5 cases	51%-60%: 1 case	91%-100%: 4 cases
21%-30%: 6 cases	61%-70%: 1 case	150%-300%: 4 cases
31%-40%: 5 cases	71%-80%: 1 case	over 4300%: 1 case

75. Broken down into chronological groupings, the awards have ranged as follows: 1902-1935: 33%-150%; 1945-1955: 15%-61%; 1956-1960: 39%-200%; 1962: 15%-4308%; 1963: 20%-204%; 1964-1965: 7%-200%. From this it may be seen that there is no historical trend toward either a high or low figure, nor toward any common figure. If anything, the percentages are moving farther away from each other.

76.

1st Cir.: 20%-204%	5th Cir.: 7%-58%	9th Cir.: 38%-150%
2d Cir.: 33%-88%	6th Cir.: 200%	10th Cir.: 15%-21%
3d Cir.: 46%-92%	7th Cir.: 15%-91%	D.C. Cir.: 24%
4th Cir.: 4308% (one case)	8th Cir.: 27%-33%	(one case)

77. The Seventh Circuit Court of Appeals indicated in 1951 that a fee award which amounted to more than 50% of the actual damages was not "reasonable" within the meaning of the statute. *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952). In that case the court awarded a fee which it announced as being 17% of the damages recovered, whereas it actually amounted to 24%. Shortly thereafter, a district court, feeling itself bound by *Milwaukee Towne*, awarded a fee of 41%. *Sager Glove Corp. v. Bausch & Lomb Optical Corp.*, 1951 Trade Cas. ¶ 62956 (N.D. Ill. 1951). See note 81 *infra*. Then in *Clapper v. Original Tractor Cab Co.*, 165 F. Supp. 565 (S.D. Ind. 1958), *aff'd in part, rev'd in part*, 270 F.2d 616 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960), the court felt that it had to disregard the great amount of time involved and the complexity of the case because of the prior decision, but still awarded a fee which amounted to 91% of the damages which the appellate court affirmed. In *A.C. Becken Co. v. Gemex Corp.*, 204 F. Supp. 28 (N.D. Ill. 1962), *modified*, 314 F.2d 839 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963), the district court, without any mention of *Milwaukee Towne*, awarded a fee of over 100%; this was reduced by the appellate court, but only to 71%.

per cent and 24 per cent.⁷⁸ In all but one decision,⁷⁹ the courts cited numerous cases to bolster their argument that the percentage awarded was generally in line with those prevailing elsewhere.⁸⁰ Apparently the courts are

78. *Milwaukee Towne Corp. v. Loew's, Inc.*, *supra* note 77 (24%); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258 (M.D. Pa. 1965) (15% of treble damages); *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708 (N.D. Cal. 1962) (13% of treble damages); *Webster Motor Car Co. v. Packard Motor Car Co.*, 166 F. Supp. 865 (D.D.C. 1955), *rev'd on other grounds*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957) (23%); *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 242 (D. Mass. 1954) (20%).

79. *Milwaukee Towne Corp. v. Loew's, Inc.*, *supra* note 77. This case cited only two other cases, and both were past decisions in the same circuit. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 182 F.2d 228 (7th Cir. 1950), *rev'd on other grounds*, 340 U.S. 211 (1951) (15%); *Bigelow v. RKO Radio Pictures, Inc.*, 150 F.2d 877 (7th Cir. 1945), *rev'd on other grounds*, 327 U.S. 251 (1946) (25%).

80. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258 (M.D. Pa. 1965) (46%), cites the following: *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964) (100%); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *appeal dismissed*, 371 U.S. 801 (1962) (45%); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962) (39%); *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952) (27%); *Milwaukee Towne Corp. v. Loew's, Inc.*, *supra* note 77 (24%); *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919 (5th Cir. 1951) (58%); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961) (92%); *Clapper v. Original Tractor Cab Co.*, 165 F. Supp. 565 (S.D. Ind. 1958), *aff'd in part, rev'd in part*, 270 F.2d 616 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960) (90%); *Darden v. Besser*, 147 F. Supp. 376 (E.D. Mich. 1956), *modified*, 257 F.2d 285 (6th Cir. 1958) (67%).

Bal Theatre Corp. v. Paramount Film Distrib. Corp., 206 F. Supp. 708 (N.D. Cal. 1962) (38%), cites the following: *Union Carbide & Carbon Corp. v. Nisley*, *supra* (45%); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, *supra* (39%); *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, *supra* (27%); *Milwaukee Towne Corp. v. Loew's, Inc.*, *supra* note 77 (24%); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, *supra* (92%); *Clapper v. Original Tractor Cab Co.*, *supra* (91%); *Darden v. Besser*, *supra* (67%); *Webster Motor Car Co. v. Packard Motor Car Co.*, 166 F. Supp. 865 (D.D.C. 1955), *rev'd on other grounds*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957) (24%).

Webster Motor Car Co. v. Packard Motor Car Co., *supra* (24%), cites the following: *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, *supra* (27%); *Milwaukee Town Corp. v. Loew's, Inc.*, *supra* note 77 (24%); *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 242 (D. Mass. 1954) (20%); *Applebaum v. Paramount Pictures, Inc.*, 1951 Trade Cas. ¶ 62944 (S.D. Miss. 1951), *rev'd on other grounds sub nom. Paramount Film Distrib. Corp. v. Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955) (27%).

Cape Cod Food Prods., Inc. v. National Cranberry Ass'n, *supra* (20%), cites the following: *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, *supra* (27%); *Milwaukee Towne Corp. v. Loew's, Inc.*, *supra* note 77 (24%); *American Can Co. v. Bruce's Juices, Inc.*, *supra* (58%); *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), *rev'd on other grounds*, 340 U.S. 558 (1951) (61%);

cognizant of percentages obtained in other cases and desire to remain within certain approved percentage limits in order to decrease the likelihood of reversal on appeal.⁸¹ However, it is doubtful that the cases cited in any of these opinions are truly representative. For example, in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*,⁸² the court justified its percentage of 46 per cent by saying that it was "in line with fees awarded in recent antitrust cases."⁸³ The cases cited were from the period 1951-1964, and the percentages ranged from about 24 per cent to 100 per cent.⁸⁴ Also, the fee awards in all cases during this period ranged from a low of 6.85 per cent to over 4307 per cent, including seven cases in which the fee was greater than 90 per cent of the damages. One generalization which can clearly be made is that more large attorney's fees were awarded in this period than in any other. However, the court did not take most of the cases in the upper range into account.⁸⁵

The same could be said of the rest of the courts that use this approach. In *Webster Motor Car Co. v. Packard Motor Car Co.*,⁸⁶ the court chose four cases⁸⁷ to use "as more or less of a yardstick."⁸⁸ The fees ranged from

William H. Rankin Co. v. Associated Bill Posters, 42 F.2d 152 (2d Cir. 1930) (50%); *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791 (2d Cir. 1924) (89%).

81. See, e.g., *Sager Glove Corp. v. Bausch & Lomb Optical Corp.*, 1951 Trade Cas. ¶ 62956 (N.D. Ill. 1951). The court considered itself bound by *Milwaukee Towne Corp. v. Loew's, Inc.*, *supra* note 77, in which the appellate court had indicated (1) that an attorney's fee in excess of 50% of the actual damages was unreasonable and (2) that a reasonable fee for an attorney in the Chicago area would be \$40 per hour for partners and \$20 per hour for associates. The problem in the *Sager Glove* case was that the court could not award a fee based on these rates to the attorneys and still remain within the 50% limitation. It chose to limit the fee award to 41% of damages (\$132,000 fee; \$325,000 damages).

82. 245 F. Supp. 258 (M.D. Pa. 1965).

83. *Id.* at 303-04.

84. See cases cited note 80 *supra*. Note that in order to get its percentage figures into the moderate range, the court used a percentage of the *treble* damages, which brought it down to 15% (as opposed to 46% of the single damages). Of the cases cited, *Milwaukee Towne Corp. v. Loew's Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert denied*, 342 U.S. 909 (1952), was based expressly on the single damages awarded, and the trial court's award of 22% in *Darden v. Besser*, 147 F. Supp. 376 (E.D. Mich. 1956), *modified*, 257 F.2d 285 (6th Cir. 1958) was raised by the appellate court to 67%.

85. *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708 (N.D. Cal. 1962), was treated in a similar manner. The court awarded a moderate figure of 13% but used treble damages as its base. (This is 38% of the single damages.) See cases and percentages cited in note 80 *supra*.

86. 166 F. Supp. 865 (D.D.C. 1955), *rev'd on other grounds*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957).

87. See cases cited note 80 *supra*.

88. *Webster Motor Car Co. v. Packard Motor Car Co.*, 166 F. Supp. 865, 866 (D.D.C. 1955), *rev'd on other grounds*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957).

20 per cent to 26.67 per cent, and if one looks at no other cases, these would seem to justify the award of "about 23 or 24 percent of the single damages"⁸⁹ made by the court. Even using the court's reference period, 1951-1954, the fees in *all* cases ranged from 17.43 per cent to 60 per cent. Thus, the court's "yardstick" constituted the bottom portion of the scale.⁹⁰

It is submitted that the percentage "test" is an arbitrary one at best because there is really no means to determine a representative percentage.⁹¹ Those courts which have made the attempt have been forced to restrict themselves severely in choosing cases to establish their base groups. In truth, any award could be justified by this method.

Furthermore, a percentage test would be unfair in an extraordinary case where the damage recovery may be small and may not reflect the effort expended by counsel in proving the antitrust violation. Even though a percentage-determined fee might be less unfair in the ordinary case, the statute specifies that "a reasonable attorney's fee" be awarded, not merely a percentage of the damages. Had Congress intended the fee to be calculated simply by taking such a percentage, it could have provided for this in the act.⁹²

B. *The "Victorious Plaintiff" Approach*

One court approached the determination of the fee with such a strong conviction that it should be viewed as accruing to the attorney, that the entire consideration of this aspect of the case was directed toward an evaluation of his performance. Thus the factors were weighted in light of this interpretation, and only those factors which lent themselves to such an approach were considered. This court concluded that

a losing defendant must pay what it would be reasonable for counsel to charge a victorious plaintiff. The rate is the free market price, the figure which a willing, successful client would pay a willing, successful lawyer. Sometimes the figure may seem high. But so far as price is determined by unique excellence and by social usefulness, the advocate is especially worthy of large recompense. . . .

Unless excellence in the trial lawyer is properly recompensed, the best men will not spend their time in court, and thus there will dry up the most essential sources of an independent bar.⁹³

89. *Ibid.*

90. Furthermore, before 1951 the percentages range up to 150%, so that it is difficult to understand why these four cases were singled out as the basis for the decision.

91. See notes 74-77 *supra* and accompanying text.

92. See note 1 *supra* and accompanying text.

93. *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 242, 244 (D. Mass. 1954). This court in a later case clarified the test as applying only where the plaintiff is *wholly* victorious:

Where in an antitrust suit a plaintiff claims a vast sum and recovers a small sum, he may owe his own counsel on account of legal services not only for items for

There are several problems with this approach. First, its major purpose is to encourage excellence at the bar, which, while a laudable purpose, is certainly far from the intention of Congress in enacting this section of the Clayton Act.⁹⁴ This is no more relevant to antitrust cases than to any others. Second, it uses the amount which the client after a successful suit is *willing* to pay rather than what would be *reasonable* at that point.⁹⁵ Having recovered a large damage award (trebled), the victorious plaintiff might be willing to reward his attorney with a large fee. And while it might be reasonable for the attorney to expect his victorious client to pay a large fee, there is no reason to believe that such an award is "reasonable" within the meaning of the statute.

Finally, if an extraordinary case is involved, there are two possible situations. On the one hand, if the plaintiff's main purpose in instituting the suit was to recover large damages, and he does not, he can hardly be characterized as "willing" and "successful" even though he may have been "victorious." In such a case, the approach would be meaningless. On the other hand, if the plaintiff's main purpose was to establish a new principle or to abolish a certain form of competition, *regardless* of the amount of damages he recovered, it is submitted that the test will have no more validity than in the ordinary case.

This approach has been rejected by other courts which have considered it,⁹⁶ although one court felt that it might indicate the upper limit of "reasonableness."⁹⁷

which recovery was allowed but also for items for which recovery was denied. Yet such a partially successful antitrust plaintiff can recover from the antitrust defendant only on account of such portion of the attorney's effort as produced a recovery.

Union Leader Corp. v. Newspapers of New England, Inc., 218 F. Supp. 490, 492 (D. Mass. 1963), *rev'd on other grounds sub nom.* Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964); *cf.* Straus v. Victor Talking Mach. Co., 297 Fed. 791, 806 (2d Cir. 1924) (no fee on appeal for partially successful plaintiff).

94. See notes 5-9 *supra* and accompanying text.

95. This court indicated in a later case that the "reasonable" test would be relevant for the *partially* successful plaintiff. "Inquiry should focus on what is the reasonable amount that a person injured by an antitrust violation would have had to pay to recover the precise losses which a court, jury, or master has held that he sustained." Union Leader Corp. v. Newspapers of New England, Inc., 218 F. Supp. 490, 492 (D. Mass. 1963), *rev'd on other grounds sub nom.* Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964).

96. Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 166 F. Supp. 163 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961); see Webster Motor Car Co. v. Packard Motor Car Co., 166 F. Supp. 865 (D.D.C. 1955), *rev'd on other grounds*, 243 F.2d 418 (D.C. Cir.), *cert denied*, 355 U.S. 822 (1957).

97. Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, *supra* note 96, at 170.

C. *The "Contribution" Approach*

Obviously approaching the fee award with the intention of limiting the defendant's liability, the court in *Webster Motor Car Co. v. Packard Motor Car Co.*, decided that its duty was to determine that amount which the defendant should be required to pay as a *contribution* toward the fee of plaintiff's counsel.⁹⁸

Looking strictly at the statute involved, it is difficult to understand how the award to a successful plaintiff of a "reasonable attorney's fee" could be transformed into a determination of a "contribution" which the defendant ought to make toward plaintiff's legal costs. What the court has done is to say (1) this plaintiff has already recovered three times the damage inflicted; (2) he is also entitled to an attorney's fee; but (3) to award a large fee would only add to the great burden on the defendant; therefore (4) the term "reasonable" shall be interpreted to mean a reasonable contribution toward plaintiff's attorney's fees.⁹⁹

The court emphasized that the defendant's contribution is not to be considered as a limit on the amount that the plaintiff's attorney should charge his client. While this court alone has expressly taken this position, other courts have indicated similar convictions,¹⁰⁰ although they have been reluctant to state their reasons.¹⁰¹ The result of this approach is to lighten the defendant's burden and at the same time increase the plaintiff's because the court does not purport to award a fee that reimburses the plaintiff for his expenses.

This approach has also had little success. No other court has adopted it, and it has been expressly rejected by one court which felt that the most it could indicate would be a lower limit of a reasonable fee.¹⁰²

98. *Webster Motor Car Co. v. Packard Motor Car Co.*, 166 F. Supp. 856, 866 (D.D.C. 1955), *rev'd on other grounds*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957). *But cf.* *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943) (decided under Fair Labor Standards Act):

The spirit of the law is that the plaintiff gets as part of his recovery, if he wins, his *whole* reasonable counsel fees, *not some fraction of them*. This is so that he will not ordinarily be required to pay anything more to his lawyer. Of course this does not mean that if an employee makes an excessive contract with his counsel, a court is bound to set the fee accordingly. (Emphasis added.)

99. See *Webster Motor Car Co. v. Packard Motor Car Co.*, *supra* note 98, at 866. The court apparently determined this on a percentage of damages basis. See notes 86-90 *supra* and accompanying text; see generally notes 72-91 *supra* and accompanying text.

100. See, *e.g.*, *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791, 806 (2d Cir. 1924).

101. Seeking a "safe" percentage which may not be grounds for reversal may be one reason for the smaller award. See also notes 103-06 *infra* and accompanying text.

102. *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163 (E.D. Pa. 1958), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds*, 365 U.S. 127 (1961). The *Noerr* court also felt that any attempt to locate an exact point between the contribution approach and the victorious plaintiff approach to determine a reasonable fee would be fruitless. *Id.* at 170.

D. Prevention of "Vicarious Generosity" and Racketeering

Some courts have approached the awarding of fees with the intention of keeping them at a relatively low level. Judge Wyzanski, who views the fee from the standpoint of a "victorious plaintiff," has indicated several reasons why other courts might balk at awarding the plaintiff a fee that would be reasonable based on principles of *quantum meruit*.¹⁰³ (1) The plaintiff, by recovering multiple damages, is getting a "windfall." He can easily pay his attorney out of this recovery without further penalizing the defendant.¹⁰⁴ (2) The judges may not sympathize with the purpose of the act, and may express their displeasure by reducing that part of the award over which they have some control. (3) They may dislike a provision which allows them to award an attorney's fee to the successful plaintiff but not to the successful defendant.¹⁰⁵ (4) Some view the provision as being in the nature of a contingent fee, of which they disapprove, and feel that it tends to make the attorney an interested party. And (5) others fear the possibility of racketeering and strike suits if large fees are awarded.¹⁰⁶

For example, in *Milwaukee Towne Corp. v. Loew's, Inc.*,¹⁰⁷ the Seventh Circuit was obviously out of sympathy not only with the attorney's fee provision of the antitrust statute but with the general trend in the private damage suit area. In reducing the attorney's fee awarded by the trial court from \$225,000 to \$75,000, this court said:

It should not be made more profitable than it [already] is for a person to become the victim of a conspiracy in restraint of trade. Already the victim is permitted to use as a yardstick for measuring his damages what he would have gained as a member of or a beneficiary of the conspiracy, and is mandatorily awarded a judgment for three times the amount thus found. Certainly Congress did not intend to impose a further penalty upon the defendants under the guise of "a reasonable attorney's fee," and yet the allowance here is more than 50% of the damages as determined by the court.¹⁰⁸

103. *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 297 (D. Mass. 1943).

104. *But see Loevinger, Private Action—The Strongest Pillar of Antitrust*, 3 ANTI-TRUST BULL. 167, 169-70 (1958); McConnell, *The Treble Damage Issue: A Strong Dissent*, in *Antitrust Administration and The Attorney General's Committee Report: A Brief Symposium*, 50 Nw. L. Rev. 305, 342 (1955).

105. See notes 11-13 *supra* and accompanying text.

106. See 2 WHITNEY, ANTI-TRUST POLICIES 181 (1958); Timberlake, *Federal Anti-trust Treble Damage Actions*, 9 N.Y.L.F. 145 (1963); *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 82d Cong., 1st Sess., ser. 1, pt. 3, at 15 (1951) (remarks by Representative Cellar).

107. 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *cf. Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661, 667 (6th Cir. 1965).

108. *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561, 570 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952).

The Eighth Circuit analogized the fee award to the problem of contingent fee contracts.¹⁰⁹ This court felt that viewed in such a manner, if an attorney sued his client on a contingent fee contract calling for a forty per cent recovery (the district court award), it would not be enforced as it would "shock the conscience."¹¹⁰ The court concluded that since it would not approve such a contract even if the attorney's client had agreed, it should not decide differently just because the defendant was paying. Thus, the courts are protecting the defendant against "vicarious generosity."

IV. THE APPELLATE COURTS AND A REASONABLE FEE

Once the trial judge has determined the amount of the fee, the appellate court will ordinarily affirm his decision unless a clear abuse of discretion can be shown.¹¹¹ In deciding whether the trial judge has abused his discretion by setting the fee too high, the appellate court may consider whether the allowance might tend to set a bad precedent which could bring the bench and bar into disrepute or to turn antitrust suits into a racketeering practice.¹¹² Of course, if the trial court has abused its discretion by setting the fee too low, the appellate court may enlarge the award.¹¹³ The bounds of discretion required by the appellate court are necessarily set by the approach it takes. Even if the court does not find that the trial judge has abused his discretion, it may reduce the fee award if it deletes an element of damages allowed in the lower court.¹¹⁴

Furthermore, because of the broad terms of the statute, the appellate court may award an additional attorney's fee because of work done on the appeal,¹¹⁵ or remand the case to the district court with instructions to determine an additional fee.¹¹⁶ Of course, when the appellate court sets fees, it should refer to the same factors which a trial court should use. However, to

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

110. See Canon 13, CANONS OF PROFESSIONAL ETHICS.

111. *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 101 F.2d 79, 81 (2d Cir. 1939).

112. See notes 103-10 *supra* and accompanying text.

113. See, *e.g.*, *Darden v. Besser*, 257 F.2d 285 (6th Cir. 1958).

114. See *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791, 806 (2d Cir. 1924).

115. *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189, 196 (5th Cir. 1965); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 222 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *North Texas Producers Ass'n v. Young*, 308 F.2d 235, 246 (5th Cir. 1962), *cert. denied*, 372 U.S. 929 (1963); *American Crystal Sugar Co. v. Mandeville Island Farms*, 195 F.2d 622 (9th Cir.), *cert. denied*, 343 U.S. 957 (1952). *But see Straus v. Victor Talking Mach. Co.*, 297 Fed. 791, 806 (2d Cir. 1924) (fee on appeal unjustified where plaintiff is only partially successful).

116. *Osborn v. Sinclair Ref. Co.*, 324 F.2d 566, 575 (4th Cir. 1963).

be consistent in awarding a fee for every phase of the litigation, without duplicating the fee already given by the trial court, the appellate court in revising a fee should attempt to find out the method by which the original fee was determined.¹¹⁷ The record of the trial court can sometimes be of assistance because the factors considered may appear there and not in the opinion.

CONCLUSION

There are various methods by which a court might determine "a reasonable attorney's fee." From the language in most of the opinions, it appears that the fee is based on modified principles of *quantum meruit*. As developed by the courts, this method would seem to apply to both ordinary and extraordinary cases and is probably the method which, on balance, is fairest to both parties. The fee is not computed exactly as it would be in a suit by the attorney against his client where there is no contract between them. Because of the limitations in the statutes themselves and because of those imposed by the courts in interpreting them, some part of the time spent in every cause is not recompensable in the fee award. Thus, for example, time spent in matters relating to defendants subsequently dismissed, in defending counterclaims and in attempting to prove damages which were not found by the trier of facts or which were disallowed for some other reason (such as the statute of limitations), is not charged against the defendant, while it would be charged against the client.¹¹⁸ In this manner, the successful plaintiff is allowed to recover a large portion of the legal expense to which he has been put by the defendant, but the defendant is not charged for costs which cannot be attributed to him.

There is no way to determine whether the courts have in fact been awarding "reasonable" attorneys' fees, for the reports of the cases not only give insufficient details as to the time spent on various matters, but also do not indicate the weight placed on the factors as considered by the courts. However, as the reports do indicate some of the facts in the cases, and because some of the fees awarded seem to bear small relation to these facts, some conclusions can be drawn therefrom.

If antitrust cases were the usual, rather than a fairly unusual, type of litigation, the relatively small number of cases in which an appeal has been taken based upon the excessiveness or insufficiency of the fee award, viewed in light of the large number of cases in the seventy-five year history of the

117. See *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 222 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *North Texas Producers Ass'n v. Young*, 308 F.2d 235, 246 (5th Cir. 1962), *cert. denied*, 372 U.S. 929 (1963).

118. See notes 38-42 *supra* and accompanying text.

legislation, would seem to indicate that the courts in most cases have made the proper determination of a reasonable fee. This position would seem to be buttressed by the even smaller number of cases in which appellate courts have felt compelled to modify the fee award. However, these assumptions are not necessarily valid. First, because of the large damages involved in antitrust litigation, the main consideration is usually given to the primary award and not the attorney's fee. Even if the plaintiff considers that the attorney's fee awarded is unreasonably small, he is likely not to object because the difference between this amount and the actual charge of his attorney can be paid from the treble damage award and still leave compensation for all damage sustained. Second, if the successful plaintiff (satisfied with the damage award) appeals on the question of the fee, he is almost certain to be faced with the prospect of a cross appeal by the defendant on the larger damage judgment. Finally, if the defendant objects to the trial court's judgment, his appeal is likely to focus on the reduction of damages, not only because a larger sum is involved, but also because the fee would probably be reduced as an incident to his appeal if it were successful. Thus it can be seen that the courts usually are not under pressure in awarding fees, nor is Congress pressed to modify this system because of the relatively few persons whom antitrust legislation affects. Therefore, the reasonable attorney's fee must continue to be determined by the trial judge exercising his best discretion in an impartial manner, based upon all the facts and circumstances of the particular case.

However, the opinions would prove immeasurably more valuable to attorneys and to appellate courts if the findings and conclusions of the trial judge were spelled out in greater detail. Having decided the primary questions involved in antitrust cases—violation and damages—the trial courts have been prone to dismiss the question of the attorney's fee rather summarily. Such discussions, if present at all, have usually been too brief to be of any use to an attorney as a guide to future decisions, or to a reviewing court.

The reason for the lack of consideration given this area of the law is not clear. While, in the ordinary case, the fee is not usually as large as the treble damages recovered, it is still a significant sum, often amounting to hundreds of thousands of dollars. In other fields of law, an award of this magnitude receives considerable discussion. But the amount in controversy is not the only criterion for determining the amount of consideration to be given a question of law. The factors and the method to be used in determining the amount of the fee to be awarded in these suits are also seriously in controversy, and some discussion would seem to be essential. If the court would

attempt to relate the factors to the particular case instead of merely listing the factors which the court feels ought to be considered, some evaluation of the weight given each factor might be made and used in subsequent cases. Were this done, the decisions might gain some consistency which is now lacking and which, to some degree at least, ought to be present in the nationwide application of a single federal statute.