ATTORNEYS' FEES IN THE AGENT ORANGE LITIGATION: MODIFYING THE LODESTAR ANALYSIS FOR MASS TORT CASES

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In 1979, a group of veterans and their families sued numerous chemical companies and the United States government based on claims that they had been injured by the veterans' exposure to Agent Orange and other herbicides during the Vietnam War.[1] The class action litigation that grew out of this claim has been remarkable in many respects. Politically, it reawakened memories of the Vietnam War and became a focal point of efforts by Vietnam veterans to gain recognition for their sacrifices and suffering. In addition, plaintiffs' unique claim for recovery gave rise to a number of notable legal issues. In the course of the Agent Orange litigation, a federal court rendered opinions on matters as diverse as the maintenance of a class action,[2] the appropriate statute of limitations for toxic tort claims,[3] the requisite scientific proof of causation to support a claim,[4] the reasonableness of a settlement,[5] and the proper distribution of the assets of a settlement fund.[6] Not the least important of the legal issues that arose was the question of appropriate attorneys' fees in the

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1. The first Agent Orange case was Dowd v. Dow Chemical, No. 79-C-467 (E.D.N.Y. filed February 23, 1979). On March 20, 1979, another complaint was filed in Ryan v. Dow Chemical, No. 79-C-747 (E.D.N.Y.). The *Ryan* action was the case under which the class action ultimately proceeded. In May 1979, the Judicial Panel on Multidistrict Litigation transferred all Agent Orange cases to the Eastern District of New York. From May 1979 until settlement, the multidistrict Agent Orange Product Liability Litigation carried the case number M.D.L. No. 381.

2. *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 787-92 (E.D.N.Y. 1980) [hereinafter cited as *Agent Orange*]; *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983) [hereinafter cited as *Agent Orange II*]; *See also In re* "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046 (E.D.N.Y. 1982) [hereinafter cited as *Agent Orange III*] (denial of Dow Chemical Company's motion to decertify the class). For easy reference, the Agent Orange opinions discussed in this article have been numbered chronologically from one to six. There were, however, more than six opinions issued by Judge Weinstein over the course of the litigation.

3. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 800-816 (E.D.N.Y. 1984) [hereinafter cited as *Agent Orange IV*].

4. *Id.* at 787-95.

5. *Id.* at 857-58.

6. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1396 (E.D.N.Y. 1985) [hereinafter cited as *Agent Orange V*].

context of a mass toxic tort claim.[7]

Determining the appropriate attorneys' fees in class actions is seldom an easy undertaking.[8] Setting the attorneys' fees in the Agent Orange case presented an especially challenging task that involved difficult factual determinations, complex legal analyses, and delicate policy choices. Furthermore, the attorneys' fees question had to be resolved in an emotionally charged atmosphere created by an active and questioning class, a group of attorneys—many of whom had dedicated five years and considerable financial resources to the Agent Orange case— and a public that was growing increasingly skeptical of large attorneys' fees awards. Given this extraordinary setting, the Agent Orange case provides an excellent opportunity to study the application of the legal and policy considerations that govern a court's determination of attorneys' fees in complex class actions.

This article briefly examines federal court Chief Judge Jack B. Weinstein's attorneys' fees opinion in the Agent Orange case.[9] The article first describes the historical basis of the court's jurisdiction over the attorneys' fees question and then reviews the customary approach that courts have used in ruling on attorneys' fee requests in class actions. The remainder of the article describes Judge Weinstein's attorneys' fees decision in the Agent Orange case and discusses its value as a model for addressing attorneys' fees questions in future mass tort class actions.

I
HISTORICAL BACKGROUND ON ATTORNEYS' FEES

The "American Rule" on attorneys' fees is that each party bears its own costs.[10] Accordingly, American courts do not ordinarily set or review attorneys' fees.[11] Although the American Rule has been sharply criticized,[12] in most cases Congress and the courts have continued to adhere to the fundamental presumption that the parties should bear their own costs.[13] However, Congress has exercised its power to enact a number of significant fee-shifting statutes that establish exceptions to the American Rule.[14] These statutory ex-

7. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296 (E.D.N.Y. 1985) [hereinafter *Agent Orange VI*].

8. *See, e.g.*, City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

9. *Agent Orange VI*, 611 F. Supp. 1296.

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

11. *See id.* at 247. In contrast, the "English Rule" statutorily grants discretion to courts to award counsel fees to successful plaintiffs. *Id.*

12. *See, e.g.*, Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972).

13. *Alyeska*, 421 U.S. at 247-50.

14. Congressional authority to enact fee-shifting statutes has been accepted since the first years of the federal court system. *Id.* at 247-48. For a summary of the early legislation in which

ceptions to the American Rule exist in such diverse areas as civil rights,[15] patent,[16] antitrust,[17] securities,[18] and environmental law.[19] The nature of the fee-shifting arrangement varies widely from statute to statute. For instance, under the antitrust laws plaintiffs who obtain treble damages receive mandatory attorneys' fee awards.[20] In contrast, in patent litigation "[t]he court in *exceptional* cases *may* award reasonable attorneys' fees to the prevailing party."[21] In civil rights,[22] securities,[23] and environmental cases,[24] the award of attorneys' fees to a prevailing party is left to the discretion of the court.

In addition to the statutory deviations from the basic rule on attorneys' fees, there are also two well-established, judicially created exceptions to the American Rule. The "bad faith" exception allows courts to order the losing party to pay fees in instances of bad faith or disobedience of a court order.[25] The other judicially fashioned exception to the American Rule, and the basis of the court's jurisdiction in the Agent Orange litigation, is the "common fund" doctrine.

Under the common fund doctrine, a court can order that class representatives receive their compensation from the fund that they helped to create. For over 100 years the Supreme Court has recognized that federal courts have equitable authority to permit recovery of attorneys' fees from a common fund.[26] Justice Frankfurter rearticulated the courts' equitable powers to assess

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Congress exercised its power to determine attorney's fees, see generally, S. LAW, THE JURISDICTION AND POWERS OF THE UNITED STATES COURTS 255-82 (1852).

15. Civil Rights Act of 1964, Title II, § 204 (b), 42 U.S.C. § 2000 a-3 (b) (1982), and Title VII, § 706 (k), 42 U.S.C. § 2000 e-5 (k) (1982); Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).

16. 35 U.S.C. § 285 (1982).

17. Clayton Act, § 4, 15 U.S.C. § 15 (1982).

18. Securities Act of 1933, 15 U.S.C. § 77k(e) (1982); Securities and Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1982).

19. *See, e.g.*, Clean Air Act, § 304 (d), 42 U.S.C. § 7604(d) (1982).

20. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall therefore recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1982).

21. 35 U.S.C. § 285 (1982) (emphasis added).

22. The Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000g-3(b) (1982); Title VII, 42 U.S.C. § 2000e-5(k) (1982).

23. The Securities Act of 1933, 15 U.S.C. § 77k(e) (1982); The Securities and Exchange Act of 1934, 15 U.S.C. § 78i(e), 78(a) (1982).

24. The Clean Air Act, 42 U.S.C. § 1857h-2(d) (1982).

25. *See* Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962) (fees assessed because of bad faith); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 427-28 (1923) (fees assessed because of disobeyance of a court order).

26. Trustees v. Greenough, 105 U.S. 527 (1882). In *Greenough*, the Supreme Court held that the exercise of congressional power to determine fees did not interfere with the historic power of equity to permit a trustee to recover attorneys' fees from those who benefitted from the fund. *Id.* at 535-36. *See generally* Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).

fees against a common fund in *Sprague v. Ticonic National Bank*,[27] explaining that "[a]llowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts."[28] The Supreme Court recently acknowledged the continuing vitality of the common fund doctrine in *Boeing v. Van Gemert*.[29] In *Boeing* the Court held that courts have the inherent authority to prevent unjust enrichment by "assessing attorneys' fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit."[30]

The common fund doctrine is compatible with the courts' historic power over class action litigations. Like the common fund doctrine, the class action mechanism was originally a product of the federal courts' equitable authority.[31] The class action device has since been codified in Rule 23 of the Federal Rules of Civil Procedure, which gives courts authority to oversee the prosecution of class actions, including the supervision and approval of any settlement and the distribution of settlement assets.[32] Thus, under both Rule 23 and the common fund doctrine, as part of its jurisdiction over the disposition of a common fund created in a class action, a court also has control over attorneys' fees paid from the fund.

The determination of attorneys' fees awards in class actions involves striking an appropriate balance between competing policy objectives. The class action mechanism depends on courts making adequate fee awards to class representatives. Courts must award counsel sufficient compensation to give attorneys an incentive to represent classes. This is particularly important in cases in which individual plaintiffs will receive relatively small recoveries, and will therefore be unable to compensate counsel adequately. In such cases, unless courts are willing to grant reasonable fees from the common fund, many plaintiffs with meritorious and socially desirable claims will go unrepresented.

On the other hand, excessive fee awards threaten the credibility and viability of the class action device. Most importantly, the courts must jealously protect the litigants' interest by insuring that overly generous fee awards do not deplete the common fund.[33] The courts must also exercise restraint in fee awards to protect against the perception that class actions redound principally to the benefit of attorneys: lucrative fee awards support the general perception

27. 307 U.S. 161 (1939).

28. *Id.* at 164.

29. 444 U.S. 472 (1980).

30. *Id.* at 478.

31. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1751 (1972).

32. FED. R. CIV. P. 23 (e). *See also* 7C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1751-58 (1985). As Professors Wright and Miller note, "[t]he court's authority to reimburse the parties stems from the fact that the class action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts." *Id.* § 1803 at 285.

33. *See* Trustees v. Greenough, 105 U.S. at 536.

that "[a] lawsuit is a fruit tree planted in a lawyer's garden."[34] Further, courts cannot be so generous as to induce attorneys to file unmeritorious claims in hopes of achieving settlements and large fee awards.

The prevailing standard for the award of attorneys' fees is "reasonableness," which the Supreme Court has recently defined as compensation that is "adequate to attract competent counsel, but . . . not produce windfalls to attorneys."[35] To avoid either under- or overcompensating class representatives, the courts have developed and refined the so-called "lodestar" method of measuring the reasonable value of an attorney's services benefitting the class. The lodestar analysis involves a two-step process: an ostensibly objective calculation of the basic level of compensation, the "lodestar" figure, followed by a more subjective calculation of the value of an attorney's services.[36] While the lodestar approach may at first blush appear to offer a relatively precise mathematical method of determining fees, a close examination of the process reveals that the attorneys' fees calculation is in fact subjective and inexact.

The first step in the process is to calculate the objective foundation of the compensation award by multiplying the number of compensable hours of attorney time by a reasonable hourly rate for attorney services.[37] To arrive at this lodestar figure, the court must (1) identify the compensable hours based on time records submitted by counsel, and (2) establish a reasonable hourly rate of compensation based on such considerations as the nature of the activities performed, the seniority of the attorneys involved, and the prevailing billing rates.[38]

Even this basic time/rate computation necessitates several critical subjective choices. "[U]ncertainties and ambiguities inherent in the time/rate formula [make] it neither a stable measure nor an easily applied one."[39] For instance, courts differ about which hours should be included as compensable time. This disagreement includes such fundamental questions as whether to credit time spent preparing the fee application itself.[40] The time records that are the basis of the compensable hours are often vague and inexact, and courts must decide which records to accept. Further, establishing an hourly rate is an extremely difficult and imprecise process when the attorneys involved nor-

34. *See* Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221, 224 (N.D. Ill. 1972).

35. Blum v. Stenson, 465 U.S. 886, 889 (1984) (*quoting* S. Rep. 1011, 94th Cong., 2nd Sess. 6 (1976)).

36. *See* Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973). *See generally*, 2 M.F. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES ch. 16 (1985).

37. *See Lindy Bros.*, 487 F.2d at 167-170.

38. *Id.*

39. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1803 (Supp. 1984).

40. *Compare* City of Detroit v. Grinnell Corp., 560 F.2d 1093 (2d Cir. 1977) (time spent preparing fee petition not allowed) *with* Jorstad v. IDS Realty Trust, 643 F.2d 1305 (8th Cir. 1981) (crediting time spent preparing application for fees).

mally work on a contingent fee basis.[41] Moreover, hourly rates tend to differ even among various firms in the same city.

The second step in the lodestar analysis is to consider subjective factors to evaluate whether the lodestar figure should be adjusted upward or downward to better reflect the actual value of an attorney's services.[42] Courts have articulated varying approaches to this aspect of the lodestar analysis. For instance, under the original formulation devised by the Third Circuit in *Lindy Brothers Builders, Inc. v. American Radiator & Sanitary Corp.*, the two key factors in the subjective analysis are risk and quality.[43] The risk element recognizes the inherently contingent nature of litigation success, and seeks to compensate attorneys for assuming that risk.[44] The quality element compensates exceptional attorney services, with a special emphasis on rewarding efficiency and penalizing dilatoriness.[45]

In its principal attorneys' fees decision, *City of Detroit v. Grinnell Corp.*,[46] the Second Circuit expressed serious concern that large fee awards in class actions threaten the integrity of Rule 23, individual attorneys, and the legal profession as a whole.[47] *Grinnell* was a class action antitrust claim based on defendant's predatory pricing of security alarm systems.[48] The parties settled, and the issue before the Second Circuit was the appropriateness of the attorneys' fee awarded to plaintiffs' counsel. The Court of Appeals held that the District Court's award of $1.5 million in attorneys' fees was excessive, and took the opportunity to generally criticize the judiciary's allowance of exorbitant fee awards.[49]

The Court of Appeals' criticisms were directed at class actions in which plaintiffs received "miniscule recoveries" while the "lawyers reaped a golden harvest of fees."[50] The court warned that courts must exercise caution to avoid granting excessive fees, "if for no other reason but to allay suspicion of windfall attorney profits."[51] To achieve this objective, the Court of Appeals directed that "courts must always heed the admonition of the Supreme Court in

41. As Professors Wright & Miller have observed, "the notion that there are fixed hourly rates that can be attributed to all lawyers and used as objective markers of the worth of their services is somewhat of an illusion. These rates have never existed for contingent fee lawyers, since time and hourly rates are irrelevant for their type of practice." C. WRIGHT AND A. MILLER, *supra* note 39.

42. *See Lindy Bros.*, 487 F.2d at 167-70. *See generally* M.F. DERFNER & A. WOLF, *supra* note 33, at ch. 16.

43. *See Lindy Bros.*, 487 F.2d at 161; *Lindy Bros.* 540 F.2d at 102.

44. 487 F.2d at 168. Particularly where an attorney has no private agreement that guarantees compensation, an upward adjustment may be justified. *Id.*

45. *Id.*

46. 495 F.2d 448 (2d Cir. 1974).

47. *Id.* at 469.

48. *Id.* at 452-53.

49. *Id.* at 469.

50. 495 F.2d at 469 (*quoting* Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26, 30 (S.D.N.Y. 1972)).

51. 495 F.2d at 470.

Trustees v. Greenough . . . when it advised that fee awards under the equitable fund doctrine were proper only 'if made with moderation and a jealous regard to the rights of those who are interested in the fund.' "[52]

Its concern about windfall fees notwithstanding, the Second Circuit in *Grinnell* adopted the basic lodestar method of determining attorneys' fees.[53] While relying heavily on the *Lindy* decision, the court placed particular emphasis on the risk factor: "Perhaps the foremost of these [subjective] factors is the attorney's 'risk of litigation,' *i.e.*, the fact that, despite the most vigorous and competent of efforts, success is never guaranteed."[54] The court attempted to explain the application of the risk factor by suggesting that courts should consider several questions: "has a relevant government action been instituted or, perhaps, even successfully concluded against the defendant; have related civil actions already been instituted by others; and, are the issues novel and complex or straightforward and well worn?"[55]

Even while adopting the lodestar method of determining attorneys' fees, the Second Circuit acknowledged that the approach was an imperfect solution.

> "It may be argued that by minimizing the important role played by the magnitude of the recovery, there will be considerably less incentive for the class attorney, particularly when negotiating a settlement, to seek as high a recovery as possible. Conversely, it can be complained that such a rule will encourage counsel to avoid quick settlement or, indeed, any settlement, in hopes of prolonging the proceedings and accumulating billable hours."[56]

Nevertheless, the court expressed the belief that the negative impact of the analysis "can be minimized by an intensified scrutiny on the part of the court which must approve each negotiated settlement."[57]

As the court recognized, each list of factors is susceptible to the same fundamental criticism.[58] The courts offer little, if any, guidance on the relative importance of the individual subjective factors or how those factors should be applied. As a consequence, the factors lose their individual significance, and courts simply pick and choose among those factors that are particularly applicable to the case at hand. Instead of directing a court's inquiry, the subjective factors become a vehicle for the court to express its feelings about

52. *Id.* at 469 (*quoting* Trustees v. Greenough, 105 U.S. at 536).

53. 495 F.2d at 470-72. More recently, the court reaffirmed its view of the lodestar analysis in New York State Ass'n for Retarded Children v. Carey, 711 F.2d 1136 (2d Cir. 1983).

54. 495 F.2d at 471.

55. *Id.*

56. *Id.*

57. *Id.*

58. Commenting on the lengthy lists of objective and subjective factors, the Court of Appeals referred to the factors as a "conceptual amalgam" that is "so extensive and ponderous that it is probably not employed in any precise way by those courts espousing adherence to it." *Id.* at 470.

the merits of the litigation and the efforts and talents of the attorneys seeking compensation.

This review of the lodestar analysis leads to the conclusion that trial courts possess and exercise broad discretion at virtually every step of the attorneys' fees calculation. While the lodestar method may give the appearance of strict objective control of the trial court's analysis, in reality in each case the award of attorneys' fees is ultimately dictated by the trial court's perception of both the litigation itself and the value of each attorney's efforts on behalf of the class. Properly understanding the imprecise nature of the lodestar method is critical in analyzing any application or modifications of the method. The lodestar method is so flexible and subjective that its application must be considered in the context of each individual case and the policy concerns that the case may trigger. Ultimately, the propriety of each application of the lodestar analysis should not and cannot be judged independently from the result rendered in any one individual case.

II
THE AGENT ORANGE ATTORNEYS' FEES OPINION

From its inception in early 1979 to its settlement in May 1984, the Agent Orange litigation was *sui generis*. During the pendency of the action, more than 600 plaintiffs filed claims, and the case developed into a massive, multidistrict class action.[59] Due to the extraordinary underlying facts, the plaintiffs' claim for relief was novel and, from the beginning, the plaintiffs faced substantial factual and legal barriers to recovery.[60] Moreover, plaintiffs' adverse health effects were disparate and required development of a complex and uncertain theory of causation. The scientific claims on which plaintiffs' case was based were uncertain at best and dubious at worst.[61] The class itself was difficult to contact, disorganized, and skeptical. In light of the inherent difficulties in plaintiffs' case, plaintiffs' ability to muster a claim and achieve a significant settlement was a testament to the dedication and efforts of their attorneys.

A consortium of lawyers, headed by Victor Yannacone, acted as lead counsel for plaintiffs in the early portion of the litigation.[62] The Yannacone Group entered into case management agreements with regional counsel around the country. These agreements called for the Yannacone Group to be

59. *Agent Orange VI*, 611 F. Supp. at 1301.

60. The principal factual problem was the plaintiffs' inability to present scientific evidence demonstrating that Agent Orange caused plaintiffs adverse health effect. *See Agent Orange IV*, 597 F.Supp. at 775-95. In addition, the evidence developed in discovery suggested that the government was aware of Agent Orange's health hazards, a fact that would have provided the chemical companies a complete defense against plaintiffs' claims. *Id.* at 795-99. The legal barriers to plaintiffs' claims included, *inter alia*, the statute of limitations, *see id.* at 800-16, the plaintiffs' inability to show that a particular plaintiff was harmed by a particular defendant, *id.* at 816-43, and the government contractor defense, *id.* at 843-48.

61. *See Agent Orange IV*, 597 F. Supp. at 749.

62. *Agent Orange VI*, 611 F. Supp. at 1301-02.

lead counsel in the multidistrict litigation and to share in regional counsel's retainer agreements with individual clients.[63] The role of the regional counsels' role was essentially limited to serving as conduits for information between Yannacone and individual plaintiffs. Although it contributed mightily to the transformation of a group of individual claims into one of the largest tort class actions in history, the Yannacone Group had troubles from the beginning of the lawsuit. They suffered from internal management problems, difficulty in advancing the litigation satisfactorily, and an inability to adequately finance the litigation.[64]

The Agent Orange litigation underwent a critical metamorphosis in the fall of 1983. Judge Weinstein became the presiding judge when Judge George C. Pratt was elevated to the Court of Appeals for the Second Circuit. The Yannacone Group asked to be removed as lead counsel for the plaintiffs, and it was replaced by a group of nationally prominent plaintiffs' personal injury attorneys.[65] This group became known as the Plaintiffs' Management Committee (the "PMC"). On October 21, 1983, Judge Weinstein established a trial date of May 7, 1984, and indicated that he would not deviate from this date.[66] From that point, the PMC worked at a frantic pace to prepare the case for trial. Under extremely short deadlines, the PMC conducted extensive discovery, developed its theories of causation, provided notice to the plaintiff class, and handled numerous pretrial motions. Perhaps most significantly, under the supervision of the court, the PMC began serious settlement negotiations with the defendant chemical companies.[67]

On the morning the trial was scheduled to begin, the PMC and the seven remaining chemical company defendants entered into a Settlement Agreement.[68] The settlement called for the companies to pay $180 million into the court for the benefit of the plaintiff class.[69] Under the terms of the settlement, attorneys' fees for class representatives were to be paid from the settlement fund pursuant to court order.[70]

A total of 121 petitions for fees and expenses were filed with the court.[71] The court divided the fee petitions into three categories: (1) submissions from the PMC; (2) submissions from the Yannacone Group; and (3) submissions from the attorneys who represented individual plaintiffs but who never represented plaintiffs as a class. The court was deluged by documents relating to

63. *Id.*

64. *Id.* at 1302. *See also* Milstein, *The Crusader Who Lost His Way*, THE AMERICAN LAWYER 98 (April 1984).

65. *Agent Orange VI*, 611 F. Supp. at 1302.

66. *Id.*

67. *Id.*

68. The text of the Settlement Agreement is set forth as Appendix A to the court's opinion granting preliminary approval of the settlement. *Agent Orange IV*, 597 F. Supp. at 862.

69. *Id.* at 863.

70. *Id.* at 865-66.

71. *Agent Orange VI*, 611 F.Supp. at 1318.

fees and expenses.[72] To perform the required lodestar analysis, the court had to employ a special staff to process and review the fee requests.[73] On January 7, 1985, Judge Weinstein issued his opinion on the requests for attorneys' fees and expenses.[74]

Judge Weinstein began his analysis of the attorneys' fees question by expressing serious reservations about the utility of the lodestar analysis. Specifically, the judge echoed the Second Circuit's concern that the lodestar method's heavy reliance on hours billed would send plaintiffs' attorneys the wrong message by providing an incentive to prolong litigation.[75]

> "Because the first step in the process calls for a calculation based on hours worked, counsel has an incentive to expend time and expand effort in order to increase the lodestar figure. The current lodestar approach thus tends to encourage excessive discovery, delays, and late settlements, while it discourages rapid, efficient, and cheaper resolution of litigation."[76]

These reservations notwithstanding, based on the Second Circuit's decisions in *Grinnell* and *New York State Association for Retarded Children v. Carey*,[77] Judge Weinstein was bound to apply the lodestar method of determining the attorneys' fees in the Agent Orange litigation.[78] Additionally, the *Grinnell* decision dictated rigorous scrutiny of hours and fees to protect the interests of the class and to avoid even the appearance of windfall profits for class representatives.[79] Judge Weinstein thus took his cues from the Second Circuit's twin directives: to use the lodestar analysis and to reach a result that fairly compensates plaintiffs' counsel without giving them a windfall.

In determining which hours to compensate, the court sought to isolate the activities that directly benefitted the class.[80] Seeking to mitigate the effects of the inherent flaws of the lodestar approach, Judge Weinstein conducted a particularly careful and detailed scrutiny of the hours billed in the Agent Orange litigation.[81] Stating that the "lodestar calculation does not contemplate that a court blindly accept counsel's records," the court reviewed each time

72. *Id.*

73. *See id.* at 1318-20 for a description of the process of reviewing the fee petitions.

74. *Agent Orange VI*, 611 F. Supp. 1296. This article deals only with the court's decision on attorneys' fees. The court's decision with respect to expenses was relatively conventional. While chastising a few attorneys for their lavish spending habits, the court granted reimbursement for almost all expenses incurred by the class representatives as long as the expenses were properly documented. For instance, the Court gave full reimbursement for the Brooklyn office maintained by counsel throughout the litigation, and other basic expenses class representatives incurred. The court did not, however, reimburse class representatives for expense of computer data management because that cost was included in the basic hourly rate.

75. *Id.* at 1306.

76. *Id.* (citations omitted).

77. 711 F.2d 1136 (2d Cir. 1983).

78. *Agent Orange VI*, 611 F. Supp. at 1305-06.

79. 495 F.2d 448, 469-71.

80. 611 F. Supp. at 1307.

81. *Id.* In adopting this approach, the court admitted that "[i]n the end, close scrutiny of

sheet submitted to "ascertain whether [the activities] resulted in some compensable benefit to the class."[82] While this type of intensified scrutiny of time records is appropriate under the lodestar approach, and was specifically endorsed by the Second Circuit, Judge Weinstein's scrutiny of the records submitted in the Agent Orange case far exceeded the examination of such records in the attorneys' fees opinions of other courts.

Where attorneys' descriptions of their activities were so vague that the court could not determine whether the activities furthered the interests of the class, the court refused to credit the time.[83] The court also reviewed the time records to root out unnecessilarily duplicative work. Acknowledging that a certain amount of duplication of legal research was unavoidable in such an enormous case, the court granted full credit for all the hours billed for research and document review by the attorneys who had primary responsibility for a particular issue or a particular set of documents.[84] Attorneys who did not have primary responsibility for an issue or set of documents received only partial credit for hours spent on such legal research and document review.[85] As a further guard against overstaffing, the court disallowed time spent in conference between partners and associates.[86] The court also sought to ensure that tasks were performed by individuals with appropriate skills.[87] Finding that work on the internal organization and financing of the plaintiffs' management committee did not directly benefit the class, the court did not give credit for time spent dealing with these internal committee matters.[88] Finally, in a major policy decision, the court found that the work of attorneys representing individual plaintiffs did not significantly contribute to the overall class benefit and therefore declined to credit any time expended by these attorneys.[89]

The other component of the basic lodestar equation is the applicable hourly rate.[90] As discussed earlier, establishing an hourly rate for attorneys who ordinarily work on contingent fee arrangements is a difficult task. Attorneys who work for contingent fees budget their time and efforts differently than if they were billing on an hourly basis. Nevertheless, the lodestar method requires the establishment and use of an hourly rate. In determining the rate, the court was sensitive to the seniority of the attorneys involved, the need to fairly compensate class representatives, and the desirability of using an approach that would afford the easiest possible administration.

In local litigation, courts apply the hourly rate charged for similar work

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the work may ameliorate but cannot eliminate the problem of unnecessary work and undue delay under lodestar." *Id.* at 1306.

82. *Id.* at 1306-07.
83. *Id.* at 1324.
84. *Id.* at 1325.
85. *Id.*
86. *Id.*
87. *Id.* at 1307.
88. *Id.* at 1319-20, 1325.
89. *Id.* at 1318.
90. *Id.* at 1307-10.

by attorneys of comparable skill in the same geographic area.[91] This formulation, however, is not easily employed in "complex multidistrict litigation that is national in scope, involves counsel from all over the country, and extends over many years during which the rates for particular lawyers and classes of lawyers are changing."[92] In light of these difficulties, the court rejected the so-called "locality rule," under which the court sets a uniform rate based on the prevailing rate in the district court's local community.[93] The court also declined to use the prevailing rate in the home locale of each of the attorneys involved in the case.[94] The court reasoned that the home locale approach was untenable because it would minimize the forum court's presumed familiarity with hourly rates, would negate the neutrality of the forum rate rule and would require such an intensive case-by-case analysis as to be nearly unworkable.[95]

In place of these various methods of determining the hourly rate, Judge Weinstein decided to apply a "uniform, nationally prevailing rate."[96] The court found this innovative solution especially appropriate because it recognized "the national character of the lawsuit and of class counsel while retaining a vitally important administrative simplicity together with an essential neutrality of result as between fee applicants and fund beneficiaries."[97] Moreover, this national hourly rate approach was workable given the recent development of a national bar.[98]

Another question concerning the establishment of an appropriate rate was whether the court should apply an historic or current hourly rate. Finding that attorneys lose a great deal because of the delay in payment in lengthy cases, the court determined that the current hourly rate would be most appropriate in the Agent Orange litigation.[99] The cost of delay is sometimes taken into account in the subjective portion of the lodestar analysis, but the court found that factoring delay into the determination of the basic hourly rate worked just as well. Furthermore, using a single rate for the entire case obviously offered significant administrative advantages.[100]

Finally, the court actually had to set the billing rates for lawyers involved in the case. As a threshold decision, the court determined that administrative convenience dictated using a single rate for each law firm.[101] Examining each firm's request for compensation, the court analyzed whether partners or associates performed the bulk of the firm's work on the case. For the firms in

91. *See* City of Detroit v. Grinnell Corp., 560 F.2d at 1098.
92. *Agent Orange VI*, 611 F. Supp. at 1308.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1309.
98. *Id.*
99. *Id.* at 1310.
100. *Id.*
101. *Id.* at 1325.

which partners did most of the work, the court set the hourly rate at $150.[102] Where associates billed most of the hours, the court set that firm's hourly rate at $100.[103] In addition, the court set an hourly rate of $125 for law professors who worked on the case.[104]

In a minor deviation from established practice, the court determined that legal assistants should not be compensated in the same manner as attorneys.[105] Instead of reimbursing legal assistant's time at a rate that reflected salary, overhead, and profit, the court treated legal assistants as expenses.[106] Expenses were allowed for most attorneys, and paying a legal assistant is an expense for an attorney. Thus to give full credit for legal assistant time would have been to give double reimbursement, one time as a profit and one time as an expense.[107] The court settled on a national rate of $20 per hour for calculating the expense of legal assistants.

Having identified the hours that would be allowed and the appropriate hourly rate of compensation, the court arrived at the lodestar figure for each attorney. The next step—the second half of the lodestar analysis—was to evaluate whether any factors present in the Agent Orange litigation warranted granting a multiplier to individual attorneys. The court noted that a multiplier must be determined on an individual basis to reflect the individual attorney's contribution to the class benefit achieved. The court also observed that a multiplier can involve either an increase or a decrease in the lodestar figure.[108]

Judge Weinstein hewed closely to the intent of the subjective half of the lodestar analysis by carefully examining each attorney's contribution to the final realization of the class benefit.[109] However, because of the circumstances of the Agent Orange litigation, the judge felt many of the subjective factors that are usually considered in the second half of the lodestar analysis were not appropriate to the Agent Orange case. Consideration of these factors would have seriously misrepresented the value of class counsels' contribution and would have run afoul of the public policy against windfall attorneys' fees. Thus, as outlined below, Judge Weinstein strayed from the Second Circuit's approach to the subjective factors in order to achieve the ultimate goal of "reasonable" compensation under the circumstances of the Agent Orange litigation.

The Second Circuit, following *Lindy*, had previously identified the risk of litigation as one of the principal criteria for applying a multiplier.[110] Under this formulation, the greater the risk of failure, the higher the multiplier that

102. *Id.* at 1326.
103. *Id.*
104. *Id*; *see also id.* at 1329-30.
105. *Id.* at 1322.
106. *Id.*
107. *Id.*
108. *Id.* at 1310.
109. *See id.* at 1329-38.
110. City of Detroit v. Grinnell Corp., 495 F.2d at 471.

should be applied.[111] While indicating a degree of sympathy for the risk multiplier, Judge Weinstein took exception with several of the fundamental assumptions underlying the risk multiplier. Specifically, the judge found fault with the risk multiplier because it only considers the chance of complete success. Settlement before trial might be much more likely than a total victory on the merits.[112]

> [A] case involving dim prospects for ultimate victory on the merits nevertheless may hold out a significant possibility of settlement. Rewarding the filing and prosecution of large, complex lawsuits with poor prospects for success arguably risks fueling the growth of 'nuisance' or 'strike' litigation, in which settlment becomes the main object and attorney fee awards an overpowering motivating force.[113]

Thus, Judge Weinstein suggested that the application of a risk multiplier in cases that settle could significantly distort the attorneys' fees.

The judge insisted that failure to apply a risk multiplier would not unnecessarily undercut the economic motivation for bringing high risk, but meritorious, claims.[114] Noting that an attorney's entitlement to the basic fee award would not be imperiled by failure to grant contingency multipliers in a high-risk case, the court maintained that "[n]o empirical evidence suggests that this approach will so discourage the legal profession's efforts on behalf of common fund plaintiffs that it should not be entertained."[115]

The Judge further found that being selective in applying the risk multiplier might have the beneficial effect of regulating extremely high-risk litigation.[116] While agreeing that there should be sufficient economic incentive to pursue meritorious claims even in the face of obstacles, Judge Weinstein expressed the belief that denying the risk multiplier in less meritorious actions could encourage the legal profession "to think at least twice before initiating sprawling, complicated cases of highly questionable merit that will consume time, expense and effort on the part of all concerned, including the courts, in a degree vastly disproportionate to the results eventually obtainable."[117] Thus, the judge concluded that "[a]t the very least, then, in borderline cases a rule is supportable providing that counsel's activities should neither be rewarded with a contingency multiplier nor be penalized by Rule 11 sanctions."[118]

By the later stages of the litigation, it became clear that Judge Weinstein

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111. *Id.*

112. *Agent Orange VI*, 611 F. Supp. at 1311. The Second Circuit recognized this problem but suggested that "intensified scrutiny" would be sufficient to offset the distorting effect of settlements. *See* City of Detroit v. Grinnell Corp., 495 F.2d at 471.

113. *Agent Orange VI*, 611 F. Supp. at 1311.

114. *Id.* at 1312.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* Under Fed. R. Civ. P. 11 attorneys can be disciplined for bringing frivolous claims.

had come to consider the Agent Orange litigation to be a borderline case. In his opinion granting preliminary approval to the Settlement Agreement, Judge Weinstein wrote that the settlement was, among other reasons, beneficial to plaintiffs because:

> the scientific data available to date make it highly unlikely that, except perhaps for those who have or have had chloracne, any plaintiff could legally prove any causal relationship between Agent Orange and any other injury, including birth defects . . . . [T]he law that would need to be established is unique and would almost certainly result in repeated trials and appeals, with the likely ultimate result being no recovery by any plaintiff.[119]

Again, in the opinion approving the plan to distribute the assets of the settlement, the court referred to the "virtual absence of proof of causation."[120] Thus, in assessing the evidence in support of plaintiffs' claims, the judge became convinced that the Agent Orange class action was a borderline case. Without establishing a flat rule for all cases, the court determined that applying a risk multiplier is not necessarily appropriate in all high-risk cases, and that it would be inadvisable in the Agent Orange case.[121]

Judge Weinstein also rejected application of a multiplier based on two other regularly considered factors: the complexity of the issues presented in the case and the delay in the payment of fees. He found that because the complexity of issues is factored into the determination of skill, it is unnecessary and even redundant to consider complexity as a separate multiplier item.[122] Similarly, the judge determined that delay in payment should not be considered as a separate multiplier because delay in payment was a critical factor in the judge's decision to apply counsels' current billing rate rather than an historic billing rate.[123] To have used a multiplier for either the complexity of issues or the delay in payment would have been to consider the factors twice.

The one multiplier that the judge did consider was quality of representation.[124] The quality of representation factor allows the judge to reward work that benefits the class with a minimum time investment while decreasing the attorneys' fees "where the benefit produced does not warrant awarding the full value of the time expended."[125] Judge Weinstein held that the quality multiplier should be applied to reward only extraordinary work. "A quality multiplier in general should not be awarded for the level of skill normally expected

119. *Agent Orange IV*, 597 F. Supp. at 749.
120. *Agent Orange V*, 611 F. Supp. at 1402.
121. *Agent Orange VI*, 611 F. Supp. at 1311-12.
122. *Id.* at 1313 (*quoting* Merola v. Atlantic Richfield, 515 F.2d 165, 168-69 (3d Cir. 1975)).
123. *Id.* at 1314.
124. *Id.* at 1313-14.
125. *Id.* at 1313 (*quoting* Merola v. Atlantic Richfield, 515 F.2d 165, 168-69 (3d Cir. 1975)).

of counsel, because it will have been accounted for already in the computation of the hourly rate usual for such a lawyer."[126]

Referring to the second *Lindy* decision, the court cited two considerations in assessing whether to adjust the lodestar figure by applying a quality multiplier: (1) a comparison of the extent of possible recovery and the actual verdict or settlement achieved, and (2) the efficiency of the methods used in processing the case.[127] In addition, the court looked to skills that might not ordinarily be considered in assessing an attorney's professional ability but which are critical to the efficient and successful prosecution of a claim such as the Agent Orange litigation. These skills and characteristics included tenacity, ability to bear the strains of preparing a difficult case under extreme time pressure, and skill in coordinating the work of other attorneys.[128] The court concluded that "[t]hese qualities of character and administrative skill often make the difference between success and failure in a lawsuit."[129] The court also considered the importance of negotiating skills. The court expressed the belief that consideration of an attorney's ability to fashion a settlement would provide an important antidote to the lodestar method's disincentive to early settlement.[130]

Applying the principles of the quality multiplier to the Agent Orange class counsel, the court found "[s]ome attorneys have demonstrated an unusual degree of skill in presenting complex and often novel issues to the court; others have shown a level of organization and efficiency that goes beyond what is usually expected."[131] The court rewarded an attorney with a multiplier of 1.75 because "[t]he legal, organizational and managerial skills [the attorney] brought to the PMC significantly expedited the litigation and were . . . extraordinary in nature. . . ."[132] Several attorneys received 1.5 multipliers in recognition of exceptionally high quality legal work.[133] While in no instance did the court apply a multiplier to decrease an attorney's award, several prominent attorneys received no multiplier at all.[134] The court granted 89 attorneys fees or expenses awards in the Agent Orange litigation.[135] The individual awards received by attorneys ranged from $10.82 to $1,557,956.94.[136] In total, the court awarded $10,767,443.63 in fees and expenses.[137]

126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 1328.
132. *Id.* at 1334.
133. *Id.* at 1331-36.
134. *Id.* at 1332-38.
135. *Id.* at 1344-46.
136. *Id.*
137. *Id.* at 1346.

SUMMARY AND CONCLUSION

Judge Weinstein faced an extremely difficult task in awarding attorneys' fees in the Agent Orange litigation. Over and above the problems that attend the allocation of fees in any class action, the circumstances of the Agent Orange litigation brought extraordinary pressures to bear on the court. The common fund available for the benefit of the class was small in relation to the number of potential claimants seeking compensation from the fund.[138] There was, therefore, a premium on preserving the fund for the benefit of the litigants. Because many class members were disenchanted about the settlement and suspicious of the motives of the class representatives,[139] and because no individual plaintiffs would recover a large award from the common fund,[140] the court had to be especially sensitive to the plaintiffs' negative reaction to a large fee award. Moreover, the tangled history of representation of the plaintiff class posed a significant substantive and administrative problem.

Compelled by the circumstances of the case, but mindful of established doctrine, Judge Weinstein tailored the lodestar analysis in an ingenious way to meet the exigencies of a mass toxic tort case. Specifically, he fashioned four major modifications to the traditional lodestar method of determining attorneys' fees: the painstaking examination of time records to identify the hours that directly benefitted the class; the application of a uniform national billing rate; the decision that the risk multiplier should not necessarily be applied in all high-risk litigation; and the emphasis on the quality of representation offered by the attorneys seeking fees from the fund. While these innovations were designed to respond to the unique circumstances of the Agent Orange litigation, the innovations have important implications for future mass tort cases.

First among the innovations was the extraordinary effort the court made in reviewing fee petitions. Recognizing the substantive and symbolic significance of the attorneys' fees decision, the court committed vast resources to the

138. The Settlement Agreement called for defendants to provide $180 million for the benefit of the plaintiff class. *Agent Orange IV*, 597 F. Supp. at 862-63. As of May 28, 1985, approximately 245,000 individuals had filed claims seeking compensation from the settlement fund. *Agent Orange V*, 611 F. Supp. at 1401.

139. Before approving the settlement, the court conducted a series of five hearings at which members of the class were given the opportunity to state their views of the settlement. Many class members were dissatisfied with the settlement, and felt that the case should go to trial. For a summary of plaintiffs' reactions to the settlement, see *Agent Orange IV*, 597 F. Supp. at 764-75. Some class members suggested that the settlement was so inadequate that the class representatives did not deserve any compensation. The court, however, found that the class representatives had brought a significant benefit to the class, and therefore found that compensating them was appropriate under the circumstances. *Agent Orange VI*, 611 F. Supp. at 1304.

140. The court approved a plan of disposition that gives benefits to disabled veterans and to the survivors of deceased veterans. Under the plan approved by the court, a disabled veteran would receive a maximum payment of $12,800, paid in equal annual installments. Dependent survivors of a deceased veteran could receive a maximum payment of $3,400, paid in a lump sum. *Agent Orange V*, 611 F. Supp. at 1418-21.

analysis of the fee requests.[141] The meticulous scrutiny was conducted with an eye toward isolating those activities that directly benefitted the class. When class representatives file an application for fees to be paid from a common fund, there is ordinarily no one to speak on behalf of the class members. Only the court is in a position to protect their interests. By carefully analyzing time records, and only crediting time that directly benefitted the class, the court limited the size of the award and ensured that the plaintiffs' interests were not ignored.

The adoption of a uniform national hourly billing rate was another significant innovation. Recognizing the value of achieving administrative simplicity wherever possible, the court streamlined the hourly rate portion of the lodestar analysis. By simplifying the computation, the court created a mechanism that allowed it to focus on the all-important evaluation of individual fee petitions without imposing an unmanageable administrative burden.

The third and perhaps most important innovation was Judge Weinstein's conclusion that courts should not automatically apply a risk multiplier in high-risk cases. The court's opinion called for a careful consideration of the chances for total success and of settlement before determining whether to award a multiplier for risk. In light of the court's evaluation of the merits of the case—a mass toxic tort case in which causation was questionable—applying the risk multiplier would have almost certainly resulted in a windfall attorneys' fee award. The court's decision, after examining the facts of the case, not to apply the risk multiplier made it possible for the court to keep the award reasonable. In addition to providing a fairer result in the Agent Orange litigation, requiring a case-by-case determination of whether to apply the risk multiplier holds the potential to reduce the incidence of nuisance suits in the future.

Further the court's decision to concentrate on the quality of representation served as a perfect complement to the other innovations in the opinion. By rewarding quality instead of quantity, the court created a crucial counterweight to the lodestar method's emphasis on the number of hours billed. Also, use of the quality multiplier was consistent with the general federal policy favoring settlement. Utilized in tandem with rigorous scrutiny of hours, the quality multiplier allowed the court to distill the value of each attorney's contribution to the class, and to reward, in a manner consistent with the size of the class benefit, those attorneys most responsible for bringing the benefit to the class.

As applied in the Agent Orange case, the emphasis on result also embraced many of the considerations that were components of the risk factor. The quality factor was applied in such a way as to consider the fact that an attorney who truly contributed to the positive result in this high-risk case would almost certainly have demonstrated the type of skill that justifies appli-

141. *See Agent Orange VI*, 611 F. Supp. at 1318-20.

cation of a quality multiplier. Thus, the court preserved the constructive aspects of the risk multiplier, without adopting that portion of the risk multiplier that might encourage attorneys to file unmeritorious actions.

In sum, by applying these innovations, the court crafted an attorneys' fee award that at once responded to the unique circumstances of the Agent Orange litigation and addressed the broad policy concerns common to mass tort class actions. The court provided ample awards to the attorneys who contributed the most to developing plaintiffs' case and who were therefore most responsible for achieving the settlement. At the same time, the court was careful to preserve the essential integrity of the settlement fund. Thus, the court's award in the Agent Orange case was a healthy compromise, meeting the disparate policy goals of providing sufficient compensation to encourage attorneys to bring meritorious actions while not giving a windfall award that might encourage unmeritorious claims and would offend the sensibilities of the litigants and the public.

Judge Weinstein's creative modifications of the classic lodestar method should be particularly influential and useful in future mass tort litigation. The court demonstrated that the lodestar analysis should not be applied in a reflective and mechanical manner. Rather, the analysis should be tailored to fit the circumstances of the individual case and should be applied in such a way as to insure that a fee award is credible and reasonable in the context of the individual case. Scrupulous attention to the size and basis of the fee award will build confidence, among both litigants and the general public, in the efficacy of class actions and the integrity of courts and lawyers. The use of a uniform national billing rate offers a needed simplification of the lodestar analysis. And perhaps most significantly, the process suggested by Judge Weinstein will encourage courts to focus on the skill attorneys exhibit and the quality of representation. In this respect, the court's approach may actually encourage good lawyering. In the long run, the innovations Judge Weinstein devised in the Agent Orange litigation should have the effect of improving both the climate for and the prosecution of class actions in the future.