K&G LAW GROUP, PLLC

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A NEW DAWN FOR THE LOADSTAR: RECOVERY OF ATTORNEY'S FEES IN FEE SHIFTING LITIGATION

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It is a well-known principle of American jurisprudence that in most lawsuits each litigant is responsible for his or her own legal fees, regardless of who wins and who loses. In fact, because this approach is a marked departure from the common law in England—where the losing party bears the fees and costs of the winning party absent some specific agreement or other rule to the contrary—the presumption that each party to a lawsuit must bear his or her own attorney's fees is known as the "American Rule."

Despite the grumbling of large numbers of lawyers and more than a few clients, the billable hour remains by far the most popular way for lawyers to charge for their services. For that reason among others, when a statute or contract contains a fee-shifting provision making the losing party responsible for the winner's legal fees, Courts by default follow the billable-hour method in assessing how much the losing party pays. The billable hour is usually referred to in this context as the "Lodestar Method."

The lodestar method is simple to apply. The party entitled to recover its legal fees has the burden of establishing two elements: first, a reasonable hourly rate for the work of its lawyers and second the party must establish that a reasonable number of hours were worked. Once those two elements are established, the fee is calculated and judgment is entered.

Although the lodestar method is simple enough to apply, there are many issues to be addressed in order to establish a reasonable rate and a reasonable number of hours. As a result—and as fee shifting statutes became more popular over the last fifty years—a body of case law has developed defining certain parameters for these two factors.

Very few judicial opinions on the topic of fee-shifting statutes have garnered as much as attention as the 2010 United States Supreme Court opinion in *Perdue v. Kenny A. ex rel. Winn,* 130 S.Ct. 1662 (2010). Although the most frequently discussed aspect of the opinion is its holding that a "fee-enhancement" over and above the lodestar method could indeed be possible where the lawyers had performed truly extraordinary work, there is an additional angle—and one that is arguably more important—that has been less explored.

We believe that over time the most important element of the Perdue opinion will be its explicit disapproval of arbitrary fee adjustments, regardless of whether the adjustment is up or down.

Indeed, the *Perdue* opinion labels as arbitrary *any* adjustments to fee awards unless those upward or downward judgments are tied to specific evidence in the case. What troubled Justice Alito the most, for example, was not the fact that the fee was enhanced, but the fact that the fees were enhanced by 75% with no explanation and no discussion of the evidence supporting the enhancement. "Why," Justice Alito wondered, "did the court grant a 75% enhancement instead of the 100% increase that respondents sought? And why 75% rather than 50% or 25% or 10%?"

It does seem that trial level courts have understood the message, and a recent opinion from the U.S. District Court for the Eastern District of Virginia provides a compelling read for anyone interested in this topic.

On April 26, 2012, U.S. District Court Judge T.S. Ellis issued an opinion on an attorney's fee petition which confirms that random and arbitrary reductions of fee awards are not acceptable. The opinion is *Bradford v. HSBC Mortgage*, 2012 WL 1481505 --- F.Supp.2d. --- (E.D.Va. 2012).

Importantly, Judge Ellis also provided a clear path for other courts to follow, and he point out two ways in which the Fourth Circuit's opinion in *Grissom v. The Mills Corp.,* 549 F.3d 313 (4th Cir. 2008) must be altered. And that, I think, is the most significant part of the *Bradford* opinion, at least for attorneys practicing in the Fourth Circuit.

In his ruling, Judge Ellis points out that an award of attorney's fees may only be reduced by a fixed percentage in certain circumstances, namely:

"[G]iven the Supreme Court's admonitions in Perdue with respect to objectivity and reviewability, this alternative—the fixed-percentage approach—may be used only if the record contains insufficient evidence upon which to determine precisely how many hours were reasonably expended litigating the successful claim and any other related claims."

Any civil litigator in Virginia would do well to review this opinion, as it is certain to have an impact.

K&G Law Group, PLLC, is a boutique-style civil litigation firm based in Northern Virginia. The firm practices nationwide in the areas of employment law, qui tam litigation and other complex civil litigation matters.

K&G Law Group partner Zachary Kitts has provided expert testimony on many different aspects of fee-shifting provisions, ranging from the reasonableness of an hourly rate to the duty of care a lawyer owes his or her client in preparing a fee petition after a successful judgment.

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