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Legal fees are a direct coefficient of protection for the legal rights of consumers and businesspersons. These persons are often unwilling to exercise their legal rights because of the prohibitively high expense necessarily associated with legal representation.[1] At common law the system of contingent fees[2] was adopted to confront the problems that accompanied the skyrocketing cost of legal fees, despite the complicated ethical problems that accompany that compensation system.[3]

The legal community has developed an array of legal aids designed to assist persons of moderate means. Group legal services, prepaid legal fee insurance, legal referral services, and legal clinics are designed to reduce the cost of litigation. In addition, class actions[4] provide an efficient and economical method of litigation. Congressional concern over the economic realities of legal expenses has been manifested in a plethora of statutes[5] designed to award le-

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1. For discussion of the economic impact of legal costs on the middleclass see B.F CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1970) (American Bar Foundation).

2. *See* MASS. SUP JUD. CT. R. 3:14.

3. *See* Brown, *Some Observations on Legal Fees*, 24 Sw U.L. REV 565 (1970).

4. *See* FED. R. CIV P 23. The class action provides method whereby persons of moderate or modest means could combine their efforts in obtaining meaningful access to the courts. Hawaii Standard Oil Co., 405 U.S. 251, 266 (1972) (Marshall, J.) Thus, the class action serves the dual purpose of providing an accessible means of litigation to the plaintiff and increased judicial administrative efficiency

Attorneys, however, have had to petition the courts for an allowance of legal fees paid out of the funds created through their efforts. Lindy Bros. Builders, Inc. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I), and Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 118 n.12 (3d Cir. 1976) (Lindy II).

5. There are more than 75 federal statutes which authorize the award of attorney fees. *See* Berger, *Court Awarded Attorneys Fees: What is "Reasonable"?* 126 U PA. L. REV 281, 303 (1977) (a comprehensive review of the attorney fee issue with focus beyond the franchise issue); Cohen, *Award of Attorney Fees*

gal fees against a violation.[6] The awarding of these legal fees, however has imposed a new burden on the judiciary Previously courts were seldom involved in the legal fee problems of clients and attorneys.[7] A judge regularly assesses and appropriates legal compensation today This paper will focus on the standards and procedures which should be utilized to compute appropriate attorneys fee awards in complex litigation such as franchise and antitrust cases.[8]

Attorneys fees have a special importance in franchising. A decade ago, a leading franchisor publicly boasted that franchisees were helpless since they could not afford the legal fees necessary to obtain redress. However factual that statement might have been, it is just as probable that the franchisees were not aware of their rights and were unprepared to engage in complex and costly litigation. This imposed a serious burden on the attorney asked to redress the egregious conduct. He had to assess his own interim liquidity prospectively during the years of potential court action. For the undercapitalized practitioner, the financial burdens and risks might be so insurmountable that representation of the undercapitalized franchisees would be declined. Consequently prosecution was neglected or premature settlement was accepted. Economics, in essence, dictated the merits of some cases.[9]

Legislative recognition of economic realities led to exemplary damages and the awarding of attorneys fees and costs against violators of antitrust laws[10] and "little Federal Trade Commission

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Against the United States: The Sovereign Is Still Somewhat Immune, 2 W NEW ENG. L. REV 177 (1979).

6. State legislatures have also enacted statutes which address the attorneys fees issue. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 93A, §§ 9(4) & 11 (West Cum. Supp. 1979) (consumer protection law with mandatory double and permissive treble damages, plus an assessment for legal fees and costs).

7 *See In re* Osofsky 50 F.2d 925, 927 (S.D.N.Y. 1931) (origin of extensive standards for court determination of attorneys fees). *See generally* A. MILLER, ATTORNEYS' FEES IN CLASS ACTIONS: A STUDY PREPARED FOR THE FEDERAL JUDICIAL CENTER (1979); 3 H. NEWBURG, CLASS ACTIONS § 6924d, at 1149-50 (1976).

8. The specific example used to illustrate the awarding of attorneys fees will be based on hypothetical franchise case. It is important to remember that in an antitrust suit, prevailing plaintiff is awarded treble damages and reasonable attorneys fees. 15 U.S.C. § 15 (1976) (Clayton Antitrust Act).

9. The analysis of an attorney economic solvency is not limited to small and medium size law firms. Major law firms have also recognized the severe financial burden of contingent fee litigation in complex cases. Many firms require prior case approval by an executive screening committee before the firm will represent the client. Such committees consider the merits of the claim, collectability of an award, reasonable assurance of partial retainer and possibility of on-going cost reimbursement.

10. 15 U.S.C. § 4 (1976).

(FTC) Acts.[11] In 1976, Congress amended the antitrust statute in order to provide for attorneys fees when only injunctive relief was obtained.[12]

While the courts have consistently awarded fees, they have yet to achieve monetary uniformity [13] This fact is of particular importance in antitrust and franchising cases because of the potentially large economic verdicts.[14] This article is designed to provide guidance to the courts in the assessment of attorneys fees. It will use for its example the awarding of fees in a hypothetical franchise case.

Assume that a settlement has been achieved in a complex suit

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11. It is typical for state legislatures to parallel federal legislation in various areas. The state acts are often referred to as little federal acts, therefore the reference to Little Federal Trade Commission Acts. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 93A, §§ 9-11 (West Cum. Supp. 1979).

12. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 26; Blum District of Columbia Nurses Ass n, [1979] 2 TRADE CAS. (CCH). ¶ 62,984, at 79,597 (D.D.C. 1979). In Knutson v. Daily Review, Inc., the Court reduced the lodestar attorney fee award by 25% because there had only been recovery of nominal damages in the district court. Knutson v. Daily Review, Inc., 936 ANTITRUST & TRADE REG. REP (BNA) A-25-26 (citing Knutson Daily Review, Inc., 468 F Supp. 226, 236 (N.D. Cal. 1979)). The court first allowed an additional 15% for the delay in receipt of payment. 936 ANTITRUST & TRADE REG. REP (BNA) at A-26 (citing Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (Lindy II)). The statute applies to all pending cases. Alphin Henson, 552 F.2d 1033 (4th Cir.), *cert. denied*, 434 U.S. 823 (1977).

13. "[T]he only truly consistent thread that runs throughout federal court decisions on attorneys fees is their almost complete inconsistency Berger, *supra* note 5, at 292. This same contention is applicable to state courts as well.

14. The awarding of attorneys fees has most often been associated with civil rights litigation. While many of the same computations are used in both civil rights litigation and antitrust litigation, there are potential distinctions in the size of the award and the economic intricacies of the litigation. *See* note 26 *infra* and accompanying text.

One of the more controversial rulings on awards in the civil rights sector is now under en banc reconsideration by the Court of Appeals of the District of Columbia. Copeland Marshall, No. 77-1351 (D.C. Cir., orally argued Oct. 9, 1979). The district court had reduced $206,000 request to $160,000 for 90 weeks of work in obtaining $33,000 in back pay and an affirmative action plan to eliminate job discrimination. The original appellate court rejected that award in favor of principle of reimbursement to firm for its costs, plus reasonable and controllable margin for profit" to be calculated from an examination of the law firm financial records. Among the seven amicus curiae briefs filed in the en banc rehearing, that of the Equal Employment Opportunity Commission complained that the new formula designed to reimburse lawyers at lower rates than the market value of their services, will be an additional deterrent (to effective private enforcement) and definitely undermine the congressional intent that fees be set at level to wean competent counsel from other types of law practice. Nat'l L.J., Oct. 1, 1979, at 3, col. 2. Those groups that rely heavily on pro bono representation from large law firms complained that such cooperation will dwindle "if the firms had to expose records of income, overhead, and profits in order to justify fee request. *Id.*

brought by a class of franchisees against their franchisor.[15] The compromise settlement encompasses a total revision of the franchise agreement reflecting major improvements in the franchisor s policies and practices and a lump sum cash payment of $2.5 million. In addition, the settlement immeasurably improves the franchisees working conditions in the crucial areas of territorial protection; standards for termination, renewal, expansion, and transfer; elimination of overbearing restrictions; and, flexibility of marketing practices. The value of these intangibles was approximately $12.5 million. Thus, the total settlement package amounted to $15 million.

After settlement, the attorney makes a fee request to the court based upon the counsel's hours[16] multiplied by the established hourly rate.[17] This "lodestar computation[18] is multiplied by a mod-

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15. The same principles would apply if we use an example of class of direct purchasers bringing suit against horizontal combination of price fixers.

In order to avoid unnecessary complications, assume that the same standards of evaluation would be allowed for attorneys fees from the settlement fund as would be charged against the violators. In practice, there are some considerations requiring disparate assessment in these categories. For example, the legal fee charges against the unwilling violator would be in the nature of penalty or deterrent against future violations. It would further reward private enforcement. In the allotment of fees from class settlement, the fees would be involuntarily paid by the absent class members who were victims of the violation. On the other hand, it would be patently unfair for the absent class members to obtain windfall benefit without any risk exposure either during the pendency of suit or at its conclusion. In both cases, the judicial calculation of attorneys fees should be substantially alike.

Franchisors have recognized the significance of judicial awarding of attorneys fees and have incorporated them, as functional element, into their system. Some franchisors have contractually specified that fees should be awarded for successful legal defense. This contract provision has been held void since it would inevitably chill the vigorous private enforcement of the antitrust laws mandated by Congress. Cohen Commodore Plaza at Century 21 Condominium Ass n, Inc., 368 So. 2d 613 (Fla. Dist. Ct. App. 1979) (encouragement of private antitrust enforcement precludes indemnity for legal fees for successful defense).

Another such example has occurred in Massachusetts. In order to debilitate automobile dealers from enforcing their Massachusetts Bill of Rights the automobile factories acceded to widespread statutory amendments on condition that the legislature eliminate both exemplary damages and attorneys fees. *See* MASS. GEN. LAWS ANN. ch. 93B, § 12 (West Cum. Supp. 1979). The auto dealers ultimately realized that the clause was not designed to enrich counsel, but to facilitate the protection of their rights. Their effort to restore attorneys fees has been vigorously opposed. *See* H. R. 5244, Mass. Gen. Ct. (1979).

For discussion of the Massachusetts Bill of Rights see Brown, *A Bill of Rights for Auto Dealers*, 12 B.C. INDUS. & COM. L. REV 757 (1971).

16. Counsel hours are those reflected in the attorney daily diary and categorized summary but not those hours spent in on-going specialty research. *See* note 31 *infra*.

17. The rate used is based on the fee for legal services regularly performed by counsel on fixed fee rate for clients who engage his services on noncontingent

ifying factor in order to cover the contingent nature of the compensation, the benefits conferred on the class, the complexity of the issues, and the quality of the services rendered.[19] In addition, a request is made for expenses incurred after the settlement and the time spent in processing the fee application. The court has to determine whether the petitioned fees are reasonable and necessary

Historically under the common fund doctrine, expenses and fees were awarded for legal services performed in the creation of a fund in which the economic benefits obtained by the plaintiff were to be shared by all members of the class.[20] Since the Federal Rules of Civil Procedure did not establish provisions for an award of fees in class actions[21] the matter was governed entirely by general equitable principles. The fees were primarily awarded on the basis of a percentage of the recovery consisting of the cash and the interpolated value of the benefits conferred in kind.[22] In the hypothetical, the cash value recovered was $2.5 million with the intangible benefits valued at $12.5 million. Using a contingent fee award[23] of 20 percent, under earlier precedents, the fee award would be $3 million.

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basis and regularly pay his monthly invoices for services and expenses. *See* City of N.Y. Darling-Delaware, 440 F Supp. 1132, 1134 (S.D.N.Y. 1977) (rather than use of historical rates after seven years of litigation, calculation at present rates is appropriate to compensate for lost interest and inflation").

18. The multiplication of hours times rates provides the basis for economic calculation of attorneys fees. Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973) (Lindy I).

19. *Id.* Courts have not always availed themselves of this method of computation. As one author notes, "Many courts simply have awarded counsel flat percentage of the recovery Others have taken the size of the damage award into consideration. *See* Berger, *supra* note 5, at 287-88 (footnotes omitted).

20. The United States Supreme Court in Alyeska Pipeline Serv Co. v. Wilderness Soc y 421 U.S. 240 (1975) held that the American rule whereby each party pay his own attorneys fees had several exceptions. Included in the exceptions was the equity power of the courts to allow attorneys fees to be awarded under the common fund doctrine. *See also* Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977). In the current term, the Supreme Court will focus on whether class action attorney awards may be obtained not only from the money recovered by class members, but also from the unclaimed portion of the judgment fund. Boeing v. Van Gemert, 590 F.2d 443 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327) (Van Gemert IV).

21. *See* note 4 *supra*.

22. For collection of such cases *see* Arenson Board of Trade, 372 F Supp. 1349, 1357 n.14 (N.D. Ill. 1974).

23. The U.S. Court of Appeals for the First Circuit was perhaps the originator of the concept that contingent factor was mandatory in order to encourage private enforcement of legislation with strong underlying public policy Angoff Goldfine, 270 F.2d 185, 189 (1st Cir. 1959).

Led by the U S. Courts of Appeals for the Second[24] and Third[25] Circuits, the calculation of fee awards has veered from such a straight contingent fee mechanism. Emphasis is being placed on factors other than monetary results. A majority of the federal circuits have held that time expended should not be used as the sole criterion upon which to base a fee award.[26]

For a simple fee award, the circuits have relied upon the twelve standards[27] codified in the American Bar Association s Code of Professional Responsibility [28] Thus, courts should consider the following in their determination of fee awards:

(1) [T]he time and labor required;
(2) the novelty and difficulty of the question presented;
(3) the skill required to perform the legal services;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) customary fee in the community·
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by client or circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation and ability of the attorney·
(10) the undesirability of the case;
(11) the nature and length of the professional relationship with the client; [and]
(12) awards in similar cases.[29]

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24. City of Detroit Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

25. Lindy Bros. Builders, Inc. American Radiator & Standard Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I). Courts have not always availed themselves of this method of computation. *See* note 19 *supra*.

26. Barber Kimbrells, Inc., 577 F.2d 216 (4th Cir. 1978); King v. Greenblatt, 560 F.2d 740 (8th Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978); Grunin v. International House of Pancakes, 513 F.2d 114, 127-28 (8th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975); Kerr Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974); Evans Sheraton Park Hotel, 503 F.2d 177 187 (D.C. Cir. 1974).

In the First Circuit King Greenblatt, 560 F.2d 1024 (1st Cir. 1977), has been expanded in Souza Southworth, 564 F.2d 609, 611 (1st Cir. 1977), Reynolds Coomey 567 F.2d 1166, 1167 (1st Cir. 1978), and Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979) (negation of plain percentage or straight hourly compensation in civil rights litigation).

27. Johnson Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) (provided the initial case consideration for the twelve standards). *See also* Souza Southworth, 564 F.2d 609 (1st Cir. 1977).

28. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-106(b). For its probable origin, see *In re* Osofsky, 50 F.2d 925 (S.D.N.Y. 1931).

29. Johnson Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).

Complex class action litigation, however, requires a refined application of these standards.[30] Initially the court should inquire into the hours expended on behalf of the class.[31] This should be done in a categorized form showing time allocation for such items as court appearances, research, writing, and discovery [32] It should also include classified identification of the individuals who performed the work such as partners, associates, law clerks, and paralegals. Hours which do not directly benefit the class should be considered separately [33] Based on its own knowledge, experience, and expertise, the court should give careful consideration to whether the hours claimed and the tasks performed were reasonable in relation to the time required by other attorneys to complete similar activities.[34]

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30. It is realized that even in simple case, the interrelationship of the twelve standards makes computation less than simple activity

31. In Keyes School District No. 1, Denver, Colo., 439 F Supp. 393 (D. Colo. 1977), school desegregation case, the fee requested for hours worked was reduced by the court because of duplication, inadequate itemization, non-legal work and failure to prevail on all the issues claimed. *See also* Parker Mathews, 411 F Supp. 1039 (D.D.C. 1976), *aff'd sub nom.* Parker Califano, 561 F.2d 320 (D.C. Cir. 1977); Davis v. Board of School Comm rs, 526 F.2d 805 (5th Cir. 1976).

32. In King Greenblatt, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), the Court of Appeals for the First Circuit stated that detailed record of the time spent on the case and the duties performed must be submitted; bills which simply list certain number of hours and lack specifics as to dates and the nature of work should be refused. *Id.* at 1027

33. A pressing issue in this area is whether to include the legal services associated with the application for the attorneys fee award. The circuits are split on this issue. The First Circuit in Souza Southworth, 564 F.2d 609 (1st Cir. 1977), allowed recovery for the time involved in securing the fee award, but added that since the class was only indirectly benefited, closer view will be taken of the reasonableness of the expense. *Id.* at 614. Thus, while the "lodestar amount of fees may be increased by contingency factor, no multiplier should be used in fee awards litigation. Lindy Bros. Builders, Inc. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 112 (3d Cir. 1976) (Lindy II). *See also* Torres v. Sachs, 69 F.R.D. 343 (S.D.N.Y. 1975).

A second alternative would be to compensate award litigation at lower rate. Keyes School District No. 1, Denver, Colo., 439 F Supp. 393, 410 (D. Colo. 1977).

The courts have also refused to award compensation for fee litigation. *See* Lindy Bros. Builders, Inc. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 111 (3d Cir. 1976) (Lindy II); Boe v. Colello, 447 F Supp. 607, 610 (S.D.N.Y. 1978); Latham Chandler, 406 F Supp. 754, 757 n.2 (N.D. Miss. 1976); Clanton v. Allied Chem. Corp., 416 F Supp. 39, 43 (E.D. Va. 1976).

In determining whether to make an award fee for fee litigation, courts should recognize that after the benefits of the class litigation have been assured, the class may regard counsel as an adversary rather than an ally This would be even though the pro rata contribution of each class member to the legal fee may be modest. Thus, there may be reluctance on the part of class members to be supportive of counsel' claim.

34. Unreasonable or unnecessary duplicative work effort or inefficiency should

After the court has determined the number of hours that were of benefit to the class, it must then determine the basic value of the services by fixing a reasonable hourly rate. In so doing, it should consider the nature of the services performed, the complexity of the undertaking, and the hourly fee charged for similar services by attorneys with similar skills and qualifications. Different hourly rates should be assigned to various categories of services.[35] By multiplying the hourly rate by the hours, the court arrives at its preliminary guidepost, the "lodestar computation.[36]

The fee award, however should consider other variables besides hours and rates in order to compensate the attorney accurately Therefore, the "lodestar" computation must be adjusted to account for the contingent nature of the undertaking.[37] This is done for several reasons. First, there is no certainty that in a class action suit the class will be certified or that certification will be retained.[38] Second, recovery is uncertain, especially if success depends on the advancement of unique concepts of law Third, the restructuring of an existing franchise involves an infinite series of variables including such diverse factors as marketing forces, system capacity monetary issues, and a workable consensus of numerous franchisees and their advisors. Thus, where the court has determined that more than the "lodestar is warranted, the award should be increased. This is done by applying a weighted multiplier commensurate with the value which the court attributes to the contingency and the aforementioned qualitative factors.[39] The

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result in the court' reduction of the claimed hours. *See In re* Armored Car Antitrust Litigation, 472 F Supp. 1357 1387-91 (N.D. Ga. 1979) (fee award of $262,000 in $11.8 million compromise settlement, compared with total fee requests of $1,127,500, primarily because of severe duplication, together with denial of multiplier because of unexceptional quality of services and substantial reliance on prior government cases against violators).

35. The assignment of various rates to various categories may be of such complex nature that such an activity is impractical. This is especially true when the attorney rate is general one in which the various categories of service have been included and an average hourly fee schedule computed. Hourly rates would then most often be the amount an attorney would charge in noncontingent matter. *See* Lindy Bros. Builders, Inc. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973) (Lindy I).

36. *Id.* at 168.

37 Angoff Goldfine, 270 F.2d 185, 189 (1st Cir. 1959).

38. Class certification is conditional and subject to later decertification. FED. R. CIV P 23; *In re* Independent Gasoline Antitrust Litigation, [1979] 2 TRADE CAS. (CCH) ¶ 62,863, at 78,993 (D. Md. 1979).

39. This multiplier is risk distribution bonus to the attorney It is obviously subjective criteria and therefore should be applied after the initial determination of

fees incurred during the period after the contingency has been eliminated by a final and binding settlement should not be increased since the risk has been removed.[40]

Perhaps the most complex task in the determination of the fee award is to select the weighted multiplier attributable to the contingent nature of the undertaking. In its determination, the court should consider the probability of success at the time the suit was filed. If a case was preceded by a litigated decree, perhaps only a modest multiplier might be justified. For example, a contested governmental civil or criminal procedure may provide prima facie proof of liability and, therefore, reduce the numerical value of the multiplier.[41] Because the U S. Department of Justice has practically abdicated its responsibility for franchise litigation,[42] however, such precedents have been rare in the franchise area.

There are no definitive guidelines for the establishment of the multiplier factor When the trial court finds that an increased award is warranted, it should identify the factors that warrant the increase, state the multiplier being used, and explicate its reasons.[43] In practice, the mean weighted multiplier used by the federal courts is three. In exceptional cases, a higher factor is used. While it is rare to use a multiplier over three, it would usually be inappropriate to use a factor less than two.[44] A factor below two,

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the "lodestar computation. Consideration must be made, however, as to the interrelationship of the compensatory rate to the subjective criteria. If hourly compensatory rates include the factors of risk and case difficulty no multiplier should be used. *See* King Greenblatt, 560 F.2d 1024, 1027 (1st Cir. 1977); Grunin International House of Pancakes, 513 F.2d 114, 128 (8th Cir. 1975); City of Detroit Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974).

40. *See In re* Penn Cent. Sec. Litigation, 416 F Supp. 907, 922 & n.43 (E.D. Pa. 1976).

41. *See* 15 U.S.C. § 16(a) (1976). Under the impact of collateral estoppel, there should be cases involving reliance on contested FTC proceedings and most especially on successful private litigation against the same franchisor. *See* Parklane Hosiery Co. Shore, 99 S. Ct. 645 (1979); Perry Amerada Hess Corp., 427 F Supp. 667 (N.D. Ga. 1977).

42. *See* U.S. v. Mercedes-Benz of N. America, No. C-79-2144 (N.D. Cal., filed Aug. 15, 1979) (civil antitrust tying claim to enjoin auto factory from conditioning the grant of its franchise on the exclusive purchase of replacement parts).

43. A court' failure to specify the rationale for an increase has been found to make such determination unreviewable and therefore an abuse of discretion. Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); Lindy Bros. Builders, Inc. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I).

44. The following is tabulation of the hourly rates and the multipliers that have been applied in number of fee awards under the antitrust laws and the securities acts:

however may be justified when numerous attorneys participated, when there was duplication of effort and unnecessary expenditure

CASE	NONCONTINGENT HOURLY RATES UPHELD	MULTIPLE OF HOURLY RATE AWARDED
Fried v. Utilities Leasing Corp., [1976-77 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,696, at 90,429 (E.D.Pa. 1976) (securities).	$75-$250/hr.	four times hourly rate justified; 25% of $1 million fund 25% interest earned on settlement fund until its distribution
Arenson v. Board of Trade, 372 F Supp. 1349 (N.D. Ill. 1974) (antitrust).	$35-$125/hr.	four times hourly rate up to $500/hr., average of $359/hr.
In re Equity Funding Corp. of Am. Sec. Litigation, 438 F Supp. 1303 (C.D. Cal. 1977) (securities).	$60-$250/hr. partners + $40-$100/hr. associates	three times hourly rate to lead counsel, two to co-counsel, one and half to associate counsel, one to attorneys on sidelines; historic hourly rates applied
In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F Supp. 680 and 410 F Supp. 704 (D. Minn. 1975) (antitrust).	$40-$200/hr.	three to one times hourly rate up to $400/hr.
Gilman v. Mohawk Data Sciences, No. 71 CIV. 4742 (S.D.N.Y. May 3, 1976) (securities).	Up to $200/hr.	three times hourly rate, up to $600/hr.
In re Gypsum Cases, 386 F Supp. 959 (N.D. Cal. 1974), *aff'd*, 565 F.2d 1123 (9th Cir. 1977) (antitrust).	$30-$100/hr. $15/hr. paralegal	range of multiples up to three times hourly rate; lead counsel $300/hr.
Miller v. Fisco, [1978] FED. SEC. L. REP. (CCH) ¶ 96,348, at 93,185 (E.D. Pa. 1978) (securities).	$50-$250/hr.	three times hourly rate, up to $750/hr., $300/hr. mixed rate
Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 382 F Supp. 999 (E.D. Pa. 1974), *aff'd in part, rev'd in part*, 540 F.2d 102 (3d Cir. 1976) (en banc) (antitrust).	$35-$125/hr.	two times hourly rate affirmed in award from recoveries of unrepresented claimants; when award is added to fees from represented clients, effective multiple is in excess of three for all attorneys
In re Master Key Antitrust Litigation, [1978] 1 TRADE CAS. (CCH) ¶ 61,887, at 73,715 (D. Conn. 1977) (antitrust).	$40-$150/hr.	two times hourly rate to lead counsel, one and three quarters to co-lead counsel
City of New York v. Darling-Delaware, 440 F Supp. 1132 (S.D.N.Y. 1977) (antitrust).	$50-$175/hr.	multiples up to two times hourly rate; currently hourly rates awarded across the board despite lower rates in earlier seven years of litigation
Dorey Corp. v. E.I. duPont de Nemours & Co., [1977] 1 TRADE CAS. (CCH) ¶ 61,313, at 71,041 (S.D.N.Y. 1977) (antitrust).	$35-$150/hr.	two times hourly rate

of time, when the contingency was minimized by a prior decree, or when the recovery represented only a fraction of the total probable recovery in a clear violation of the applicable law [45]

The basis of the discussion thus far has been the variables utilized by the courts for the determination of a fee award. Since the end product is a monetary value, it is reasonable that a calculable formula should be used. While the resultant monetary award will be a specific mathematical figure, the formula s numerical values, upon which the award is predicated, are imprecise. Many of the values will be made by the subjective determination of the court. For instance, there is no mathematical formula which can be used to determine the value of the multiplier That figure is a result of a court's subjective determination of variables previously discussed.

In the franchise hypothetical, the total settlement was $15 million: $12.5 million in intangible results and $2.5 million in cash. The court had before it a petition for attorneys fees. If only one attorney was involved, the court could apply the following formula to determine the fee award:

$$(H)(C)(M) + (H')(C') = FA$$

While complicated at first glance, the formula is simple in application. The hours of the attorney (H) should be multiplied by the compensation of the attorney (C) in order to achieve the "lodestar This "lodestar would then be multiplied by the multiplier factor (M). If post-settlement services were required, the formula would be further developed. The same principles would apply except that

CASE	NONCONTINGENT HOURLY RATES UPHELD	MULTIPLE OF HOURLY RATE AWARDED
Republic Nat'l Life Ins. Co. v. Beasley, 73 F.R.D. 658 (S.D.N.Y. 1977) (derivative securities).	$80-$150/hr.	two times hourly rate
In re Folding Carton Antitrust Litigation, 937 ANTITRUST & TRADE REG. REP (BNA) A-32 (N.D. Ill. 1979) (antitrust).	$50-$250/hr.	range of multiples, with three times hourly rate for lead counsel one and one quarter times hourly rate for senior partner with hourly rates ranging from $75-$150 depending upon activity; associate compensation from $30-$75 depending upon activity, no multiplier used
HEW Corp. v. Tandy Corp., No. 73-2654-F (D. Mass. Nov. 21, 1979) (antitrust).	$30-$150/hr.	

45. It is clear that court would be dealing with fractional percentages if it used multiplier below two since it would have to use multiplier calculation between 1.1 and 1.9. A multiplier of one would not result in any additional compensation.

the administrative hours (H') and the administrative compensation (C') of the attorney would be used. Presumably these would differ from the rate charged in litigation. In addition, there would be no multiplier since the risk factor would be removed after settlement. The sum of the litigation and the administrative products would result in the attorney s fee award (FA).[46] Assuming more than one person worked on the case, a separate calculation for each would be necessary The formula for the total fee award (TFA) would be:

$$TFA = FA_P + FA_A + FA_S$$

This would be the fee award for partners (FA_P), plus the fee award for associates (FA_A), plus the fee award for the law students or paralegals (FA_S). Each of the separate fee awards would be calculated in the same manner as in the previous example except no multiplier (M) would be used for the student s fee.[47]

Assume that in our hypothetical franchise case three individu-

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46. The formula used is simplification of more complex and accurate formula which could be used to calculate fee awards. The complex formula would consider various factors such as unnecessary hours expended on the case and unreasonable levels of computation. Thus, more accurate determination would be made by using the following: $[(H - UH)(C - UC)(M)] + (H' - UH')(C' - UC')] = FA$. The hours expended (H) would have to be reduced by the unnecessary hours expended (UH). The unnecessary hours might include those spent on travel, items unrelated to the case or duplication of activity. *See* notes 31 & 32 *supra*. *See also* United Fed' of Postal Clerks, AFL-CIO v. United States, 61 F.R.D. 13 (D.D.C. 1973). The same principle would be applied to the unreasonable compensation (UC) which would be subtracted from the compensation (C).

The multiplier (M) is perhaps the most difficult and subjective of all factors to determine. The courts have used variety of multipliers. *See* note 44 *supra*. In order to attract counsel willing to forego the normal compensation rate in lieu of an attorney fee award, courts have compensated for the contingency risk by application of multiplier, or, in some cases bonus. As Berger points out:

> If there has been no significant risk there should be no adjustment. If the court concludes that success was more likely than not at the outset, an increase in the fee award of fifty percent would be appropriate. Where the court concludes that the chance of success was about even at the outset, an increase in the hourly rate in the range of 100 percent appears appropriate. Finally, if the case appeared unlikely to succeed when initiated, an increase of the basic hourly rate of up to 200 percent may be justified to compensate the attorney for the substantial risk undertaken.

Berger, *supra* note 5, at 326.

The hours of post settlement administrative work (H') and the compensation for that time (C') would, like the litigation work, be reduced by unnecessary hours of administrative work expended (UH') and unreasonable compensation (UC'). Note that there is no multiplier included in this calculation since there is no contingent risk involved.

47 It is assumed that the overhead cost of secretarial and clerical assistance is subtotaled within the individual hourly compensation rate charged by the firm.

als worked on the case: a partner, an associate, and a law student. To ease the computation, further assume that each spent 500 hours of nonduplicative time on the litigation portion of the case with the partner spending 50 hours and the associate 100 hours in nonduplicative post settlement administrative work. The hourly non-contingent compensation rates for a partner are assumed to be $250 for litigation and $200 for administrative work, for an associate $150 and $100 respectively and for a law student a flat $5. For the sake of the problem, these rates are assumed to be appropriate and not inflated.[48] Based upon the difficulty of the case and the risk involved, a multiplier of 3 will be used. The separate formula for each of the individuals will be:

$$TFA = FA_P\,[(H)(C)(M) + (H')(C')] + FA_A[(H)(C)(M) + (H')(C')] + FA_S\,[(H)(C)][49]$$

Inserting the numerical values into the formula would result in a fee award of $622,500.[50]

While this is considerably less than the straight contingent fee award of $3 million, it is certainly more reasonable.[51] Consider however the effect of a change in the multiplier A multiplier of 4 would result in a fee recovery of $822,500, an increase of $200,000.[52] Thus, the courts should be cognizant of the impact a change in the multiplier will make. An inappropriate or poorly determined multiplier could prove extremely costly to the losing party and be a windfall to the prevailing attorney

48. Our hypothetical law firm is efficient and honest.

49. The same formula is necessary for each individual as was printed in note 46 *supra*. The formula would be:

$$TFA = FA_P\,[(H - UH)(C - UC)(M) + (H' - UH')(C' - UC')] + FA_P\,[(H - UH)(C - UC)(M) + (H' - UH')(C' - UC')] + FA_S\,[(H - UH)(C - UC) + (H' - UH')(C - UC')].$$

There is no necessity to include multiplier with the law student' compensation. While the salary of the student may not be subtotaled within the hourly compensation rate of the various partners and associates, as were the secretarial and clerical salaries, there is certainly no risk factor for the student.

50. Using the formula in note 49 *supra*, the calculations would be as follows:

$$FTA = FA_P[(500 - 0)(250 - 0)(3) + (50 - 0)(200 - 0)] + FA_A[(500 - 0)(150 - 0)(3) + (100 - 0)(100 - 0)] + FA_S[(500 - 0)(5 - 0)] = FA_P[(125,000)(3) + 10,000] + FA_A[(75,000)(3) + 10,000] + FA_S[2500] = FA_P[375,000 + 10,000] + FA_A[225,000 + 10,000] + FA_S[2500] = FA_P[385,000] + FA_A[235,000] + FA_S[2500] = \$622,500.$$

51. It should be noted that the statutes which allow for attorneys fees premise that fee award as being reasonable. *See* note 5 *supra*. In addition, Sprogis United Airlines, Inc., 517 F.2d 387, 392 (7th Cir. 1975) has implied that fees should be proportionate to the damage recovered. While this is title VII case, the same principle should apply to franchise cases.

52. Calculation is left to the reader.

A generous award is needed, however, to encourage private counsel to devote willingly the immense amount of time and specialized effort required in complex litigation. Successful prosecution is the basic cornerstone of Congress statutory policy to encourage private enforcement of complex commercial law Both Congress and the courts have repeatedly recognized that public enforcement of laws is not adequate. Without the generous cooperation of the private attorney general, the strong public policy underlying many statutes could not be achieved.

The overriding consideration is that the fee award be fair to all the persons involved including the class members[53] and the lawyers. On the other hand, it also must be perceived as fair to an informed public lest it call into question the integrity and reputation of the legal profession.[54] Although these goals may appear elusive, the alternative should not be reliance solely upon mathematical calculations. It must evoke the careful application of common sense, sound judgment, and experience:

> [Ultimately the] felt necessities of the time, the prevalent moral and political theories, intentions of public policy avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[55]

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53. *See* Barron Commercial & Indus. Bank, [1979] FED. SEC. L. REP (CCH) ¶ 97,132, at 92,240 (S.D.N.Y. 1979) (legal fee in class action securities case settlement reduced from $325,000 to $275,000 because the class consisted mostly of retired and elderly persons).

54. *Cf* Blackie v. Borrack, 524 F.2d 891 (9th Cir. 1975) (class action brought under the federal security laws claiming misrepresentation about the company finances).

55. O. HOLMES, THE COMMON LAW 1-2 (1881).