Enhancing Your Understanding of Statutory Fee Claims

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What's a reasonable attorney fee? Trial judges routinely have to decide the value of attorney services when fees are claimed under one of California's many fee-shifting provisions. The formula that has developed over time is straightforward in theory: multiply the reasonable number of hours by the reasonable hourly rate to arrive at a "lodestar" market-based figure, and in unusual cases, enhance or reduce as necessary to reach a reasonable fee. But in practice, confusion over when a fee enhancement is proper has resulted in some truly startling fee requests and awards.

Recently, however, some courts have taken a closer look at the problem, going back to first principles expressed by the California Supreme Court: attorney fees awarded by statute must provide *reasonable* compensation for the work performed. Some courts have placed heavy emphasis on one factor bearing on reasonableness: the uncertainty that counsel would prevail and obtain any recovery at all, which courts have referred to as the "contingency" factor. While that factor was crafted in the context of access-to-justice cases in which little or no monetary recovery was available even if counsel were successful, some courts came to believe that virtually any cases handled on a "contingency" basis warranted an enhancement. Lately, however, we have seen courts adhering more closely to the rationale behind the "contingency" factor, examining whether the attorney's proposed lodestar rate already incorporates a contingency risk, and whether the nature of the claim significantly reduced any real contingency risk.

This article analyzes key decisions regarding the circumstances under which fee enhancements are proper, and then discusses three cases – one in the Court of Appeal, and two in the trial court – where the courts declined to award a fee enhancement on the basis that none was warranted, even though the client representation was undertaken on a contingency basis. Together, these cases provide guidance for how to reasonably compensate attorneys for their work without awarding an unwarranted windfall, and without injecting perverse incentives to engage in extended litigation rather than settling for payments that reasonably compensate both the plaintiff and his or her counsel.

The Guidance: *Serrano III, Ketchum,* and *Weeks*

In *Serrano v. Priest* (1977) 20 Cal.3d 25 *(Serrano III),* the California Supreme Court established the two-step process for determining a reasonable fee award. The trial court first determines a lodestar figure, based on a "careful compilation of the time spent and reasonable hourly compensation of each attorney … involved in the presentation of the case." The trial court is expected to set the reasonable hourly rate based on comparable hourly rates in the community for someone with the attorney's skill and experience, and to reduce any time spent for inefficient or duplicative efforts.

Once the court determines the lodestar figure, the court may, at its discretion, adjust that figure up or down based on a number of factors indicating unusual circumstances, including "(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; [and] (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award."

The Court clarified the *purpose* of fee adjustments in *Ketchum v. Moses* (2001) 24 Cal.4th 1122. *Ketchum* explained that fee adjustments should be made "to fix a fee at the fair market value for the particular action." To that end, a fee enhancement might be warranted in "cases involving enforcement of constitutional rights, but little or no damages," in order to make "such cases economically feasible to competent private attorneys."

A lodestar enhancement is not automatically warranted simply because the attorney took the case on a contingency basis. Instead, "the trial court should consider whether, and to what extent, the attorney and

continued on page 23

Statutory Fee – continued from page 22

client have been able to mitigate the risk of nonpayment." That may occur where the client has agreed to pay some portion of the lodestar amount regardless of outcome, or may occur because the attorney stands to collect significantly *more* than the lodestar amount if the client obtains a monetary recovery that is then shared with the attorney on a percentage basis. (An attorney who spends ten hours to present a demand that produces a $50,000 settlement, and who collects 40% of that payment, will have earned $2,000 per hour for her efforts.) The court should also consider the degree to which the hourly rate described for the relevant market already compensates for contingency risk, extraordinary skill, or other factors under *Serrano III*.

The *Ketchum* opinion relied in part on the *Weeks v. Baker & McKenzie* (1998) 63 Cal. App.4th 1128. *Weeks* addressed a fee claim where the plaintiff prevailed in a FEHA case against her employer, and the court awarded attorney fees with a 1.7 multiplier over and above the lodestar. The Court of Appeal *reversed* the fee order on the ground that the multiplier was excessive, even though the representation was on a contingency basis, and even though the principle behind the lawsuit – preventing workplace sexual harassment – is a meritorious public goal. The court reiterated that the goal of fee enhancements is "to fix a reasonable fee in a particular action," and cautioned against "awarding enhanced fees, particularly in private actions, that will then encourage future litigation of questionable claims."

Weeks also noted that FEHA has a fee-shifting provision that enables contingency-fee counsel to collect significant fees even if the ultimate monetary recovery is small, so that a percentage-based recovery would amount to little compared to the work performed. In such ordinary tort cases pursuing statutorily guaranteed rights, the need for a fee enhancement is low compared to cases where "the public value of the case is great and the risk of loss results from the complexity of the litigation or the uncertainty of the state of the law."

Weeks warned that fee enhancements "should not be a tool that encourages litigation of claims where the actual injury to the plaintiff was slight," or "compel a defendant to settle frivolous claims under threat that the weaker the claim the more likely it is that any fees awarded will be enhanced should the plaintiff manage to prevail."

Lodestar Enhancements – Uses and Abuses

Serrano III, Ketchum, and *Weeks* establish that lodestar enhancements should do no more than bring a fee award in line with the approximate market-level compensation based on what an attorney would earn if providing those services on an hourly basis. Where the right to be vindicated is private, where finding counsel to take on the matter would not be unduly difficult, and where the law supporting the claim clearly allows for significant monetary recoveries as well as a mandatory fee-shifting provision, an enhancement is likely not warranted under *Ketchum*.

But that has not stopped some attorneys from seeking significant fee enhancement in such cases. For example, in *McCullough v. FCA US LLC* (San Diego Super. Ct., No. 37-2015-00013501-CU-BC-CTL), the court awarded the plaintiff $17,163.83 in damages following a bench trial on the plaintiff's Song-Beverly ("Lemon Law") claim. Plaintiff's counsel then requested $125,055 in attorney fees. (The court wryly remarked in its order addressing the fee claim, "This is not a typographical error.") The $125,055 amount was reached through plaintiff's claim of a lodestar of $83,370 and a request for a 1.5 "bonus multiplier" over and above that amount.

The court's response in *McCullough* is discussed later in this piece, but it is not uncommon for multipliers of 1.5, or even higher, to be sought in Lemon Law cases, employment (FEHA) cases, and others involving similar circumstances. One

continued on page 24

perverse aspect of this dynamic is that *courts have provided no disincentive for seeking a multiplier,* because such requests have often been granted, awarding an effective hourly rate of $1,000 or more in many cases, far exceeding what counsel handling the cases on an hourly basis are earning.

A Return to the Principles of *Ketchum?*

Despite the trend of plaintiffs' attorneys requesting significant fee enhancements as a matter of course, recent Court of Appeal opinions and trial court orders suggest that courts are returning to the principles of *Ketchum* and its limits on enhancements. In particular, courts have recognized that causes of action with mandatory fee-shifting provisions, which virtually guarantee some recovery for the plaintiff's attorney handling this type of work (especially given that the vast majority of such cases settle), do not present the kind of "contingency risk" that warrants a multiplier under *Ketchum* and *Serrano III.* Discussed below are three examples of the courts' growing unwillingness to award an outsized fee simply because the matter was taken on contingency.

Campos v. Kennedy: Beware Double Counting

The Second District of the Court of Appeal addressed the runaway fee enhancement problem in a recent unpublished decision, *Campos v. Kennedy* (Feb. 13, 2018, No. B266663). The trial court had awarded a 2.0 multiplier on a fee award in a sexual battery case. The trial judge stated, as he had been known to do in other cases, that "[a]lthough some trial judges only award a multiplier in unusual cases, this Court understands *Ketchum* to advice that a multiplier should normally be awarded."

The Court of Appeal reversed, explaining explained that the trial court's understanding of *Ketchum* was incorrect. The trial court abused its discretion by granting a fee enhancement on the assumption that they should "normally" be awarded.

In remanding the case for further consideration, the Court of Appeal discussed some of the *Serrano III* factors that the trial court should consider. First, the Court of Appeal warned against awarding a multiplier for amounts already accounted for in the lodestar figure. The trial court had believed that the legal issues presented were not particularly novel, but that the case presented difficult issues of fact which required significant time to develop. The Court of Appeal noted, however, that the time taken to develop the facts of the case were already accounted for in the lodestar's "reasonable hours spent." To enhance the lodestar further for the time spent would be "improper double counting," which *Ketchum* prohibits.

The Court of Appeal also noted that a fee enhancement for the attorneys' skill will also result in improper double counting under *Ketchum.* The quality of the representation will be encompassed in the lodestar, because "a more skillful and experienced attorney will command a higher rate" than a less skilled one. To comply with *Ketchum,* a fee enhancement for skill should be given only where "the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation." Anything else results in unfair double counting and an unreasonable award.

Finally, the Court of Appeal cautioned that even multipliers for contingency risk can result in " 'unfair double counting' of factors already included in the calculation of the lodestar amount." The plaintiff's attorney in *Campos* had two separate billing rates – $300-350 per hour when being paid hourly, and a fictional, or aspirational, $650 per hour when working on contingency matters. (That rate, of course, was untested in the market, because by definition, it was never paid by the client who entered into the contingency fee agreement.) Accordingly, under *Ketchum,* where an attorney's lodestar rate is based on a figure that already incorporates the contingency risk by being higher than what the attorney is actually able to charge in hourly rate cases, no further fee enhancement would be warranted.

The unpublished *Campos* decision cannot be cited in California state court proceedings, but its analysis nonetheless provides guidance to counsel examining this issue in their own cases.

Sorbel v. Ford Motor Company: Not Every Contingency Case Warrants a Multiplier

Trial courts, too, have begun to reject the knee-jerk application of multipliers, instead deciding to rely on *Ketchum's* caution that fee enhancements are not proper in routine cases.

In one such case, *Sorbel v. Ford Motor Company* (L.A. Super. Ct., BC633608), the trial court considered a fee request arising out of a Song-Beverly claim. Plaintiff submitted a fee motion asserting a lodestar

continued on page 25

fee amount of $42,375 and requesting a 1.5 multiplier. According to the plaintiff, the multiplier was broken down into two parts: a 20% enhancement "to compensate for the risk that Plaintiff may not have prevailed," and a 30 % enhancement "for the delay in payment inherent in any contingency representation."

The defendant argued that, if the court was going to modify the lodestar amount, the court should modify it downward, to account for the simplicity of the claim: " 'This was a run-of-the-mill Lemon-Law case, so lacking in novelty or complexity that Plaintiff's counsel admits in the motion to having prosecuted it by rote.' " The defendant also argued that the matter did not present the kind of contingency risk that the court in *Ketchum* was concerned with – a risk that threatened the ability of clients to find competent counsel if an enhancement were not allowed.

The court "agree[d] with defendant" and declined to award a multiplier.

The trial court's recognition that the " 'the generous nature of the Song-Beverly Act and its mandatory fee-shifting statute substantially diminishes the risk of prosecuting a Lemon-Law claim on a contingency basis' " is a long time coming. Lemon Law claims have become something of a cottage industry in California, with plaintiffs' attorneys' websites trumpeting "record settlements" for their clients and promising that the auto manufacturer will pay the clients' attorney fees. This is a far cry from the public interest litigation in *Serrano III,* where the attorneys represented the clients without any expectation of recovering fees.

McCullough v. FCA: Don't Be Ridiculous

In the *McCullough* case – where the attorneys requested $125,055 in fees (including a 1.5 multiplier) for a $17,163.83 damages award – the trial court's order described the fee application as containing "equal measures of overreaching and frivolousness" and said it was "sorely tempted to deny the request in its entirety as a result." That outcome would be well-supported under the law. "A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315,1322; see also *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 991 (conclusion that plaintiff's attorney fee request in the amount of $870,935.50 for 1,851.43 attorney hours was "grossly inflated" was "alone was sufficient to justify denying attorney fees altogether"].) An occasional order along those lines would go far to staunch the practice of asking for the moon on a fee award on the fairly safe assumption (at least so far) that the worst that can happen from extending the litigation through overreaching fee motion practice is recovery of an award based on the lodestar figure.

Instead, the court exercised its discretion to award $18,685 in fees (which, as the court noted, was still more than the damages awarded in the case).

In its analysis, the trial court easily dispensed with the request for a 1.5 multiplier over and above the lodestar, calling it "not a close question." Indeed, the court suggested that a *negative* multiplier might be proper instead. The court relied on *Weeks* and two main aspects of the plaintiff's claim to deny the multiplier request.

First, the court noted that Song-Beverly's fee-shifting provision significantly lessened the risk to the attorney of nonpayment. Although plaintiffs' attorneys in Song-Beverly lawsuits frequently cite the risk of nonpayment as a reason to grant a fee enhancement or multiplier, the actual risk of nonpayment is quite low, especially given how frequently Song-Beverly cases settle with a little boilerplate work-up by a paralegal and only an insignificant contribution by any skilled trial counsel needed.

Second, the court stated that plaintiff's claim conferred no conceivable benefit on anyone but himself. Song-Beverly jurisprudence is well established, and thousands of claims under the Act have been processed to the point that any individual case now is simply a private action to return monetary benefit to the single plaintiff who brought the suit. Unlike the plaintiffs in the *Serrano* cases – who spent years litigating to bring the state's education funding in line with the state constitution, conferring a benefit on the state's school children without any prospect of monetary relief from which a share of fees could be obtained. There is, in contrast, no dearth of counsel willing and able to represent Song-Beverly plaintiffs who are, in effect, trying to get a generous refund on car purchases, boosted by a statutory doubling penalty. This is not an unworthy goal; it is simply not the kind of "public value" warranting a multiplier under *Weeks, Serrano III,* and *Ketchum*.

McCullough shows how courts can address the problem identified by *Weeks,* in which the court expressed concern that fee enhancements could be "a tool that encourages litigation [rather than settlement] of claims where the actual injury to the plaintiff was slight," or could be used to "compel a defendant to settle frivolous claims under threat that the weaker the claim the more likely it is that any fees awarded will be enhanced should the plaintiff manage to prevail." In cases like *McCullough,* where the fee request bears no reasonable relationship to the benefits obtained (for the plaintiff or for the public), trial courts should follow the *McCullough* court's lead and reduce the lodestar amount, or grant a negative multiplier, or even deny the fee claim altogether as a cautionary tale.

Going Forward and Following *Ketchum*

Ketchum gives trial courts substantial discretion to determine reasonable attorney fees. But *Ketchum* also expects that courts will get into the nitty-gritty of fee requests by examining billing records, making reductions of hours and rates as needed, and awarding fee enhancements only where necessary to bring a fee award up to a reasonable market rate that ensures an adequate supply of competent counsel to handle such claims. *Campos, Sorbel,* and *McCullough* are important examples of courts undergoing the kind of detailed analysis *Ketchum* commands, and the kind of common sense that courts should apply to outsize fee requests.