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Attorney's Fees under the Surface Mining Control and Reclamation Act of 1977: A Primer

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ATTORNEY'S FEES UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977: A PRIMER

I. INTRODUCTION........................................................ 987

II. BACKGROUND ......................................................... 988

III. STATUTORY FEE-SHIFTING ........................................ 992

IV. ELIGIBILITY FOR FEES ............................................. 994

V. ENTITLEMENT TO FEES ............................................ 996

VI. DETERMINING THE BASIC FEE (LODESTAR) .................... 997

VII. THE REASONABLE HOURLY RATE ............................... 1000

VIII. ENHANCEMENT (THE MULTIPLIER) .............................. 1003

IX. AWARDS RELATIVE TO THE FEE ACTION ....................... 1006

X. CONCLUSION .......................................................... 1008

I. INTRODUCTION

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) is one of many federal statutes with fee-shifting provisions. Such provisions have been included in Congressional enactments to encourage the participation of private citizens in the enforcement of these statutes. However, it is necessary to be familiar with the way in which the fee-shifting provisions of these statutes have been applied by the courts and administrative law judges in order to predict when and what compensation will be awarded. The purpose of this note is to explore the current state of the law in this area and to suggest the direction it may be taking so that attorneys can determine with some certainty their eligibility for compensation. In addition, the method by which courts determine the amount of the compensation will be discussed.

II. BACKGROUND

The American Rule for the payment of attorney's fees provides that each party to a lawsuit pays his or her own attorney's fees. This rule was formally adopted by the U. S. Supreme Court in *Arcambel v. Wiseman* where the court refused to award attorney's fees to a prevailing party stating that this was not the practice in the United States.  

The American Rule was further entrenched in the legal practices of the United States by the Fee Act of February 26, 1853 which listed the costs which might be charged against the non-prevailing party in a lawsuit and specifically excluded from those costs the charges between "solicitor and client."  

However, in the years since *Arcambel*, certain well-delineated common-law exceptions to the American Rule have developed. These exceptions allow for the shifting of attorney's fees from the party incurring the fees to other parties affected by the litigation.  

The earliest of these exceptions was developed by the U. S. Supreme Court in *Trustees v. Greenough*, and is called the "common fund" exception. In exercising the traditional equitable powers of the judiciary, the *Greenough* Court shifted some of the prevailing party's attorney's fees to other shareholders in a trust fund which was rescued from improper use by the plaintiff's suit. The Court used the unjust enrichment of the other beneficiaries of the fund to justify the fee-shifting, reasoning that the other beneficiaries gained the proper administration of the trust through the plaintiff's suit without bearing any of the expense of the litigation.

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2. 3 U.S. (3 Dal.) 306 (1796).
3. *Id.* at 306.
5. *Id.* at 161.
7. 105 U.S. 527 (1881).
8. *Id.* at 532.
9. *Id.* at 537.
10. *Id.*
The U. S. Supreme Court elaborated on the common fund doctrine in *Sprague v. Ticonic Nat’l Bank*\(^1\) where the beneficiary of a trust, in pursuing her own claims, vindicated claims of beneficiaries of separate, but similarly situated trusts.\(^2\) In *Sprague*, the Court found permissible the award of attorney’s fees against an ascertainable group who benefited from, but did not participate in the lawsuit.\(^3\) This group obtained a common benefit even though not holding an interest in the same trust fund as the plaintiff did.\(^4\) Thus, a “common benefit” exception was added to the “common fund” exception established in *Greenough*. Authority for the action was based on the “historic equity jurisdiction of the federal courts.”\(^5\) The Court indicated, however, that the award of attorney’s fees was appropriate only for “dominating reasons of justice.”\(^6\)

The “common benefit” exception established in *Sprague* was given further definition by the U. S. Supreme Court in *Mills v. Electric Auto-Lite Co.*\(^7\) In *Mills*, the successful prosecution of a suit by one stockholder conferred a substantial benefit on other stockholders.\(^8\) The Court held it within the jurisdiction of the courts to spread the costs of the litigation proportionately among the beneficiaries even though the common benefit was not monetary.\(^9\)

However, in *Boeing Co. v. VanGemert*,\(^10\) the U.S. Supreme Court indicated the outer limits of the “common fund/common benefit” exception. In *Boeing* a holder of unredeemed convertible debentures brought a class action suit which resulted in the creation of a fund from which all class members could receive recompense for their debentures.\(^11\) The Court ruled that attorney’s fees incurred by the representatives of the class should be assessed against the entire fund

\(^1\) 307 U.S. 161 (1939).
\(^2\) Id. at 166.
\(^3\) Id. at 167.
\(^4\) Id. at 166.
\(^5\) Id. at 164.
\(^6\) Id. at 166.
\(^7\) 396 U.S. 375, 393 (1970).
\(^8\) Id. at 393.
\(^9\) Id. at 395.
\(^11\) Id. at 480-81.
so that the cost of the litigation would fall on each member of the class in exact proportion to their share of the fund.\textsuperscript{22} However, the Court cautioned that class action suits would not entitle the class representatives to reimbursement for attorney’s fees from the class under the “common fund/common benefit” exception unless each specifically discernible member of the class obtained a precisely ascertainable benefit.\textsuperscript{23}

In addition to the “common fund/common benefit” line of exceptions, the U. S. Supreme Court has developed a second strain of exceptions to the American Rule that each party to a lawsuit pay his own attorney’s fees. This second exception is predicated on the judiciary’s power to sanction bad faith behavior and is codified in Rule 11 of the Federal Rules of Civil Procedure\textsuperscript{24} which provides for sanctions against attorneys filing frivolous suits. The possible sanctions include shifting to the offending party the attorney’s fees incurred by others as the result of a frivolous filing of a suit.\textsuperscript{25}

In addition, bad faith behavior directed at the plaintiff rather than the court may be sanctioned by shifting attorney’s fees. This occurred in \textit{Vaughan v. Atkinson}\textsuperscript{26} where a seaman was trying to obtain recuperative pay from his employer.\textsuperscript{27} In \textit{Vaughan}, the U. S. Supreme Court declared that the plaintiff’s attorney’s fees could be assessed against the defendant as part of damages when the losing party’s vexious behavior forced the plaintiff to hire an attorney to vindicate the plaintiff’s rights.\textsuperscript{28}

Another instance of the imposition of sanctions by a court for bad faith behavior occurred in \textit{Toledo Scale Co. v. Computing Scale Co.}\textsuperscript{29} where the losing party attempted to circumvent an adverse court decision by filing an action to block enforcement of the adverse decision in a court in another jurisdiction.\textsuperscript{30} In \textit{Toledo}, the U.
S. Supreme Court ruled that it was not abuse of discretion for the lower court to hold the offending party liable for the attorney's fees necessarily incurred by the prevailing party in enforcing the decision.\textsuperscript{31}

Thus, there were two strains of common-law developed exceptions to the American Rule, one predicated on the equitable power of the courts and one based on the power of the courts to control their own proceedings. Besides the common law exceptions to the American Rule, attorney's fees may be allocated by contract in which the parties specify who will pay the expenses of litigating disputes involving the contract.\textsuperscript{32}

In addition to the common-law created "common fund/common benefit" and bad faith exceptions to the American Rule, the courts attempted to create another exception based on the "private attorney general" concept.\textsuperscript{33} This concept involved the shifting of the attorney's fees of private citizens who help enforce public policy through private litigation.\textsuperscript{34} The use of this judicially created "private attorney general" exception was foreclosed by the U. S. Supreme Court in \textit{Alyeska Pipeline v. Wilderness Society}.\textsuperscript{35}

\textit{Alyeska} involved a suit by environmental groups to block issuance of the permits necessary for construction of the trans-Alaska pipeline.\textsuperscript{36} Attorney's fees were awarded to the environmental groups by a lower court on the "private attorney general" theory, and Alyeska Pipeline Service Co. appealed.\textsuperscript{37}

The U. S. Supreme Court reversed the lower court's award of attorney's fees stating that the determination of when fee-shifting should occur to encourage private enforcement of public policy was for the legislature and not the judiciary to decide.\textsuperscript{38}

\begin{itemize}
  \item \textsuperscript{31} \textit{Id.} at 428.
  \item \textsuperscript{32} 17 Am. Jur. 2d \textit{Contracts} § 164 (1964 and Supp. 1988).
  \item \textsuperscript{33} \textit{See generally} Alyeska, 421 U. S. at 240 (discussing the development of the "private attorney general" theory).
  \item \textsuperscript{34} \textit{Id.}
  \item \textsuperscript{35} \textit{Id.} at 269.
  \item \textsuperscript{36} \textit{Id.} at 241.
  \item \textsuperscript{37} \textit{Id.}
  \item \textsuperscript{38} \textit{Id.} at 269.
\end{itemize}
In *Alyeska*, the Court reasoned that since federal law created a statutory bar to the award of attorney's fees against the United States and since the theory behind the "private attorney general" concept was to enlist the aid of private citizens in ensuring the enforcement of laws by public officials, a waiver of government immunity would be necessary in cases where the government, as defendant, became liable for plaintiff's fees. Furthermore, it was logical to accomplish the waiver and the authorization in one step through Congressional enactment.

III. STATUTORY FEE-SHIFTING

In 1975, when *Alyeska* was decided, Congress had provided for fee shifting in twenty-eight statutes. By 1985, the number of statutes providing for fee shifting had burgeoned to over two hundred.

Among the two hundred statutes was the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The SMCRA was enacted in response to the environmental problems created by surface coal mining. National regulation was necessary because the states were reluctant to disadvantage their respective coal industries by imposing the regulations necessary for effective control of pollution and because many of the environmental problems created by surface mining spanned state boundaries.

Congressman Morris Udall, the driving force behind passage of the SMCRA, noted that it was written to encourage full citizen participation in enforcement. To encourage this participation, the authors of the SMCRA included four fee-shifting provisions. These provisions are contained in sections 703(c), 520(f), 520(d), and 525(e).

39. Id. at 267-68.
40. Id. at 260 n.3.
44. Id. at 553-54.
45. Id. at 557.
47. Id. § 1270(f).
48. Id. § 1270(d).
49. Id. § 1275(e).
The purpose of Section 703(c) is to protect from retaliatory firing those who report infractions of the SMCRA. This provision is an outgrowth of *In re Quarles* in which the U.S. Supreme Court made clear that it is the duty of the government to assure that citizens may freely exercise the right to report violations of the law. It is essential that this right be protected from coercion if the government is to obtain the cooperation of the people in the enforcement of the laws. Under section 703(c), an employer dismissing an employee for informing the government of a violation of SMCRA, must pay the attorney's fees incurred by the employee in proving such retaliatory action. The fees would be assessed as part of damages. While encouraging citizen participation in enforcement underlies all the fee-shifting provisions of SMCRA, the historical development of Section 703(c) differs from that of the other fee-shifting provisions and is outside the scope of this note.

In addition, Section 520(f) of the SMCRA is outside the scope of this note. Briefly, it provides for the payment of the attorney's fees as a part of damages when a party proves injury through a violation of SMCRA. Its focus is the recompense of an injured plaintiff rather than the fostering of watchdog activities by private citizens.

It is the fee-shifting provisions of SMCRA which encourage watchdog activities by private citizens which are the focus of this note. These sections are Sections 520(d) and 525(e). Section 520(d) states: "In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." This section, by its plain language covers judicial proceed-

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50. Id. § 1293(c).
51. 158 U.S. 532 (1895).
52. Id. at 536.
53. Id.
54. 30 U.S.C. § 1293(c).
55. Id.
56. Id. § 1270(f).
57. Id. § 1270(d).
ings, and by judicial decision covers the monitoring of judicial orders such as consent decrees.\textsuperscript{58}

Section 525(e), which also provides for fee shifting, states:

Whatever an order is issued under this section, or as a result of an administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.\textsuperscript{59}

Section 525(e) covers administrative proceedings and judicial proceedings resulting from the administrative actions.

The legislative history of these sections indicates that their purpose is to encourage private litigation to insure enforcement of provisions of SMCRA.\textsuperscript{60} Further, these fee-shifting provisions are to be interpreted consistent with similar federal statutes providing for fee-shifting.\textsuperscript{61} This congressional intent is important as it allows reference to the entire body of law that has developed around statutory fee-shifting provisions intended to encourage citizen enforcement when construing similar fee-shifting provisions of SMCRA.

\textbf{IV. Eligibility for Fees}

To become eligible for an award of attorney's fees under a fee-shifting statute, a party must achieve some success on the merits. This requirement was decreed by the U. S. Supreme Court in \textit{Ruckelshaus v. Sierra Club}.\textsuperscript{62} \textit{Ruckelshaus} was decided as a result of an

\begin{itemize}
  \item \textsuperscript{58} Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S.546, 558-59 (1986) [hereinafter Delaware Valley I] (allowing reimbursement for attorneys' fees for monitoring a consent decree).
  \item \textsuperscript{59} 30 U.S.C. § 1275(e).
  \item \textsuperscript{62} 463 U.S. 680 (1983) \textit{rev'g sub nom.}, Sierra Club v. Gorsuch, 684 F.2d 972 (D.C. Cir. 1982).
\end{itemize}
appeal of the lower court decision in *Sierra Club v. Gorsuch* in which plaintiffs were awarded attorney's fees, even though they had achieved no success on the merits in their litigation. The lower court reasoned that an award of attorney's fees to plaintiffs was appropriate in view of their contributions to the furtherance of the goals of the Clean Air Act even though plaintiffs did not prevail on the merits with regard to any aspect of the case.

However, in *Ruckelshaus* the U. S. Supreme Court, divided five to four, reversed *Gorsuch* and ruled that a provision of the Clean Air Act identical to Section 520(d) of the SMCRA required at least partial success on the merits of an action as a prerequisite for eligibility to receive an award of attorney's fees. The Court further stated that awards of attorney's fees to parties having no success on the merits would contravene traditional notions of fairness. The Court concluded that the use of the phrase "whenever it (the court) determines that such an award is appropriate" was meant by Congress to give courts and administrators discretion to award attorney's fees to litigants who were partially successful on the merits, but not those who achieved no success on the merits.

The *Ruckelshaus* requirements have been extended to Section 525(e) of SMCRA by changes made in 43 CFR 1294(b) under which 525(e) is administered. Prior to *Ruckelshaus*, Section 1294(b) provided that attorney's fees might be awarded to any person making a "substantial contribution to a full and fair determination of the issues." After *Ruckelshaus*, this section was amended to also require that a person seeking an award of attorney's fees under SMCRA must achieve some success on the merits.

The requirement of some success on the merits was also discussed in *Hensley v. Eckerhart* where attorneys sought to collect fees for

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64. *Gorsuch*, 684 F.2d at 973.
65. *Id.* at 975.
67. *Id.* at 686.
68. *Id.* at 689.
69. 43 Fed. Reg. 34,399 (1978) (stating the wording of 43 C.F.R. 1294(b) prior to *Ruckelshaus*).
70. 50 Fed. Reg. 47,224 (1985) (indicating the change in 43 C.F.R. 1294(b) after *Ruckelshaus*).
a partially successful constitutional challenge to treatment and conditions at a Missouri state hospital.\textsuperscript{72} In \textit{Hensley}, decided about six weeks prior to \textit{Ruckelshaus}, the U.S. Supreme Court identified “the degree of success” as the most critical factor and refused to allow fees for hours expended on unsuccessful claims, unrelated to successful claims.\textsuperscript{73}

Further, in \textit{Pennsylvania v. Delaware Valley Citizens' Council (Delaware Valley II)},\textsuperscript{74} which involved the request for attorney’s fees by a citizens’ group who successfully compelled the Commonwealth of Pennsylvania to comply with certain provisions of the Clean Air Act, the U. S. Supreme Court indicated that under all “typical” fee-shifting statutes, attorney’s fees are awarded to the prevailing party only to the extent that party prevails.\textsuperscript{75}

Thus, after \textit{Ruckelshaus}, some success on the merits is necessary to establish eligibility for an award of attorney’s fees to plaintiffs under the SMCRA. However, the \textit{Ruckelshaus} court indicated in a footnote that “trivial success on the merits” and “purely procedural victories” would not justify an award.\textsuperscript{76} In addition, the \textit{Ruckelshaus} court urged that the differences in the ability to pay of private and public defendants be taken into consideration when awarding costs and that special care be taken in awarding fees against private parties.\textsuperscript{77}

V. Entitlement to Fees

In keeping with the \textit{Ruckelshaus} position that “trivial success” does not satisfy the requirement of “some success on the merits,” 43 CFR § 4.1294(b), under which Section 525(e) is administered, also requires more than some success on the merits. When Section 4.1294(b) was amended to add the \textit{Ruckelshaus} requirement of “some success on the merits”, the original language of the regulation requiring that a party make a “substantial contribution to a full and

\begin{footnotes}
\item[72] \textit{Id.} at 426-28.
\item[73] \textit{Id.} at 440.
\item[74] 483 U.S. 711 (1987) [hereinafter Delaware Valley II].
\item[75] \textit{Id.} at 713 n.1.
\item[76] \textit{Ruckelshaus}, 463 U.S. at 688 n.9.
\item[77] \textit{Id.} at 692 n.12.
\end{footnotes}
fair determination of the issues” to be entitled to statutory attorney’s fees was retained.78 Thus, as is indicated in Natural Resources Defense Council v. Office of Surface Mining Reclamation and Enforcement,79 a 1989 administrative hearing involving citizen group intervention in the permitting process for a Colorado surface mine, eligibility does not mean entitlement.80 Eligibility is attained by some success on the merits, but entitlement which is also a prerequisite for an award of attorney’s fees requires more. There is substance to the “substantial contribution” requirement, and attorneys representing clients who hope to collect fees from defendants under SMCRA should evaluate the significance of the ends that will be achieved should the clients prevail or partially prevail before proceeding with a case.81

VI. DETERMINING THE BASIC FEE (LODESTAR)

Once both eligibility and entitlement have been established, it is then necessary for the court to determine the actual amount of the fee to be awarded. Congress has indicated only that the fee-shifting statutes should “result in fees adequate to attract competent counsel, but which do not produce windfalls to attorneys.”82 To calculate the baseline fee, the U. S. Supreme Court in Hensley, adopted a formula using the attorney’s reasonable hourly rate times the reasonable number of hours expended on the case.83 The use of this formula for obtaining what has come to be known as the “lodestar” was affirmed by a unanimous court in Blum v. Stenson,84 involving a class of Medicaid recipients represented by Legal Aid Society attorneys.85

The apparent simplicity of the “lodestar” formula is deceptive. Its application has been difficult and has required considerable ju-
dicial definition. First, under both *Hensley* and *Ruckelshaus*, a court must decide 1) which claims were successful, 2) which unsuccessful claims are related to successful claims, and 3) which unsuccessful claims are totally unrelated to successful claims and, therefore, not compensable. In determining which claims are successful, the Court in *Hensley* stated that the completeness of the relief granted is not necessarily determinative of the degree of success.

The determination of which claims fall into which category can be a time-consuming task, especially if the judge hearing the fee petition for attorney's fees is unfamiliar with the litigation for which the fees are sought. He may have to conduct a painstaking review of the case to determine which claims qualify for reimbursement. During this review, a judge, whether administrative or judicial, must rely on his own knowledge of the interrelationship of claims in a proceeding to determine the linkage between successful claims and related unsuccessful claims.

One way of conducting such a review was employed in *National Resources Defense Council v. Office of Surface Mining Reclamation and Enforcement*. In *National Resources* the administrative judge analyzed which claims were compensable by dividing all claims into the *Hensley-Ruckelshaus* categories: 1) successful, 2) unsuccessful related and 3) unsuccessful unrelated. After categorizing all claims, the page-counting method was adopted to determine what percentage of the total hours claimed by plaintiff's attorneys were compensable. To implement the method, the plaintiff's brief was reviewed and the number of pages devoted to successful or related claims was determined. The percentage those pages constituted of the whole brief was then applied to the total number of hours claimed to determine how many hours were compensable. Pages devoted to

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86. *Hensley*, 461 U.S. at 440; *Ruckelshaus*, 463 U.S. at 694. It seems reasonable to read *Hensley* and *Ruckelshaus* together because although they do not refer to each other, they were before the United States Supreme Court at the same time and share a consistent view on the statutory shifting of attorney's fees.
87. *Hensley*, 461 U.S. at 435 n.11.
89. *Id.* at 369.
90. *Id.* at 386.
procedural matters were deducted from the total number of brief pages before the percentage figure was determined.  

An alternative method of calculating the number of hours devoted to successful or related claims was adopted in *Utah Int'l, Inc. v. Department of Interior* where a U.S. District Court surveyed the attorneys' time sheets and determined how many hours were devoted to the successful claims. It should be noted that the *Utah Int'l* court expressly disallowed time spent by attorneys on public relations activities, such as time spent informing the media.

A final method of determining compensable hours was adopted by a U.S. District Court in *Save Our Cumberland Mountains, Inc. v. Hodel (SOCM I)* where attorney's fees were sought by groups who compelled enforcement of the provisions of SMCRA. In *SOCM I*, detailed time records were submitted to U.S. District Court. Rather than scrutinizing the records to decide which hours should be reimbursed, the court allowed opposing counsel to review the application and make objections to any hours thought to be non-compensable. The court then ruled on these objections. The *SOCM I* method which entails placing the burden of determining which hours are reasonable on the party who will have to pay the fees seems to be the most efficient means of determining compensable hours from a judicial standpoint. However, it is only useful when detailed records are kept. Otherwise, a time-consuming review of the litigation is necessary or the rather inexact page-counting method must be used.

In order to insure that sufficiently detailed records are kept, a Third Circuit Task Force on court-awarded attorney fees has recommended that a pretrial conference be held to reach an agreement

91. *Id.* at 388.
93. *Id.* at 830-31.
94. *Id.* at 831 n.41.
96. *Id.* at 1531.
97. *Id.* at 1532.
98. *Id.*
on how the records of an attorney's hours will be kept whenever actions are brought under a statute which contains a fee-shifting provision.\textsuperscript{99} Furthermore, contemporaneous record-keeping was recommended.\textsuperscript{100} This process requires that hourly records be submitted to the court at regular intervals during litigation so that the court can monitor the record-keeping. The Task Force recommended that such records should be kept \textit{in camera}.\textsuperscript{101}

Finally, in \textit{Missouri v. Jenkins},\textsuperscript{102} where reimbursement for hours expended by paralegals and law clerks was at issue, the U. S. Supreme Court indicated that costs and expenses usually billed to clients are compensable.\textsuperscript{103} Such expenses may include the cost of paralegals, telephone calls, and travel. The key to reimbursement for these expenses is the practice of the community in which the attorney's hourly rate is determined, since rates for attorneys will reflect whether or not certain expenses are billed separately.\textsuperscript{104} In addition, it is clear from the plain language of Section 520(d) that the fees of expert witnesses are compensable.\textsuperscript{105}

\textbf{VII. THE REASONABLE HOURLY RATE}

The second component of the lodestar determination is the hourly rate. While there has been no consensus on the basis for the calculation, most courts have adopted the approach used by the Third Circuit in \textit{Student Pub. Interest Research Group v. A.T. & T. Bell Lab.}\textsuperscript{106} After surveying various methods of determining a reasonable hourly rate, the court concluded that under \textit{Blum}, the community market rate was mandated.\textsuperscript{107} The community market rate is the local hourly rate of similar attorneys in private practice. Furthermore, under \textit{Blum}, it is the burden of the fee applicant to submit affidavits

\begin{itemize}
  \item \textsuperscript{99} \textsc{Third Circuit Task Force, Court Awarded Attorney Fees} 44 (1985).
  \item \textsuperscript{100} Id. at 44.
  \item \textsuperscript{101} Id. (\textit{In camera} recordkeeping means that the records are not available to the public).
  \item \textsuperscript{102} 109 S. Ct. 2463 (1989).
  \item \textsuperscript{103} Id. at 2465.
  \item \textsuperscript{104} Id. at 2471.
  \item \textsuperscript{105} 30 U.S.C. § 1270(d).
  \item \textsuperscript{106} 842 F.2d 1436 (3rd Cir. 1988).
  \item \textsuperscript{107} Id. at 1448. \textit{See also} \textit{Blum}, 465 U.S. at 895.
\end{itemize}
to the court establishing the community market rate for his services.\textsuperscript{108}

However, when the award of fees is against the United States government, historical fees are required. A historical fee is the community market rate at the time the litigation actually occurred, rather than the current rate.\textsuperscript{109} As the U. S. Supreme Court in \textit{Library of Congress v. Shaw}\textsuperscript{110} explained, the government immunity from awards of interest is not waived by congressional enactments like SMCRA which waive the government's immunity from the collection of attorney's fees.\textsuperscript{111} For the government to waive its immunity from interest payments, specific statutory language waiving such immunity is necessary. Absent such language, multipliers which compensate for delay of payment as well as the use of current community market rates to compensate for delay are considered interest and impermissible.\textsuperscript{112} However, in \textit{Missouri v. Jenkins},\textsuperscript{113} the U.S. Supreme Court made clear that awards which take into account a delay in payment are permissible against a state.\textsuperscript{114} Presumably, such awards would also be permissible against private litigants.

Another means of determining a reasonable hourly rate was set forth in \textit{Save Our Cumberland Mountains v. Hodel (SOCM II)}\textsuperscript{115} which was an appeal of the fee award in \textit{SOCM I}. In \textit{SOCM II} the D.C. Circuit stated that an attorney's established hourly rate should be presumed to be the reasonable hourly rate at which he should be compensated under statutory fee-shifting provisions.\textsuperscript{116} Relying on \textit{Laffey v. Northwest Airlines, Inc.},\textsuperscript{117} which was controlling precedent, the court reasoned that an attorney is in the best position to know what his reasonable hourly rate should be and there is no

\begin{footnotes}
\item[108] \textit{Blum}, 465 U.S. at 896 n.11.
\item[110] \textit{Id}.
\item[111] \textit{Id.} at 321.
\item[112] \textit{Id.} at 322.
\item[113] 109 S. Ct. 2463 (1989).
\item[114] \textit{Id.} at 2469.
\item[115] 826 F.2d 43 (D.C. Cir. 1987), \textit{rev'd} 857 F.2d 1516 (D.C. Cir. 1988) (en banc) [hereinafter \textit{SOCM II}].
\item[116] \textit{Id.} at 48.
\end{footnotes}
reason to allow him a higher rate of compensation when the government is paying his fee.118 The Circuit Court distinguished Blum, where Legal Aid lawyers were compensated at the community rate for private lawyers, because the Legal Aid lawyers in that case were salaried and, therefore, had no set rates.119

The reasoning of SOCM II and Laffey is attractive as the method employed takes the burden of establishing a reasonable hourly rate off the court whenever an attorney has established his own rates. This holds true even if the attorney does not charge all of his clients the same rate or if he takes most of his cases on a contingent basis.

However, the three judge panel which decided SOCM II did so with misgivings. Even the author of the opinion admitted that Laffey, on which the SOCM II decision was based, might not be correct on the issue of the established hourly rate.120 In Save Our Cumberland Mountains v. Hodel (SOCM III),121 rehearing was granted en banc. Laffey was vacated, and the prevailing community standard was adopted for all attorneys whether practicing for profit, practicing in a public interest legal services organization or practicing privately for profit, but at a reduced rate reflecting non-economic goals, such as improving the environment or vindicating constitutional rights.122 The SOCM III court reasoned that the difficulty of determining the market rate, which was the rationale behind the development of the Laffey method, does not prevent that rate from being the proper basis for determining the reasonable hourly rate for an attorney seeking an award of fees.123

Since the Laffey strain of cases has been vacated by the D.C. Circuit, it would not seem necessary to discuss it. However, the dissent in the SOCM III decision points out that the U. S. Supreme Court has not yet spoken on this issue.124 In fact, the Court recently

118. SOCM II, 826 F.2d at 48.
119. Id.
120. Id. at 49.
121. 857 F. 2d 1516 (D.C. Cir. 1988) (en banc) [hereinafter SOCM III].
122. Id. at 1524.
123. Id. The court noted, however, that to conform with Shaw, the prevailing community rate must be historical when the award is against the federal government. Id. at 1525.
124. Id. at 1534.
declined an opportunity to resolve this issue by refusing to review the Ninth Circuit decision in *Maldonado v. Lehman*\textsuperscript{125} wherein the trial court determined the hourly billing rate of the prevailing party’s attorney by using the reasonable community standard.\textsuperscript{126} The Ninth Circuit affirmed the trial court’s decision against a challenge that the *Laffey* method should have been used to ascertain the reasonable hourly rate.\textsuperscript{127} In *Webb v. Maldonado*\textsuperscript{128} the U. S. Supreme Court declined to grant *certiorari* to the Ninth Circuit decision.\textsuperscript{129}

*Webb* might have permanently resolved the question of how a reasonable fee should be determined. In *Webb*, Justice White, who authored *Alyeska, Delaware Valley I* and *Delaware Valley II*, strongly dissented noting the difficulty the circuits have had in determining what a “reasonable” attorney’s fee is and the diversity of the methods utilized.\textsuperscript{130} While the specific differences discussed by White have been eliminated with the D.C. Circuit’s vacating of *Laffey*, the practicality of the *Laffey* method, its ease of application and predictability of result, make it an attractive, though not perfect, solution to the problem of determining a “reasonable” fee. This method has been rejected by the circuits for the time being, but its use has not been foreclosed by the U. S. Supreme Court.

### VIII. Enhancement (The Multiplier)

Once the lodestar amount has been determined based on the factors in the above section, the court may then consider whether a “multiplier” should be used to adjust the fee upward or downward.\textsuperscript{131} “Multiplier” is the term used to identify the mechanism by which a fee is adjusted upward or downward for exceptional or substandard representation. To evaluate whether or not a multiplier should be used, the *Hensley* court indicated that the factors iden-
tified by the Fifth Circuit in Johnson v. Georgia Highway Express, Inc. should be used, but cautioned that some of the Johnson factors were included in the lodestar.

In Blum v. Stenson the U. S. Supreme Court specifically singled out the 1) "novelty (and) complexity of the issues," 2) "experience and special skill of the attorney," 3) "quality of representation," and 4) "results obtained" as factors already taken into consideration in the initial lodestar determination. In Delaware Valley I where a citizens' group sought to recover attorney's fees expended in successful efforts to force the Commonwealth of Pennsylvania to comply with the Clean Air Act, a majority of the U. S. Supreme Court affirmed the inclusion in the lodestar of the four factors mentioned in Blum. Thus, a "strong presumption" exists that the lodestar is a reasonable fee sufficient to satisfy the congressional purpose behind the fee-shifting statutes. The Court concluded that the only "multiplier" question left open was whether an upward adjustment was warranted in cases where the risk of loss was great.

This question of whether enhanced compensation was due attorneys seeking fees for work on exceptionally risky cases was held over for argument, and a decision was rendered in Delaware Valley II. In Delaware Valley II, a majority of the Court agreed that enhanced compensation was not warranted in this particular case. The Chief Justice and Justices White, Powell and Scalia concluded that the multiplier should never be used to compensate attorneys

132. 488 F.2d 714 (5th Cir. 1974).
133. Hensley, 461 U.S. at 434 n.9. The Johnson factors are incorporated in Rule 1.5(a) of the ABA Model Rules of Professional Conduct, a section which deals with the determination of a lawyer's reasonable fee. The factors are: 1) The time and labor required; 2) The novelty and difficulty of the questions; 3) The skill requisite to perform the legal service properly; 4) The preclusion of other employment by the attorney due to acceptance of the case; 5) The customary fee; 6) Whether the fee is fixed or contingent; 7) Time limitations imposed by the client or the 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; 12) Awards in similar cases. Johnson, 488 F.2d at 717-19.
136. Id.
137. Id. at 568.
for taking exceptionally risky cases.\textsuperscript{139} However, they then waffled by stating that even if the multiplier might be warranted in some cases for risk, it should not have been used in this case.\textsuperscript{140} The Court reasoned that since the fees in question in this case were solely for enforcing a consent decree, there was little risk involved.\textsuperscript{141} Further, the Court indicated that should an enhancement be required, it should not exceed one-third of the lodestar.\textsuperscript{142}

Justice O'Connor, while concurring in the result, refused to join that part of the opinion which would have cast considerable doubt on, if not totally eliminated, the last application of the multiplier, that is as an enhancement to compensate for risk.\textsuperscript{143} She would allow the use of a multiplier to enhance an award whenever the applicant can prove that without enhancement, attracting competent counsel would have involved substantial difficulty.\textsuperscript{144} Her position appears to be required by the congressional purpose behind the fee-shifting provisions which is to allow fees sufficient for private citizens to attract competent counsel.\textsuperscript{145} However, in implementing the multiplier she would require courts to treat contingency cases as a class governed by a community standard in the hope of bringing consistency to the determination of the amount of enhancement.\textsuperscript{146} Four other members of the court filed a separate dissent, but agreed with Justice O'Connor that the multiplier might be used in certain instances to enhance a fee.\textsuperscript{147}

\textit{Delaware Valley II} seemed to send the clear message to the lower courts that use of the multiplier will not be upheld by the Supreme Court except in the most exceptional of circumstances, circumstances of which even the Court is unable to formulate an example. However

\textsuperscript{139} Id. at 725.
\textsuperscript{140} Id. at 728.
\textsuperscript{141} Id. at 729-30.
\textsuperscript{142} Id. at 730.
\textsuperscript{143} Id. at 734 (O'Connor, J., concurring in part and concurring in the judgment).
\textsuperscript{144} Id. at 733 (O'Connor, J., concurring in part and concurring in the judgment).
\textsuperscript{145} S. REP. No. 1011, \textit{supra} note 78.
\textsuperscript{146} \textit{Delaware Valley II}, 483 U.S. at 732-33, (O'Connor, J., concurring in part and concurring in the judgment).
\textsuperscript{147} Id. at 735 (Blackmun, Brennan, Marshall and Stevens, J., dissenting).
in Ramos v. Lamm, the Tenth Circuit suggested that a situation such as that which existed fictionally in To Kill a Mockingbird might warrant an enhancement of the lodestar for risk. In To Kill a Mockingbird, an attorney in a small southern town in the 1930's agrees to represent a Negro accused of raping a white girl. The physical danger in which he placed himself and the emotional trauma to which his family was subjected may have risen to the level of a risk sufficient to warrant application of a multiplier.

Unfortunately for the quest for clarity in this area of the law, the U. S. Supreme Court in Blanchard v. Bergeron apparently resurrected the Johnson factors and the multiplier when it indicated that the "Johnson factors may be relevant in adjusting the lodestar amount ...." Justice Scalia, while concurring in the judgment, voiced dismay at the resurrection of Johnson and launched a stinging attack on the use of legislative history by the courts. Thus, because of Blanchard it is difficult to know the status of the multiplier, but important to remember that while the Court has refused to bury it, the Court has never upheld an award based on its use.

IX. AWARDS RELATIVE TO THE FEE ACTION

In Utah Int'l the U. S. District Court indicated that hours claimed for work on fee petitions should be reimbursable, but only for time spent in preparing the fee application related to compensable claims. In addition, the award should be reduced based on the percentage of success obtained on the fee petition.

However, the U.S. Supreme Court decision in North Carolina Dept. of Transportation v. Crest St. Council, Inc. involving a Title VI challenge to the routing of an expressway through a predomi-

150. Id. at 558.
152. Id. at 945.
153. Id. at 946-47 (Scalia, J., concurring in part and concurring in the judgment).
155. Id.
156. 479 U.S. 6 (1986).
nately black neighborhood in Durham, North Carolina, indicates that the action for attorney's fees must be brought as part of the statutory enforcement action. The action for attorney's fees in *Crest St.* was brought under the Civil Right Attorney's Fees Awards Act of 1976 in a separate proceeding commenced after the civil rights claims had been settled. The Court indicated that where the statutory provision for an award of attorney's fees provides that "in the action or proceeding to enforce . . . . (the statute) . . . . the court may award attorney's fees", the fee action must be a part of the action to enforce. The fee-shifting provisions of SMCRA do not track precisely the language of the fee-shifting provision in *Crest St.* However, the provision under consideration in *Crest St.* was also the provision under consideration in *Hensley* and *Blum*, cases widely used in interpreting myriad statutory fee-shifting provisions including the SMCRA provisions. In addition, *Crest St.* was the case chosen by the Court to resolve a Circuit conflict about the allowability of separate actions to recover statutorily-provided attorney's fees. Thus, *Crest St.* should be considered when recovery of fees is contemplated under the SMCRA, at least until the Court clearly defines the scope of *Crest St.*

In addition, the U. S. Supreme Court considered what proceedings are covered by the fee-shifting provision of a statute. In *Webb v. Dyer County Board of Education*, which involved a challenge to the job termination of a school teacher, the Court disallowed claims for work done on a state administrative hearing which preceded the judicial litigation. The Court reasoned that since a clear line could be drawn between the work on the two actions and since the federal statute under which the fees were claimed did not require the administrative hearing, reimbursement could not be obtained under *Hensley* as reasonable preparation.

157. *Id.* at 12.
159. *Crest St.*, 479 U.S. at 11.
160. *Id.* at 16.
161. *Id.* at 11.
163. *Id.* at 238.
Further, in *Crest St.*, the U.S. Supreme Court indicated that under statutory fee-shifting provisions whose language specifies an “action or proceeding to enforce,” a resolution through judicial litigation is required to be eligible for recovery of attorney’s fees. The history of the interpretation of statutory fee-shifting provisions detailed in this note indicates the broad applicability of court decisions to similar provisions. However, thus far *Crest St.* has not been applied in environmental litigation, and it is difficult to predict if its future application will remain narrow or be expanded by the Court.

X. CONCLUSION

While it has been argued that the requirement of “some success on the merits” and “substantial contribution” will have a chilling effect on environmental litigation, it is not clear that some evaluation of claims prior to the commencement of litigation is not desirable. It is important to remember that attorneys, not private citizens, evaluate claims prior to taking legal action, and this is no different than that which attorneys are asked to do everyday—assess for each client his likelihood of succeeding. An experienced environmental lawyer should be able to make this evaluation with some accuracy and should be prepared to accept responsibility for his assessment of a case. Neither the government, nor private defendants should be expected to pay for his mismevaluation.

The purpose of the fee-shifting statutes is to ensure that every person can obtain competent counsel, but that is not to say that every attorney taking a case under a fee-shifting statute should be reimbursed. The congressional intent does not seem to have been to provide fee insurance for the bar. In addition, it is becoming apparent that not every path to resolution will result in compensation.

However, as has been noted in the body of this note, judges have considerable discretion in determining which claims qualify for

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164. *Crest St.*, 479 U.S. at 12.
165. Id. at 14.
reimbursement to assure that justice is served. Therefore, it would seem, at least in theory, that all claims having merit would be reimbursable under the partially prevailing party standard.

As long as some success is required for reimbursement, it is not likely that the fee-shifting sections of the SMCRA will have widespread repercussions for the coal industry. Most litigation conducted under 520(d) and 525(e) has involved the government as the defendant with private parties as interveners. Therefore, the fees have been assessed against the government rather than private businesses.

Thus, it would seem that as long as individual coal companies maintain compliance with current statutes, any litigation is likely to involve suits by citizens’ groups against the government to compel enforcement of the statutory provisions and to bring about changes in the regulations governing administration of the statutes. Of course, coal companies who violate the provisions of the SMCRA risk prosecution and liability for the attorneys’ fees of opponents. Such coal companies also risk the assessment of their opponents’ attorney’s fees as damages under Section 520(f) of the SMCRA.

However, even in actions by private groups to change government regulations affecting the coal industry, it is to be expected that considerable expenditures will be necessary to legally influence the outcome of the action. In this situation, it can be argued that if the fee-shifting provisions of the SMCRA make it easier for private individuals to assert claims for regulatory changes, the coal industry faces the increased legal costs of insuring representation of its interests.

E. Ann Compton Keel