BILLS, BILLS, BILLS*: THE EFFECT OF A REJECTED SETTLEMENT ON ATTORNEY'S FEES UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT OF 1976

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* DESTINY'S CHILD, *Bills, Bills, Bills*, *on* THE WRITING'S ON THE WALL (Columbia Records 1999).

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INTRODUCTION

Under the "American Rule," every litigant normally "bears the burden of paying [her] own attorney's fees" when she decides to initiate litigation.[1] Shows such as *Suits*[2] and *Boston Legal*[3] depict the quintessential example of American litigation: private parties suing each other because they believe that the time and expense of the lawsuit will be worthwhile.[4] However, when it comes to public interest litigation, the economic incentive that *normally* drives private parties to bring suit is a less powerful motivation.[5] Given these financial obstacles, how do low-income individuals, who cannot promise their attorneys adequate compensation, vindicate civil wrongs?

Consider the case of Colin Gonzales,[6] which was decided after the Supreme Court affirmed the American Rule in *Alyeska Pipeline Services*

1 Matthew B. Tenney, *When Does a Party Prevail?: A Proposed "Third-Circuit-Plus" Test for Judicial Imprimatur*, 2005 BYU L. REV. 429, 432–33 (2005) (explaining that, under the American Rule, the prevailing party cannot collect from the loser unless there is a statutory exception). "Under the 'America Rule' . . . attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization." Alyeska Pipeline Servs. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

2 *Suits* (USA Television Network).

3 *Boston Legal* (ABC Network).

4 Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1272 (2006) (discussing the economic model that is most frequently applied when deciding to initiate litigation). "The most common economic model applied to . . . litigation decisions involves expected value analysis based upon a discount factor that reflects the risk inherent in the project or lawsuit." *Id.*

5 In the typical situation, an attorney and her client enter into private contracts in which the attorney agrees to be paid either a fixed fee, an hourly rate, or a contingent fee based on the outcome of the case. In most civil rights cases the plaintiffs are poor and cannot absorb the extraordinarily high fees of litigation. Further, civil rights recovery is often non-monetary and thus a civil rights plaintiff may not be able to attract competent counsel. *See* Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorney's Fees in Federal Civil Rights Litigation*, 73 N.Y.U. L. REV. 1943, 1945 (1998).

6 Gonzales v. Fairfax-Brewster Sch., Inc., 363 F. Supp. 1200 (E.D. Va. 1973) *aff'd in part, rev'd in part sub nom.* McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975). On appeal to the Fourth Circuit, the court cited *Alyeska* and upheld the district court's decision not to award attorney's fees. *McCrary*, 515 F.2d at 1097.

Company v. Wilderness Society.[7] In 1969, Colin's parents contacted the Fairfax-Brewster School—a private school located in Fairfax County, Virginia—about enrolling their five-year-old son.[8] Colin visited the school with his parents and subsequently submitted an application for attendance.[9] Colin, however, was not admitted; his application was returned with a form letter stating that the school was "unable to accommodate his application."[10] No further explanation for Colin's rejection was given.[11] When Colin's father inquired as to why his son was rejected, Mr. Gonzales said he was told "that the school was not integrated."[12]

The relief in this case included an adjudication of the school's policies with respect to the admission of students based on race, a permanent injunction against the school, and a small award of compensatory damages for embarrassment.[13] Because of the *Alyeska* decision and the absence of statutory authority, Colin was denied an attorney's fee award.[14] Thus, after the *Alyeska* decision, regardless of the benefit to society at large, courts had no basis under which they could award attorney's fees.[15]

Congress identified the problems that individuals, such as Colin, face in civil rights litigation—especially low-income individuals—and responded by enacting various statutes.[16] These statutes give courts the

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7 421 U.S. 240, 265–71 (1975) (holding that in the absence of statutory authorization, courts could not award attorney fees to prevailing parties on public policy grounds). Testimony at hearings on the proposed legislation disclosed that the *Alyeska* decision caused many civil rights plaintiffs—especially those who could not afford legal counsel—to suffer "very severe hardships." Evans v. Jeff D., 475 U.S. 717, 748 (1986) (referencing H.R. REP. NO. 94–1558, at 1 (1976)).

8 *Gonzales*, 363 F. Supp. at 1202.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* (Subsequent to their son's rejection from Fairfax-Brewster, Mr. Gonzales telephoned Bobbe's School—another private school in the area—and was told, "only members of the Caucasian race were accepted."). Both Fairfax-Brewster and Bobbe's were defendants in this proceeding. *Id.* at 1203.

13 *Id.* at 1205. This case was a consolidated action by parents of black children denied admission to privately supported schools. In 1972, Mrs. Sandra McCrary, who is black, called Bobbe's Private School to enroll her two-year-old son, Michael. Mrs. McCrary asked if the school was integrated. "Upon receiving a negative reply, she asked if the school accepted black children. The answer to this question was also 'no.'" *Id.* at 1202.

14 *Id.*

15 McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975) *aff'd*, 427 U.S. 160 (1976). Further, the plaintiffs could not retroactively seek attorney's fees because, "[t]he Civil Rights Attorney's Fees Awards Act of 1976 was signed into law on October 19, 1976, and . . . the plaintiffs filed their motion in the district court for an award of costs and attorneys' fees [on November 1, 1976].". Gonzales v. Fairfax-Brewster Sch., Inc., 569 F.2d 1294, 1296 (4th Cir. 1978).

16 Marjorie A. Silver, *Evening the Odds: The Case for Attorneys' Fee Awards for Administrative Resolution of Title VI and Title VII Disputes*, 67 N.C.L. REV. 379, 380 (1989) ("Prominent among such statutes are section 706(k) of the Civil Rights Act of 1964, providing for fees to parties who prevail in employment discrimination actions . . . and the 1976 amendments to section 1988,

power to award attorney's fees to parties who prevail in civil rights litigation—a power that is known as fee-shifting.[17] Congress created fee-shifting statues for the purpose of helping public interest litigants overcome some of the hurdles that they may face in obtaining adequate representation.[18] Congress' goal was to increase access to the courts for those litigants who otherwise might be unrepresented in civil rights litigation.[19]

While these fee-shifting statutes attempt to solve one problem, they have unintentionally led to another issue—increased litigation.[20] This is because, while much of civil rights litigation was once handled on a *pro bono* basis or by private agreements between client and counsel, the attorneys of a prevailing party now have the right to be adequately compensated for their services with an attorney's fee award.[21] Since the amount of the award under the Civil Rights Attorney's Fees Awards Act must be determined on the facts of each case, these attorney compensation determinations often lead to satellite litigation in which a party to the litigation believes that the fees are either excessive or inadequate.[22]

While the district courts are given considerable discretion to calculate attorney's fee awards, the most useful starting point for this determination is the lodestar calculation[23]—the number of hours

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providing for fees to parties who prevail in actions . . . to enforce statutes enumerated in section 1988.").

17 *Id*.

18 Many civil rights plaintiffs are unable to afford a competent attorney without fee-shifting statutes—thus in the absence of fee-shifting, civil rights plaintiffs will be limited to attorneys that agree to take on their cases pro bono. Additionally, in the absence of fee-shifting statutes, attorneys might only concentrate on civil rights cases involving the possibility of large monetary damages awards. This would result in the neglect of important civil rights cases that involve only equitable relief. *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205–06 (2003).

19 *See* S. REP. NO. 94–1011, at 1–3 (1976); H.R. REP. NO. 94–1558, at 1 (1976); Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 241 (1984).

20 *See* Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 436 (1986) (explaining that the growth of civil rights litigation and the authorization of fee awards by Congress has led to considerable secondary litigation over fees).

21 *See* Emily M. Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988*, 55 U. COLO. L. REV. 341, 344–45 (1984) (explaining that prior to the enactment of section 1988, civil rights litigation was handled largely on a pro bono basis). "Although courts were frequently requested to make equitable fee awards, especially in the late sixties and early seventies no one assumed that recovery was guaranteed or even routinely to be expected in civil rights cases." *Id*. at 344.

22 Dobbs, *supra* note 20. The Supreme Court has twice cautioned against these satellite litigations and stated that "a request for attorney's fees should not result in a second major litigation." Blum v. Stenson, 465 U.S. 886, 902 n.19 (1984) (quoting Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)).

23 *Hensley*, 461 U.S. at 433 ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial

reasonably expended on the litigation multiplied by a reasonable hourly rate.[24] However, once the lodestar is calculated there is no precise formula for adjusting this aggregate.[25] Since these award determinations are made on a case-by-case basis, the Supreme Court has approved twelve factors[26] for district courts to consider when calculating fee awards. This test was provided for the district courts in order to ensure that the fee award adequately compensates the attorney for the services provided—a goal that Congress sought to achieve.[27]

However, what happens when a plaintiff is successful—meaning that she has prevailed on one or more claims during trial—but in the process rejected a settlement offer that was more than the ultimate award? Should this informal settlement offer be taken into consideration when the district court is calculating the attorney's fee award? The circuits have split on this issue. The First Circuit has answered this question in the negative, and held that settlement offers should not be used to adjust fee awards. The Third, Seventh, and Ninth circuits have taken the opposite approach and advocate for informal settlement negotiations to be evaluated when assessing fee awards.[28] This Note argues that considering informal settlement negotiations when calculating attorney's fee awards goes against the purpose and spirit of § 1988 and, thus, should be disregarded when adjusting the lodestar.

Part I of this Note considers the history of the "American Rule" and explores the statutory exceptions enacted by Congress in response to *Alyeska*.[29] It then examines how the district courts calculate the lodestar and how the *Johnson* "list of twelve" has impacted fee adjustment. Part II explores how the circuit courts have divided when rejected settlements are added into the fee adjustment calculation. It

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estimate of the value of a lawyer's services.").

24 For a detailed discussion of the Lodestar, see *infra* Part I.C.

25 *Hensley*, 461 U.S. at 434 n.9 (explaining that there is no precise rule or formula for adjusting the lodestar, but that the court's discretion must be exercised in light of the *Johnson* factors).

26 The twelve *Johnson* factors include: "[T]ime and labor required"; "novelty and difficulty of the questions"; "skill requisite to perform the legal service properly"; "preclusion of other employment by the attorney due to acceptance of the case"; "customary fee"; "whether the fee is fixed or contingent"; "[t]ime limitations imposed by the client or the circumstances"; "amount involved and the results obtained"; "experience, reputation, and ability of the attorneys"; "undesirability of the case"; "nature and length of the professional relationship with the client"; and "[a]wards in similar cases." Johnson v. Georgia Highway Exp., Inc., 488 F.2d 714, 717–19 (5th Cir. 1974). While *Johnson* was decided before § 1988 was enacted in 1976, the Supreme Court approved these factors in *Hensley* because the House and Senate Reports cited to *Johnson*. *Hensley*, 461 U.S. at 430.

27 *See* S. REP. NO. 94–1011, at 1–3 (1976); H.R. REP. NO. 94–1558, at 1 (1976); *see generally* Washington v. Phila. Cnty. Ct. of Common Pleas, 89 F.3d 1031, 1036 (3d Cir. 1996).

28 For a detailed discussion of the split in the circuits with respect to using informal settlement negotiations to determine attorney's fees, see *infra* Part II.

29 *See supra* note 7.

discusses sources of inconsistency in post-*Hensley v. Eckerhart*[30] case law and sets forth numerous legal arguments for why settlement negotiations should not be taken into consideration. Part III proffers various policy-based arguments supporting the assertion that settlement negotiations should not be considered when calculating an attorney's fee award. This section examines the counter-arguments raised by the opposing circuits and posits that they are unsubstantiated. Part IV advocates for a rule that focuses on whether the relief obtained by the prevailing party justifies the expenditure of the attorney's time. This standard will allow the district courts to identify specific hours that should be eliminated *before* calculating the lodestar but will not allow a reduced award because of rejected settlements. This test will balance Congress' twin goals of inducing attorneys to take on civil rights cases while preventing windfalls to attorneys.[31]

I. BACKGROUND

A. The "American Rule"

The "English Rule," which is applicable in the majority of the world's legal systems, requires that the losing party in a lawsuit pay the fees of the prevailing party, if those fees are deemed reasonable.[32] However, under the "American Rule," each party assumes responsibility for paying its own attorney's fees.[33] The American legal system has chosen to depart from the dominant method of calculating attorney's fees for several reasons.[34] First, there is concern that the poor would be discouraged from bringing lawsuits because, if unsuccessful, their loss would come with a heavy financial burden.[35] Additionally, there is the concern that having courts decide *reasonable* fees in every lawsuit would expose the courts to an exorbitant amount of litigation and that scarce judicial resources would be best spent elsewhere.[36]

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30 461 U.S. 424 (1983).

31 *See* S. REP. NO. 94–1011, at 1–3 (1976); H.R. REP. NO. 94–1558, at 1 (1976).

32 Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 328 (2013) ("[I]n most Western legal systems other than the United States, the prevailing norm is the English rule, which provides that the losing party must pay the winner's reasonable fees.").

33 Alyeska Pipeline Servs. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (reaffirming the American Rule); Tenney, *supra* note 1, at 432 (explaining the American Rule).

34 Eisenberg & Miller, *supra* note 32.

35 Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) ("[I]t has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.").

36 *Id.* ("[T]he time, expense, and difficulties of proof inherent in litigating the question of

Opponents of the American Rule argue that the English Rule is superior, claiming that plaintiffs are less likely to file frivolous lawsuits and suits that do not have a high probability of success.[37] Further, some commentators feel that the American Rule prevents the poor from gaining access to courts because, unlike the English Rule, they do not have a way to pay for their counsel.[38] Those commentators go on to argue that the American Rule neglects to fully compensate the prevailing party, because the full cost of litigation is not refunded.[39]

Despite those who oppose the American Rule, the Supreme Court in *Alyeska*[40] reaffirmed the American Rule and held that each party in a lawsuit shall be responsible for its own attorney's fees *unless* there is express statutory authorization to the contrary.[41] Thus, there is a way for a prevailing party to obtain fee awards in American courts despite the existence of the American Rule—legislation in the form of a statutory exception.[42]

B. Fee-Shifting Statutes: The Civil Rights Attorney's Fees Awards Act of 1976 and Its Purpose

In the wake of the *Alyeska*[43] decision, Congress recognized the devastating effects that the Supreme Court's decision was having on civil rights litigation.[44] Many plaintiffs who could not afford legal counsel

what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration.").

37 Brandon Chad Bungard, *Fee! Fie! Foe! Fum!: I Smell the Efficiency of the English Rule Finding the Right Approach to Tort Reform*, 31 SETON HALL LEGIS. J. 1, 44 (2006) (providing an economic analysis of the two general approaches to fee-shifting). "[A]ssuming all parties act rationally, American Rule plaintiffs are more likely to file suits that are frivolous or have a low probability of victory than English Rule plaintiffs." *Id*. at 37.

38 Rochelle Cooper Dreyfuss, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 348 (1980) (providing information about the American Rule and its criticisms).

39 *Id*.

40 421 U.S. 240 (1975).

41 *Id*. at 263.

42 Allison Crist, *Civil Rights-No Private Attorney General Exception to the American Rule in New Mexico:* New Mexico Right to Choose/National Abortion Rights Action League v. Johnson, 31 N.M. L. REV. 585, 587 (2001) (explaining the statutory exceptions to the American Rule that have been enacted). "At the federal level, fee-shifting provisions have been included in many diverse statutes such as the Freedom of Information Act and the Fair Labor Standards Act. The primary federal fee shifting statute is the Civil Rights Attorney's Fees Awards Act. Passed in 1976, section 1988 awards fees for successful suits under the civil rights statutes, primarily under section 1983, against the state or a person acting under the authority of state law." *Id*.

43 *Alyeska*, 421 U.S. at 240 (federal courts could not use their equitable powers to authorize fee awards on the ground that a case served the public interest; only Congress, not the courts, could decide which laws merited fee-shifting). Evans v. Jeff D., 475 U.S. 717, 748 (1986).

44 *See* H.R. REP. NO. 94–1558, at 2 (1976). Hearings on the proposed legislation revealed that civil rights plaintiffs were going through "very severe hardships" because of the *Alyeska* decision. *Id*.

were left without meaningful access to the courts.[45] Legal Aid services, which were already "short of resources,"[46] were unable to bring many of these claims, and private attorneys were refusing to take on civil rights cases because of the low probability of receiving compensation.[47] Understanding the compelling need to respond to *Alyeska*, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976 (§ 1988 or Fees Awards Act).[48]

By enacting the Fees Awards Act,[49] Congress gave courts the requisite authority to award attorney's fees in certain instances. Post-enactment, a prevailing plaintiff can obtain an attorney's fee award from an American court through the statutory exception provided in § 1988. Thus, this statute authorizes the district courts to award *reasonable* attorney fees to *prevailing parties* in civil rights litigation as part of the costs.[50]

In enacting the fee-shifting provision of the Fees Awards Act, Congress' goal was to attract competent counsel to civil rights litigation, while avoiding a "windfall" to attorneys.[51] Congress sought to remove some of the economic barriers that low-income plaintiffs faced, such as unequal access to the courts.[52] Congress recognized that the Justice Department, with their limited personnel and resources, could not effectively enforce these rights alone.[53] Congress also believed that a fee-shifting statute might induce voluntarily compliance with federal law and that these fee-shifting statutes would "serve as a deterrent" to illegal and discriminatory conduct.[54]

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45 *Id.* Pre-*Alyeska*, the district courts often used their equitable powers to authorize fee awards on the ground that a case served the public interest. However, without fee-shifting statutes, many civil rights litigants were unable to attract attorneys. *See Evans*, 475 U.S. at 747.

46 *Id.* at 749 (citing *Hearings on the Effect of Legal Fees on the Adequacy of Representation before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary*, 93d Cong., 1st Sess., pts. 1–4 (1973)).

47 *Id.*

48 42 U.S.C. § 1988 (2013).

49 The Fees Awards Act provides in pertinent part that:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id.

50 *Id.* For a discussion of the interpretation of "prevailing party" see *infra* Part I.B.1.

51 Hensley v. Eckerhart, 461 U.S. 424, 444 (1983) (citing S. REP. NO. 94–1011 (1976); H.R. REP. NO. 94–1558 (1976)).

52 *Id.* at 429 ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances.") (citing H.R. REP. NO. 94–1558, at 1 (1976)).

53 Evans v. Jeff D., 475 U.S. 717, 749 (1986).

54 Calhoun, *supra* note 21, at 343 (discussing the objectives and impacts of § 1988).

1. Prevailing Party Status

In order to be eligible for fee-shifting under § 1988, the first prerequisite is that the litigant be deemed the *prevailing party*.[55] While it is sometimes clear that a party has prevailed,[56] in other instances it is more difficult to make this determination—such as when a plaintiff is successful on some, but not all, of the issues in a given case.[57] The Supreme Court has stated that the conventional formulation for interpreting § 1988's prevailing party requirement is that if a party "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit[,]" then the requirement has been met.[58]

While § 1988 makes no distinction between prevailing plaintiffs and prevailing defendants on its face, the Supreme Court has interpreted § 1988 as only allowing a prevailing defendant to recover attorney's fees if "the suit [is] vexatious, frivolous, or brought to harass or embarrass the defendant."[59] Further, a prevailing defendant may only recover costs that the defendant would not have incurred but for the frivolous claims.[60] While there is a sharp distinction as to how the parties may recover attorney's fees under § 1988, there are sound policy reasons for this double standard. First, the plaintiff is Congress' chosen instrument to vindicate a policy that Congress considered of the highest priority.[61] Second, when a district court awards attorney's fees to a prevailing plaintiff, it is awarding them against a person who has violated the federal law.[62] Thus, while a court *may* award attorney's fees

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55 42 U.S.C. § 1988 (2013).

56 For example, a party has prevailed when she has been granted all relief sought or has been victorious on every claim.

57 The Supreme Court gave the following hypothetical explaining the difficulty in determining prevailing party status.

> These standards would be easy to apply if life were like the movies, but that is usually not the case. In Hollywood, litigation most often concludes with a dramatic verdict that leaves one party fully triumphant and the other utterly prostrate. The court in such a case would know exactly how to award fees (even if that anti-climactic scene is generally left on the cutting-room floor). But in the real world, litigation is more complex, involving multiple claims for relief that implicate a mix of legal theories and have different merits. Some claims succeed; others fail. Some charges are frivolous; others (even if not ultimately successful) have a reasonable basis. In short, litigation is messy, and courts must deal with this untidiness in awarding fees.

Fox v. Vice, 131 S. Ct. 2205, 2213–14 (2011). *See* Dreyfuss, *supra* note 38, at 354 (discussing the prevailing party requirement).

58 Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (citing Nadeau v. Helgemoe, 581 F.2d 275, 278–79 (1st Cir. 1978)).

59 *Hensley*, 461 U.S. at 429 n.2.

60 *Fox*, 131 S. Ct. at 2211.

61 Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978) (citing Newman v. Piggie Park Enters. Inc., 390 U.S. 400, 402 (1968)).

62 *Christiansburg Garment Co.*, 434 U.S. at 418.

to a prevailing defendant, the basis for doing so is stronger and more prevalent for a prevailing plaintiff.[63]

The Supreme Court has explained that one who succeeds in correcting a violation of civil rights law—whether it be through monetary relief, an injunction, or settlement—"should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[64] The Court has stated that this "generous formulation," only brings that party across the "statutory threshold," and does not end the fee inquiry.[65] The district court still needs to determine what amount of attorney's fees will *reasonably* compensate the prevailing party for the work preformed by their counsel.[66] Thus, being deemed a prevailing party ensures a fee award, but does not guarantee what amount the fee award will include.

C. Calculating a Reasonable Fee: The Lodestar Method

After a prevailing plaintiff requests a fee award under § 1988, the district court must determine what amount of costs and fees will adequately compensate the plaintiff.[67] This *reasonable* amount must be set by the district court on a case-by-case basis and thus will differ depending on the facts of each case.[68] The lodestar method of calculating this reasonable amount is a product of the Third Circuit, and calculates attorney fees by multiplying the reasonable hours of time expended by a reasonable rate.[69] That amount is then adjusted upwards or downwards based on the twelve factors[70] laid out in *Johnson v. Georgia Highway Express, Inc.*,[71] and affirmed in *Hensley v. Eckerhart*.[72]

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63 *Fox*, 131 S. Ct. at 2213 ("Most of our decisions addressing this provision have concerned the grant of fees to prevailing plaintiffs.").

64 *Hensley*, 461 U.S. at 429 (quoting *Newman*, 390 U.S. at 402 (internal quotation marks omitted). "The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." Evans v. Jeff D., 475 U.S. 717, 725 n.9 (1986) (quoting Maher v. Gagne, 448 U.S. 122, 129 (1980)).

65 *Hensley*, 461 U.S. at 433.

66 *Id.*

67 *Id.* at 429. While a prevailing defendant can also obtain an attorney's fee award under § 1988, that scenario is less common and thus this discussion will focus on the fees of a prevailing plaintiff. *See supra* Part I.B.1.

68 *Id.*

69 *Id. See also* George B. Murr, *Analysis of the Valuation of Attorney Work Product According to the Market for Claims: Reformulating the Lodestar Method*, 31 LOY. U. CHI. L.J. 599, 602 (2000) (evaluating how the lodestar method is computed).

70 See *infra* Part I.D. for a discussion of the *Johnson* factors.

71 488 F.2d 714 (5th Cir. 1974).

72 461 U.S. 424 (1983).

The lodestar method has since become the dominant basis for determining attorney's fee awards in the United States.[73]

The first task to calculate the lodestar is to determine the number of hours reasonably expended by the plaintiff's counsel.[74] The general rule is that the number of hours should be as though the lawyer was sending a bill directly to her client.[75] This means that lawyers are required to "produce contemporaneous billing records or other sufficient documentation so that the district court can fulfill its duty to examine the application for noncompensable hours."[76] Thus, if the documentation provided is "vague *or* incomplete," a district court may reduce the number of hours expended.[77] While vague statements may reduce the numbers of hours expended, failing to provide billing statements does not automatically preclude an award of fees as long as reasonable hours can be determined from the billing evidence produced.[78]

The second task required in order to compute the lodestar is to determine the hourly rate.[79] This rate is not necessarily the attorney's billing rate but instead may reflect what similarly situated attorneys would be paid.[80] While one could logically assume that this rate would be uniform throughout the districts, courts determine the reasonable rate of the attorney's services using different metrics.[81] The majority of courts use rates that are comparable to those of other attorneys in which

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73 *See* Gisbrecht v. Barnhart, 535 U.S. 789, 801 (2002); Brooks Magratten et al., *How Do Courts Calculate Attorney Fee Awards?*, 39 BRIEF 52, 53 (Fall 2009) (discussing the lodestar method and the reasons for its dominance). Other methods have been proposed in lieu of the lodestar method. For example:

Justice O'Connor, in a concurring opinion, suggested an alternate two-part test for evaluating contingency enhancements. Under Justice O'Connor's test, a fee petitioner must first establish that without an adjustment for risk the prevailing party would have faced substantial difficulties in finding competent counsel in the local or other relevant market. Next, the fee petitioner must demonstrate that the market rate of compensation . . . for contingency fee cases as a class was different from cases in which payment was certain, win or lose.

Murr, *supra* note 69, at 610 (internal quotation marks omitted) (citing Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 483 U.S. 711, 733 (1987)).

74 *Hensley*, 461 at 429.

75 *Id.*

76 Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 324 (5th Cir. 1995) (citation omitted); *see also Hensley*, 461 U.S. at 433.

77 *Louisiana Power*, 50 F.3d at 324.

78 Heasley v. C.I.R., 967 F.2d 116, 123 (5th Cir. 1992).

79 *Hensley*, 461 U.S. at 429 (providing a general explanation of how the district courts calculate the lodestar).

80 *Louisiana Power*, 50 F.3d at 328 ("When an attorney's customary billing rate is the rate at which the attorney requests the lodestar be computed and that rate is within the range of prevailing market rates, the court should consider this rate when fixing the hourly rate to be allowed); Murr, *supra* note 69, at 605 (providing information about lodestar calculation).

81 *See* Murr, *supra* note 69, at 605–07.

the court sits.[82] However, some courts have adopted the minority approach and use the rates of the community from which the lawyer originates.[83] Regardless of which metric is used, once the lodestar is calculated—by multiplying the hourly rate by the hours expended—there is a strong presumption that the lodestar represents a *reasonable* fee.[84] Courts, however, may adjust the lodestar amount upward or downward to reflect partial or exceptional success.[85]

D. Adjusting the Lodestar: The Johnson *Factors*

While § 1988 removes some of the economic barriers that civil rights litigants face on their path to vindication,[86] it has led to confusion within the district courts and to increased litigation.[87] The source of these problems is § 1988's vagueness. Section 1988 provides that a district court may award a *reasonable* fee to a prevailing civil rights litigant; however, the statute does not define the word "reasonable."[88] The Supreme Court has held that the lodestar method is a good indicator of reasonableness, and that once it is calculated, there is a strong presumption the lodestar amount represents a reasonable award. The Court has further stated that the lodestar can be adjusted to reflect the prevailing litigant's degree of success.[89]

While the Supreme Court adopted this hybrid lodestar-*Johnson* test in order to preclude disparate results in the district courts,[90] the Court

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82 Magratten et al., *supra* note 73, at 53 (discussing the lodestar method and the reasons for its dominance).

83 *Id.* "[T]he rates for a client's attorney requires an assessment of the experience and skill of the applicant's attorneys and a comparison of their rates to the rates prevailing in the community *in which the attorneys practice* for similar services provided by attorneys of similar skill, experience, and reputation[.]" *Id.* at 58 n.13 (internal quotation marks omitted) (citing United States *ex rel.* John Doe I v. Pa. Blue Shield, 54 F. Supp. 2d 410, 414 (M.D. Pa. 1999)).

84 *Id.* at 54–55; *see also* City of Riverside v. Rivera, 477 U.S. 561, 561–62 (1986).

85 Hensley v. Eckerhart, 461 U.S. 424, 434–37 (1983). *See In re* Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640, 655–56 (E.D. La. 2010) (*Johnson* "time and labor" factor warranted a moderate upward adjustment); Brother v. Miami Hotel Invs., Ltd., 341 F. Supp. 2d 1230 (S.D. Fla. 2004) (a downward lodestar was warranted).

86 For a discussion about how § 1988 removes some of the barriers that civil rights litigants face, see *supra* Part I.B.

87 Calhoun, *supra* note 21, at 344 ("Since the enactment of section 1988 in 1976, approximately 1730 federal court decisions have interpreted the statute."). Given that the aforementioned Law Review Article was written in 1984, the number of federal court decisions interpreting § 1988 is likely considerably higher. *See id.*

88 42 U.S.C. § 1988 (2013).

89 Blanchard v. Bergeron, 489 U.S. 87, 87 (1989) (explaining that the lodestar figure is entitled to a strong presumption of reasonableness and that it prevents windfalls to attorneys by ensuring that they are only compensated a reasonable fee for their services).

90 Perdue v. Kenny A., 559 U.S. 542, 550–51 (2010) ("One possible method was set out in *Johnson v. Georgia Highway Express, Inc.* . . . . This method, however, gave very little actual guidance to district courts . . . and produced disparate results.") (internal quotation marks

has not been completely successful in its goal. The adoption of the lodestar method has not eradicated interpretation issues[91] because the power to adjust the lodestar is highly discretionary.[92] The test used to make these adjustments comes from *Johnson v. Georgia Highway Express, Inc*.[93] This case, while decided before § 1988 was enacted, provides insight into Congress' intentions because both the House and Senate Reports refer to the twelve factors listed in *Johnson*.[94] Thus, the *Johnson* "list of twelve" provides a useful catalog of factors that comport with Congress' goals and, as such, the Supreme Court has repeatedly held that those factors can be used to *reasonably* adjust the lodestar.[95]

While the *Johnson* factors are useful to the district courts, how the courts should apply them is somewhat vague. First, the Supreme Court has held that "enhancements may be awarded in 'rare' and 'exceptional' circumstances," yet the court has never enhanced a fee award above the lodestar; thus, these hollow phrases are vehicles for the district courts to use their discretion.[96] Second, the Court has held that "enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation," but has not provided a comprehensive list of which factors overlap.[97] Finally, the Court has held that one of the most critical factors that the district courts should look to when making this adjustment is the "results obtained," but does not provide guidelines that account for varying degrees of success.[98] Despite the problems with this approach, the district courts are still guided by the twelve factors in *Johnson* and it

omitted); "[I]n *Hensley* . . . [the court] adopted a hybrid approach that shared elements of both *Johnson* and the lodestar method of calculation." Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 563–64 (1986).

91 For examples of how the district courts struggle to interpret § 1988's reasonableness component, see *infra* Part II.A.

92 Dreyfuss, *supra* note 38, at 351–52.

93 488 F.2d 714, 717–20 (5th Cir. 1974). For a list of the twelve *Johnson* factors, see *supra* note 26.

94 Hensley v. Eckerhart, 461 U.S. 424, 429–30 (1983) ("The amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to twelve factors set forth in *Johnson*[.] The Senate Report cites to *Johnson* as well and also refers to three district court decisions that 'correctly applied' the twelve factors."); *see* S. REP. NO. 94–1011, at 6 (1976).

95 Gisbrecht v. Barnhart, 535 U.S. 789, 801 (2002); Blanchard v. Bergeron, 489 U.S. 87, 91–92 (1989); City of Riverside v. Rivera, 477 U.S. 561, 567–69 (1986); *Hensley*, 461 U.S. at 429–30.

96 Perdue v. Kenny A., 559 U.S. 542, 552 (2010) (stating that the Court has never sustained an enhancement of a lodestar based upon performance).

97 *Id.* at 553 (Enhancements should not be based on factors typically subsumed in the lodestar calculation, such as the novelty and complexity of a case or the quality of an attorney's performance.).

98 *City of Riverside*, 477 U.S. at 562; *see Hensley*, 461 U.S. at 436. This factor is important because § 1988 contemplates reasonable compensation in light of the facts of each case, and thus an attorney who receives excellent results for his client should receive either a full or enhanced fee award. However, if a plaintiff has achieved only partial or limited success, the lodestar number may overcompensate the attorney and provide him with a windfall; an outcome Congress sought to avoid. *Hensley*, 461 U.S. at 436.

remains essential that the district courts clearly explain their reasoning for fee award determinations.[99]

II. A SPLIT IN THE CIRCUITS: ADDING INFORMAL SETTLEMENT NEGOTIATIONS TO THE CALCULATION

While in theory the *Johnson* factors should apply uniformly throughout the district courts, the *Johnson* list has fell somewhat short of this ideal. The crux of the problem is that courts sometimes put too much emphasis on inappropriate factors—factors that are outside the *Johnson* list—or do not fully explain their decisional calculus.[100] One such *outside* factor that has caused controversy within the Circuits is the question of whether to consider rejection of settlements. The First Circuit has held that informal settlement negotiations should not be taken into consideration when determining fees, as they are not one of the twelve *Johnson* factors.[101] Conversely, the Third,[102] Ninth,[103] and Seventh Circuits[104] have held that informal settlement negotiations should be taken into consideration when deciding fees.

A. The Misapplication of Johnson *in Post-*Hensley *Case Law*

Focusing on rejected settlement offers when calculating attorney's fees is not a rare concept; many of the district courts have applied this *outside* factor when adjusting attorney's fee awards.[105] This error seems to be fueled by district courts' discomfort with awarding large attorney's fees in cases where the monetary sums granted to the plaintiff were small by comparison.[106] However, reducing attorney's fee awards because of the monetary disparity between judgments and costs is inappropriate; it goes against the purpose of § 1988 and the intentions of Congress.[107] Further, Congress and the Supreme Court *specifically* identified twelve factors the district courts can use to comply with

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99 *See Perdue*, 559 U.S. at 558; *Hensley*, 461 U.S. at 437.

100 *See infra* Part II.A.

101 *See* Joyce v. Town of Dennis, 720 F.3d 12 (1st Cir. 2013); Diaz v. Jiten Hotel Mgmt., Inc., 704 F.3d 150 (1st Cir. 2012).

102 *See* Smith v. Borough of Dunmore, 633 F.3d 176 (3d Cir. 2011); Lohman v. Duryea Borough, 574 F.3d 163 (3d Cir. 2009).

103 *See* A.D. v. Cal. Highway Patrol, 712 F.3d 446 (9th Cir. 2013); Ingram v. Oroudjian, 647 F.3d 925 (9th Cir. 2011).

104 Moriarty v. Svec, 233 F. 3d 955 (7th Cir. 2000).

105 *See Cal. Highway Patrol*, 712 F.3d 446; *Smith*, 633 F.3d at 184; *Ingram*, 647 F.3d at 927; *Lohman*, 574 F.3d 163; *Moriarty*, 233 F. 3d at 967.

106 Discussed *infra*.

107 See *supra* Part I.B. for a discussion of Congress' intent when it enacted § 1988.

§ 1988's reasonableness component.[108] Thus, twisting, disregarding, or adding factors to the *Johnson* twelve is outside of the district court's discretion and intrudes upon Congress' dominion of authority.[109]

The Third Circuit has inappropriately held that settlement negotiations are a permissible factor for consideration when awarding attorney's fees.[110] In *Lohman v. Duryea Borough*,[111] Lohman, the plaintiff, brought an unlawful discharge action against Duryea Borough, his employer.[112] Lohman was successful on one of the three claims that he brought to trial and was awarded $12,205 in lost wages and nominal damages by a jury.[113] After the trial commenced, the defendant made three offers for settlement—the largest being for $75,000—however, Lohman chose to reject each of these offers.[114] Following the jury verdict in his favor, Lohman moved for attorney's fees and costs in the amount of $112,883.73.[115]

The district court calculated a lodestar of $62,986.75,[116] but then determined that the award should be lessened for the plaintiff's "limited success."[117] In reasoning through this diminution, the court looked at the evidence of settlement negotiations between the parties and at the rejected $75,000 settlement offer.[118]

The first error that the district court made in *Lohman* was its application of the "results obtained" *Johnson* factor.[119] The district court stated that evidence of settlement negotiations could be used as an indicator of the degree of success obtained by Lohman's counsel—i.e. an indicator of the "results obtained."[120] However, this application is

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108 Johnson v. Georgia Highway Exp., Inc., 488 F.2d 714, 717–19 (5th Cir. 1974); *See* Hensley v. Eckerhart, 461 U.S. 424, 443–44 (1983) (Brennan, J., dissenting) (citing S. REP. NO. 94–1011, at 6 (1976); H.R. REP. NO. 94–1558, at 8–9 (1976)).

109 *See generally* Tenney, *supra* note 1, at 434 (discussing Congress' role with respect to § 1988).

110 *See Smith*, 633 F.3d at 184 (settlement negotiations can be used to adjust the lodestar, affirming *Lohman*); *Lohman*, 574 F.3d 167–68 (settlement negotiations could be considered when awarding attorney's fees).

111 *Lohman*, 574 F.3d at 163.

112 *Id.* at 164–65.

113 *Id.* at 164 (Damages were awarded for one of three First Amendment retaliation claims brought by Lohman and thus § 1988 applied.).

114 *Id.*

115 *Id.* at 165.

116 To calculate the lodestar, the district court found a reasonable number of hours to be "two-hundred and sixty-eight and seven-tenths (268.70) hours. The reasonable fee was found to be two-hundred and fifteen dollars ($215.00). Therefore, the lodestar is calculated to be fifty-seven thousand, seven-hundred and seventy dollars and fifty cents ($57,770.50)." Lohman v. Borough, No. 3:05 Civ. 1423, 2008 WL 2951070, at *8 (M.D. Pa. 2008). The lodestar for the lawyer's legal assistants was "three-thousand, nine-hundred and twenty-six dollars and twenty-five cents ($3,926.25)." *Id.* at *9.

117 *Lohman*, 574 F.3d at 166.

118 *Id.* at 165.

119 *See id.* at 166 (applying the "results obtained" factor).

120 *Id.* at 168.

misguided. Here, the district court is distorting a valid *Johnson* factor so that it can evaluate the failed settlement negotiations.[121] The district court could have identified specific hours to eliminate from the initial lodestar calculation—i.e. hours spent on unsuccessful claims—but should not have focused on the rejected settlement offers because they had little bearing on the result obtained.[122] Settlement negotiations are a means to save time and judicial resources; they are not a jury verdict.[123] Thus, while the Third Circuit correctly calculated the lodestar, it incorrectly adjusted the number.

Further, considering settlement negotiations when adjusting fee awards could lead to confusion and disparity in the district courts. This consequence could transpire because § 1988 makes no distinction between actions for damages and actions for equitable relief.[124] Thus, looking to informal settlement negotiations may create confusion when evaluating fee awards in the future—i.e. the district courts will not have adequate guidance when adjusting awards for a prevailing party who rejected an offer for non-monetary relief.

While other jurisdictions have embraced the flawed position of *Lohman*, they have not offered reasons for their departure from *Johnson*.[125] Rather, these courts adopt *Lohman*—or its position on the matter—and then provide a statement of their discomfort with awarding large sums of money where a rejected settlement would have yielded a greater result.[126] In *A.D. v. California Highway Patrol*,[127] the Ninth Circuit adopted *Lohman* but offered no explanation for its position.[128] The Circuit Court, however, did point to the $553,120 awarded in costs compared to the $30,000 awarded to each plaintiff in

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121 Settlement negotiations are not mentioned anywhere in the House or Senate Reports. Further, while the Supreme Court has approved of the *Johnson* factors, the Court has never indicated that settlement negotiations comply with § 1988's reasonableness requirement. Blanchard v. Bergeron, 489 U.S. 87 (1989); Hensley v. Eckerhart, 461 U.S. 424, 444 (1983) (citing S. REP. NO. 94–1011,(1976); H.R. REP. NO. 94–1558 (1976)); Johnson v. Georgia Highway Exp., Inc., 488 F.2d 714, 717–19 (5th Cir. 1974).

122 *Hensley*, 461 U.S. at 436 (explaining that the district court may identify specific hours that should be eliminated from the lodestar calculation).

123 *See* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) ("[P]retrial settlement is almost always cheaper, faster, and better than trial").

124 *Blanchard*, 489 U.S. at 95 (explaining that § 1988 makes no distinction between the type of relief sought).

125 Ingram v. Oroudjian, 647 F.3d 925 (9th Cir. 2011); Parke v. First Reliance Standard Life Ins. Co., 368 F.3d 999, 1012 (8th Cir. 2004); Moriarty v. Svec, 233 F.3d 955, 967 (7th Cir. 2000) (holding that settlement negotiations may be considered by the district courts when adjusting fee awards without explaining their reasoning).

126 *See* A.D. v. Cal. Highway Patrol, 712 F.3d 446 (9th Cir. 2013); *Moriarty*, 233 F.3d at 955.

127 712 F.3d at 446.

128 *Id.* at 461 (The Ninth Circuit cites to the Third Circuit's decision in *Lohman* to defend its position).

compensatory damages.[129] In *Moriarty v. Svec*,[130] the defendants made a settlement offer of $43,000 that was rejected by the plaintiff.[131] When determining the plaintiff's attorney's fee award, the court held that the rejected settlement offer could be considered when adjusting the lodestar.[132] The court offered no reason for departing from *Johnson*, but stated that the fees accumulated after a plaintiff rejects a serious settlement offer "provide minimal benefit to the prevailing party"—thus, a reasonable attorney's fee award could be less than the lodestar calculation.[133]

Finally, in order to comply with the spirit of § 1988, the district courts should not look to settlement negotiations to adjust attorney's fee awards. When Congress enacted § 1988 it intended that the attorney's fee award represent the reasonable worth of the services rendered by the prevailing party's counsel.[134] Evaluating a rejected settlement does not further Congress' goal of awarding adequate compensation in § 1988 litigation but instead uses hindsight as a way to punish an attorney for utilizing the judicial process.[135] Further, the Supreme Court has pointed out that "an undesirable emphasis" should not be placed on the recovery of damages in civil rights litigation.[136] This is because Congress' intent was to encourage attorneys to vindicate the rights of civil rights litigants, "not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief."[137]

III. POLICY ANALYSIS: THE NEED TO IGNORE SETTLEMENT OFFERS WHEN CALCULATING ATTORNEY'S FEE AWARDS

In *Diaz v. Jiten Hotel Management, Inc.*,[138] Plaintiff-Appellant Carmen Diaz—a sixty-one-year-old housekeeper—brought an action against her employer, alleging age discrimination and intentional

129 *Id.* at 452.

130 233 F.3d at 955.

131 *Id.* at 967.

132 *Id.* Although this court did not cite the *Lohman* decision, it adopted the same holding with respect to using attorney's fees to adjust the lodestar.

133 *Id.*

134 *See* S. REP. NO. 94–1011, at 6 (1976) ("In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'") (citation omiited); H.R. REP. NO. 94–1558, at 1 (1976).

135 Hensley v. Eckerhart, 461 U.S. 424, 447 (1983) ("[T]he legislative history of § 1988 reveals Congress' basic goal that attorneys should view civil rights cases as essentially equivalent to other types of work they could do[.]").

136 Blanchard v. Bergeron, 489 U.S. 87, 95 (1989); S. REP. NO. 94–1011, at 6 (1976) ("It is intended that the amount of fees awarded . . . not be reduced because the rights involved may be nonpecuniary in nature.").

137 *Blanchard,* 489 U.S. at 95.

138 704 F.3d. 150 (1st Cir. 2012).

infliction of emotional distress.[139] Diaz was successful on one of six claims that she raised in her complaint and sought to recover attorney fees in the amount of $139,622, and costs in the amount of $13,389.24.[140] The district court, however, only awarded Diaz $25,000 in attorney fees.[141] The district court calculated a lodestar of $44,766, and then determined that the lodestar should be adjusted downward.[142] In making this reduction, the court emphasized the fact that Diaz rejected an informal settlement offer of $75,000 and expressed its concern that there was a "perverse incentive for attorneys to encourage clients to reject reasonable offers and proceed to trial to earn more in fees."[143]

The First Circuit reversed, in part, and held that the district court's fee reduction improperly focused on the rejected settlement offer, remanding the case so the lodestar could be readjusted in light of the *Johnson* factors.[144] On remand, the district court did not see any "significant reason" to adjust the lodestar upwards or downwards and held that the unadjusted lodestar represented a reasonable fee.[145]

While this holding was reversed on appeal,[146] other circuits have implied similar policy concerns including the apprehension that lawyers will use § 1988 as a mechanism for their own personal gain[147]—i.e. that lawyers will try and "get rich on the backs of their clients."[148] Further, some commentators have hinted at the fear that plaintiffs' lawyers will waste valuable judicial resources to take advantage of § 1988's fee awards—i.e. that attorneys will advise against settlement to log additional hours that the losing defendants will be required to pay.[149] However, despite these concerns, and some of the district courts'

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139 *Id.* at 152. Diaz initially brought an action against Jiten claiming six causes of action, but only proceeded to trial on two claims for federal and state age discrimination. *Id.*

140 *Id.* at 152.

141 *Id.*

142 *Id.* at 153. The district court calculated the lodestar by accepting the requested hourly rate of $300 per hour as reasonable. Further, the court reduced the requested fee by two-thirds "as an approximation for the number of hours spent working on the four claims that were not viable." *Id.*

143 *Id.* at 154. If Diaz had accepted the settlement offer under a *normal* contingent fee arrangement, then Diaz's attorney would have been entitled to receive one-third of the accepted settlement. *Id.* at 153.

144 *Id.* at 154.

145 Diaz v. Jiten Hotel Mgmt., Inc., 930 F. Supp. 2d 319, 322 (D. Mass. 2013).

146 *Diaz*, 704 F.3d. 150.

147 *See* A.D. v. Cal. Highway Patrol, 712 F.3d 446 (9th Cir. 2013); Smith v. Borough of Dunmore, 633 F.3d 176 (3d Cir. 2011); Ingram v. Oroudjian, 647 F.3d 925 (9th Cir. 2011); Lohman v. Duryea Borough, 574 F.3d 163 (3d Cir. 2009); Moriarty v. Svec, 233 F. 3d 955 (7th Cir. 2000).

148 Diaz v. Jiten Hotel Mgmt., Inc., 822 F. Supp. 2d 74, 83 (D. Mass. 2011), *aff'd in part*, *rev'd in part and remanded*, 704 F.3d 150 (1st Cir. 2012).

149 *See* Calhoun, *supra* note 21, at 382 (explaining attorney-client conflicts of interest when § 1988 is involved).

paternalistic attempts to expand *Johnson*, these allegations are unsubstantiated.[150]

A. Attorneys Are Not Gamblers

One argument that has been advanced in favor of adding settlement negotiations to the *Johnson* list[151] is that under a contrary rule, an attorney might advise a client to reject a settlement in order to try her luck at trial.[152] While the idea that attorneys might desire to maximize the size of their fee award is not impractical, the assumptions that underlie this argument are flawed when applied in § 1988 cases.[153] First, in § 1988 cases, a litigant may only recover fees if they are the *prevailing* party.[154] If a plaintiff rejects a settlement—regardless of the contents of the offer—and then obtains no relief at trial, the plaintiff is not entitled to any fees under the fee-shifting statue.[155] Thus, to make the aforementioned argument plausible, one would have to assume that an attorney would be willing to *gamble* losing all of their recovery.[156] Second, this argument assumes that going to trial does not involve transaction costs.[157] Trial preparation requires additional time and money—resources that a lawyer could spend elsewhere if a good settlement offer were presented to her client.[158] Finally, this argument is

150 *See supra* Part II.A. (explaining how some courts have attempted to extend *Johnson*).

151 For a list of the twelve *Johnson* factors, see *supra* note 26.

152 *Diaz*, 822 F. Supp. 2d at 83 ("A large award of attorney's fees here would only further encourage plaintiffs and their lawyers to reject reasonable settlement offer [sic] and use the threat of a fee award to extract larger settlements from defendants."); *see* Lohman v. Duryea Borough, 574 F.3d 163, 168 (3d Cir. 2009) ("permitting settlement negotiations to be considered would encourage reasonable and realistic settlement negotiations").

153 "All lawyer-client relationships create conflicts because the interests of lawyers and clients are not perfectly aligned, a situation economists call an 'agency problem.' Lawyers have a keen interest in the size of their fees, while clients are interested primarily in the size of their recovery." Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 145 (2001) (citation and internal quotation marks omitted).

154 For a discussion of the prevailing party status required under § 1988, see *supra* Part I.B.1.

155 *Id.* (explaining that in order to be eligible for fee-shifting under § 1988, the first prerequisite is that the litigant be deemed the prevailing party).

156 In *Lohman*, the district court pointed out that Lohman's attorney was working on a contingent fee basis, which likely would have entitled Lohman's attorney to one-third of an accepted settlement offer. The rejected settlement offer in this case was for $75,000, which would have entitled Lohman's attorney to $25,000. However, at trial Lohman was awarded only $12,205. This would mean that Lohman's attorney risked losing all of her attorney's fees and violating her ethical duties for a more lucrative payout through fee shifting. *Lohman*, 574 F.3d 163.

157 G. Nicholas Herman, *How to Value A Case for Negotiation and Settlement*, 31 MONT. LAW. 5, 7 (2005) (explaining the economics of evaluating settlement offers as opposed to going to trial, and discussing how transaction costs affect this economic calculus).

158 Gross & Syverud, *supra* note 123, at 346 (explaining the added value of not going to trial).

flawed because it presupposes that attorneys are violating their ethical duties to their clients.[159]

1. The Ethical Duty of an Attorney: What to Do When Receiving an Offer for Settlement

The theory that an attorney would have her client reject a settlement offer for the sole purpose of profiting from § 1988's fee-shifting provision is misguided. Another reason for this argument's shortcoming is that it rests upon the idea that attorneys are willing to violate their ethical duties to their clients—duties that require the client to make all of the settlement decisions.[160]

Attorneys have an ethical duty to consult with their clients before taking any independent action.[161] This includes any decision that could affect the outcome of their client's case or any action that could affect the ability of their client to bring a claim in the future.[162] Thus, a lawyer may accept a settlement offer but only if the *client* has decided to accept it.[163] Further, lawyers are not only under a duty to present settlement offers to their clients but also are required to ensure that their client's decision is "an informed one."[164] Attorneys must give their honest opinions about what they believe will be the consequence of an action.[165] Finally, a lawyer is under a duty to avoid conflicts of interests when representing a client.[166] Thus, an attorney who encourages a client to reject a substantial settlement offer for her own personal gain—or

159 Diaz v. Jiten Hotel Mgmt., Inc., 704 F.3d 150, 154 (1st Cir. 2012) ("[T]he district court's rationale assumes that attorneys are violating their ethical duties, which require the *client*, not the lawyer, to make all settlement decisions.").

160 *Id.*; *see infra* note 167.

161 Florida v. Nixon, 543 U.S. 175, 187 (2004) ("An attorney undoubtedly has a duty to consult with the client regarding 'important decisions[.]'") (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)).

162 *See* Glenn E. Bradford, *Who's Running the Show? Decision-Making in the Courtroom in Civil and Criminal Cases*, 62 J. MO. B. 148, 157 (2006) ("If your client insists on your making a tactical decision you believe imprudent, you must determine whether to withdraw from representation. It is better to withdraw than to make a strategic blunder, especially if the tactical decision may significantly affect the outcome of the case.") (footnote omitted); Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH. L. REV. 823, 835 (1986) (explaining a lawyer's ethical duties).

163 Aronson, *supra* note 162, at 835. "The lawyer should advise the client of the possible effects of both the legal and nonlegal alternatives that are available." *Id.*

164 *Id.*

165 *Id.* at 836.

166 "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests." WASH. R. PROF. CONDUCT § 1.7 cmt. 1.

rejects it without informing the client—is in violation of her ethical duty.[167]

In *Lohman*, the Third Circuit pointed out that Lohman rejected a $75,000 settlement offer, which was more than six times the amount Lohman was awarded at trial, to justify the reduction in Lohman's attorney's fee award.[168] However, what the court did not address was that the decision to reject the $75,000 settlement offer was up to Lohman—not Lohman's attorney.[169] Thus, there is little reason to reduce the compensation of Lohman's attorney for a decision he had no authority to make.[170] Further, Lohman's attorney may have advised Lohman against rejecting the settlement offer, since civil rights litigants often refuse to settle for non-monetary reasons.[171]

2. Civil Rights Plaintiffs May Be More Interested in the Principles at Stake than the Monetary Award: The Client that Declines to Settle

Another reason that reducing an attorney's fee award based upon a rejected settlement offer makes little sense is that an attorney and a client may have different views about settling a case.[172] An attorney may advise a client that they should accept a settlement offer, but the client may be unwilling to settle, despite the attorney's advice.[173]

There are a variety of reasons why a plaintiff may not want to settle a case, even if settlement seems to be the client's best option. First, a plaintiff may want to try her luck at a large payoff—rather than taking a more moderate settlement—regardless of her probability of success.[174]

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167 WASH. R. PROF. CONDUCT § 2.1 cmt. 5:
In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

168 Lohman v. Duryea Borough, 574 F.3d 163, 166 (3d Cir. 2009).

169 *See* Aronson, *supra* note 162 (explaining that the decision to settle is within the client's power).

170 *See Id.*

171 Discussed *infra* Part III.A.2.

172 The plaintiff may have different interests than the attorney with respect to settlement. An attorney may be concerned with the likelihood of a payout, the additional expense of trial, and the attorney's own possibility of recovery. A plaintiff may be concerned with receiving the most compensation possible, even if it means taking a risk with trial. There is also an emotional component to a lawsuit that the lawyer may not understand, since he was not the person who was wronged. *See* Nathan M. Crystal, *"Let's Make a Deal"—Settlement Ethics*, 20 S.C. LAW. 8 (Nov. 2008).

173 *Id.* at 8 (discussing the client who unreasonably refuses to settle and how to handle such a client).

174 *Id.* ("A plaintiff who is in need of funds may be willing to accept an offer of settlement that the plaintiffs [sic] lawyer considers inadequate. On the other hand, a plaintiff who is not desperate

Second, a plaintiff may wish to have her day in court—regardless of the settlement amount—because of animosity toward the defendant.[175] A plaintiff who feels she has been wronged may want to have a jury enter a judgment against the defendant.[176] Moreover, if the plaintiff settles the case, there will probably be no precedent established for the future.[177] Thus, a plaintiff who feels strongly about a particular issue may want to go to court, despite knowing that they risk a lower recovery.

B. Contingent Fee Arrangements Are Not Intended to be a Ceiling on Fee-Shifting Statutes

Another argument that has been advanced in support of considering settlement negotiations when determining attorney's fees is that attorneys should not be able to obtain a greater result from a fee-shifting statute than they would from a private agreement with their client.[178] However, a contingent fee arrangement in a civil rights case does not automatically impose a ceiling on the amount of compensation an attorney can recover under § 1988.[179] Holding otherwise would go against the purpose of § 1988.[180]

In *Blanchard v. Bergeron*,[181] the Supreme Court explained that § 1988 is intended to provide an attorney with "reasonable compensation, in light of all of the circumstances, for the *time and effort expended* . . . no more and no less."[182] This indicates that if a contingent fee agreement—such as a percentage of a settlement—provides less than a *reasonable* amount, the defendant is still required to pay attorney's

for funds may be willing to reject a good settlement offer and take the risk of a trial in the hope of a big recovery[.]").

175 *See*, Gross & Syverud, *supra* note 123, at 376 ("plaintiffs apparently insisted on trial because of their accumulated personal and economic stake in the disputes"). "Six of the employment lawyers we interviewed told us that their cases went to trial because the plaintiff wanted a trial. In one case, the plaintiff wanted 'a day in court'; in another the plaintiff wanted 'justice'; in a third the plaintiff felt 'seriously wronged.' One of the remaining plaintiffs wanted a trial because 'she felt she had a good case.'" *Id*. at 376 n.145.

176 *Id*.

177 *See* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?,* 75 NOTRE DAME L. REV. 221, 221 (1999) ("Precedent . . . does not just 'happen.' A judicial precedent requires not only an aggrieved party who files a lawsuit, but also that the case goes to trial, and perhaps appeal, without a settlement.").

178 *See* Diaz v. Jiten Hotel Mgmt., Inc., 822 F. Supp. 2d 74, 82 (D. Mass. 2011).

179 *See* Townsend v. Benjamin Enters., Inc., 679 F.3d 41, 59 (2d Cir. 2012); United States v. Claro, 579 F.3d 452, 461 (5th Cir. 2009); Blanchard v. Bergeron, 489 U.S. 87, 93 (1989).

180 *Blanchard*, 489 U.S. at 93 ("[T]he purpose of § 1988 was to make sure that competent counsel was available to civil rights plaintiffs, and it is of course arguable that if a plaintiff is able to secure an attorney on the basis of a contingent or other fee arrangement, the purpose of the statute is served if the plaintiff is bound by his contract."). For a more detailed discussion of the purposes of § 1988, see *supra* Part I.B.

181 489 U.S. 87 (1989).

182 *Id*. at 93 (emphasis added).

fees in an amount the court deems reasonable.[183] Further, if a contingent fee arrangement provided for *more* than the court deems reasonable, the defendant is not required to assume the private contract between the plaintiff and her attorney.[184] Thus, the argument that settlement negotiations should be considered when adjusting the lodestar makes little sense, as *Blanchard* implies that there is a weak relationship between a private contract and a reasonable fee.[185]

In *Perdue v. Kenny A.*,[186] the Supreme Court held that there is a strong presumption that the lodestar represents a *reasonable* amount under § 1988.[187] Further, the Court held that the lodestar should only be enhanced in "extraordinary circumstances"—such as if the attorney performance "includes an extraordinary outlay of expenses and the litigation is exceptionally protracted."[188] While the Court does not mention circumstances where the lodestar should be reduced, the Court's logic implies that the presumption of the lodestar's reasonableness is a difficult hurdle to overcome—i.e. that the lodestar should only be reduced in *extraordinary* circumstances. Thus, it follows that compensation resulting from § 1988 should pay an attorney for the time and effort spent on the case—including the time spent after a rejected settlement offer was made—and should not be reduced because of a private agreement between client and counsel.

C. Rule 68—Using an Informal Offer as a Shield . . . and a Sword

Some courts[189] have expressed concern that under § 1988, a defendant will be exposed to an exorbitant amount of fees, and worry

183 *Id.* ("A contingent-fee contract does not impose an automatic ceiling on an award of attorney's fees, and to hold otherwise would be inconsistent with the statute and its policy and purpose.").

184 *Id.* ("*Johnson*'s 'list of 12' . . . provides a useful catalog of the many factors to be considered in assessing the reasonableness of an award of attorney's fees; but the one factor at issue here, the attorney's private fee arrangement, standing alone, is not dispositive.").

185 *Id.*

186 559 U.S. 542 (2010).

187 *Id.* at 553–54 (explaining that there is a strong presumption that the lodestar represents a reasonable fee).

188 *Id.* at 555. "The lodestar method for determining a reasonable attorney fee under § 1988 yields a fee that is presumptively sufficient to achieve the objective of inducing a capable attorney to undertake the representation of a meritorious civil rights case, and that presumption is a strong one." *Id.* at 552.

189 Lohman v. Duryea Borough, 574 F.3d 163 (3d Cir. 2009) ("While evidence of settlement negotiations is only one indicator of the measure of success [for calculating attorney fees for a prevailing plaintiff], it is a permissible indicator . . . "); *see* A.D. v. Cal. Highway Patrol, 712 F.3d 446, 460–61 (9th Cir. 2013) (settlement negotiations are a permissible factor when awarding attorney's fees); Ingram v. Oroudjian, 647 F.3d 925 (9th Cir. 2011) (district court did not abuse its discretion by considering settlement negotiations); Moriarty v. Svec, 233 F.3d 955, 967 (7th Cir. 2000) (substantial settlement offers should be considered when awarding atorney's fees).

that defendants will have no way to contain these costs.[190] These courts advocate for an extension of *Johnson*—i.e. that informal settlement offers should be added to the list of twelve.[191] However, what these courts have failed to consider is that Rule 68 of the Federal Rules of Civil Procedure already provides a mechanism whereby defendants can reduce their risk of loss.[192] According to Rule 68, if a defendant makes a formal settlement offer, and the plaintiff chooses to reject it, then the plaintiff must pay the costs incurred after the offer was made.[193] However, this only occurs if the judgment finally obtained by the plaintiff is less favorable than the offer made by the defendant.[194] Rule 68 only applies when it has been formally invoked—a "garden-variety settlement offer" does not provide the same protections.[195] Hence, while evaluating rejected settlements when assessing fee awards will protect defendants, it does so by robbing plaintiffs of Rule 68's benefits.[196]

If the Rule with respect to § 1988 fee awards were to extend the *Johnson* factors to include settlement negotiations,[197] then a defendant could benefit by simply making an informal settlement offer to the plaintiff. This is because *ex post facto*, the defendant could use the informal offer as a way to reduce the lodestar calculation and hence the amount the defendant would need to pay in attorney's fees.[198] Further,

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190 In *Moriarty*, the Seventh Circuit held that:
Substantial settlement offers should be considered by the district court as a factor in determining an award of reasonable attorney's fees, *even where Rule 68 does not apply*. Attorney's fees accumulated after a party rejects a substantial offer provide minimal benefit to the prevailing party, and thus a reasonable attorney's fee may be less than the lodestar calculation.
233 F. 3d at 967 (emphasis added) (citations omitted).

191 For a list of the twelve *Johnson* factors, see *supra* note 26.

192 FED. R. CIV. P. 68(d) ("If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made."); Marek v. Chesny, 473 U.S. 1, 4–5 (1985) (explaining that Rule 68 applies in § 1988 cases); Diaz v. Jiten Hotel Mgmt., Inc., 704 F.3d 150, 154 (1st Cir. 2012) (explaining that the Federal Rules already contain a formal way for defendants to contain fees and costs through a reasonable settlement offer).

193 FED. R. CIV. P. 68.

194 *Id.*

195 *Diaz*, 704 F.3d at 154 (quoting Spooner v. EEN, Inc., 644 F.3d 62, 71 (1st Cir. 2011)).

196 "Rule 68 lays out specific procedures that make offers of judgment thereunder unique. The rule 'allows a defendant to make a firm, non-negotiable offer of judgment,' which includes costs accrued to that point, leaving the plaintiff two options: either accept or reject the offer within a set period." *Spooner*, 644 F.3d at 70–71 (citations omitted).

197 For a list of the twelve *Johnson* factors, see *supra* note 26.

198 Consider the following hypothetical situation: The defendant in a § 1988 case makes the plaintiff an informal settlement offer for $75,000. The parties go to trial, and the plaintiff is awarded $50,000 in damages. Consider the lodestar for the plaintiff's attorney is $30,000. Absent the settlement offer, it is unlikely that the lodestar would be reduced. *See* Perdue v. Kenny A., 559 U.S. 542, 546 (2010) (there is a strong presumption that the lodestar represents a *reasonable* amount under § 1988). However, if settlement negotiations were considered when adjusting the lodestar, then the mere presence of the defendant's offer would warrant a reduction of the lodestar. *See* Moriarty v. Svec, 233 F. 3d 955, 967 (7th Cir. 2000) (endorsing the view that settlement negotiations be considered, even in the absence of Rule 68).

extending *Johnson* is unfair to the plaintiff because under Rule 68—unlike informal settlement offers—the defendant is offering to have a judgment entered against her *in addition to* paying the plaintiff a certain amount of monetary compensation. Thus, extending *Johnson* provides a defendant with all of the monetary benefits of Rule 68, without any of the downside—i.e. agreeing to have a judgment entered against her.[199]

Further, there is no need to consider informal settlement negotiations under § 1988 because Rule 68 *already* provides plaintiffs with strong incentives to settle cases—i.e. if they reject the settlement and are *less* successful at trial, they will risk losing the attorney's fees that accrue after the formal offer was made.[200] This strong incentive means that rejecting a substantial settlement offer will not be made lightly.[201] Since under Rule 68 defendants have a vehicle by which they can contain costs and fees through settlement, an extension of *Johnson* to include settlement negotiations is unnecessary.

IV. PROPOSAL

A. Balancing Congress' Goals: A Distinct View of Settlement Negotiations When Calculating the Lodestar

Considering the aforementioned legal[202] and policy-based[203] reasons for disregarding settlement negotiations when adjusting the lodestar, this Note advocates for a rule that focuses on whether the relief obtained by the prevailing party justifies the expenditure of the attorney's time. This standard will allow the district courts to identify specific hours that should be eliminated *before* calculating the lodestar, but will not allow a reduction in the lodestar because settlement negotiations took place. This rule will not extend the *Johnson* factors[204] to include settlement negotiations, but rather—in certain instances—will allow settlement negotiations to be reflected *in* the lodestar. Hence, the rule will balance Congress' twin goals of inducing attorneys into taking on civil rights cases, while preventing windfalls to attorneys.[205]

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199 Delta Air Lines, Inc. v. August, 450 U.S. 346, 353–55 (1981).

200 *Id.* at 352 n.9 ("[T]he opportunity to avoid the otherwise almost certain liability for costs should motivate realistic settlement offers by the defendant, and the risk of losing the right to recover costs provides the plaintiff with an additional reason for preferring settlement to further litigation.").

201 Diaz v. Jiten Hotel Mgmt., Inc., 704 F.3d 150, 154 (1st Cir. 2012) (discussing Federal Rule of Civil Procedure 68 in a § 1988 case).

202 *See supra* Part II.

203 *See supra* Part III.

204 For a list of the twelve *Johnson* factors, see *supra* note 26.

205 The Senate Report, in discussing the goals of § 1988, explains that:

The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir.

This Note argues that settlement negotiations should not be used as a factor to *adjust* the lodestar because it goes against the purposes of § 1988.[206] While some of the circuits have struggled to find a place for this factor—attempting to append it to the *Johnson* list of twelve[207]—those courts have not been incorrect in attempting to consider informal settlements; however, they have been improperly employing this factor.[208] A rejected settlement should have a place in the grand scheme of § 1988 attorney's fee awards, but not through *Johnson* lodestar adjustments. Rather, this Note proposes that rejected settlements may be considered—in certain circumstances—*before* the lodestar is calculated. Specifically, this Note proposes that failed settlement negotiations may alter the "hours reasonably expended" component of the lodestar calculation.

The Supreme Court[209] has stated that the most useful starting point for determining the amount of a reasonable fee under § 1988 is the number of hours reasonably spent on the litigation multiplied by a reasonable hourly rate—i.e. the lodestar.[210] Further, the Court has explained how to arrive at the number of hours reasonably expended on a case.[211] That is, the only hours that should be reflected in this component of the lodestar are hours that would be billed to a normal fee-paying client.[212] When a law firm seeks fees from a normal fee-paying client, that firm should document how the various hours spent on the case were expended.[213] When fees are billed to an adversary, the same documentation should occur so the district court can—if necessary—dissect the hours spent by the attorneys who worked on the case, and "segregate into categories the kinds of work performed" by the attorneys.[214] Further, no compensation is required for *nonproductive* time.[215] By mirroring the reporting system used for fee paying clients,

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1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. 9444 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

S. REP. NO. 94–1011, at 6 (1976).

206 *See supra* Part II (discussing why settlement negotiations should not be used to adjust the lodestar after it has been calculated).

207 See *supra* Part II.A. for a list of circuit courts that have attempted to attach settlement negotiations to the *Johnson* list.

208 *See supra* note 147.

209 Hensley v. Eckerhart, 461 U.S. 424 (1983).

210 *Id.* at 433.

211 *Id.* at 447.

212 *Id.* ("[H]ours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.") (emphasis omitted) (quoting another source).

213 Copeland v. Marshall, 641 F.2d 880, 891–92 (D.C. Cir. 1980).

214 *Id.* at 891.

215 *Id.*

judges can evaluate the time spent by an attorney and choose which hours to reasonably strike from their compensation.[216] Thus, it follows that the same principles should apply to the lodestar calculation.

This rule proposes that if a prevailing plaintiff rejects a substantial settlement offer and is ultimately less successful at trial, the court should have the *discretion* to eliminate specific hours spent unproductively. However, this would be done *before* the lodestar is calculated. For example, if a plaintiff's attorney knows that a client is unwilling to settle,[217] and despite this knowledge spends countless hours in unsuccessful settlement negotiations, those hours should be eliminated before the lodestar is calculated. However, the hours spent going to trial after the rejected settlement offer should not be eliminated from the attorney's lodestar because the hours spent vindicating the plaintiff's rights, as one example, were reasonable in light of the plaintiff's desire to have her day in court.

Further, "no compensation should be paid [to an attorney] for time spent litigating claims upon which the party seeking the fee did not ultimately prevail." Thus, these hours may be stricken from the lodestar calculation as well.[218] This supports the idea that if a plaintiff received a lump sum settlement offer—for example, to compensate her for all six of the claims that she raised in her complaint—and the plaintiff only prevailed on one of those claims, then the hours spent on the unsuccessful claims should be eliminated from the lodestar calculation.

This rule, if properly executed, will lead to more predictable attorney's fee awards and will utilize less judicial resources in addition to furthering Congress' goals.[219] First, the lodestar method for determining a reasonable attorney's fee award is readily administrable and objective.[220] The Supreme Court, in *Perdue v. Kenny A.*,[221] stated that this method, "cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results."[222] Thus, the rule that this Note proposes will lead to less disparity in the district courts because judges will have less arbitrary discretion. Instead of subjectively reducing the lodestar based on a set of largely discretionary factors[223]—i.e. the *Johnson* factors—the district courts will be entrusted with identifying and eliminating specific

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216 *Id.*

217 For a discussion on the reasons a client may not want to settle despite the amount of the settlement offer, see *supra* Part III.A.2.

218 *Copeland*, 641 F.2d at 891–92 (explaining that the hours spent on claims in which the plaintiff did not prevail should not be included in the lodestar calculation).

219 *See* S. REP. NO. 94-1011, at 2–6 (1976) (discussing Congress' goals with respect to § 1988).

220 Perdue v. Kenny A., 559 U.S. 542, 551–52 (2010).

221 *Id.* at 551.

222 *Id.* at 552 (discussing the subjectivity of the *Johnson* factors).

223 *Id.*

unproductive hours spent on settlement negotiations, leading to more meaningful and efficient judicial review. Further, since the district courts will have less discretion under this rule, and the plaintiff will be able to clearly see the reasons for the fee award, there will likely be a decrease in satellite litigation and thus an increase in judicial efficiency.[224]

B. Counter-Arguments: The Lesser of Two Evils

While there are numerous upsides to the rule that this Note proposes, the rule also comes with some drawbacks. First, while this rule is more objective than extending *Johnson* to include settlement negotiations, it is still somewhat discretionary.[225] The district courts may struggle with deciding which hours they should eliminate from the "reasonable hours" calculation. Second, attorneys may argue that their client *was* interested in settling the case and that the hours spent in settlement negotiations should not be eliminated. District courts may need to do some fact-finding to determine whether the hours spent in settlement negotiations were truly productive. Finally, this rule may deter attorneys from settlement negotiations altogether because they may not want to waste their time on expenditures for which they may not be compensated—an outcome which cuts against the idea that judicial resources will be saved.[226]

However, despite its drawbacks, this rule still better aligns with Congress' goals in enacting section § 1988 than the alternative.[227] First, this rule more adequately compensates attorneys for the services that they provided. The rule better approximates the fee that the prevailing party's attorney would have received had he been representing a paying client—a client who was billed on an hourly rate.[228] Second, this rule is more attractive to attorneys than the alternative. If an attorney knows that she will not be compensated for her unproductive time, she will likely not be deterred from involving herself in § 1988 litigation.

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224 For a discussion on satellite litigation, see *supra* note 22.

225 This rule is still discretionary because the district court judge will have to identify which hours should be eliminated and which hours should be included in the lodestar calculation.

226 *See generally* Chicago Title & Trust Co. v. Verona Sports Inc., 11 F.3d 678, 678 (7th Cir. 1993) (explaining that settling cases saves the court "from the significant expenditure of judicial resources").

227 By alternative, this Note is referring to extending the *Johnson* factors to include settlement negotiations. *See* S. REP. NO. 94-1011, at 2–6 (1976) (discussing Congress' goals with respect to § 1988).

228 A fee-paying client generally does not have the ability to lower the attorney's fees if the attorney rejected a settlement offer under the client's direction. *See generally* Copeland v. Marshall, 641 F.2d 880, 891–92 (D.C. Cir. 1980) (explaining how attorneys for fee-paying clients are normally compensated).

However, if an attorney knows that her fee may be arbitrarily reduced because her client rejected a settlement—perhaps because the client wanted her day in court regardless of the contents of the settlement offer—then § 1988 cases may appear less desirable. Thus, this rule better reinforces Congress' interests because it attracts talent to uphold the civil rights of litigants.[229] Third, under this rule, attorneys will not be discouraged from entering into *all* settlement negotiations, rather it makes attorneys think twice about spending a significant amount of time—and potentially money that the losing defendant will have to pay in fees—on futile efforts. Finally, this rule prevents windfalls to attorneys—a goal that Congress felt was of the upmost importance[230]—because attorneys are not being compensated for any of their unproductive time.

CONCLUSION

Under § 1988, a prevailing plaintiff in a civil rights action can obtain an attorney's fees award from the defendant. The purpose of the Fees Awards Act was to provide incentives to attorneys to take on civil rights cases, which may be less desirable than other types of litigation with greater monetary outcomes. The district court determines this fee by first calculating the lodestar, which is the reasonable hourly rate for a similarly situated attorney, multiplied by the time expended on the litigation. Once the district court calculates the lodestar, this number can be adjusted upwards or downwards, depending on the degree of success of the case, among other factors. The Supreme Court, in *Hensley v. Eckerhart*,[231] laid out twelve factors that a court should consider when adjusting the lodestar; these factors are meant to adequately compensate attorneys for their work. While the factors discussed in *Johnson* do not include informal settlement negotiations, the circuits have split on whether they should be a factor considered when making lodestar adjustments. The First Circuit has held that informal settlement negotiations should not be a factor used to adjust the lodestar. The Third, Seventh, and Ninth Circuits have taken the opposite view and have held that informal settlement negotiations should be considered when adjusting the lodestar.

This Note argues that informal settlement negotiations should not be considered when adjusting the lodestar for a variety of reasons. First, attorneys are not gamblers—they likely will not advise clients against

229 S. REP. NO. 94-1011, at 2–3 (1976) (discussing Congress' goals with respect to § 1988).

230 *Id.* at 6 (explaining that preventing windfalls to attorneys was one of Congress' goals when enacting § 1988).

231 Hensley v. Eckerhart, 461 U.S. 424 (1983).

settling in § 1988 cases in order to obtain more in fees because if the plaintiff does not *prevail* at trial, the attorney has lost all of her compensation.[232] Second, it is not the attorney's decision to settle the case, and thus she should not be penalized for her client's decision. Third, contingent fee arrangements were never intended to act as a ceiling on fee-shifting statutes. Thus, rejecting a settlement offer—with an accompanying contingent fee arrangement—should have no bearing on an attorney's fee award. Finally, if a defendant is worried about the amount of money that she may need to pay in fees, the Federal Rules of Civil Procedure already provide a mechanism whereby costs accrued after a formal offer are contained.

This Note advocates for a rule that focuses on whether the relief obtained by the prevailing party justifies the expenditure of the attorney's time. Pursuant to this rule, the district court will be given the discretion to identify specific hours that should be eliminated *before* calculating the lodestar, but will not allow a reduced award because of failed settlement negotiations. While this model is not without its shortcomings, this rule best balances Congress' twin goals of inducing attorneys to take on civil rights cases, while preventing windfalls to attorneys.

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232 In order to recover fees under § 1988, the plaintiff must be deemed the prevailing party. *See supra* Part I.B.1.