US Supreme Court

Case: *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439

Date: July 2, 1986 **Votes:** 5-4 (? For PA, but there were two issues.)

Opinion: White **Concurrence/Dissents:** Blackmun (with Marshall and Brennan)

Tags: Attorney fees, Clean Air Act, fee enhancement

Question(s) Presented: May respondents claim attorney's fees for regulatory work done after a consent decree was put in place? May the fees be enhanced because of "superior quality" of work by the attorneys, and because of the risk of not prevailing?

Holdings:

(1) Attorneys' fees may be awarded for work done after case is closed, including further administrative proceedings and monitoring of compliance.
(2) The lower courts should not have increased the attorneys' fee award for "superior quality work" or supposed risk factors. (This might be okay sometimes, but you gotta make a really good case for it.)

Rationale:

(1) "the work done by counsel in these two phases was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom." (558)
(2) The lodestar already includes enhancements (rate & hours spent) that reflect the quality of the work, as well as the risk factor. Without much documentation (as here), it's impossible to justify an adjustment up for exceptional work.

Facts: PennDOT was sued in 1977 for noncompliance with the vehicle inspection program mandated by the Clean Air Act. A consent decree was approved in 1978, which included a request for $30,000 in attorney's fees. (The rest of the consent decree had to do with contracting with garages for inspection and maintenance.) "Entry of the consent decree marked only the beginning of this story, for implementation of the I/M program did not proceed smoothly." (549) DV Clean Air Council had to keep prodding them through the courts to comply, and then monitored their compliance once they finally started. DV also testified before the EPA in this matter.

Legal History, Prior Appeals & Trial Court Input:

- **District Court (1984):** awarded DV $209,813 in attorney's fees and $6675 in costs for work done since 1978.
    - **Lodestar Calculation:** Reasonable hours necessary for legal services X reasonable hourly rate ("the latter being based on the court's determination of the attorney's reputation, status and

type of activity for which the attorney is seeking compensation." 581 F. Supp. 1412, 1419 (ED Pa. 1984))

- **Court used three separate hourly rates:**
  - For "most difficult" work: $100/hr (bcz "inexperienced attorney with no prior litigation experience)
  - Work that could have been done by an associate: $65/hr
  - Work that required little or no legal ability: 25/hr
- **Multiplier of 2.0 applied to a couple phases of the proceedings:**
  - After *Hensley* (1983)
  - "new legal theories with little precedent," David & Goliath scenario—therefore contingent (risky), and work was found to be "superior"
  - Multipliers applied for contingency in a couple phases, and for excellence in one other phase.

- **Court of Appeals (3rd Circuit)**
  - Affirmed district court: work beyond the consent decree was useful and necessary for enforcing the decree. 3rd Circuit approved of lodestar multipliers in *Lindy*.

Attorneys' Arguments:

- **For PA:** DV "was seeking compensation for work done in only tangentially related state and federal administrative proceedings" (554)

Appeals to Statute & Precedent:

- **42 U.S.C. § 7604(d) [§ 304(d)] Clean Air Act**—court may award attorney's fees "whenever the court determines such an award is appropriate."
- "Several courts have held that, in the context of [§ 1988], post-judgment monitoring of a consent decree is a compensable activity for which counsel is entitled to a reasonable fee." (559)
  - ***Garrity v. Sununu*, 752 F.2d 727, 738-739 (CA1 1984)**
  - ***Bond v. Stanton*, 630 F.2d 1231, 1233 (CA7 1980)**
  - ***Miller v. Carson*, 628 F.2d 346, 348 (CA5 1980)**
  - ***Northcross v. Board of Ed. Of Memphis City Schools*, 611 F.2d 624, 637 (CA6 1979)**
- ***Webb v. Board of Ed. Of Dyer County*, 471 U.S. 234, 105 S.Ct. 1923, 85 L.Ed. 2d 233 (1985):** "for the time spent pursing optional administrative proceedings properly to be included in the calculation of a reasonable attorney's fee, the work must be 'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." (561, quoting *Webb* at 243/1928)
- ***Alyeska Pipeline* (1975):** exceptions to the American Rule
- ***Johnson v. Georgia Highway Express* (5th Cir. 1974):** factors affecting "reasonableness"
- ***Lindy Brothers* (3d. Cir. 1973/1976):** Lodestar approach w/ adjustments as needed for contingency & quality
- ***Hensley v. Eckerhart* (1983):** Hybrid *Johnson* & Lodestar approach: may want to adjust up or down, but many of the *Johnson* factors are already in the Lodestar.

- ***Blum v. Stenson* (1984):** Lodestar is usually enough for calculating quality and contingency. More specifically: Lodestar already contains special skill & experience, novelty & complexity, quality, & results obtained. Upward adjustments permissible for quality in rare & exceptional cases with lots of documentation. (Upward adjustments for contingency left open: see *Del Valley* at 568.)

Dicta/Discussion:

- Re. Commonwealth/U.S.'s objection that statute doesn't cover attorney fees past litigation: "We reject these limiting constructions on the scope of § 304(d)." (558)

- "Although it is true that the proceedings involved in Phases II and IX were not 'judicial' in the sense that they did not occur in a courtroom or involve 'traditional' legal work such as an examination of witnesses or selection of jurors for trial, the work done by counsel in these two phases was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom." (558)

- Compare with § 1988 re. post-judgment monitoring & attorney fees, & legislative history about this (interchanging "action" and "proceeding" in discussions). Purpose identical: to encourage private enforcement of Acts.
    - "Given the common purpose of both § 304(d) and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner." (560)

- "There are over 100 separate statutes providing for the award of attorney's fees; and although these provisions cover a wide variety of contexts and causes of action, the benchmark for the awards under nearly all of these statutes is that the attorney's fee must be 'reasonable.'" (562/3096-97)

- Re. *Johnson* factors: "This mode of analysis, however, was not without its shortcomings. Its major fault was that it gave very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." (563/3097)

- Re. *Lindy* & Lodestar: "provided a more analytical framework"; "On the other hand, allowing the courts to adjust the lodestar amount based on considerations of the 'riskiness' of the lawsuit and the quality of the attorney's work could still produce inconsistent and arbitrary fee awards." (563)

- Re. *Hensley:* combine *Johnson* & Lodestar and okay to adjust up or down; but note that many of the *Johnson* factors are subsumed in Lodestar hours & rates already.

- Re. *Blum*: specific *Johnson* factors subsumed in Lodestar (see above list of precedents), so not okay to adjust up for quality except in VERY VERY rare cases.

- **"In short, the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance."** (566)

- We left open the question of calculating upward for contingency in *Blum*, and there's a bunch of Circuit Court splits on this. We'd like to argue this one in the future, plz.

Concurrence/Dissent: Blackmun (with Marshall and parts of Brennan):

- Court "improperly heightens the showing required [for adjustment upward for exceptional quality] to the point where it may be virtually impossible for a plaintiff to meet." (569)