# 1

523 F.3d 973
United States Court of Appeals,
Ninth Circuit.

Rita CAMACHO, on behalf of herself and all others similarly situated,
Plaintiff–Appellant,
v.
BRIDGEPORT FINANCIAL, INC.; Ray Lewis; Christina Harbridge,
Defendants–Appellees.

No. 07–15297.
|
Argued and Submitted March 13, 2008.
|
Filed April 22, 2008.

**Synopsis**

**Background:** After prevailing in Fair Debt Collection Practices Act (FDCPA) action against debt collector, 430 F.3d 1078, debtor moved for award of costs and attorney fees. The United States District Court for the Northern District of California, Charles R. Breyer, J., 2007 WL 1302731, entered award and debtor appealed.

**Holdings:** The Court of Appeals, Brunetti, Circuit Judge, held that:

[1] district court failed to identify the relevant community in awarding attorney fees;

[2] district court failed to address or determine the prevailing market hourly rate in awarding attorney fees; and

[3] district court abused its discretion by awarding a flat award of $500 without calculating the lodestar.

Vacated and remanded.

West Headnotes (23)

[1] **Federal Courts**
Costs and attorney fees

170BFederal Courts
170BXVIICourts of Appeals
170BXVII(K)Scope and Extent of Review
170BXVII(K)2Standard of Review
170Bk3612Remedial Matters
170Bk3617Costs and attorney fees
(Formerly 170Bk878, 170Bk776)

The Court of Appeals reviews the factual determinations underlying an award of attorney fees for clear error and the legal premises a district court uses to determine an award de novo.

1 Cases that cite this headnote

[2] **Federal Courts**
Costs and attorney fees

170BFederal Courts
170BXVIICourts of Appeals
170BXVII(K)Scope and Extent of Review
170BXVII(K)2Standard of Review
170Bk3612Remedial Matters
170Bk3617Costs and attorney fees
(Formerly 170Bk830)

If the Court of Appeals concludes that the district court applied the proper legal principles and did not clearly err in any factual determination, then it reviews an award of attorneys' fees for an abuse of discretion.

1 Cases that cite this headnote

[3] **Federal Civil Procedure**
Result; prevailing parties; "American rule"

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees

170Ak2737.1Result; prevailing parties; "American rule"

Generally, litigants in the United States pay their own attorneys' fees, regardless of the outcome of the proceedings.

2 Cases that cite this headnote

[4] **Antitrust and Trade Regulation**
Attorney fees

29TAntitrust and Trade Regulation
29TIIIStatutory Unfair Trade Practices and Consumer Protection
29TIII(E)Enforcement and Remedies
29TIII(E)7Relief
29Tk395Costs
29Tk397Attorney fees

The FDCPA's statutory language makes an award of fees mandatory. Fair Debt Collection Practices Act, § 813(a)(3), 15 U.S.C.A. § 1692k(a)(3).

27 Cases that cite this headnote

[5] **Federal Civil Procedure**
Amount and elements

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.4Amount and elements

District courts must calculate awards for attorney fees using the lodestar method and the amount of that fee must be determined on the facts of each case.

26 Cases that cite this headnote

[6] **Federal Civil Procedure**
Amount and elements

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.4Amount and elements

In calculating an award of attorney fees, the lodestar is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate.

159 Cases that cite this headnote

[7] **Federal Civil Procedure**
Amount and elements

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.4Amount and elements

Although in most cases, the lodestar figure is presumptively a reasonable attorney fee award, the district court may, if circumstances warrant, adjust the lodestar to account for other factors which are not subsumed within it.

36 Cases that cite this headnote

[8] **Federal Civil Procedure**
Discretion of court
**Federal Courts**
Costs and attorney fees

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2723Discretion of court
170BFederal Courts
170BXVIICourts of Appeals
170BXVII(K)Scope and Extent of Review
170BXVII(K)2Standard of Review
170Bk3612Remedial Matters
170Bk3617Costs and attorney fees
(Formerly 170Bk830)

The district court has a great deal of discretion in determining the reasonableness of an attorney fee award,

and as a general rule, the Court of Appeals defers to its determination; this discretion is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

3 Cases that cite this headnote

[9] **Antitrust and Trade Regulation**
Attorney fees

29TAntitrust and Trade Regulation
29TIIIStatutory Unfair Trade Practices and Consumer Protection
29TIII(E)Enforcement and Remedies
29TIII(E)7Relief
29Tk395Costs
29Tk397Attorney fees

In determining that $200 was reasonable hourly rate for services provided by debtor's attorneys in awarding attorney fees in FDCPA action, instead of requested hourly rates of $425 to $500, district court failed to identify the relevant community or explain the prevailing hourly rate in that community for similar services by attorneys of reasonably comparable skill, experience and reputation, and thus, remand was required. Fair Debt Collection Practices Act, § 813(a)(3), 15 U.S.C.A. § 1692k(a)(3).

143 Cases that cite this headnote

[10] **Federal Civil Procedure**
Amount and elements

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.4Amount and elements

When determining a reasonable hourly rate for an award of attorney fees, the relevant community is the forum in which the district court sits.

143 Cases that cite this headnote

[11] **Federal Civil Procedure**
Amount and elements

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.4Amount and elements

In determining the reasonable hourly rate for an award of attorney fees, rates outside the forum may be used if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case.

28 Cases that cite this headnote

[12] **Antitrust and Trade Regulation**
Attorney fees

29TAntitrust and Trade Regulation
29TIIIStatutory Unfair Trade Practices and Consumer Protection
29TIII(E)Enforcement and Remedies
29TIII(E)7Relief
29Tk395Costs
29Tk397Attorney fees

In determining that $200 was reasonable hourly rate for services provided by prevailing debtor's attorneys in awarding attorney fees in FDCPA action, instead of requested hourly rates of $425 to $500, district court failed to address or determine the prevailing market hourly rate in that district for work performed by debtor's attorneys, and thus, remand was required. Fair Debt Collection Practices Act, § 813(a)(3), 15 U.S.C.A. § 1692k(a)(3).

14 Cases that cite this headnote

81 Cases that cite this headnote

[13] **Federal Civil Procedure**
Amount and elements
**Federal Courts**
Costs and attorney fees

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.4Amount and elements
170BFederal Courts
170BXVIICourts of Appeals
170BXVII(K)Scope and Extent of Review
170BXVII(K)2Standard of Review
170Bk3612Remedial Matters
170Bk3617Costs and attorney fees
(Formerly 170Bk763.1)

While the Court of Appeals recognizes that determining an appropriate market rate for the services of a lawyer is inherently difficult when awarding attorney fees, the established standard when determining a reasonable hourly rate is the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation.

116 Cases that cite this headnote

[14] **Federal Civil Procedure**
Attorney fees

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2742Taxation
170Ak2742.5Attorney fees

To inform and assist the court in the exercise of its discretion, the burden is on the attorney fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.

[15] **Federal Civil Procedure**
Attorney fees

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2742Taxation
170Ak2742.5Attorney fees

In determining the prevailing market rate for an award of attorney fees, affidavits of the plaintiffs' attorneys and other attorneys regarding prevailing fees in the community, and rate determinations in other cases are satisfactory evidence of the prevailing market rate.

88 Cases that cite this headnote

[16] **Federal Civil Procedure**
Attorney fees

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2742Taxation
170Ak2742.5Attorney fees

The party opposing the application for an attorney fee award has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the facts asserted by the prevailing party in its submitted affidavits.

30 Cases that cite this headnote

[17] **Federal Civil Procedure**
Attorney fees

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2742Taxation
170Ak2742.5Attorney fees

In determining the prevailing market rate in awarding attorney fees, a district court abuses its discretion to the extent it relies on cases decided years before the attorneys actually rendered their services.

6 Cases that cite this headnote

[18] **Antitrust and Trade Regulation**
Attorney fees

29TAntitrust and Trade Regulation
29TIIIStatutory Unfair Trade Practices and Consumer Protection
29TIII(E)Enforcement and Remedies
29TIII(E)7Relief
29Tk395Costs
29Tk397Attorney fees

In order to encourage able counsel to undertake FDCPA cases, as congress intended, it is necessary that counsel be awarded fees commensurate with those which they could obtain by taking other types of cases. Fair Debt Collection Practices Act, § 813(a)(3), 15 U.S.C.A. § 1692k(a)(3).

8 Cases that cite this headnote

[19] **Antitrust and Trade Regulation**
Attorney fees

29TAntitrust and Trade Regulation
29TIIIStatutory Unfair Trade Practices and Consumer Protection
29TIII(E)Enforcement and Remedies
29TIII(E)7Relief
29Tk395Costs
29Tk397Attorney fees

In awarding attorney fees to prevailing debtor in FDCPA action, district court abused its discretion by awarding a flat award of $500 for time debtor's attorneys spent in establishing entitlement to and amount of fee, without calculating the lodestar. Fair Debt Collection Practices Act, § 813(a)(3), 15 U.S.C.A. § 1692k(a)(3).

33 Cases that cite this headnote

[20] **Federal Civil Procedure**
Attorney fees

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2742Taxation
170Ak2742.5Attorney fees

A request for attorney fees should not result in a second major litigation.

2 Cases that cite this headnote

[21] **Federal Civil Procedure**
Amount and elements

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.4Amount and elements

Despite a district court's discretion in determining the amount of an attorney fee award, it must calculate awards for attorney fees using the lodestar method.

25 Cases that cite this headnote

[22] **Federal Civil Procedure**
Amount and elements

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.4Amount and elements

The most useful starting point for determining the amount of a reasonable attorney fee award is the number of hours reasonably expended on the litigation

multiplied by a reasonable hourly rate.

93 Cases that cite this headnote

[23] **Federal Civil Procedure**
Amount and elements

170AFederal Civil Procedure
170AXIXFees and Costs
170Ak2737Attorney Fees
170Ak2737.4Amount and elements

A district court is required to calculate an award of attorney fees by first calculating the lodestar before departing from it.

6 Cases that cite this headnote

**Attorneys and Law Firms**

***975** Richard M. Pearl, Law Offices of Richard M. Pearl, Berkeley, CA; O. Randolph Bragg, Horwitz, Horwitz & Associates, Chicago, IL; Irving L. Berg, The Berg Law Group, Corte Madera, CA; and Richard J. Rubin, Santa Fe, NM, for the plaintiff-appellant.

Mark E. Ellis and June D. Coleman, Ellis, Coleman, Poirier, La Voie & Steinheimer, LLP, Sacramento, CA, for the defendants-appellees.

Appeal from the United States District Court for the Northern District of California; Charles R. Breyer, District Judge, Presiding. D.C. No. CV–04–00478–CRB/MEJ.

Before: STEPHEN REINHARDT, MELVIN BRUNETTI, and RAYMOND C. FISHER, Circuit Judges.

**Opinion**

BRUNETTI, Circuit Judge:

Rita Camacho (Camacho) appeals the district court's order awarding her $77,069.36 in merits fees, costs, and fees-on-fees. The district court determined Camacho's award by multiplying the number of hours worked by each of her three attorneys by an hourly rate of $200, by compensating Camacho for costs, and by ***976** awarding Camacho a "flat award" of $500. We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand.

**I. Facts and Proceedings Below**

In the underlying action, Camacho, a debtor, sued Bridgeport Financial, Inc. (Bridgeport Financial), a debt collector, in a putative class action alleging violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692g, 1692e. Camacho alleged that Bridgeport Financial misrepresented the rights of consumers in its initial collection letter by requiring her to dispute her debt in writing. Bridgeport Financial filed a motion to dismiss, arguing that section 1692g(a)(3) implicitly requires disputes to be made in writing. The district court denied Bridgeport Financial's motion to dismiss, certified the issue for interlocutory appeal, and we affirmed in a published opinion. *See* 430 F.3d 1078, 1082–83 (9th Cir.2005). We held that the district court correctly denied Bridgeport Financial's motion to dismiss because there is no writing requirement implicit in section 1692g(a)(3), and that Bridgeport Financial violated that section insofar as it stated that disputes must be made in writing. *Id.* at 1082.

On remand, the litigation focused on class certification, Bridgeport Financial's net worth, and the class remedy. After the district court approved a statewide class, consisting of more than 7,000 members, the parties settled. Pursuant to the parties' Class Action Settlement Agreement, the court ordered Bridgeport Financial to pay a cy pres award of $341.50 to Legal Services of Northern California for use in consumer education or representation, and $1,000 in actual and statutory damages to Camacho. Bridgeport Financial also agreed to pay reasonable and necessary attorneys' fees and costs, to be determined by the court absent an agreement by the parties. The parties did not reach an agreement and Camacho filed her Motion for an Award of Costs and Attorney Fees.

During the course of this litigation, three attorneys represented Camacho, Irving L. Berg (Berg), O. Randolph Bragg (Bragg), and Richard J. Rubin (Rubin). Berg and Bragg represented Camacho during proceedings in the district court, and

Camacho retained Rubin to handle the interlocutory appeal.

In her motion, Camacho sought to recover fees and costs totaling $167,434.36. This total included $56,142.50 (132.1 hours x $425/hour) in fees and $192.41 in costs for Berg; $72,772.50 (156.5 hours x $465/hour) in fees and $5,823.71 in costs for Bragg; $1,495.00 (13 hours x $115/hour) in fees for Bragg's law clerk/associate; $115.00 (1 hour x $115/hour) for the services of Bragg's paralegal; and $30,100.00 (60.2 hours x $500/hour) in fees and $793.24 in costs for Rubin. Included in the attorneys' requests were hours spent pursuing fees. Berg, Bragg, and Rubin each provided a declaration supporting their respective fee/costs requests, and Camacho also filed declarations from two additional attorneys in support of her motion. Bridgeport Financial filed an opposition to Camacho's motion which included numerous exhibits and declarations from two more attorneys.

Camacho also explained in her motion that her attorneys would submit a supplemental declaration detailing additional time and costs expended. Bragg ultimately did so, filing a supplemental declaration wherein he sought an additional $12,373.00: $7,533.00 (16.2 hours x $465/hour) in fees for his services, and $4,840.00 (24.2 hours x $200/hour) in fees for his law clerk/associate's services. Although Bridgeport Financial objected to portions of Camacho's three attorneys' declarations, and objected to the two additional attorneys' declarations and Bragg's supplemental ***977** declaration in their entirety, the district court never ruled on these objections and Bridgeport Financial never requested a ruling.

In its Second Amended Order, the district court noted that Camacho sought to recover $6,809.36 in litigation expenses and $160,625.00 in fees. This total reflects the amount requested in Camacho's initial motion, but does not account for the amount requested in Bragg's supplemental declaration. The court went on to explain that:

> Here, the Court is satisfied that the number of hours spent upon this case by [Camacho's] three attorneys ... is reasonable. The attorneys spent their time on motions brought by [Bridgeport Financial] and defending the case against an appeal brought by [Bridgeport Financial]. While the Court acknowledges that [Camacho's] three attorneys were already exceedingly well-versed on the narrow legal question presented in the case, the Court nonetheless finds that the hours spent on the matter were reasonable. The Court holds, however, that it would be unreasonable on the facts of this case to award the full amount requested by these attorneys. Rather than awarding the full hourly rate suggested by [Camacho], the Court finds, in rough accord with numerous other courts that have considered the issue in published and unpublished opinions, that a reasonable rate for fees for an action brought for the violation of a mandatory provision of the FDCPA is $200.00 per hour.

(Footnote omitted.) Therefore, the court awarded Berg $26,420.00 (132.1 hours x $200/hour), Bragg $31,300.00 (156.5 hours x $200/hour), and Rubin $12,040.00 (60.2 hours x $200) in fees. The court also awarded Berg $192.41, Bragg $5,823.71, and Rubin $793.24, their requested costs. The court then held that the fees submitted by Bragg on behalf of his law clerk/associate ($1,495.00) and paralegal ($115.00) were reasonable, but did not account for these amounts in its ultimate award. To this point, the court awarded Camacho $6,809.36 in costs, and $69,760.00 in fees.

Finally, the court found that while Camacho indicated an intent to seek a supplemental award of costs, expenses, and fees, a substantial award of fees-on-fees would be inappropriate in this case. The court explained that:

> Here, [Camacho's] counsel regularly represent litigants in FDCPA cases, and they are therefore experienced

> with the law governing awards of attorneys' fees and the process for recouping them. Indeed, as [Bridgeport Financial] points out, the materials submitted by [Camacho's] attorneys in support of the motion for costs and attorneys' fees in this case are virtually identical to the materials that these attorneys have submitted in other cases.

The court concluded that "[w]here ... the attorneys seeking fees support their motion with materials that are substantially unchanged from those filed by them in numerous other cases ... it would be inappropriate to award fees on fees on an hourly basis," and instead, the court awarded a "flat award" of $500. In the end, the district court awarded Camacho a total of $77,069.36 in fees and costs ($69,760.00 in fees, $6,809.36 in costs, and a $500 "flat award"). Camacho appealed.

## II. Standard of Review

[1] [2] "We review the factual determinations underlying an award of attorneys' fees for clear error and the legal premises a district court uses to determine an award de novo." *Ferland v. Conrad Credit Corp.,* 244 F.3d 1145, 1147–48 (9th Cir.2001) (per curiam) (citations omitted). "If we conclude that the district court applied the proper legal principles and did not clearly err in any factual determination, ***978** then we review the award of attorneys' fees for an abuse of discretion." *Id.* at 1148.

## III. Discussion

[3] [4] "Generally, litigants in the United States pay their own attorneys' fees, regardless of the outcome of the proceedings." *Staton v. Boeing Co.,* 327 F.3d 938, 965 (9th Cir.2003). However, "[i]n order to encourage private enforcement of the law ... Congress has legislated that in certain cases prevailing parties may recover their attorneys' fees from the opposing side. When a statute provides for such fees, it is termed a 'fee shifting' statute." *Id.* The FDCPA is one such statute, providing that any debt collector who fails to comply with its provisions is liable "in the case of any successful action ... [for] the costs of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1692k(a)(3). The FDCPA's statutory language makes an award of fees mandatory. *Tolentino v. Friedman,* 46 F.3d 645, 651 (7th Cir.1995). "The reason for mandatory fees is that congress chose a 'private attorney general' approach to assume enforcement of the FDCPA." *Id.*; *see also Graziano v. Harrison,* 950 F.2d 107, 113 (3d Cir.1991) (noting that the FDCPA "mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorneys general"). Here, pursuant to the Settlement Agreement, Bridgeport Financial agreed to pay reasonable and necessary attorneys' fees and costs.

[5] [6] [7] "District courts must calculate awards for attorneys' fees using the 'lodestar' method," *Ferland,* 244 F.3d at 1149 n. 4, and the amount of that fee must be determined on the facts of each case, *Hensley v. Eckerhart,* 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Ferland,* 244 F.3d at 1149 n. 4 (citation and internal quotation marks omitted). "Although in most cases, the lodestar figure is presumptively a reasonable fee award, the district court may, if circumstances warrant, adjust the lodestar to account for other factors which are not subsumed within it." *Id.*

Here, the district court first found that Camacho's three attorneys spent a reasonable number of hours on this case, specifically noting that they spent their time on motions brought by the defendant and successfully defending against an interlocutory appeal. The court made this finding after recognizing that the attorneys were exceedingly well-versed on the narrow legal question presented. Bridgeport Financial does not challenge this reasonableness finding.

The district court then decided that $200 was a reasonable hourly rate for the attorneys' services, holding that on the facts of this case it would be unreasonable to compensate Camacho's three attorneys at their requested hourly rates of $425, $465, and $500. The court did not specifically identify which facts made the attorneys' requested hourly rates unreasonable. Instead, in a single footnote, the court cited eleven cases to support its finding that $200 was in "rough accord" with

numerous other courts—all but one located in other communities—that had considered the issue in published and unpublished opinions.

[8] We acknowledge that the "district court has a great deal of discretion in determining the reasonableness of the fee," and that, as a general rule, we defer to its determination. *Gates v. Deukmejian,* 987 F.2d 1392, 1398 (9th Cir.1992). This discretion is "appropriate in view of the district court's superior understanding ***979** of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley,* 461 U.S. at 437, 103 S.Ct. 1933. Here, however, the district court erred by not identifying the relevant community, and by not explaining what was the prevailing hourly rate in that community for similar services by lawyers of reasonably comparable skill, experience and reputation, as well as by awarding a "flat award" of $500 for fees-on-fees.

**A. Relevant community**

[9] [10] [11] Camacho argues that the district court applied the wrong legal standard when determining a reasonable hourly rate because it did not consider rates in the relevant community. Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits. *Barjon v. Dalton,* 132 F.3d 496, 500 (9th Cir.1997). "[R]ates outside the forum may be used if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." *Id.* (citation and internal quotation marks omitted). Neither party contends that an exception to the general rule applies in this case; therefore, the relevant community is the Northern District of California (the Northern District).

Bridgeport Financial argues that the district court "expressly stated [that its] decision was based on the facts of the case," and so implicitly identified the Northern District as the relevant legal community. There is no indication in the record that the district court actually did so. We review the adequacy of the district court's own articulated reasoning, not the after-the-fact rationalizations offered by counsel. The district court cited eleven cases in its order, ten of which were decided outside the Northern District. So far as we can tell, the court relied almost exclusively on cases decided in the Southern District of Ohio, the District of Oregon, the Eastern District of New York, the Bankruptcy Court of the Southern District of Florida, and the Southern District of New York, none of which is the relevant community for determining Camacho's fee award. While the court's order includes one case from the Northern District, there is no indication that the court considered this case to be any more relevant to its analysis than the ten cases from outside the relevant community. We also note that the district court made no mention of a case decided in the Northern District, and cited by Bragg in his declaration, awarding Bragg fees at an hourly rate of $435. *See Defenbaugh v. JBC & Assocs., Inc.,* No. C–03–0651 JCS, 2004 WL 1874978, at *7 (N.D.Cal. Aug. 10, 2004), *aff'd by unpublished mem.,* No. 04–16866, 2006 U.S.App. LEXIS 19930 (9th Cir. Aug. 3, 2006).

Therefore, we remand for the district court to make a determination of the reasonable hourly rate on the basis of the prevailing rates in the Northern District, or a community shown to be comparable to the Northern District.

**B. Prevailing market rate**

[12] [13] While "[w]e ... recognize that determining an appropriate 'market rate' for the services of a lawyer is inherently difficult," *Blum v. Stenson,* 465 U.S. 886, 895 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), the established standard when determining a reasonable hourly rate is the "rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Barjon,* 132 F.3d at 502 (internal quotation marks omitted). Here, the district court failed to assess or determine the prevailing hourly rate in the Northern District for ***980** the work performed by Camacho's attorneys.

[14] [15] "To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum,* 465 U.S. at 895 n. 11, 104 S.Ct. 1541. As we have noted, "[a]ffidavits of the plaintiffs' attorney[s] and other attorneys regarding prevailing fees in the community, and rate determinations in other cases ... are satisfactory

  

evidence of the prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.,* 896 F.2d 403, 407 (9th Cir.1990).

Here, in addition to filing declarations from her three attorneys, Camacho also submitted declarations from two other attorneys. One of these attorneys declared that Berg, Bragg, and Rubin's requested rates of $425, $465, and $500 were within the range of prevailing market rates for attorneys with similar experience and abilities in the Northern District. Similarly, the second attorney declared that the hourly rates charged by Camacho's three attorneys were consistent with, if not slightly lower than, the prevailing market rates for attorneys with comparable skill, qualifications, experience, and reputations.

[16] However, declarations filed by the fee applicant do not conclusively establish the prevailing market rate. "The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the ... facts asserted by the prevailing party in its submitted affidavits." *Gates,* 987 F.2d at 1397–98. In support of its opposition to Camacho's motion, Bridgeport Financial filed the declarations of two attorneys from the law firm representing it in this case. One attorney declared that the reasonable market rate for the services provided by Camacho's three attorneys was in the $200 to $250 range, or perhaps even less. The other attorney's declaration (which was made in another case), indicated that the reasonable market rate for the services provided to the plaintiff in *that* case was in the $200 to $250 an hour range, or perhaps even less.

However, when the district court held that it would be unreasonable on the facts of this case to award the full hourly rates requested by Camacho's attorneys, the court did not identify which facts led to this conclusion, nor did the court indicate why an hourly rate of $200 was "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum,* 465 U.S. at 895 n. 11, 104 S.Ct. 1541. The district court did not discuss the declarations filed by either party, nor did the court distinguish between Camacho's three attorneys, though they each sought different hourly rates. We recognize that cases decided in the Northern District offer a wide spectrum of reasonable hourly rates, even for work performed by the same attorney. *Compare Defenbaugh,* 2004 WL 1874978, at *7 ($435 a reasonable hourly rate for Bragg's services), *with Johnson v. Credit Int'l, Inc.,* No. C–03–100 SC, 2005 WL 2401890, at *4 (N.D.Cal. July 28, 2005) ($250 a reasonable hourly rate for Bragg's services), *aff'd in part and vacated and remanded in part by unpublished mem.,* 257 Fed.Appx. 8, 9 (9th Cir.2007). In light of the above, we remand to the district court with instructions to determine the proper amount of fees applying the legal standard set forth above, and specifically by determining the prevailing hourly rate in the Northern District for work that is similar to that performed in this case, by attorneys with the ***981** skill, experience and reputation comparable to that of Camacho's attorneys.

[17] We also note that in determining the prevailing market rate a district court abuses its discretion to the extent it relies on cases decided years before the attorneys actually rendered their services. *Bell v. Clackamas County,* 341 F.3d 858, 869 (9th Cir.2003) (holding that it was an abuse of discretion to apply market rates in effect more than two years before the work was performed). Each of Camacho's attorneys began their services at different points in time, Berg in December 2003, Bragg in April 2004, and Rubin in January 2005. It is clear, therefore, that on remand the district court should not treat as dispositive the cases decided in 1998, 2000, and early in 2001 when determining the prevailing market rate for any of Camacho's attorneys, as it did in its Second Amended Order.

[18] Camacho also argues that the district court erred by relying solely on FDCPA cases in determining the prevailing market rate. Camacho is correct that "[i]n order to encourage able counsel to undertake FDCPA cases, as congress intended, it is necessary that counsel be awarded fees commensurate with those which they could obtain by taking other types of cases." *Tolentino,* 46 F.3d at 652; *see also Semar v. Platte Valley Fed. Sav. & Loan Ass'n,* 791 F.2d 699, 706 (9th Cir.1986) (explaining that reasonable hourly rate must be based on "customary fees in cases of like difficulty"). The record contradicts Camacho's assertion, however, that the court considered *solely* FDCPA cases, as the court included a trademark infringement case in its eleven-case footnote. *See Yahoo!, Inc. v. Net Games, Inc.,* 329 F.Supp.2d 1179 (N.D.Cal.2004). Again, however, the district court did not explain how this non-FDCPA case factored into its determination of the prevailing market rate, or

whether the court limited its analysis primarily to FDCPA cases. Therefore, we simply note that on remand the district court should not restrict its analysis to FDCPA cases, or assume, as it apparently did, that Camacho's particular FDCPA case was like the typical "action brought for the violation of a mandatory provision of the FDCPA" in terms of the complexity and difficulty of her attorneys' services, particularly given their successful defense of Bridgeport Financial's interlocutory appeal.

**C. Fees-on-fees**

[19] [20] Camacho also argues that the district court abused its discretion by awarding a "flat award" of $500 for fees-on-fees rather than applying the lodestar method to determine a reasonable fee. "In statutory fee cases, federal courts, including our own, have uniformly held that time spent in establishing the entitlement to and amount of the fee is compensable." *In re Nucorp Energy, Inc.,* 764 F.2d 655, 659–660 (9th Cir.1985). This is so because it would be inconsistent to dilute a fees award by refusing to compensate attorneys for the time they reasonably spent in establishing their rightful claim to the fee. *Id.* at 660; *Kinney v. Int'l Bhd. of Elec. Workers,* 939 F.2d 690, 695 (9th Cir.1991). However, "[a] request for attorney's fees should not result in a second major litigation," *Hensley,* 461 U.S. at 437, 103 S.Ct. 1933; and "[f]or rather obvious practical reasons we are loath to disturb a ruling by a district judge on a request for second-round attorneys' fees." *Muscare v. Quinn,* 680 F.2d 42, 44 (7th Cir.1982).

Here, the district court found that a substantial award of fees-on-fees would be inappropriate because Camacho's attorneys regularly represent litigants in FDCPA cases, they are experienced with the law governing fees and the process for recouping them, and the materials submitted ***982** in this case were virtually identical to those submitted by the attorneys in other cases. Therefore, the court concluded, it would be inappropriate to award fees-on-fees on an hourly basis; and instead, the court awarded a "flat award" of $500.

[21] Despite a district court's discretion in determining the amount of a fee award, it "must calculate awards for attorneys' fees using the 'lodestar' method." *Ferland,* 244 F.3d at 1149 n. 4. While in most cases the lodestar figure is presumptively reasonable, "in rare cases, a district court may make upward or downward adjustments to the presumptively reasonable lodestar on the basis of those factors set out in *Kerr v. Screen Extras Guild, Inc.,* 526, F.2d 67, 69–70 (9th Cir.1975), that have not been subsumed in the lodestar calculation." *Gates,* 987 F.2d at 1402 (internal citations omitted).[1]

Here, however, rather than calculating the lodestar, the district court concluded that "it would be inappropriate to award fees on fees on an hourly basis" and awarded Camacho a "flat award" of $500 without discussing, or even mentioning, Bragg's supplemental declaration. The court offered no authority to support its conclusion that the lodestar method could be abandoned in favor of a "flat award," Bridgeport Financial does not cite any, and we have found none. Nor did the district court articulate any reasons why the lodestar method could not adequately account for its specific concerns in this case.

[22] [23] Citing *Ferland,* Bridgeport Financial notes that a district court may reduce attorneys' fees by a percentage, so long as the court sets forth clear and concise reasons for adopting this approach. *See Ferland,* 244 F.3d at 1151 (explaining that the district court must both "explain adequately the decision to cut the lodestar hours ... by the across-the-board method" and "provide ... some explanation for the precise reduction chosen"); *Gates,* 987 F.2d at 1400 (recognizing that "percentages indeed are acceptable, and perhaps necessary, tools for district courts fashioning reasonable fee awards"). However, the district court did not make a percentage reduction *after* calculating the lodestar; instead, the district court abandoned the lodestar method in favor of a $500 "flat award." While we recognize a district court's discretion to adjust the presumptively reasonable lodestar figure, the fact remains that "[t]he 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." *Hensley,* 461 U.S. at 433, 103 S.Ct. 1933. "This circuit requires a district court to calculate an award of attorneys' fees by *first* calculating the 'lodestar' " before departing from it. *Caudle v. Bristow Optical Co., Inc.,* 224 F.3d 1014, 1028 (9th Cir.2000) (emphasis added). Therefore, the district court erred by awarding a "flat award," and on remand the court should calculate the lodestar to determine a presumptively

reasonable fees-on-fees award before assessing whether upward or downward adjustments are warranted.

Furthermore, while it is undisputed that Camacho's initial motion for costs and fees included time spent pursuing fees, the district court failed to explain why it applied the lodestar method (albeit with the errors identified above) to these fees-on-fees requests, but refused to do so for any supplemental ***983** requests. In the first part of its order, after acknowledging that the attorneys were "already exceedingly well-versed on the narrow legal question presented" the district court found all of the attorneys' hours in Camacho's initial motion to be reasonable and computed their fee awards accordingly. However, in the second part of its order, the court changed course, abandoned the lodestar method, and awarded a $500 "flat award" because the attorneys supported their motion with substantially unchanged materials. The court offered no explanation as to why it determined Camacho's fees-on-fees award in part using the lodestar method, and in part by awarding a $500 "flat award," when the court's concerns appear to focus on hours included in Camacho's initial application, which the court found reasonable. This apparent internal inconsistency is itself sufficient to remand for a redetermination of the fees-on-fees award employing the proper legal standard.

Finally, as far as we can tell, despite the court's finding that the $1,495.00 in fees requested by Camacho for Bragg's law clerk/associate's work and the $115.00 requested for the services rendered by Bragg's paralegal were reasonable, the court did not include these amounts in its final award. Therefore, on remand if it concludes again that Camacho is not entitled to fees for these services, the court shall explain the legal basis for that conclusion.

**VACATED and REMANDED.**

**All Citations**

523 F.3d 973, 08 Cal. Daily Op. Serv. 4617, 2008 Daily Journal D.A.R. 5661

Footnotes

1 The relevant factors include, for example, the preclusion of other employment by the attorney due to acceptance of the case; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the "undesirability" of the case; the nature and length of the professional relationship with the client; and awards in similar cases. *See Kerr,* 526 F.2d at 70.

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# 2

927 F.2d 1473, 19 Fed.R.Serv.3d 952, 33 Fed. R. Evid. Serv. 825
**(Cite as: 927 F.2d 1473)**

United States Court of Appeals,
Ninth Circuit.
John DAVIS; Wayne Broughton, a minor, through his guardian and mother Sharon Broughton; Doug Durbin; Ed Rodius, and Don Taylor, Plaintiffs-Appellees-Cross-Appellants,
v.
MASON COUNTY; Mason County Sheriff's Department; Pete Cribben, in his capacity as a Mason County Deputy Sheriff and as an individual; Jack Gardner, in his capacity as a Mason County Deputy Sheriff and as an individual; Susan Gardner, his wife, and the martial community composed thereof; Garry Ohlde, in his capacity as a Mason County Deputy Sheriff and as an individual; Doug Quantz, in his capacity as a Mason County Deputy Sheriff and as an individual, and; Ray Sowers, in his capacity as a Mason County Deputy Sheriff and as an individual, Defendants-Appellants-Cross-Appellees.

Nos. 88-3947, 88-4394 and 88-3951.
Argued, Submission Deferred Dec. 4, 1989.
Resubmitted Dec. 13, 1989.
Decided March 12, 1991.
As Amended May 6, 1991.
As Amended June 6, 1991.

In § 1983 action against county, its sheriff and several deputies, the United States District Court, Western District of Washington, Robert J. Bryan, J., entered judgment on jury verdict finding defendants liable for damages for excessive use of force used while arresting citizens in four separate incidents. Defendants appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) sheriff was official policymaker regarding law enforcement practices; (2) county's failure to adequately train its deputies as to constitutional limits of use of force was deliberate indifference to safety of county inhabitants as matter of law for purposes of § 1983 liability; (3) evidence supported award of punitive damages; and (4) evidence supported determination that plaintiff was "seized" when deputy's wife ordered him down from hay wagon and put him in patrol vehicle.

Affirmed.

Wallace, Chief Judge, filed concurring and dissenting opinion.

West Headnotes

**[1] Federal Courts 170B ⇨813**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk813 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases

District court's decision regarding severance may be set aside only for abuse of discretion; under abuse of discretion standard, reviewing court cannot reverse unless it has definite and firm conviction that district court made clear error of judgment in its conclusion. Fed.Rules Civ.Proc.Rule 42(b), 28 U.S.C.A.

**[2] Federal Courts 170B ⇨612.1**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of

Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk612 Nature or Subject-Matter of Issues or Questions
170Bk612.1 k. In General. Most Cited Cases
(Formerly 170Bk612)
County's failure to raise before district court issue of whether requirements for permissive joinder in § 1983 action were met precluded county from raising issue before Court of Appeals absent showing of any reasons why county failed to raise issue below. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 42(b), 28 U.S.C.A.

**[3] Federal Civil Procedure 170A 1956**

170A Federal Civil Procedure
170AXV Trial
170AXV(A) In General
170Ak1956 k. Separate Trial as to Particular Parties. Most Cited Cases
District court did not abuse its discretion in rejecting county's motion to sever claims of § 1983 plaintiffs; even if each plaintiff had separate trial, evidence of pattern of misconduct would still have been admitted because each plaintiff presented claim against at least one individual defendant and against county. Fed.Rules Civ.Proc.Rule 42(b), 28 U.S.C.A.

**[4] Federal Civil Procedure 170A 2142.1**

170A Federal Civil Procedure
170AXV Trial
170AXV(F) Taking Case or Question from Jury
170AXV(F)2 Questions for Jury
170Ak2142 Weight and Sufficiency of Evidence
170Ak2142.1 k. In General. Most Cited Cases
(Formerly 170Ak2142)
Directed verdict is proper if court finds that evidence and its inferences, viewed in light most favorable to nonmoving party, permits only one reasonable conclusion as to verdict.

**[5] Civil Rights 78 1345**

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1345 k. Acts of Officers and Employees in General; Vicarious Liability and Respondeat Superior in General. Most Cited Cases
(Formerly 78k206(2.1), 78k206(2))

**Civil Rights 78 1351(1)**

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom
78k1351(1) k. In General. Most Cited Cases
(Formerly 78k206(3))
Municipalities may be held liable under § 1983 for actions which result in deprivation of constitutional rights, but cannot be held liable on respondeat superior theory; municipal liability is incurred under § 1983 only when execution of government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts injury. 42 U.S.C.A. § 1983.

**[6] Civil Rights 78 1351(1)**

78 Civil Rights
78III Federal Remedies in General

78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom
78k1351(1) k. In General. Most Cited Cases
(Formerly 78k206(3))
To establish municipal liability under § 1983, it must be shown that decision maker possesses final authority to establish municipal policy with respect to action ordered. 42 U.S.C.A. § 1983.

**[7] Civil Rights 78 ⚿1351(4)**

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom
78k1351(4) k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k206(3))
As chief executive officers under Washington law, sheriffs possess final authority with respect to training of their deputies and, thus, their actions constitute county policy on subject for purposes of imposing municipal liability under § 1983. 42 U.S.C.A. § 1983; West's RCWA 36.28.010.

**[8] Civil Rights 78 ⚿1351(4)**

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom
78k1351(4) k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k206(3))
Sheriff was official policymaker regarding law enforcement practices for purposes of § 1983 municipal liability claim arising from deputies' use of excessive force while arresting citizens, even though sheriff did not have final authority over all employment practices; training of officers on use of force was type of law enforcement practice that fell squarely within sheriff's policymaking authority under Washington law. 42 U.S.C.A. § 1983; West's RCWA 36.28.010.

**[9] Federal Courts 170B ⚿630.1**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk630 Instructions
170Bk630.1 k. In General. Most Cited Cases
(Formerly 170Bk630)
County's failure to object to jury instruction in § 1983 action, that failure to train deputies concerning use of force could serve as basis of county liability if county exhibited "reckless disregard for" or "deliberate indifference" to safety of inhabitants, barred county from raising issue on appeal, as governing circuit case at time of instruction indicated that state of mind sufficient to find failure-to-train liability was not settled point of law. 42 U.S.C.A. § 1983.

**[10] Civil Rights 78 ⚿1437**

78 Civil Rights
78III Federal Remedies in General
78k1433 Instructions
78k1437 k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k245)
Jury instructions in § 1983 action al-

lowing jury to find municipal liability for failure to train deputies concerning use of force only upon showing of "reckless disregard" or "deliberate indifference" were not inconsistent with "deliberate indifference" standard enunciated by Supreme Court; definition of "reckless disregard" was effectively the same as cited Supreme Court language. 42 U.S.C.A. § 1983.

**[11] Civil Rights 78 ⇐1352(4)**

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1352 Lack of Control, Training, or Supervision; Knowledge and Inaction
78k1352(4) k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k206(4))

County's failure to adequately train its deputies as to constitutional limits of use of force was deliberate indifference to safety of county inhabitants as matter of law for purposes of imposing municipal liability under § 1983; sheriff department's "field training program" for deputies, although apparently adequate on paper, was never followed in practice. 42 U.S.C.A. § 1983.

**[12] Federal Courts 170B ⇐823**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk823 k. Reception of Evidence. Most Cited Cases

Trial court has broad discretion in admitting and excluding expert testimony and its decisions will not be reversed unless manifestly erroneous; thus, district court's evidentiary rulings are reviewed for abuse of discretion.

**[13] Federal Courts 170B ⇐823**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk823 k. Reception of Evidence. Most Cited Cases

Admission or exclusion of evidence under Federal Rule of Evidence addressing exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time or under rule addressing character evidence is reversible only for clear abuse of discretion. Fed.Rules Evid.Rules 403, 404, 28 U.S.C.A.

**[14] Federal Civil Procedure 170A ⇐2011**

170A Federal Civil Procedure
170AXV Trial
170AXV(C) Reception of Evidence
170Ak2011 k. In General. Most Cited Cases

Testimony of police expert was properly excluded in civil rights action as cumulative; county admitted that sheriff testified for defendants on same topic. Fed.Rules Evid.Rule 404, 28 U.S.C.A.

**[15] Federal Civil Procedure 170A ⇐2011**

170A Federal Civil Procedure
170AXV Trial
170AXV(C) Reception of Evidence
170Ak2011 k. In General. Most Cited Cases

Testimony of former county deputy who was not listed as witness in pretrial or-

der was properly excluded in civil rights action; witness' testimony would not only have been cumulative, but county offered no compelling reasons to add him as witness. Fed.Rules Evid.Rule 403, 28 U.S.C.A .

**[16] Civil Rights 78 ⚿1412**

78 Civil Rights
78III Federal Remedies in General
78k1408 Admissibility of Evidence
78k1412 k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k241)

Evidence of previous altercation involving plaintiff was properly excluded when offered to show plaintiff's proclivity to violence, in civil rights action arising from deputies' use of force. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

**[17] Evidence 157 ⚿506**

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k506 k. Matters Directly in Issue. Most Cited Cases

**Evidence 157 ⚿512**

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k512 k. Due Care and Proper Conduct in General. Most Cited Cases

Testimony of § 1983 plaintiffs' police expert, that sheriff was reckless in his failure to adequately train his deputies in use of force and that there was causal link between that recklessness and plaintiffs' injuries, was not improper opinion testimony on question of law, and was properly admitted. Fed.Rules Evid.Rules 702, 704, 28 U.S.C.A.; 42 U.S.C.A. § 1983.

**[18] Civil Rights 78 ⚿1465(1)**

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1465 Exemplary or Punitive Damages
78k1465(1) k. In General. Most Cited Cases
(Formerly 78k275(1))

Jury may award punitive damages under § 1983 when defendant's conduct was driven by evil motive or intent, or when it involved reckless or callous indifference to constitutional rights of others. 42 U.S.C.A. § 1983.

**[19] Civil Rights 78 ⚿1465(1)**

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1465 Exemplary or Punitive Damages
78k1465(1) k. In General. Most Cited Cases
(Formerly 78k275(1))

Plaintiff's inability to show compensable injury in § 1983 action does not bar award of punitive damages. 42 U.S.C.A. § 1983.

**[20] Civil Rights 78 ⚿1465(2)**

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1465 Exemplary or Punitive Damages
78k1465(2) k. Government Liability. Most Cited Cases
(Formerly 78k275(2))

Under § 1983, punitive damages may

not be recovered from municipalities. 42 U.S.C.A. § 1983.

**[21] Federal Courts 170B ⚿871**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk870 Particular Issues and Questions
170Bk871 k. Damages and Extent of Relief. Most Cited Cases

**Federal Courts 170B ⚿872**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk870 Particular Issues and Questions
170Bk872 k. Inadequate and Excessive Damages. Most Cited Cases

Unless amount of damages is grossly excessive, unsupported by evidence, or based solely on speculation, reviewing court must uphold jury's determination of amount.

**[22] Civil Rights 78 ⚿1465(1)**

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1465 Exemplary or Punitive Damages
78k1465(1) k. In General. Most Cited Cases
(Formerly 78k275(1))

Evidence in § 1983 action arising from deputies' excessive use of force was sufficient to support inference of reckless or callous indifference to plaintiffs' federally protected rights, providing basis for assessing punitive damages even if there was insufficient evidence of evil intent or motive. 42 U.S.C.A. § 1983.

**[23] Federal Courts 170B ⚿631**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk630 Instructions
170Bk631 k. Requests and Failure to Give Instructions. Most Cited Cases

Issue of whether jury should have been instructed to consider defendants' net worth in § 1983 action when assessing punitive damages was not preserved on appeal; county did not offer evidence before jury and did not object when jury was not instructed on issue. 42 U.S.C.A. § 1983.

**[24] Federal Courts 170B ⚿636**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)2 Objections and Exceptions
170Bk636 k. Necessity of Specific Objection or Exception. Most Cited Cases

In order to preserve issue on appeal, objections to jury instructions must be specific.

**[25] Civil Rights 78 ⚿1465(1)**

78 Civil Rights
78III Federal Remedies in General
78k1458 Monetary Relief in General
78k1465 Exemplary or Punitive Damages
78k1465(1) k. In General. Most Cited Cases
(Formerly 78k275(1))
Punitive damages assessed against individual defendants in § 1983 action would stand even though remedial measures were taken. 42 U.S.C.A. § 1983.

**[26] Federal Courts 170B ⚖846**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk846 k. Substantial Evidence. Most Cited Cases
If jury verdict is supported by substantial evidence, reviewing court must let it stand; "substantial evidence" is admissible evidence that reasonable minds might accept as adequate to support conclusion.

**[27] Federal Courts 170B ⚖847**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk847 k. Verdicts in General. Most Cited Cases
If sufficient evidence is presented to jury on particular issue and if jury instructions on issue stated law correctly, court must sustain jury's verdict.

**[28] Arrest 35 ⚖68(4)**

35 Arrest
35II On Criminal Charges
35k68 Mode of Making Arrest
35k68(4) k. What Constitutes Seizure. Most Cited Cases
Person is "seized" within meaning of Fourth Amendment whenever police officer restrains his or her freedom to walk or drive away. U.S.C.A. Const.Amend. 4.

**[29] Civil Rights 78 ⚖1420**

78 Civil Rights
78III Federal Remedies in General
78k1416 Weight and Sufficiency of Evidence
78k1420 k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k242(5))
Evidence supported jury's conclusion that § 1983 plaintiff had been illegally "seized" within meaning of Fourth Amendment; plaintiff testified that he stayed on wagon while deputy was beating plaintiff's uncle because he believed deputy would shoot and that he complied with order of deputy's wife to get off wagon and into patrol car thinking that she was police deputy as well. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 4.

**[30] Damages 115 ⚖57.10**

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.8 Nature of Injury or Threat in General
115k57.10 k. Physical Illness, Impact, or Injury; Zone of Danger. Most Cited Cases

(Formerly 115k56.20, 115k50)
Washington law does not require physical manifestations in order to make emotional distress claim.

**[31] Damages 115 ⚿192**

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k192 k. Mental Suffering and Emotional Distress. Most Cited Cases
Evidence, including testimony from physician that plaintiff suffered from posttraumatic stress syndrome as result of seeing his uncle bloodied by deputies and having gun pointed at him, supported jury's determination with respect to plaintiff's emotional distress claim under Washington law, that deputies' behavior was so outrageous as to go beyond bounds of decency.

**[32] Federal Civil Procedure 170A ⚿2723**

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2723 k. Discretion of Court. Most Cited Cases

**Federal Courts 170B ⚿830**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk830 k. Costs, Attorney Fees and Other Allowances. Most Cited Cases
District court has broad discretion to grant attorney fees and costs and Court of Appeals reviews its decision only for abuse of discretion.

**[33] Civil Rights 78 ⚿1486**

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1486 k. Services or Activities for Which Fees May Be Awarded. Most Cited Cases
(Formerly 78k301)
District court may not use § 1988 as basis to award expert witness fees exceeding statutory limits of $30 per day. 28 U.S.C.A. §§ 1821, 1920; 42 U.S.C.A. § 1988.

**[34] Civil Rights 78 ⚿1476**

78 Civil Rights
78III Federal Remedies in General
78k1476 k. Costs. Most Cited Cases
(Formerly 78k291)
Travel expenses were properly awarded to prevailing parties in § 1983 action under § 1988. 42 U.S.C.A. §§ 1983, 1988.

**[35] Civil Rights 78 ⚿1488**

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases
(Formerly 78k303)
Hourly rate allowed in attorney fee award to § 1983 plaintiffs of $135 per hour was reasonable for the Western District of Washington. 42 U.S.C.A. §§ 1983, 1988.

**[36] Civil Rights 78 ⚿1488**

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1488 k. Time Expended; Hourly Rates. Most Cited Cases
(Formerly 78k303)
Generally, relevant community for de-

termining reasonableness of attorney fee rates is one in which district court sits. 42 U.S.C.A. § 1988.

**[37] Civil Rights 78 ⇐1487**

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1487 k. Amount and Computation. Most Cited Cases
(Formerly 78k302)
Trial court in § 1983 action did not abuse its discretion in determining amount of attorney fee award to prevailing plaintiffs; trial court used lodestar method of calculation in addition to 12-factor analysis. 42 U.S.C.A. §§ 1983, 1988.

**[38] Civil Rights 78 ⇐1487**

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1487 k. Amount and Computation. Most Cited Cases
(Formerly 78k302)
"Lodestar" figure in context of calculating attorney fee award is multiplication of number of hours reasonably expended by reasonable hourly rate. 42 U.S.C.A. § 1988.

**[39] Civil Rights 78 ⇐1487**

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1487 k. Amount and Computation. Most Cited Cases
(Formerly 78k302)
Twelve factors enumerated for use in calculating attorney fee award include such considerations as novelty of case, experience, reputation and ability of attorneys, and skill required to perform legal service properly. 42 U.S.C.A. § 1988.

**[40] Civil Rights 78 ⇐1482**

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1482 k. Results of Litigation; Prevailing Parties. Most Cited Cases
(Formerly 78k296)
Attorney fees awarded in § 1983 action would not be reduced to extent that plaintiffs did not prevail on their claims for injunctive relief; plaintiffs submitted affidavit attesting to minute amount of time spent on injunction claim, county produced no evidence in support of assertion that plaintiffs spent much of their time working on injunction issue and plaintiffs prevailed on 18 of 20 basic verdicts. 42 U.S.C.A. §§ 1983, 1988.

***1477** Nancy K. McCoid, Merrick, Hofstedt and Lindsey, Seattle, Wash., for defendants-appellants.

Timothy K. Ford, Kathleen Wareham, MacDonald, Hoague & Bayless, Seattle, Wash., Robert Wilson-Hoss, Hoss & Wilson-Hoss, Shelton, Wash., for plaintiffs-appellees.

Appeal from the United States District Court for the Western District of Washington.

Before WALLACE, Chief Judge, PREGERSON and NELSON, Circuit Judges.

PREGERSON, Circuit Judge:
Mason County, its sheriff and several deputies appeal from a jury verdict finding them liable under 42 U.S.C. § 1983 for damages for excessive force used while ar-

resting citizens in four separate incidents. We affirm the jury verdict and find municipal liability of Mason County and the Sheriff's Department.

BACKGROUND

Each of the plaintiffs-appellees' complaints arose out of traffic stops which resulted in arrests, beatings, and false charges that were later dropped. The incidents occurred within a nine-month period between June, 1985 and March, 1986.

A. The Durbin Incident

Early on the morning of June 29, 1985 as Doug Durbin returned home from a local ***1478** tavern, Deputy Ray Sowers followed him and waited outside of Durbin's home. Deputy Tom Furrer later arrived as backup. Sowers, flicking an electric stun gun on and off, ordered Durbin out of his house. Durbin, who complied, was arrested for drunk driving. After taking one step toward his house, the two deputies tackled Durbin and threw him to the ground. Though Durbin never attempted to resist, Sowers began to beat him on the back of his head with his fist. In the patrol car on the way to the jail Sowers slammed on the brakes, causing Durbin, who was handcuffed and thus defenseless, to smash into the screen with his face.

Durbin was charged with driving while intoxicated [FN1], resisting arrest and obstructing an officer. Yet after Durbin signed a "Release and Satisfaction" against Mason County, the charges against him were dismissed.

FN1. Durbin's breathalyzer test, taken at the Mason County Jail, read .05, well below the legal definition of intoxication.

B. The Taylor Incident

Deputy Doug Quantz pulled over Don Taylor as he was driving through Shelton on the afternoon of July 20, 1985, allegedly for driving too fast. Quantz ordered Taylor to spread-eagle against the patrol vehicle and proceeded to conduct a pat-down search. Under the guise of this search, Quantz twisted the skin on Taylor's arms and legs, struck him on the sides, hit him in the testicles, and slammed him against the side of the patrol car. Later, in the jail elevator, Quantz hit Taylor in the kidneys with his fist.

After signing a "Partial Covenant Not to Sue," promising not to bring charges against Mason County, the charges against Taylor, including reckless driving, obstructing an officer, and resisting arrest, were dropped.

C. The Davis/Broughton Incident

John Davis and his fifteen year-old nephew, Wayne Broughton, were driving a loaded hay wagon drawn by a team of four horses on the afternoon of July 28, 1985. Because some cars were slowed behind the wagon, Deputy Jack Gardner came alongside the wagon in his patrol vehicle and, using his loudspeaker, ordered Davis to pull over. Davis lost control over the horses, who had been frightened by the noise of the loudspeaker. Gardner pulled in front of the wagon, took out his gun, pointed it at Davis and Broughton and threatened to shoot if they did not stop. As Davis got down from the wagon to attend to his horses, Gardner beat him on the legs with his nightstick and struck him on the head. He then knocked him down to the ground and continued to beat him. After Deputies Pete Cribben and Garry Ohlde arrived at the scene, all three hit him, kicked him, and shocked him with an electric stun gun. According to one witness, Davis

"looked like he had been dipped in a bucket of blood" after the officers finished beating him.

Deputy Gardner's wife, who had been riding with him as a passenger and who was not an officer, ordered Broughton down from the wagon, and then took him by the arm and put him in the patrol car. After being questioned for an hour, Broughton was released.

Davis was arrested and charged with felony assault, resisting arrest and obstructing an officer. The misdemeanor charges were dismissed, and a jury, which found that Davis was acting in self-defense, acquitted him of the felony charge.

D. The Rodius Incident

When Deputy Ray Sowers observed four young people talking between a car and a truck on the evening of March 15, 1986, he pulled over both vehicles. Sowers ordered Ed Rodius, a passenger in the truck, into the patrol car after he asked why they had been stopped. When Rodius refused to comply, Sowers jumped on Rodius, choked him, pulled on his hair, and then threw him to the ground and rubbed his face on the gravel of the parking lot.

***1479** Rodius was arrested and charged with possession of alcohol as a minor, purchasing liquor, and resisting arrest. Rodius was tried twice on the resisting arrest charge. The first trial resulted in a hung jury, and the second was declared a mistrial after the prosecution violated a motion *in limine* by referring to the case at bar in front of the jury. The Mason County Prosecutor's office eventually dismissed the charges.

In the present case, the jury returned verdicts against all the individual deputies and the County, awarding $528,000 in compensatory Punitive damages were awarded only against the individual deputies, not the County. The jury awarded $225,000 in punitive damages and $150,000 compensatory to Davis; $10,000 in punitive and $5,000 compensatory to Broughton; $25,000 in punitive and $5,000 compensatory to Durbin; $25,000 in punitive and $0 compensatory to Rodius; and $35,000 in punitive and $1,500 compensatory to Taylor. The district court awarded attorneys' fees, expenses, and costs to plaintiffs in the amount of $323,559.65.

Defendants-appellants timely appealed. This court has jurisdiction over the appeal under 28 U.S.C. § 1291.

DISCUSSION

*I. Whether the district court erred in denying defendants' motion to sever.*

Defendants-appellants (collectively "Mason County") argue that the district court erred in denying their motion to sever. This argument is based on two theories. First, they contend that the requirements for permissive joinder were not met. Second, they maintain that even if the requirements for permissive joinder were met, the motion to sever the plaintiffs' claims should have been granted because not doing so resulted in prejudice to the individual defendants.

[1] Federal Rule of Civil Procedure 42(b) gives a district court broad discretion to order separate trials. A district court's decision regarding severance may be set aside only for abuse of discretion. *United States v. Sanchez-Lopez,* 879 F.2d 541, 551 (9th Cir.1989). Under the abuse of discretion standard, a reviewing court cannot reverse unless it has a definite and firm conviction that the district court made a clear error of judgment in its conclusion. *Abatti*

*v. Commissioner,* 859 F.2d 115, 117 (9th Cir.1988).

A. Permissive Joinder

[2] Mason County did not raise the issue of whether the requirements for permissive joinder were met below. They are thus precluded from raising it now. This court will not "review an issue not raised below unless necessary to prevent manifest injustice." *International Union of Bricklayers and Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.,* 752 F.2d 1401, 1404 (9th Cir.1985). This court will address the issue only if the proponent can point to "exceptional circumstances why the issue was not raised below." *Id.* (quoting *Taylor v. Sentry Life Ins. Co.,* 729 F.2d 652, 655-56 (9th Cir.1984) (per curiam)). Because Mason County does not show any reasons why they failed to raise the issue below, this court will not consider the issue.

B. Prejudice to the Defendants-Appellants

[3] Mason County moved before trial to sever the claims of the plaintiffs because, they argued, joinder would result in prejudice to the individual defendants. It is true that by trying the claims against the individual defendants with the claims against Mason County and the Sheriff's Department, evidence of the series of incidents of excessive force involving different police officers which would have been inadmissible against individual defendants not involved in the particular episode, were admissible against the County and the Sheriff's Department in order to show a pattern of misconduct.

Yet, while severing the defendants would have surely eliminated this prejudice, severing the plaintiffs would not have solved the problem. Even if each plaintiff had a separate trial, evidence of a pattern of misconduct would still have been admitted because each plaintiff (except Taylor who did not sue Mason County) presented a claim against at least one defendant *and* against ***1480** the County. Since defendants requested severance of the *plaintiffs'* claims, the court below did not abuse its discretion in rejecting the motion.

*II. Whether the district court erred in not granting a directed verdict on the issue of municipal liability of Mason County and the Sheriff's Department, and whether the jury was properly instructed on the issue.*

[4] A directed verdict is proper if the court finds that the evidence and its inferences, viewed in the light most favorable to the non-moving party, permits only one reasonable conclusion as to the verdict. *Peterson v. Kennedy,* 771 F.2d 1244, 1256 (9th Cir.1985), *cert. denied,* 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986). A directed verdict "is inappropriate if there is substantial evidence to support a verdict for the non-moving party." *Id.* Jury instructions are reviewed for abuse of discretion. *Maxwell v. Hapag-Lloyd Aktiengesellschaft, Hamburg,* 862 F.2d 767, 768 (9th Cir.1988).

[5] Plaintiffs sued the individual deputies, Mason County, and the Sheriff's Department for violation of their federal constitutional rights protected by the Fourth Amendment. Municipalities may be held liable under 42 U.S.C. § 1983 for actions which result in a deprivation of constitutional rights. *Monell v. New York City Dep't of Social Servs.,* 436 U.S. 658, 690, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). However, a municipality cannot be held liable on a *respondeat superior* theory. *Id.* at 691, 98 S.Ct. at 2036. Municipal liability is incurred under section 1983 only when "execution of a government's

policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury...." *Id.* at 694, 98 S.Ct. at 2037.

The Supreme Court recently addressed the issue whether the inadequacy of police training may result in municipal liability under section 1983 in *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). In determining liability the Court said that the adequacy of the training program must be assessed in relation to the tasks the officers must perform. *Id.* at 390, 109 S.Ct. at 1205. Further, the failure to train must "reflect[ ] a 'deliberate' or 'conscious' choice by a municipality-a 'policy'...." *Id.* at 389, 109 S.Ct. at 1205.

A. Sheriff Nat Stairs was a policy-making official

[6][7] To establish municipal liability under section 1983, it must be shown that the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986) (plurality opinion). Because "municipalities often spread policymaking authority among various officers," a particular officer may have authority to establish binding policy with respect to particular matters, but not others. *Id.* at 483, 106 S.Ct. at 1300. According to Washington law, in counties organized like Mason County, "[t]he sheriff is the chief executive officer and conservator of the peace of the county." Wash.Rev.Code § 36.28.010 (1990). As chief executive officers, sheriffs possess final authority with respect to the training of their deputies, and thus it may be fairly said that their actions constitute county policy on the subject.

The dissent argues that "[f]inal authority for personnel administration does not rest with the county sheriff; rather it rests with the civil service commission." Dissenting opinion at 2630. This conclusion misses the point: the majority opinion holds that Mason County is liable as a matter of law for failing to train its officers on the constitutional limits of force-not for its hiring practices.

The purpose of the Washington Sheriff's Office Civil Service statute "is to establish a merit system of employment for county deputy sheriffs and other employees of the office of county sheriff...." Wash.Rev.Code § 41.14.010; *Fezzey v. Dodge,* 33 Wash.App. 247, 249, 653 P.2d 1359, 1361 (1982). To this end, the Commission is ***1481** empowered to make rules and regulations regarding "appointments, promotions, reallocations, transfers, reinstatements, demotions, suspensions, and discharges," along with "other matters connected with the general subject of personnel administration." Wash.Rev.Code § 41.14.060(1). But nowhere does the statute extend the Commission's powers to the field of law enforcement, or specifically in this case, *peace officer training. See Clallam County Deputy Sheriff's Guild v. Board of Clallam County Comm'rs,* 92 Wash.2d 844, 847, 601 P.2d 943, 946 (1979) (en banc) ("A full reading of [§ 41.14 of the Revised Code of Washington] reveals that in its enactment the legislature intended to preempt the coverage by county personnel systems of deputy sheriffs' *selection, promotion and termination* .") (emphasis added).

Our holding is consistent with the Supreme Court's teachings in *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915,

99 L.Ed.2d 107 (1988), and *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). Both provide for municipal liability in the circumstances here. The example in *Pembaur,* reiterated in *Praprotnik,* bears repeating:

> [T]he County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, *although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability.*

*Id.* at 483 n. 12, 106 S.Ct. at 1300 n. 12 (plurality opinion) (emphasis added); *see Praprotnik,* 485 U.S. at 140, 108 S.Ct. at 932 (Brennan, J., concurring).

[8] This example explains that a Sheriff can be the official policymaker regarding law enforcement practices without having final authority over all of its employees' employment practices. This is the case here. The training of peace officers on the use of force is a type of law enforcement practice that falls squarely within the policymaking authority of a County Sheriff.

B. Jury instructions with respect to municipal liability

[9] The trial judge instructed the jury that failure to train could serve as the basis of County liability if the County exhibited a "reckless disregard for" or a "deliberate indifference to" the safety of its inhabitants. The instructions given by the district court required a higher mental state than the "gross negligence" standard prescribed by this circuit at that time. *See Bergquist v. County of Cochise,* 806 F.2d 1364, 1369-70 (9th Cir.1986). The County did not object to the instructions. After trial, however, the Supreme Court held in *City of Canton v. Harris* that failure-to-train liability is proper "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 388, 109 S.Ct. at 1204.

Mason County now argues that it was reversible error to instruct on the "reckless disregard" standard for failure-to-train liability in addition to the "deliberate indifference" standard. We have held that where a jury instruction correctly stated the law of the circuit at the time it was given, yet subsequent authority changed the law, consideration on appeal is not barred by the fact that no exception was taken to the instruction at the time of trial. *Robinson v. Heilman,* 563 F.2d 1304, 1307 (9th Cir.1977). "No exception is required when it would not have produced any results in the trial court because a 'solid wall of Circuit authority' then foreclosed the point." *Id.* The rationale for this rule is that while district courts should not be burdened by objections to settled points of law, neither should parties be penalized for failing to object if this settled law is later overturned.

*Bergquist* is not, however, a "solid wall of Circuit authority" regarding the mental state sufficient to find failure-to-train liability. Although in *Bergquist* we did hold that a policy of gross negligence in training could give rise to a claim for section 1983 ***1482** liability, we said that "[t]he Supreme Court expressly reserved the question whether 'something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.' " *Bergquist,* 806 F.2d at 1370 (quoting

*Daniels v. Williams,* 474 U.S. 327, 334 n. 3, 106 S.Ct. 662, 667 n. 3, 88 L.Ed.2d 662 (1986)). The Supreme Court subsequently answered this question in *City of Canton.* In *Bergquist,* by saying that the question was left open by the Supreme Court, we clearly indicated that the state of mind sufficient to find failure-to-train liability was not a settled point of law. Thus, the *Robinson* exception for waiving objections does not apply to the issue in this case. Mason County, having failed to object to the jury instruction, lost the right to raise this issue on appeal. *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc.,* 732 F.2d 1403, 1410 (9th Cir.1984).

[10] Even if Mason County did object to the jury instruction regarding the standard for municipal liability, we still would hold that the district court did not commit reversible error. "We examine whether or not the instructions taken as a whole were misleading or represented a statement inadequate to guide the jury's deliberations." *United States v. Kessi,* 868 F.2d 1097, 1101 (9th Cir.1989). The instructions given by the district court allowed the jury to find municipal liability only upon a showing of "reckless disregard" or "deliberate indifference." We do not find the court's instructions, taken as a whole, to be inconsistent with the "deliberate indifference" standard enunciated in *City of Canton.* In *City of Canton,* the Court stated that "the need for more or different training [may be] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent." 489 U.S. at 390, 109 S.Ct. at 1205.

Similarly, the district court in this case instructed that a person acts with reckless disregard when he "disregards a substantial risk that a wrongful act may occur *of which he is aware, or which is so obvious that he must have been aware of it,* and his disregard of that risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." (Emphasis added). The district court's definition of reckless disregard is effectively the same as the language cited from *City of Canton;* both allow a jury to impose municipal liability in failure-to-train cases for acts that so clearly violate the rights of an individual that the policymakers can be said to be deliberately indifferent.

In fact, after *City of Canton,* two circuits have suggested that § 1983 liability may be imposed on a municipality if it exhibits a "reckless disregard" for an individual's constitutional rights. *See D.T. v. Independent School Dist. No. 16,* 894 F.2d 1176, 1192-93 (10th Cir.) ("[u]nder the standard [for municipal liability] mandated by [*City of Canton* ] ... the evidence in this case is simply insufficient to demonstrate that the School District's policy reflected a *reckless disregard or deliberate indifference* ") (emphasis added), *cert. denied,* 498 U.S. 879, 111 S.Ct. 213, 112 L.Ed.2d 172 (1990); *Clipper v. Takoma Park, Maryland,* 876 F.2d 17, 20-21 (4th Cir.1989) (reaffirming the "deliberate indifference to or reckless disregard to" standard used in *Spell v. McDaniel,* 824 F.2d 1380 (4th Cir.1987), *cert. denied,* 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 765 (1988)). *But see Calvert Ins. Co. v. Western Ins. Co.,* 874 F.2d 396, 400 n. 5 (7th Cir.1989) ("[a] recent Supreme Court case has held that an allegation of mere reckless failure to train does not state a cause of action against a municipality under § 1983").

C. Failure-to-train liability as a matter of

law

[11] The jury instructions on this issue were nevertheless harmless because Mason County's failure to adequately train its deputies constituted deliberate indifference as a matter of law.

The training that the deputies received was woefully inadequate, if it can be said to have existed at all. Sheriff Stairs himself never attended the State Training ***1483** Academy and Undersheriff Harry "Bud" Hays had neither training nor experience. Although Washington law requires all police officers to complete academy training within fifteen months of hire,[FN2] Deputy Sowers did not complete the academy until sixteen months after he was hired.

FN2. Wash.Rev.Code § 43.101.200 (1990).

Instead of academy training, the Sheriff's Department devised a "field training program" for the officers. While this program may have seemed adequate on paper, in practice it was never followed. Indeed, one of the Department's two original field training officers, both of whom quit, called the program "a joke." The field training program was supposed to include tests, reports, and reviews by the field training officer and supervising sergeant on a periodic basis, yet there is no evidence that this was ever done. Although the program was supposed to last twelve months, in actuality it lasted only for a small fraction of that time. [FN3] One of plaintiffs' experts testified that as a result of the inadequacy of the field training program, the Department "sent officers out on the street to perform police services without any training whatsoever." The officers involved in these four incidents had received minimal or no training.

FN3. Sowers received only three or four weeks in field training before he was sent out on patrol alone.

At the time of the Durbin incident (June 29, 1985), Sowers had not attended the State Academy. His only training besides minimal field training, which was cut short, consisted of the explorer cadets, a program in which teenagers with interest in law enforcement rode with officers. Deputy Quantz had received no training whatsoever prior to the Taylor incident (July 20, 1985). [FN4] Although Deputies Gardner and Ohlde had attended the State Academy prior to the Davis incident (July 28, 1985), Deputy Cribben had not. He had only received minimal police-type training in other contexts, such as a private security guard.

FN4. Although Taylor did not sue the Mason County, this fact is still relevant to show the County's practice in training its officers.

The issue is not whether the officers had received *any* training-most of the deputies involved had some training, even if it was minimal at best-rather the issue is the adequacy of that training. *City of Canton,* 489 U.S. at 390, 109 S.Ct. at 1205. More importantly, while they may have had some training in the use of force, they received no training in the constitutional limits of the use of force. The Supreme Court in *City of Canton* declared: if "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, ... the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* The Court went on to say in a footnote that "the need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious,' that failure to do so

could properly be characterized as 'deliberate indifference' to constitutional rights." *Id.* at 390 n. 10, 109 S.Ct. at 1205 n. 10 (citation omitted).

In the case at bar, the deprivation of plaintiffs' Fourth Amendment rights was a direct consequence of the inadequacy of the training the deputies received. Mason County's failure to train its officers in the legal limits of the use of force constituted "deliberate indifference" to the safety of its inhabitants as a matter of law.[FN5] Moreover, there was certainly more than enough evidence presented regarding the inadequacy of training in order to survive Mason County's motion for a directed verdict on the issue of municipal liability.

> FN5. Since we have found failure-to-train liability as a matter of law, there is no need to inquire into whether the two other grounds upon which plaintiffs state their claim-negligent hiring practices and failure to provide adequate supervision-subjected the County to liability.

*III. Whether the district court erred in various rulings related to the admission of evidence.*

[12][13] Defendants-appellants object to various of the district court's evidentiary ***1484** rulings. A trial court has broad discretion in admitting and excluding expert testimony and its decisions will not be reversed unless "manifestly erroneous." *Taylor v. Burlington N.R.R.,* 787 F.2d 1309, 1315 (9th Cir.1986). Thus, its evidentiary rulings are reviewed for an abuse of discretion. *Roberts v. College of the Desert,* 870 F.2d 1411, 1418 (9th Cir.1988) . The admission or exclusion of evidence under Fed.R.Evid. 403 or 404 is reversible only for a clear abuse of discretion. *Coursen v. A.H. Robins Co.,* 764 F.2d 1329, 1333, *amended,* 773 F.2d 1049 (9th Cir.1985).

A. Testimony of Dr. Kevin Parsons

[14] Mason County contends that the district court improperly excluded the testimony of one of their police experts, Dr. Kevin Parsons. A district court may exclude relevant, but cumulative evidence, because of "considerations of undue delay, waste of time, or needless presentation." Fed.R.Evid. 403. The court ruled that each side was free to call two experts to the stand. Mason County argues that the testimony of their third witness, Dr. Parsons, was necessary, not cumulative, because he "brought a different level of expertise and experience to the topic." But the County admitted that Sheriff Jones testified for them on the "same topic." The district court therefore did not abuse its discretion by excluding Dr. Parson's testimony as cumulative evidence.

B. Testimony of Bryan Kelly and Mike Smith

[15] Mason County maintains that the trial court erred in excluding the testimony of former Mason County deputies Bryan Kelly and Mike Smith regarding the Taylor arrest. However, the district court *did* grant the County's motion to include Kelly to its witness list; Mason County never called Kelly.

Smith was not listed as a witness in the pretrial order, and it was not until late in the trial that Mason County moved to include him. Not only would Smith's testimony have been cumulative, Mason County offered no compelling reasons to add him. Fed.R.Evid. 403 gives the district court broad discretion in excluding cumulative evidence. *See Hamling v. United States,* 418 U.S. 87, 127, 94 S.Ct. 2887,

2912, 41 L.Ed.2d 590 (1974). The district court did not abuse its discretion in excluding Smith's testimony.

C. Testimony on the James Davies incident

[16] The day before the Davis/Gardner incident, there was an altercation between John Davis and James Davies. Davies, allegedly drunk and annoyed at being caught behind Davis' wagon, attacked Davis' teenage son. In defending his son, Davis bloodied Davies' nose. Although Davis filed a police report reporting the incident, he did not press charges against Davies for initiating the attack, and the matter was dropped. Yet after the Davis/Gardner incident, the Sheriff's Department brought assault charges against Davis, who was acquitted in a jury trial.

Mason County sought to bring in evidence regarding this incident in order to show Davis' proclivity to violence. Fed.R.Evid. 404(b) says, however, that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." *See Coursen v. A.H. Robins Co., Inc.,* 764 F.2d at 1335. The trial court did not abuse its discretion in refusing to admit evidence of the Davies incident.

D. Testimony of Donald Van Blaricom

[17] Mason County objected to plaintiffs' police expert, Donald Van Blaricom, because he testified that Sheriff Stairs was reckless in his failure to adequately train his deputies, and that there was a causal link between this recklessness and plaintiffs' injuries. They contend that this was improper opinion testimony on a question of law.

This argument is without merit. Fed.R.Evid. 704 allows expert witnesses to express an opinion on an ultimate issue to be decided by the jury. ***1485***Northrop Architectural Sys. v. Lupton Mfg. Co.,* 437 F.2d 889, 891 (9th Cir.1971). Moreover, Fed.R.Evid. 702 permits expert testimony comparing conduct of parties to the industry standard. *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.,* 803 F.2d 454, 461 (9th Cir.1986). The trial court did not abuse its discretion in admitting Van Blaricom's testimony.

*IV. Whether there was sufficient evidence to support the findings of punitive damages in the amount assessed.*

[18][19][20] The jury awarded punitive damages against the individual deputies totalling $320,000.[FN6] A jury may award punitive damages under section 1983 either when a defendant's conduct was driven by evil motive or intent, or when it involved a reckless or callous indifference to the constitutional rights of others. *Smith v. Wade,* 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983). Moreover, a plaintiff's inability to show compensable injury does not bar the award of punitive damages. *Id.* at 55 n. 21, 103 S.Ct. at 1639 n. 21.

FN6. Punitive damages were not awarded against Mason County. Under § 1983, punitive damages may not be recovered from municipalities. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 271 (1981); E. Chemerinsky, *Federal Jurisdiction* § 8.11, at 477 (1989) ("Punitive damages may be recovered from individual officers, although not from government entities.").

[21] Unless the amount of damages is grossly excessive, unsupported by the evidence, or based solely on speculation, the reviewing court must uphold the jury's de-

termination of the amount. *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League,* 791 F.2d 1356, 1360 (9th Cir.1986), *cert. denied,* 484 U.S. 826, 108 S.Ct. 92, 98 L.Ed.2d 53 (1987).

The deputies make four arguments regarding the amount of punitive damages awarded. First, they argue that the punitive damages award should be stricken because there was insufficient evidence of any evil intent or motive. Second, they contend that the jury should have been instructed that their net worth should be considered in assessing punitive damages. Third, the deputies assert that because remedial measures were taken, punitive damages were unnecessary. Finally, they argue that since the jury awarded Rodius $0 in compensatory damages, he should not have been awarded punitive damages.

A. Reckless or callous indifference

[22] The deputies' argument that the punitive damages award should be stricken because there was insufficient evidence of evil intent or motive is completely without merit because the alternative basis for assessing punitive damages is "reckless or callous indifference to the federally protected rights of others." *Smith v. Wade,* 461 U.S. at 56, 103 S.Ct. at 1640. The jury could certainly infer that there was "reckless or callous indifference" based upon the evidence presented of the excessive force used.

B. Deputies' net worth

[23][24] Plaintiffs concede that evidence of the deputies' net worth would have been relevant in assessing punitive damages. However, the deputies did not offer this evidence before the jury, and they did not object when the jury was not instructed on this issue. In order to preserve the issue on appeal, objections to jury instructions must be specific. *Kopczynski v. The Jacqueline,* 742 F.2d 555, 560 (9th Cir.1984), *cert. denied,* 471 U.S. 1136, 105 S.Ct. 2677, 86 L.Ed.2d 696 (1985). We will not consider the issue on appeal.

C. Remedial measures

[25] The deputies believe that the remedial measures taken rendered punitive damages unnecessary. Yet, they have failed to cite any Ninth Circuit case which supports this proposition. Further, punitive damages were assessed only against individual defendants. The jury obviously felt that the punitive damages were necessary to deter future unlawful and egregious behavior by the deputies. The jury's decision on this issue should stand.

D. Compensatory damages

Rodius received $25,000 in punitive damages and $0 in compensatory damages. ***1486** The deputies' argument that the jury erred in awarding punitive damages while not awarding compensatory damages fails. The Supreme Court has held that punitive damages may be available under Section 1983 where there has been a violation of constitutional rights even though the victim is unable to show compensable injury. *Smith v. Wade,* 461 U.S. at 55 n. 21, 103 S.Ct. at 1639 n. 21.

*V. Whether there was sufficient evidence both to show that Broughton had been seized and to support his state law outrage claim.*

The jury ruled that Broughton had been illegally seized when Deputy Gardner's wife ordered him down from the hay wagon, and then took him by the arm and put him in the patrol vehicle. Mason County claims that there is insufficient evidence to sustain the jury's verdict on this issue.

[26][27] If the jury verdict is supported

by "substantial evidence," the reviewing court must let it stand. "Substantial evidence" is admissible evidence that reasonable minds might accept as adequate to support a conclusion. *Oltz v. St. Peter's Community Hosp.,* 861 F.2d 1440, 1450 (9th Cir.1988); *Transgo, Inc. v. Ajac Transmission Parts Corp.,* 768 F.2d 1001, 1014 (9th Cir.1985), *cert. denied,* 474 U.S. 1059, 106 S.Ct. 802, 88 L.Ed.2d 778 (1986). If sufficient evidence is presented to a jury on a particular issue and if the jury instructions on the issue stated the law correctly, the court must sustain the jury's verdict. *Transgo,* 768 F.2d at 1014.

A. Jury instruction

[28] The district court instructed the jury that "[a] person is seized within the meaning of the Fourth Amendment whenever a police officer restrains his or her freedom to walk or drive away." This instruction stated the law correctly. *See Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985).

[29] Moreover, there was certainly ample evidence from which the jury could infer that Deputy Gardner restrained Broughton's freedom to walk away. Broughton testified that he stayed on the wagon because he believed that Gardner would shoot. When Susan Gardner, the deputy's wife, ordered Broughton off the wagon and into the patrol car, he complied, thinking that she was a police officer as well. Broughton also testified that Susan Gardner forcibly took him by the arm and put him in the patrol car. From this evidence, it is clear that the jury could conclude that Broughton had been illegally seized.

B. Broughton's emotional distress claim

[30] Although Mason County argues that Broughton cannot state a claim for emotional distress because he has not exhibited any objective symptoms of emotional distress, Washington law does not require physical manifestations in order to make an emotional distress claim. *Contreras v. Crown Zellerbach,* 88 Wash.2d 735, 741 n. 2, 565 P.2d 1173, 1176 n. 2 (1977) (quoting *Grimsby v. Samson,* 85 Wash.2d 52, 59, 530 P.2d 291, 295 (1975)).

[31] Further, the jury had to evaluate defendants' behavior in this incident and determine whether it was so outrageous as to go beyond bounds of decency. *Spurrell v. Bloch,* 40 Wash.App. 854, 701 P.2d 529, 535, *review denied,* 104 Wash.2d 1014 (1985). After hearing testimony from Dr. Beaton that Broughton suffered from post-traumatic stress syndrome as a result of seeing his uncle bloodied by the deputies and having a gun pointed at him, the jury decided in the affirmative the fact question of whether the defendants' behavior was "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community." Having so decided, the jury's verdict should stand.

**1487 VI. Whether the district court erred in calculating attorneys' fees.*

[32] A district court has broad discretion to grant attorneys' fees and costs. *Thornberry v. Delta Air Lines, Inc.,* 676 F.2d 1240, 1242 (9th Cir.1982), *vacated on other grounds,* 461 U.S. 952, 103 S.Ct. 2421, 77 L.Ed.2d 1311 (1983). We review its decision only for an abuse of discretion. *Id.* "Due to the trial judge's familiarity with the litigation, review of the trial court's exercise of discretion in awarding attorneys' fees is narrow." *Id.*

Plaintiffs-appellees requested $575,658.13 in attorneys' fees and

$99,201.63 in costs and expenses of litigation pursuant to the Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. The district court awarded $4,348.57 in costs pursuant to 28 U.S.C. § 1920, and $249,588.00 in attorneys' fees and $69,623.08 in expenses of litigation under 42 U.S.C. § 1988. Mason County contests the award of expert witness fees, travel expenses, and attorneys' fees.

A. Expert Witness Fees

The district court granted $29,217.18 for plaintiffs' expert witnesses, the largest element of expenses awarded. Mason County argues that payment of expert witness fees as expenses is precluded by the Supreme Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). *Crawford Fitting* holds that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] § 1821(b), absent contract or explicit statutory authority to the contrary." 482 U.S. at 439, 107 S.Ct. at 2496. [FN7]

FN7. 28 U.S.C. § 1821(b) limits witness fees to $ 30.00 per day.

Plaintiffs originally contended that 42 U.S.C. § 1988 provides statutory authority for awarding expert witness fees greater than those allowed under 28 U.S.C. § 1821, a question left open in *Crawford Fitting. See* 482 U.S. at 445, 107 S.Ct. at 2499 (Blackmun, J., concurring) ("I join the Court's opinion and its judgment but upon the understanding that it does not reach the question whether, under 42 U.S.C. § 1988, a district court may award fees for an expert witness."). In our opinion filed March 12, 1991, we held that, consistent with the majority of circuit courts to consider the issue, section 1988 allows a prevailing plaintiff to recover reasonable expert witness fees regardless of the limits of 28 U.S.C. §§ 1821 and 1920. [FN8] But after the opinion was filed the Supreme Court in *West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (March 19, 1991), reached the opposite conclusion. The Court held that "[ 42 U.S.C.] § 1988 conveys no authority to shift expert fees." 499 U.S. at ----, 111 S.Ct. at 1148.

FN8. 28 U.S.C. § 1920 reads:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title.

[33] In their motion to modify our March 12, 1991 opinion, plaintiffs now concede that, under *Casey,* the district court's award of expert witness fees cannot stand. Under *Casey,* the district court may not use section 1988 as a basis to award expert witness fees in excess of the limits imposed by 28 U.S.C. §§ 1821 and 1920. We remand to the district court with instructions to modify the award of expert witness fees consistent with *Casey.*

***1488** B. Travel Expenses

[34] Mason County contends that costs other than expert witness fees should also be limited to those available under 28 U.S.C. § 1920. The only costs disputed below were travel expenses. Because this court will not consider issues not raised below, our review will be limited to travel expenses. *See Amalgamated Clothing & Textile Workers Union v. Murdock,* 861 F.2d 1406, 1420 (9th Cir.1988).

Mason County fails to see that like the expert witness fees, the travel expenses were not granted as costs under section 1920, but rather as out-of-pocket expenses, compensable under section 1988. Courts have generally held that expenses incurred during the course of litigation which are normally billed to fee-paying clients should be taxed under section 1988. *Dowdell v. City of Apopka,* 698 F.2d 1181, 1190 (11th Cir.1983); *Palmigiano v. Garrahy,* 707 F.2d 636, 637 (1st Cir.1983); *Northcross v. Board of Educ.,* 611 F.2d 624, 639 (6th Cir.1979), *cert. denied,* 447 U.S. 911, 100 S.Ct. 2999, 3000, 64 L.Ed.2d 862 (1980). As the Eleventh Circuit said in *Dowdell:*

> Reasonable attorneys' fees under the [Attorney's Fees Awards] Act must include reasonable expenses because attorneys' fees and expenses are inseparably intertwined as equally vital components of the costs of litigation. The factually complex and protracted nature of civil rights litigation frequently makes it necessary to make sizeable out-of-pocket expenditures which may be as essential to success as the intellectual skills of the attorneys. If these costs are not taxable, and the client, as is often the case, cannot afford to pay for them, they must be borne by counsel, reducing the fees award correspondingly.

698 F.2d at 1190. Thus, following the reasoning adopted in upholding the award of expert witness fees, we also affirm the district court's award of travel expenses pursuant to section 1988.

However, it is unclear why the district court granted $12,845.25 for travel expenses as part of the $249,588.00 attorneys' fees, and $4,135.83 for travel expenses as part of the $69,623.08 award for expenses of litigation. Because the award of travel expenses may have been double-counted, we remand on this issue.

C. Attorneys' fees

Mason County disputes the amount awarded in attorneys' fees. Specifically, they question whether $135/hour accurately reflected the prevailing market rate in Western Washington. Further, they argue that the award should have been adjusted for billing judgment and reduced to the extent plaintiffs did not prevail on their claims for injunctive relief.

[35][36] First, the hourly rate granted was reasonable for the Western District of Washington. Plaintiffs submitted affidavits from the relevant community in support of their hourly fee request. Generally, the relevant community is one in which the district court sits. *Polk v. New York State Dep't. of Correctional Servs.,* 722 F.2d 23, 25 (2d Cir.1983); *Avalon Cinema Corp. v. Thompson,* 689 F.2d 137, 140 (8th Cir.1982). Western Washington is the relevant community here, for it is where the court is located and where three of plaintiffs-appellees' attorneys practice. The court did not abuse its discretion in setting the hourly fees based on the prevailing rates there.

[37][38][39] Second, the court did not abuse its discretion in determining the

amount of the award. The trial court used the "lodestar" method of calculation in addition to the twelve-factor analysis. The "lodestar" figure is simply the multiplication of the number of hours reasonably expended by the reasonable hourly rate. *Jordan v. Multnomah County,* 815 F.2d 1258, 1262 (9th Cir.1987). The twelve factors, as outlined in ***1489***Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir.1974) and in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir.1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976), include such considerations as the novelty of the case, the experience, reputation and ability of the attorneys, and the skill required to perform the legal service properly. After careful consideration of the twelve factors, the district court granted $249,588.00 in fees. There was no abuse of discretion.

[40] Third, attorneys' fees should not be reduced to the extent that plaintiffs-appellees did not prevail on their claims for injunctive relief. Plaintiffs submitted an affidavit which attested to the minute amount of time actually spent on the injunction claim. Mason County did not produce any evidence in support of their assertion that plaintiffs spent "much of their time" working on the issue of injunctive relief. Moreover, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.... In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley v. Eckerhart,* 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983). There were excellent results in this case. The jury returned verdicts in favor of every plaintiff and against every defendant. Of the twenty basic verdicts in this case, plaintiffs prevailed on eighteen. We affirm the amount awarded in attorneys' fees.

## CONCLUSION

A jury found Mason County, its sheriff and several deputies liable under 42 U.S.C. § 1983, and awarded damages to five plaintiffs who were arrested without probable cause, beaten and then subjected to false criminal charges by Mason County deputies. We hold that Mason County's failure to adequately train its officers in the constitutional limits of the use of force constituted deliberate indifference to the safety of its inhabitants as a matter of law. The jury's verdict is sustained. In addition, we remand to the district court to determine the proper accounting of travel expenses for plaintiffs' attorneys and of expert witness fees.

AFFIRMED.

WALLACE, Chief Judge, concurring in part and dissenting in part:

I have no quarrel with the majority opinion, except for its affirming liability against Mason County. In 1959, the Washington legislature enacted a comprehensive civil service system for the employment of sheriffs' deputies, creating a commission with the authority to make personnel policy and review its implementation. Washington courts have since repeatedly held this system superior to any supposed rights of county sheriffs over their personnel.

Nevertheless, from a statute naming the county sheriff its chief law enforcement officer, the majority concludes he is also the final policymaking authority for personnel training. The majority holds the entire civil service system irrelevant by inventing a distinction between "hiring" and "training," a distinction without basis in

controlling Washington state law. I disagree, and because the case against Mason County turns on this point, I respectfully dissent.

I

The jury found that constitutional deprivations had been inflicted under the color of law, *see* 42 U.S.C. § 1983, and held liable the individuals involved. The jury also imposed liability on Mason County. Review of the county's liability, and the erroneous instructions that led to it, is the issue I address. We review jury instructions to determine "whether, considering the charge as a whole, the court's instructions fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." *Thorsted v. Kelly,* 858 F.2d 571, 573 (9th Cir.1988).

***1490** Section 1983 does not impose vicarious municipal liability. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 478, 106 S.Ct. 1292, 1297, 89 L.Ed.2d 452 (1986) ( *Pembaur* ). Direct municipal liability is extremely limited, and applies only "to acts that are, properly speaking, acts of the municipality-that is, acts which the municipality has officially sanctioned or ordered." *Id.* at 480, 106 S.Ct. at 1298 (quotation omitted). A municipality is liable only if the tort was committed pursuant to a municipality's official policy. *Id.* at 479, 106 S.Ct. at 1298.

"The official policy requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id.* at 479-80, 106 S.Ct. at 1298 (quotation omitted) (emphasis in original). The official policy requirement is the focal point for recent cases which have considered the issue. It has been precisely defined by the Supreme Court to maintain appropriate limits on burgeoning municipal liability. The district court, in its instructions to the jury, ran afoul of these appropriate limits. The majority opinion, in its attempt to save these flawed instructions, threatens to blur the precise distinctions required by Supreme Court authority.

The identification of officials whose decisions represent official policy is a question of state law to be determined by the trial judge before the case is submitted to the jury. *Jett v. Dallas Independent School District,* 491 U.S. 701, 109 S.Ct. 2702, 2723, 105 L.Ed.2d 598 (1989) (*Jett* ). "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur,* 475 U.S. at 481, 106 S.Ct. at 1299 (plurality opinion); *see also Jett,* 109 S.Ct. at 2723.

Plaintiffs (collectively Davis) proceeded to trial against Mason County on a theory that the county had an official policy to hire, train, and supervise its deputy sheriffs inadequately. Davis argued that the county sheriff was the final policy-making authority for personnel. Consequently, he argued, the sheriff's personnel decisions constituted official county policy, on which Mason County liability could be pegged.

The district court adopted Davis's theory in its jury instructions. "The Sheriff of Mason County is the chief law enforcement officer of that county and a policy-making official for the Mason County Sheriff's Office." The majority has attempted to save this instruction by reference to Wash.Rev.Code Ann. § 36.28.010 (West Supp.1990) ("The sheriff is the chief executive officer and conservator of the peace

of the county."). Relying solely upon this statute, the majority holds that "[a]s chief executive officers, sheriffs possess final authority with respect to the training of their deputies, and thus it may be fairly said that their actions constitute county policy on the subject." Maj. op. at 1480.

The reality is decidedly more complex. The sheriff may be "chief executive officer and conservator of the peace" but he is profoundly not the final authority for personnel administration. Final authority for personnel administration does not rest with the county sheriff; rather it rests with the civil service commission (Commission), pursuant to Wash.Rev.Code Ann. § 41.14 (West 1964 & Supp.1990). The Commission's extensive powers and duties include the making of rules and regulations about examinations, appointments, promotions, transfers, reinstatements, demotions, suspensions, and discharges, and which "may also provide for any other matters connected with the general subject of personnel administration." Wash.Rev.Code Ann. § 41.14.060(1) (West Supp.1990).

"Implicit in the statutory scheme is the legislative intent to circumscribe the county sheriff's previously unbridled discretion in personnel matters." *Fezzey v. Dodge,* 33 Wash.App. 247, 249, 653 P.2d 1359, 1361 (1982). "A full reading of [Wash.Rev.Code Ann. § ]41.14 reveals that in its enactment ***1491** the legislature intended to preempt the coverage by county personnel systems of deputy sheriffs' selection, promotion and termination." *Clallam County Deputy Sheriff's Guild v. Board of Clallam County Commissioners,* 92 Wash.2d 844, 847, 601 P.2d 943, 946 (1979) (en banc).

The majority attempts to discount the policymaking authority of this broadly empowered Commission by isolating a portion of Davis's theory at trial and hanging the entire case on it. The majority argues that liability arises solely from a failure of training and not from any other aspect of personnel administration. Maj. op. at 1481. Of course, the majority is entitled to tailor its opinion as it sees fit, but it cannot alter state law or recent Supreme Court authority to match these developed contours.

It appears to me that the majority itself loses sight of its distinction. In a later section of its opinion, the majority simply asserts: "Since we have found failure-to-train liability as a matter of law, there is no need to inquire into whether the two other grounds upon which plaintiffs state their claim-negligent hiring practices and failure to provide adequate supervision-subjected the County to liability." Maj. op. at 1483 n. 5. In fact, the majority *cannot* so inquire, because to do so would undermine its theory of final policymaking authority, which depends on the absence of these other grounds. A few pages before, this distinction was crucial. Maj. op. at 1480. I have no explanation for this inconsistency.

Washington state law does not suggest a distinction between "hiring" and "training" for the purposes of final policymaking authority. In order to save Davis's case, the majority treats Washington law as if it said "the Commission may make rules and regulations about any matters connected with the general subject of personnel administration, except training." This, I respectfully suggest, it cannot do. Absent a state law basis for its distinction, and the majority does not propose one, both hiring and training are properly included within the "general subject of personnel administration," over which the Commission has final policymaking authority.

Wash.Rev.Code Ann. § 41.14.060(1) (West Supp.1990).

This is true, even if the sheriff actually hires or even trains his personnel, as recent Supreme Court authority makes clear. In *Pembaur,* two deputy sheriffs forcibly entered Pembaur's clinic to serve subpoenas on clinic employees. The deputies acted at the express direction of the county sheriff and an assistant prosecutor. The Supreme Court reversed the appellate affirmance of the district court's dismissal of Pembaur's section 1983 claim against the county. In doing so, the plurality was careful to distinguish the situation before us.

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. *If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability.* Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board.

475 U.S. at 483 n. 12, 106 S.Ct. at 1300 n. 12 (plurality opinion) (emphasis added). Thus, final authority with regard to law enforcement is irrelevant to a claim alleging a failure of personnel policy. The statement from *Pembaur,* as well as logic and common sense, makes this clear. Moreover, the actual exercise of discretion in hiring or training cannot change the locus of final policymaking authority, which is fixed by state law.

***1492** This last point is poignantly illustrated by another recent Supreme Court case, *City of St. Louis v. Praprotnik,* 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). Praprotnik was transferred from one city agency to another and was then laid off. The jury found that the transfer and layoff had been retaliatory for Praprotnik's exercise of his first amendment rights. The jury exonerated the individual defendants and held the city liable.

The Supreme Court reversed the determination of municipal liability. The court of appeals in *Praprotnik,* like the majority here, held that Praprotnik's immediate supervisors had final authority with regard to his employment. *Id.* at 117, 108 S.Ct. at 920. Seven of the eight Justices considering the case disagreed with this contention. "To the contrary, the City Charter expressly states that the Civil Service Commission has the power and the duty [to consider and determine all personnel matters]." *Id.* at 129, 108 S.Ct. at 927 (O'Connor, J.) (plurality opinion) (bracketed material in place of statutory language); *see also id.* at 132, 108 S.Ct. at 928 (Brennan, J.) (plurality opinion).

Following *Praprotnik,* it matters not whether the sheriff actually hired or even trained his personnel. These acts are irrelevant to the locus of final policymaking authority. As I have already said, the issue turns solely on Washington law, which empowers the Commission with final policymaking authority over the entire subject of personnel administration. *See Jett,* 109 S.Ct. at 2723; Wash.Rev.Code Ann. § 41.14.060(1) (West Supp.1990). Washing-

ton law does not distinguish between hiring and training, or between training and any other aspect of personnel administration, in its definition of Commission powers.

As directed by *Praprotnik* and *Pembaur,* and required by Washington state law, I would therefore hold that the Mason County sheriff is not a final decisionmaking authority with regard to "hiring" or "training" deputy personnel. This holding would require reversal as to Mason County, eliminating the need to consider the district court's second dispositive error. Since the majority both reaches and erroneously decides this issue, however, my discussion necessarily continues.

II

The district court instructed the jury to find liability against Mason County if the county acted with "thoughtless disregard" or "reckless disregard." This is not the law. *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) ( *Canton* ), holds that a municipality will be liable "only where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police come into contact." *Id.* 109 S.Ct. at 1204 (emphasis added).

*Canton* requires the jury to find an element of deliberateness; the district court's instructions did not. Thus, I would hold that the instructions and *Canton* are irreconcilable. The majority nevertheless attempts to save these erroneous instructions by overlooking the differences in language and by contending that, in any event, Mason County waived its objection.

The district court gave its instructions in apparent reliance upon *Bergquist v. County of Cochise,* 806 F.2d 1364 (9th Cir.1986), since *Bergquist* was the law of this circuit at the time those instructions were given. *Bergquist* held that municipal liability for a failure to train required no more than gross negligence. *Id.* at 1370. Subsequent to trial, however, the Supreme Court decided *Canton,* overruling *Bergquist* and requiring no less than a showing of deliberate indifference. *See* 109 S.Ct. at 1204 & n. 7.

The majority contends that by not anticipating *Canton,* and by not objecting to the *Bergquist* instruction at trial, the County waived the *Canton* objection-even though *Canton* was subsequently decided.

"No exception is required when it would not have produced any results in the trial court because 'a solid wall of Circuit authority' then foreclosed the point." ***1493***Robinson v. Heilman,* 563 F.2d 1304, 1307 (9th Cir.1977), *quoting United States v. Scott,* 425 F.2d 55, 57 (9th Cir.1970) (en banc). This rule protects the parties and district court from the burden of countless objections to previously decided points of law on the hope they may someday be changed.

The majority concedes as much. It argues, however, that *Bergquist* is not "a solid wall of Circuit authority." The majority states

> [a]lthough in *Bergquist* we did hold that a policy of gross negligence in training could give rise to a claim for section 1983 liability, we said that "[t]he Supreme Court expressly reserved the question whether 'something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.' " The Supreme Court subsequently answered this question in *City of Canton.* In *Bergquist,* by saying that

> the question was left open by the Supreme Court, we clearly indicated that the state of mind sufficient to find failure-to-train liability was not a settled point of law.

Maj. op. at 1481-82 (citations omitted). My reading of *Bergquist* is different. *Bergquist* observes the question left open by the Supreme Court and then proceeds to decide it. Its decision settled the point for this circuit and for the district courts within it, until overruled by *Canton.*

It is pointless to debate how "settled" the issue was within the circuit. At the time of trial, *Bergquist* was authority directly on point. The argument in this circuit was over. The district court instructions properly conformed to *Bergquist*-an objection would be useless. Thus, the *Canton* objection was not waived.

At best the majority's analysis shows that *Bergquist* was not a solid wall of *Supreme Court* authority. Indeed it was not. But *Robinson* does not require Supreme Court authority, nor should it. *Robinson* specifically refers only to a circuit wall. From the perspective of the district courts, for which the *Robinson* rule was announced, Ninth Circuit precedent is as controlling as that from the Supreme Court.

Should we adopt a rule waiving objections to adverse Supreme Court precedent while requiring those to mere Ninth Circuit precedent? This distinction makes no sense to me. The district court must follow both; an objection to either will be ineffectual at trial. *Robinson* announced a bright-line rule to minimize the delay and confusion of needless trial objections. The majority opinion obliterates it.

Perhaps the majority signals discomfort with its waiver theory by providing an alternative. Assuming the *Canton* objection was not waived, the majority contends that the erroneous instructions were harmless error. This is so, the majority argues, because the county's training policy was inadequate as a matter of law. Maj. op. at 1482. Surprisingly, this contention is unaccompanied by an articulation of the relevant standard of review. Indeed, it is difficult to discern the authority by which it can be made. The majority cites *Canton,* but *Canton* remanded the precise question the majority now keeps for itself. 109 S.Ct. at 1207.

As I have already discussed, *Canton* requires findings that (1) a county official with final decisionmaking authority (2) acted with deliberate indifference in adopting a policy that (3) caused the tort to occur. *Id.* at 1204-06. These elements impose an extraordinarily high burden on Davis, a burden rendered especially unamenable to appellate disposition by *Canton* 's emphasis on its innate fact-dependency. *See id.* at 1206.

The majority nevertheless states that the deputies "received no training in the constitutional limits of the use of force," maj. op. at 1482, and imposes county liability on this basis. Of course the deputies received training; the majority opinion itself recounts the training practices to discount their adequacy. Maj. op. at 1482-83. The majority's attempt to reconcile this contradiction highlights the difficulty with its premise. The majority asserts that while training did occur, it did not cover the "constitutional limits of the use of force." Maj. op. at 1482. This is an interesting way to define the issue, but one on which ***1494** the record is utterly silent; my review of the record reveals absolutely no evidence

at this level of detail, and the majority offers none. The absence of proof cannot be properly charged against the county, as the majority has done. Davis has the burden here. *See Canton,* 109 S.Ct. at 1206.

Ultimately, the entire inquiry misses the mark. Even if the absence of evidence could be properly held against the county, which of course it cannot, it would be irrelevant to the questions of authority and deliberation necessary for a finding of a Mason County policy, and to the question of causation.

> [The] rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible. That much may be true. The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy."
>
> . . . . .
>
> Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury.

*Id.* at 1205-06. I have already discussed the elements of authority and deliberation, neither of which is present here. As for causation, the majority addresses this element only long enough to assert that it has been met. Maj. op. at 1483. By what authority does the majority justify this conclusion? No reliance can be placed on the jury's findings, for the jury considered causation in a much broader context. At trial Davis offered to link his injury to inadequate hiring, training, and supervision. Based on the instructions given, the jury might easily have found causation only as to supervision or only as to hiring. On appeal, however, the majority has stripped from this theory both hiring and supervision, leaving only training for which it imposes liability. Whatever else might be said, this much is absolutely clear: We have no jury finding in this case linking Davis's injury to "inadequate training in the constitutional limits of force." Therefore, at the very least, the majority should remand the case for a new trial on this question. As it now stands, the majority apparently finds this fact for itself. This, I suggest, it cannot do.

III

The jury found the conduct of the deputy sheriffs completely unacceptable. It is thus tempting to fashion a theory imputing liability to Mason County, but the law requires we resist this temptation. The allure is to find some sure means of financial recompense for the torts that were committed, but that allure cannot be indulged here consistent with section 1983. The law imposes municipal liability only for torts caused by municipal policies, adopted by persons with final decisionmaking authority, after some element of deliberation. The law requires plaintiffs to prove each of these elements by a preponderance of the evidence.

The jury instructions at issue failed to follow the law. As a consequence, Davis was not required to meet his burden of proof, and the jury was unable to consider properly the claim of Mason County liability.

The majority attempts to save these erroneous instructions by contracting the

scope of Washington's system of civil service and by contending that much of Mason County's case on appeal was waived during trial. The majority then completes its work by deciding the case against the county as a matter of law. For these reasons, I respectfully dissent from the holding affirming liability against the county.

C.A.9 (Wash.),1991.
Davis v. Mason County
927 F.2d 1473, 19 Fed.R.Serv.3d 952, 33 Fed. R. Evid. Serv. 825

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# 3

137 F.R.D. 240
**(Cite as: 137 F.R.D. 240)**

United States District Court,
S.D. Ohio.

ENTERPRISE ENERGY CORP., et al.,
Plaintiffs,
v.
COLUMBIA GAS TRANSMISSION CORPORATION, Defendant.

No. C2-85-1209.
June 18, 1991.

Upon joint motion for final approval of a class action settlement of a suit brought by gas producers against a gas pipeline company, the District Court, George C. Smith, J., held that: (1) settlement of class action was fair, reasonable and adequate and therefore would be approved; settlement provided substantial, immediate economic benefits to all class members and also provided economic and noneconomic benefits for class members in their continuing contractual relationship with gas pipeline company and produced only one objection representing two of the 850 contracts in the class action; (2) class counsel were entitled to attorney fees of $5 million, which was approximately 8.8 percent of the $56.6 million estimated present value of the total settlement or 15.6 percent of the $32 million current cash portion of the settlement; and (3) class representatives were entitled to class representative incentive awards in the amount of $50,000 each.

Order in accordance with opinion.

West Headnotes

**[1] Compromise and Settlement 89 56.1**

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k56.1 k. In General. Most Cited Cases
(Formerly 89k56)

In granting final approval to a class action settlement, court must follow a three-step process: first, court must preliminarily approve proposed settlement, second, members of class must then be given notice of proposed settlement, and third, a hearing must be held, after which court must decide whether proposed settlement is fair, reasonable and adequate. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

**[2] Compromise and Settlement 89 57**

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k57 k. Fairness, Adequacy, and Reasonableness. Most Cited Cases

Factors to be considered in determining whether a proposed class action settlement is fair, reasonable and adeqate include: plaintiffs' likelihood of ultimate success on the merits balanced against amount and form of relief offered in the settlement, complexity, expense and likely duration of the litigation, stage of the proceedings and the amount of discovery completed, judgment of experienced trial counsel, nature of the negotiations, objections raised by class members, and public interest. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

**[3] Compromise and Settlement 89 57**

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k57 k. Fairness, Adequacy, and Reasonableness. Most Cited Cases
In determining fairness, adequacy and reasonableness of proposed class action settlement, court need not reach ultimate conclusions of fact regarding merits of the case or decide underlying issues of law. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A .

**[4] Compromise and Settlement 89 56.1**

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k56.1 k. In General. Most Cited Cases
(Formerly 89k56)
Whether settlement of class action is fair, reasonable and adequate must be evaluated by examining settlement in its entirety and not as isolated components. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A .

**[5] Compromise and Settlement 89 70**

89 Compromise and Settlement
89II Judicial Approval
89k66 Proceedings
89k70 k. Evidence; Affidavits. Most Cited Cases
Once preliminary approval to a class action settlement has been granted, a settlement is presumptively reasonable and an objector must overcome a heavy burden to prove that the settlement is unreasonable. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A .

**[6] Compromise and Settlement 89 58**

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k58 k. Opposition or Approval. Most Cited Cases
Approval of class action settlement should not be denied merely because some class members object to it. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

**[7] Compromise and Settlement 89 61**

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited Cases
Settlement of class action brought by gas producers against gas pipeline company was fair, reasonable and adequate and therefore would be approved; settlement provided substantial, immediate economic benefits to all class members and also provided economic and noneconomic benefits for class members in their continuing contractual relationship with gas pipeline company and produced only one objection representing two of the 850 contracts in the class action. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

**[8] Federal Civil Procedure 170A 2737.2**

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.2 k. Public Interest or Common Benefit; Private Attorneys General. Most Cited Cases

Lawyer who recovers a common fund for benefit of a class of persons in commercial litigation is entitled to reasonable attorney fees and expenses payable from that fund.

**[9] Federal Civil Procedure 170A ⚿ 2737.2**

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.2 k. Public Interest or Common Benefit; Private Attorneys General. Most Cited Cases

Factors relevant to an award of attorney fees from a common fund are: value of benefit rendered to the class, society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others, whether services were undertaken on a contingent fee basis, value of the services on an hourly basis, complexity of the litigation, and professional skill and standing of all counsel.

**[10] Federal Civil Procedure 170A ⚿ 2737.13**

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Class counsel, who negotiated settlement of class action brought by gas producers against gas pipeline company, were entitled to attorney fees of $5 million, which was approximately 8.8 percent of the $56.6 million estimated present value of the total settlement or 15.6 percent of the $32 million current cash portion of the settlement.

**[11] Federal Civil Procedure 170A ⚿ 2737.13**

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Courts approve incentive awards to representatives of class members where the representatives have earned the awards.

**[12] Federal Civil Procedure 170A ⚿ 2737.13**

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Following factors are reviewed when considering a request for a class representative incentive awards: action taken by class representatives to protect interests of class members and others and whether those actions resulted in a substantial benefit to class members, whether class representatives assumed substantial direct and indirect financial risk, and amount of time and effort spent by class representatives in pursuing the litigation.

**[13] Federal Civil Procedure 170A ⚿ 2737.13**

170A Federal Civil Procedure
170AXIX Fees and Costs
170Ak2737 Attorneys' Fees
170Ak2737.13 k. Class Actions; Settlements. Most Cited Cases

Class representatives in class action brought by gas producers against gas pipeline company were entitled to class representative incentive awards in the amount of $50,000 each where they had taken actions which had protected the interests of class members and which resulted in settlement and provided substantial economic and noneconomic benefits for

class members, entered into contingent fee arrangement with class counsel which obligated them to pay class counsel for all expenses incurred in pursuit of the litigation, devoted a substantial amount of time and effort and incurred unreimbursed expenses in pursuing the litigation.

***242** Duke W. Thomas, John C. Elam and James Hedden, Columbus, Ohio, for plaintiffs.

Daniel W. Costello, Columbus, Ohio and John E. Beerbower, New York City, for defendant.

OPINION AND ORDER
FINDINGS OF FACT AND CONCLUSIONS OF LAW

GEORGE C. SMITH, District Judge.

This matter is before the Court pursuant to the Joint Motion for Final Approval of Class Action Settlement under Federal Rule of Civil Procedure 23(e).[FN1] Furthermore, before the Court there is a motion by plaintiffs for an award of attorney's fees and expenses to class counsel and a motion by plaintiffs for an order to granting class representative incentive awards. The Court will address each of these matters *seriatim.*

FN1. Rule 23(e) provides as follows:

> **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

FACTS

On July 26, 1985, a class action lawsuit was filed on behalf of gas producers ("Class Members") that had contracts with the defendant Columbia Gas Transmission Corporation ("Columbia Gas"). The contracts between the parties essentially provided the price to be paid for each unit of natural gas (MMBtu) as the maximum lawful price during the month of delivery under the Natural Gas Policy Act of 1978 ("NGPA"). Among the various provisions in the contract allowing for adjustment in price is a the "Cost Recovery Clause" ("CRC"). The clause provides as follows:

> *Cost Recovery.* Notwithstanding any other provisions of this Agreement, if any order, opinion, enactment or regulation of the Federal Energy Regulatory Commission, or any other governmental authority (Federal or State), or of any court, may have the effect, either directly or as a precedent, of preventing Buyer's full recovery of any portion of the Purchase Price paid or to be paid Seller, then Buyer with the next monthly billing cycle after the date of such order, opinion, enactment or regulation, or at such later date as it may elect, may in Buyer's judgment enable Buyer to recover its full costs. In such case, the price provisions applicable to Seller's deliveries of gas to Buyer shall be deemed modified as appropriate to assure Buyer its full-cost recovery. Seller hereunder shall not, however, be liable to Buyer for any overpayment hereunder prior to the date of such order, opinion, enactment or regulation.

***243** Pursuant to the above-cited clause, on July 11, 1985, Columbia Gas sent a letter to all Class Members announcing that it was invoking the CRC and that it would be adjusting the purchase price of the natural gas downward. The letter explained that Columbia Gas believed that two opinions of the Federal Energy Regu-

latory Commission ("FERC"), specifically, nos. 204 and 204-A, would have the effect, either directly or as a precedent, of preventing Columbia Gas' full recovery of a portion of the gas purchase specified in the contracts.

Plaintiffs claimed that these FERC opinions do not have the effect of preventing Columbia Gas' full recovery of the gas purchase price, and as such, the CRC cannot be invoked. Instead, the Class Members interpreted the FERC opinions to permit Columbia Gas to pass through the increased costs to the consumers.

By an Order entered by this Court on February 21, 1986, subsequently amended on March 1, 1991, a class was certified by this Court consisting of "[a]ll owners, operators and producers of natural gas producing wells in the Appalachian region (New York, Pennsylvania, West Virginia, Kentucky, Maryland, Virginia and Ohio) who are parties to gas purchase contracts with Columbia Gas Transmission Corporation entitling them to receive the maximum lawful price or a deregulated price under the NGPA ... and against whom Columbia has invoked a price reduction for amounts due under the contracts". The plaintiff class involved approximately 852 contracts and 2163 Class Members.

The parties, over a period of six years, engaged in substantial discovery, including the use of interrogatories, requests for documents, and depositions. This discovery was then utilized by the respective parties in a variety of motions, including dispositive motions.

Pursuant to a motion for summary judgment filed by the Defendant, the Court, in an Opinion an Order dated September 15, 1989, held that the there existed no genuine issue of material fact as to whether Columbia Gas did in fact invoke the CRC in July of 1985, March of 1987 and September of 1987. This Court further held that there was a "prevailing opinion, order, enactment, or regulation out of FERC ... which Columbia [Gas] could rely upon so as to meet the language prerequisite found within the CRC provision of the contract." In short, the Court found that Columbia Gas could rely upon the 204 and 204-A cases and other decisions, settlements, and FERC regulatory orders existing at the time in the industry to meet the contractual language prerequisite requirement in order to invoke the CRC.

This Court further found, however, that there existed "a genuine issue of material fact as to whether Columbia Gas had objectively acted in good faith in their decision to invoke the 1985 and 1987 CRCs"; whether Columbia Gas had "subjectively and with honesty in fact decided to invoke the CRCs"; whether Columbia Gas had ostensibly utilized the 204 cases and other decisions; and whether the prices set following the invocations were just and reasonable. In making the above findings, the Court had granted in part and denied in part the defendants' motion for summary judgment.

On June 25, 1990, the Plaintiff Class Members filed a motion for partial summary judgment. In an Opinion and Order dated August 30, 1990, the Court denied the dispositive motion. It became apparent at that time that the resolution of the case would only come through a negotiated settlement or a trial.

The issues of liability and damages were bifurcated for trial. Additionally, only a portion of the liability issue has been subject to discovery and was set for trial in

September of 1990. Consequently, substantial litigation and discovery could remain prior to any final determination of the parties' rights.

The parties engaged in a non-binding mediation proceeding during the first half of 1990. Following extensive briefing and preparation, the mediation lasted for almost one week in Columbus during June of 1990. In spite of the participants' efforts, the parties were unable to negotiate a settlement of this lawsuit during the mediation process.

***244** After the mediation, both sides again continued to prepare for an early September 1990 trial. This preparation led to settlement negotiations beginning in September of 1990. These settlement negotiations lasted several months and at the request of both parties included the supervision of the Court.

After almost six months of concerted negotiations by Class Counsel, Class Representatives and Columbia, a Stipulation of Proposed Class Action Settlement (the "Settlement") was reached in late February of 1991. This Settlement was then filed with the Court. This Court preliminarily approved the Settlement on March 15, 1991, and scheduled a fairness hearing for May 23, 1991.

Contemporaneous with its preliminary approval of the proposed Settlement, this Court approved the form of Notice proposed by the parties, and ordered that the Notice be sent by Class Counsel to each Class Member, at the Class Member's last known business address, on or before March 22, 1991.

On March 22, 1991, pursuant to this Court's Order, Class Counsel mailed the Notice concerning the proposed Settlement to the approximately 2,163 Class Members having interests in the 852 Class Member contracts involved in this case. Thereafter, on April 19, 1991, pursuant to the Order and Notice, Class Counsel mailed data concerning each of the 852 contracts to each of the Class Members who had an interest in any such contract. This data set forth the necessary information to enable the Class Member to compute the contract's share of the Settlement monies.

The Order of this Court and the Notice sent to the Class Members provided that if a Class Member wanted to object to any aspect of the Settlement, a Class Member was required to file a Notice of Objection with this Court on or before May 1, 1991, with copies of such Notice of Objection also served upon Class Counsel and defendant's counsel. If a Class Member had any objection or corrections to the accuracy of the data, the Class Member was to advise Class Counsel in writing on or before May 10, 1991.

Twenty (20) Notices of Objection were filed with the Court. All but two of those submissions presented comments on or challenges to the data or calculations concerning the Settlement or objections to the proposed exclusion of all or some part of a Class Member contract from the benefits of the Settlement. As of the date of the hearing on May 23, 1991, there was only one objection (representing two contracts) to the fairness, reasonableness or adequacy of the Settlement.

At the time of the hearing only two substantive objections were voiced. One objection simply related to the amount of attorney's fees requested, and the second related to the entire settlement agreement.

Attorney Richard G. Morgan, representing Seneca Upshur Petroleum Company ("Seneca Upshur"), voiced an objection to the amount of attorney fees requested by Class Counsel. He suggested a fee of $4.5 million would be more appropriate. It was his position that the only funds this Court should consider in determining the reasonableness of the attorney's fees requested by Class Counsel was the $30 million payment. He further suggested that the Court should award Class Counsel 15% of the $30 million. It was from these calculations that he derived the $4.5 million figure.

The second significant objection related to the entire settlement agreement, including the request for attorney's fees and class representative incentive awards. Attorney Brian Peterson appeared before the Court on behalf of his client, Johnson Petroleum Company, ("Johnson Petroleum").[FN2] Johnson Petroleum takes the position that "the proposed settlement is not fair, reasonable and adequate in that it fails to adequately compensate the Class Members ***245** for past claims, ... does not adequately assure the Class Members of reasonable future gas prices, [and] does not adequately assure the Class Members of the availability of transportation, yet extracts from the Class Members substantial contract concessions with respect to certain provisions of contracts which are not the subject matter of this action." See Johnson Petroleum's objection, Doc. 167 at p. 1. [FN3]

FN2. Attorney Peterson's representation includes the class members, Russell V. Johnson, Jr., Russell V. Johnson, Jr., d/b/a Johnson Petroleum Company, Rockwell Petroleum Company, Mark R. Worl, d/b/a Rockwell Petroleum Company and Rockwell Petroleum Company. For clarity, the group will be referenced as "Johnson Petroleum".

FN3. Johnson Petroleum also argues that the Representative Plaintiff's failed to properly notify them, and that the delay in receiving the documentation necessary to make a reasonable and informed decision as to the settlement, deprived them of adequate notice and an opportunity to prepare adequate timely objections.

> The Court addressed this issue at the hearing in conjunction with the motion of Johnson Petroleum for a continuance of the hearing. The Court was not impressed with the eleventh hour filing of the motion for a continuance and skeptical as to any potential notice problems. Accordingly, the Court can see no reason to deviate from the original denial of the continuance.

Johnson Petroleum further argues that the request for attorney's fees is excessive, "because the legal issues to be resolved were not unreasonably complex, because counsel did not assume a high degree of risk and because the settlement does not necessarily have a present value of Fifty-Six Million Dollars ($56,000,000.00) ..." Memorandum in Support, Doc. 167 at p. 3.

The first issue now before this Court is whether to approve or reject the Settlement based upon its fairness, reasonableness and adequacy.

I. JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

A. *The Legal Standard*

Court approval is required in order to settle a class action. Rule 23(e) provides as follows:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

[1] In granting final approval to a class action settlement, the Court must follow a three step process: First, the Court must preliminarily approve the proposed settlement; Second, members of the class must then be given notice of the proposed settlement; and Third, a hearing must be held, after which the Court must decide whether the proposed settlement is fair, reasonable and adequate. *Bailey v. Great Lakes Canning, Inc.,* 908 F.2d 38, 42 (6th Cir.1990); *United States v. Jones & Laughlin Steel Corp.,* 804 F.2d 348, 351 (6th Cir.1986); *Williams v. Vukovich,* 720 F.2d 909 (6th Cir.1985); *Stotts v. Memphis Fire Department,* 679 F.2d 541 (6th Cir.), *rev'd on other grounds, sub nom. Firefighters Local Union No. 1784 v. Stotts, et al.,* 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1982); *Bronson v. Board of Education of the City School District of the City of Cincinnati,* 604 F.Supp. 68 (S.D.Ohio 1984); *Thompson v. Midwest Foundation Independent Physicians Ass'n,* 124 F.R.D. 154 (S.D.Ohio 1988).

[2] In determining whether a proposed class action settlement is fair, reasonable and adequate, this Circuit has identified several factors to be considered. They include: (1) the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; (2) the complexity, expense and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the judgment of experienced trial counsel; (5) the nature of the negotiations; (6) the objections raised by class members; and (7) the public interest. *Vukovich,* 720 F.2d at 922; *Bronson,* 604 F.Supp. at 73; *Thompson,* 124 F.R.D. at 157.

[3][4] In determining the fairness, adequacy and reasonableness of the proposed Settlement, this Court need not reach ultimate conclusions of fact regarding the merits of the case or decide the underlying issues of law. *Williams,* 720 F.2d at 921; *Thompson,* 124 F.R.D. at 157; *Bronson,* 604 F.Supp. at 73-74. Whether a settlement is fair, reasonable and adequate must be evaluated by examining the settlement ***246** in its entirety and not as isolated components. *Thompson,* 124 F.R.D. at 159; *Bronson,* 604 F.Supp. at 78. The Court does not have the power to change the terms of the proposed settlement which it may not like, "only the parties, during arms-length negotiations ... have the power to agree upon changes". *Bronson,* at 73.

[5][6] Once preliminary approval has been granted, a settlement is presumptively reasonable and an objector must overcome a heavy burden to prove that the settlement is unreasonable. *Williams,* 720 F.2d at 921; *Stotts,* 679 F.2d at 551; *In re Dun & Bradstreet Credit Serv. Customer Litig.,* 130 F.R.D. 366, 370 (S.D.Ohio 1990); *Thompson,* 124 F.R.D. at 156; *Bronson,* 604 F.Supp. at 71. In considering objections to a settlement, approval should not be denied "merely because some class members object to it". *Thompson,* 124 F.R.D. at 159; *see also Flinn v. FMC Corp.,* 528 F.2d 1169, 1173 (4th Cir.1975),

*cert. denied,* 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976); *Bronson,* 604 F.Supp. at 73; *cf. Clark Equip. Co. v. International Union, Allied Indus. Workers,* 803 F.2d 878, 880 (6th Cir.1986) (acceptance of settlement over class representative's objection not necessarily abuse of discretion). It should be remembered that a settlement "is a compromise which has been reached after the risks, expense, and delay of further litigation have been assessed". *Williams,* 720 F.2d at 922. "Class counsel and the class representatives may compromise their demand for relief in order to obtain substantial assured relief for the plaintiffs' class." *Id.*

The law generally favors and encourages the settlement of class actions. *See Franks v. Kroger Co.,* 649 F.2d 1216, 1224 (6th Cir.1981); *Thompson,* 124 F.R.D. at 157.

B. *Findings and Conclusions Concerning the Settlement*

[7] The Court has already concluded, pursuant to its March 15, 1991 Order granting preliminary approval, that the Settlement was the result of arms-length negotiations and was not collusive or illegal. This Court has personally had an opportunity to administrate, supervise, and offer limited participation in the negotiations which brought about the settlement agreement proposed by the parties. It is apparent from those observations that the Settlement is the by-product of an arm's length negotiation between the parties.

The Notice of the proposed Settlement, the fairness hearing and related matters were completed, are sufficient under Rule 23 of the Federal Rules of Civil Procedure, and allowed Class Members a full and fair opportunity to consider the proposed Settlement and to develop a response.

*Vukovich,* 720 F.2d at 921.

The Court finds Johnson Petroleum's argument that the necessary information was not before them in a timely fashion, thus they did not have a sufficient amount of time to evaluate the settlement and decide whether to objection, to be unpersuasive. The information was sent to Johnson Petroleum as provided for in this Court's Order preliminarily approving the settlement and setting parameters for notification of the class. The specific additional information requested by Johnson Petroleum was supplied in a timely fashion and the eight days of preparation were more than adequate, especially given Johnson Petroleum's stated position that the instant case is not "unreasonably complex".

This Settlement provides substantial, immediate economic benefits to all Class Members. It also provides economic and non-economic benefits for Class Members in their continuing contractual relationships with Columbia. Although there has been some disagreement as to the magnitude of the future benefits and such benefits are necessarily to some extent speculative, no Class Member has asserted that the changes in future rights under the contracts result in a net detriment to the Class as a whole or to any Class Member, and the Court finds based upon the record that the value of the future benefits provided by the Settlement are substantial.

The Court finds that while this case has already been in litigation for six years, if a ***247** settlement cannot be achieved considerable litigation remains. As such, the Settlement provides immediate value to the Class and minimizes the costs which plaintiffs must otherwise incur in moving forward and potentially obtaining a successful result.

Defendant's motion for summary judgment raised difficult, close questions. Although the Court concluded that there were genuine issues of material fact remaining for trial, there is no assurance that plaintiffs would be able to sustain their burden with respect to those issues. As such, a favorable or successful result is merely a potential and not unequivocal.

This Court would be the ultimate finder of fact if the case went to trial. Furthermore, this Court has had the opportunity to review and rule on dispositive motions pending in this action. As a result, the Court is in a strong position to assess and understand the uncertainties about the ultimate outcome of a trial of all issues.

Based only upon a comparison of the economic and non-economic benefits of the Settlement with the likely outcome of the litigation on the merits and the relief that would be obtained, the Court concludes that this Settlement is fair, reasonable and adequate.

This action has already entailed the expenditure of substantial private and judicial resources. While one segment of the liability issues was set for trial, an even larger portion would need to be tried in the future in addition to any damages issues should the class prevail on liability.

The parties have carefully and fully analyzed the strengths and weaknesses of their positions in light of the extensive discovery already completed.

The attorneys that represent the parties have litigated complex class actions and have had extensive litigation experience. They are able to evaluate the strengths and weaknesses of this case. Counsel for both sides represent to the Court that it is a fair, reasonable and adequate resolution of the present controversy.

The Court finds that although this action was not near a conclusion, extensive discovery and motion practice have already occurred. In addition, the parties and counsel had engaged in a lengthy mediation proceeding in an effort to resolve the dispute. As such, the parties and their counsel, as well as this Court, are in good positions to evaluate the strengths of each side's case and the risks of continued litigation.

The Court concludes that the endorsement of the Settlement by counsel for both sides, in light of the extensive discovery and other pretrial activity, supports the fairness, adequacy and reasonableness of this Settlement. *Williams,* 720 F.2d at 922-23.

In addition, the Class Representatives were knowledgeable, experienced businessmen with significant economic stakes in the litigation. They participated actively in the negotiation of the Settlement and agreed to accept the terms thereof.

The proposed Settlement took almost six months to negotiate. These settlement negotiations were only successful after a week long mediation session and almost six (6) years of litigation. It is clear to this Court from the time and effort involved that this Settlement represents an arms-length, hard bargained settlement. Both parties were confident of their positions and effectively asserted their rights. It was only after repeated efforts that the parties were able to reach this Settlement.

The fact that there is only one objection to the terms of the Settlement (representing two of the 852 contracts in the class action) is a factor that weighs heavily in favor of

approving the proposed Settlement. *See Seagoing Uniforms Corp. v. Texaco, Inc.,* [1989-1990 Transfer Binder], Fed.Sec.L.Rep. (CCH) ¶ 94, 791, 1989 WL 129691 (S.D.N.Y.1989). Johnson Petroleum has the burden to demonstrate that the Settlement is unfair, inadequate or unreasonable. *See Stotts,* 679 F.2d at 554; *Bronson,* 604 F.Supp. at 78.

To meet this burden, Johnson Petroleum has essentially forwarded an argument that the case is valued at $115 million and the amount of the settlement merely represents a 26% recovery. Johnson Petroleum ***248** states in a conclusory fashion that the Class should get more. This conclusion is made without the benefit of attending the numerous settlement discussions and makes absolutely no reference to the prior opinions of this Court wherein it was made abundantly clear that there exists a very real potential that the Class could come away from a long expensive trial with nothing. Thus, this Court finds that Johnson Petroleum has failed to carry its burden.

This Court finds that the Settlement serves the public interest. It will avoid a time-consuming and expensive trial. In addition, it will eliminate the possibility of any time-consuming and expensive appeals. The Settlement results in a final and complete resolution of all of the issues raised by the Class Members in the litigation.

The Court concludes that the stage of the proceedings, the amount of discovery completed, the opinion of Class Counsel, the nature of the negotiations, the lack of objections of Class Members and the public interest all support the conclusion that the Settlement taken as a whole is fair, reasonable and adequate.

For all of the foregoing reasons, the Court hereby grants final approval of the Settlement.

## II. MOTION FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES TO CLASS COUNSEL

In a filing made herein on April 12, 1991, Class Counsel have applied for an award of attorneys' fees to Class Counsel and an award reimbursing Class Counsel for actual expenses incurred in the course of this litigation to be paid from the common fund of over $32 million which has been created for the benefit of the class in this litigation. Class Counsel is requesting $5 million in total attorneys' fees, with $2.5 million of these fees to be paid at the time of final approval of the Settlement, and with the remaining $2.5 million to be paid in March of 1992 from the $15 million to be deposited by Columbia at that time into escrow. Class Counsel has reserved the right to file a supplemental application for attorneys' fees if this order is appealed.

In addition, Class Counsel has requested an award reimbursing them for actual expenses incurred totalling $164,580.05 for the period July 1985 through March 31, 1991, which amount would be paid out of the interest earned on the $17 million deposited into escrow prior to final approval of this Settlement. It is understood that Class Counsel will file one or more additional applications for reimbursement of actual expenses incurred from April 1, 1991 until the final disbursement of Settlement monies is made in 1992.

[8] Class Counsel's application is governed by the legal standards for awards of attorneys' fees and expenses in "common fund" situations. *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478-79, 100 S.Ct. 745, 749, 62 L.Ed.2d 676 (1980); *Smillie v.*

*Park Chemical Co.,* 710 F.2d 271, 275 (6th Cir.1983); *Basile v. Merrill Lynch, Pierce, Fenner & Smith,* 640 F.Supp. 697, 699-700 (S.D.Ohio 1986). It is well-settled that a lawyer who recovers a common fund for the benefit of a class of persons in commercial litigation is entitled to reasonable attorneys' fees and expenses payable from that fund. *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478-79, 100 S.Ct. 745, 749-50, 62 L.Ed.2d 676 (1980); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 391-92, 90 S.Ct. 616, 625-26, 24 L.Ed.2d 593 (1970); *Smillie v. Park Chemical Co.,* 710 F.2d 271, 275 (6th Cir.1983); *Basile v. Merrill Lynch, Pierce, Fenner & Smith,* 640 F.Supp. 697, 699-700 (S.D.Ohio 1986).

[9] An award of attorneys' fees and expenses lies within the sound discretion of the trial court. *Ramey v. Cincinnati Enquirer, Inc.,* 508 F.2d 1188, 1196 (6th Cir.1974), *cert. denied,* 422 U.S. 1048, 95 S.Ct. 2666, 45 L.Ed.2d 700 (1975). The factors relevant to an award of attorneys' fees from a common fund in this Circuit have been clearly established. As the Sixth Circuit stated in *Smillie,* the relevant considerations are:

(1) the value of the benefit rendered to the class;

(2) society's stake in rewarding attorneys who produce such benefits in ***249** order to maintain an incentive to others;

(3) whether the services were undertaken on a contingent fee basis;

(4) the value of the services on an hourly basis;

(5) the complexity of the litigation; and

(6) the professional skill and standing of all counsel.

710 F.2d at 275; *accord Ramey,* 508 F.2d at 1196; *Basile,* 640 F.Supp. at 700; *see also Thompson v. Midwest Foundation Independent Physicians Ass'n,* 124 F.R.D. 154, 162 (S.D.Ohio 1988). An examination of each of these factors as applied to the present case supports approval of Class Counsel's application.

[10] The value of the benefit rendered to the class has been amply demonstrated in the record. The Settlement provides substantial economic and non-economic benefits to the class. The Settlement includes a common fund in excess of $30 million for the benefit of the class with respect to those claims asserted during the period of approximately July 10, 1985, through January 10, 1991. Class Counsel has also created a common fund of about $2 million for gas produced from January 10, 1991, to May 10, 1991. Class Counsel has obtained future benefits for members of the class in the nature of increased prices for gas to be produced and sold to Columbia as well as reduced transportation and gathering charges concerning the transportation of this gas in the future. Class Counsel has estimated these future benefits as having a present discounted value of approximately $24.65 million. Although the one objector contends that this future benefit value estimate of $24.65 million is too high, and while the Court recognizes that any effort to value future benefits is necessarily somewhat speculative, the Court does conclude that there is substantial value to the class contained in the future benefits provided by the Settlement.

If attorneys are to be encouraged to handle litigation of this nature, attorneys must be awarded fair and reasonable compensation for their efforts. Class Counsel accepted this representation on a contin-

gent fee basis and would not have recovered any fees for their services if they had not been successful. The contingency fee risk of non-payment in this action was significant because the likelihood of a class recovery is far from clear based upon the difficult, close questions raised in defendant's motion for summary judgment.

The "lodestar" amount of hourly charges at current rates incurred by Class Counsel through April 30, 1991 is $1,828,037.90 and Class Counsel estimates that they will incur approximately $220,000 in additional charges implementing the Settlement from and after May 1, 1991-for a total lodestar amount at current rates of approximately $2.05 million. The "lodestar" amount of hourly charges computed on the basis of Class Counsel's rates being charged when the services were rendered totals $1,681,580.15 through April 30, 1991-for a total lodestar value, when the $220,000 estimate is added concerning future charges for implementation of the Settlement, of approximately $1.9 million.

It is clear to this Court that this litigation was extremely complex and vigorously defended. The legal and factual issues were novel, and the subject matter itself was multifarious.

Finally, all counsel, Defense Counsel and Class Counsel alike, exercised the highest degree of skill and competence in this proceeding. It should be noted that the attorneys and their respective law firms enjoy the highest degree of respect in their communities. Furthermore, they have an outstanding reputation both locally and nationally.

As previously stated, only two objections were made to the request for an award of $5 million in Class Counsel fees. One objector, Johnson Petroleum, recommended $4 million as an appropriate award and the other objector, Seneca Upshur, recommended $4.5 million.

Attorney fee awards in common fund cases are often calculated as a percentage of the fund created. The percentages awarded in common fund cases typically range from 20 to 50 percent of the common ***250** fund created. *See, In re Cincinnati Gas & Electric Co. Securities Litigation,* 643 F.Supp. 148, 150 (S.D.Ohio 1986); *In re Warner Communications Securities Litigation,* 618 F.Supp. 735, 749-50 (S.D.N.Y.1985). Here, Class Counsel are applying for an award of fees in the total amount of $5 million, which is approximately 8.8% of the $56.65 million estimated present value of the total Settlement or alternatively, approximately 15.6% of the $32 million current cash portion of the Settlement.

Class Counsel's attorney fee application is well in line with, and in fact is lower than, the percentages of the common fund approved as attorney fee awards in numerous other reported common fund cases in the Sixth Circuit and elsewhere. *See, In re Cincinnati Gas & Electric Co. Securities Litigation,* 643 F.Supp. 148 (S.D.Ohio 1986) (fee of 18% of common fund); *Basile v. Merrill Lynch, Pierce, Fenner & Smith,* 640 F.Supp. 697 (S.D.Ohio 1986) (fee of 26.3% of common fund); *Schwartz v. Novo Industries A/S,* 119 F.R.D. 359 (S.D.N.Y.1988) (25% of common fund); *Kirkorian v. Borelli,* 695 F.Supp. 446 (N.D.Cal.1988) (25% of common fund); *Meyer v. Citizens and Southern National Bank,* 117 F.R.D. 180 (M.D.Ga.1987) (30% of common fund); *Northwestern Fruit Co. v. A. Levy & J. Zentner Co.,* 117

F.R.D. 670 (E.D.Cal.1987) (29% of common fund); *Levit v. Filmways, Inc.,* 620 F.Supp. 421 (D.Del.1985) (33 1/3 % of common fund).

Another method for computing an appropriate attorney fee award in a common fund case is to apply a "multiplier" to the "lodestar" amount. In *In re Cenco, Inc. Securities Litigation,* 519 F.Supp. 322 (N.D.Ill.1981), the Court found that a multiplier of four times the "lodestar" amount was appropriate. In *In re Beverly Hills Fire Litigation,* 639 F.Supp. 915 (E.D.Ky.1986) , the Court found that a multiplier of five was appropriate.

In the present case, the total lodestar amount at current rates is approximately $2.05 million and at historic rates is approximately $1.9 million-for a multiplier of 2.4 or 2.6, respectively, concerning Class Counsel's $5 million attorney fee request. This 2.4-2.6 range of multiplier which Class Counsel is requesting in this litigation to support its $5 million attorney fee request is reasonable and conservative when compared to similar cases.

Based upon the foregoing, this Court finds that Class Counsel's application for an attorney fee award of $5 million is fair, reasonable, and warranted.

Class Counsel also seeks an award of $164,580.05 for reimbursement of actual expenses incurred from July 1985 through March 31, 1991, plus reimbursement for all additional expenses incurred during the period from April 1, 1991 until the final distribution of the second Settlement installment is made in 1992. There are no objections to this request. Based upon the undisputed evidence in the record, these expenses are reasonable and Class Counsel is entitled to their full recovery of these expenses from the common fund.

III. MOTION FOR CLASS REPRESENTATIVE INCENTIVE AWARDS

The six Class Representatives in this case (Enterprise Energy Corp., Beldon & Blake Corporation, Allstates Oil and Producing Co., Inc., Energy Development Corp., Edco Drilling and Production, and The Clinton Oil Company) have also applied to this Court for class representative incentive awards in the amount of $50,000 each, for a total of $300,000 of incentive award payments.

[11][12] Courts approve incentive awards to representatives of class members where the representatives have earned the awards. The Courts in this circuit review the following factors when considering a request for class representative incentive awards: (1) the action taken by the Class Representatives to protect the interests of Class Members and others and whether these actions resulted in a substantial benefit to Class Members; (2) whether the Class Representatives assumed substantial direct and indirect financial risk; and (3) the amount of time and effort spent by the Class Representatives in pursuing the litigation.

[13] ***251** In this case, the Class Representatives have taken actions which have protected the interests of the Class Members and which have resulted in a Settlement that provides substantial economic and non-economic benefits for the Class Members.

The Class Representatives entered into a contingent fee arrangement with Class Counsel which obligated them to pay Class Counsel for all expenses incurred in the pursuit of this litigation, which expenses amounted to $164,580.05 through March

31, 1991 and which will exceed this amount before the Settlement is final.

The Class Representatives have devoted a substantial amount of time and effort and have incurred unreimbursed expenses in pursuing this litigation.

Only one objection was made to the request for Class Representative incentive award, by Johnson Petroleum, and they recommended $25,000 for each Class Representative.

The Court finds that the Class Representatives have satisfied the requirements for an award of a class representative incentive fee, and the requested incentive awards in the amount of $50,000 for each of the six Class Representatives, or a total of $300,000 of incentive fee awards, is fair, reasonable and warranted.

Pursuant to the above findings of the Court IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows, that:

a. Class Members, excluding all persons who have been properly excluded from the class, pursuant to Rule 23(c)(2) Federal Rules of Civil Procedure, are:

> All owners, operators and producers of natural gas producing wells in the Appalachian Region (New York, Pennsylvania, West Virginia, Kentucky, Maryland, Virginia and Ohio) who are parties to Gas Purchase Contracts with Columbia Gas Transmission Corporation ("Columbia") entitling them to receive the Maximum Lawful Price ("MLP") or a deregulated price under the Natural Gas Policy Act ("NGPA") with respect to § 102, § 103, § 104, § 105, § 107(c)(4), § 107(c)(5), § 108 and/or § 109 NGPA categories gas, and against whom Columbia has invoked a price reduction for amounts due under the contracts by notice similar to the July 11, 1985, March 5, 1987, August 28, 1987 and/or October 12, 1987 letters from Columbia, at any time during the period commencing on or about July 10, 1985 and ending on or about January 10, 1991.

b. This Court has preliminarily approved the Settlement on March 15, 1991, and Notice to the Class Members required by Rule 23(e) of the Federal Rules of Civil Procedure has been given in an adequate and sufficient manner, was the best notice practicable under the circumstances, and complied in all respects with Rule 23 and due process.

c. The proposed Settlement is in all respects fair, adequate, reasonable and is in the best interests of the Class Members and is hereby finally approved.

d. Class Counsel's application for an award of attorneys' fees in the amount of $5 million and for reimbursement of actual expenses incurred in the amount of $164,580.05 through March 31, 1985 is hereby granted. $2.5 million of the attorneys' fees and $164,580.05 of non-reimbursed expenses shall be paid from the $15 million portion of the common fund deposited in escrow on March 21, 1991 and from the interest thereon as well as from the interest on the approximately $2 million common fund for gas produced from January 10, 1991, to May 10, 1991. The remaining $2.5 million in attorneys' fees and any remaining additional expenses incurred by Class Counsel after March 31, 1991 shall be paid from the second $15 million portion of the common fund to be deposited on March 23, 1992 and when these monies are distributed. Class Counsel is

entitled to seek recovery of its additional expenses incurred after March 31, 1991 from the common fund by filing with this Court an appropriate application(s) for such reimbursement accompanied by an affidavit which outlines the expenses for which reimbursement is sought.

***252** e. The incentive awards requested by the Class Representatives are fair and reasonable and the incentive award application in the total amount of $300,000 is hereby granted. Each Class Representative (i.e. Enterprise Energy Corp., Beldon & Blake Corporation, Allstates Oil and Producing Co., Inc., Energy Development Corp., Edco Drilling and Production, and The Clinton Oil Company) shall receive $50,000. These awards shall be payable from the first $15 million deposited in escrow on March 21, 1991.

f. Named plaintiffs, Class Members and defendant shall now consummate and be bound by the Settlement.

g. Except for claims arising under the Settlement on behalf of Class Members or Columbia, and at such time as this Order of the Court approving the Settlement as final is non-appealable, named plaintiffs and all Class Members and their heirs, executors, assigns and any one who may claim through them, shall be deemed to release and forever discharge the defendant, its predecessors and successors-in-interest, and each past or present parent, subsidiary, related or otherwise affiliated entity, partner, principal, director, officer, employee, agent, representative or assign, from any and all claims of the type asserted in this litigation relating to defendant's exercise of the cost recovery clause contained in the Class Members' gas purchase contracts at any time during the period commencing on or about July 10, 1985 and ending on or about July 10, 1991.

h. Jurisdiction is hereby retained as to matters related to the interpretation, administration and consummation of the Settlement as approved in this Order.

i. There is no reason for delay in the entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and the Clerk of the District Court is directed to enter this judgment. Certification under Rule 54(b) will not result in any unnecessary appellate review nor will review of the adjudicated claims moot any further developments in this case. Even if subsequent appeals are filed, the nature of these claims are such that the appellate court would not have to decide the same issues more than once.

j. The court costs concerning this litigation shall be paid from the common fund.

IT IS SO ORDERED.

S.D.Ohio,1991.
Enterprise Energy Corp. v. Columbia Gas Transmission Corp.
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